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PRINCIPLES IN ENGLISH PUBLIC CONTRACTS LAW, ETHICS AND ADMINISTRATIVE MANAGEMENT

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INTRODUCTION

The collapse of Carillion,[2] a UK government strategic contractor, in 2018, along with repeated problems with railway franchises[3] and the infamous « Brexit » ferry contracts[4] that the UK government had to cancel due to their lack of transparency, have all led to public contracting featuring prominently in the British media recently. Yet public contracts are a relatively new feature in English administrative law.[5] As a starting point, they are governed by private law and its legal principles. Until the 1970s, questions not addressed by private law were dealt with informally by guidelines, standards or practices developed by departments.[6] This paper maps how layers of legal, ethical and management principles regulate English public contracts in 2020.

The origins of English public contracts remain in the background, although public contracting (public purchasing and tools to deliver public policies) developed significantly

[2] I Khadaroo and E Salify, « PFI has been a failure – and Carillion is the tip of the iceberg », *The Conversation*, 24 January 2018.

[3] X, « Stagecoach launches legal action over rail franchise competition ban », *The Guardian*, London, 8 May 2019.

[4] F Topham and L O'Carroll, « Chris Grayling cancels ferry contracts at £50m cost to taxpayers », *The Guardian*, London, 1st May 2019.

[5] Public procurement is a devolved matter in the UK. In theory, England, Wales, Northern Ireland and Scotland can have different systems. In practice, there seems to be few variations across the UK.

[6] C Turpin, *Government procurement and contracts* (Longman 1989).

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when the UK joined the EEC, in the 1970s.[7] The UK economy became privatized from the 1980s on, leading public services to be provided through contracts. These new social and commercial relationships have been formalized: legal regulation is now more involved with public contracting to protect public interests, such as the good use of public money, safety, consumer protection, environmental protections etc.[8] In parallel to these developments public spending became a key factor in the UK economy, which led the HM Treasury to become « *the* central department of government »[9] and to steer UK public contracting.

With UK membership of the EU also came implementation of EU directives on procurement. As a rule, the UK implements these directives in a formal and literal way.[10]

[7] T Daintith, « Regulation by contract: The new prerogative » (1979) *CLP* 41.

[8] J Black, « "Which arrow?": Rule type and regulatory policy » [1995] *PL* 94-117. This process has been termed "juridification" by Teubner (« Juridification: Concepts, aspects, limits and solutions » in G Teubner (ed) *Juridification of social spheres* (De Gruyter 1988)) referred to in R Rawlings, « Soft law never dies » in M Elliott and D Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 215-235, footnote 36.

[9] A Page and T Daintith, *The Executive in the Constitution: Structure, autonomy and internal control* (OUP 1999) 109 (original emphasis).

[10] P Henty, « Implementation of the EU Public Procurement Directives in the UK: the Public Contracts Regulations 2015 » [2015] 3 *PPLR* na74-na80; A Sanchez-Graells, « The copy-out of Directive 2014/24/EU in the UK and its limited revision despite the imminence of Brexit » [2019] 5 *PPLR* 186-200. This approach changed slightly when the *Public Contracts Regulations* 2015 departed from the minimum transposition of the 2014 EU procurement directives to include a few additional

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The UK has not been condemned for infringement of EU procurement directives.[11] Furthermore, there is little CJEU case law in relation to the EU procurement directives in the UK and few preliminary questions emanate from UK courts.[12]

Overall, this leads the law of public contracts to be a layering of English contract law and European procurement law, with a range of gaps and uncertainty, and a pinch of principles drawn from the systems of the Commonwealth.[13] In addition, the specific role

obligations for contracting authorities. (S Arrowsmith and S Smith, « The "Lord Young" reforms on transparency of information and selection of firms to be invited to tender under the Public Contracts Regulations 2015: A practical analysis of the legal provisions » [2018] 2 *PPLR* 75-95).

[11] A search in the CJEU database on « action for a declaration of failure to fulfil obligations », « procurement » and « UK » (2.10.2019) returns no cases. The Single Market Scoreboard mentions no pending procurement cases regarding the UK (2019 edition).

[12] A search in the CJEU database on « procurement » and « UK » (2.10.2019) returns only two cases for « general » procurement [*Uniplex* (C-406/08, 13 March 2010, ECLI:EU:C:2010:45) and *Cambridge* (C-380/98, 3 October 2000, ECLI:EU:C:2000:529)] and one for the « special sectors » [*British Telecommunications plc*, C-392/93, 26 March 1996, ECLI:EU:C:1996:13].

[13] UK judges regularly refer in public law matters to the law applicable to other Commonwealth jurisdictions. For human rights: H Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart 2018). For the proportionality principle: J Rivers, « Proportionality and Variable Intensity of Review » (2006) (65:1) *Cambridge Law Journal* 174-207, 177. This extends to public contracts, especially when the EU directives do not provide for a solution. S Arrowsmith *The law of public and utilities procurement – Regulation in the EU and the UK* (3rd edn, Sweet and Maxwell 2014) 2/110 refers to the law applicable in Commonwealth jurisdictions when discussing the rule on authorisation of funds by Parliament, the leading case being *R v Auckland Harbour Board* [1924]

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that public bodies play in public contracts contributes to administrative law becoming increasingly resorted to when disputes arise in relation to public contracts, due to the specific quality of one of the parties – that of the public body. That in principle private law applies in principle in an equal manner to both citizens and public bodies is usually connected to A. Dicey and his approach to the rule of law. The rule of law[14] requires that « *ministers and public officers at all levels must exercise their powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably* ».[15]

Analyzing the role of (legal and non-legal) principles in public contracting contributes to mapping if and how public bodies are subject to the rule of law in their spending, policy-implementation and purchasing functions. Principles applicable to English public contracts can be found either in formal statutes and regulations, in the common law or in the soft law documents issued by departments. They can be of a legal ethical or managerial nature. Over time, principles can spread, become formalised or gain new shades of meanings. This is overall a fluid process of legal development, where European constraints on the effect of fostering freedom of movement in the internal market meet the

A.C. 318. Similarly, she discusses the implications of the *Blackpool* implied contract in relation to Canadian case law (*Ibid*, 2/166) and problems related to the content of an implied contract in relation to Australian case law and the Privy Council case law (*Ibid*, 2/167).

[14] The rule of law is a broad and contested church. For one version of it in the UK, see Lord Bingham, *The rule of law* (Penguin 2010). Among the different components highlighted are the following principles: accessibility of the law, law not discretion and equality before the law.

[15] *Ibid*, chap 6, 60.

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practical need to ensure the good use of public spending. This leaves scope for general legal principles to provide solutions when gaps or conflicts arise. This paper maps the diversity of principles in English public contracts, highlighting what distinguishes English public contracts from English private contracts.

This paper reads as follows. Section 1 gives an overview of principles regulating public contracting that are embedded in formal rules. Section 2 discusses the principles shaping administrative actions in general and which are thus also applicable to public contracting. Section 3 maps how judges use principles in relation to litigations arising in public contracts. Section 4 flags the contribution scholarship have made to developing legal principles in English public contracts. The conclusions return to the idea of legal principles in public contracting as a way of regulating the use of public discretion according to the rule of law.[16]

1. PRINCIPLES EMBEDDED IN FORMAL RULES REGULATING PUBLIC CONTRACTING

The A range of principles apply at each stage of the lives of English public contracts. However, « *judicial tools of public law ... operate at the beginning to determine the capacity to contract and may in extreme case operate at the end to terminate or override the contracts. They do not operate in the space in between. Therein contract law*

[16] The idea that public and private discretions are controlled according to similar standards was put forward in T Daintith, « Contractual discretion and administrative discretion: A unified analysis » (2005) (68:4) *MLR* 554-593.

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reigns. Public law and private law do not mix ».[17] This section looks at the various stages of the life of public contracting highlighting the legal principles embedded in statutory provisions.

