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New elements in the organisation and functioning of the Public Administration and Administrative Justice

Questionnaire

Responses from: The Supreme Court of the United Kingdom

I. New models of organisation and functioning in the Public Administration

The aim and scope of Part I of this questionnaire is:
(A) To examine collaboration with private individuals (who are not public servants) in the unilateral action taken by the Administration, and more specifically to study the delegation to private individuals of tasks traditionally performed by public servants during the procedure of issuing an administrative act. Participation, in general, of citizens/interested parties in administrative proceedings (e.g. preliminary hearings, participation and all forms of consultation), collaboration with private individuals in the Administration's contractual activity (works, supply and service contracts, concession contracts, public-private partnerships, etc.), privatisation of public-sector bodies and creation of legal entities governed by private law are not covered by this questionnaire.
(B) To study the integration of private-sector organisational models into the tools and operating methods of the Public Administration.

A. Delegation of administrative tasks to private individuals

1. General provisions

Does your legal system recognise the following forms of collaboration between private individuals and the Public Administration?

Tasks assigned to private individuals during the procedure of issuing [adopting] an administrative act ✓
Recruitment of private individuals who are not civil servants within the Administration's structure, e.g. executive managers, senior managers ✓

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2. Regarding the involvement of private individuals in administrative proceedings

i. If the involvement of private individuals in administrative proceedings (as indicated above) is provided for in your legislation, please mention specific provisions.

Constitutional provision ..... □
General provision of a legislative nature ..... ✓
Specific legislation ..... ✓

1. General legislative provisions:

Private individuals acting within, or recruited to, administrative bodies

The assigning of tasks to and recruitment of private individuals may fall under general powers conferred on the Secretary of State and/or Minister responsible for a particular part of the administration.

For example, the Constitutional Reform Act 2010 ("**CRA 2010**") Chapter 1 provides a statutory basis for management of the civil service. Section 3 provides that the Minister for Civil Service has the power to manage the civil service, excluding the power to manage the diplomatic service which rests with the Secretary of State. The general power to manage includes the power to make appointments (and dismissal) but does not cover national security vetting. Sections 10-14 provide for selections of persons who are not civil servants for appointments to the civil service. CRA 2010 does not make specific provision for the involvement of private individuals in administrative proceedings beyond their appointment.

Sections 3 and 4 (all statutory management powers in effect prior to the CRA 2010 continue to have effect and are exercisable subject to section 3) of the CRA 2010 are applied to the devolved administrations by the Government of Wales Act 2006 section 52 and the Scotland Act 1998 section 51: Schedule 2 (Consequential Amendments to Acts of Parliament) of the CRA 2010. CRA 2010 Chapter 1 does not, however, apply to the Secret Intelligence Service, the Security Service, the Government Communications Headquarters, or the Northern Ireland Civil Service: section 1(2). It does not apply to the selection of persons who are not members of civil service for appointment to the service for the purpose only of duties to be carried out wholly outside the UK: section 1(3).

2. Specific legislation:

Non-statutory private bodies exercising statutory powers

Statutory powers may be conferred, or duties imposed, on bodies which are in origin non-statutory private bodies. This arrangement reflects the meandering development of public law in the UK: functions once carried out by private individuals or charitable bodies become matters of public concern. Rather than dismantle the existing structure, statute frequently adds a super-structure of

powers or duties or otherwise incorporates existing bodies within the statutory framework within which such activities are performed.

For example, in the field of education, religious schools were incorporated into the statutory framework of education and maintained by local authorities. The Education and Libraries (Northern Ireland) Order 1986 (SI 1986/594 (NI 3)) addresses the modern statutory system of education in Northern Ireland in Part III. Section 9(2) provides that an education and library board, with the approval of the Department, may give financial or other assistance to the Board of Governors of a grant-maintained integrated school on such terms and conditions as may be arranged between the Authority and the Board of Governors of the school.

Professional bodies incorporated by Royal Charter may have statutory powers conferred on them. Statute frequently provides for statutory powers of discipline, often exercisable by a statutory committee granted on to the existing structure of the chartered body. The Law Society, a body created by charter, has a large number of disciplinary and regulatory functions conferred upon it by statute. The Solicitors Act 1974 section 31 (rules as to professional practice, conduct and discipline) provides in subsection 1 that the Law Society may make rules for regulating in respect of any matter the professional practice, conduct, fitness to practise and discipline of solicitors and for empowering the Society to take such action as may be appropriate to enable the Society to ascertain whether or not the provisions of rules made, or of any code or guidance issued, by the Society are being, or have been, complied with.

ii. Does national case-law or legislation define criteria pursuant to which the delegation of administrative tasks to private individuals is authorised?

1. Legislation:

The UK does not have primary legislation which provides criteria pursuant to which the delegation of administrative tasks to private individuals is authorised. See further **question 3(iii)** (there is no UK-wide general administrative statute or code that applies to private individuals performing public functions).

Delegation of administrative tasks to private individuals, and any criteria pursuant to which this is authorised, instead depends upon the nature of any power to delegate which has been conferred on the Secretary of State and/or Minister responsible for a particular part of the administration.

For example, national legislation acknowledges the delegation of administrative tasks to private individuals by the Minister for the Civil Service but does not define criteria for authorising this. The Civil Service (Management Functions) Act 1992 provides for the delegation of functions conferred on the Minister for the Civil Service by CRA 2010 section 3. Section 1(2) provides that the

Minister may, to such extent and subject to such conditions as the Minister thinks fit, delegate a function to any other servant of the Crown. Where a function is delegated otherwise than to such a person, the person to whom the function is delegated may, subject to the terms of the delegation, authorise a servant of the Crown for whom he is responsible to carry out the function on his behalf: section 1(4). Section 1(4) thereby acknowledges the delegation of a function to someone who is not a servant of the Crown, but it is not explicit that the Minister has a power to define criteria to which administrative tasks are delegated to persons other than servants of the Crown.

In the absence of criteria by which the delegation of administrative tasks to private individuals is authorised, it can be difficult to identify when this has in fact occurred. This issue has become prevalent since the enactment of section 6 of the Human Rights Act 1998 (**"HRA**"). Section 6(1) states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(3) provides that a "public authority" includes a court or tribunal, and "any person certain of whose functions are functions of a public nature" but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament. Section 6(5) provides that "in relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private." The words of section 6 HRA do not explicitly require delegation of administrative tasks to private individuals to be authorised for a private body to be exercising a public function. The question of whether a particular function is a public function has been the subject of considerable analysis and differences of approach by courts (see further **question 5**).

2. National case-law:

National case-law has not defined general criteria pursuant to which the delegation of administrative tasks to private individuals can be authorised (although see the discussion of public functions in **question 5** on judicial review).

This may be in part be explained by the fact that meanings attributed by the courts to the term "administrative" act (as opposed to "legislative", "ministerial", "judicial", "quasi-judicial") for administrative law purposes have often been inconsistent. A distinction often made was that a legislative act entails the creation and promulgation of a general rule of conduct without reference to particular cases, whereas an administrative act cannot be exactly defined, but includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice. The application of these distinctions often created significant complications and have now been abandoned: Lord Denning in *R. v Gaming Board Ex p. Benaim* [1970] 2 Q.B. 417 at 430 in respect of the decision of the HL in *Ridge v Baldwin* [1964] A.C. 40; see also Lord Diplock in *O'Reilly v Mackman* [1983] 2 A.C. 237 at 279.

iii. How are administrative tasks delegated to private individuals? Please provide specific examples.

