



BRIEFING PAPER

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Brexit: public procurement

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Summary

Immediately after Brexit, existing UK regulations on procurement – which implement EU directives – will continue to apply.

After this, there will be more freedom for the UK to set/change its own procurement rules.

Such freedom to change the rules may be restricted by any international agreements that the UK chooses to make, with the EU and other countries.

There are policy trade-offs here. Like the rules that come with EU membership, such international agreements limit domestic policy choices in various ways – for example they would limit the government's ability to award contracts solely to British suppliers. However they can ensure that certain public procurement opportunities are opened up to more potential suppliers (in other countries) – potentially leading to better value for money for the public sector in the UK. Such international agreements also open up opportunities for UK businesses to sell to the public sector in other countries.

The UK Government is already taking steps to maintain the UK's membership of the WTO Agreement on Government Procurement (GPA), which involves an ongoing commitment for the UK to open up certain higher value public procurement opportunities to other countries, in exchange for their public procurement markets being opened up in a similar way.

We do not yet know what the UK's trade relationship will be with the EU after the UK leaves, including in relation to procurement. As well as mutually opening up procurement as parties to the GPA, further commitments could be made as part of a UK-EU trade agreement or another arrangement between the UK and EU.

1. The current position

At present, much UK public procurement is regulated by EU rules, coming from the main EU treaty and specific EU directives:

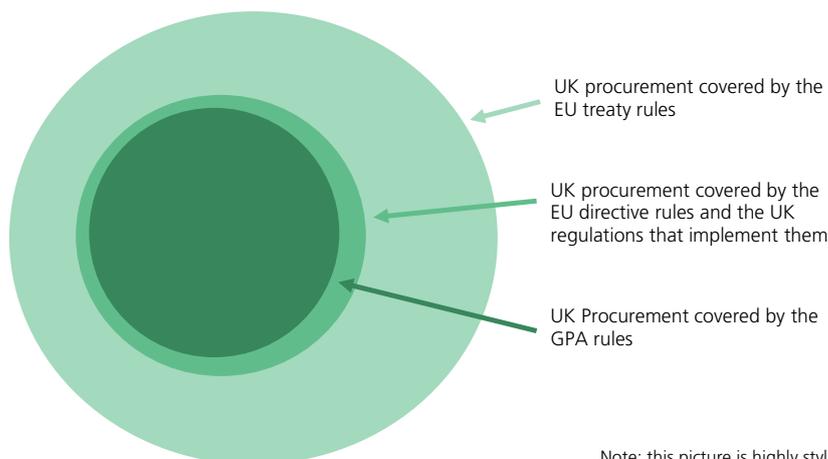
- **Principles** from the Treaty on the Functioning of the European Union apply to much procurement – these principles include the free movement of goods, non-discrimination and transparency. These lead to general requirements such as advertising procurement opportunities where they might be of cross-border interest and opening up procurement opportunities to suppliers located in other EU Member States.
- **EU directives** and **the UK regulations that implement them** – these are detailed rules that apply to much procurement above certain thresholds. They set out for example what procedures must be followed, the criteria that can be used to select suppliers where procurement opportunities must be advertised and how procurement decisions can be challenged.

A key set of regulations is the [Public Contracts Regulations 2015](#) and [The Public Contracts \(Scotland\) Regulations 2015](#), which implement the EU 'classic' Public Procurement Directive 2014/24/EU.

At present, the EU rules that apply to the UK also apply to other EEA countries (Iceland, Liechtenstein and Norway), under the EEA agreement. Switzerland is subject to a separate arrangement.

The EU – and with it the UK – is part of the WTO's **General Procurement Agreement** (GPA), which covers a wider range of countries. Procurement is also included in some **EU trade agreements** with other countries.

International obligations are embedded in the EU directives.



