The implications of Brexit for public procurement law and policy in the United Kingdom

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1. Introduction

On June 23 2015 the UK voted to leave the European Union and on October 5 2016 the Prime Minister, Theresa May, announced at the Conservative Party conference that the UK would invoke the procedure for leaving under Art.50 of the Treaty on European Union by the end of March 2017. She also announced that the Government would take the further concrete step of proposing a “Great Repeal Bill” in the next Parliamentary sessions to repeal the European Communities Act 1972, which provides the domestic legal basis for the application of EU law. These developments leading to a future “Brexit” from the EU obviously have potential significance for the law and policy governing public procurement in the UK. The aim of this article is to consider the potential impact of Brexit in relation to three main questions in this area.

The first is the extent to which Brexit will lead to the dismantling of legal constraints on the use of procurement to promote and support national industry – the industrial policy aspect. Currently such strategic use of procurement is constrained for most domestic contracts by the EU rules, the very purpose of which is to open up national markets to EU-wide competition. Thus for all contracts of cross-border interest industrial policy measures are largely ruled out by the rules of the TFEU, which prohibit discrimination in public procurement and do not make exceptions for national industrial development measures, even those targeted at particular industries or regions (such as preferences for firms in undeveloped areas). Similar limitations derive also from the fact that the UK – by virtue of its EU membership – is a Party to the WTO’s Agreement on Government Procurement 2012 (GPA), and under that Agreement offers other Parties non-discriminatory access to most major public contracts, and from other trade agreements to which the UK is party, again by virtue of its EU membership. The key question so far as this aspect of procurement policy is concerned is the extent to which both EU membership itself and the trade agreements that come with it will be replaced or duplicated by new agreements that impose the same, or similar, procurement regimes.

A second question is the potential impact of the freedom to use procurement to promote and support social and environmental goals – the social and environmental policy aspect. There are again significant legal constraints on this deriving from EU law, both from prohibitions against

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4 See generally S. Arrowsmith and R. D. Anderson (eds), The WTO Regime on Government Procurement: Challenge and Reform (CUP, 2011).
5 There is a vast literature on this topic; for general works on the legal aspects see, in particular, S. Arrowsmith and P. Kunzlik (eds), Social and Environmental Policies in EC Procurement Law (CUP 2011); J.M. Fernández Martín, The EC Public Procurement Rules: a Critical Analysis (OUP, 1996), Chs 2 and 3; R. Caranta and M. Trybus (eds), The Law of Green and Social Procurement in Europe (Djøf Publishing; 2010); D. Dragos and “Sustainable Public Procurement in the EU: Experiences and Prospects”, in F. Lichère. R. Caranta and S. Treumer (eds.), Modernising Public Procurement: the New Directive (Djøf publishing; 2014), pp.301-335; C. McCrudden, Buying Social Justice: Equality, Government Procurement, &
discrimination and the EU’s procedural rules that support the open market policy, in particular in the procurement Directives which govern major contracts\(^6\). With only limited exceptions\(^7\), the Directives preclude most policies that deal with a supplier’s behaviour outside the contract being awarded\(^8\), except when debarment from procurement contracts is a judicially-imposed sanction for legal violations\(^9\), and they also control the way in which different mechanisms – contractual conditions, award criteria etc – are used in implementing policies linked directly to contractual performance. Similar constraints exist under the GPA, although their exact impact is less certain and probably less extensive\(^10\), and again the GPA does not apply to all procurement covered by EU rules. More general EU measures relating to social and environmental policy also affect public procurement in a significant way, either because they impose very specific constraints and/or because they oblige Member States to address various social or environmental objectives; these include the Acquired Rights Directive\(^11\) (implemented in the TUPE Regulations\(^12\)), the Posted Workers Directive\(^13\), and certain directives on energy-efficiency of government purchases\(^14\). This use of procurement to promote social and environmental goals is a topic of great current interest given the recent emphasis placed on this by the UK administrations\(^15\).

The third and final question relates to the role of the law in regulating award procedures and related supplier remedies. In this regard, as observed, the EU regime, the GPA and also other trade agreements impose specified award procedures, from advertising through selection and exclusion to the final award, and these are enforceable by suppliers in accordance with review procedures that

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\(^7\) Notably rules allowing set asides for sheltered employment programmes e.g. 2014 Public Contracts Directive Art. 20.

\(^8\) See, for example, 2014 Public Contracts Directive Art.67(2) and Art.70 requiring award criteria and contract conditions respectively to be linked to the subject matter of the contract; and Art.57(6) providing for a self-cleaning defence against exclusions that links the power of exclusion to reliability.

\(^9\) See, for example, 2014 Public Contracts Directive Art.57(6) final para., limiting use of the self-cleaning defence.


\(^12\) Transfer of Undertakings (Protection of Employment) Protection Regulations 2006 SI 2006/246.


\(^15\) As discussed later below.
must meet certain minimum standards. The EU rules on these matters originated mainly in the desire to secure a minimum level of transparency to prevent states from concealing decisions that favour national industry. To this end the EU adopted the Directives referred to above to regulate procedures for contracts above certain financial thresholds and this later inspired the European Court of Justice (CJEU) to develop transparency rules under the TFEU for all contracts of cross-border interest, even those outside the Directives. In general the Directives’ rules, since they are intended to be enforceable by third parties – suppliers - must be transposed into the national legal order by a method providing for legally enforceable rights within the domestic system. Before implementing these procurement Directives in the manner required by the EU, the UK did not have a significant body of public procurement law at all, at least not law that was legally enforceable by suppliers. Procurement was regulated nationally to foster domestic goals, in particular to promote value for money and prevent corruption, but mainly through administrative instructions and guidance rather than legal rules. An enforceable body of law was created mainly by the national regulations that gave effect to the Directives, which – after a false start by attempting to implement through the traditional “administrative” method of regulation (instructions in administrative circulars), which did not comply with EU requirements for a legal form - was done from 1991 onwards through regulations adopted under the European Communities Act 1972. These were then adapted to give effect also to obligations under the other trade agreements, including the GPA. These regulations still represent the vast bulk of UK procurement law. Thus “UK public procurement law” has always been for the most part “EU procurement law as applied in the UK”. Whilst the purpose of this EU-based law has been to open up UK markets to tenderers from other Member States, in practice the EU rules, in providing for transparent award procedures, also contribute towards national goals of value for money etc. The questions which Brexit raises in this regard are whether the UK will retain the current, somewhat complex, set of regulations, or will instead adopt quite different – possibly more simple – rules, or will even resort to the historical approach of regulating procurement primarily by administrative instruments. Reflecting the fact that current law and policy on all three aspects derives to a large extent from EU rules and from other trade agreements on procurement which depend on EU membership, the impact of Brexit depends significantly on the outcome of negotiations to replace the existing trade arrangements. Procurement will not, of course, be considered in isolation from other areas of trade, and even should the UK wish to adopt a less liberal view in negotiations on procurement than on

18 In the context of public procurement see Case C-433/93 Commission v Germany [1995] ECR I-2303.
19 As explained later below, local authority standing orders had been held legally binding but not enforceable by suppliers who were considered to lack standing to litigate.
23 In the case of the Public Contracts Regulations 2015, for example, see reg.90 making provision for enforcement of the regulations by firms with rights under the GPA.
other areas, in order to use procurement as a policy tool – and there is no clear indication of this - its ability to do so, especially in negotiations with the EU, may be constrained, as we will see. The main problem in analysing the possible impact of Brexit is, of course, that the outcome of these general negotiations remains highly speculative, depending on controversial and as yet mainly unknown political decisions.

A few clues to the UK’s own approach emerged in the speech by Theresa May at the October 2016 Conservative party conference26. This indicated, first, a commitment to free trade in both goods and services, and more generally to a “Global Britain”. However, so far as relations with the EU itself are concerned, the Prime Minister also indicated that the UK will not be prepared to give up “control over immigration”, which will limit the realistic prospects for negotiating full access to the EU’s single market. References to a liberal trade policy with both the EU and other partners were also further tempered by reference to developing an industrial policy which, rather ambiguously, was said not to be about “picking winners, propping up failing industries, or bringing old companies back from the dead” but “identifying the industries that are of strategic value to our economy and promoting and supporting them through policies on trade, tax, infrastructure, skills, training and research and development”. The distinction between picking winners, which is rejected, and supporting industries of strategic value through trade policy, is not immediately apparent, although it is clear that the main thrust of policy is intended to be towards developing the new and/or successful rather than rescuing the declining and/or old industries.

These pronouncements clarify the likely direction of negotiations only to a limited extent and are far from irrevocable, so that speculation as to the likely outcome is still very premature. Rather than making specific predictions, the present article will thus proceed mainly by outlining different options, indicating some of the practical and legal considerations, both positive and negative, which might influence their adoption, and considering in general terms their implications for each of the three different aspects of procurement referred to above. The article does not address individual areas of social and environmental policy, but the issues relating to the Acquired Right Directive/TUPE are considered in a separate article in this issue of the Review27.

The article also limits its focus to relationships with EU and GPA partners, since these are almost certain to be the main or only focus of the immediate negotiations, and thus the relationships which will shape UK procurement policy. As noted above, the UK is also party to many other trade agreements covering procurement28 which Brexit will bring to an end and which the UK may wish to replace. However, it seems unlikely that these will be an immediate priority or that the UK will constrain itself to any great extent over award procedures and remedies unless it is anyway bound to do so by its EU and GPA partners.

As will be explained, one realistic possibility is a trade agreement with the EU - through the EEA or otherwise - that provides for continued application of the EU procurement regime to the UK, in which case Brexit would have few consequences. Another distinct possibility, however, is an agreement with the EU and/or other trading partners based solely on the GPA. This would not much loosen the current constraints on using major procurement as an industrial policy tool and would probably have only limited and uncertain implications for promoting social and environmental policies through procurement, although it would provide freedom of action in some areas (notably low-value procurement and hard defence procurement) that are outside the GPA. However, it could

27 I. Omambala and N. Motraghi, “The implications of Brexit for TUPE in the area of public procurement” (2017) 26 P.P.L.R. xxx. We will also not consider other areas of law that affect public procurement but which are less significant on a day to day basis, such as competition law (including state aid).
28These are outlined later below.
have a major impact on procedural aspects, since it will significantly increase national autonomy on these matters, as well as affecting the remedies regime. We will argue that this would present a significant opportunity for better regulation, which should be based on a single and simple approach for all regulated procurement with more flexible procedures; and, indeed, the opportunity that the GPA-based approach presents in this regard provides a strong argument for the UK to opt for such an approach if it is realistically available. A third, although unlikely, scenario is that the UK does not conclude any agreements on public procurement, either intentionally or because negotiations fail. This would mean complete national flexibility over industrial and social/environmental aspects, as well as procedures and remedies. This would give rise to the possibility of either devising a new regulatory system, again with possibilities for better regulation, or of jettisoning the use of law as a regulatory tool altogether. How the UK would actually respond is, however, difficult to predict. The greater freedom of action under the last two options may well also involve a step backwards so far as simplicity is concerned by producing greater divergence between the regimes of England, Wales, Northern Ireland and Scotland, as well as “local” protectionism.

We will consider in turn these different possibilities and their variations. We will look first at the possibility of EEA membership or similar (the “Norway option”) (section 2), secondly at the possibility of a bespoke trade agreement (section 3), thirdly at the “GPA” option (section 4) and, finally, at the possibility that there will be no trade agreement at all (section 5). We will also consider the likely timing of any changes (section 6). Finally, we will summarise the conclusions reached (section 7).

2. EEA membership or equivalent - the “Norway option”: business (largely) as usual

A first possibility that has been widely discussed is that the UK leaves the EU but remains party to the European Economic Area (EEA) Agreement – a possibility often referred to in the UK media and debate pre-referendum as the “Norway option”. This may be opposed by EFTA states, which are currently all small states and may be concerned with a lack of balance with such a large partner, but a similar possibility might be for the UK to conclude an EEA-type arrangement just with the EU or with some of the other EEA states. The EEA effectively applies the same rules on public procurement as the EU does, and thus under these scenarios it would be pretty much business as usual for public procurement.

First concluded in 1992, the EEA Agreement, is an agreement applying to the EU Member States (including the UK) and certain states of the European Free Trade Association (EFTA), Norway, Iceland, and Liechtenstein, which creates a single market for all these countries. (Switzerland is also a member of EFTA but declined to join the EEA.) The EEA Agreement does this, essentially, by applying the EU’s single market rules to the whole of the EEA. EEA members get access to a single market and provide access for other EEA members to their own markets, effectively on the basis of EU single market rules, whilst rules on certain other issues also apply, including (of relevance for

public procurement) competition law and the environment. The EEA Agreement does not, however, provide for application of EU-based rules on many other matters, including on agriculture, on fisheries, on taxation, on freedom, security and justice and on foreign and security policy. In the field of procurement, this means, first, that EU Member States must open up their public procurement markets to other EEA members in the same way as to their fellow EU Member States and that, similarly, the non-EU members of the EEA must open their own procurement markets to EU Member States, based on public procurement rules which parallel those of the EU.