First, the **capacity to contract** is linked to the « *ultra vires* » rule, which seeks to determine whether a contract is valid. The capacity to contract at central level is discussed,[18] but practical problems mostly arise in relation to the powers of local government. Local governments are statutory bodies under English law, and hence enjoy only the capacity that statutes give them. Financial pressures on local governments in the 1980s-1990s led them to be creative in their accounting and contracting.[19] In the "swap" cases, judges decided that local governments had no power to enter into highly speculative financial operations.[20] The immediate effect of these decisions was to prevent local authorities from losing huge amounts of money due to mis-investments. The indirect effect was to shatter bankers' confidence in the commitments local authorities might undertake. A risk arose that banks would refuse to enter into such contracts or make them more

[17] J McLean, « For a law of public contract per se: An intervention from liberal contract theory » (2019) [39:4] *OJLS* 856–877, 862; Y Marique, « Les contrats publics anglais et français entre technique et loyauté » in R Feltkamp and F Vanbossele (eds), *Wilsautonomie, contractvrijheid en ondernemingscontracten – Welke toekomst beschoren?* (Intersentia/Anthemis 2012) 285-333.

[18] A Davies, « *Ultra vires* problems in government contracts » (2006) 122 *LQR* 98.

[19] M Loughlin, « Innovative financing in local government: the limits of legal instrumentalism » (Part 1)[1990] *PL* 372-408 and (part 2) [1991] *PL* 568-599.

[20] Eg: *Hazell v Hammersmith LBC* [1992] 2 AC 1.

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expensive. To address this issue, the *New Labour Government* adopted an act setting up a procedure ensuring that contracts undertaken by local governments would not be made void.[21] In parallel, the powers of local governments were expanded in 2000 to include the pursuit of « *economic, social and environmental well-being* ».[22] This did not prevent courts from finding that some contracts undertaken by local authorities were *ultra vires*.[23] The legislature reacted to these findings.[24] The *Localism Act* 2011 grants local authorities the « *power to do anything that individuals generally may do* ».[25] However, the period since 2010 has been one of sustained financial austerity leading to drastic cuts in local budgets and finances. Again, local authorities have sought to be creative in their financial undertakings.[26] The future will show if their creativity remains unchallenged. In any case, the *ultra vires* rule remains relevant for other statutory bodies outside local government.

[21] *Local Government (Contracts) Act* 1997.

[22] *Local Government Act* 2000 section 2.

[23] *Brent LBC v Risk Management Partners Ltd* [2009] EWCA Civ 490 (9 June 2009).

[24] Before extending powers in general, the Parliament adopted a provision pertaining to the specific issue arising in *Brent* (*Local Democracy, Economic Development and Construction Act* 2009 section 34).

[25] *Localism Act* 2011 section 1.

[26] J Braithwaite, « Thirty years of *ultra vires*: Local authorities, national courts and the global derivatives markets » (2018) (71:1) *CLP* 369-402. The general competence granted to local authorities may be delicate in practice.

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Regarding the **making of contracts**, the EU directives and their principles of transparency, equality and non-discrimination apply to contracts falling within the scope of the EU directives.[27] However, the last transposition of the EU directives added requirements, especially of transparency (namely publication of contract information on the government's Contracts Finder website) that do not flow from the EU directives.[28] Thus, the transparency principle is given its own meaning within the English regulations.

For contracts falling outside the EU directives, there is no national legislation in the UK.[29] However, some statutory provisions may be relevant: competition is a key principle, even beyond the EU directives. This has been so since at least the *Local*

[27] The current transposition of the EU directives is the *Public Contracts Regulations* 2015. Section 18 deals with the principles of procurement.

[28] Chap 7-9 *Public Contracts Regulations* 2015. Arrowsmith and Smith above (10) 75-95.

[29] *E.g.* C Turpin, *Government Procurement and Contracts* (Longman 1989); S. Arrowsmith, « Implementation of the New EC Procurement Directives and the Alcatel ruling in England and Wales and Northern Ireland: A review of the new legislation and guidance » (2006) *PPLR* 86.

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Government Act 1972.[30] Techniques, such as compulsory competitive tendering[31] and best value[32], were introduced in subsequent years with the effect of mandating or encouraging competition. Compulsory competitive tendering had to be carried out by local authorities before awarding a contract inhouse; best value is a process requiring constant improvement in the delivery of public services. Competition is not formally required competition to demonstrate improvement, but competition is a way to demonstrate it.[33] In the case of good performance under best value, broader autonomy is granted to local government.[34]

[30] *Local Government Act* 1972 section 135(3): « *Standing orders made by a local authority with respect to contracts for the supply of goods or materials or for the execution of works shall include provision for securing competition for such contracts and for regulating the manner in which tenders are invited, but may exempt from any such provision contracts for a price below that specified in standing orders and may authorise the authority to exempt any contract from any such provision when the authority are satisfied that the exemption is justified by special circumstances* ».

[31] *Local Government Act* 1988, section 17 (exclusion of non-commercial considerations).

[32] *Local Government Act* 1999 section 3(1).

[33] *Local Government Act* 1999 section 3.

[34] CLG, *Best Value Statutory Guidance*, 2011. Case law about this « *best value* » duty has emerged in relation to land redevelopment operations. Section 123 (1) and (2) *Local Government Act* 1972 requires local government not to dispose of land « *for a consideration less than the best that can reasonably be obtained* ». Courts have accepted that a local government can choose to proceed through a procurement route or to select their commercial partner after competition (*R (on the application of Faraday Development Ltd) v West Berkshire Council & Anor* [2016] EWHC 2166 (Admin)).

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Outside local government, competition is also relied upon when it comes to rights allocations, such as licences or franchises.[35] In the case of franchises, the situation is in a state of flux. Currently, competition and direct award can be used for railway franchises,[36] which has led to poor results.[37] This is undergoing a review in 2019 (based on international comparisons[38]), with reforms scheduled for 2020.[39] This is due to recurring problems with

[35] The *Competition Act* 1998 implements competition principles equivalent to those found in article 101 TFEU in the UK. For the general description, see C Harlow and R Rawlings, *Law and Administration* (3rd edn, CUP 2009) 394-402.

[36] L Butcher, *Railways passenger franchises*, House of Commons Library, Briefing paper, CBP 1343, 23 May 2018; L Butcher, *Passenger rail services in England*, House of Commons Library, Briefing paper, CBP 6521, 9 January 2018.

[37] *Eg* « *Between September 2014 and September 2017, Govia Thameslink passengers have experienced the worst overall service performance on the national rail network in terms of the number of trains arriving on time* » (NAO, *The Thameslink, Southern and Great Northern rail franchise* (528 HC 2017–2019, 10 January 2018) para 10.

[38] With European countries (France, Germany, Italy, the Netherlands, Sweden, and Switzerland) and non-European countries (Australia, Japan, and the USA). Williams Rail Review, *Current railway models: Great Britain and overseas – Country summaries – Evidence paper*, 2019.

[39] https://www.gov.uk/government/news/rail-review-chair-says-franchising-cannot-continue-in-its-current-form .

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some franchises, both at the award level and the performance stage.[40] Competition is also extended in the National Health Service,[41] where the system is also under revision.[42]

Contractual performance is mainly the realm of private law principles and management principles. The two main legal principles are sanctity of contracts and privity of contracts.[43] The privity principle is now regulated by a legal basis.[44] The sanctity principle means that contracts are not adapted during the performance unless parties agree to do so. There is no principle of good faith in English contract law and the courts do not allow adaptations for changing circumstances.[45] This means that only very detailed contractual planning provides an option for contractual parties to vary the contracts during

[40] L Butler, « An inspection of rail franchise procurement: first-class regulation for privatised passenger rail? » [2018] 6 *PPLR* 251-278.

