

## What does Brexit mean for public sector procurement?



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Jacob Bronowski's comment that "*Knowledge is an unending adventure at the edge of uncertainty*" has never seemed more applicable in the legal arena than it does following the EU referendum. There are so many 'facts', but precious little inevitability about what they will result in.

So how much can we be sure about?

#### EU law

The EU treaty principles of free movement of workers and goods have for years underpinned the legal and economic relationship between the UK and other EU members. Were this to come to an end it could have a dramatic impact in a number of areas, for example:

- Halting the free movement of people could further stretch already pressured sectors such as the construction industry where UK government figures have identified that 12% of the 2.1 million workers come from abroad. The industry has already suffered from labour shortages in recent years and the impact was immediately apparent. A previous shortage in bricklayers' led to a significant increase in rates. Due to the impact on project costs this led to some architects seeking to avoid brickwork where possible.
- Goods may become subject to restrictions on imports and exports such as licenses and national price control mechanisms. If realised, these are likely to increase prices of the £221 billion of goods imported annually (2013 figures). This would be compounded by the current diminution in value of Sterling against the Euro.

The same principles are at the heart of the rules governing public sector procurement. So what will happen to the Public Contracts Regulations 2015 which implement the EU's 2014 Public Sector Procurement Directive in England, Wales and Northern Ireland by essentially 'copying out' the articles of the EU directive?

The answer is going to depend on the terms of the UK's exit.

#### Exit mechanism

The Lisbon Treaty, which took effect in December 2009 provides a five point mechanism for exit at Article 50. To date it is untried and there is much debate about how it will operate; and in particular how long it will take.

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In short, the UK are required to negotiate an exit framework with the European Council. This process is supposed to take two years. However, leading European Union law professor Michael Dougan commented:

*"The overwhelming consensus is that these things do not take two years to negotiate, the rough guide that we are all talking about in the field is around 10 years.*

*"The treaty said that you have two years within which to make your divorce settlement. But the divorce settlement is completely separate from the framework agreement for your future relations with the EU."*

And though under different provisions, Switzerland signed their first framework agreement with the EU in 1972 and are still negotiating.

### What might the exit terms be?

This has been a further area of hot debate and little consensus. Though the three most obvious models are:

#### The Norway model

This allows the UK to remain a member of the European Economic Area (EEA), though as a non-member of the EU. It would permit full access to the single market in return for a financial contribution and such obligations as accepting the majority of EU laws and free movement.

#### The Switzerland model

Where the UK is a member of the European Free Trade Association but not the EEA. Access to EU market is then governed by series of bilateral agreements. This model also has obligations to make a financial contribution and accept EU laws, but to a lesser extent than under the Norway model.

#### The World Trade Organisation model

In this scenario the UK would utilise its membership of the WTO to govern the basis of trade with the EU. The WTO favours transparent and competitive tendering for public contracts through a regime that mirrors the EU regime.

Whether the divorce terms follow one of the above models, another such as the Turkish model or a hybrid, there seems a strong likelihood that the deal will exert outside influence on having public sector procurement rules that are at least similar to the current ones since that would align with the requirements of the EEA, WTO or whichever organisation alliances are made through.

### Conclusions

The only thing that seems broadly agreed on is that things will take time. Even if the framework agreement can be concluded in two years it is doubtful that the first thing the government will want to change is public sector procurement, and there seems to be little political pressure in that direction.

On top of that we should remember that the Public Contracts Regulations 2015 did not simply enact the bare minimum required by the EU. In fact Part 4, driven by the Lord Young Reforms went some way beyond that and introduced a new level of requirements. That would seem to suggest that the UK government is not only aligned with the EU public sector procurement regime, but seeks to take the same principles further.

When all this is taken into account I do not anticipate any significant change in public sector procurement in the coming few years, so don't throw away those policies just yet.

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