In this regard, the EEA Agreement, first, contains provisions on free movement and competition that parallel those in the TFEU. So far as EU secondary legislation is concerned, single market rules existing at the time of the EEA Agreement, including in the procurement Directives, were accepted as part of the EEA package. Rules in subsequent Directives apply only if adopted by the EEA Joint Committee, but there is a duty to align EEA law with EU law as closely as possible and the Committee has adopted all subsequent procurement Directives, including those of 2014. Under these rules the EU’s Official Journal serves as the medium for advertising procurements in all EEA states, not just EU Member States. Article 6 EEA provides for reception of all pre-EEA jurisprudence interpreting EU provisions which are “identical in substance” to those of EEA law; thus EEA provisions on free movement and procurement procedures are to be interpreted in the light of the pre-existing EU case law on those matters. There was no provision for automatic reception of later EU jurisprudence but in practice the EFTA Court, which effectively fulfils the role of the CJEU for the non-EU members of the EEA, generally applies the law as developed by the CJEU. Pursuant to these obligations in the EEA Agreement, the UK procurement regulations have been made enforceable by suppliers from all the EEA countries.

Were the UK to join the EEA, or to conclude some similar arrangement, there would thus be little change. UK markets would remain open to EEA members, curtailling to the same extent as at present the use of procurement as a tool of industrial, social or environmental policy, and the same rules on award procedures and remedies would continue to apply. The current procurement regulations that implement the EU Directives would no doubt be retained, with technical adjustments to reflect the UK’s new status.

UK business would itself, of course, continue in turn to benefit from public procurement opportunities in other EEA states in the same way as at present. Further, since all the single market

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32 http://www.efta.int/eea/eea-agreement/eea-basic-features.
34 In particular, Art.4 EEA prohibits within the scope of the EEA Treaty, discrimination on grounds of nationality, parallel to Art.18 TFEU; Art.11 prohibits restrictions on the free movement of goods, parallelising Art.34 TFEU EU; whilst Arts 31 and 36 guarantee the freedom to establish and freedom to provide services, parallelising Arts 49 and 56 TFEU.
35 Note also that the EEA Agreement provides for adaptation of the EU rules to cover the EEA states, since the wording in the EU rules is based on the assumption that they only apply to EU Member States. The adaptations to the procurement directives are contained in Annex VI to the EEA Agreement.
36 And failure to do so would result in suspension of market access in the relevant areas. On the adoption process see D. Chalmers, G Davies and G. Monti, European Union Law: Text and Materials (3rd ed. 2014), Ch.5A, pp.10-23 p.21.
38 Regarding non-EU suppliers see e.g. Public Contracts Regulations 2015 reg.89(1) and (2).
39 It is also worth noting that access to third country markets might also possibly be negotiated on the basis of agreements already concluded by EFTA states through EFTA, although the UK would need to negotiate to be accepted separately for
rules would apply, UK firms seeking public procurement business in other EEA states would benefit from these rules – for example, from not having to pay tariffs on goods imported for use in public procurement contracts and from rights to set up subsidiary companies in other states of the EEA. However, some new obstacles would apply: for example, the EEA does not create a customs union meaning, inter alia, that imported goods must go through customs procedures that can create practical barriers to trade.

Some changes would, nevertheless, be seen, even under this option⁴⁰.

First, the UK would have no vote, and thus a significantly reduced voice, on future changes to the applicable rules. EEA states that are not EU members can often provide de facto input into the legislative process through participation in, for example, the European Commission’s governmental Advisory Committee on procurement, but influence is clearly limited when there are no voting rights. Further, as the CBI has stated “[EEA] governments are often left out of the information loop and risk missing out on early-stage discussions when EU member states begin new initiatives or are formally consulted by the Commission”⁴¹. In the author’s experience the UK has played a significant and positive role in shaping EU procurement rules along commercial rather than bureaucratic lines, most notably in relation to the provisions on framework agreements and competitive dialogue that were introduced in 2004⁴². The UK has also had influence in the introduction or adoption of measures of concern to the UK in the 2014 reform process, including the “mutuals” exemption (allowing a temporary reservation for public service organisations of certain contracts for health, cultural and social services)⁴³ and the provision for wider use of award procedures involving negotiation⁴⁴. Future amendments will apply only if explicitly adopted by the Joint Committee of the EEA⁴⁵ (comprising both its EU members, in practice represented by the European Commission, and non-EU EEA members), but as noted above there is a duty to align EEA law with EU law as far as possible.

In addition, the role of the European Commission in dealing with complaints and the role of the CJEU in hearing cases and giving interpretations would cease for the UK. For Norway, Iceland and Liechtenstein largely the same functions are carried out by the EFTA Surveillance Authority and EFTA Court, with the EFTA Court in practice following CJEU interpretations as we noted above. If the UK were to join EFTA these EFTA institutions would also take this role for the UK. Were the EU and UK instead to include a separate EEA-type arrangement, similar appropriate institutional arrangements to deal with enforcement between will be needed. It is possibly questionable whether any of these enforcement arrangements would operate with the same rigour as those of the European

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⁴⁰ Other possible general differences may include less effective enforcement in national courts in cases in which the rules are not properly implemented by the national authorities: on this see D. Chalmers, G Davies and G. Monti, European Union Law: Text and Materials (3rd ed. 2014), Ch.5A, pp.17-20.


⁴² These remarks are based on the author’s personal experiences of the evolution of the 2004 procurement directives, including as a member of the European Commission’s independent Advisory Committee for the Opening up of Public Procurement and as a participant in private meetings with European Commission functionnaires in the period during the drafting process and legislative procedure leading up to the 2004 directives, in which development of competitive dialogue and framework agreements were discussed. For further consideration of the influence of UK practice, and other factors, on the competitive dialogue procedure see S Arrowsmith and S. Treumer (eds.), Competitive Dialogue in EU Procurement (2012, CUP), pp.20-29 and pp.190-192.


⁴⁴ As provided for in 2014 Public Contracts Directive Art.26. The new provisions providing for the possibility of aggregation of contracts for threshold purposes at the level of independent purchasing units rather than the procuring entity as a whole is also based on UK law and practice, embodied in provisions of the earlier procurement UK regulations relating to such “discrete operational units”, as they are referred to in the UK: see S. Arrowsmith, The Law of Public and Utilities Procurement (3rd ed. 2014), Vol.1, paras 6-124-6-128.

⁴⁵ See EEA Agreement Art.102.
Other than this institutional issue, if an EEA approach, or similar, is politically the preferred solution, reaching an agreement should from a technical perspective be relatively easy since it is essentially an “off the shelf” solution. However, the choice of such a solution is beginning to look increasingly unlikely from both sides. From the UK perspective, despite the Prime Minister’s recent assertion of the Government’s commitment to open trade, a major obstacle is that the EEA rules include full rules on free movement of persons which allow significant migration to the UK from other EEA states. This was the very issue that influenced many UK voters to favour Brexit and we have seen above that the Prime Minister has, at the same time as reiterating a commitment to free trade, stated that the UK intends to take control over immigration. EEA membership would also entail significant UK contributions to the EU budget, which was another voter concern – although budget contributions, at least on temporary basis to ensure stability, might well anyway be envisaged as a requirement of even a more limited trade deal and have not been ruled out by the UK. The very fact that EEA membership, or similar, is effectively “EU-lite” raises questions over whether this option would be in line with the spirit of the referendum outcome. From the perspective of the UK’s trading partners, support now also seems to be strong for a “hard” Brexit to deter further departures from the EU. Such departures could potentially call into question the EU’s very pre-eminence at the heart of Europe as an organisation which most European countries either belong to or aspire to join; and in this light loss of economic benefits from UK participation in the single market may well be considered to be significantly outweighed by the longer term political and economic costs of allowing the UK to participate from outside the EU. EEA membership now looks very much less likely that it did in the immediate aftermath of the referendum.

3. Another type of trade agreement with the EU – the “bespoke option” (e.g. “Switzerland option”): business as usual or limited change?

Given this situation, a different possibility that may well come to pass is that the UK will negotiate a different, bespoke, trade arrangement with the EU. Given the EU’s approach to its trade agreements in general it seems very likely that that any such arrangement would include procurement provisions, and it is possible, although not inevitable, that these would be the same as under EU/EEA rules.

The EU has many bespoke agreements that go beyond its general commitments under World Trade Organization (WTO) rules – for example, providing for lower tariffs for imports than it applies under the WTO’s General Agreement on Tariffs and Trade (GATT). It is striking that these agreements now invariably address public procurement. The EU considers its own procurement markets to be open de facto, and it is committed to formally opening these markets when partners are willing to

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46 There are formal differences including the absence of any power to impose fines for violations by Governments (which the CJEU possesses) and the fact that when states seek references from the EFTA Court on questions of interpretation the responses have only the status of an advisory opinion rather than being legally binding on national review bodies, but these are not the only considerations.


48 Both to the funds for reduction of regional and social disparities and to specific programmes, such as those for research development. The former will be politically more problematic than the latter. Contributions to the administration of any new institutional arrangements would also be required.

49 For a full list of agreements with public procurement provisions and those currently being negotiated see the information provided by the European Commission at http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/
reciprocate\textsuperscript{50}, in line with the liberal external trade policy envisaged in Art.206 TFEU\textsuperscript{51}. It has also generally been insistent on procurement being addressed in any trade agreements. Not surprisingly, provisions aimed ultimately at complete liberalisation of procurement under rules in line with the EU \textit{acquis} are an element of the Stabilisation and Association Agreements with actual or potential EU candidates (such as some of the Balkan states)\textsuperscript{52}. However, significant provisions for liberalising public procurement which, where possible, are supported by rules on transparent award procedures and supplier remedies, are also included even in agreements that do not seek to pave the way for EU accession. In recent years these have generally been modelled on those of the GPA 2012.

Thus public procurement provisions are included in various bilateral agreements with states covered by the European Neighbourhood Partnership (ENP) framework in North Africa, the Middle East and the former Soviet Union\textsuperscript{53}. In particular, Association Agreements concluded in 2014 with the Ukraine, Moldova and Georgia\textsuperscript{54} have provided for gradual reciprocal liberalisation of procurement, based on transparent tendering and gradual alignment of procurement legislation with the EU rules, as part of a wider package of alignment measures; and these Agreements have given the impetus to the former two countries to accede quickly to the GPA\textsuperscript{55}. Other agreements with neighbour countries have included less extensive and concrete provisions but nevertheless given particular significance to public procurement. Typical is the partnership and cooperation Agreement with Armenia, providing for Armenia to “endeavour” to approximate its laws with those of the EU\textsuperscript{56} and for the parties to “cooperate to develop conditions for open and competitive award of contracts for goods and services in particular through calls for tenders”\textsuperscript{57}; and again this gave impetus to recent GPA accession\textsuperscript{58}.

Outside the immediate neighbourhood, trade agreements with Mexico (2000), Chile (2002), Columbia and Peru (2013) and Ecuador (initialled in 2014) also contain extensive provisions for mutual access to procurement markets. In this regard an early Agreement was that with Mexico\textsuperscript{59}

\textsuperscript{50} This position and the desire for reciprocity given the open nature of EU markets are highlighted by European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries COM/2016/060 final - 2012/060 (COD), proposing an instrument that will provide for possible closure of EU markets where there is no reciprocity from trading partners.

\textsuperscript{51} And in accordance with the strategy that was clearly adopted in the 1980s in parallel with the push to complete the internal market by 1992, as set out in Commission Memorandum of 1988, “Europe 1992: Europe World Partner”, Commission Press Release P 117 of October 19, 1988.

\textsuperscript{52} See [2004] O.J. L 084/13 (FYROM), [2009] O.J. L 107/166 (Albania), [2010] O.J. L 108/1 (Montenegro), [2013] O.J. L 278/1 (Serbia), Turkey, which has a Customs Union with the EU, has also commenced the process of adapting its procurement legislation to that of the EU in the context of accession negotiations, but negotiations on liberalisation of procurement as part of the potential development of the Customs Union were suspended in 2002:


\textsuperscript{53} The ENP framework covers Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine.


\textsuperscript{55} The 2012 GPA came into force for the Ukraine on 18 May 2016 and Moldova on 14 July 2016.

\textsuperscript{56} Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part [1999] O.J. L 239/3. Art.43(1) and (2). Armenia has declined to sign an Association Agreement but negotiations were launched in December 2015 for a new agreement to replace that of 1999: see the information provided by the European Commission at http://eeas.europa.eu/delegations/armenia/eu_armenia/political_relations/index_en.htm

\textsuperscript{57} Art.48.

\textsuperscript{58} In force since 6 June 2015.

providing for mutual opening of central government procurement based on national treatment. From the Mexican side this is supported by an undertaking to apply award procedures to which Mexico is already committed under the North America Free Trade Agreement (NAFTA), whilst the EU undertakes to provide access in accordance with GPA procedures, whilst supplier review measures also apply, these procedures are deemed “equivalent” and also apply in future variations provided that equivalence still exists. In the case of Chile the Agreement again provides for mutual opening of procurement based on national treatment, in this case at both central and regional/local level, and for award procedures modelled on those of the GPA and for supplier review. The same general approach using a GPA model is followed for the Andean Community under the Trade Agreement concluded with Columbia and Peru (now applied provisionally), and in July 2014 negotiations were concluded for Ecuador to accede to the same Agreement. An agreement concluded with Iraq in 2012 (the trade elements of which are in force provisionally) similarly provides for mutual opening of certain markets with GPA-based procedures and supplier review, as does an Association Agreement concluded with the Central American countries of Panama, El Salvador, Guatemala, Costa Rica, Nicaragua and Honduras, the trade elements of which have been provisionally applied since 2013. An agreement recently negotiated with Vietnam is similar, although with temporary derogations from some of the GPA-type procedural requirements for Vietnam (and an interesting feature of this Agreement in the light of Brexit is the requirement for the Parties to provide summaries of their notices in English and for the EU to provide financial and technical assistance to Vietnam to this end). The EU is also negotiating a free trade agreement with Mercosur, in which public procurement (a subject covered within Mercosur itself) is an important item on the agenda.