Note: this picture is highly stylised

2. Policy choices

The current procurement rules are sometimes seen as controversial – partly because they are often seen as overly bureaucratic and partly because they limit the ability of public bodies to promote certain policies in certain ways through procurement. For example, they limit the ability of bodies to ‘buy British’.

As it leaves the EU, the UK has **choices** about the extent to which it will open up its public procurement market to suppliers in other countries. It can choose to commit to opening up (all or part of) its own markets to foreign suppliers in exchange for foreign markets being opened up to UK suppliers, through agreements with the EU and other countries.

Such agreements could limit the ability of UK public sector buyers to choose to buy only from certain groups of suppliers when carrying out certain procurement processes – for example generally stopping buyers only buying British or local goods. At present such restrictions derive from the EU rules in this area (and the obligations under international agreements that are embedded in them).

Future obligations would only apply in the procurements covered by international agreements that the UK is part of – for example, the WTO Agreement on Government Procurement (GPA) only applies to certain procurements above certain values from certain countries. This potentially opens up the possibility of a more flexible or different procurement policy especially for smaller procurements.

There are policy trade-offs here. Any international agreements will limit domestic policy choices – for example the ability to restrict procurement to British suppliers. However they can also ensure that certain public procurement opportunities are opened up to more potential suppliers (in other countries) – potentially leading to better value for money for the public sector in the UK. They also offer the potential for greater opportunities for UK businesses to sell to the public sector in other countries.

3. Maintaining current laws following Brexit

Under the [European Union \(Withdrawal\) Act 2018](#), much current European law will continue to apply in the UK immediately after Brexit.

Section 2 of the Act preserves “EU-derived domestic legislation”. This includes the UK regulations that sets out the detailed procurement rules that apply above certain thresholds, for example the Public Contracts Regulations 2015.

There appears to be some ambiguity about the future applicability of the treaty principles for cases where the regulations do not apply, as explained in the box.

Box 1: Treaty principles in UK law after Brexit

Section 4 of the European Union (Withdrawal) Act 2018 says that “any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day - (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and (b) are enforced, allowed and followed accordingly,” will continue to be available in domestic law following exit.

The government have indicated that various of the treaty provisions that apply to procurement would continue as directly effective rights converted into domestic law as a result of this section – for example freedom of movement of goods (prohibition on quantitative restrictions on imports), freedom to provide services and non-discrimination on ground of nationality.¹

However Paragraph 3 of Schedule 1 (not yet in force) states that “There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.” As a consequence, domestic procurement challenges cannot be based on violations of general principles that underpin the Treaties, like transparency (which encompasses a requirement to advertise contracts).

After Brexit, laws and obligations could be changed through UK legislation.

The Government have said that:

The longer-term opportunities for our procurement regulations are being considered carefully.²

For further discussion of this area, see Jorren Knibbe, [The EU Withdrawal Bill – possible implications for public procurement law](#), 2 August 2017

¹ [Explanatory Notes to the European Union \(Withdrawal\) Act 2018](#)

² [PQ 119348](#), answered 19 December 2017

4. The withdrawal agreement

The UK and EU are currently negotiating a withdrawal agreement.

Subject to agreement of the whole document, this is expected to include a transition / implementation period, until the end of 2020, when EU law will generally continue to apply in the UK much as it does today – including in relation to procurement.

As well as this, there are some specific articles that relate to the transitional issues for procurement, relating to:

- public procurement procedures launched before the end of the transition period and not yet finalised on the last day of it, and
- the award of contracts made under framework agreements where the procurement of the framework agreement was launched before the end of the transition period until the framework expires (or is terminated).

The text of the relevant sections for these has been agreed at negotiator level – see the green parts of Articles 71 to 74 in the [March 2018 draft agreement](#) and the [June 2018 joint statement](#) for the remaining text.