Directly by law ..... ✓
By an administrative act ..... ✓
By contract ..... ✓
Other ..... □
See questions **2(ii)** and **3(i).**

iv. Which administrative tasks can be entrusted to private individuals [content of the tasks]? Please provide specific examples from legislation and case-law.

Preparation of the administrative act ..... ✓
Issuance [adoption] of the administrative act ..... ✓
Implementation of the administrative act ..... ✓
Other ..... ✓
See question **5(iii)**.

v. What is the extent [range] of administrative tasks that can be entrusted to private individuals? Please provide specific examples from legislation and case-law.

Advisory tasks ..... ✓
Decision-making tasks ..... ✓
Control and verification tasks:
- Establishment of the facts ..... ✓
- Legal qualification of the facts ..... ✓
- Other ..... □

See question **5(iii),** including the discussion of *R (Shashikanth)* (an arbitrator's decision).

vi. Are there any cases where the involvement of private individuals in administrative proceedings is prohibited?

No □
Yes (please specify ……..) ✓
See question **3(iv).**

If yes, which legal instrument provides for the corresponding prohibitions?

Constitution ..... □
Legislation ..... □
Other ..... ✓
Code of Conducts prohibiting conflicts of interests: see question **3(iv).**

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Please indicate any relevant case-law.

We have not found case law on the discrete prohibition of the involvement of private individuals in administrative proceedings. The courts have however engaged in considerable discussion of the prohibition of conflict of interests.

3. Qualifications and selection procedure for private individuals

i. What is the procedure provided for in the legislation for the certification of private individuals? Please mention specific examples.

Participation in examinations ..... ✓
Selection based on criteria ..... ✓
Other ..... □

Selection based on criteria: Section 63(2)(a) Tribunals, Courts and Enforcement Act 2007 ("2007 Act") provides that private individuals may act as an enforcement agent if he acts under a certificate under section 64. A certificate may be issued under section 64(1) 2007 Act by a judge of the county court. The Certification of Enforcement Agents Regulations 2014 ("2014 Regulations") are made by the Lord Chancellor pursuant to section 64(2) 2007 Act. Those regulations provide that a judge may issue a certificate if they are satisfied that the criteria in regulation 3(b) are met.

Participation in examinations: Regulation 4 of the Statutory Auditors and Third Country Auditors Regulations 2016 requires that a person appointed to conduct a statutory audit must conduct that audit in accordance with the relevant standards for the conduct of statutory audits, which include the appropriate qualifications set out in the international auditing standards adopted by the European Commission. Section 390A Insolvency Act 1986 also provides that an insolvency practitioner must be a member of a professional body be permitted to act as an insolvency practitioner for all purposes by or under the rules of that body.

ii. How are selected the private individuals who will be entrusted with a specific administrative task? Please give examples.

Random selection from a list/register ..... ✓
Selection from a list/register based on criteria ..... ✓
Absolute discretionary power of the Administration ..... □
Selection by the citizen [upon a declaration] ..... ✓
Other ..... ✓

Random selection from a list/register: The official receiver can request that the Secretary of State appoints an insolvency practitioner, which will generally be the insolvency firm next in line on the rota of practitioners.

Selection from a list/register based on criteria: Section 1 UK Border Act 2007 permits the Secretary of State to designate only officers who the Secretary of State thinks are (a)fit and proper for the purpose, and (b)suitably trained.

Selection by the citizen: Creditors may vote to retain or appoint an insolvency practitioner. Private citizens can also search for a statutory auditor via the Audit register. Private creditors with a CCJ in their favour can select bailiffs.

Other: There is no provision for the selection of persons who are not civil servants to be entrusted with a specific administrative task other than by appointment to the civil service. Private individuals are selected by the ordinary procedure for recruitment of non-civil servants for appointment to the civil service. The selection of persons who are not civil servants for appointment to the civil service must be on merit on the basis of fair and open competition: CRA 2010 section 10. This requirement is subject to exceptions for selection for an appointment to the diplomatic service as head of mission or Governor of an overseas territory, as special adviser, or a selection excepted by the recruitment principles published by the Civil Service Commission (as provided for in sections 11 and 12(1)(b) CRA 2010).

iii. Is there a legal provision and/or other instrument governing the actions of private individuals when performing administrative tasks? Please indicate specific provisions.

No	□
If yes,	✓
General normative act (e.g. Code of Administrative Procedure)	□
Specific normative acts …….	✓
Codes of Conduct, good practices (soft law) …….	✓
Other …….	□

There is no UK-wide general administrative statute or code that applies to private individuals performing public functions. Instead, there are pieces of legislation governing the actions of private individuals when performing administrative tasks (such as Schedule 12 Tribunals, Courts and Enforcement Act 2007 and section 13 Mental Health Act 1983), and codes of practice for relevant professionals (e.g. Code of Audit Practice issued by the National Audit Office, Mental Health Act 1983: Code of Practice issued pursuant to section 118 Mental Health Act 1983, and the Taking Control of Goods: National Standards 2014).

iv. How are the impartiality and integrity of private individuals guaranteed under the law? Please indicate specific provisions.

Incompatibilities	✓
Impediments	✓
Criminal or disciplinary liability	✓
Other	□

Incompatibilities: Some roles are barred if conflicts of interests exist, e.g. where an insolvency practitioner has a conflict of interest that cannot be eliminated or reduced to an acceptable level (see Insolvency Practitioners Association Ethics Code for Members paragraph 310), or where a building inspector has a conflict of interest (Code of conduct for registered building inspectors paragraph 2.8 – 2.10).

Impediments: Conditions may be applied to any individual who registered as a building safety inspector which may include further professional development or action to support the good standing of the profession (Code of conduct for registered building inspectors paragraphs 3.1).

Criminal or disciplinary liability: A private entity exercising public functions may be subject to criminal liability for breach of certain statutory provisions (e.g. section 389 Insolvency Act 1986 which provides that a person who acts as an insolvency practitioner in relation to a company or an individual at a time when he is not qualified to do so is liable to imprisonment or a fine, or to both). The Secretary of State can also reprimand an insolvency practitioner if an act or omission of the practitioner had or is likely to have an adverse impact of the achievement of one or more of the regulatory objectives (section 391J Insolvency Act 1986). Registered building inspectors are similarly committing an offence if they work outside the scope of their registration (Code of conduct for registered building inspectors paragraph 4.1). A breach of the Code of conduct for registered building inspectors may lead to disciplinary action, including the cancellation of their registration (see Introduction to the Code of conduct for registered building inspectors).

v. What are the legal consequences in the event of an error, offence or failure on the part of the private individual?

Withdrawal of the certification	✓
Disbarment from the professional association	✓
Imposition of a fine or other penalty	✓
Personal liability of the private individual (civil, criminal, disciplinary)	✓
Revocation of the administrative act in the issuance of which the private individual collaborated	✓

Civil liability of the State	□
Other	□

4. Administrative checks [controls]

i. Does the Administration carry out checks on private individuals when they perform administrative tasks?

Yes	✓
No	□

ii. If yes, at what stage are the checks carried out?

A priori	✓
A posteriori	✓
At any time	✓

iii. How are checks activated?

Following a complaint/administrative appeal	✓
Ex officio	□

iv. How extensive are the checks?

Checks based on sampling	□
Mandatory checks for all actions	✓

v. What is the nature of the checks?