References:

- Decision 2/2000, Art. 29(1).
- Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2002] O.J. L352/3.
- See Arts 143-154.
- Art. 155.
- Trade Agreement between the European Union and its Member States, of the one part, and Columbia and Peru, of the other part, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=691. Procurement is dealt with in Title VI, applicable award procedures being set out in Arts 175-189 and challenge procedures provided for in Art.190. Detailed provisions on public procurement including coverage, advertising media, time periods and tender documentation are contained in Annex XII to the Agreement: see http://ec.europa.eu/trade/policy/countries-and-regions/andean-community/
- The text is published at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1156, and will be applied following completion of the relevant internal procedures.
- Partnership and cooperation agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part [2012] OJ L204/20.
- EU-Central America Association Agreement, http://trade.ec.europa.eu/doclib/press/index.cfm?id=689, Arts 209-227, and Annex XVI setting out coverage. The Agreements often provide for limitations even for covered procurement - for example, the possibility for Iraq to provide price preferences for a temporary period of 10 years, and provision for the Central American partners to maintain policies in favour of ethnic minorities and micro, small and medium-sized enterprises and to maintain existing measures requiring local establishment or registration (to be reviewed after ten years).
- EU-Vietnam Free Trade Agreement; available (in a text as at Jan 2016 published for information purposes only which is subject to legal revision) at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154216.pdf. Government procurement is dealt with in Ch.9 and related Annexes. The procedural derogations are in Annex 9-a, “Transitional Measures for the implementation of this Chapter by Vietnam”.
- EU-Vietnam Free Trade Agreement Ch.9 Art.VI.3.
- EU-Vietnam Free Trade Agreement Ch.9 Art.VI.4.
- See, most recently, European Commission, Comprehensive Free Trade Agreement with Mercosur, Potential gains for the EU (May 2016) http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154559.pdf
For many of the EU’s major trading partners, including the US, Japan and Canada, mutual access to procurement has been developed mainly under the framework of the GPA itself, as explained further below. However, the EU also has additional bespoke agreements with some of its longstanding GPA partners, providing for access to procurement beyond that generally provided under the GPA framework and/or to some extent for other specificities in award procedures and enforcement.

The most extensive agreement is that with Switzerland. The EU concluded a free trade agreement with Switzerland in 1972 and alongside this the Parties later concluded two packages of bilateral agreements (one in 1999 following Switzerland’s decision not to join the EEA, and another in 2004) under which, in return for access to the single market, Switzerland undertook to apply many EU laws and to further consider their adoption on a case-by-case basis. They include a specific agreement on public procurement, which came into force on 1 June 2002. This does not provide for complete application of the EU procurement rules and to a large extent is in fact based on GPA award procedures and remedies (which in this case is the GPA 1994 since the GPA 2012 has not yet been ratified by Switzerland). However, the scope of liberalisation goes further than is provided for generally by the GPA framework: the latter does not extend at all to certain utility sectors covered by the Directives and also, unlike the EU’s Utilities Directives, does not cover private utilities that enjoy special or exclusive rights, but the Agreement with Switzerland provides for some coverage of these areas, in line with the approach of the EU’s internal market. For this procurement to which the GPA will not necessarily apply (private utilities etc), the Agreement provides not for use of an established model of procedures but for covered contracts to be awarded simply in accordance with principles of “non-discrimination, transparency and fairness” and, for some explicit, although skeletal, obligations on advertising, time limits, award criteria and selection criteria/qualification systems and specifications. This choice of a limited approach rather than adoption of GPA procedures is no doubt influenced by what is palatable for the relevant utilities. In relation to enforcement, the Agreement provides for supplier review procedures before an independent body, as well as monitoring by each party through an independent authority which is able to deal with complaints and to take administrative or judicial enforcement action. These procurement provisions do, however, need to be seen in the context of the broader package of measures providing for a single market between the EU and Switzerland, including provision for general

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74 Which now, given impetus by the trade agreements on procurement with the EU, also covers the Ukraine, Moldova and Armenia, as noted above.
76 With commitments between the EU and Switzerland under the 1994 GPA having been expanded by the 1999 Agreement between the European Community and Swiss Confederation on certain aspects of government procurement referred to above.
77 This is still pending in light of the process of bringing sub-federal legislation in Switzerland into compliance with the new GPA. On the GPA 1994 and 2012 see further below.
78 Art.3(5) provides for the non-application of the 1999 Agreement’s obligations to utilities where other entities are “free to offer the same services in the same geographical area and under substantially the same conditions” - that is to utilities in competitive markets. This allows for excluding from the Agreement EU utilities that are exempt from the EU Utilities Directive under the exemption for entities in competitive markets (now in the internal regime under Arts 34-35 of the 2014 Utilities Directive).
79 Art.4(1) of the Agreement between the European Community and Swiss Confederation on certain aspects of government procurement.
80 Art.4(1) of the Agreement between the European Community and Swiss Confederation on certain aspects of government procurement.
81 Art.4(2) of the Agreement between the European Community and Swiss Confederation on certain aspects of government procurement.
82 Art.5 and Annex V of the Agreement between the European Community and Swiss Confederation on certain aspects of government procurement.
83 Art.8 of the Agreement between the European Community and Swiss Confederation on certain aspects of government procurement.
evolution of relevant Swiss laws towards those of the EU. More broadly, leaving aside the specific case of public procurement, this general approach adopted towards achieving a single market has not overall been a conspicuous success and does not seem likely to be replicated in a general way with the UK.

Current initiatives for broader and deeper trade agreements with Canada and the United States – both also GPA Parties – also put considerable emphasis on public procurement, and include negotiations on issues going beyond the GPA. The negotiations with the US for a Transatlantic Trade and Investment Partnership (TTIP) not only seek, between the EU and US, expanded coverage in relation to the types of procurement already regulated between some Parties within the GPA framework, but also seek to go beyond that framework in developing more detailed common rules on some aspects of award procedures – which from the EU perspective seem to aim at introducing EU-type regulation for some matters - and also enforcement measures going beyond those of the GPA.

In the case of Canada negotiations were concluded in 2014 for a Comprehensive Economic and Trade Agreement (CETA) which, after various delays and controversies, was finally adopted by the Council and signed on 30 October 2016. CETA extends the scope of open procurement markets between the Parties, including for some sub-federal procurement that Canada does not open to other GPA Parties (such as communes and their utilities, and universities). Contracts are to be awarded in accordance with specified procedures modelled on those of the GPA, and there is provision again for supplier review (although more limited than under the GPA) and also for a joint Committee on Government Procurement for monitoring and consultation purposes. Negotiations were also concluded in 2014 for a general comprehensive trade agreement with Singapore, another GPA Party, which again provides (in Art.10) for opening up specified procurement based on procedures and remedies which largely mirror those of the GPA and again with a joint body for monitoring and consultation (the Committee on Trade in Services, Investment and Government Procurement). Coverage will include, for example, works and services concessions, an area whose current coverage under the GPA more generally within the general definition of procurement is rather uncertain, as well as expanded coverage of utilities. A 2011 Free Trade Agreement with South Korea, another GPA Party, sets up a Government Procurement Working Group with a view to enhancing future liberalisation between the EU and South Korea.

Whilst each agreement has its own political context and special features, the importance they all place on public procurement means that if and when a separate trade agreement is concluded between the EU and UK it is hard to envisage an agreement acceptable to the EU that would not include extensive procurement provisions. The exact form that these might take, however, is harder

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87 Including because of debate over whether or not it was a mixed agreement and last minute issues over acceptance by Belgium.
88 It’s trade provisions will come into force provisionally once it is approved by the European Parliament.
89 Procurement is dealt with in CETA Art.19.
90 CETA Art.19.2 and associated Market Access Schedules.
91 CETA Art.19.5-19.16.
92 CETA Art.19.17.
93 CETA Art.19.9.
95 See Annex 10-F and Annex 10-I.
98 Free Trade Agreement between the European Union and the Republic of Korea Art.9.3.
to predict, particularly in light of the uncertain and highly charged political environment in which negotiations will take place.

Given that in the recent agreements the provisions on procedures and review that support market access commitments have been modelled to the greatest extent possible, even in agreements with non-GPA Parties, on those of the GPA, the minimum commitment that can probably be expected in any EU-UK agreement is to open up public procurement under the framework of the GPA itself, with general coverage of the type of procurement covered by the EU’s own GPA commitments. This could be provided for simply under the GPA itself without needing to conclude any broader trade agreement, and this seems in fact a distinct possibility, either as a first step (being possibly easier to negotiate in isolation from wider trade issues) or as the long-term solution. The implications of adopting this minimal “GPA option” are examined further in the next section below.

However, it seems a strong possibility, also, that either a broad EU-UK trade agreement, or (although perhaps less likely) an agreement concerned specifically with public procurement that is negotiated outside a broader package, might go beyond this minimum, adhering more closely to the coverage and rules of the EU’s regime.

Such an agreement might involve, first, broader coverage of the rules than applies to the EU under the GPA, to embrace procurement that is outside the GPA but subject to the EU’s internal rules. As Wang explains further in this same issue of the Review, the EU’s internal regime is broader than that of the GPA in several respects. First, the EU regime covers in principle certain additional utility sectors, namely gas and heat, postal services and the extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels. Secondly, the EU regime but not the GPA covers certain utilities purely on the basis that they have special or exclusive rights in relation to the utility activity in question, even though the entities are not “public” in any other sense. This more extensive coverage of utilities is reflected, as we have seen, in the agreement with Switzerland, although it is true that this is a special situation given the broader package of measures relating to Switzerland.

Thirdly, the EU’s internal regime covers works and services concessions, the general status of which is somewhat unclear under GPA rules, including the basic definition of procurement. The EU has, however, recently sought to include concessions within its trade agreements as seen, for example, in its recent agreements with both South Korea and Singapore, no doubt influenced by the deeper regulation of concessions in the internal EU’s regime under Concessions Directive 2014/23. Fourthly, under the TFEU obligations of national treatment and transparency cover all contracts of cross-border interest, as assessed on a case-by-case basis, even those below the Directives’ thresholds; this approach has no parallel in the GPA, which applies only to contracts above the thresholds specified for each Party (which for the EU are coordinated with those of the directives).

Fifthly, the GPA’s coverage of hard defence procurement is more limited. Coverage that is based on the EU rules, rather than the GPA, as a starting point could potentially cover all these matters which are, of course, regulated in the UK at present in accordance with its obligations as an EU Member States.

Secondly, an EU-UK agreement might also include award procedures and/or rules on supplier review that go beyond those of the GPA. So far as award procedures are concerned, the EU and GPA regimes are similar in their essentials. They have developed in parallel and influenced each other over many years, and to the extent that the EU’s internal regime has not provided for the minimum

requirements of the GPA, the internal regime has been adapted to do so even though, technically, it was necessary to make such adaptations only for the benefit of suppliers from non-EU GPA Parties, and not to the internal regime itself103. However, whilst mirroring the GPA minimum requirements, the EU directives also include many more strictures than the GPA on important matters. For example, for entities and contracts covered by the 2014 Public Contracts Directive, the possibility of using procedures involving negotiation is more limited104 than under the GPA (where this is generally allowed where signalled in advance105), as is use of mandatory qualification systems106, whilst under both the 2014 Public Contracts Directive and 2014 Utilities Directive electronic procurement is mandatory107 (although with a transition period in many cases). The EU Directives also include complex and uncertain provisions on an array of detailed matters not addressed at all, or not addressed in a detailed manner, in the GPA, which entail additional obligations and restrictions; to take just a few examples, they include limits on use of award criteria relating to experience of staff108, rules on life-cycle costing109, obligations relating to sub-contracting110, and detailed rules on evidence of proof of financial and technical ability111, including a general requirement to accept self-declarations on many matters prior to the actual contract award112. The EU remedies regime113 is also more stringent in many respects: in particular, the GPA has no requirement for a standstill between notification of award and conclusion of the contract such as exists under the EU regime, nor a requirement for automatic suspension of awards; nor is there any requirement of ineffectiveness such as applies in the EU for unlawful direct awards or certain breaches of standstill and suspension rules114. The EU public sector regime also differs in requiring the possibility of set aside of unlawful decisions as a general rule115 rather than allowing damages as an alternative116, and in requiring any damages remedy to include lost profits117. The EU also, of course, has a significant centralised mechanism for monitoring, enforcement and interpretation through the European Commission and CJEU118 as well as provision in the 2014 directives for a more extensive