5. Government Procurement Agreement

The Agreement on Government Procurement (GPA) is a voluntary (plurilateral) agreement between the EU and 18 countries to open up their public procurement markets to each other, under the World Trade Organization (WTO).³

The UK is currently a part of the GPA only through its EU membership. The Government is taking steps to ensure that the UK continues to be part of the GPA – becoming an independent member – as the UK leaves the EU.⁴

Under the GPA, many large public sector procurement opportunities must be opened up to suppliers in the EU and certain other countries (the parties to the agreement), and this procurement must be subject to open, fair and transparent conditions of competition.⁵

The Government says that the UK becoming an independent member of the GPA will:

- maintain “current guaranteed access for UK businesses to global procurement opportunities” and
- offer value for money for public sector buyers by promoting competition among suppliers.⁶

It would also mean that certain larger UK procurement opportunities continue to be open to suppliers in EU countries and other GPA member countries, including the United States, Japan, South Korea and Canada.

5.1 About the GPA

What procurement is covered by the GPA?

The GPA focusses on larger procurements, above certain thresholds.⁷ It covers procurement of goods, services and construction services, by both central government and other public sector bodies.

³ The [Government Procurement Agreement](#) is a WTO plurilateral agreement – in other words one that is optional for WTO members.

The current [parties](#) to the GPA are: Armenia, Canada, the EU, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States. Ten more WTO members are in the process of acceding, including China and Russia.

The GPA was originally agreed in 1994, entering into force in 1996. A new version, the Revised GPA, was agreed in 2012, entering into force in 2014. For most countries the Revised GPA is in force but Switzerland has not yet formally accepted it, so the original 1994 GPA remains in force with respect to Switzerland.

⁴ Department for International Trade, [Preparing for our future UK trade policy](#), 9 October 2017

⁵ WTO Integrated Government Procurement Market Access Information (e-GPA) Portal, [The Agreement in brief](#) [online, accessed 10 November 2017]

⁶ [Trade and Customs Legislation: Written statement - HCWS228](#), 7 November 2017

⁷ For example the threshold that applies for 2018 in the UK is £118,133 for goods and services for buyers in central government – this is the lowest of the thresholds

The GPA's [schedules](#) set out the details of coverage for each party (the EU and certain other countries), including what bodies are subject to the agreement. The coverage can vary by party, often depending on what procurement that party has itself committed to open up – so exact coverage can differ across pairs of parties.

What does the GPA require and oblige?

For procurement that it covers, the GPA's [general rules and obligations](#) guarantee:

- national treatment and non-discrimination – in other words, public authorities must treat potential suppliers from all parties equally,
- minimum standards regarding national procurement procedures,
- transparency of procurement-related information.⁸

How is it enforced?

Parties to the Agreement must have a 'domestic review mechanism' that allows suppliers to challenge breaches of the GPA and/or the national legislation giving effect to the Agreement. This is currently provided through the High Court (the Sheriff Court or the Court of Session in Scotland) via the process set out in the UK regulations.

At the international level, parties may also use the WTO dispute settlement mechanism when they believe another party to be in violation of its obligations under the Agreement.

How does it relate to the EU rules?

The EU directives and the UK regulations implement the GPA commitments that the EU has made. The rules in the EU directives and the regulations are generally more specific and detailed than those in the GPA, and they have slightly wider coverage.

The differences are usefully summarised by Prof Sue Arrowsmith:

The scope of procurement covered for the EU/UK under the GPA is narrower than the scope of covered procurement under the EU procurement directives in relation to a few utility sectors, coverage of private utilities, the defence sector, some services, (possibly) concessions, and certain private contracts subsidised by government. The GPA also does not include below-threshold procurement. However, some of these differences are of limited importance in the UK context. Further, the procurement that does fall into the gaps between the directives and GPA, at least above the directives' thresholds, could easily be added to the GPA UK if desired. [...]⁹

that currently apply to the UK. The [thresholds](#) vary by buyer type and depend on what is being bought – they are considerably higher for construction services.

