



BRIEFING PAPER

Number 8390, 5 November 2019

Brexit: public procurement

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Summary

Immediately after Brexit, existing UK regulations on procurement – which implement EU directives – will continue to apply. This is true whether the UK ratifies the Withdrawal Agreement with the EU or leaves without a deal.

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 has taken 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:

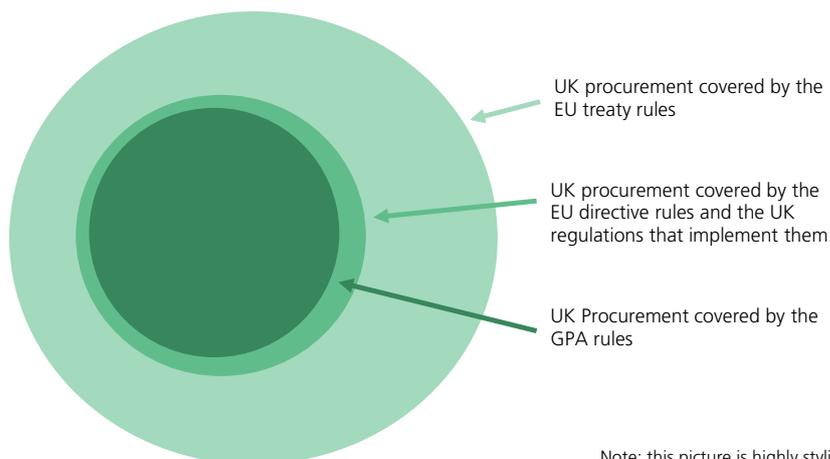
- **Principles** from the Treaty on the Functioning of the European Union apply to much procurement – these principles include the free movement of goods, non-discrimination and transparency. These lead to general requirements such as advertising procurement opportunities where they might be of cross-border 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 [Public Procurement Directive 2014/24/EU](#), often referred to as the 'Classic Sector' or 'Classical' Directive.

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 **Agreement on Government Procurement** (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).

Public procurement regulations will remain broadly unchanged in case the UK leaves the EU without a deal.²

The Government has made two Statutory Instruments (SI) - [the Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) and [the Public Procurement \(Amendment etc.\) \(EU Exit\) \(No. 2\) Regulations 2019](#). These Regulations will amend UK procurement law to ensure that it continues to operate effectively in the period after exit day. Parliamentary debates on this SI can be accessed through the Parliament procedural activity tracker ([here](#) and [here](#)).

The key practical difference with the current regulations is that contracting authorities would have to publish information about contract opportunities to a new UK e-notifications service instead of going through the EU official channels:³

One key difference for contracting authorities will be the need to send notices to a new UK e-notification service instead of the EU

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

² HMG, [guidance Public-sector procurement after a no-deal Brexit](#), 25 September 2019; See also HMG [Procurement Policy Note 02/19: Preparing for the UK Leaving the EU](#), 9 May 2019 and [Public procurement, Frequently asked Questions on No-deal Exit](#), 8 May 2019

³ HMG, [guidance Public-sector procurement after a no-deal Brexit](#), 25 September 2019

Publications Office. As UK contracting authorities may lose access to the EU official publications and Tenders Electronic Daily (TED), a new UK service would be made available on the exit day, called [Find a Tender \(FTS\)](#). The requirements to advertise tenders remain unchanged. Also suppliers wishing to access public sector contract opportunities would be able to use the FTS service.

The Scottish Government has [proposed changes](#) to the [Public Contracts \(Scotland\) Regulations 2015](#).

After Brexit, laws and obligations could be changed through UK legislation. In its October 2019 [No-Deal Readiness Report](#) the Government said that Brexit provides opportunities for public procurement:⁴

Leaving the EU presents an opportunity to design a radically new regulatory framework for public procurement which better meets UK needs, drives improved commercial outcomes, delivers greater simplification and flexibility, reduces burdens on the public sector and business, and is more transparent.

Lawyers Bonnar and Lyons have noted that the UK could diverge from some of the perceived constraints of the EU regime, whilst still being GPA-compliant:⁵

An example might be the prescriptive regime for modification of procured contracts [Regulations 32 and 72 of the Public Contracts Regulations 2015] which has no parallel under the GPA.

For further discussion of this area, see Jorren Knibbe, [The EU Withdrawal Bill – possible implications for public procurement law](#), 2 August 2017 and Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017.