103 On this and the adaptations see the historical account of the EU procurement regime in S.Arrowsmith, The Law of Public and Utilities Procurement Vol.1 (3rd ed, 2014; Sweet & Maxwell), in particular paras 3-35-3-37.
104 See 2014 Public Contracts Directive Art.26(3) (innovation partnership) and Art.26(4) (competitive dialogue and competitive procedure with negotiation).
105 GPA 2012 Art.XII(1), also allowing negotiations where no tender is obviously the most advantageous.
110 E.g. 2014 Public Contracts Directive Art.70(1).
114 Remedies Directive Art.2(1)(b).
115 As under GPA 2012 Art. XVIII(7)(b).
116 As indicated by Advocate General Cruz Villalón in Case C-568/08, Combinatie Spijker Infrabouw and others v Provincie Drenthe, CJEU judgment of 9 December 2010, para.110 of the Opinion GPA 2012 Art.XVIII(7)(b) states that damages may be limited to costs.
Several factors may give impetus to conclusion of an arrangement between the EU and UK in procurement that is broader and/or deeper than the GPA in some or all of the above respects, and make it a distinct possibility. One factor, as we have seen, is that in all the areas referred to above – coverage, award procedures and enforcement – the EU has included, or sought to include, broader or deeper rules based on the Directives in other trade agreements, even with countries that are not potential candidates for accession, in the limited cases in which this has been feasible. Secondly, given that the UK has both agreed and applied the EU rules in full already, and has had input into their content, acceptance of these rules in a new trade agreement, as regards both open markets and the supporting award procedures and remedies, is very much easier for the UK than for other countries. This is the case politically in terms of the substance of commitments (including regulation of private sector entities), and from the perspective of the technical adaptations and resources needed for compliance – a not inconsiderable consideration in this complex area. Whilst lack of familiarity and input makes it unreasonable to impose the EU Directives’ detailed procedures and remedies on other trading partners, leading the EU to accept broadly comparable or even more limited rules, these arguments do not have force for the UK. Thirdly, any national treatment commitment that would presumably be included in any agreement would entail the EU Member States applying the award procedures and supplier review provisions of the EU regime (which apply to national suppliers as well as to those from other Member States\(^\text{120}\)) for the benefit of UK suppliers, and the EU may be reluctant to do this without full reciprocity; application of the less stringent GPA procedures and remedies might be considered unacceptable in light of the ease with which the UK could apply them, even if adequate for other trading partners.

However, even in an agreement not confined solely to the GPA framework it is clearly possible that the full EU regime might not be applied. As regards coverage, one might well envisage exclusion of hard defence procurement from a general regime, even if arrangements for mutual access to markets might be envisaged in the context of continuing defence cooperation through, in particular, the European Defence Agency (which has arrangements with, for example, Switzerland and Norway)\(^\text{121}\). Other sensitive areas, such as health services, public-public arrangements or voluntary organisations might become issues of negotiation. As in many other trade agreements it might also be considered inappropriate to regulate procurement below the Directives’ thresholds and/or the UK may resist this as disproportionate or undesirable – for example, because of political pressure to use procurement to promote local Small and Medium-Sized Enterprises (SMEs) or because the EU’s rules are regarded as too bureaucratic and uncertain, and of limited value\(^\text{122}\). It is also conceivable that the UK might want to negotiate for more limited award procedures and supplier review in certain respects – perhaps even for a regime based on the GPA, as with other EU trading partners, but combined with broader coverage than the GPA in the utilities sectors, as with the Swiss model. However, adding any bespoke elements to an agreement would introduce difficulties and delay.

It is impossible to predict what might happen in these respects in light of the many factors that could affect the position, including the parties’ political stance in the overall negotiations and the domestic political concerns at the time of negotiations that might influence the approach to carve-outs. Given this situation the precise impact of any trade agreement on the three aspects of procurement policy


\(^{120}\) Case C-87/94 Commission v Belgium [1996] E.C.R. I-02043

\(^{121}\) See https://www.eda.europa.eu/; A. Georgopoulos “The EDA and EU Defence Procurement Integration”, in N. Karampekos and I Oikonomou (eds), The European Defence Agency (Routledge, 2015) 118.

\(^{122}\) For detail and critical analysis of these rules see S.Arrowsmith, The Law of Public and Utilities Procurement Vol.1 (3rd ed, 2014; Sweet & Maxwell), paras 4-33-4-39 and the works cited there.
– industrial policy, social and environmental policy, and award procedures and remedies – is also impossible to assess. However, what is clear is that any bespoke procurement agreement will continue to preclude industrial policy measures through procurement to a very large extent, although some limited scope could appear for this in areas such as hard defence and low-value procurement which might be taken out of the open market and on which there are also no commitments to other countries. A regime based otherwise on current EU rules would, however, leave untouched the scope for domestic flexibility on award procedures and supplier review.

To the extent that EU definitions and rules (for example, on aggregation) continue to be used for defining coverage – which, as we suggest below, is to be expected even under a GPA-based solution and therefore a fortiori under a bespoke agreement – and to the extent that EU rules and remedies continue to apply, one issue will be how the rules are to be interpreted as they evolve within the EU through new legislation and jurisprudence. Of course, this is not just an issue for public procurement, and will need to be addressed in any wider trade package. No doubt some kind of joint committee of the Parties would be established as with the EU’s other trade agreements. However, any automatic reception of new rules would be controversial and perhaps unlikely, especially in the light of the Prime Minister’s recent statement that the UK will not submit to the CJEU. This is one factor that may be an obstacle to concluding a wide and deep trade agreement with the EU more generally, and may give impetus towards a solely or largely GPA-based solution for public procurement.

The exact extent of the UK’s own access to EU procurement markets will, of course, depend on the UK’s own coverage, as any agreement will certainly be based on reciprocity; thus any limitations in relation to, for example, defence or low value procurement, will be mirrored in a corresponding loss of access to the relevant EU markets.

How likely is such a bespoke agreement that goes beyond the GPA framework at least in some respects? If a general trade agreement can be concluded then it is almost certain that public procurement will be included: this is very likely to be the preference of the UK in order to retain access to EU procurement markets (as discussed further below) but it is anyway unlikely to be possible to exclude procurement in light of the EU’s policy of including procurement in its trade agreements. Assuming procurement provisions are included, it is very possible that they will be influenced by the scope, rules and remedies of the current EU regime, perhaps to a significant degree, and go beyond the GPA framework. However, the political and practical difficulties of concluding any broad and deep trade agreement with the EU in the immediate aftermath of Brexit means that trade relations both in public procurement and more generally may well be based, at least initially, solely on the WTO framework – the so-called “brutal Brexit”.

4. The “GPA option”: limited change - but for the better?

4.1. The practicalities and possibilities of GPA accession

This “brutal Brexit” scenario under which UK departs from the EU without a specific trade agreement with the EU means that the relationship will be governed only by WTO trading rules. To a large extent, in particular as regards the tariffs imposed on goods under GATT (which range from 0-45%), this means that the EU must apply to the UK the same rules that it applies to other WTO members, by virtue of Most Favoured Nation (MFN) requirements (and vice versa). As explained, by Ping Wang in his article elsewhere in this issue of the Review123, the UK is already a member of the WTO.

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in its own right, although new schedules of commitments may be needed in many areas since the UK’s current commitments apply only by virtue of its EU membership.\(^{124}\)

However, the position of government procurement is a little different. This is governed mainly by the GPA\(^{125}\) but, unlike the other key WTO Agreements, the GPA is a plurilateral agreement – that is, it is optional and depends on specific accession. This provides the main basis for the relationship in public procurement between current EU members – including the UK – and many of the EU’s main trading partners, as well as for the relationship of other GPA countries inter se. As Ping Wang’s article also explains, however, the UK is not a Party to the GPA other than through its EU membership. His view and that of most others\(^{126}\) is that the UK will after Brexit therefore need to apply to accede to the GPA in the same way as any other country seeking to become a Party, although a different view put forward by Bartels is that the UK will remain Party to the GPA automatically in its own right in accordance with rules of customary international law on accession to treaties and past practice under GATT 1947.\(^{127}\) It can be noted that MFN rules are generally considered inapplicable in relation to GPA coverage (MFN treatment is not required to be extended even to the Parties to the GPA itself, let alone between all WTO members)\(^{128}\). Thus the UK will not enjoy access to any significant procurement markets under WTO rules unless it is a Party to the GPA.

Assuming that a GPA accession application will be needed for this, then regardless of whether there is a specific EU–UK trade agreement it seems quite likely that the UK will wish to make an application, in order both to retain its current access to GPA Parties’ procurement markets and to gain access to the procurement markets of the increasing number of countries that have applied to join (notably China) or are interested in this. As Ping Wang points out, GPA accession will also facilitate continuing UK access to third country markets that it currently enjoys as an EU Member State, since the agreements providing this access are, as we have seen, based largely on GPA templates. Further, if there is no bespoke UK–EU agreement, the incentive for the UK to join the GPA will be even greater, since the GPA will then provide a basis for UK access to the EU’s own procurement markets. The importance of this is enhanced by the fact that whilst EU markets are largely open de facto at present even to countries without legal rights to access, the position may change if the EU eventually adopts its proposed trade instrument on restricting access to EU markets for third countries that do not provide reciprocal access.\(^{130}\) Further, the UK has been a key voice within the EU arguing for liberalisation, including in opposing this trade instrument, recognising that

\(^{124}\) Wang suggests that this will be formally addressed by way of “modification” of commitments e.g. under GATT Article XXVIII and GATS Article XXI. A different view is put forward by Bartels, who suggests that there will merely be a change which is not a modification, since it is only the issue of who will exercise the UK’s WTO rights (the UK or EU) and not the underlying rights which are affected: L. Bartels, “The UK’s Status in the WTO after Brexit”, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747.


\(^{130}\) European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries COM/2016/034 final. However, opposing an instrument that may require the UK to exclude certain third countries from its markets is not the same as choosing simply to have freedom of action to do in its own discretion.
even unilateral liberalisation is often economically beneficial. Of course, by reason of this fact Brexit itself could improve the prospects of the trade instrument being adopted, and of the UK being shut out of EU procurement markets unless it concludes some specific reciprocal arrangement. As Ping Wang also points out, GPA accession is also more attractive for the UK than for many other countries, since negotiation and compliance costs will be limited given that the Agreement already applies in the UK.\(^{131}\)

On the other hand, the value of access to EU procurement markets under the GPA will be less than the value of current access since it will be affected by general trade barriers (such as tariffs on goods imported for public contracts) which will be greater after Brexit. It also cannot be totally ruled out that the Government might decide against GPA accession anyway, including as a result of political pressure to use public procurement as an industrial policy tool, if this were not already constrained by a separate EU agreement. However, this does seem unlikely.

Accession will, of course, depend not merely on the UK’s preference in light of these considerations, but on acceptance by GPA Parties, and in this regard the key question is whether the EU will assist or hinder the UK’s application. This is again impossible to predict. It is possible that in the context of a “brutal Brexit” the EU might be unwilling to go beyond the minimum required by its strict WTO obligations and therefore be unwilling to conclude any agreement on procurement, including through the GPA. However, given the EU’s push for GPA accession for all WTO members, including by requiring a commitment on this as a condition of WTO membership for new members (as happened, for example, with China), it may be politically awkward to take a different approach to the UK, and the fact that procurement negotiations between the EU and UK can be addressed within the WTO forum separately from other matters should facilitate agreement on this subject. Further, as Ping Wang points out, UK accession to the GPA could help ensure that the EU itself is not subject to successful compensation claims by other GPA Parties as a result of the lower value of EU markets under the GPA following Brexit.\(^{132}\)

4.2. Coverage issues

If the UK does decide to accede to the GPA and this is accepted by the Parties, what markets the UK will open up will depend on bilateral negotiations with the different Parties. (Unlike under the EU rules, there is not a pre-determined and identical scope of coverage for all countries and also, as noted above, a Party is not required to give the same commitments to all trading partners.) Coverage for each Party is set out in Annexes referring to different aspects of coverage (Annex I for each Party listing covered central government entities, Annex 2 dealing with most sub-federal and local coverage etc).

In principle the EU (including the UK at present) opens up most procurement covered by the Directives, but with some significant limitations which, as mentioned, relate mainly to private utilities, certain utility sectors, concessions, and defence procurement; and the GPA, unlike the EU’s internal regime, is also not applicable to contracts below the Directives’ thresholds. Further, to the extent feasible EU coverage is set out using the concepts and definitions in the Directives, to secure a harmonised approach between the GPA and the internal regime. Thus, for example, Annex 2 uses the concept of “body governing by public law”, that is used in the Directives to define coverage of Annex 2 entities that are not “regional” or “local” contracting authorities, whilst Annex III relating to utilities uses the concept of a “public undertaking” that is used in the Utilities Directive and also uses that Directive’s definitions to delimit covered utility activities. The EU does not provide access


\(^{133}\) As defined in e.g. 2014 Public Contracts Directive Art.2.(1)(4) and 2014 Utilities Directive Art.3(4).

\(^{134}\) As defined in 2014 Utilities Directive Art.4(2).
to all this procurement, however, to all Parties: where others do not reciprocate in a particular area (for example, a specific utility sector), the EU limits access to its own equivalent procurement\(^\text{135}\).