⁸ WTO Integrated Government Procurement Market Access Information (e-GPA) Portal, [The Agreement in brief](#) [online, accessed 10 November 2017]

⁹ Summary to Chapter 4 of Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017

5.2 Joining the GPA as an independent member

The UK is currently a part of the GPA only through its EU membership. The Government is taking steps to ensure that the UK continues to be part of the GPA – becoming an independent member – as the UK leaves the EU.¹⁰

The Government has said it is working with GPA members to find a way that the UK remain a member of the GPA on the same terms that currently apply (out of a number of options for doing this).¹¹ In a joint letter, representatives of the EU and UK stated that:

The UK and EU will work together on the UK's objective of remaining, upon leaving the EU, subject to the rights and obligations it currently has under the Government Procurement Agreement as an EU Member State on the basis of the commitments currently contained in the EU schedule of commitments.¹²

The Government submitted its [application](#) to re-join as an independent party in 1 June 2018, and this was discussed in the WTO Government Procurement Committee on 27 June:

The UK's initial market access offer and replies to a checklist on its national government procurement legislation were circulated to parties in June. The UK explained that, under the proposed offer, GPA parties will continue to enjoy the same level of entity coverage and of market access post-Brexit, as its offer replicates its current commitments under the EU. The UK also highlighted the urgency to agree upon its terms of membership in order to ensure its seamless continued participation in the Agreement after Brexit.

Further clarity was sought by parties on: a) details of the market access commitments the UK would be granting them; b) its EU withdrawal agreement, including timelines that would apply to the GPA; and c) the internal procurement legislation the UK intends to put in place. Several parties requested more time to review the documents on the table. The EU noted that no decision on a transition period has been taken yet.

The Chair welcomed the parties' apparent recognition of their "collective interest" in seamless ongoing participation of the UK in the GPA post-Brexit, with several acknowledging the relative urgency to do so. "This is a very positive step forward," he said.¹³

The committee meets around four times a year.¹⁴

¹⁰ Department for International Trade, [Preparing for our future UK trade policy](#), 9 October 2017

¹¹ [Letter](#) dated 8 October 2017 from Dr Liam Fox MP to Angus Brendan MacNeil MP and Hilary Benn regarding the Government's future commitments within the World Trade Organization as we leave the EU

¹² [Letter](#) dated 11 October 2017 from UK and EU Permanent Representatives to all Permanent Representatives to the World Trade Organization

¹³ WTO, [Australia's accession negotiations for government procurement pact reach milestone — Chair](#), 27 June 2018

¹⁴ WTO, [GPA Committee](#) [online, accessed 31 August 2018]

5.3 Parliament's role

The government leads on international negotiations but Parliament has a core role in making and amending domestic legislation and has an opportunity to object to certain treaties.

Trade Bill

The Trade Bill would allow legislative changes to be made where necessary for the UK to implement the GPA, or if another country joined the GPA, or withdrew from it.

For more information on this, see the Library briefing [The Trade Bill](#).

GPA to be laid before Parliament

The Government will have to meet the requirements of the [Constitutional Reform and Governance Act 2010](#) before it can join the GPA as an independent member.¹⁵ This means that the Government cannot accede to the GPA unless it has been laid before Parliament for 21 sitting days without either House objecting.

The Constitutional Reform and Governance Act does not require Parliament to scrutinise whether the UK should join the GPA, to decide whether to approve it, or to agree that the UK should join. It simply requires the Government to lay the instrument before Parliament, gives Parliament an opportunity to object, and gives an objection statutory effect. See the Library briefing [Parliament's role in ratifying treaties](#) for more information on this.

¹⁵ [Trade Bill Explanatory Notes](#) para 24

6. Other existing agreements

Some trade agreements also include commitments to open up certain public procurement markets, beyond any obligations in the GPA.

This is true for example of the EU-Canada trade agreement (CETA) and the EU-South Korea agreement.