Of legality	✓
Of the substance, of appropriateness	✓

vi. What is the type of checks?

On persons	✓
On actions	✓

vii. Are the conclusions of private individuals binding on the Administration?

Yes	□
No	✓

5. Judicial review

i. Can the actions of private individuals be subject to judicial review? Please indicate specific provisions or the relevant case-law.

No □
Yes ✓

If yes, what is the scope of the judicial review?

The review directly targets the action of the private individual (per se) ..... ✓

The review indirectly targets the action of the private individual (appeal lodged against the final act of the Administration, whether explicit or implicit, e.g. appeal lodged against the tacit acceptance of the actions of private individuals by the Administration) .....… ✓

ii. What types of disputes arise when challenging the actions of private individuals?

administrative disputes ✓
private disputes □

See **5(iii)** below ('Enforcement of private law rights').

iii. Please mention typical cases from national case-law concerning the delegation of administrative tasks to private individuals.

Overview of judicial review: Judicial review is principally concerned with the activities of bodies deriving their authority from statute. Where an individual seeks to challenge the exercise of a power derived from statute, or seeks to compel the performance of a statutory duty, the presumption is that such an issue raises a matter of public law suitable for resolution by judicial review: *R (Shashikanth)*. That presumption may, on rare occasions, be displaced. The courts have, on occasions, approached the matter as involving a three-fold test, namely whether the public body was exercising statutory powers, whether the function in question was a public or a private function and whether the body was performing a public duty owed to the individual in the particular circumstances of the case (*R. (Tucker) v Director-General of the National Crime Squad* [2003] I.C.R. 599 at [24] at 607; *R. (Hopley) v Liverpool Health Authority* [2003] P.I.Q.R. at p.10). In general, however, if the body is exercising statutory powers, and if the challenge is to the exercise of those statutory powers (rather than seeking to enforce some private law right against the body), such a challenge may be brought by way of judicial review.

<u>Amenability to judicial review</u>

In *R (Shashikanth) v. NHS Litigation Authority* [2024] EWCA Civ 1477 ("*R (Shashikanth)*"), the Court of Appeal held that the determination by an adjudicator of a dispute referred to the Secretary of State under the National Health Service (General Medical Services Contracts) Regulations 2015 regulation 82 was amenable to judicial review. The Court of Appeal observed at [43]-[44] that judicial review is only available against a body exercising public functions. There are broadly two approaches to the question of whether a person or a body is exercising a public function. First, if a person or body is exercising power derived from statute (or the prerogative, if the matter is

justiciable), the person or body is generally assumed to be exercising public functions. Secondly, the courts may have regard to the nature of the function being performed to determine whether that function has a sufficient public element such as to make it amenable to judicial review. See further the discussion of section 6 HRA below.

The nature of the decision

As observed in *R (Shashikanth)*, the courts have recognised that there are cases where a power may be derived from statute but the nature of the decision is such that it does not involve the performance of a public duty to the individual in the particular circumstances of the case. For example, in *R(Tucker) v Director-General of the National Crime Squad* [2003] ICR 599 a decision to terminate the secondment of a police officer did not involve a public function.

Furthermore, even if a decision is amenable to judicial review, the available grounds of challenge in public law may be more limited in certain contexts, such as in a commercial context: *The State of Mauritius v The (Mauritius) CT Power Ltd* [2019] UKPC 27; *Mercury Ltd v Electricity Corporation* [1994] 1 WLR 521.

The nature of the function being performed

A number of considerations may be relevant to determining the function being performed by the private individual which include, but are not limited to, the extent of government or other public authority involvement in the function, whether and to what extent the exercise of the function is performed against a background of statutory powers, and the nature and importance of the function. In *R v Take-over Panel, ex parte Datafin Plc* [1987] 1 QB 825, Sir John Donaldson MR held that "Possibly, the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction" (p.381E-F).

Enforcement of private law rights

R v East Berkshire Area Health ex p. Walsh [1985] QB 152 explained that judicial review is only available against public law bodies in respect of public law matters (see further the discussion of *Bevan* below). Judicial review is not available to enforce purely private law rights such as rights derived from contract or tort. Such rights are enforceable by way of claims in the civil courts, not a claim for judicial review in the Administrative Court.

In the recent case of *R (SARCP) v Stoke-on-Trent City Council* [2025] EWHC 18 (Admin) ("***R (SARCP)***"), HHJ Tindall explained that the definition of 'public authority' in section 6 HRA (below) is material to the 'public/private' issue. Whilst the defendant in that case was obviously a 'public authority' under section 6(3) HRA, the central debate was on whether a contract and decision

relating to it were acts sounding only in *private* law for the purposes of judicial review. HHJ Tindall held at [44] that there is a clear analogy with section 6(5) HRA, as recognised in the leading case on amenability to review of local authority 'usual cost' and care home fee decisions (see below). Applying *R (Shashikanth),* at [54] the judge held that "where the decision-maker derives their power from statute (as the defendant did [in *SARCP*] on the 'public law level' even if they were also exercising a contractual discretion on the 'private law level'), they will generally be exercising public functions, even if there is a 'private law element' in their decision".

The interpretation of a "public function" under section 6 HRA

As detailed in question **2(ii)** above, the words of section 6 HRA do not explicitly require delegation of administrative tasks to private individuals to be authorised for a private body to be exercising a public function. Interpretation of section 6 has centred on the nature of the function rather than the fact of delegation. The question of whether a particular function is a public function has been the subject of considerable analysis and differences of approach by courts, for example in *YL v Birmingham CC* [2008] AC 95 (***'YL'***) and *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363 (***"R (Weaver)"***). In those cases, the context was whether the bodies were public bodies within HRA section 6.

In *YL*, the Lords decided by a majority that a privately-run care home accommodating residents placed by a local authority was not exercising 'public functions' under section 6(3) HRA. However, the result in *YL* was reversed by Parliament in section 145 of the Health and Social Care Act 2008, which has now been effectively re-enacted in section 73 of the Care Act 2014, to provide that a registered care home providing nursing or personal care arranged and (at least part-)funded by an authority under the Care Act 2014 also exercises public functions under section 6(3) HRA. This was recently applied in *R (SARCP),* in which HHJ Tindal held at [44] that this simply means the claimant's member providers in that case were also 'public authorities' under the HRA, not that an authority's fee decision relating to a contract with them was amenable to judicial review.

R (Weaver) considered whether, when terminating a tenancy, a registered social landlord, a "hybrid" rather than a "core" public body was subject to section 6 and to public law principles. For Elias LJ at [55] and [57] the starting point is 'to focus on the nature of the act in the context of the body's activities as a whole'. Elias LJ at [76] distinguished acts necessarily involved in the regulation of what is a public function, which he considered to be public acts, from those which are purely incidental or supplementary to it.

Whether the decision of a **public** body is amenable to judicial review when it concerns the delegation of administrative acts to private individuals

Elias LJ's approach was applied in *R (Bevan) v Neath CBC* [2012] EWHC *("**Bevan**").* Claimant private sector operators of residential homes applied for judicial review of a decision of the defendant local authority to award a 5.7% increase in the rate to be paid to them. Local authority placements arranged under the National Assistance Act 1948 section 21 accounted for a significant proportion of the beds in their case homes. Beatson J held at [47]: "It is clear that, because the purpose of attaching liability under [section 6 HRA] is different to the purpose of subjecting a body to public law principles, 'it cannot be assumed that because a body is subject to one set of rules it will therefore automatically be subject to the other': Elias LJ in [*R (Weaver)*] at [37]. However, the approach taken by the majority of the court in *Weaver's* case to [section 6 HRA] is in its broad thrust, of analogical assistance in the present context. Elias LJ at [83] indicated that he agreed with the Divisional Court's view that the landlord's decision to terminate a tenancy was governed by public law principles and susceptible to judicial review on conventional public law grounds".