[41] *Health and Social Care Act* 2012, part 3 chapter 2 ("competition"). M. Guy, *Competition policy in healthcare – Frontiers in insurance-based and taxation-funded systems* (Intersentia 2018).

[42] NHS commissioning would be taken out from the procurement regulations but transparency would be maintained (NHS, *The NHS's recommendations to Government and Parliament for an NHS Bill*, 2019, 3).

[43] For a more detailed explanation of these principles, see J Cartwright, *Contract law: An introduction to the English law of contract for the civil lawyer* (Hart 2007).

[44] *Contracts (Rights of Third Parties) Act* 1999.

[45] S Smith, *Atiyah's Introduction to the Law of Contract* (Oxford 2005) 164-166; R Brownsword, *Contract Law* (Oxford 2006) 115 (on the adversarial ethics between contractual parties).

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its performance (with detailed cases, circumstances, procedures and committees organized in the contracts). The same applies to termination. What was for a long time a matter of case law now has written basis when it comes to contracts regulated by the EU directives: changes of circumstances and contractual variations are now regulated in regulations 72 and 73 *Public Contracts Regulations* 2015.

Judicial control[46] has not been greatly used in English public contracts. Only with the EU directives on remedies (Remedies Directive)[47] has the tide started to turn.[48] Judicial review is not automatically opened against a public contract, because traditionally courts have considered that contracts are typically a private law instrument, even when a contracting party is a public body.[49]

[46] For a systematic explanation of judicial control, see R Craven, « Controls and litigation of public contracts: The United Kingdom » in L Folliot-Lalliot and S Torricelli (eds), *Oversight and challenges of public contracts* (Bruylant 2018) 109-130.

[47] First the EU Directive 89/665; then the EU Directive 2007/66.

[48] Today *Public Contracts Regulations* 2015 (chapter 5) replacing the *Public Contracts Regulations* 2006; S Arrowsmith and R Craven, « Public procurement and access to justice: A legal and empirical study of the UK system » [2016] 6 *PPLR* 227-252 (on the previously applicable regulations).

[49] S Boyron, « The public-private divide and the law of government contracts: Assessing a comparative effort » in M Ruffert (ed), *The Public-Private Law Divide: Potential for Transformation* (BIICL 2009) 221-244.

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As to the awarding of **damages**, the Remedies Directive requires that a damages remedy is opened.[50] The UK *Public Contracts Regulations* provide for this remedy for loss or damages caused by the breach of duties owed under the Regulations.[51] This is based on principles of tort (*i.e.* a breach of a statutory duty), requiring that the supplier to be put in the same position as if a breach had not occurred.[52] The Supreme Court has been called on to clarify the relationship between the *Public Contracts Regulations* and the *Francovich* case law, *i.e.* to clarify when damages needed to be made available in cases of breaches.[53]

Finally, a well-developed system of **financial accountability and audit** applies in public contracting.[54] The National Audit Office monitors the regularity and value for money (*VfM*) of contracting by central government agencies and the *VfM* of contracting by local government.[55] According to Arrowsmith, *VfM* translates a fiduciary duty imposed by

[50] Article 2 (1) c.

[51] Regulations 97 (2) c and 98 (2) c. The *Public Contracts Regulations* 2006 also included a provision for damages.

[52] Craven above (46) 119.

[53] See below Section 3.1.

[54] A Page and T Daintith, *The Executive in the Constitution: Structure, autonomy and internal control* (OUP 1999); N Meletiadis, *Public-private partnerships and constitutional law – Accountability in the United Kingdom and the United States of America* (Routledge 2018).

[55] On the system applicable to local government: NAO, *Local auditor reporting in England 2018* (2017–2019 HC 1864, 10 January 2019).

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case law under general principles of administrative law.[56] The regularity of public spending at local level is now regulated by the *Local Audit and Accountability Act* 2014. The actual monitoring has been mainly carried out through Public Sector Audit Appointments Limited (PSAA) since 2014.[57] The *Local Audit and Accountability Act* 2014 aimed to deliver greater localism, decentralisation and transparency.[58] These legal provisions are more than principles: they form the basis for sophisticated processes that scholarship sometimes labels as the « audit society ».[59]

Overall, this overview indicates three main features of the principles regulating English public contracts. First, there is no systematic codification of principles, in the sense of a formal « code » as understood in France and its *code de la commande publique.*[60] This is however no peculiarity of English public contracts as there is no formal code in general

[56] Arrowsmith, above (13) 2/14 and 2/149.

[57] https://www.psaa.co.uk/about-us/ .

[58] DCLG, *Local Audit and Accountability Bill – A Plain English guid*e, 2013, 5.

[59] *E.g.*: I Lapsley and J Lonsdale, « The audit society: Helping to develop or undermine trust in government » in M Adler (ed), *Administrative justice in context* (Hart 2010) chap 4. According to Harlow « [t]*his gradual building up of an accounting process typifies the pragmatic British approach to constitution-making, which so often substitutes history for theory and machinery for principle* » (C Harlow, « Accountability and Constitutional Law » in M Bovens, R Goodin, and T Schillemans (eds), *Oxford Handbook of public accountability* (OUP 2012) 195-210, 196, underlining added).

[60] M Amilhat, « Le code, les principes fondamentaux et la notion de commande publique – Une copie à revoir? » (2019) *AJDA* 793.

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in the UK or in England and Wales. No organized collection of legal principles applicable in public contracts can be clearly pinpointed.[61] Secondly, principles are present at all stages of public contracts, but their sources can be very diverse: private common law, administrative common law, EU law or statutes. Thirdly, three types of legal principles can be distinguished: 1) the principles of transparency, equality and non-discrimination, connected to the EU directives and relating to the modalities of parties' behaviour; 2) the common law principles of *ultra vires*, sanctity and privity which can be understood as forming the hard edges of public contracting; 3) competition which has roots both in the EU and English systems and brings public contracting firmly into a market mindset. Across all these principles, the core concern of English public contracts is the pursuit of *VfM*.

2. PRINCIPLES SHAPING PUBLIC ADMINISTRATION AND ACTION

Although Three types of principles shape the ways in which the UK administration takes decisions in general and in particular in relation to public contracts.[62] First, the administration and civil servants have to comply with principles of good behaviour and a range of soft law instruments help them in their decision-making (**2.1**). Secondly, public bodies have a double legal obligation, one of accountability and one of pursuing *VfM* when

[61] Soft law documents pertaining to public contracting such the *Handbook on managing public money*, adopted by the HM Treasury and regularly updated provide an overview of key principles applicable to public spending and contracting.

[62] K Greenawalt, *Statutory and Common Law Interpretation* (OUP 2012) chap 6 (« *Administrative interpretation and the complications it reveals* »).

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spending public money. As such, these obligations are enshrined in statutory provisions but their actual operation both requires and generates soft law (**2.2**). Thirdly, social and green principles are mentioned in soft law documents. Beyond soft law, specific statutes make it mandatory for public bodies to take social and green considerations into account when taking decisions, including contracting (**2.3**).

2.1 *Principles of action and behaviour*[63]

Across the UK administration a range of entities are in charge of developing guidance (documentation, notes or standard terms) for contracting,[64] in the Cabinet Office,

[63] This is of particular importance in an English context not only at a practical level but also at a conceptual level. Contracts are primarily private law techniques. This means that each party is entitled to pursue its own self-interest. However, when it comes to contracts entered in by public bodies, one needs to find a rationale why 1) public bodies do not pursue their own selfish interest but that of the community; 2) officials do not pursue their own preferences but these of the state / public body / community (see McLean above (17) 867). Furthermore, there is a whole research area opening up when it comes to the extent to which public officials are complying with the law in general and in particular in contracting. See *e.g.*: E Apsey and R Craven, « Regulating complex contracting: A socio-legal study of decision-making under EU and UK law » (2018) (81:2) *MLR* 191–221. *Add*. P Braun, « Strict compliance versus commercial reality: The practical application of EC public procurement law to the UK's Private Finance Initiative » (2003) *European Law Journal* 575.