⁴ HMG [No-Deal Readiness Report](#), October 2019, CP 179, p8

⁵ Richard Bonnar, Joe Lyons, [No-deal Brexit: Impact on public sector procurement contracts](#), Law firm DLA Piper, 1 September 2019, [accessed 5 November 2019]

4. The withdrawal agreement

After a period of intense negotiation, the EU and UK have reached a new settlement formed of an updated Withdrawal Agreement (WA) and Political Declaration (PD). These were published on 17 October 2019.

Theresa May's Government finished negotiating a Withdrawal Agreement and an accompanying Political Declaration on the framework for the future relationship with the EU in November 2018. However, it was not able to obtain Parliamentary support for this package. Boris Johnson's Government renegotiated the Agreement, changing the provisions with regard to Northern Ireland, and amendments were made to the Political Declaration.

The revised Withdrawal Agreement secures a transition period, also described as the 'implementation period', which is meant to bridge the period between the date of the UK's exit from the EU and the entry into force of the new, yet to be negotiated, UK-EU partnership arrangements. The transition will run until the end of December 2020, with the possibility of extension for up to two years.

'Separation provisions' in the main Withdrawal Agreement are intended to create an orderly exit from the EU and have not changed from the November 2018 text. They secure continuity to ongoing procurement procedures.

4.1 Continuity during transition

The Government [has confirmed](#) that public procurement regulations will "remain broadly unchanged" for the duration of the transition period. **Articles 75-78** of the WA provide that public procurement procedures that have been started but are not yet finished at the end of the transition period.⁶ They essentially mean that any procurement procedures ongoing at the end of the transition period will be covered by the existing regulatory regime up to award of contracts.

Current rules will continue to apply 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 (see box 2 below) where the procurement of the framework agreement was launched before the end of the transition period, until the framework ends.

This includes the EU rules for review and remedies for breaches of the procurement rules for these ongoing procurement procedures.

It is worth noting that these Articles will continue to be relevant for a number of years after transition ends for certain cases, particularly

⁶ The key background documents on this area are: European Commission [Position paper on On-going Public Procurement Procedures](#), September 2017 & UK Government [Technical note: other separation issues - phase 2](#), March 2018.

because framework agreements can be made for up to four years (and more in exceptional circumstances).

Box 2: Framework Agreements

Many public sector contracts today are made under framework agreements. These are arrangements with a provider, or a list of providers, to provide a certain type of good or service – for example to provide temporary staff. The framework agreement defines what will be purchased (such as maximum price and quality of services) and is valid for a certain number of years. Organisations can use a framework to buy common goods and services either directly or by conducting a short competition among the framework suppliers.

In addition, the UK and EU have agreed that the UK will be able to access the EU's online certification database (e-Certis) for up to nine months after the end of transition.

More information is provided in Commons Library Briefings [The October 2019 EU UK Withdrawal Agreement](#), CBP 8713 (17 October 2019) and [The UK's EU Withdrawal Agreement](#), CBP 8453 (11 April 2019) section 4.3. The Government has published a [Public-sector procurement under the EU Withdrawal Agreement](#) (8 August 2019).

4.2 Political Declaration on future relationship

The Political Declaration (PD) sets the framework for the UK's future relationship with the EU. The PD is not a binding legal document and it is unlikely that it will bind the parties to anything beyond a commitment to negotiate for a future relationship of a certain type in good faith.

There is nothing to preclude the UK and the EU in the future agreeing a relationship framework that goes beyond the parameters set by the PD. Alternatively a looser arrangement could be agreed.

Sections in the revised PD on public procurement (Part II: Economic Partnership) remain unchanged from the November 2018 text.

The Political Declaration suggests that the UK and EU will open additional public procurement markets beyond those they are committing to opening up via the Government Procurement Agreement. The UK and EU may agree other measures that would encourage the two markets to be open to each other in practice. There will be mechanisms for reviewing and remedying breaches of the procurement rules.

Beyond these, it is worth noting that ease of access to public procurement markets depends on factors that influence ease of access to markets more generally – for example checks and controls for goods or the ability to offer services across borders. These are covered elsewhere in the Political Declaration.

Opening up markets

The PD says that both sides should “provide for mutual opportunities in the Parties’ respective public procurement markets beyond their commitments under the WTO Government Procurement Agreement”.

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In the UK a lot of higher value public procurement would be covered by the GPA. The gaps are:

a few utility sectors, coverage of private utilities, the defence sector, some services, (possibly) concessions, and certain private contracts subsidised by government.... However, some of these differences are of limited importance in the UK context.⁷

These areas are covered at present by EU Directives and the UK regulations that implement them.

