Giving procurement the competition law treatment: Arriva the Shires Ltd v London Luton Airport Operations Ltd

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Practice notes | Law stated as at 28-Jan-2014 | England, Wales

An overview of the recent High Court decision in *Arriva the Shires Ltd v London Luton Airport Operations Ltd [2014] EWHC 64 (Ch)*, which challenges the traditional divide between competition and public procurement law, and suggests that a more holistic approach to these areas may be needed in mixed cases.

The recent High Court judgment of 28 January 2014 in *Arriva the Shires Ltd v London Luton Airport Operations Ltd [2014] EWHC 64 (Ch)* (*Luton* case) challenges the traditional divide between competition and public procurement law.

It suggests that claimants can now rely on competition law to challenge the fair conduct of tenders conducted by dominant undertakings and that, in some circumstances, they may have a choice between procurement and competition law.

It also makes clear that there are constraints under competition law on the nature of exclusive concessions that may be lawfully granted by procuring bodies that are also dominant undertakings.

Different rules for different bodies?

Public procurement and competition law are different disciplines. The former applies to the buying activities of contracting authorities and the latter applies to the conduct of undertakings.

A **contracting authority** is one that is either:

- Listed in Schedule 1 to the Public Contracts Regulations 2006 (*SI 2006/5*), as amended (PCR 2006). This includes government departments, local authorities, fire authorities, NHS Trusts and so on; or
- Covered by Regulation 3(1) of the PCR 2006. This includes the sweep-up category of corporations or groups of individuals acting together for the specific purpose of meeting needs in the general interest, **not having an industrial or commercial character** and owned, managed or financed by a public body.

  For more information, see *Practice note, Public procurement in the UK*.

An **undertaking** is a body engaged in economic activity, generally involving competition on a market. In other words, they certainly **do have an industrial or commercial character**. It is a functional test so a body may be an undertaking in doing certain things and not in others. Undertakings that enjoy a dominant position are subject to greater scrutiny under competition law. For more information, see *Practice note, Overview: UK competition law*.

The problem is that these neat distinctions are increasingly blurred.

For example, NHS Foundation Trusts are defined by the PCR 2006 as contracting authorities but also act increasingly as undertakings in that they compete for patient activity. They are expressly subject to the merger control rules and implicitly subject to the competition rules as a result of the Health and Social Care Act 2012. Even NHS commissioners (that is

Clinical Commissioning Groups (CCGs)), a more typical contracting authority with no economic activity, are now subject to a prohibition on anti-competitive conduct under the National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 (*SI 2013/500*).

Another example of a body that crosses the divide of procurement and competition law is a utility. "Utilities" are broadly defined as bodies that:

- Carry out a monopoly activity (such as operating a water, gas or electricity network or running an airport); and-
- Are either:
    - specifically licensed for that purpose; or
    - contracting authorities, public bodies or undertakings with special and exclusive rights to carry out that activity.

Utilities are subject to a slightly more relaxed regime under the Utilities Contracts Regulations 2006 (*SI 2006/6*), as amended (UCR 2006). Utilities are generally privately owned in the UK and will generally, although not necessarily always, be categorised as "undertakings".

It seems rather unfair for certain bodies to be subject to competition **and** procurement law, but that is sometimes the case. Clearly, the more bodies that are subject to both disciplines, the greater the scope for competition and procurement law to converge.

Different rules for different activities?

Procurement law is about ensuring that public money in the EU is not spent in a way which discriminates between bidders (particularly against non-national companies). It is about the rules relating to public tenders. Competition law is about ensuring that economic operators do not collude or otherwise undermine the competitive process, for example by agreeing to fix prices or share markets or through the abuse of a dominant position on a market.

The *Luton* case shows that the classic terrain of procurement law, the public tender process, may be subject to competition law scrutiny.

The Luton case

London Luton Airport Operations Ltd (Luton Operations) conducted a tender to award a concession to operate a coach service between Luton airport and London. Luton Operations was in a position to award this lucrative concession due to its enjoyment of a concession to run Luton airport, previously granted to it by Luton Borough Council.

