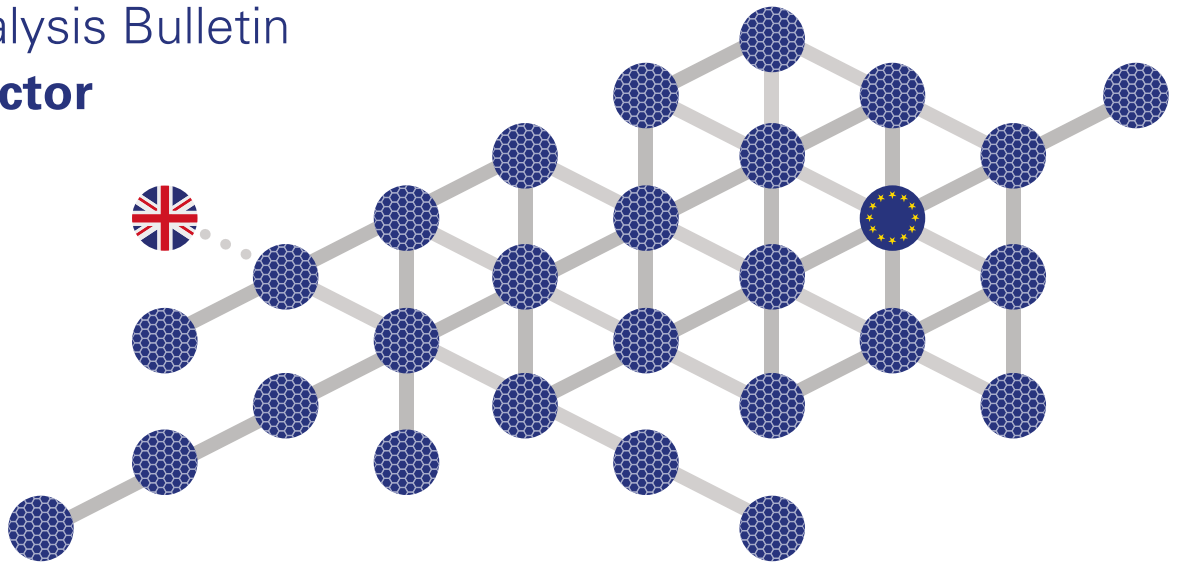


Brexit Analysis Bulletin

Public Sector



The UK has voted to leave the European Union. This on its own does not automatically affect or change the UK's legal position in or vis-à-vis the EU. In order to exit from the EU, the UK government will need to trigger a formal process under Article 50 which sets in train a two-year formal negotiation. Until the end of that process, the UK remains part of the EU and will be subject to all the rights and obligations of an EU member state. There is much uncertainty around who will negotiate for what in the coming months and how much of that will be realistically achievable. Moreover, some significant UK-internal constitutional issues are currently unfolding which add additional complexity to the potential outcomes.

The public sector is one of the areas that is often considered to be heavily regulated and impacted by the European Union, particularly in relation to areas such as public procurement and the rules which regulate state aid. However, in practice the majority of legislation which regulates the public sector is UK legislation. This note looks at what the impact of Brexit might be on the public sector across the UK.

EU Procurement

One of the areas which many consider might change is the UK's approach to public procurement. The UK is currently still subject to the EU Procurement Directive, which has been adopted into UK law via enabling legislation; the Public Contracts Regulations 2015 in England and Wales, and the Public Contracts (Scotland) Regulations 2015 in Scotland. At present, the UK remains subject to EU Law and this will be the case until the completion of negotiations following the triggering of Article 50. In the short term; nothing will therefore change. However; the referendum result does mean that where those negotiations result in the UK not being subject to EU law, the UK enabling legislation could ultimately be revoked and/or replaced with alternative legislation.

It is therefore possible that the UK could have more flexibility; however, we consider that it is unlikely that the UK would remove public procurement rules altogether. Public Procurement is, at its core, there to prevent corruption and enable open and fair treatment and that driver will remain as will the incentive to ensure that public sector bodies follow disciplined procurement practices to secure good commercial outcomes and deliver best value. It is possible; however, that any amended procurement regime could seek to restrict competition to UK entities. Many UK based companies would see this as a positive step, particularly in relation to certain areas of industry such as steel and labour. However; this, of course, depends on the parameters of the emerging relationship and any trade arrangement put in place between the EU and the UK following Article 50 negotiations. In the absence of a trade arrangement with the EU, UK businesses would no longer be afforded the protection to compete on a level playing field in EU procurements.