The GPA also does not include lower value procurement, below the [thresholds](#) above which the current EU Directives apply (for example the threshold that applies for 2018 in the UK is £118,133 for goods and services for buyers in central government).⁸ A future trade agreement could allow for access to some or all of this lower value procurement. At present, EU Treaty principles such as transparency and non-discrimination apply to much public procurement of this level.⁹

For more detail on the PD see Commons Library briefing CBP 8714 [Revisions to the Political Declaration on the framework for future EU-UK relations](#).

⁷ Summary to Chapter 4 of Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017 – the chapter has a more detailed description of these gaps. See also Chapter 23: Brexit and Public Procurement of Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Volume 2 (Third Edition, 2018)

⁸ This is the lowest of the thresholds 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 (works).

⁹ It is generally only in the case of a contract value being so small, or the service being so niche, that the contract ‘would be of no interest to economic operators located in other Member states’, where the principles would not apply – according to Commission Interpretive Communication, [Application of the procurement directives](#) (August 2006).

5. Agreement on Government Procurement

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).¹⁰

The UK is currently a part of the GPA only through its EU membership. The Government has taken steps to ensure that the UK continues to be part of the GPA – becoming an independent member – as the UK leaves the EU.¹¹

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.¹²

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.¹³

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.¹⁴ It covers procurement of goods, services and construction services, by both central government and other public sector bodies.

¹⁰ 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.

¹¹ Department for International Trade, [Preparing for our future UK trade policy](#), 9 October 2017

¹² WTO Integrated Government Procurement Market Access Information (e-GPA) Portal, [The Agreement in brief](#) [online, accessed 10 November 2017]

¹³ [Trade and Customs Legislation: Written statement - HCWS228](#), 7 November 2017

¹⁴ 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.¹⁵

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 Institute for Government notes that the GPA does not give the UK the same full access to EU procurement markets that it currently enjoys.¹⁶

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

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.

¹⁵ WTO Integrated Government Procurement Market Access Information (e-GPA) Portal, [The Agreement in brief](#) [online, accessed 10 November 2017]

¹⁶ Institute for Government Explainers, [Public procurement](#) [accessed 5 November 2019]

the directives' thresholds, could easily be added to the GPA UK if desired. [...]¹⁷

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 has taken steps to ensure that the UK continues to be part of the GPA – becoming an independent member – as the UK leaves the EU.¹⁸

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).¹⁹ 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.²⁰

The Government submitted its [application](#) to re-join as an independent party in 1 June 2018. The UK offered access to its market on terms which replicate its current commitments as an EU Member State. In February 2019, other GPA members agreed to the UK offer.²¹

The accession to the GPA will be formalised after the UK has left the EU and may take up to 30 days to come into force. Therefore, the Government is anticipating a short gap where UK businesses might temporarily lose some of their rights protected under the GPA.²²

The Government has emphasized that joining the GPA in its own right, the UK will ensure

'continuity of access for UK business to £1.3 trillion of global public procurement opportunities. This also covers a substantial proportion of the access that UK businesses have to EU government procurement contracts as part of the single market.'²³

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

¹⁸ Department for International Trade, [Preparing for our future UK trade policy](#), 9 October 2017

¹⁹ [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

²⁰ [Letter](#) dated 11 October 2017 from UK and EU Permanent Representatives to all Permanent Representatives to the World Trade Organization

²¹ WTO, [UK set to become a party to the Government Procurement Agreement in its own right](#), 27 February 2019; Department for International Trade, [WTO agreement secures £1.3 trillion market for British contractors](#), 27 February 2019

²² [HCWS1365](#) 28 February 2019; Government guidance, [Bidding for overseas contracts: what to expect if there's a no-deal Brexit](#), 16 August 2019

²³ HMG [No-Deal Readiness Report](#), October 2019, CP 179, p30

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 have allowed 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](#).

The Bill **however** failed to complete its passage through Parliament before the end of **its 2017-19** session and will make no further progress. Liam Fox, then Secretary of State for International Trade, told the International Trade Committee in July 2019 that while he would have liked to see the Trade Bill passed to provide continuity, he suggested that its main functions with regard to the GPA could be carried out by other means:²⁴

No, the Trade Bill had three functions. The first was to maintain our ability to trade with countries that had agreements with the European Union. We have the legal powers to do that, whether we have the Trade Bill or not. The second aim was to get trade remedies in place so British businesses would not be disadvantaged in the event of no deal. We have those in place—in fact, they are up and running. The third was to achieve membership of the Government procurement agreement, which we also have. It would be much better to put it on a long-term statutory basis and to have the Trade Bill go through, but I'm afraid you are quite wrong: we are able to carry out the three main functions of the Trade Bill by other means, without that legislation passing. Would I like to see it and those three sections on the statute book to provide long-term continuity? Yes, I would. Is it absolutely necessary? No, it's not.