The claimant (ATS), the incumbent concessionaire, failed to win the new concession and brought a competition law action alleging abuse of dominance by Luton Operations. The claim is based on the alleged unfairness of the tender procedure and the terms of the new contract, which included a seven-year exclusivity over routes to London (except for routes reserved to easyBus) and a right of first refusal over new routes to London.

Luton Operations conceded that the trial would proceed on the assumption that it had a dominant position on the relevant market for the supply of facilities at the Luton airport bus station and quantum would be reserved to a further date. On the question of abuse, the court heard legal submissions and evidence from various witnesses and experts.

In relation to the conduct of the **tender**, Rose J found that:

- The tender was not a typical tender in that Luton Operations would not pay for the services procured. It would in fact receive a share of the profits. As such, it was more akin to an auction and the judgment therefore cannot necessarily be read across into classic tender situations.
- Although neither side produced any authorities showing that the conduct of a tender amounted to an abuse of dominance, the categories of abusive conduct are not closed. It is possible for a dominant firm to conduct a tender in such an unfair manner that it amounts to an abuse of its dominant position.
- The cause of action is a statutory tort and to be complete there must be some loss caused to the claimant. This issue of whether there is some minimal loss to complete the tort is therefore included in the trial on liability.
- On the facts:
    - Luton Operations had not ruled out ATS: ATS was genuinely invited to participate in the tender, although the invitation was "rather begrudging" (*Rose J at paragraph 75*));
    - although the invitation to tender was constituted by a short e-mail and post-bid discussions were held with National Express alone, ATS was not unfairly treated in the consideration of bids;
    - ATS's bid was significantly worse than that of National Express and there was no indication that ATS had intended to and would have substantially improved it in later discussions if given the chance; and
    - there was nothing seriously amiss in the informal tender procedure adopted and, while there were certain aspects that were "perhaps less than fair" (*at paragraph 90*), these did not cause any loss to ATS because their bid would have lost anyway.
- In conclusion, Luton Operations did not abuse its dominant position in the way in which it conducted the tender process.

In relation to the seven-year **exclusivity**, Rose J found:

- The concept of abuse is objective and does not rely on any motivation or intention; the *Aeroports de Paris v Commission of the European Communities (Case T-128/98) [2000] ECR II-3929* shows that it is not necessary for the dominant undertaking to be present on the downstream market affected by the abuse and need not derive any commercial benefit from the abuse. In any event, Luton Operations did in fact have a commercial stake in the downstream market due to the revenue earned from the concessionaire's operations.
- The duration of exclusivity was extended from five to seven years during post-bid discussions with National Express in return for a greater share of revenue. As in *Re Joint selling of the media rights to the FA Premier League (C-2/38173) [2007] CEC 2138*, the Commission decision of 22 March 2006 (FAPL), the grant of exclusivity for a long period to a single competitor had a distortive effect on the downstream market (for bus services between Luton Airport and London) by preventing any other operator from entering the market.
- Rose J did not accept that the market was a "natural monopoly" (*at paragraph 117*); the incumbent exclusive provider (ATS) enjoyed a high profit margin and this indicated that there was sufficient demand to support more than one operator. Rose J accepted the argument that it was not for Luton Operations to determine in advance that there should be only one operator. Even if there were room for only one operator, a well-run competitive tender should mimic the competitive process by awarding the contract to the operator that offered the best service to consumers rather than the highest fee to the body awarding the concession (which was the main criteria here).

- The distortion of competition was aggravated by the fact that the extended exclusivity lasted after completion of the new bus station (in 2017), the right of first refusal granted to National Express over new routes and the discrimination shown to easyBus. While easyBus had two years to run on its own agreement, there was no justification for carving it out of the exclusivity for the whole seven-year period.
- The exclusivity was not objectively justified by congestion at the bus station. This argument was clearly undermined by the fact that the exclusivity extended into the period after the planned redevelopment of the bus station but the justification was not established even in the short-term.
- In conclusion, Luton Operations abused their dominant position in the grant and duration of exclusivity to National Express, the right of first refusal over new routes and the discrimination shown in favour of easyBus.

