EU COMMISSION WARNS COMPANIES ABOUT LEGAL REPERCUSSIONS IN THE FIELD OF PUBLIC PROCUREMENT DUE TO BREXIT

On 18 January 2018, the European Commission (General Directorate GROW) published its "Notice to stakeholders - Withdrawal of the United Kingdom and EU rules in the field of public procurement" to inform market participants about implications of a "hard brexit"[i] in the field of public procurement. The notice is available in English and describes consequences for economic operators in public procurement procedures launched by EU Member States authorities due to a "hard Brexit".

I. Addressees

The notice is addressed to all market participants and is to be understood as a mere information.

The notice does not represent a legislative act of the European Union. It has no regulatory content and no antecedent effects that must be considered in the future.

Regarding the longer-lasting withdrawal negotiations, the notice has to be seen as an opinion leader.

II. Content of the notice

The EU Commission points out that in the case of a so-called "hard Brexit", the UK will become a third country[ii]. This consequence is important not only for public authorities, but also for private companies, as a "hard brexit" would have legal repercussions for them.

In the field of public procurement, the EU Commission identifies four consequences provided the United Kingdom leaves the EU by the end of March 29, 2019 without any agreement:

1. From 30 March 2019 onwards economic operators from the United Kingdom will have the same status as all other economic operators based in a third country with which the EU does not have any agreement providing for the opening of the EU procurement market. They shall therefore be subject to the same rules as any third country tenderer.
2. In view of Article 85 of Directive 2014/25,[iii] tenders submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, and hence from the United Kingdom, exceeds 50 % of the total value of the products constituting the tender. In case two or more tenders are equivalent in the light of the contract award criteria contracting entities shall give preference to those tenders which may not be rejected by virtue of the proportion-clause.[iv]
3. Member States retain the power to decide whether their contracting authorities/entities may allow economic operators from third countries to participate in their defense and security procurement procedures. Economic operators from the United Kingdom may therefore be excluded from bidding for defense and security contracts in the EU.
4. Furthermore, Article 22 of Directive 2009/81/EC provides that Member States shall recognize the security clearances which they consider equivalent to those issued in accordance with their national law. Since, as of the withdrawal date, the United Kingdom ceases to be a member of the Union, EU Member States will no longer be under the obligation to recognize security clearances obtained by an economic operator in the United Kingdom, even where they could consider them as equivalent to their national security clearances. This may lead to the exclusion of operators relying on a United Kingdom security clearance in EU defense and security public procurement procedures.

III. Legal assessment

The repercussions for British companies identified by the EU Commission are correct.

1. No obstacle to German market accession in principal

It must be stated that the third-party affiliation of a company does not (yet) constitute an obstacle to market access for the majority of European contract awards, namely public contracts within the meaning of Section § 103 GWB (German Law Against Infringement of Competition). The Higher Regional Court Dusseldorf[v] recently decided that the exercise of subjective bidder rights in a procurement procedure does not depend on the bidder's affiliation with the EU. Because,

> *(D) the European Public Procurement Law (so far) does not contain a geographic restriction. Access to procurement procedures for third-country based economic operators is considered as granted. This also follows from the current discussion*

> *on whether access to the European Union's public procurement market for third-country based economic operators should be limited. (...) The aim of the regulation discussed is to open public procurement markets through consultations between the EU and the third country. Until the adoption of this regulation, however, it remains the case that any interested economic operator can participate in an EU procurement procedure independently of any geographical restrictions (see also Willweber in Heiermann / Zeiss / Summa, jurisPK-VergR, 5th edition 2016, § 15 VgV)*[vi].

To avoid any misinterpretation of the notice, it would have been preferable to clarify that British participation in procurement procedures for public contracts remains in principle possible. It is to be seen whether there will be disadvantages for British economic operators in terms of selection criteria. § 48 (6) VgV (German Public Procurement Regulation) does not restrict acceptance of equivalent means of proof to EU Member States.

2. Disadvantages in the award of contracts within the scope of the SektVO (German law on public procurements in the water, energy, transport and postal services sectors)

It is undisputed that tenders from economic operators based in the UK will be at risk of being rejected if their supply is more than 50% manufactured in a third country. While subject to discretion of the contracting authority, economic operators from the UK have to assume that their tenders will not be successful where two or more tenders are equivalent, when competing with EU tenderers.