If the UK does decide to apply to join the GPA it might well be expected that the UK’s coverage offer will reflect its current coverage and, even apart from this, will continue to use “EU” terminology and definitions. This will certainly speed up accessions negotiations. It is significant in this regard that the UK Governments have recently used “EU” concepts to define the scope of certain purely domestic procurement rules and powers. Thus the entities potentially subject to regulation under s.39(1) of the Small Business, Enterprise and Employment Act 2015, which gives to the Minister for the Cabinet Office or the Secretary of State a general power to make regulations on public procurement, are defined by reference to the concept of “contracting authority” under the EU’s 2014 Public Contracts Directive\(^\text{136}\). The Public Services (Social Value) Act 2012, requiring consideration of environmental/social considerations in relation to certain services contracts, again uses the concept of contracting authority to define entity coverage\(^\text{137}\) as well as referring to the EU concept of a public service contract\(^\text{138}\) to define the types of contracts covered\(^\text{139}\). The Equality Act 2010 also refers to both the concept of contracting authority\(^\text{140}\) and the functions regulated by the 2014 Public Contracts Directive\(^\text{141}\) in delimiting the Ministerial power under that Act to make regulations on how the Public Sector Equality Duty\(^\text{142}\) will apply. The Procurement Reform (Scotland) Act 2014 also uses the “EU” concepts of contracting authority and public contracts to define the coverage of the Act\(^\text{143}\), which, inter alia, imposes a general duty of sustainable procurement and regulates procedures for both contracts above and (in certain cases) below the EU thresholds. In view of their familiarity both within the UK itself and to its trading partners, it seems very possible that the UK will choose to use these concepts of EU origin in future arrangements unless there is a good reason for a different approach. So far as substance, rather than merely terminology is concerned, there may be some desire by the UK to depart from EU GPA-coverage in some sensitive areas, as mentioned earlier in considering the possibility of a bespoke agreement with the EU. However, given that doing so may delay and complicate accession and that most of the sensitive areas mentioned earlier are either not covered by the GPA (low-value procurement) or their coverage is uncertain (public-public arrangements\(^\text{144}\)), this is perhaps unlikely.

It is also worth reiterating that the EU’s negotiations with other GPA countries to extend opening of procurement, including with the United States under TTIP and Canada under CETA, to some extent aim at extending the scope of covered procurement markets within a GPA framework. Were the UK to leave the EU, the UK could conclude a separate agreement – or no agreement – with the US and Canada, potentially adding complications to the UK’s GPA negotiations, although it might also merely conclude agreements on the coverage terms already negotiated.

**4.3. The implications of a GPA solution: industrial development policies**

\(^\text{135}\) As set out in the “Notes” section of the relevant EU Annexes.

\(^\text{136}\) By referring to the definition of “contracting authority” in the domestic Public Contracts Regulations 2015 S.I. No.102, which implement the 2014 Public Contracts Directive in domestic law.

\(^\text{137}\) Public Services (Social Value) Act 2012 s.1(1) and 1(15), defining the basic duty as applicable to contracting authorities.


\(^\text{139}\) Public Services (Social Value) Act 2012s.1(1) and s.1(15)(a).

\(^\text{140}\) Equality Act s.155(2) and (3).

\(^\text{141}\) Referred to in the Act as the “Public Sector Directive”: Equality Act s.155(2) and (3).

\(^\text{142}\) The duty under s.149 of the Equality Act requiring public authorities to have due regard to equality considerations in exercising their functions.

\(^\text{143}\) Procurement Reform (Scotland) Act 2014, s.2 and s.3.

What would be the implications, then, of the UK’s trade relationships in public procurement being based solely on the GPA?

Regarding the first aspect of our enquiry, industrial development policies, we have already noted that for covered procurement there would be little change in the ability of the UK to use procurement as a policy tool – for example, to protect declining industries, promote new ones, support local or national employment, promote national SMEs or assist less-developed regions; it is requirements not to favour national industry from which most constraints derive in this regard and these will apply under the GPA for covered procurement. In contrast with the position under the EU rules there is in theory scope to negotiate exceptions even for covered procurement – for example, for specific policies - since everything related to coverage depends on negotiation. However, politically there is no realistic prospect of this for new accessions from developed countries; this is signalled formally by inclusion in the revised GPA 2012 Art.V of specific provisions contemplating special arrangements for developing countries (and only on a temporary basis) and by the commitment in future work programmes to eliminate existing discriminatory measures. There are general derogations that may be invoked under GPA 2012 Art.III.1, concerning security and defence, and Art.III.2, allowing measures necessary to protect public morals, order or safety, human, animal or plant life or health and intellectual property, and relating to goods or services of persons with disabilities, philanthropic institutions or prison labour. However, while their scope remains largely untested, they seem to have little application to industrial policy. Where an impact may be seen, however, is in relation to procurement that is no longer covered by any international rules, in particular low-value procurement and hard defence procurement. How the UK might react to greater flexibility in these areas is considered briefly later below.

**4.4. The implications of a GPA solution: social and environmental policies**

So far as concerns use of procurement to promote social and environmental policies, some measures are clearly constrained by the GPA’s national treatment rules, as they are by the EU rules. As regards the constraints of procedural rules on these policies, on the other hand, the position is rather uncertain. In particular, whilst the procedural rules of the Directives have been subject to extensive judicial interpretation and legislative clarification that has largely limited measures to those connected with the contract’s subject matter, those of the GPA have not yet been considered from this perspective and it is unclear whether they involve the same restrictions. Thus, in particular, it remains unclear under the GPA whether award criteria based on the “most advantageous tender” basis are limited in this way, ruling out, for example, price preferences for SMEs or minority owned businesses; whether contract conditions are also so limited, precluding conditions that do not concern the works, supplies or services or the way they are delivered – for

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147 GPA 2012 Art.XXII.7.


149 GPA 2012 Art.XV.5 simply provides that the award must be based on the lowest price or most advantageous tender criteria without any explicit reference to the need for a link to the subject matter of the contract as is now included in the EU Directives (e.g. Public Contracts Directive Art.67) – a requirement originally developed by the CJEU in Case C-513/99, Concordia Bus Finland v Helsinki [2002] E.C.R. I-7213, in interpreting provisions in the earlier Directives that referred merely to lowest price or “most economically advantageous tender” (i.e. similar to the language of the current GPA) without explicit reference to a link to the contract’s subject matter.
example, prohibiting government suppliers from investing in unethical industries\textsuperscript{150}, or whether suppliers can be excluded based on general social or environmental considerations, such as their willingness to follow “fair” recruitment or fair trade policies in their business as a whole\textsuperscript{151}. These uncertainties cannot be discussed in detail here but have been examined by the author elsewhere\textsuperscript{152}. It is on the resolution of these uncertainties that the extent of flexibility under the GPA mainly turns. There are also some other respects in which GPA-only award procedures may offer a bit more flexibility in using procurement in support of social or environmental policies – for example, in allowing rejection in advance of tenderers that are unable to comply with social and environmental requirements relating to contract performance, which is not always permitted under EU law\textsuperscript{153}; and in permitting exclusion for past failure to comply with social and environmental contract obligations under less strict conditions than is provided for under EU law\textsuperscript{154}. Finally, regardless of any general need for a link to the subject matter, the GPA derogations may ensure wider scope for social or environmental policies than is possible under the EU Directives; in particular, the derogation relating to persons with disabilities and philanthropic institutions could allow for various mechanisms to be used in support of opportunities for those groups which are not possible under the EU regime, including price preferences and direct awards\textsuperscript{155}.

EU law also imposes certain obligations relating to social and environmental procurement, including under the Directives. Thus the 2014 Public Contracts Directive, for example, includes an obligation to ensure that suppliers comply with various applicable social and environmental laws and international conventions\textsuperscript{156}; an obligation to take into account accessibility considerations and design for all users\textsuperscript{157}; a requirement to give reasons for not dividing procurement into lots (to support SMEs)\textsuperscript{158}; and an obligation to exclude undertakings with convictions for certain offences of EU concern\textsuperscript{159} or adjudicated to be in default with tax or social security payments\textsuperscript{160}. These obligations the UK would also be free to disregard after Brexit under a GPA-only regime\textsuperscript{161}.

\footnotesize
\begin{itemize}
\item \textsuperscript{150} This is not expressly referred to anywhere, as it is in the EU Directives (e.g. in 2014 Public Contracts Directive Art.70 limiting special conditions (a concept covering many social and environmental conditions) to those limited to the subject matter of the contract), but could, for example, be deduced from other GPA provisions that possibly require a link to the contract’s subject matter.
\item \textsuperscript{151} The provisions on exclusion in GPA 2012 Art.VIII.4 are ambiguous as the listed exclusion grounds are indicated as being illustrative only and it is not clear what other exclusions are allowed.
\item \textsuperscript{152} S. Arrowsmith, Government Procurement in the WTO (Kluwer; 2003), pp.331-334.
\item \textsuperscript{153} In Case 31/87 Gebroeders Beentjes BV v Netherlands [1988] E.C.R 4635 the CJEU interpreted the provisions of the predecessor Directives to 2014 Public Contracts Directive as precluding rejection for perceived inability to comply with conditions that are “special conditions” – a concept covering many contractual requirements of a social and environmental nature. It is not clear that the similar, although far from identical, GPA provisions on qualification conditions, contained in GPA 2012 Art.VIII, will be interpreted in the same way.
\item \textsuperscript{154} GPA 2012 Art.VIII.4c allows the possibility of exclusion merely for “significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts” whereas EU law requires that such deficiencies be followed by “early termination of that prior contract, damages or other comparable sanctions”: 2014 Public Contracts Directive Art.57(4)(g).
\item \textsuperscript{155} Because of the general requirement for a link to the subject matter of the contract and strict limitation of direct awards; the only specific derogation is one allowing set asides for disadvantaged groups and even then via EU-wide competition rather than set asides for national institutions: see, for example, 2014 Public Contracts Directive Art.20, and also Case C 113/13 Azienda sanitaria locale n. 5 ‘Spezzino’ v San Lorenzo Soc. coop. sociale, ECJ judgment of 11 December 2014, para.44 of the judgment, regarding the restriction on set asides outside this Article, including for voluntary institutions.
\item \textsuperscript{156} 2014 Public Contracts Directive Art.18(2).
\item \textsuperscript{157} 2014 Public Contracts Directive Art.42(2).
\item \textsuperscript{158} 2014 Public Contracts Directive Art.46(1).
\item \textsuperscript{159} 2014 Public Contracts Directive Art.57(1).
\item \textsuperscript{160} 2014 Public Contracts Directive Art.57(2).
\end{itemize}
The (possibly) greater scope for promoting policy goals through procurement under GPA-only coverage and award procedures, as described above, may be attractive to policy-makers both in Westminster and in the devolved jurisdictions, as well as to contracting authorities, particularly local authorities. In the late 1980s and 1990s UK central government was largely hostile towards, and at best unenthusiastic about, this use of procurement, both on its own account and in its view of the place of such goals in the procurement of sub-central entities. The latter concern culminated in the 1988 Local Government Act which significantly restricted local authorities’ use of procurement as a policy tool. However, in recent years the climate has changed and the policy dimension of public procurement has become of increasing political and practical importance in all UK jurisdictions, one prominent feature being support for SMEs and the voluntary and community sectors. This has been reflected, in particular, in legislation imposing positive duties to consider using procurement as a policy tool. Thus the s.149 of the Equality Act 2010 (applicable in England and Wales and in Scotland) imposes broad obligations on all public purchasers to promote equality (gender equality, racial equality etc) in the exercise of their functions, which includes public procurement; the Public Services (Social Value) Act 2012, applicable in England (and in Wales to authorities that do not mainly or wholly exercise devolved functions) requires public purchasers awarding larger services contracts to consider how what is being procured might improve the social, economic and environmental well-being of their area; whilst in Scotland there is now, as mentioned above, a general duty of sustainable procurement under the Procurement Reform (Scotland) Act 2014, s.9(1), for all but the smallest contracts, modelled to a degree on the Public Services (Social Value) Act 2012 and referring specifically to improving the economic, social, and environmental wellbeing of the authority’s area, facilitating the involvement of small and medium enterprises, third sector bodies and supported businesses, and promoting innovation.

A GPA-only regime would, inter alia, allow the UK Governments to give their procuring entities greater flexibility in carrying out these duties by removing current restrictions that limit measures taken to those relating to the contract. It could also result in significantly greater flexibility with, for example, lower value procurement covered by the duty of sustainable procurement in Scotland - which would be unregulated at international level - including to allow support of local SMEs and voluntary organisations. However, it is impossible to predict the extent to which current laws and practices would actually be modified. For example, there is a certain tension between, on the one hand, policies supporting SMEs and voluntary organisation and, on the other hand, other policies (environmental policies, preventing discrimination etc) which often involve increased bureaucracy and costs and which can have a disproportionate effect on these same SMEs and voluntary organisations. This consideration, the need to balance the benefits of policies with other costs, and the uncertainty over the legal position under the GPA could well led to the maintenance of current restrictions on policies that go beyond the contract being awarded. So far as low value procurement is concerned, there could be significant political impetus for local or regional protectionism. This could be significantly detrimental to national welfare, and might end up being restricted through agreements by and between Westminster and the devolved administrations (as it is already under domestic law for some authorities under s.17 of the 1988 Local Government Act). Whilst many of the EU-level restrictions on using procurement as a national policy tool in the social and environmental context are, it is submitted, unjustified in light of the appropriate balance...