Commentary

Procurement or competition case?

The claim based on the fairness of the tender process conducted by Luton Operations comprises the sort of allegations usually found in a procurement case. In fact, this may be an example of a claim that could have been brought under either the procurement or competition rules.

It is not clear from the judgment whether Luton Operations is itself a utility subject to the UCR 2006. That point does not appear to have been argued. It may be on the basis that it operates an airport pursuant to what appears to be an exclusive right. The Commission has previously stated that the grant of a service concession to a private undertaking can give rise to exclusive rights and subject that undertaking to the procurement rules, but does not do so if the grant follows an advertised, open and non-discriminatory tender process (in other words a fair competition for the market). Certainly, a quick internet search shows that Luton Operations publish tender notices in the *Official Journal of the European Union* (OJEU), which indicates that it is a utility. Although services concessions are currently excluded from the UCR 2006 and PCR 2006 (a newly adopted Directive will soon change this), they are subject to general EU principles of non-discrimination and transparency (including sufficient advertising) where there is "cross-border interest" in the tender. For more information, see *Practice note, Part B, below threshold and other procurements outside the regulations*.

It is possible that breach of procurement law principles was not argued for limitation reasons as there is generally a 30-day limitation period on bringing a procurement claim based on the regulations or EU principles (from the date when the claimant was aware or ought to have been aware of the breach). However, the 30 day rule is probably not applicable to claims based on service concession tenders under current law, as they are excluded from the UCR 2006.

Rose J's approach to determining the tender process claim indicates that procurement law might have been a more fruitful legal basis for challenging the conduct of the tender had it been available to the claimant. The developed procurement case law and guidance would probably have indicated a more rigorous approach than the threshold applied to establish an abuse of dominance. In particular, inviting proposals by way of a short e-mail (which did not set out the tender procedure or even state how long the exclusivity would last) followed by the conduct of substantial post-bid negotiations with one bidder and not another might well have breached the EU non-discrimination and transparency requirements.

Competition law applies to tenders

The *Luton* case indicates that the conduct of tenders by undertakings, or at least concession tenders (which commonly involve a return to the procuring body of part of the profits from the operation of the service) and auctions, will be subject to scrutiny

under the prohibition on abuse of dominance. This entails an assessment of the market power enjoyed by the undertaking, whether its conduct amounts to an abuse and whether it is objectively justifiable.

The *Luton* case does not import public procurement law into the area of abuse of dominance but it applies similar principles based on non-discrimination and opens the door to read-across arguments from procurement law. It is potentially significant for dominant undertakings in a wide range of sectors not generally associated with public procurement, ranging from financial services to cement. Perhaps more likely is that equivalent principles could be applied to the tendering activities of port and airport operators and operators of other public or quasi-public infrastructure.

In relation to utilities and even public bodies already subject to procurement law, the *Luton* case indicates that these bodies may also be subject to competition law in the conduct of tenders. However, this will only be where they are acting as "undertakings" and enjoy a dominant position in the relevant market. It was assumed for the purposes of the trial that Luton Operations was an undertaking (with a dominant position) when conducting the tender.

As indicated above, it will often be the case that **utilities** will be considered as undertakings when conducting procurements. The very definition of a utility includes the concept of an "undertaking with special or exclusive rights" so by implication the immunity from competition derived from having exclusive rights over an activity cannot mean that a body is not an undertaking.

Public bodies, however, are not necessarily acting as undertakings in the conduct of public tenders. They are not established as economic operators and any competitive activity is ancillary to their main functions and often curtailed by law and regulation (for example, local government legislation). *Fenin v Commission (Case T-319/99) [2003] ECR II-357* indicates that the question of whether the public body acts as an undertaking in its purchasing activity is determined by whether or not the subsequent use of the purchased goods amounts to an economic (competitive) activity.