[64] Rawlings (above (8)) makes the point that soft law can play different roles, from interpretation to experimentation, to supporting co-operative and co-ordinating arrangements in fragmented governance. One legal principle underpinning English public contracting may be formulated as being the flexible normativity allowed by soft law to shape and reshape public discretion and relationships between public and private parties.

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HM Treasury and other related agencies (such as the Infrastructure and Projects Authority[65]).[66] Currently, two of the most important bodies are 1) the Crown Commercial service located in the Cabinet Office,[67] which provides policy,[68] advises and buys goods and services; and 2) the so-called « Government Commercial Function », « *a cross-government network procuring or supporting the procurement of goods and services for the government* ».[69] For instance, the Crown Commercial Service issues specific guidance in relation to public contracts[70] and procurement[71]. The Government Commercial Function

[65] https://www.gov.uk/government/organisations/infrastructure-and-projects-authority.

[66] E.g.: the « crown representatives » engaging as a focal point of contact for specific suppliers in order to communicate the governmental view to these suppliers, to seek to identify cost saving and to address cross-cutting issues. (https://www.gov.uk/government/publications/strategic-suppliers).

[67] The details of the administrative machinery supporting public contracts change periodically but the basic features remain. For an overview of the history behind the Crown Commercial Service, see Arrowsmith above (13) 2/05-2/06.

[68] For instance, it publishes *public policy notes* in relation to procurement. Some of these relate to principles such as Crown Commercial Service, *Procurement Policy Note – Reforms to make public procurement more accessible to SMEs*, Information Note 03/15, February 2015; Crown Commercial Service, *Procurement Policy Note – Update to Transparency Principles*, Action Note PPN 01/17, February 2017.

[69] https://www.gov.uk/government/organisations/government-commercial-function/about.

[70] https://www.gov.uk/government/collections/the-public-sector-contract.

[71] https://www.gov.uk/guidance/transposing-eu-procurement-directives.

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has issued a policy paper detailing the principles that should direct public contracting.[72] The purpose of this policy paper « *is to set expectations and drive consistency in the planning, management and execution of commercial activities, ensuring contracts and relationships with suppliers realise value for money and result in delivery of high quality public services* ».[73] In particular, it maps commercial practices to support public contracting, such as categorising suppliers, aggregating demand, market-making and developing, managing supplier relationships, managing commercial risks, developing commercial capability and resourcing, using commercial systems and data, managing documents and record keeping, reporting and continuous improvement.[74] This kind of policy paper and other supporting documents build on management principles such as the LEAN principles.[75] One illustration can be found in *The Outsourcing Playbook*,[76] which explicitly states as a guiding principle: « *The Contract Notice and tender documentation should carry a statement to indicate that the procurement will be run in the spirit of Supplier Code of Conduct. This also helps to*

[72] HM Government, *Government Functional Standard – GovS 008: Commercial*, 2019.

[73] *Ibid*, 5.

[74] *Ibid*, section 5.

[75] *Eg*: https://www.gov.uk/government/publications/lean-sourcing-guidance-for-public-sector-buyers.

[76] On 20 February 2019, the UK Government Commercial Function published *The Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting (the Playbook).* See p. 38 for reference to the LEAN principles. https://www.gov.uk/government/publications/the-outsourcing-playbook. L Wisdom, « A new approach to UK Government outsourcing? » [2019] 4 *PPLR* na183-na186.

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ensure that government is seen as an attractive client to do business with ».[77] The supplier code of conduct has one key motto: building trust between public bodies and their suppliers.[78] Some of the principles mentioned in this code of conduct are of a managerial,[79] ethical[80] or economic[81] nature. In addition, the code mentions legal obligations to be complied with, such as the *Equality Act* 2010 or the *Modern Slavery Act* 2015 (see below Section 2.3).

Furthermore, two general sources of legal obligations apply across public administration. First, the *Constitutional Reform and Governance Act* 2010 creates a Civil Service Code,[82] which sets four main principles to be complied with by the civil service (in England, this refers only to central government staff, not to local government staff), namely, integrity, honesty, objectivity and impartiality.[83] In so doing, it builds on the

[77] *Outsourcing Playbook* above (76) 38.

[78] Government Commercial Function, *Supplier Code of Conduct v2 - Delivering better public services together*, 2019, foreword.

[79] *E.g.* p 7: risk management.

[80] *E.g.* p 10 referring to the « *Committee on Standards in Public Life's 2014 report and 2015 guidance: Ethical Standards for Providers of Public Services* ».

[81] *E.g.* p 8: value.

[82] Section 5 (1). *Add* https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code.

[83] Section 7 (4).

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Standards in Public Life, adopted by the Nolan Committee in 1995.[84] Secondly, the *Bribery Act* 2010 integrates in the UK legal system the OECD Convention against Corruption Corruption into the UK legal system.[85] It applies to all civil servants, British and foreign, and to all their dealings, including contracting.

2.2 *Overarching principles: value for money and accountability*

As mentioned in Section 1, value for money (*VfM*) and (financial) accountability[86] have gained a statutory underpinning: they are two overarching principles in the functioning of the English administration when discharging public functions in general and contracting in particular. They work in an interlinked fashion.[87]

[84] Cm 2850.

[85] C Rose, « The UK Bribery Act 2010 and accompanying guidance: Belated implementation of the OECD Anti-Bribery Convention » [2012] *ICLQ* 485.

[86] T Wright, « The politics of accountability » in M Elliott and D Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 96-115.

[87] Historically speaking they are also interlinked: accountability primarily originated in the duty to account for public spending (C Harlow, « Accountability and constitutional law » in M Bovens, R Goodin and T Schillemans (eds), *Oxford Handbook of public accountability* (OUP 2012) 195-210, 195-196).

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The National Audit Office (NAO), a body attached to the House of Commons, works in close relationship with a parliamentary select committee,[88] the Public Accounts Committee,[89] in order to assess whether *VfM* has been achieved with taxpayers' money (according to the principles of efficiency, economy and effectiveness[90]). In this function the NAO undertakes studies of specific government activities or issues.[91] Over the years it has published many reports pertaining to contracting and fleshing out the principle of *VfM*. The NAO makes recommendations, which are discussed by the Public Accounts Committee. In turn this committee may make (non-binding) recommendations to the relevant department.[92]

[88] S Bates, M Goodwin and S McKay, « Do UK MPs engage more with select committees since the Wright reforms? An interrupted time series analysis, 1979–2016 » (2017) 70 *Parliamentary Affairs* 780–800.

[89] This is the oldest committee existing in the House of Commons. https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/history-of-committee/.

[90] *National Audit Act* 1983. Harlow and Rawlings above (35) 59-62.

[91] *E.g.*: NAO, *Transforming contract management* (268 HC 2014-15); NAO, *Government commercial and contracting: an overview of the NAO's work*, 2016; NAO, *A review of collaborative procurement across the public sector*, 2010.

[92] Y Marique, *Public-private partnerships and the law – Regulation, institutions and community* (Edward Elgar 2014) 160-168.

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The principle of accountability applies in public contracting.[93] For instance, prime minister's questions were asked at the demise of Carillion, one of the major contractors of public bodies, in 2018.[94] Equally, when Concentrix failed dramatically in processing tax credits HM Revenue & Customs was called to account for its poor commercial capability.[95] Parliamentary inquiries have been carried out into major contracts, such as PFIs in general, or into major contractual troubles.[96] As civil servants can be called to give account in the Public Accounts Committee guidelines have been adopted to specify where the lines of accountability lie between ministers and key civil servants (such as accounting officers or senior responsible owners[97]) and to distinguish between accountability processes and disciplinary procedures.[98]

[93] M Freedland, « Government by contract and public law » [1994] *PL* 86; ACL Davies, *Accountability: A public law analysis of government by contracts* (OUP 2001); Meletiadis above (54).