The act was the fee-setting decision of the Council. The wider context was the function of a local authority under the National Assistance Act 1948 in providing care or making arrangements for others to provide care for those who need it. That was a public function. Beatson J held at [48]: "While the fee-setting function of the Council is less closely regulated than those of a registered social landlord, the statutory and regulatory framework shows that a Council does not have the freedom that a private individual would have to use its bargaining power to drive down the price as far as possible. The mere fact the decision concerns the setting of a fee under a contract does not mean it is to be characterised as a private act. The decision therefore could not be characterised as purely incidental or supplementary to the function of making arrangements for the provision of care in care homes operated by third party providers for those who qualify under the National Assistance Act 1948." The local authority decision was therefore amenable to judicial review, although it concerned the delegation of administrative acts to private individuals.

B. Integration of private-sector methods and organisational models into the functioning of the Administration

1. Recruitment of senior managers outside the hierarchy of the civil service

i. What are the objectives of recruiting private individuals as senior managers within the Administration?

Section 10 of the CRA 2010 provides for the selection of persons who are not civil servants for appointment to the civil service. The overriding requirement is set out in section 10(2), which provides that a person's selection must be "on merit on the basis of fair and open competition".

The exceptions to this requirement are set out at section 10(3) and include: (a) selection for an appointment to the diplomatic service either as head of mission or as Governor of an overseas territory; (b) selection for appointment as a special advisor; and (c) a selection excepted under the recruitment principles.

Special advisors are individuals who hold a position in the civil service, who are appointed to assist a Minister of the Crown and selected by that Minister personally (section 15). Their appointment will cease when that Minister ceases to hold ministerial office. Section 8 provides that special advisors may not authorise the expenditure of public funds, exercise any management powers within the civil service (other than managing other special advisors), or exercise any statutory or prerogative powers.

The Recruitment Principles are published by the Civil Service Commission under section 11 and set out a series of principles and requires for selection and appointment to the civil service. The overriding purpose of the principles is to meet the statutory requirement of section 10(2), requiring selection for appointment on merit, on the basis of fair and open competition.

Exceptions to this statutory requirement must be justified by the needs of the civil service or be necessary to enable the civil service to participate in a government employment initiative (para 59). Permitted exceptions are set out at Annex A to the principles. These are as follows:

1) Temporary appointments of up to two years, where urgency means that a full competition is impracticable or disproportionate.
2) Support for government employment programmes, for individuals whose circumstances make it difficult for them to compete for appointments on merit on the basis of fair and open competition.
3) Secondments from outside the civil service of up to two years.
4) Highly specialist skills, not readily available within the civil service for up to two years.
5) Former service servants who were previously appointed on merit on the basis of fair and open competition within five years of leaving the civil service.
6) Transfers of staff from the Northern Ireland Civil Service to UK Government Departments.
7) Transfers of staff from other public bodies.
8) Transfers of organisations into the civil service.
9) Conversions to permanency of candidates appointed on a temporary basis.

Any other appointments or classes of appointment to the civil service not on merit on the basis of fair and open competition must be approved by the Civil Service Commission (para 100).

The Civil Service Commissioners have also published the Civil Service Senior Appointments Protocol, governing appointments to the most senior posts in the civil service. This applies to appointments to Director General, Permanent Secretary and equivalent levels within the civil service (para 2), which are the most senior managerial roles. This protocol provides that appointment must follow an internal or external recruitment competition, which must be conducted in compliance with the Recruitment Principles. The selection route, whether by internal,

external or a managed internal move, will be decided by the Senior Leadership Committee of the Civil Service Commission (para 4), and the principles are to remain the same whether advertised internally or externally (para 7).

Recruitment to the Northern Ireland Civil Service is not governed by the CRA 2010 (section 1(1)(d)). The Civil Service Commissioners (Northern Ireland) Order 1999 also provides that selection for appointment to the civil service must be made on merit on the basis of fair and open competition (article 3(1)). This is governed by the Recruitment Code, published by the Civil Service Commissioners for Northern Ireland.

ii. In which sectors of the Public Administration is it permissible to recruit senior managers who do not belong to the hierarchy of the civil service, and in which sectors is it prohibited?

The statutory requirement and principles of recruitment set out above apply to all parts of the civil service, subject to certain exceptions set out below. This means that in all sectors of the civil service, it is permissible to recruit senior managers who do not belong to the civil service, provided that the statutory requirement and recruitment principles are complied with, as set out above.

The exceptions to this, set out at section 1(2) of the CRA 2010, are the Secret Intelligence Service, the Security Service, and the Government Communications Headquarters. There is no equivalent code or recruitment principle for these bodies, therefore it is not clear in what circumstances external recruitment of senior managers is permitted.

iii. What criteria does the Administration use to select external senior managers?

The criteria for selection of senior managers from outside the civil service will depend on the department advertising the role. Civil service recruitment generally is based on success profiles, based on behaviours, strengths, ability, experience and technical skills. Whilst there is general guidance about the elements required for different levels within the civil service, not all requirements will be relevant to every role. The specific criteria will be set out in the job description of the specific role. There is therefore no overarching criteria involved in the recruitment of external senior managers.

There is guidance within the Annex A to the Civil Service Senior Appointments Protocol, however, as to the factors to be taken into account when deciding whether to recruit internally or externally for senior positions. These include the strength of the internal pool of candidates available, the specific skills or experience required, knowledge of the external market, diversity of the existing team and ministerial preferences.

iv. What is the nature of the duties of external senior managers?

Decision-making	✓
Advisory	✓
Other	✓

Once appointed, an external senior manager will become a member of the civil service and thereafter have any duty relevant to their specific role, which may involve decision-making, advisory or other duties.

v. Does error on the part of a senior manager give rise to:

Civil liability of the State	✓
Personal liability of the manager (civil, criminal, disciplinary)	✓

This will depend on the nature of the error. There is a political convention that ministers are accountable to Parliament for their department's actions and omissions. The state may be liable for in civil law for errors of its employees in exercising the functions of the state.

Poor performance will be managed by internal disciplinary proceedings, and performance management policies. In serious and strictly defined cases, a senior manager may be liable to civil proceedings for the tort of misfeasance in public office or to criminal proceedings for the common law offence of misconduct in a public office.

2. Organisational models

i. Does your country use New Public Management, Public Value Management, Digital Era Governance, or New Public Governance policies in the organisation of its Public Administration, for example, to digitise procedures, achieve objectives, ensure accountability, evaluate efficiency, promote the rational use and distribution of resources, control expenditure and ensure compliance with budget restrictions, codify legislation, promote career progression, train staff, etc.? Please provide specific examples.

We do not have any specific examples of the use of these policies in administration of the civil service.

ii. Is there a specific provision for the organisation of the Administration based on the above-mentioned models (Constitution, legal provision, etc.)?