Trade agreements negotiated by the EU will probably cease to apply to the UK after Brexit, at least in their current form. The Government is seeking ways of maintaining continuity in trade arrangements with the 'third countries' concerned:

The aim is to establish a UK trade agreement with each partner country based, as closely as possible, on the corresponding trade agreement that country has with the EU.¹⁶

This is not without challenges – for example some countries may wish to reopen parts of their trade agreements.

These issues are discussed further in the Library briefing on the [UK adoption of EU external agreements after Brexit](#).

¹⁶ [Trade Bill Explanatory Notes](#), para 38

7. Future agreement with the EU

We do not yet know what the UK's trade relationship will be with the EU after the UK leaves, including in relation to procurement.

While the GPA is expected to apply, mutually opening up much of the larger public procurement opportunities in the UK and EU, it covers only some of the access that the UK provides to EU suppliers now and vice versa:

The scope of procurement covered for the EU/UK under the GPA is narrower than the scope of covered procurement under the EU procurement directives in relation to a few utility sectors, coverage of private utilities, the defence sector, some services, (possibly) concessions, and certain private contracts subsidised by government. The GPA also does not include below-threshold procurement. However, some of these differences are of limited importance in the UK context. Further, the procurement that does fall into the gaps between the directives and GPA, at least above the directives' thresholds, could easily be added to the GPA UK if desired.¹⁷

As well as mutually opening up procurement as parties to the GPA, further commitments could be made as part of a UK-EU trade agreement or another arrangement between the UK and EU.

The EU's [guidelines for the framework for future EU-UK relations](#) (March 2018) lists "access to public procurement markets" as one area that they would like to see covered in a future free trade agreement.

A free trade agreement could promote cooperation, open markets not opened under the GPA and / or make trade more likely (compared with the GPA). There are a range of options:

- Even if the UK does not remain fully part of the Single Market, an option for an EU-UK agreement in procurement (the « EEA-minus » approach) is to apply the current EU procurement directives, as has been done in the DCFTAs with, for example, Ukraine (the EEA-minus approach). This would maintain EU access to above-threshold UK markets on the same basis as at present as regards scope of coverage, award procedures and remedies. The common advertising system could also easily be retained in an agreement with the UK, although not applied in the DCFTAs, as could use of tools such as e-Certis.
- The application of the EU directives in light of future developments in legislation and case law is an issue that is both important and difficult, however.
- Another option is a GPA-plus approach (which is being pursued in TTIP negotiations), whereby access is governed primarily by the GPA but supplemented by additional rules and commitments on coverage, award procedures and/or remedies for undertakings, to address the most important « gaps » between the EU and GPA systems - for example, through rules on modifications to concluded contracts, rules on arrangements between public bodies, rules on

¹⁷ Summary to Chapter 4 of Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017

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framework agreements and other recurring purchasing arrangements, and rules to address some of the differences in the area of qualifications (criteria, evidence and use of EU tools, such as e-Certis)

- Consideration would also need to be given under an EEA-minus or GPA-plus approach to whether to include transparency rules on below-threshold procurement
- The design of enforcement mechanisms additional to remedies for undertakings, including inter-governmental enforcement, might be a significant consideration in EEA-minus or GPA-plus agreements.¹⁸

Public procurement could also be a part of future new trade agreements with non-EU countries.

¹⁸ Summary to Chapter 4 of Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017

8. Devolution and changes in responsibilities

If responsibilities for much of procurement law move from the EU to the UK with Brexit, there are questions about who takes on these responsibilities.

At present, responsibilities for procurement are generally either devolved or set at the EU level.

The devolved governments in [Scotland](#), [Wales](#) and [Northern Ireland](#) have their own procurement policies (although Northern Ireland has not had a functioning Executive or Assembly since January 2017). The devolved legislatures in Scotland and Wales can legislate on procurement to implement EU directives in their areas (Wales gained this power only in the last few years). In Scotland, [The Public Contracts \(Scotland\) Regulations 2015](#) implemented the classic EU directive and the [Procurement Reform \(Scotland\) Act 2014](#) introduced further requirements.