[94] HC Deb, 17 January 2018, vol. 634.

[95] PAC, *HMRC's contract with Concentrix* (998 HC 2016-17).

[96] *E.g.*: PAC, *PFI in Housing and Hospitals* (631 HC 2010–11); PAC, *Department for Transport – The Failure of Metronet* (390 HC 2009–10); PAC, *The Procurement of the National Roads Telecommunications Services* (578 HC 2007–08); PAC, *London Underground Public Private Partnerships* (446 HC 2004–05); PAC, *The Operational Performance of PFI Prisons* (904 HC 2002–03); PAC, *Delivering Better Value for Money from the Private Finance Initiative* (764 HC 2002–03).

[97] Specific guidance may further specify accountability relationships (*eg* Infrastructure and Projects Authority, *Project delivery: guidance – The role of the senior responsible owner*, 2019, 5).

[98] Cabinet Office, *Giving evidence to select committees – Guidance for Civil Servants*, 2014.

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In addition, HM Treasury has developed procedures to ensure respect for *VfM* (especially when it comes to major contracts)[99] and has issued a manual detailing the principles underpinning the spending of public money.[100] A special appendix is devoted to public contracts.[101] As such this manual does not create rights or legal obligations.[102] However, these first-line techniques seek to foster compliance with the legal principle of *VfM*. There is indeed very little case law pertaining to this principle. The most well-known case where courts have been involved to assess respect for *VfM* was a case at the limit of corruption.[103] This means that the first line of monitoring compliance with *VfM* is actually the NAO and then the Public Accounts Committee, not judicial accountability.

2.3 *Social and green principles*[104]

[99] PAC, *Delivering major projects in government* (710 HC 2015-16).

[100] HM Treasury, *Managing public money*, 2015.

[101] *Ibid*, Annex 4.6.

[102] Point A4.6.2.

[103] *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 All ER 611.

[104] This subsection draws on Marique above (92) 222-232. For other illustrations of statutes including social concerns, see Arrowsmith above (13) chap 2. For more detailed analysis of the PSED and the PS(SV): *Ibid*, chap 20; T Wright and H Conlye, « Advancing gender equality in the construction

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Public bodies have to comply with social and green principles when contracting.[105] Some of these principles are phrased in soft law terms,[106] some in contractual terms,[107] and others in hard law, such as the *Modern Slavery* Act 2015.[108] Two duties enshrined in hard law deserve further discussion: the "public sector equality duty" and the public sector (social value) duty.

sector through public procurement: Making effective use of responsive regulation » (2018) *Economic and Industrial Democracy* 1–22.

[105] The actual compliance and practical implementation of these principles is difficult to ascertain. Some empirical research is however available on some aspects. See *e.g.* K Jaehrling, M Johnson, T P Larsen, B Refslund and D Grimshaw, « Tackling precarious work in public supply chains: A comparison of local government procurement policies in Denmark, Germany and the UK » (2018) (32:3) *Work, Employment and Society* 546–563.

[106] *E.g.*: « *In addition, suppliers must have robust means of ensuring that the subcontractors in their supply chain also comply* [with all applicable human rights and employment laws in the jurisdictions in which they work and with the provisions of the Modern Slavery Act 2015] » (*Supplier Code of Conduct v2,* above (78) 6); Crown Government Service, *Procurement Policy Note – Supporting Apprenticeships and Skills Through Public Procurement,* Action Note 14/15 27 August 2015; Mayor for London, *Responsible Procurement – GLA Group Implementation Plan 2018 – 2020,* 2019.

[107] For the technique known as « contractual linkages », see ACL Davies, *The public law of government contracts* (OUP 2008) chap 9.

[108] R Craven, « The role of public procurement in the fight to eradicate modern slavery in the UK construction industry » in G Piga and T Tatrai (eds) *Public procurement policy* (Routledge 2016) 22-37; R Broad and N Turnbull, « From human trafficking to modern slavery: The development of anti-

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First, the administration has a duty to consider equality (understood in a social sense) when it takes any decision, including when contracting: this is called the public sector equality duty (PSED) as provided for in the *Equality Act* 2010. The PSED illustrates one way in which ethical commitments to equality have become formalised in legal requirements. The *Equality Act* 2010 section 149 (1) consolidates previously existing duties[109] and extends them to new grounds. Currently, public authorities have a duty, when they exercise their functions, to have regard to the need to eliminate discrimination, advance equality and foster good relations between persons sharing protected characteristics and persons who do not share them.[110] The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion, belief, gender and sexual orientation.[111] The PSED requires that public authorities consider the

trafficking policy in the UK » (2019) 25 *Eur J Crim Policy Res* 119–133 ; L Eldridge, « Is the UK's public procurement legislation fit to address human rights abuses in supply chains? » [2019] 2 *PPLR* na79-na82.

[109] Namely through the *Race Relations (Amendment) Act* 2000, the *Disability Discrimination Act* 2005 section 49A and the *Sex Discrimination Act* 1975.

[110] *Equality Act* 2010 section 149(1). T Hickman, « Too hot, too cold or just right? The development of the Public Sector Equality Duties in administrative law » [2013] *PL* 325, 332.

[111] *Equality Act* 2010 section 149(7).

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consequences of any of their decisions for categories of people sharing these protected characteristics. Public authorities have to do more than just ensure the absence of discrimination; they must also actively and positively promote equality of opportunity between different groups.[112] The Equality and Human Rights Commission issued guidance on PSED in procurement in 2016.[113] This PSED has given rise to case law in the realm of public contracting, most notably in two cases:[114] *Luton* (when the secretary of state for education cancelled funding for school refurbishments without undertaking an assessment of the impact of stopping the school projects on pupils from minority ethnic backgrounds or with special education needs), and the *Law Centres Network*[115] (where the Ministry of Justice

[112] C McCrudden, « Equality and non-discrimination » in D Feldman (ed) *English Public Law* (2nd edn, OUP 2009) 499 para 11.156.

[113] Equality and Human Rights Commission, *Buying better outcomes: mainstreaming equality considerations in procurement – A guide for public authorities in England*, 2013.

[114] Other cases relate to PSED in public contracts but not with clear legal consequences. E.g.: *R (RB) v Devon County Council* [2012] EWHC 3597 (Admin) in A Davies, « Public law and privatisation » in M Elliott and D Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 172-192, 180-181.

[115] *R. (on the application of Law Centres Federation Ltd (t/a Law Centres Network)) v Lord Chancellor* [2018] EWHC 1588 (Admin); [2018] 6 WLUK 452 (QBD (Admin)); G Brunello, « Irrationality and the public sector equality duty in public procurement: R. (Law Centres Network) v Lord Chancellor » [2019] 3 *PPLR* na130-na133.

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was found to have breached the PSED by not taking sufficiently into account the interests of vulnerable individuals when restructuring the contracts providing legal aid).

Secondly, the *Public Service (Social Value)* Act 2012 (*PS(SV)* Act 2012) creates a duty for public authorities to consider economic, social and environmental well-being in the pre-procurement stage of services contracts. It requires public authorities to consider « *how what is proposed to be procured might improve the economic, social and environmental well-being* » of their areas and « *how in conducting the process of procurement, it might act with a view to securing that improvemen*t ».[116] The duty is limited in its reach and bindingness. Indeed, the authority only needs to take into account what is relevant to the procurement, and not overall economic, social or environmental well-being.[117] It also needs to consider what is proportionate to taking these relevant matters into account.[118] This duty applies in parallel with the best value duty,[119] and does not lead to derogation

[116] *PS(SV) Act* 2012 section 1(3)(a) and (b).

[117] *PS(SV) Act* 2012 section 1(6).