The legal basis for the civil service is now provided for by Chapter 1 of the CRA 2010. The CRA 2010 provides that the Minister for the Civil Service has overarching power to manage the civil service (section 3(1)); places the Civil Service Commission on a statutory basis (section 2); provided

for the creation of the civil service code (section 5); and established the selection for appointment principles discussed above.

Prior to its enactment, the civil service was based on prerogative powers. These powers derive from the historical power of the monarch and now rest in the executive. Ministers could alter the basis of the civil service, without going through Parliament, through prerogative Orders in Council: Orders in Council - UK Parliament. Prerogative powers are residual powers, however, that only exist to the extent that Parliament has not legislated to replace or remove them: eg *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508. Therefore, the executive maintains a residual power to govern the civil service to the extent that this is not provided for by the CRA 2010.

The management methods and policies used within the civil service is therefore a matter for the Minister for the Civil Service, or any other servant of the Crown to whom the Minister delegates this function. There is no constitutional or legal provision governing the management models to be used within the civil service.

iii. In which public services and agencies is this type of organisation used?

The Administration stricto sensu □
Public enterprises □
Other public entities □

iv. Are the policies for achieving the objectives designed:

At national level □
At regional level □
By subject-matter □
By taking into account specific public entities □
Other □

v. Have specific objectives been set out for the action of the Administration? Please provide examples.

As noted above, we do not have any specific examples of the use of these policies in the civil service.

If yes, is their accomplishment:

Optional □
Mandatory □

Does failure to meet these objectives lead to:

Personal consequences for the senior managers □
Legal consequences for the assessed organisation □

Financial consequences for the assessed organisation □

Are incentives of any kind provided for civil servants (e.g. remuneration) or public entities to ensure that these objectives are achieved? □

vi. Are there any indicators for evaluating the action of the Administration in relation to the following factors:

Compliance with the regulatory framework □
Effectiveness □
Efficiency □
Economy □
Achievement of strategic objectives □
Other □

II. Alternative methods for resolving administrative disputes

1. General provisions

i. Does your legislation provide for alternative dispute resolution (ADR) in cases involving public law/administrative law?

Arbitration □
Mediation ✓
Other …….. ✓

UKSC: Additional Explanation of UK ADR Regime

There is no overarching piece of legislation that provides for, and comprehensively covers, the use of ADR in disputes between parties generally, including where the dispute involves public law or administrative law and/or the State. Instead, there are specific instances of primary and secondary legislation (discussed below) which encourage or facilitate the use of ADR in specific contexts (prior to, or during, certain court proceedings), regulate its application and rules generally (for instance, governing UK-seated arbitrations generally), or provides for limited, independent investigations by an independent ombudsmen with specific powers and remits. Consequently, this legislation, and its associated case law, *may* be relevant *if* such public law / administrative law issues fall within their general scope.

A high-level summary of this UK ADR legislation is set out below to provide further context to the responses provided in Part II of this Questionnaire.

1. ADR and Court Proceedings (which includes public/administrative law disputes)

A) Pre-Action ADR

Court rules may place specific obligations on potential litigants to consider, or attempt to use, ADR prior to formally instituting a claim in the court, including where the envisioned claim relates to public law and administrative law disputes. In this sense, these court rules indirectly provide for the use of ADR in such disputes with the State.

In England and Wales, of particular relevance is the 'Pre-Action Protocol for Judicial Review' (the **Protocol**). The Protocol sets out a code of good practice for parties to follow when bringing a claim for judicial review (broadly, a claim where the court reviews the lawfulness of an enactment or decision, action or failure to act in the exercise of a public function and can provide remedies) and requires the parties to consider if some form of ADR would be more suitable than litigation for their dispute. If the Protocol is not followed, the court could impose cost consequences in the eventual litigation. The Protocol (non-exhaustively) lists forms of ADR to be considered: negotiation between the parties, the aggrieved party following a complaints procedure, involving certain Ombudsmen to investigate (discussed below), or referring the dispute to mediation.

In Scotland, there are no analogous pre-action court rules to consider ADR in public law / administrative law disputes prior to commencing litigation.

B) Court Procedures and ADR

In England and Wales, once a claim has been initiated, the 'Civil Procedure Rules' ("**CPR**") (a form of secondary legislation made under the Civil Procedure Act 1997 which govern all civil claims, including public / administrative law claims) place a positive duty on the court to consider "*ordering or encouraging*" the parties to use ADR (CPR 1.4(2)(e)). Further, as part of a court's case management powers, they can order the parties to engage in ADR and be facilitative of that by, for example, adjourning the litigation in the interim period whilst ADR is conducted (CPR 3.1(2)(o); *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416). These powers of the court *can* be used in public law and administrative law disputes but they remain discretionary and are specific to that case.

In Scotland and Northern Ireland, there is no power for the court to compel the parties to engage in ADR. The courts can only recommend that the parties should engage in ADR, if appropriate.

2. Arbitration

The Arbitration Act 1996 (as amended) (for England, Wales, and Northern Ireland) ("**AA 1996**") and the Arbitration (Scotland) Act 2010 (for Scotland) ("**ASA 2010**") set out the rules, powers and frameworks concerning all UK-seated arbitrations.

Both the AA 1996 and ASA 2010 primarily regulate private consensual arbitrations. There is a requirement that the parties have voluntarily agreed to arbitrate their dispute pursuant to an "*arbitration agreement*" before those parties become subject to legislations' respective regimes.

However, both the AA 1996 and ASA 2010 make provision for "*statutory arbitrations*", being arbitrations where a separate law or piece of legislation provides for the dispute to be submitted to arbitration rather than there being a separate arbitration agreement (sections 94 – 98 AA 1996; 17 – 18 ASA 2010). The instances of 'statutory arbitrations' arise in piecemeal instances and are rare in practice. From the examples we have been able to identify, they do not typically concern public law or administrative law disputes (see, for example, section 10 Agricultural Tenancies Act 1958 concerning statutory rent reviews between farm business tenants. Similarly, under Schedule 12, Water Industry Act 1991, this only concerns compensation due from water and sewerage companies carrying out certain works and not administrative disputes). The only 'statutory arbitration' we have identified with some nexus to public law is found in the 'Local Government Changes for England (Property Transfer and Transitional Payments) Regulations 1995' which provides for disputes surrounding the distribution of assets and liabilities between local governments from a statutory reorganisation to be subject to arbitration (see *Durham County Council v Darlington Borough Council* [2003] EWHC 2598 (Admin)) (effectively, with the State as both parties).

Concerning arbitration agreements entered into by the State/State entities, the AA 1996 (section 106) and the ASA 2010 (section 34) expressly envision that they can be parties to such arbitrations and be bound by the legislations' regimes. For private law disputes involving the State/State entities, e.g. concerning commercial contracts entered into which feature arbitration clauses, no specific legal regime arises by virtue of the State being a party. In contrast, typical public law / administrative law disputes which this questionnaire is concerned with are *unlikely* to be subject to arbitration (for the reasons discussed in (ii) below). This is due to the general law principle of "*non-arbitrability*". However, there is no explicit case law or legislation authoritatively confirming this point.

3. Mediation

Since Brexit, the UK does not have legislation governing the use of meditation as a form of ADR.

Regarding mediation and public law / administrative disputes:

- We have not identified any legislative restrictions on the use of mediation by the parties in such disputes.
- As detailed further above, under the applicable rules of court, parties in such disputes may be required to explicitly consider mediation prior to bringing any litigation and (in the case

of England and Wales) be ordered by the court to conduct mediation if they felt it was necessary on the facts.