If the EU is no longer responsible for procurement rules and principles after Brexit, there is the potential for a greater role for the devolved administrations and legislatures and/or the UK government.

The UK government has said that it expects procurement to be the subject of a future “framework” between the UK government and devolved administrations setting out a common approach and how it will be operated and governed.¹⁹ Frameworks:

...may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate.²⁰

The UK government has said that it believes that this framework may need to be legislative.²¹

The Scottish government are concerned that common frameworks could legally be imposed without the Scottish Parliament’s consent.²²

For further information on this see the Library briefing paper [Intergovernmental relations in the United Kingdom](#).

¹⁹ Cabinet Office, [Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland](#), 9 March 2018

²⁰ [Joint Ministerial Committee communiqué: 16 October 2017](#)

²¹ Cabinet Office, [Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland](#), 9 March 2018

²² PA, [Scottish Government stands alone in opposition to UK Brexit Bill](#), 24 April 2018.

9. Opposition views

9.1 Labour

Labour said in its 2017 manifesto that it would rejoin the Government Procurement Agreement after Brexit:

Labour is committed to the rules-based international trading system of the World Trade Organisation (WTO). We will rejoin the Government Procurement Agreement, whilst safeguarding the capacity for public bodies to make procurement decisions in keeping with public policy objectives.²³

The Leader of the Opposition has said that Labour wants to see more government procurement spending in the UK:

Because Labour is committed to supporting our manufacturing industries and the skills of workers in this country we want to make sure the government uses more of its own money to buy here in Britain. [...]

Labour is determined to see public contracts provide public benefit using our money to nurture and grow our industries and to expand our tax base. [...]

... we will use the huge weight of the government's purchasing power to support our workers and industries.

This will be done using a three-pronged approach:

Changing how we buy things with new procurement rules so that government supports jobs and industry.

[...]

[...] if you go to Germany you'll struggle to find a train that wasn't built there, even though they're currently governed by the same rules as us. [...]

We have made clear we would seek exemptions or clarifications from EU state aid and procurement rules where necessary as part of the Brexit negotiations to take further steps to support cutting edge industries and local businesses.²⁴

9.2 SNP

Much of the focus of the SNP in this area has been on the location of powers following Brexit – with the Scottish government/parliament or the UK government, and on Scottish consent.

In scrutiny of the Trade Bill, Hannah Bardell, for the SNP, said that "We agree with the provision in clause 1 [about the GPA] that aims to ensure continued access to Government procurement markets after the UK leaves the EU, but we believe that UK Ministers should have to seek consent, not just to consult."²⁵

²³ [Labour Party Manifesto 2017](#)

²⁴ ["Build it in Britain again" – Corbyn's full speech](#), 24 July 2018

²⁵ [Trade Bill Deb 25 January 2018 c114](#)

10. Further information

- Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017 - see [Chapter 4](#)
 - Chapter 23 of Prof Arrowsmith's book *The law of public and utilities procurement* (vol 2) also focusses on Brexit and public procurement
- Kamala Dawar for Trade Policy Observatory, [Brexit and Government Procurement](#), March 2017
- Pedro Telles and Albert Sanchez-Graells, [Examining Brexit Through the GPA's Lens: What Next for UK Public Procurement Reform?](#) October 2017
- Jorren Knibbe, [The EU Withdrawal Bill – possible implications for public procurement law](#), 2 August 2017
- Abby Semple, [Socially responsible public procurement after Brexit: Will it get easier?](#), June 2017
- European Commission, [Notice to stakeholders - Withdrawal of the United Kingdom and EU rules in the field of public procurement](#), Jan 2018

There have also been a number of articles in the Public Procurement Law Review – full text is available via [Westlaw UK](#) (via the Parliamentary intranet).

Further Brexit research and analysis from Parliament's libraries and committees can be found on www.parliament.uk/brexit

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