[118] *PS(SV) Act* 2012 section 1(6).

[119] PPN, *The Public Services (Social Value) Act 2012 – Advice for Commissioners and Procurers*, information note 10/12, 2012.

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of any legal obligations following the *Public Contracts Regulations*.[120]

This duty reveals an attempt to articulate the use of taxpayers' money (usually used as a proxy for the common good), collective interests and private interests. Indeed, it sets out how public contracting has to be designed so that the outcome of the competitive process, *i.e.* the procurement, can contribute to economic, social and environmental well-being. However, it faces implementation problems. The duty is limited to the pre-procurement stage.[121] The outcome of these considerations of well-being and their integration into contractual design, terms or performance is left uncharted in the statute. Well-being is a notion which may be difficult to quantify, although indicators are being developed by the Office for National Statistics (ONS) and Defra.[122] These indicators may become integrated into *VfM* assessment. The Gateway Process and the major project approval and

[120] *PS(SV) Act* 2012 section 1(8) and (10).

[121] Courts accept that it can apply by analogy to operations other than procurement, such as developing train lines, under some conditions (*R. (on the application of Enfield LBC) v Secretary of State for Transport* [2016] EWCA Civ 480 (CA (Civ Div)); P. Henty, « Judicial review of the substantive contents of a specification based on administrative law principles and on the Public Services (Social Value) Act 2012: R. (on the application of London Borough of Enfield) v Secretary of State for Transport » [2016] 5 *PPLR* na161-na167).

[122] EAC, *Measuring Well–being and sustainable development: Sustainable development indicators: Government response to the committee's fifth report of session 2012–13* (139 HC 2013–14); ONS, *Measuring national well-being: Life in the UK*, 2012.

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assurance process[123] may also enable a tracking down of whether the economic, social and environmental well-being that public authorities considered at the outset of their project is being delivered during the performance phase. The mere fact that this would be monitored might improve the understanding of how public spending impacts (in)directly on collective well-being.

Overall, three comments can be made about these two statutes. Firstly, they go further than mere social and green principles. After a period of incremental developments the *Equality Act* includes a duty for public bodies to take into account the effects of public decisions on groups of vulnerable individuals. Secondly, even though the nature of these statutory provisions is one of imposing a duty in the sense of how public bodies proceed with their decision-making process, this is more a duty in terms of means and procedural steps to be included in public decision-making than a duty in terms of the results to be achieved. Thirdly, implementation tools for these two duties are still in the making.

3. PRINCIPLES DISCOVERED BY JUDGES

The UK courts interpret statutes and the common law to arrive at decisions. In that process, they use a range of techniques, one of which is the discovery of « principles

[123] Infrastructure and projects authority, *Guidance for departments and review teams – Project Assessment Review (PAR)*, 2016.

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».[124] Although there are discussions on the exact meaning of « principles » (*vs* rules), the basic understanding is that « *everyone agrees that principles (however defined) do figure importantly in common law decisions* ».[125] This means that principles are discovered, used and developed by judges, including in matters of public contracting.[126] This section gives first a general idea of how case law has developed in relation to contracting issues, mainly focusing on public law principles (**3.1**). It then discusses in a tentative way some of the main functions that principles play in this case law (**3.2**).

3.1 *Selected illustrations*

The role of judges in common law systems is much debated. Public law and administrative law include illustrations of an incremental process of development to adapt to changing social, economic and political circumstances. Judicial review as it has become in England today is a development from judges starting in the 1960s-1970s.[127] When it comes to public contracts, judges use principles when there is no statutory provision to

[124] K Greenawalt, *Statutory and common law interpretation* (OUP 2012).

[125] Greenawalt above (124) 189. Judges can take principles within or outside the law. Dworkin has argued that judges should not take policy considerations into account. « *The exact line he had in mind is elusive, but the basic idea was that in common law and other cases, judges should not simply be giving weight to calculations of the balance of desirable consequences for the community* » (*Ibid* 190).

[126] Harlow and Rawlings above (35) 95-96.

[127] Harlow and Rawlings above (35) 99-105.

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answer a legal question. As English law did not know "public contracts" until the UK joined the European Communities in 1973 very few statutory provisions exist outside the national transposition of EU law. In theory, this leaves ample scope for judges to use legal principles when issues arise in relation to public contracts and can potentially go far beyond the core principles of public procurement as developed by the CJEU (*e.g.* principles in the meaning of *Telaustria*). However, the UK Supreme Court has decided only a few cases in relation to "procurement" in England.[128] In general, the UK Supreme Court uses two ways to interpret EU law: 1) comparison of the different language versions of an EU text; and 2) the principle of consistent interpretation.[129] For the rest, the judges' toolkit includes legal principles in either public or private law.[130] Here some illustrations are selected.

[128] *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2017] UKSC 34 (11 Apr 2017); *Edenred (UK Group) Ltd v HM Treasury* [2015] UKSC 45 (1 Jul 2015); *Healthcare at Home Ltd v Common Services Agency* [2014] UKSC 49 (30 Jul 2014) (Scotland); Brent LBC v Risk Management Partners Ltd [2011] UKSC 7 (9 Feb 2011). The Privy Council also decided cases in relation to procurement: *DPP v Jugnauth* [2019] UKPC 8 25 Feb 2019 (Mauritius); Central Tenders Board v White (t/a *White Construction Services)* [2015] UKPC 39 (6 Oct 2015) (Montserrat); Pratt Contractors Ltd v Transit New Zealand [2003] UKPC 83 (1 Dec 2003) (New Zealand).

[129] A Arnull, « The UK Supreme Court and References to the CJEU » (2017) 36 *Yearbook of European Law* 314-357.

[130] We focus here on principles of public law. It is however important to keep in mind that contractual performance especially is very much regulated by private law. All the legal principles developed in private law will thus apply. This also means that many legal issues arising during contractual performance can lead to transactions and settlements. How these settlements are reached, and which principles are actually relied upon, are not accessible for investigation. Here transparency is

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First, when it comes to **access to judicial review** courts require that an « *additional public element* » is present.[131] The starting point in the case law is indeed that « *a public body [is] free to negotiate contracts and something additional [is] necessary over and above the fact that the negotiator [is] a public body to impose on that body a public law obligation* »:[132] public procurement is « *essentially a commercial process* ».[133] There is no general definition of the test for an « *additional public element* ». However, factors such as statutory underpinning, public funding or the identification of a public function

definitively not an applicable legal principle. See for examples: the GS4 settlement in the Olympic Games case (https://www.gov.uk/government/speeches/london-2012-games-settlement-between-locog-and-g4s-security) or more recently the Brexit ferries with Eurostar (https://www.gov.uk/government/publications/eurotunnel-obligations-under-government-settlement-agreement/eurotunnel-obligations-under-government-settlement-agreement). However, this system may come under pressure (see the reaction of P&O in the Eurostar settlement: G Topham, « P&O sues over £33m Eurotunnel payout in Brexit ferry fiasco », *The Guardian*, London, 26 April 2019 [https://www.theguardian.com/politics/2019/apr/26/po-sues-over-33m-eurotunnel-payout-in-brexit-ferry-fiasco]: « *Firm says government's settlement puts it at a competitive disadvantage* »). Regarding the interactions between public law and contract law, see J Beatson, « Public law influences in contract law » in J Beatson and D Friedmann (eds), *Good faith and fault in contract law* (Clarendon Press 1995) 263.

[131] E Aspey, « The search for the true public law element: Judicial review of procurement decisions » [2016] *Public Law* 35; S Bailey, « Judicial review of contracting decisions » [2007] *Public Law* 444; Arrowsmith above (13) 2/144-2/147.

[132] *Newlyn Plc* [2016] EWHC 771 (TCC), [18].

[133] *R (on the application of Menai Collect Ltd and others)* [2006] EWHC 724 (Admin), [47].