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163 Which, reflecting EU law, are made explicit in the Public Services (Social Value) Act and the duty of sustainable procurement in Scotland: Public Services (Social Value) Act 2012 s.1(6), Procurement Reform (Scotland) Act 2014, s.9(2), referring to “matters that are relevant to what is proposed to be procured”.
between trade considerations and national discretion\textsuperscript{165}, caution would be needed over the use of this tool in a less restrictive international environment\textsuperscript{166}.

4.5. The implications of a GPA solution: award procedures

Conversely, it is submitted that so far as contract award procedures are concerned, the greater flexibility afforded by a GPA-only regime presents an important opportunity to improve the national regime, and that this in fact provides a strong argument for the UK to favour a GPA-only approach should this be available\textsuperscript{167}.

In this regard the author has already argued prior to the 2014 revisions for reform of the EU’s own regime to introduce real simplicity and flexibility\textsuperscript{168}. To reduce complexity and uncertainty it was argued that the EU should regulate procurement through a single instrument that establishes a single set of procedures for all major procurement (thus eliminating both differences in rules and boundary disputes) and that, both to this end and to provide the most appropriate balance between national and EU objectives by increasing flexibility, this instrument should take as its starting point the procedural rules of the pre-2014 Utilities Directive. The arguments for such an approach at EU level remain following the 2014 reforms. Whilst the reforms have to some extent addressed the flexibility issue, in particular by extending scope for procedures that involve some negotiation\textsuperscript{169}, at the same time they have reduced flexibility in certain ways including, arguably, by limiting negotiation after final tenders\textsuperscript{170}. In any case, the very fact that the core public sector regime of the 2014 Public Contracts Directive is now closer to that of the other directives\textsuperscript{171} actually makes the further step of a single Directive both more justified and easier to achieve. Further, complexity and uncertainty have been further exacerbated by the reforms – for example, by the reforms to competitive dialogue and the old negotiated procedure with a notice, which leave the difference between, and purpose of, those procedures rather unclear\textsuperscript{172}; by the introduction of additional detailed and poorly drafted provisions – for example, on award criteria\textsuperscript{173}; and by the adoption of

\textsuperscript{166} On the relevant considerations see S. Arrowsmith, “Horizontal Policies in Public Procurement: a Taxonomy” (2010) 10 Journal of Public Procurement 149.
\textsuperscript{167} This benefit would obviously be available also under an agreement with the EU that combined GPA-only award procedures with broader coverage - for example, to take in all utility sectors and/or private utilities operating on the basis of special or exclusive rights.
\textsuperscript{168} S. Arrowsmith “Modernising the EU’s Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility” (2012) 21 P.P.L.R. 71.
\textsuperscript{169} By providing wide grounds for using competitive dialogue and the competitive procedure with negotiation under the 2014 Public Contracts Directive (Art.26(4)).
\textsuperscript{170} Resulting from the fact that negotiations available within the negotiated procedure with prior publication under the 2004 Public Sector Directive may now be significantly restricted in under the replacement competitive procedure with negotiation under the 2014 Public Contracts Directive by the requirements for final tenders envisaged under Art.29(7). See J. Davey, “Procedures Involving Negotiation in the New Public Procurement Directive: Key Reforms to the Grounds for use and the Procedural Rules” [2014] 23 P.P.L.R.103.
\textsuperscript{171} For example, as a result of extension of use of procedures involving negotiation in the 2014 Public Contracts Directive as mentioned above, greater regulation of frameworks in the utilities sector (under 2014 Utilities Directive Art.51) to align them more with the public sector rules, and provision for sub-central entities under the 2014 Public Contracts Directive to enjoy additional flexibilities already available to utilities in relation to advertising and time limits.
the separate Concessions Directive, despite the fact that from the perspective of award procedures it is not possible in the author’s view to distinguish concessions from other complex contracts\textsuperscript{174}. 

Leaving aside the issue of EU-level reform, however, a GPA-only approach for the UK would enable the UK to reform its own procurement regime in this direction, and to address many of the problems that arise from the obligation to apply the EU regime. Under this approach the UK jurisdictions could choose to regulate using a single instrument with largely identical award procedures, with the advantages that entails, while maintaining an approach that is sufficiently flexible to meet commercial needs.

This arises, first, from the fact that the GPA itself - similar in this regard to the early Directives\textsuperscript{175} - is a relatively simple and streamlined instrument, which to a large extent provides a single set of rules for all covered procurement, although there are some stricter rules for central government\textsuperscript{176} (including on means of advertising and time limits)\textsuperscript{177}. Domestic legislation implementing the GPA could simply follow this single streamlined approach. Greater standardisation than exists at present is, of course, possible in the UK even under EU rules. However, this can be achieved only by adopting stricter rules than necessary for some entities and contracts (those covered by the utilities, concessions and defence rules) along the lines of the 2014 Public Contracts Directive, which is undesirable. In any case, the scope for doing this has been reduced by the 2014 reforms – for example, these reforms limit the possibility for Member States to preclude contracting entities from using all of the competitive award procedures, arguably limiting the possibility of aligning procedures between the different regimes\textsuperscript{178}. A GPA-only framework, however, allows for a single and simple approach within a sufficiently flexible framework.

This links with the second advantage of a GPA-only regime which is that the UK jurisdictions could, if they wished, increase flexibility for procurements currently covered by the 2014 Public Contracts Directive. The author’s view is that for the UK a regime based very broadly\textsuperscript{179} on the framework of the Utilities Directive – the minimum standard for procedures which the author has proposed for the EU regime and which in any case follows for the most part from the requirements of the GPA - is the most appropriate (although this would not be the case for every Member State were such flexibility given at EU level). This would, in particular, allow all entities to require registration on qualification systems as a mandatory condition of participation and as the basis for selecting participants, with the benefits that entails\textsuperscript{180}, greater use of procedures involving negotiations outside the constraints of the (rather unclear) grounds in Art.26(4) of the 2014 Public Contracts Directive, eliminating the caution that may be induced by uncertainty; and access to procedures involving significant possibilities for negotiation after the final tender stage, which is useful for major and novel projects\textsuperscript{181}.

\textsuperscript{176} Those listed in Annex I of the Parties’ Annexes.
\textsuperscript{177} As reflected already in the different rules on these matters for central and local entities in the 2014 Public Contracts Directive.
\textsuperscript{178} See Utilities Directive Art.44(2) which seems to preclude restricting access to flexible procedures for any procurement i.e. to prevent use being restricted to the same circumstances as allowed under the public sector rules.
\textsuperscript{179} In addition to the specific matters discussed below there are also some other areas where departure from the rules of the original Utilities Directive may be appropriate – for example, in the area of drafting specifications (where the rules in Art.X GPA might usefully be adopted directly).
\textsuperscript{180} On these and on balancing cost and benefits see S. Arrowsmith, Government Procurement in the WTO (Kluwer; 2003), pp.233-236.
\textsuperscript{181} As we noted earlier this may be limited under the competitive procedure with negotiation, and thus may apply now under the 2014 Public Contracts Directive only when using the innovation partnership procedure (which largely retains the structure of the old negotiated procedure with prior publication).
Such an approach would ensure compliance with GPA requirements in a manner that is cost-efficient, because familiar to stakeholders, in terms of the award procedures used - open procedure, restricted procedure, negotiated procedure with prior publication and negotiated procedure without prior publication – but without departing significantly from the traditional domestic starting point of regulating public procurement through non-legal means. In this regard, clarification that these procedures are based on those of the Directives, as interpreted in the case law, would enhance certainty. There is, it is submitted, no need to include the innovation partnership procedure introduced by the 2014 Directives, since the function of this procedure is already met by the negotiated procedure with prior publication\(^\text{182}\); its value is largely symbolic in highlighting the desirability of promoting innovation, and not worth the cost of unnecessarily complicating the legislation. Consideration might be given to including competitive dialogue for complex contracts, since the tighter discipline involved in this procedure at the post-tender stage as compared with the negotiated procedure with prior publication has proved beneficial\(^\text{183}\). However, another approach would be to encourage this tighter discipline within the negotiated procedure guidance, using guidance rather than legal regulation.

As regards detail of the procedural steps, this also should in general be provided only at the level of the 1990 or 2004 Utilities Directives, although adapted to some extent to follow the language of the 2012 GPA. For example, permitted award should be set out by reference to the GPA concepts of “lowest price” and “most advantageous tender” (rather than taking the convoluted and confusing approach of the 2014 Directives) with an explicit reference to the requirement for a link to the subject matter of the contract (taken from the 2004 Utilities Directive) if this requirement is considered desirable. However, legislation should exclude the detailed elaboration of this found in the 2014 Directives concerning use of criteria relating to experience and the possibility of taking into account all stages of the life-cycle\(^\text{184}\); if clarification is needed it should be given in guidance which can be easily amended and should certainly avoid the uncertainties of the language used in the 2014 directives.

So far as notices are concerned, the possibility might be considered of negotiating with the EU for continued use of the Official Journal of the European Union (OJ), subject to a contribution towards costs, ensuring that information on UK contracts is shown in OJ searches, and that key information is available in all EU languages. However, the latter is probably a marginal issue given the widespread knowledge of English and this approach would also involve continued use of the EU’s cumbersome standard forms. Not using the OJ for UK contracts would also not preclude access to information from Member States, since the information is publicly available. Thus requiring publication only through national media, such as ContractsFinder, may be a better solution, although possibly making use of EU tools such as the CPV where useful.

One issue deserving specific mention is the principle of transparency, which is an explicit principle of the EU directives\(^\text{185}\) and also applies under the free movement rules\(^\text{186}\). One aspect of this principle that gives rise to significant practical difficulties is that it requires all conditions and detailed rules of the procedure to be drawn up in the contract notice or contract documents in a manner that is “clear, precise and unequivocal” so that, first, “all reasonably informed tenderers exercising ordinary


\(^{183}\) On the evidence from the UK see S. Arrowsmith and R. Craven, “Competitive dialogue in the United Kingdom”, Ch.3 (pp.181-271) in S. Arrowsmith and S. Treumer (eds.) *Competitive Dialogue in EU Procurement* (CUP; 2012).

\(^{184}\) It will also necessary to remove the very confusing rules on treatment of abnormally low tenders (as to which see S. Arrowsmith, *The Law of Public and Utilities Procurement* Vol.1 (3rd ed.2014; Sweet & Maxwell) paras 7-252-7-270) or to replace them with something that is clearer reflecting the desired policy.

\(^{185}\) See, for example, 2014 Public Contracts Directive Art.18(1).

care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether tenderers satisfy the criteria.\textsuperscript{187} It appears that this requirement, as interpreted in the domestic courts by the Inner House of the Court of Session and by the Supreme Court in \textit{Healthcare at Home}, means that if a reasonably well informed and diligent tenderer ("RWIND" tenderer) could understandably and plausibly have construed criteria in different ways, then those criteria are insufficiently transparent\textsuperscript{188}. In this regard, the courts appear to have rejected the view taken at first instance by Lord Hodge that such a standard is unrealistic, as impracticable in the case of complex contracts, and should therefore be rejected\textsuperscript{189}. In the present author’s view, allowing a procuring entity to act on any reasonable interpretation provides a better balance between transparency and the interest in the smooth flow of the procurement process, provided that where there is more than one reasonable interpretation there is clarification on request of the way in which the provisions will be applied. Whilst the GPA contains, in Art.IV.4, a general obligation to conduct procurement in a “transparent” manner, the exact requirements of this have not yet been elaborated, and in the absence of further elaboration a GPA-only regime is likely to provide more scope for the UK courts to develop a more balanced approach.

Procedures based broadly on the earlier Utilities Directives would not go much beyond the GPA requirements and, as noted above, would not involve a change to the traditional UK approach of regulating by legally binding rules only insofar as is actually required by international obligations. Whilst detailed consideration of this issue is beyond the scope of this article, it is this author’s view that this is the right approach, in that very detailed regulation through legal means does not provide the best tool to achieve a balance between different procurement objectives.\textsuperscript{190} It would nevertheless be useful to include provisions on some additional matters, based on those of the 2014 Utilities Directive, which largely serve to adapt procedures to specific contexts. These should include rules on electronic auctions; these appear to work well and to create few problems.\textsuperscript{191} They could, however, be slightly adjusted to deal with some problematic aspects, notably the requirement to disclose all current rankings rather than just which is the winning bid, which may facilitate collusion.\textsuperscript{192} It would also be useful to include rules on dynamic purchasing systems, the 2014 rules being a significant improvement on those of 2004;\textsuperscript{193} and on framework agreements, those of the 2014 Utilities Directive being clearer and providing a better balance between discretion and transparency than those of the 2004 Utilities Directive. Rules on mandatory electronic procurement

\textsuperscript{187} Case C-368/10 \textit{Commission v Netherlands} ECJ judgment of May 10 2012 para.109.