The UK is also a party to the World Trade Organisation's Government Procurement Agreement and, as such, even



after the implementation of arrangements following the Article 50 negotiation, those rules will continue to apply.

In Scotland, the Scottish Government has gone further than Westminster in terms of Public Procurement by implementing the Procurement Reform (Scotland) Act 2014; which implements a separate set of regulations to contracts that sit below the EU thresholds. These rules will also therefore continue to apply in Scotland and, as the Scottish Government has gone further than it was required to under EU Law, it is unlikely that it would eliminate the procurement rules altogether.

State Aid

Subject to Article 50 negotiations, the rules preventing unlawful State Aid could cease to apply to the UK meaning that the Westminster and Scottish Governments would be in a position to revise their public spending guidelines and protocols which could, in turn, enable direct investment in certain projects that may not currently be possible due to the State aid rules. It is expected that any breaches of the State aid rule which preceded the exit e.g. if any adverse decisions are made in respect of the ongoing tax investigations will require to be implemented.

Grant Funding

The public (and private) sector currently benefits from grant funding from various EU institutions and that funding can be useful in stimulating growth and regeneration in areas and projects that would not otherwise be feasible. Subject to Article 50 negotiations, UK public sector bodies would no longer be entitled to apply for that grant funding, which may prejudice the ability to progress those projects or areas of research.

Accounting Treatment

Public Sector bodies in the UK are currently required to comply with the European System of Accounts 2010 which are a set of rules issued by Eurostat that determine how the public sector reports its overall levels of debt in relation to the national accounts which are prepared by the Office of National Statistics (the "ONS"). These rules have impacted on the public sectors ability to structure finance solutions and delivery models, including the Scottish Government's Non Profit Distributing Revenue Finance model. It is therefore possible that the UK will no longer need to follow rules prescribed by Eurostat which could allow the ONS to follow alternative accounting rules which may impact future delivery models.

Infrastructure Investment

The European Investment Bank (the "EIB") is the European Union's bank and it provides finance and expertise across a wide range of investment projects which contribute to furthering EU policy. The EIB often provides a large element of finance for many of the UK's largest complex infrastructure projects. The EIB primarily invests in projects within Europe and represents the interests of the European Union's member states. Following conclusion of Article 50 negotiations it is possible that UK public sector may no longer have the ability to secure EIB finance, although it is also possible that alternative finance models could arise and these are covered in our banking and finance analysis bulletin; which is available [here](#).

Access to EU Expertise and input into EU Law

One of the less tangible benefits to the UK public sector is access to wider areas of expertise and forums across the various EU Institutions. Following Article 50 negotiations UK public sector bodies may no longer be able to take advantage of those forums.

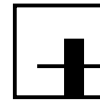
The UK can currently directly influence EU policy and law, and this influence is likely to be lost. Although we consider that any model emerging out of Article 50 negotiations will still require the UK to observe many of the EU's rules and regulations when trading in the future; the UK is unlikely to have the opportunity to shape or influence those rules going forward.

Changes to the Political and Electoral System

Clearly Brexit will also have consequences for the political and electoral system. We are unlikely to have a requirement for Members of the European Parliament and therefore no requirement for European elections.

Concluding Remarks

In the short term it is unlikely that Brexit will have major implications for the public sector in terms of day-to-day operation; however, in the longer term, depending on the outcome of Article 50 negotiations and the emerging trade relationship between the UK and the EU, it is possible that the government will have more flexibility to shape the UK's procurement and spending protocols and rules; however, that is likely to come at the cost of grant funding, EIB investment and restrictions on the UK's ability to bid for opportunities across Europe.



SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS JOINING THE DOTS OF THE EU REFERENDUM

What next?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

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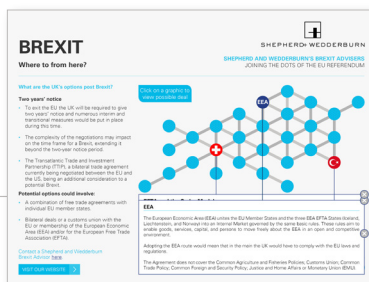


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