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Contacts:

Matthew Smith
+44.(0)20.7360.8246
matthew.smith@klgates.com

Inga Hall
+44.(0)20.7360.8137
inga.hall@klgates.com

K&L Gates Brexit Task Force

Clients can contact the firm with questions about the consequences of Brexit by email at brexit@klgates.com

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BREXIT: Construction & Engineering

It seems unlikely that the UK's exit from the EU will result in significant legal or regulatory changes for clients investing or working on construction or infrastructure projects in the UK in the short term.

The uncertainty over where Brexit will take both our UK and international construction clients in the medium to longer term is however likely to be reflected in an uptake in disputes, particularly in adjudication, and some UK projects and/or foreign investment decisions put on hold (or remaining on hold) until the picture becomes clearer.

Key issues going forward in the longer term are likely to include:

- **Labour and materials** One of the most directly-felt impacts of Brexit in the construction market could be a skills shortage with an associated impact on project delivery cost and timescales. The UK construction industry is currently heavily dependent on labour from within the EU. The industry will need to focus on training and skills development within the UK labour market. This may be most keenly felt within the London construction market, which has traditionally relied more heavily on an EU skills pool. The impact on the supply (and sale) of goods and materials will depend to a large extent on the trade deals which are agreed but impacts on tariffs/duties and quantities can be expected.
- **Property and real estate development** To the extent that this sector is largely a domestic rather than internationally-focussed sector, the impact of any inward investment slowdown may be less keenly felt than in other (more outwardly focussed) market sectors. The impact of Brexit in the residential development market is likely to be most acutely felt in London, which has a higher proportion of foreign residents than elsewhere in the UK, and this may also be where the impact is most keenly felt for construction and engineering provided by foreign firms into the UK.
- **Red-tape?** We can expect a gradual 'unwinding' of the raft of EU-related secondary legislation affecting the domestic UK construction industry, such as the Construction Design and Management Regulations 2015, Energy Performance in Buildings Directive and EU procurement rules enacted within UK legislation.
 - On the face of it this is an appealing aspect of Brexit, but whether or not this 'red tape' will effectively be replaced with equivalent domestic legislation will depend to an extent on the exit model which is adopted and the future trading relationships which are negotiated.
 - Many EU-related laws are however likely to remain relevant in the UK in some form or another because they serve a particular purpose, or are reflective of public international law, such as

- UN conventions, and would be expected to remain. This is likely to be an issue of particular significance to public sector bodies. EU 'State Aid' rules may no longer apply unless the UK remains a member of the European Economic Area under a 'Norway style' model.
- **Commercial impact for EU companies operating in the UK** Unless a 'Norway' style Brexit model applies, the current access of foreign EU construction and engineering companies could well be more limited. It is also possible that the principles of transparency, equal treatment and proportionality currently embodied in UK procurement rules may no longer apply, or may be modified in any substitute legislation. This would have an impact on foreign companies strong in the infrastructure sector from countries such as France and Spain.
- **Commercial impact on UK construction companies** The impact on construction companies from a public procurement perspective is that the reduction in regulation may open the domestic market up to greater opportunities, and procurement options, but the same companies may expect to find it harder to compete for EU contracts.
- **Governing law and dispute resolution** There are likely to be implications for dispute resolution processes involving English law, English courts and enforceability in the EU. The rules governing consumer, employment, competition and insurance aspects of a dispute may change. Enforceability of English judgments may become less straightforward, and parties should consider how to address this in their contracts and parent company guarantees (for example, by providing for arbitration as their chosen dispute resolution forum, rather than litigation). For longer term contracts which span the period of exit then there may be disputes about which laws apply and/or how the parties' obligations may have changed as a result. Negotiation of choice of law and jurisdiction provisions in such contracts may also be more fraught.

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