\textsuperscript{188} \textit{Federal Security Services v Northern Ireland Court Service xx; Healthcare at Home v The Common Services Agency} [2013] Scots CS CSIH 22, para.57 of the Opinion. The Supreme Court did not specifically address this difference of view between the Outer House and Inner House, but did appear implicitly to accept the view of the Inner House, commenting in setting out the applicable law that transparency requires that the criteria are sufficiently clear to admit of a “uniform” interpretation by “all” RWIND tenderers (para. 8 of the judgment of Lord Reed in the Supreme Court; and see also para.14).

\textsuperscript{189} [2012] Scots CS CSOH 75, para.26 of the Opinion.


\textsuperscript{191} 2014 Utilities Directive Art.53.


might also be considered. (Those on electronic catalogues\textsuperscript{196}, on the other hand, should not be included, since they largely repeat, rather than clarify, the general rules of the directives applicable to such matters.) Doing this would go beyond the simple minimum requirements of the GPA itself, and to that extent is a departure from the approach to implementation adopted for the Directives. However, it would provide useful additional controls and certainty in areas that are not addressed at all, or are addressed only in a skeletal manner (as with auctions\textsuperscript{197}) in the GPA, using rules familiar to stakeholders.

Clarification on some issues, such as the principles governing changes to pre-stated award criteria and procedures - which should be permitted provided they are not material - might also be useful. However, these clarifications should be made through guidance wherever possible, to ensure flexibility in both application and amendment.

Whilst reform of the UK regimes along the above lines is highly desirable, however, and itself a good reason to push for procedures based on the GPA only, it is probably not realistic prior to GPA accession; if, as appears possible, no general trade EU-UK trade agreement is concluded at the time of Brexit, and the UK applies for GPA accession at that point, it will probably be expedient to maintain the current - EU based - regulations. This will provide a simple means of demonstrating GPA-compliance and will speed up accession negotiations, which will be delayed by the need, first, for drafting of any new legislation rules and, secondly, by the need for it to be scrutinised for compliance by other GPA Parties. Even if Bartels is correct that accession is not required, this may be disputed by the other Parties and in practice existing regulations will also need to be maintained pending resolution of the UK’s status. Further, maintenance of the existing regulations will be expedient anyway if the prospect of an ultimate agreement with the EU based on EU procedures is at least not ruled out at the time of Brexit, since the regulations may then be needed in the end to fulfil the requirements of any eventual agreement with the EU. Thus it is likely that any reform along the lines proposed above will be a long term project.

It is also relevant finally to note that if TTIP includes not just extended coverage but also development of common award procedures beyond what is provided by the GPA, any UK-US agreement on TTIP terms would, of course, necessitate the UK going beyond GPA procedures to that extent.

4.6. The implications of a GPA solution: supplier remedies

As mentioned, the GPA also sets minimum standards for supplier remedies (in GPA 2012 Art. XVIII), which are more flexible than those of the EU in some respects. It is uncertain how the UK regimes would react to this increased flexibility, but a few comments may be offered.

First, perhaps the most significant change under a GPA-only approach would be the absence of a standstill requirement, a requirement which has contributed to an increased level of complaints and challenge in the UK\textsuperscript{198}. It is far from clear that one or more of the UK jurisdictions would not decide to retain this requirement and this is arguably desirable: it has the laudable aim of promoting resolution of disputes before a contract is concluded, does not seem to cause particular problems, and is included in the 2011 UNCTIRAL Model Law\textsuperscript{199}. It is pertinent to mention that in the initial UK consultation on implementing the CJEU’s \textit{Alcatel} decision\textsuperscript{200}, which clarified the need for an effective set aside remedy, consultees expressed a preference for an ineffectiveness remedy for a short

\textsuperscript{197} See, in particular, GPA 2012 Art.1f and Art.XIV.
\textsuperscript{199} See, in particular, UNCTIRAL Model Law on Public Procurement 2011 Art.22(2) and (4).
\textsuperscript{200} Case C-81/98, \textit{Alcatel Austria v Bundeministerium für Wissenschaft und Verkehr} [1999] ECR I-7671.
period post-contract to a pre-contract standstill, to limit delay solely to challenged procurements\textsuperscript{201}. This was in the end rejected as possibly inconsistent with EU law. A post-Brexit GPA-only regime would not preclude this approach. However, preferences may be different now that the UK has experience of standstill requirements, and it is perhaps more likely that either standstill will be retained or nothing put in its place.

Another recent change to EU remedies law, which has again contributed to a recent increase in challenge and complaints\textsuperscript{202} but is not required by the GPA, is the provision for suspension of conclusion of the contract to be automatic rather than requiring specific action by suppliers. It is not clear whether or not the UK would wish to retain this if no longer obliged to do so under EU law.

The possibility for a supplier at least to obtain suspension on request is required by the GPA\textsuperscript{203}, on the other hand. It is arguable that the UK's current approach to suspension does not comply with the effectiveness principle of the EU Remedies Directive, in view of the "adequacy of damages" condition, consideration of cross-undertakings in damages and limited weight given to the interests of EU law in the balance of convenience\textsuperscript{204}; and in light of the European Commission's recent focus on remedies, UK rules on suspension might have been challenged by the Commission were it not for the outcome of the Brexit referendum. However, it is much less clear whether such an approach is precluded by GPA requirements. The GPA generally requires that remedies be effective\textsuperscript{205}, but this effectiveness requirement has yet to be elaborated. This weakens its de facto impact. Even if it is intended to create binding obligations at all, it is perhaps unlikely to impose the same constraints as the well-developed EU principle. This may reduce the incentive for change to the UK suspension rules. On the other hand, it is not impossible that the EU might take up this issue when considering whether the UK system complies with the GPA for the purpose of the UK's GPA accession.

As noted, other effects of a GPA-only solution would probably be to allow removal of any requirement for ineffectiveness for direct awards or (if standstill were adopted at all) for violation of that or for suspension requirements, as well as some relaxation of damages and set aside requirements. It is not clear how the UK would choose to react to such greater flexibility but certainly the possibility of removing damages for lost profits – which the UNCITRAL Model Law, like the GPA, makes optional\textsuperscript{206} – could be attractive.

As regards the forum for review, on the other hand, whilst GPA obligations may in some respects be less stringent than those of EU law, for example regarding procedures and independence\textsuperscript{207}, this is unlikely per se to have an impact given that the UK already chooses to use the courts\textsuperscript{208}, rather than some more flexible approach, under EU law itself. It is in fact highly doubtful whether the use of the High Court as a forum for review in England and Wales and Northern Ireland complies with EU effectiveness requirements, at least without providing legal aid, given the cost of using this forum\textsuperscript{209}. As with suspension it is not clear how the GPA's own requirement for effective remedies would

\textsuperscript{201} On this point see the discussion in S. Arrowsmith, \textit{The Law of Public and Utilities Procurement} (2\textsuperscript{nd} ed. 200; Sweet & Maxwell), paras 21-70-21-73.
\textsuperscript{203} GPA 2012 Art.XVIII.7a
\textsuperscript{205} GPA 2012 Art.XVIII.1.
\textsuperscript{206} UNCITRAL Model Law on Public Procurement 2011 Art.67(9)(i).
\textsuperscript{207} On the GPA provisions see GPA 2012 Art.XVIII.2-6.
affect this. However, even more so than suspension, there could be some possibility of the EU raising this issue in the context of the UK’s application for GPA accession.

4.7. Greater fragmentation within the UK

Finally, a possible consequence of a GPA-only solution is the potential for increased fragmentation of procurement law within the UK. Currently the Westminster Government has responsibility for international trade aspects of public procurement. It is also responsible for implementing EU law – including on procurement - in England and Wales and in Northern Ireland, in which each EU Directive is implemented by a single common set of Regulations. Scotland has responsibility for implementing EU law in that jurisdiction and has its own separate procurement regulations for this purpose, but has largely followed the Westminster approach to implementation although with some differences, more in implementing the 2014 directives than the 2004 directives. Other aspects of public procurement policy generally fall within the responsibility of the devolved administrations. However, as in other areas affected by EU law, EU obligations have significantly limited the scope for devolved policy-making: the existence of extensive common rules based on the Directives, which cover most key issues in the award process, has in practice meant a substantial degree of similarity in the public procurement law of the domestic jurisdictions.

Moving from the EU system to a GPA-only system would, however, create a much greater space for the exercise of national discretion, which would be open to be filled by the devolved governments in light of their general jurisdiction over public procurement. As we will discuss further in the next section, divergence between the UK jurisdictions has recently increased even within the limited area left for national action by EU law, and this trend towards divergence seems very likely to be exacerbated by moving to a GPA-only regime which extends that area of action. This will potentially affect all three aspects of procurement policy discussed above.

Thus there may be differences over whether and how to use legal tools to regulate procurement that is no longer covered by the international regime, including below-threshold procurement. In relation to industrial policy, we have already observed that there could be political pressures for regional and local protection, which may need to be addressed by and between the domestic Governments to avoid economic damage. In Canada efforts to deal with this issue have led to the conclusion of an Agreement on Internal Trade, which includes a chapter (Ch.V) on public procurement). (Some damage to internal trade may also, of course, result from the fragmentation process itself since lack of familiarity with the applicable procurement rules can deter tenderers.) Increased fragmentation also seems likely in the area of social and environmental policy measures to the extent that there is any increased scope for such measures since, as we have seen, this is a particular area of interest at present for the UK legislators. In relation to award procedures, divergence may arise out of the greater scope for choices in the areas just discussed above, such as whether to use “EU” procedures at all (alternatives being to simply require procuring entities to follow GPA requirements or to invent new “domestic” procedures that fit the GPA framework), and which precise elements of EU procedures and techniques, if any, to retain or adapt alongside

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210 The Welsh Assembly may be designated as the body for implementing EU law in particular areas (Government of Wales Act 2006, s.59), but has not been designated as the implementing body in the area of public procurement.

211 Similarly with Wales no order has designated a devolved authority in this respect for Northern Ireland.


213 Scotland Act 1998, s.53 and Sch. 8, para. 15.


215 Available at http://www.ait-aci.ca/.

216 It is the very objective of the UNCITRAL Model Law on Public Procurement 2011 to promote trade by reducing divergences in procurement law.
minimum GPA requirements. Finally, in the area of remedies differences may occur over decisions such as whether to retain standstill, automatic suspension and ineffectiveness, and how to deal with damages.

5. No trade agreements on procurement – a blank canvas: major change or not?

5.1. Introduction

Finally, we need to address the possibility that there will be no international trade agreements to constrain the procurement policy of the UK, either by choice or through failure of negotiations. Factors that may affect the UK’s decision whether to commit in principle to liberalising procurement have already been considered above in examining the GPA option, and it is much more likely that the UK will at least aim to be Party to the GPA. However, for completeness it is appropriate to comment briefly on what kind of procurement law might result from a blank canvas scenario.

It is, in fact, very difficult to speculate but a few points can be made.

5.2. Will the UK Governments continue to use legislation to regulate award procedures?

A first point is that while the aim of EU procurement law is to open up markets, this EU law and the implementing UK regulations de facto also provide a system of transparent procurement procedures of the kind that countries often put in place to support value for money and anti-corruption objectives in procurement. A key question is whether without the constraints of EU law (or other trade agreements) the UK would altogether reject the use of law as a tool to achieve its procurement goals and revert to the traditional system that relies mainly on “administrative” regulation (which at central Government level means instructions and guidance to procuring entities from the Treasury and Cabinet Office).

This is a possibility. However, it is notable that the UK jurisdictions have recently increasingly used legal rules that are enforceable by suppliers to pursue purely domestic procurement policies. Thus in the Westminster jurisdiction, the Public Contracts Regulations 2015 not only implement the obligations in the 2014 Public Contracts Directive, which require national legislation, but also include, in Part IV additional “domestic” rules217 designed mainly to help SMEs (the “Lord Young reforms”)218 which provide, inter alia, for further transparency (including national publication) and simplified qualification processes for contracts covered by the Directives; transparency (publication of information and response times) and simplified qualification rules for certain contracts below the Directive’s thresholds; and obligations relating to prompt payment of invoices. We have also seen that duties relating specifically to use of procurement as a policy tool are included in the Public Services (Social Value) Act 2012 for England and Wales. As noted above, s.39(1) of the Small Business, Enterprise and Employment Act also 2015 now gives to the Minister for the Cabinet Office or the Secretary of State a general power to make regulations on public procurement. In Scotland the Procurement Reform (Scotland) Act 2014 – driven mainly by a desire for a legal framework for using procurement as a policy tool, including to support SMEs – now provides a comprehensive framework for regulating public procurement in Scotland, covering both procurement above the EU

217 The rules on transparency are relevant also for ensuring compliance with TFEU obligations on transparency for contracts of cross-border interest.

Directives’ thresholds and procurement below those thresholds. All covered contracts are subject to some basic transparency obligations in the 2014 Act itself, as well as to obligations relating to sustainable procurement, as we have seen above; and the Act makes provision for further regulations and guidance.