- Certain legislation may provide a specific entitlement for individuals to initiate mediation regarding specific administrative decisions. From our review, we identified section 52 of the Children and Families Act 2014 which *allows* a parent / young child to initiate mediation concerning some decisions taken by a local authority in respect of a child's 'education, health and care plan', but *does not require* mediation to be used.

4. Other (Parliamentary Ombudsman): The Parliamentary Commissioner Act 1967 created the office of the 'Parliamentary Ombudsman', an independent body that investigates and tries to resolve complaints surrounding actions taken by or on behalf of most government departments, which can involve public law / administrative law decisions.

Such investigations by the Parliamentary Ombudsman take an inquisitorial approach and can lead to the Parliamentary Ombudsman making non-binding recommendations to the organisation, if an issue is determined. The Parliamentary Ombudsman has limited remedies available to it. It can request the organisation to take certain actions to remedy the compliant or unfair treatment, request that the organisation retakes the decision, or request that its services are improved generally (and provide such recommendations). From a legal perspective, the State organisation could ignore such requests of the Parliamentary Ombudsman.

There are restrictions on what subject matters can be considered by the Parliamentary Ombudsman which are discussed below.

ii. Are there categories of administrative disputes that are excluded from ADR by law or according to case-law?

* *Please elaborate on your answer, citing any relevant legislation and/or case-law*

Arbitration: Whilst there is no direct case law or legislation on this point, it is likely that administrative disputes (i.e. those involving public law or administrative law issues concerning enacted secondary legislation/regulations, the State and public authorities) would generally not be capable of being determined in arbitration under the AA 1996 / ASA 2010.

Both the AA 1996 (section 81(a)) and the ASA 2010 (section 30) provide that any general law restriction on what matters are "*capable*" of settlement by arbitration/being arbitrated generally continue to apply. The leading statement on such "subject matter non-arbitrability", as it is described, is the decision of the Judicial Committee of the Privy Council in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] JCPC 33. The rationale

behind such exclusion is that "…*there are certain matters which in the public interest should be reserved to the courts or other public tribunals for determination. But there is no agreement internationally as to the kinds of subject matter or dispute which fall within subject matter non-arbitrability*." (emphasis added). This was also discussed in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 where, when discussing arbitrability, it was held that "*[i]t is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process*."

We have not been able to identify any definitive ruling that administrative disputes would fall into subject matter non-arbitrability exclusion, however, there are factors indicating such a conclusion. First, there is dicta in the High Court concluding that constitutional challenges to sub-ordinate legislation, a typical administrative law issue, would not be capable of being subject to arbitration (see *Aqaba Container Terminal (Pvt) Co. v Soletanche Bachy France SAS* [2019] EWHC 471, [36]. Secondly, the main remedies involved in such administrative disputes are mandatory, prohibiting or quashing orders and injunctions against public bodies. The language of the legislation which governs such claims for those remedies speaks in mandatory terms: "*An application… for one or more of the following forms of relief… shall be made… by a procedure known as an application for judicial review*" (section 31 Senior Courts Act 1981). This potentially indicates that such matters are reserved to the courts or other public bodies rather than arbitration. Textbook commentary also supports this conclusion (See 'Merkin and Flannery on the Arbitration Act 1996' (6th Edition)(2020): "*Other matters will always fall within the provenance of public law and the courts e.g. immigration and asylum issues and judicial review applications…*" (pg. 823)).

Mediation: No express exclusions of administrative disputes provided by law. For further details, see response concerning mediation in 'UKSC: Additional Explanation' above.

Parliamentary Ombudsman: The Parliamentary Ombudsman can investigate and consider administrative disputes concerning most UK government departments, however, it cannot investigate education, local councils, members of Parliament, or the police. More importantly, section 5 of the Parliamentary Commissioner Act 1967 prevents the Parliamentary Ombudsman from investigating any dispute where the individual may have legal means (such as a right of appeal or ability to bring judicial review) to obtain a remedy.

2. Settlement and Mediation

** Please elaborate on your answers, citing any relevant legislation and/or case-law.*

i. In administrative disputes, is it permissible for the Administration and private individuals/legal entities to sign a settlement agreement or other similar document (without prior mediation)?

Yes	✓
No	□

ia. If yes,
Is this option expressly provided for in a legislative text (Constitution, law) or does it derive from a general principle of law?

It is a general principle of law that parties to a dispute have unfettered power to compromise their disputes by means of settlement (with minor exceptions provided in the CPR for children and protected parties). This general principle also applies when the claim relates to an administrative dispute and does not require any form of ADR, including mediation, to be undertaken prior to settlement.

Does this option only apply to the settlement of administrative disputes that are already under way, or can it also be used to prevent administrative disputes from arising in the first place?

Parties to a dispute can settle their claim at any time, even prior to commencing any formal claim or action. Such a settlement will often include terms preventing a party from subsequently bringing a further legal claim in respect of the same subject matter.

Do the law or case-law distinguish between application for annulment (judicial review limited to the legality) and appeal on the merits (full judicial review of both legality and substance)?

Yes. In administrative disputes, the court's judicial review jurisdiction is an aspect of the court's inherent powers/ jurisdiction. This jurisdiction is 'supervisory': it is limited to reviewing the lawfulness of the administrative decision, and does not permit the court to re-take the decision itself and substitute its own view of the merits of the decision. An appeal on the merits only arises where a statute specifically makes provision for such an appeal to the court (for example, section 40A British Nationality Act 1981).

Is there a special procedure for initiating and conducting this alternative dispute resolution method, or are all matters left to the discretion of the parties involved?

Whether the parties initiate such forms of alternative dispute resolution and how it is to be conducted is normally left to the discretion of the parties involved. As noted in the 'UKSC: Additional Explanation' above, in England and Wales, court procedural rules may require the parties to consider alternative dispute resolution prior to bringing a claim in court or risk cost

consequences being imposed if it was appropriate to and was not utilised. Additionally, in England and Wales, the court can stay proceedings and order it be conducted by the parties in certain circumstances.

After signing a settlement agreement (or other similar document), is ratification by a court required?

Yes □
No ✓

If yes, by which court?

[Question not applicable]

If no, can the legality of the settlement agreement (or other similar document) be examined by the judge on an incidental basis? Under what circumstances could the settlement be considered null and void and without legal effect?

Court involvement

Ratification by the court of a settlement agreement is not *strictly* required for validity of the settlement agreement. The settlement agreement is considered a form of contract and thus a breach of it (for instance, bringing or continuing proceedings against its terms) would give rise to a separate action against the party in breach of the settlement. New proceedings would have to be instituted to then enforce an appropriate remedy for this breach.

Alternatively, the parties may seek to embody the agreement in a consent order of the court (a form of court order) which will enable the enforcement of the agreement as a court judgment within any existing proceedings. Unless required by a specific statute or whether the counterparty is a litigant in person, the court's approval would not be needed if the agreed relief in the settlement agreement is for any of the orders listed in CPR 40.6(3).

Review of settlement agreement

Where the settlement agreement takes the form of a contract (and may or may not be enshrined in a consent order), the court may invalidate the settlement agreement based on similar principles that would invalidate a typical contract. For instance, on grounds that the settlement agreement was made as a result of fraud, mistake, duress, undue influence, misrepresentation, and/or in circumstances where a party lacked legal capacity to make such an agreement.

