

Peering Into The Fog

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Peering Into The Fog

- Do the EU provisions still apply?
- Where are you obliged to advertise, e.g. OJEU?
- What about contractors and supplies from the EU?
 - prices,
 - extensions,
 - supply chains
 - new contracts

Peering Into The Fog

- No Brexit (including extensions)
- The Withdrawal Agreement is approved
- "No deal" Brexit e.g. October 2019





What is the Withdrawal Agreement?

Legally binding international treaty: only deals with terms of exit

Time Limited: The period will last until **December 2020** with the possibility of a time limited extension for up to 1 or 2 years

Provides for UK's exit from the EU - but ensures this is orderly.

- **Citizens' Rights:** Protecting EU citizens' rights in the UK, and vice versa
- **Separation issues:** Winding down provisions of Union law in the UK
- **Implementation Period:** Giving business and government time to prepare, so they only have to adjust to one set of changes
- **Financial Settlement:** Resolving the UK's financial rights and obligations to the EU
- **Governance:** Ensuring that the UK's withdrawal is managed effectively
- **Protocols:** Upholding UK joint commitments in Northern Ireland and Ireland, and providing specific arrangements in Gibraltar and the SBAs

What does Withdrawal Agreement do?

- Essentially provides for a time limited transition
- Transition period will last until **December 2020** with the possibility of a time limited extension for up to 1 or 2 years
- During transition period, UK will have left EU so is not a Member State
 - No vote of a Member State,
 - No Commissioners,
 - No judge at Court of Justice of European Union
- But EU law (including updates) continues to apply
- Court of Justice continues to have jurisdiction
- UK continues to benefit from EU international trade agreements including Government Procurement Agreement on the current EU terms

Does Withdrawal Agreement address procurement?

- **Title VIII** - Ongoing Public Procurement and Similar Procedures (Articles 75 - 78)
- **Coverage** - main procurement Directives (public, utilities, concessions, the remedies regime, some other provisions and a sweeper clause)
- EU rules apply to any procurements commenced before end of transition period
- EU rules will continue to apply to any framework concluded before end of transition period or where its procurement has started before end of transition period
- EU / UK economic operators have full rights of access as at present throughout transition period - non-discrimination provision.
- Remedies regime to be applied in tandem.

If the Withdrawal Agreement is approved...

- European Union (Withdrawal) Act 2018 - will repeal European Communities Act 1972 so EU law no longer UK law as of "exit day" (Section 1)
- BUT continuing effect given to EU-derived domestic legislation (Section 2) and Direct EU legislation (Section 3)
- This will have effect of preserving Regulations implementing EU procurement Directives (at least temporarily)
- Includes OJEU advertising, procedures and thresholds
- EU reciprocity will be temporarily agreed (through Withdrawal Agreement)
- EU (Withdrawal Agreement) Bill would then follow
- Some aspects of procurement law are not required by EU law:
 - Procurement Reform (Scotland) Act 2014
 - Procurement (Scotland) Regulations 2016
 - Public Services (Social Value) Act 2012 (England & Wales)

No deal Brexit - what happens?

- The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 (draft Scottish Statutory Instrument)
- Purpose is to adapt current procurement regulations change references and remove requirements that would make no sense in no deal
- Broadly same approach to be taken in RoUK with equivalent Statutory Instrument to be made

No deal Brexit - the detailed amendments

- The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 (draft Scottish Statutory Instrument)
 - Work within framework of existing Public Contracts (Scotland) Regulations 2015 (and utilities and concessions regulations)
 - Formalities of procurement processes remain unchanged;
 - However, OJEU advertising replaced by new UK e-notification system
 - Obligation to publish on PCS not affected (as this is a domestic law rather than EU law provision)
 - Scope of economic operators owed duties changes - new Regulation 83A is intended to facilitate GPA alignment
 - Limited amendments of Procurement Reform (Scotland) Act 2014

Business Impacts - No deal

- Physical impacts - e.g. supply chains, logistics, storage, trucks
- Impact on terms of existing contracts?
- Finance, forex and capital raising
- Trade in goods based on EU-wide approval or registration; authorised importers, label and approval of premises, chemicals
- Exhaustion of rights, designations of origin
- Access to non-EU markets with Free Trade Agreements
- Tariffs / duties
- Operation in Europe based on UK establishment and *vice versa*
- People and immigration
- Data and intellectual property
- Dispute resolution
- Insurance

Unanswered issues

- What will UK only GPA access terms / schedules be? This can affect which bodies and contracts are covered by procurement law.
- Will current Scottish devolved powers regarding procurement remain in their current form and extent?
- How will the courts construe cases before them when dealing with retained EU law?
- To what extent and when will there be an appetite (or time) for procurement law reform?

Post-Brexit Regulated Procurement: The EEA Regime

- 2014 procurement directives were adopted by the EEA/EFTA with effect from April 2016, and same duties re transparency, advertising and equal treatment
- No need to change the current implementing regulations
- Same EU case law continues to apply under “homogeneity goal”
- Policed by EFTA Surveillance Authority and EFTA Court instead of European Commission and ECJ

Post-Brexit Regulated Procurement: The WTO Regime

- Government Procurement Agreement (GPA)
- Lighter touch but same basic principles of non-discrimination, transparency, competition, conflicts of interest and corrupt practices
- Detailed procedural requirements including electronic tools and minimum time requirements
- Provisions regarding modifications and rectifications
- Requirements for domestic review procedures for supplier challenges
- Application of the WTO Dispute Settlement regime
- See HoC Briefing Paper 8390, 5th September 2018 for excellent discussion of future options

What does this mean in practice?

- **No Brexit** - nothing changes
- **Article 50 extension(s)** - nothing changes, but for how long?
- **A Withdrawal Agreement accepted and implemented**
 - very little changes
 - but what of the future?
 - do the same arguments start again following approval but this time on the trade relationship (and impacting on procurement)?
- **Beyond the Implementation Period** - depends entirely on a future EU / UK trade relationship
- **No Deal** - WTO terms including Government Procurement Agreement

Thank you

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