Of course, using legislation to regulate procurement for domestic reasons is far from entirely novel; in particular law was recently used to impose the (now repealed) regime on Compulsory Competitive Tendering (CCT) in local government and, as we mentioned above, to curtail use of procurement as a policy tool by local authorities (s.17 of the Local Government Act 1988). Further, local authorities have long been under a statutory obligation to regulate their own procurement procedures by standing orders, which themselves have the force of law, although these rules, at least initially, have not been enforceable by aggrieved tenderers. There have also historically been a variety of legislative provisions imposing (usually quite skeletal) tendering requirements for limited types of contract. However, the recent extension of the “legal” approach in a significant way to central government is novel. Recent developments made possible reflect a step-change towards accepting a wide role for law in regulating contract award procedures, which may have been influenced by the approach of EU law and prove to be a lasting legacy of EU membership.

Also of possible significance for the future is the potential for regulation through judicial development. The Court of Appeal held in the Blackpool case in 1990 that there is an “implied contract” governing the tendering process, and this implied contract has been invoked in other jurisdictions, notably Canada, to ensure fair treatment of tenderers in a manner that supports key objectives of the procurement process. In JBW our own Court of Appeal effectively rejected any role for this doctrine for procurements regulated by the EU directives; the Court considered that no implied contract generally arises with these procurements, stating briefly that it would add nothing and be inconsistent with the directives’ purpose - reasoning that is neither logical nor internally consistent but which has the merits of ensuring certainty. Presumably the same approach would be taken to any GPA-based regime or other reasonably comprehensive legislative system. However, were the UK Governments to revert back to the administrative approach to regulation, the implied contract doctrine would take on greater potential importance. Moreover, it might well be invoked in practice more than in its early days given the increased familiarity of the domestic legal system and its lawyers with legal approaches to procurement. The courts have also sometimes applied judicial review principles to control procurement (although their approach - requiring a special element of “public law” for review - has been unsatisfactory and inconsistent); but again there has been little room for this mechanism in the context of procedures governed by extensive legislative rules. However, again judicial review could take on a greater role in the absence of legislation. Piecemeal judicial development of rules would not necessarily, however, produce a satisfactory system, especially given the absence of judicial expertise, and would almost most certainly result in decades

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220 For a brief overview see S. Arrowsmith, The Law of Public and Utilities Procurement Vol.1 (3rd ed. 2014; Sweet & Maxwell) para.2-16 and also the works cited there.
221 Local Government Act 1972 s.135.
224 Paras 2-162-2-174.
of uncertainty. This background may influence the UK legislators to opt for a statutory system of basic regulation.

Another element of the current background is the obligation referred to above for local authorities to make standing orders to govern their own procurement. These must include provision for securing competition for contracts for goods and works and for regulating the manner in which tenders are invited\(^\text{230}\). Even in light of the common EU framework for awarding major contracts there is significant variation in the standing orders of different authorities\(^\text{231}\) and clearly without such a common framework even more divergence can be expected. It is also worth mentioning that in 1970 \textit{R. v Hereford Corporation Ex p. Harrower}\(^\text{232}\) the High Court held that, whilst there was a legal duty to comply with the standing orders made and this duty could be enforced in the courts by ratepayers, it could not, however, be enforced\(^\text{233}\) by suppliers as an interest as a “competitor” was insufficient to give standing. It is likely, however, that interested suppliers would now have standing to sue under the “sufficient interest” test currently applicable in judicial review proceedings\(^\text{234}\). In the absence of other legislation to govern larger contracts, the courts might in future encounter legal actions based on standing orders, requiring the courts to interpret a variety of different provisions. A legislative regime laying down common rules for all authorities may well be considered preferable.

All these considerations may influence decisions on how to regulate procurement after Brexit and it cannot be ruled out that the UK Governments will choose the tool of enforceable legislation to shape basic award procedures. The existing system already provides, as we have seen, for national publication rules to supplement EU-level publication obligations, as well as for certain controls over qualification processes. No doubt these will be retained under a purely national system, and could well be accompanied by national rules regulating other key procedural steps, even if not required by international obligations.

5.3. An opportunity for better regulation

It is pointless to speculate in detail at this early stage how any legislative systems of regulation might actually look in relation to the various aspects of procurement – industrial and social policy, and award procedures and remedies - were the UK Governments to be given a largely blank canvas. However, it was suggested above that the introduction of a GPA-only regime would provide an opportunity for better regulation of public procurement and clearly the absence of any external constraints at all would provide the same – or an even greater – opportunity for this. In the author’s view this would entail, as mentioned above, a single system for all procuring entities, and a system that is both simple and relatively flexible. As was suggested also for a GPA-based system and for the same reasons explained there, it is both desirable and quite likely that any new system would continue to use, for both coverage and procedural issues, terminology, concepts and rules based on those of EU law.

However, as mentioned, the actual content of any new domestic system, and the extent to which it might be an improvement on the current system, is impossible to predict. Rather than producing a

\(^\text{230}\) Local Government Act 1972 s.135(3).

\(^\text{231}\) The former London procurement Centre for Excellence found a wide variation in the content of standing orders even within the authorities studied in London alone: see Model Contract Standing Orders: \textit{Best practice guidance on developing a modern set of CSO’s [sic] that address the commercial challenges in Local Government Procurement} (June 2006), available at http://library.sps-consultancy.co.uk/documents/guidance-policy-and-practice/model-contract-standing-orders.pdf


\(^\text{233}\) At least by the remedy of mandamus (now mandatory order).

more streamlined and otherwise improved approach it is also possible that a blank canvas could result in a complex patchwork of provisions, additional bureaucracy and/or poorly drafted and uncertain rules, which are arguably features of both some past domestic law, such as the former regime on Compulsory Competitive Tendering (rightly described as a “Frankenstein’s monster”\(^235\)), and, to some extent, current provisions.

A further improvement, it is submitted, would be to introduce a system of remedies that is available only when there is significant fault by a procuring entity, but which – as a quid pro quo – is also cheaper and easier to use than the current systems, so providing a better balance between costs and benefits of legal remedies.

5.5. The fragmentation issue again

Finally, related to the previous point of the potential for more complexity in the national system, it needs to be highlighted again that more regulatory space at the national level is likely to produce greater divergence between the rules of the different UK jurisdictions. This is likely to be very much more so with a complete absence of international rules than it is under a GPA-only system, since under the latter the essential core of the rules in the different jurisdictions will remain common.

6. The timing of changes to the procurement regulations

So far as timing is concerned, the UK will, of course, maintain the current regulations in place until Brexit actually occurs; the “Great Repeal Act” envisaged by the Prime Minister for 2017 will not have the effect of immediate repeal of all legislation implementing EU law, but is intended merely to “repatriate” the legal rules made under the European Communities Act 1972, with these rules only being removed, if at all, at appropriate times once EU membership ends. In practice Brexit will not occur for at least two years after the UK has invoked the procedure for leaving under Art.50 of the Treaty on European Union (two years being the period at which membership ceases in the absence of agreement to the contrary) - and longer if the EU Council agrees to extend negotiations. As mentioned earlier, the Prime Minister announced at the Conservative Party conference that the UK would invoke the Art.50 procedure by the end of March 2017. It is widely assumed that this will happen around that time rather than much before. However, there could be a delay even beyond this following the successful legal action to establish the need for Parliamentary approval for invoking the Art.50 procedure\(^236\), which is now being appealed to the Supreme Court, with the hearing due to start on 5 December 2016. Against this background there seems unlikely to be any Brexit, and hence any change in UK public procurement rules, until well into 2019, at least.

In fact, it is likely that the current rules will remain in place even longer, regardless of the eventual regime that is adopted. This is because it is likely that the eventual outcome of the trade negotiations that will shape the ultimate regime will not be known at the time of Brexit.

First, negotiations with the EU itself are very likely to still be continuing at that point. If that is the case then the current regulations will surely be maintained pending resolution of the question of whether they will be required in the longer term; reasons for this could include to save scarce resources and to ensure that stakeholders remain familiar with the regime. It is possible also that the right to enforce the rules might be removed from EU suppliers if this were considered helpful to the UK’s negotiating position and/or the UK were unwilling to retain EU suppliers legal rights of access to UK procurement for this interim period without reciprocal commitments to UK suppliers\(^237\). However, complete repeal or temporary amendment (the latter of which would involve considerable resources) is not to be anticipated so long as negotiations with the EU remain outstanding.


\(^{236}\) R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768.

\(^{237}\) Of course, this step alone would not preclude access to EU suppliers being given de facto by procuring entities.
Secondly, as we saw above, negotiations to accede to the GPA cannot even formally begin until the moment of Brexit. As we mentioned, even if at the time of Brexit there appears to be no prospect of concluding a bespoke agreement on procurement with the EU, it is still unlikely that the current regulations will be repealed until after accession, in order to speed up the accession process. It will not even be necessary to make temporary amendments to remove access of GPA suppliers pending reciprocation through GPA accession (or otherwise), since the access of GPA suppliers under the regulations expressly depends on whether reciprocal access is provided under the GPA or a comparable agreement.

Thus it can be expected that even if they are not retained on a permanent basis the current procurement regulations will remain operative for many years - not just until the two years or more until Brexit but for some time thereafter, until negotiations with the EU and other GPA Parties are finally resolved.

7. Conclusion

All that can be said with reasonable certainty of the future of the UK public procurement regulations is that they will remain as they are until at least the time of Brexit. This will be at least two years after the UK invokes the procedure for leaving and longer if negotiations for Brexit are extended, meaning that current measures will stay in place until well into 2019. Further, if negotiations for a either a trade agreement with the EU and/or GPA accession are still on-going at the time of Brexit, it is likely that the current regulations will be retained at least until the outcome of those negotiations is determined.

In the longer term, the impact of Brexit will depend mainly on the content of any trade agreements that are negotiated in place of current arrangements.

First, were the UK to remain a member of the EEA, or to engage in a similar arrangement with the EU, the current public procurement rules would continue to apply in almost exactly the same way. The impact of Brexit on all the dimensions of procurement policy that we have addressed in this article – industrial, social/environmental and award procedures and remedies – would then be very limited, and UK industry would also continue to obtain the same access as now to EEA procurement markets. However, an important problem would be a significant loss of influence in shaping future changes to the rules. We have also suggested that centralised enforcement might not be so effective and may result in some current problems, such as defects in the UK remedies system, remaining unaddressed.

Such an “EEA-type” outcome is still possible but it is perhaps not likely. However, we have seen that even without EU membership a trade agreement with the EU might involve broad and deep procurement regulation based wholly or largely on the current EU regime, in light of the EU’s general policy of including procurement in its trade agreements and a likely reluctance to accept a less stringent regime for the UK than applies in the EU itself. This outcome, also, may mean little change to procurement in the UK, although there is possibly potential for reduced obligations in certain respects – for example, low value procurement or hard defence procurement might be omitted from coverage. This would raise the prospect of using this procurement to promote and support industrial development, which could be politically attractive to the UK Governments and their procuring entities. However, it would certainly create economic dangers, not least of local and regional protectionism, which would need to be addressed.

It is also possible, however, that the UK’s trade relationships in procurement with the EU, as well as with its other major trading partners, will be governed wholly or mainly by the GPA. Whilst it is generally (although not universally) considered that Brexit would entail the need to apply for GPA accession, the accession process should be straightforward, provided that it is supported by the EU.
A GPA-only regime would mean that international constraints would no longer apply to some utility contracts, hard defence contracts or concessions, or to low value contracts, raising again the prospect of using procurement as an industrial policy tool to some extent. A GPA-only regime would also entail much more flexibility for the UK in the area of award procedures, as well as less stringent remedy requirements. In the author’s view using the GPA’s more flexible model for award procedures opens up a golden opportunity to design a single, simple and much improved system of procurement rules for UK entities, and this in fact provides a strong argument for favouring a GPA-only approach if this is available to the UK as a practical possibility. To reap the benefits of familiarity we have suggested that a new system should be modelled to a great extent on the 2004 Utilities Directives, although modified to include, in particular, more recent rules on frameworks and electronic procurement and also to take account of GPA terminology. However, whether the UK would take this opportunity is open to debate. It is also likely that the benefits of any improvements within the UK jurisdictions would be offset to some extent by fragmentation between the jurisdictions arising from the greater regulatory space available to the different UK Governments as a result of the contraction of international rules. We may also possibly see greater use of procurement to promote social and environmental goals, using mechanisms that are ruled out by the current EU regime. However, the uncertainty of what the GPA rules allow in this regard may also mean that there is little change even in this area.

Finally, there is a possibility, albeit rather slight, that Brexit would see UK procurement law free of international constraints – whether by choice or otherwise - leaving the UK free to design its own systems. This could produce a return to the purely administrative approach to regulation or, alternatively, the “legal” approach made familiar by EU requirements could still be maintained - perhaps preferable to a piecemeal judicial development of regulatory rules which could emerge in the absence of a legislative regime. Should a legal framework be maintained, Brexit would again provide an opportunity for simplified and improved procedural rules within each UK jurisdiction which, again for reasons of familiarity, might be modelled to some degree on the EU regime. The absence of international constraints would also offer the opportunity to create a supplier remedies system that offers a better balance between the costs and benefits of legal enforcement. Again, however, almost certainly there would be greater fragmentation between jurisdictions, and the dangers of internal protectionism would need to be addressed.

Clearly, only time will reveal the future shape both of international constraints on public procurement and of the domestic reaction to any changes, and forecasts of the outcomes of Brexit for the various aspects of procurement policy covered in this article can at this stage only be highly speculative. The only certainties are that these are interesting times and that any ultimate changes – if they come at all – are still several years away.