**WHEN IS AN OJEU OR OTHER COMPETITION REQUIRED FOR A LAND DEAL?**

As the European case of C-220/05 Auroa v. Comune di Rosanne made clear, land transactions are not always exempt from the EU public procurement regime and related tendering obligations. This complex, evolving and often confusing area of law is regarded by many as a real barrier to redevelopment in the UK. This chart is designed to provide high-level guidance to both contracting authorities and developers on the strategic choices open to them. For ease, tenders which are subject to the full tendering requirements of EU Procurement Directives are referred to as ‘OJEU’ procurements or tenders. This chart identifies the most common structures used in land developments and, through a combination of colour coding and key questions, is designed to help users identify factors which indicate OJEU tenders will normally be required, situations where some lesser form of competition may be required and circumstances where the EU procurement rules are unlikely to apply.

Additional “Notes” boxes provide more detailed explanations of key legal concepts. It is important to recognise that even if there is no legal obligation to hold an OJEU or other competition, there may be other factors such as securing eligible funding which may make it necessary or desirable to opt for some form of tender process. The risks associated with each of the options below may differ, but none of the options are entirely risk free. As ever, much depends on the particular circumstances of each deal and this guide is not intended as a substitute for specific legal advice. Other legal obligations will also need to be considered on a case-by-case basis. The chart is based on the law as at April 2013. Further guidance can be obtained from the Procurement Lawyers’ Association (www.procurementlawyers.org) and the Cabinet Office (www.gov.uk), amongst others.

### Note 1: Definition of contracting authority

The EU procurement regime is designed to provide for transparent and uniform processes for seeking developers to undertake opportunities. There are advantages to OJEU, including reduction of both state aid and inefficiencies in public procurement. However, there is a risk that the procedure is selected to avoid unnecessary burdens on bidders. There are seven processes for procurements above certain thresholds for the open and restricted procedures, competitive dialogue and negotiated procedures, as set out in the UK version of OJEU. Whatever process is used is crucial to ensure legal protection and that the competition is an efficient way. The pre-OJEU planning and market testing stage will be particularly important. Further guidance on OJEU processes is being developed as a follow-up to this guide.

### Note 2: OJEU options

The EU procurement regime is designed to provide for transparent and uniform processes for seeking developers to undertake opportunities. There are advantages to OJEU, including reduction of both state aid and inefficiencies in public procurement. However, there is a risk that the procedure is selected to avoid unnecessary burdens on bidders. There are seven processes for procurements above certain thresholds for the open and restricted procedures, competitive dialogue and negotiated procedures, as set out in the UK version of OJEU. Whatever process is used is crucial to ensure legal protection and that the competition is an efficient way. The pre-OJEU planning and market testing stage will be particularly important. Further guidance on OJEU processes is being developed as a follow-up to this guide.

### Note 3: Additional requirements for works or services

Do the conditions reflect details similar to high level planning requirements or level plan? No obligation for a competition under EU (OJEU) procurement rules [See Note 10]

### Note 4: Non-OJEU competitions

Several gaps remain in the EU’s OJEU tendering obligations, other rules may still require a tender to be run.

### Note 5: What constitutes an economic benefit?

Works are likely to be carried out for the economic benefit of the contracting authority where they are of direct and immediate benefit to the authority (beyond those benefits which it would derive from the exercise of its planning powers). The most obvious examples are where the authority will own part of all of the development or receive income from it. Community benefits (e.g. a school or library) or public realm projects associated with the development which would otherwise have been paid for by the authority may also constitute an economic benefit, although recent UK case law indicates that section 106 agreements will not trigger OJEU tendering obligations.

### Note 6: Assessing contract value

The threshold (set out in note 3 above) is governed by the European Commission. Valuations should be based on good market estimates, exclude VAT and include account of reserves generated from third parties, not just payments. A contract with an economic benefit to the developer is potentially at risk of being declared illegal state aid.

### Note 7: Exclusive rights

A key decision in the bidding requirements is where, claims ‘exclusive rights’, review each option can perform the contract. In development, this would be a considerable impediment to the ability of the developer to seek to ensure that the site is sold as a whole for the highest price. 

### Note 8: Active and passive roles in a Joint Venture Company (JV)

Joint Ventures can typically provide an incentive in settling up of the JVs or to the level of capital. Active investors will have been keen to ensure on role including influencing the budget and day-to-day operations as well as with its own or other strategic commercial behaviour.

### Note 9: Assessing and managing risk

There are a number of approaches to risk in this market. Barriers to funding development may reduce likelihood for a development to be placed on the market. The process is therefore not just about getting to a deal. The question is how to manage the risks and therefore, provide greater flexibility.

### Note 10: Active and passive roles in a Joint Venture Company (JV)

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### Note 11: What constitutes an economic benefit?

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### Table: WHEN IS AN OJEU OR OTHER COMPETITION REQUIRED FOR A LAND DEAL?

<table>
<thead>
<tr>
<th>Disposal of land with no further interests.</th>
<th>Sale or release of leasing authority?</th>
<th>Rain or loss? Does contracting authority have control over the property?</th>
<th>Contracting authority controlling risk and funding?</th>
<th>Taking title in emerging and funding development?</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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</table>

### Chart: WHEN IS AN OJEU OR OTHER COMPETITION REQUIRED FOR A LAND DEAL?

[Diagram showing decision flow chart with questions and outcomes associated with each decision point.]

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