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contribute to the presence of this additional public element.[134] After reviewing the main cases on this issue Arrowsmith notes that « *the lack of coherence in the principle and its exceptions lead to great uncertainty* ».[135] Therefore, she suggests that

« contracting should be reviewable in principle in the same manner as any other government activity, even where the type of contract has an analogy in private law, as with procurement. It is appropriate to apply such principles because of the public interests involved, because a public body should be held to high standards because of its influence as an example to others; and because considerations of private autonomy do not apply in the same way. The fact that the relationship of the parties is affected to some degree by private law does not make it inappropriate to apply public law in addition to, or alongside, that law. A case can also, however, be made for the contrary view that procurement powers should in principle be reviewable only for bad faith, to avoid any danger of unreasonable fetters on commercial discretion [...] Procurement decisions should either be reviewable in principle or not at all ».[136]

Secondly, the **non-fettering principle** seeks to balance different values of public law, namely legal certainty and consistency on the one hand and responsiveness to

[134] McLean above (17) 863.

[135] Arrowsmith above (13) 2/147.

[136] *Ibid*., (footnote omitted).

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individual circumstances on the other hand.[137] This ensures that public contracts do not prevent public bodies from exercising their discretion, and thus their ability to govern in the future:[138] public contracts cannot be used to fetter this discretion. In practice, any contract limits future choices. The aim of this principle is not to prevent public bodies from contracting in general but only to prevent them from *unreasonably* limiting their future discretion. There is thus a balance of interests in the utility of the contract to be weighed up. This means that scholarship sometimes argues that commercial contracts such as procurement contracts should not be considered an unreasonable fetter on public discretion.[139]

Thirdly, the principle of **legitimate expectations,** now accepted in English administrative law, has been applied in cases involving public contracts.[140] For instance, it has been relied on in cases involving the termination of the funding needed to pay contractors by a third-party public body. Illustrations of these are the *Luton* case relating to the Building Schools for the Future (*BsF*) programme and the *Cheshire* case relating to

[137] B Huntley, « The rule against fettering in the context of the prerogative: R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs » [2015] (20:2) *Judicial Review* 86-89, para 16 (referring to *De Smith's Judicial Review* at [9.005]).

[138] ACL Davies, « Vires problems in Government contracts » (2006) 122 *LQR* 98.

[139] Arrowsmith above (13) 2/112, noting that Davies above (107) 243-46 is of the other opinion.

[140] For instance, the procedural legitimate expectations: *R. (on the application of London Criminal Courts Solicitors' Association) v Lord Chancellor* [2015] EWHC 295 (Admin) (DC).

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waste PFIs. In *Luton*[141] the judge found that there existed procedural legitimate expectations to be consulted, while in *Cheshire*[142] the judge considered that no procedural legitimate expectations to be consulted could be found. The difference proceeds from different appreciations of the circumstances of the cases by the judges. In *Luton* the judge considered that even a short consultation period could have been applied. The economic crisis was not a sufficient ground of public interest to set consultation aside.[143] In *Cheshire* the judge considered that the emergency was a sufficiently overriding public interest to justify the absence of consultation.[144] In short, the judges differed in their appreciations of the circumstances, yet they both accepted that the principle of legitimate expectations could be argued.

Fourthly, the principle of the *Blackpool*[145] **implied contract** applies to procurements not governed by the EU directives. Judges decided that the relationships between a tendering public body and bidders are governed by an implied contract. This means that a tendering public body has a duty to consider fairly the tenders submitted after

[141] *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin).

[142] *R (Cheshire East BC) v Secretary of State for Environment Food and Rural Affairs* [2011] EWHC 1975.

[143] *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin) at [96].

[144] *R (Cheshire East BC) v Secretary of State for Environment Food and Rural Affairs* [2011] EWHC 1975 at [90].

[145] *Blackpool and Fyle Aero Clubv BC* [1990] 1 W.L.R. 1195.

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a call for tenders. In *JBW Group v Ministry of Justice*[146] the court accepted the idea that such an implied contract existed and that this meant an obligation to consider the tenders in good faith. However, it rejected the idea that there was an implied obligation to act in a fair and transparent manner. According to the court such terms were not necessary to give efficiency to the contract.[147]

Finally, courts have also relied on the principle of state liability when it comes to **damages** in the case a breach of procurement regulations. The Supreme Court decided that a mere breach of a statutory duty was not enough for a party to claim damages. Relying on the *Francovich* case law and subsequent CJEU cases, the Supreme Court decided that the breach had to be "sufficiently serious" for a remedy for damages to have to be opened to the victim.[148]

3.2 *Functions*

[146] [2012] EWCA Civ 8.

[147] At [62].

[148] *Nuclear Decommissioning Authority v EnergySolutions EU Ltd (now ATK Energy EU Ltd),* 11 Apr. 2017 [2017] UKSC 34). NAO, *The Nuclear Decommissioning Authority's Magnox contract*, (2017-19 HC 408). *Add* http://ukscblog.com/case-comment-nuclear-decommissioning-authority-v-energy-solutions-eu-ltd-2017-uksc-34/]. P Henty, « "Sufficiently serious breach" as a condition to the damages remedy in public procurement, and the issue of mitigation of loss through remedies in the standstill period: The Supreme Court judgment in the NDA/Energy Solutions case » [2017] 5 *PPLR* na179-na186.

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The discovery of principles in public contracting may serve a range of functions at a theoretical level. Here three concrete functions observed in the case law are mentioned.

First, legal principles may **strengthen rights** already provided for in statutes. On this function Arrowsmith commented that, although this may be indeed the case or might become the case in the future, there is still too little case law in relation to judicial review in procurement to be able to claim that this function is currently present.[149]

Secondly, legal principles may help judges **imply rules into the legislative framework**. The CJEU tends to do this in particular in relation to transparency and equal treatment. Normally, the domestic courts need to follow the CJEU's approach when they interpret the domestic legislation implementing the relevant EU directives.[150] When English judges do this it is then difficult to distinguish whether they are seeking to give an efficient interpretation of the legislative framework or whether they are seeking to **fulfil their roles under EU law**. In *Edenred* the Supreme Court's starting point is the principal purpose of EU procurement law, namely « effective competition ».[151] The Supreme Court relies on the CJEU's case law, which states that derogations to this principle have to be narrowly

[149] Arrowsmith above (13) 2/151.

[150] *Ibid*, 2/143.

[151] For a variation, namely the principle of fair competition, see Fraser J [53]-[54] in *Energysolutions EU Ltd v Nuclear Decommissioning Authority (Judgment No. 3)* [2016] EWHC 3326 (TCC); (2017) 26 *PPLR* na103-na108.

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interpreted.[152] In *Brent* « *[t]he Supreme Court's ruling [...]provides a welcome clarification to the application of the Teckal exemption in the United Kingdom and sits well with the more purposive approach to this area of the law that the CJEU has taken in recent years* ».[153] In her research on the implementation of CJEU procurement principles in the UK de Mars has provided a number of cases where the UK courts have applied them to address technical issues (weighing, scoring, late tenders).[154] She concludes that « [t]*he UK courts [...] have used the general principles both where ECJ case law has itself used them to decide disputes, such as on award criteria, but also in situations not yet considered by the ECJ* ».[155]

Thirdly, legal principles may help judges give a legal answer when there is **no clear previous guidance** as to which answer to give to a specific issue. The best illustration of this is provided by the *Blackpool* implied contract case law. It is far from clear that the tendering phase of a contract can be construed as a contract, even an implied contract, under English contract law. Arrowsmith wrote about *Blackpool* that « *[a]lthough this was expressly denied by Bingham LJ in Blackpool, the courts appear to have been manipulating contractual principles to provide a remedy where they feel one ought to be given by some*

[152] *Edenred* [28].