After being signed and/or validated, as applicable, does the settlement agreement have the force of res judicata? Can the enforcement of this document be pursued?

The settlement agreement does not have the force of a court judgment. It is a contractual agreement unless and until its terms have been enshrined in a court order of the court. Enforcement of a settlement agreement would require new proceedings to be instigated by the parties were it to be breached with the usual remedies for contractual breach (i.e. damages or injunctive relief).

Where there are existing proceedings already instituted in the court, if the settlement agreement is enshrined in a consent order, this can be relied upon without the need for having to start new proceedings for enforcement. Additionally, if the settlement included an obligation to pay a sum of money, further remedies such as a charging order could be applied for easily.

Which court has jurisdiction over disputes concerning such enforcement?

Broadly, in England and Wales, the Country Court and High Court would commonly have jurisdiction regarding enforcement, varying depending on the values and complexity involved. In Scotland, this would be the Sheriff Court and the Court of Session Outer House.

ib. If the signing of a settlement agreement or other similar document between the Administration and private individuals/legal entities is not permitted in your country, this prohibition results from:

a legislative provision □
a general principle of law □

[Question not applicable]

ii. Does your country provide for a mediation procedure between the Administration and private individuals/legal entities for administrative disputes?

** The term 'mediation' is used here to refer to a procedure conducted by an independent and impartial third party, and not to administrative appeal procedures addressed to the Administration or to a body that is hierarchically dependent on the Administration.*

Yes □
No ✓

iia. If yes,

Is it expressly provided for in a legislative text (Constitution, law) or does it derive from a general principle of law?

[Question not applicable]

Is it mandatory or optional?

[Question not applicable]

If it is optional, does it require:

The mutual agreement of the parties □
Only the intention of the Administration □
Only the intention of the private individual/legal entity □

Specifically with regard to the State as a party to the dispute, is mediation initiated:

After approval by a special committee □
By the administrative authority involved in the dispute □
Other □

[Question not applicable]

At what stage can a case be referred for mediation?

Necessarily before the introduction of legal proceedings □
At any stage of the litigation proceedings □

Is there a specific piece of legislation governing the mediation process?

Yes □
No □

If yes, please specify:

[Question not applicable]

Which principles of trial apply to the mediation process (hearing of the parties, adversarial principle, equality of arms, publicity, representation by a lawyer?

[Question not applicable]

How is the impartiality of the mediator ensured?

[Question not applicable]

Is there any interim relief (stay of execution, etc.) during the mediation process? If yes, who is competent to hear the case?

[Question not applicable]

At the end of the mediation process,
If an agreement is concluded:

A document is drawn up

Other possibility (please specify)

[Question not applicable]

If an agreement is not concluded:

Is a time limit set for bringing the matter before the competent court?

Are the litigation proceedings already under way (if applicable) continued?

[Question not applicable]

In the event that a document is drawn up following mediation, do the rules concerning the settlement procedure (see above) apply, or are there differences? If yes, please specify.

[Question not applicable]

iib. If no mediation process is provided for, is this exclusion provided for in:
a legislative provision □
a general principle of law □

N/A. As noted in the 'UKSC: Additional Explanation' above, the UK does not provide for a specific mediation procedure between the State/State entities and private individuals/legal entities for administrative disputes. The UK only *indirectly* promotes the use of mediation in such administrative disputes through the general requirement to consider ADR before initiating a formal legal claim (which can include mediation options) and the potential power of the court to recommend or direct that mediation should be carried out between the parties. Such indirect provision is included in the CPR and relevant Practice Directions of the courts concerned.

3. Arbitration

** Please elaborate on your answers, citing any relevant legislation and/or case-law.*

i. In administrative disputes, is arbitration between the Administration and private individuals/legal entities permitted in your country?
Yes □

No ✓

ia. If yes,
Is this option expressly provided for in a legislative text (Constitution, law) or does it derive from a general principle of law?

[Question not applicable]

Does it concern both application for annulment (judicial review limited to the legality) and appeal on the merits (full judicial review of both legality and substance)? Are there any exceptions provided for by law or established by case-law?

[Question not applicable]

Is it mandatory or optional?

[Question not applicable]

ib. If arbitration is not permitted, is this prohibition due to

A legislative provision ✓
A general principle of law ✓

Please see the detailed response provided in Question 1(ii) of Part II above concerning the potential prohibition of arbitration concerning administrative disputes. On this analysis, this conclusion would be a result of a combination of a general principle of law ('subject matter non-arbitrability') and the preservation of this principle in the legislation (the AA 1996 and ASA 2010). Disputes of a private nature (i.e. non-administrative disputes) between parties and the State / State entities are capable of arbitration in the usual way.

ic. If arbitration is optional, does it require:
The mutual agreement of the parties □
The sole intention of the Administration □
The sole intention of the private individual/legal entity □

On the part of the State, is arbitration initiated:
After approval by a special committee □
By the administrative authority involved in the dispute □
Other □

[Question not applicable]

ii. For disputes arising from contracts between private individuals/legal entities and the State, do the common provisions relating to commercial arbitration (domestic or international) apply, or is there a special regime?
If there is a special regime, please briefly mention the elements that differentiate it from the commercial arbitration regime.

For disputes arising from contracts between private individuals/legal entities and the State / State entities, the common provisions relating to commercial arbitration set out in the AA 1996 and the ASA 2010 would apply.

iii. Is arbitration provided for in contracts falling within the scope of Directives 2014/24/EU and 2014/25/EU?
If yes, have any issues been raised regarding the application of the rules governing the performance of these contracts? How have the courts addressed such issues in the relevant case-law?

Since leaving the European Union, the United Kingdom has changed its approach to public procurement, departing from the above Directives and introducing the Procurement Act 2023 and associated regulation. This new regime regulates procurement rules and specifically provides for remedies to certain suppliers for breaches under this Act. This remedy is a claim for breach of statutory duty made to the High Court. Arbitration is not provided for in the Procurement Act 2023 or its implementing regulation.

iv. How are the independence and impartiality of the arbitrator ensured?

[*Please note: The answer to this question provides a response on the basis that the arbitration concerned is a commercial dispute between a party and the State / State entity (not an administrative dispute).*] For an arbitration seated is seated in England and Wales or Northern Ireland, the AA 1996 allows the parties to choose the arbitrators they wish to use. There are a number of additional provisions which support the independence and impartiality of such arbitrators: – A recent reform has introduced a duty of disclosure for a potential arbitrator to disclose whether there are any circumstances which may give rise to doubts as to their impartiality prior to their appointment as arbitrator (section 23A). – The court has the ability to remove an arbitrator, including on grounds of apparent impartiality (section 24(1)(a)). – There is a general duty on the arbitrators to act fairly and impartially throughout the process and on their decisions (section 33).

– Where the arbitrators have breached this duty in circumstances where this has led to substantial injustice to the applicant, it can remit any arbitration award made from this arbitration back to the tribunal for reconsideration, set the award aside, or declare it to be of no effect (section 68).

Similar rules are provided for concerning arbitrations seated in Scotland under the mandatory rules provided by the ASA 2010 (section 8; Schedule 1).

The procedural rules which the parties have agreed to apply to their arbitration (including common versions such as the LCIA or ICC rules) may also promote independence and impartiality of the arbitrator.

v. Is there any interim relief when an administrative dispute has been submitted to arbitration? If yes, which body is competent to hear the case?