3. Market access for security and defense contracts

The consequences in the area of security and defense procurement should be seen as far more disadvantageous. The obstacles to market access due to a "hard Brexit" are likely to weigh heavily on economic operators based in the UK. Recital 18 of Directive 2009/81 clarifies:

> *“This exclusion means also that in the specific context of defense and security markets, Member States retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures.”*

However, as far as German procurement procedures within the scope of the VSVgV (the German regulation for public procurements in security and defense) are concerned, market access barriers are generally not to be expected. Neither the provisions of the GWB nor the VSVgV state a general ban for tenders of economic operators based in a third country.

4. Difficult proof of evidence regarding the protection of classified information

Even if a general ban for economic operators from the UK is not to be expected, the EU Commission's view is correct that disadvantages will arise with regards to the verification of the suitability of British candidates and the selection thereof. This could even make a British participation in German public procurement procedures impossible.

According to § 7 (7) sentence 1 VSVgV, only security clearances of other European Member States must be recognized, provided they are equivalent. There is no additional obligation to accept security clearances from a third country.

For economic operators from the UK this may lead to the result that the given requirements for the protection of classified information can only be proved exceptionally when awarding contracts whose subject are classified as "CONFIDENTIAL" or higher. An obligation to accept a British security clearance will not continue after a "hard Brexit". As a result, this might lead to an effect similar to a market entry barrier.

5. Transfer of the notice to EU institutions

In the context of public procurement procedures initiated by EU institutions, the European Commission's notice is likely to have a very significant and comprehensive impact. EU institutions must comply with the provisions of the EU Financial Regulation (FR)[vii] and their rules of application[viii] when awarding contracts. Article 119 (1) FR states:

> *"Participation in procurement procedures shall be open on equal terms to all natural and legal persons within the scope of the Treaties and to all natural and legal persons established in a third country which has a special agreement with the Union in the field of public procurement under the conditions laid down in that agreement. It shall also be open to international organisations."*

Although formulated positively with regard to the application of the principle of equal treatment, Article 119 (1) FR in the view of the competent body (DG Budget), based on a statement issued in 2013, constitutes a geographical restriction. This means participation of economic operators based in third countries in public procurement procedures initiated by EU institutions shall not be possible, unless there are relevant trade agreements. Such a trade agreement, however, would be missing in by virtue of a "hard Brexit". Consequently, economic operators from the UK would be excluded from participation in procurement procedures of the EU institutions which are to be seen significant in monetary terms.

IV. Legal effects and potential remedies

The disadvantages foreseen by the EU Commission to British economic operators are considerable. It should also not be forgotten that the legal repercussions apply to European economic operators competing for British contracts vice versa.

The argument, often mentioned in the discussion, that market access will be guaranteed (at least) by the Agreement on Government Procurement (GPA) hosted by the World Trade Organization is to be rejected. Signatory Member of the GPA is the European Union, which has the exclusive competence to conclude international agreements in accordance with Article 3 (2) TFEU. The UK should therefore first have to join the GPA on an individual basis before the market access regulations of the GPA can come into force.

On this background the obvious question arises, what UK companies could do in order to avoid such negative impacts on their business as a result of a "hard Brexit". With exception of contracts requiring security clearance, a possibility could be the timely setting up of affiliated entities within one of the EU-27 Member States. Such affiliates could then participate in public procurements with their UK “parent” as subcontractors. With the possibility to burrow capacities from third parties, in particular under a sufficiently stable commitment, such as a letter of intent (LoI), even a recently created entity within the EU-27 Member States may well be able to overcome eventual capacity requirements such as established knowledge and heritage in the respective business. This approach should even be accepted by EU institutions subject to the Financial Regulation as it is also established opinion by DG Budget that Article 119 (1) FR does not apply to subcontractors.

Please contact us for further information and support in your particular business needs for avoiding the consequences of a “hard Brexit”.

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[i] „Hard Brexit“ means a withdrawal of the United Kingdom without any withdrawal agreement, in which market access could be regulated.
[ii] Concerns both non-EU Member States and companies from countries with which the EU does not have a trade agreement.
[iii] Implemented in Sec. 55 Sektorenverordnung – SektVO (national procurement law concerning water, energy, transport and postal services sectors).
[iv] See also Sec. 55 (2) SektVO.
[v] Decision from 31.05.2017, VII-Verg 36/16 -Drones.
[vi] Free Translation.
[vii] Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the Financial Regulation applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002.
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