[153] S Brunning, « English Supreme Court ruling on the Teckal in-house exemption: the decision in Brent LBC v Risk Management Partners Ltd » [2011] 3 *PPLR* na77-na82, na81.

[154] S de Mars, « The limits of general principles: a procurement case study » (2013) *European Law Review* 316-334, 325-326.

[155] de Mars above (154) 326.

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means ».[156] The discovery of a legal principle here leads to the result that public bodies and contractors have a clearer idea of where they stand during the pre-contractual phase in sub-thresholds contracts.

UK courts are used to discover legal principles in general. The particularity of English public contracts is linked to the low level of litigation and thus the lack of opportunity for courts to discover legal principles specific to English public contracts. This makes legal principles in English public contracts stand out: they emerge from practice and statutes more than case law and their normativity is more to be tested in them being complied with in the day-to-day life of contracts than in judicial enforcement.

4. PRINCIPLES AND ACADEMIC SCHOLARSHIP

Academic scholarship contributes to the discussions about legal principles applicable to public contracts, either at a general level (**4.1**) or in the specific case of procurement (**4.2**).

4.1 *General principles: a public law of contract in the making?*

The practical development of English public contracts since the 1970s has led scholarship to call for the development of a public law of government contracts, sometimes mostly at the level of principles,[157] sometimes for specific issues,[158] and sometimes in a

[156] Arrowsmith above (13) 2/163.

[157] M Freedland, « Public law and private finance – Placing the private finance initiative in a public law frame » [1998] *PL* 288.

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detailed and comprehensive fashion.[159] The key scholarly discussions have sought to link the development of such a public law of government contracts with the relational contract theory developed by Ian MacNeil.[160] This approach could help explain why one of the parties to the contract, the public body, might leave aside self-interest to pursuit more general goals. It would also help to frame risks and the asymmetry of information. More recently, a New Zealander (!) scholar has suggested grounding this public law of government contracts on liberal contract theory, which is more classic in contract law than relational contract theory.[161] In addition, scholarship has discussed the opportunity of developing principles of sustainable procurement,162 especially in relation to the supply chain. In addition to suggesting such development the scholarship also pinpoints the need to

[158] P Craig, « Contracting-out, the Human Rights Act and the scope of judicial review » [2002] *LQR* 118.

[159] Davies above (107) 218. She explicitly seeks inspiration in the French law of public contracts (55-58).

[160] P Vincent-Jones, *The new public contracting – Regulation, responsiveness, relationality* (OUP 2006). A private law scholar, H Collins, has also asked whether a specific public law of contracts should be developed (*Regulating Contracts* (OUP 1999) chap 13). His approach to private law contracts is related to MacNeil's.

[161] McLean above (17).

[162] L Butler, « Responsible public procurement: towards a public service contract regulator? » [2019] 5 *PPLR* na198-na208.

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ensure compliance mechanisms, which leads to calls to set up new bodies in charge of this function.

To appreciate the possible influence of these developments on the practice of public contracts or on judicial decisions pertaining to litigations on public contracts, however, one needs to note that the relationships between scholarship and practice in the UK cannot be compared to those existing in continental jurisdictions such as Germany. Legal scholarship exists on a broad spectrum, with extremely theoretical discussions and more practical discussions. Usually, scholarship can remain for a long while in its ivory tower. Times are slowly changing, however, for both judges163 and academics. Recently, academics have been encouraged to seek to harness their research to practical discussions in order to contribute to « impact case studies » to be submitted for a periodic research assessment ("REF"), where academics detail how their research has been applied outside academia. In the REF 2014 impact case studies related to procurement were submitted by the Nottingham Law School (on « Influencing the Content of the UNCITRAL Model Law on Public Procurement »[164]) and the Bangor Law School (on « Removing SME Public Procurement Participation Barriers in Wales »[165]). The next REF is due to be undertaken in

[163] Lord Neuberger, « UK Supreme Court decisions on private and commercial law: The role of public policy and public interest », Speech at the Centre for Commercial Law Studies Conference, 4 December 2015.

[164] https://results.ref.ac.uk/(S(hmrbdybs3dmd3t1fdo0d2fbk))/Submissions/Impact/1566.

[165] https://results.ref.ac.uk/(S(hmrbdybs3dmd3t1fdo0d2fbk))/Submissions/Impact/1196. One of the key themes of this academic engagement with non-academic actors was transparency in procurement.

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2021. It will be interesting to see which law schools submit an impact case study related to public contracts and whether these case studies support the principles of public contracts.

4.2 *Scholarship on principles specific to procurement*

Exceptions to the general picture of the relationship between academic scholarship and the judiciary need to be mentioned. As a rule, these exceptions pertain to specific legal areas and do not necessarily seek to discuss public contracts as a whole legal category. They mostly pertain to procurement. In *Energy solution* for instance, the Supreme Court discussed academic authority.[166] However, the most prominent source of reflexions on English procurement comes from the Nottingham School of Law, which has developed extended scholarship which is in more direct contact with practice in the UK over a long period of time (next to international and European levels). Arrowsmith, the Achilles professor of Public Procurement Law and Policy and director of the Public Procurement Research Group at Nottingham, is the author of a two-volume book on European and UK procurement totalling *ca*. 2,000 pages. In it she analyses a range of principles of English law, such as ultra vires, and of EU law, such as transparency, detailing their concrete implementation. Her specific authority on the topic has been acknowledged explicitly by

[166] *Nuclear Decommissioning Authority v Energysolutions EU Ltd* [2017] UKSC 34, [at 26]: reference to S Treumer's *Basis and conditions for a damage claim for breach of EU public procurement* (to set his argument aside); Fairgrieve and Lichère's *Public Procurement Law – Damages as an Effective Remedy* (2011) and Judge Anthony Collins' "Damages in public procurement – an illusory remedy?" chap 21 *in Of Courts and Constitutions – Liber amicorum in honour of Nial Fennelly* (eds Bradly, Travers and Whelan, 2014) (as confirming the judge's views).

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courts.167 Her current research is about the « *incoherence in the conceptual framework of EU public procurement law and a study of the impact of public law violations on concluded contracts in UK and EU law, including from a comparative law perspective* ».[168] This leaves scope for developing further principles specific to procurement in England.

CONCLUSIONS

Overall, public contracting is a matter of exercising discretion in England. Yet, the rule of law frames this public discretion through a range of legal principles. First of all, the starting point of public contracting is that public contracts are contracts, and thus commercial tools to which private law principles apply in all their commercial hardness. Secondly, administrative law principles pertaining to the powers of public bodies and the use of their discretion equally apply to contracting. This means that the non-fettering principle or the legitimate expectations principle apply. However, access to judicial review is limited to contracts with a public law element. Thirdly, general principles of EU law (deriving from primary and secondary EU law and case law) also apply to English public contracts. Yet, the Supreme Court maintains its narrow understanding of state liability when constructing EU law in the case of damages. Fourthly, a range of legal principles (such as financial accountability, value for money and principles of public life for civil servants) and a range of legal duties (such as the PSED and the PS(SV)) have been formalised in statutes and

167 *SRCL Ltd v The National Health Service Commissioning Board* [2018] EWHC 1985 (TCC) at [180]-[194]. P Henty, « Abnormally low tenders, the authority of academic writing in procurement and extension of time for bringing proceedings: SRCL Ltd v The National Health Service Commissioning Board » [2018] 6 *PPLR* na177-na187.

168 https://www.nottingham.ac.uk/law/people/sue.arrowsmith

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complement the soft law practice of ethical and managerial principles scattered across soft law documents. English public contracts are thus regulated by legal, ethical and managerial principles. What makes them stand out is that judges are only one tiny contributor to this regulation, while other public bodies such as the NAO, the PAC and departments generate their own discourses on the principles to be complied with in English public contracts and are often on the front line of monitoring this compliance in practice. The normativity of principles in English public contracts may thus appear more a matter of effectiveness than of bindingness.

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