As the court in the *Luton* case suggests, the tendering of concessions may be more prone to competition law principles than classic procurements. There is a commercial driver in specifying a services concession on the basis that the provider will return a share of profits to the tendering body. The fruits of the tender for the public body are at least, in part, this financial reward that can be diverted to other activities. This is seen in concessions ranging from rail franchises to catering contracts or car parks. As such, the commercial aspect of the concession tender may lead to the conclusion that the body is acting as an economic operator.

However, there are often gain-share and other commercial mechanisms in classic procurements particularly where the tender appoints a private sector partner to provide services both to the procuring body and other public bodies. Therefore, there may be scope for applying competition law in other tender situations.

If the hurdle of establishing that the public body is acting as an undertaking can be overcome, the *Luton* case indicates that the conduct of a range of public and quasi-public tenders is subject to the competition rules on abuse of dominance.

Competition law applies to the terms of the concession contract

The *Luton* case is also notable for its strict approach to assessing the distortive effects of exclusivity and rights of first refusal in a tender or auction situation.

The court's analysis was based on competition law precedent. Procurement law generally confers freedom on the procuring body to set the specification, duration and terms of the contract if all bidders are given a fair opportunity to bid. Many tendered contracts are for long periods of 20 years or more (for example, a Private Finance Initiative (PFI) services contract). This is subject to the procurement of frameworks, which are limited to four years and for which it is provided that a contracting authority shall not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition (*regulation 19(12), PCR 2006*). Indeed, there may be a read-across from the court's approach to interpreting regulation 19(12) in the *Luton* case.

The approach taken by the court seems quite interventionist on this element of the claim. There are after all many other bus contracts that ATS could bid for and there is nothing particularly unique about the Luton to London route (other than that it is obviously the only way of getting by bus between those destinations). The court cited the auctioning of sports rights (*FAPL* case) as an example of competition law applying to similar situations. However, the *FAPL* case was different in that it related to the joint selling of rights by undertakings (the Premier League clubs) and was a "must have" commodity in the downstream Pay TV market.

Rose J was influenced by the level of profit previously enjoyed by ATS on the route and the economic expert evidence presented by ATS. This seemed to support the proposition that a dominant undertaking could not decide in advance to grant an exclusive concession **for** the market if competition **in** the market was feasible and would have been better for consumers. Rose J also appeared to accept that bids should have been evaluated on the basis of customer benefits rather than the financial return to Luton Operations. If these principles were translated to public concession tenders (such as rail franchise tenders), they would have the consequence that, on profitable routes, bidders should compete on lowest fares and quality only rather than the level of premium returned to the tax payer.

The implications of this are that private and public bodies which act as undertakings and enjoy market dominance have a special responsibility to ensure that end consumers are fully protected in both the conduct of tenders and the terms of the awarded contract. This is particularly relevant in relation to concession tenders. In effect, any financial return enjoyed by the dominant undertaking and any exclusivity conferred on the winner may need to be carefully justified.

Where competition law does or could apply to tender activities, public bodies and utilities will now need to think not only about remedies under procurement law, but also potential fines (of up to 10% of their turnover) under competition law.

Conclusion

There are several lessons from the *Luton* case, including:

- In procurement cases, claimants should consider whether competition law may add strength to the claim. There may also be aspects of the contract awarded (such as a long-term exclusivity, discriminatory treatment or a right of first refusal) that infringe competition law.
- In competition claims, claimants should consider the availability of a procurement law cause of action. Procurement claims will also entitle the claimant to damages and injunctive remedies and the claimant may find that the breach is easier to establish than an abuse of dominance.
- Utilities, public bodies and dominant undertakings should give consideration in the design of tenders, particularly those involving exclusive concessions, to the potential constraints posed by competition law.

After the *Luton* case, a holistic approach to procurement and competition will be needed in mixed competition and procurement cases, reading across principles from one area of EU law to another.

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