

When are universities bound by EU public procurement rules as buyers and providers? — English universities as a case study

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Motivation

- There is significant confusion in the UK (and elsewhere) about the extent to which universities are bound by EU economic law
 - Remarkably, in certain BIS public statements
- Current proposals for further reform of the HE sector (Nov 2015 green paper) do not adequately tackle these implications

Motivation

- Public procurement is a particularly relevant area of EU economic law at least for two reasons
 - It imposes significant restrictions on the way universities buy and, more importantly, on the way universities sell / receive financial support
 - Breaches of these rules are generating an increasing risk of actual litigation (and liability) for universities

Research question(s) and method

- Research questions
 - To what extent are universities bound by EU public procurement rules, both as buyers and suppliers?
 - If they are generally bound, to what extent can universities free themselves from those rules?
- We take a black letter law approach

Universities as buyers

- Coverage by EU public procurement rules stems from classification as a ‘contracting authority’ or a ‘body governed by public law’
 - *U. of Cambridge test (C-380/98, EU:C:2000:529)*: fundamentally, whether 50%+ public income
 - Test was developed previous to introduction of fee-based funding for English universities

Universities as buyers

- Then, the key element in a ‘revived’ *University of Cambridge* test is to assess whether fees are public or private funds
 - We take a State aid based approach
 - Is there continuous public control of the funds managed by the Student Loans Company (SLC)?
 - Can the SLC resort to extraordinary enforcement proceedings and are any losses hitting the public purse?
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English Universities as buyers

- Our analysis shows that
 - SLC-managed funds remain public funds
 - Most English unis are (increasingly) fee dependent, which classes them as ‘bodies governed by public law’
- Conclusion: English universities are very unlikely to free themselves from the obligation to comply with EU public procurement rules as buyers

Universities as sellers

- There is a preliminary question that requires an assessment of whether HE teaching and research are ‘economic activities’
 - Art 14 TFEU and Protocol No 26
 - Each Member State decides whether to retain HE (teaching) as a non-economic activity
 - In England, it is quite clearly an economic activity, except for some types of research (below)
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Universities as sellers

- Application of EU public procurement rules to HE teaching and research services depends on
 - Whether it takes place ‘within the framework of a contractual relationship’
 - In England, HEFCE provides support for teaching and QR-related funding, both of which under ‘funding agreements’ that we deem of a contractual nature

Universities as sellers

- **HE teaching services**
 - They are an economic activity in England
 - HEFCE must comply with EU public procurement rules in tendering ‘funding agreements’ to unis
 - There is a light-touch regime that covers these tenders; plus obligation to comply with EU Treaty principles
 - Only exception would be for the CJEU to consider HE ‘special’ following *Spezzino* (C-113/13, EU:C:2014:2440)

Universities as sellers

- **HE research services**
 - Need to distinguish between economic and non-economic research
 - It is non-economic activity if it is *'independent R&D for more knowledge and better understanding'*
 - Increasing difficulty in drawing line where calls for research projects are very specific
 - Economic research needs to be tendered (triggers a risk)

Universities as sellers

- **HE research services**
 - What exact public procurement rules need to be complied with is relatively unclear
 - Strong view: full compliance with EU procurement rules
 - Intermediate view may allow for flexibility alike to light-touch regime or 'simple' compliance with EU principles
 - Framework for State aid for research and development and innovation [2014]: pp or price reflects market value

Universities as sellers

- HE teaching and research services – **State aid**
 - Under ‘standard’ conception of State aid rules, infringement of EU public procurement rules is likely to trigger infringement of State aid rules *as well*
 - However, the *Spezzino* approach would exclude it
 - For a ‘*social purpose and the pursuit of the objective of the good of the community and budgetary efficiency*’
 - Non-profit entities only, though

English Universities as sellers—Conclusions

- Entrustment and funding of HE teaching services within a contractual relationship between HEFCE and each university requires light-touch regime of Directive 2014/24
- Non-economic research does not have to be commissioned on the basis of any procurement
- Economic research needs to be commissioned through a full-fledged public procurement procedure under Directive 2014/24
- State aid rules for SGEIs become highly relevant, but it is unclear whether a *Spezzino*-like approach could save current risks

Can universities avoid these rules?

- Two theoretical options, applicable both to universities as buyers and as sellers
 - **Public-public cooperation**
 - Difficult: *'public services they have to perform are provided with a view to achieving objectives they have in common'*
 - ***In-house* providing**
 - Rests on 'similarity of control' that *university autonomy* complicates (*Datenlotsen*, C-15/13, EU:C:2014:303)

Can universities avoid these rules?

- Our assessment
 - Universities as providers/sellers are unlikely to qualify for either of these exceptions
 - In particular English universities, which score amongst the top 3 most independent in the EU
 - Reverse situation here universities are buyers and seek to commission services or supplies from spin-off companies under their control

Policy Implications

- ‘Marketisation’ of HE sector is unlikely to free universities, as sellers and buyers, from public procurement unless no (major) public support
 - Diminishes advantages of market-based approach?
- There are increasing litigation risks that require universities (and MS) to reassess compliance with EU public procurement and State aid rules

Thank you for your attention

Full paper: <http://ssrn.com/abstract=2692966>

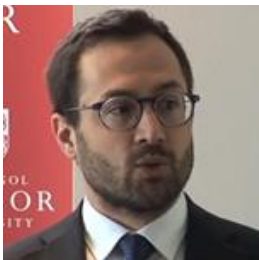
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