

# How will Brexit affect public procurement and state aid?

**Timothy Lyons QC**  
**Kelly Stricklin-Coutinho**  
**Rose Grogan**

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# Brexit and Public Procurement

**Rose Grogan**

# Outline

- What will happen to procurement law post-brexite?
- What will happen to procurement litigation post-brexite?

# Procurement Law Post-Brexit I

## Current position:

- “Brexit means Brexit”
- Likely to invoke article 50 by early 2017
- Article 50 negotiations are to determine the terms of exit – but there is also a need to negotiate our future relationship with the EU
- Potential models: EEA, partial (sector-based) EEA access, FTA with the EU, FTA with other countries (e.g. Australia)

# Procurement Law Post-Brexit II

## Domestic context

- Public Contracts Regulations 2015 implement EU procurement rules
- Local Government is obliged to secure “best value” in any event
- Competitive tendering has its advantages
- Direction of travel in the UK is towards regulation e.g. “gold plating”
- Common law/contractual claims have developed similar principles

# Procurement Law Post-Brexit III

## International Context

- Single market access
- EU Third-Country rules
- WTO/GPA principles
- Free Trade Agreements with other countries

# Procurement Litigation Post-Brexit I

- **Pre-article 50 (up to January 2017)**
  - Business as usual
  - Current litigation likely unaffected
- **Post article 50**
  - EU law continues to apply
  - What about interpretive obligations?
  - Will we see litigants trying to develop new routes to challenge?
  - What about referrals to the CJEU?

# Procurement Litigation Post-Brexit II

- Post Brexit
  - Transitional provisions likely
  - What about EU cases?
  - What about English cases decided with reference to EU principles?
  - Increase in contract claims?



# State aid & Brexit

Kelly Stricklin-Coutinho

Barrister, 39 Essex Chambers

Visiting Lecturer, Dickson Poon School of Law, King's College London

# State aid & Brexit

## Key issues to consider:

1. State aid law
2. State aid related transactions
3. State aid investigations/litigation

# State aid & Brexit

## When are we concerned with?

1. Interim period prior to Art. 50 TEU notification
2. Period between Art. 50 TEU notification and EU law ceasing to apply
3. After EU law ceases to apply in the UK

# Before Art. 50 TEU notification

## Law:

- Business as usual

## Transactions:

- Depends on the type of transaction

## Litigation:

- Timing essential

# Before Art. 50 TEU notification

## Transactions:

Already had full amount of funding, or will have had the full amount before exit?

- Business as usual
- Recoverable in the usual way
- Any effects likely to be market related
- Effect of possible economic downturn on project?

# Before Art. 50 TEU notification

Transactions:

Funding spans pre-notification and post-notification periods

Consider:

- Period of availability of funds
- Is the project sustainable without them?
- Is there a feasible alternate source of funds?

# Before Art. 50 TEU notification

Transactions:

More complex funding structures

- Government backed loan or guarantee?
- Relying on a grant of relief or an exemption from a charge?
  - Annual reliefs?
  - Possibility of withdrawal?

# Before Art. 50 TEU notification

## Investigations / Litigation

- Business as usual
- Timing of any required reference to CJEU
- Past aid v Prospective aid
  - Whether aid has been given in the past v. whether competitor is getting treatment you would like
  - Will the litigation deliver a commercially desirable result?



# After Art.50 TEU notification

- Depends on how Art.50 TEU notification is done
- Transitional Agreement?
- Length of period:
  - Very short
  - 2 years
  - Longer

# After EU law ceases to apply

- Depends on whether we have Single Market Access
  - Norway
  - FTAs likely to make some provision
- WTO Obligations – Agreement on Subsidies and Countervailing Measures
- Own motion

# After EU law ceases to apply

## WTO Obligations – Agreement on Subsidies and Countervailing Measures

Subsidies are prohibited

Definition: financial contribution by a government or any public body

- i. Government practice involves a direct transfer of funds (e.g. grants, loans and equity infusion), potential direct transfer of funds or liabilities (e.g. loan guarantees)

...

# After EU law ceases to apply

## WTO Obligations – Agreement on Subsidies and Countervailing Measures

Definition:...

- ii. Government revenue otherwise due is foregone or not collected
  
- iii. Government provides goods or services other than general infrastructure or purchases goods
  
- iv. Government makes payments to a funding mechanism or entrusts a private body to carry out public functions...

# After EU law ceases to apply

## WTO Obligations – Agreement on Subsidies and Countervailing Measures

Definition:...

OR any form of income or price support

AND a benefit is thereby conferred

[ksc@39essex.com](mailto:ksc@39essex.com)

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