[Question not applicable]

vi. In arbitration concerning administrative disputes:

	yes / no
Is there an obligation to make publicly available the basic information and documents relating to the proceedings?	□ □
Is the participation of third parties permitted?	□ □
Is legal representation mandatory?	□ □
If yes, is legal aid available?	□ □
Is the hearing public?	□ □
Is the arbitral tribunal obliged to give reasons for its award?	□ □
Is the arbitral award made publicly available?	□ □

vii. During the proceedings, the applicable system is:

the adversarial system	□
the inquisitorial system	□

viii. What powers does the arbitral tribunal have?

Reviews the legality of administrative acts of a non-pecuniary nature	□
Reviews the legality of an administrative act of a pecuniary nature (fine, etc.)	□
Annuls/amends an administrative act of a non-pecuniary nature	□
Annuls/amends an administrative act of a pecuniary nature	□
Addresses only recommendations to the Administration	□
Restricts itself to awarding compensation for damages	□

Does the arbitral award have effect:

Erga omnes (with regard to all) □

Inter partes (between the parties) □

Is it considered 'case-law' for other cases? □

If the answer to the last question is yes, please explain.

[Question not applicable]

Can the validity of the arbitral award be challenged in court?

Yes ✓

No □

If yes, is the validity of the arbitral award reviewed directly or incidentally?

[*Please note: The answer to this question provides a response on the basis that the arbitration concerned is a commercial dispute between a party and the State / State entity (not an administrative dispute).*]

For an arbitration seated in England and Wales or Northern Ireland, an arbitration award can be challenged under three limited grounds: (i) that the arbitrators lacked substantive jurisdiction (section 67 – mandatory); (ii) that a serious irregularity occurred which caused substantial injustice (section 68 – mandatory); and (iii) there was an error concerning a question of law (section 69 – optional and with agreement of all parties/leave of the court). The court can then decide whether to vary, remit, or set aside the arbitral award.

Again, similar rules are provided for arbitrations seated in Scotland under the mandatory rules provided by the ASA 2010 (section 8; Schedule 1).

Is it possible to waive the right to judicial review?

[Question not applicable]

Which courts have jurisdiction?

[*Please note: The answer to this question provides a response on the basis that the arbitration concerned is a commercial dispute between a party and the State / State entity (not an administrative dispute).*]

The High Court (in England and Wales or Northern Ireland) and the Outer House (in Scotland) have jurisdiction to hear appeals concerning arbitral awards.

What is the scope of the judge's review according to case-law?

[*Please note: The answer to this question provides a response on the basis that the arbitration concerned is a commercial dispute between a party and the State / State entity (not an administrative dispute).*]

As mentioned above, there are three potential grounds of judicial review for an arbitration seated in England and Wales or Northern Ireland under the AA 1996.

s.67 - Substantive Jurisdiction: Previously this provision had been interpreted as requiring a full rehearing of the jurisdiction matter to determine the point. Reforms to the AA 1996 made last year now allow for court rules to be made which effectively limit what evidence will need to be reheard by the court. New grounds of objection or new evidence that was not originally considered by the arbitrators will not be admitted to be heard by the court unless certain circumstances apply (sections 67(3B) – 67(3C)).

s.68 – Serious Irregularity: Section 68 lists nine forms of serious irregularity, ranging from uncertainty of the award to issues with impartiality. This has been interpreted as not whether the arbitrators reached the 'right' decision but whether it did so in accordance with the rules of natural justice. This has a high threshold before the court can intervene, with a focus on ensuring due process of the original arbitration (see *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221).

s.69 – Appeal on a point of law: This optional provision (which the parties can agree does not apply to their arbitration) allows a court to review whether the arbitrators have applied a principle of English law correctly (it does not apply to any findings of foreign law). The point of law must be put to the arbitrators and not be a merely hypothetical point that would have no influence on the arbitral award. Leave will only be granted by the court to hear this appeal if: (i) the decision of the arbitrators was obviously wrong; or (ii) the question involved is of general public importance, where the decision of the arbitrators was open to serious doubt (section 69(3)).

In arbitration, is the concept of public policy different, according to case-law, in cases where the State (or a legal person governed by public law) is a party to the arbitration? If yes, what are the differences compared with the concept of public policy in arbitral proceedings between private individuals?

[*Please note: The answer to this question provides a response on the basis that the arbitration concerned is a commercial dispute between a party and the State / State entity (not an administrative dispute). Further it does not discuss any approach under international law, for instance, concerning the New York Convention arbitration concept of 'public policy'.*]

From our review of the case law, there appears to be a unitary interpretation of "*public policy*", whether as a ground of challenging the award (section 68(2)(g)) or in refusing enforcement (section 81(2)), that does not vary if a State/State entity is a party to the arbitration. For instance, an argument in *PT Transportasi Gas Indonesia v ConocoPhillips (Grissik) Ltd* [2017] 2 Lloyd's Rep 600 challenging the arbitral award as being against public policy since it would attempt to circumvent national legislation was rejected on the grounds it was effectively an attempt to re-argue what was lost before the arbitrators. The reasoning of the court mirrored such reasoning that would typically feature in disputes concerning only private parties.

"*Public policy*" has generally been interpreted as requiring reprehensible or unconscionable conduct (See *Gater Assets Ltd v Nak Naftogaz Ukrainiy (No 2)* [2008] 1 Lloyd's Rep 479). Whilst not exhaustively defined in the case law, a restricted interpretation is afforded to this term in order to respect the policy of ensuring the finality of the arbitration award.

In arbitration, in addition to the rules of European competition and consumer protection law (see C-126/97, Eco Swiss China Time Ltd v Benetton International NV and C-168/05 Mostaza Claro v Centro Móvil Milenium SL, respectively), has case-law recognised other rules of EU law as rules of international public policy? If yes, please mention the relevant cases.

Following Brexit, the UK is no longer bound by such decisions concerning mandatory EU law rules. Consequently, they are unlikely to play a part in arbitration through the lens of public policy. However, prior to Brexit, certain case law in England and Wales has held that competition disputes (if covered by the requisite arbitration agreement) are arbitrable and are not excluded by virtue of public policy (see *ET Plus SA v Welter* [2006] 1 Lloyd's Rep 251).

Regarding recognising wider forms of international public policy (non-EU law specific), there is dicta suggesting that certain forms of illegality are sufficiently universally condemned that they would amount to breaching public policy if tainting the arbitration. These include "*terrorism, drug-trafficking, prostitution and paedophilia*" (*Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and others* [1998] 4 All ER). The extent to which these issues of universal public policy will arise in arbitration practice is likely to be limited.

Which body has jurisdiction to hear disputes arising during the enforcement of an arbitral award? Has case-law dealt with special cases where enforcement has been contested on the grounds of the administrative nature of the dispute?

[*Please note: The answer to this question provides a response on the basis that the arbitration concerned is a commercial dispute between a party and the State / State entity (not an administrative dispute).*]

Jurisdiction: The High Court (in England and Wales or Northern Ireland) and the Outer House (in Scotland) have jurisdiction concerning the enforcement of an arbitral award. Arbitral awards require leave of the court to enforce and depending on whether it is a foreign arbitration award under the New York Convention or a domestic arbitration, they will have slightly different procedural routes to follow.

Enforcement: We have not been able to identify any cases dealing with enforcement challenges on the grounds of the administrative nature of the dispute. This is likely due to the fact that administrative disputes are viewed as unlikely to be considered as arbitrable in the first place (see Question 1(ii) of Part II above).