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.²⁵ 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.

²⁴ International Trade Committee Oral evidence: Work of the Department for International Trade, 3 July 2019, HC 436, Q879

²⁵ [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), the EU-South Korea and EU-Japan agreement.

Trade agreements negotiated by the EU will cease to apply to the UK after Brexit.

The Department of International Trade White Paper, [Preparing for our future UK trade policy](#), published in October 2017, stated that the Government intended to “seek to transition all existing EU trade agreements and other EU preferential arrangements,” in order to “ensure that the UK maintains the greatest amount of certainty, continuity and stability in our trade and investment relationships.”

In order to secure trade continuity, the Government is negotiating with third countries to replace the existing arrangements with standalone UK-third country agreements. The transitioned agreements would come into force in the event of a no deal Brexit.

The UK has concluded some agreements, such as the [agreement with South Korea](#), but engagement is ongoing with others. There is no prospect of transitioning agreements with Canada and Japan in the short term.

These issues are discussed further in the Library briefings on the [UK replacement of the EU's external agreements after Brexit](#) and [UK progress in rolling over EU trade agreements](#).

6.1 Negotiating future trade agreements with other countries

Public procurement could also be a part of future new UK trade agreements with other non-EU countries which have no free trade agreement with the EU.

The Government has prioritised negotiations with the US, Australia, New Zealand and 11 signatories of the Comprehensive and Progressive Agreement for Trans-Pacific Trade (CPTPP).²⁶

The Institute for Government has pointed out that negotiations on procurement with future trade partners may have wider political implications that governments need to take into account:²⁷

Much of the debate about the proposed EU-US trade deal, known as the Transatlantic Trade and Investment Partnership, has been about the potential impact of its procurement provisions on public services, and particularly the NHS. Opponents have argued that including healthcare services in the agreement will force the

²⁶ Commons Library Briefing [Future free trade agreements: US, CPTPP, Australia and New Zealand](#), CBP 8499, 20 February 2019

²⁷ Institute for Government, explainer [Public Procurement](#), 22 May 2019

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privatisation of the NHS. However, the Commission insisted that this agreement would include a carve-out for public health services that would prevent any foreign privatisation.

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 part of the access that the UK provides to EU suppliers now and vice versa.²⁸ See section 5.1 of this briefing.

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 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

²⁸ Summary to Chapter 4 of Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017

be a significant consideration in EEA-minus or GPA-plus agreements.²⁹

7.1 Leaving without a deal

If the UK and the EU fail to reach an agreement, the UK would be leaving the EU's single market and customs union. A no deal Brexit would mean no transition period. The UK would become a 'third country' for the EU. The UK's trade with the EU would revert to World Trade Organization (WTO) terms. This would raise barriers to trade between the UK and EU.

The European Commission has said that becoming a third country would mean no mutual rights of access to public procurement markets in the UK and the EU – although many contracts may in practice still be open. The EU rules on public procurement would no longer apply and EU Member States' authorities would have to treat potential UK suppliers as any businesses based in a third country with which the EU did not have an agreement on procurement.³⁰

In the UK, in case the UK leaves the EU without a deal, the Public procurement regulations will remain broadly unchanged.³¹ See also section 3 of this briefing.

This points towards a somewhat imbalanced relationship, where the UK preserves the status quo but the EU applies the 3rd country status.³² This 'cliff-edge' and possible exclusion of UK bidders from procurement procedures in the EU is largely avoided by the UK joining the General Procurement Agreement of the WTO (GPA).

In practical terms though, an abrupt end to free movement of goods, services and capital between the UK and the EU could mean increased barriers for UK suppliers and contractors who would like to bid or deliver services in EU Member States. The EU has said that it will apply tariffs to goods imported from the UK. Non-tariff barriers would also increase: for example, there would be new [product certification requirements](#) for certain UK goods entering the EU market. Visa and work permit requirements might increase administrative burden to UK businesses moving their employees to [deliver services](#) under contract in the EU.

²⁹ Summary to Chapter 4 of Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017

³⁰ European Commission, Notice to Stakeholders: [Withdrawal of the United Kingdom and EU Rules in the Field of Public Procurement](#), 18 January 2018

³¹ HMG, [guidance Public-sector procurement after a no-deal Brexit](#), 25 September 2019; See also HMG [Procurement Policy Note 02/19: Preparing for the UK Leaving the EU](#), 9 May 2019 and [Public procurement. Frequently asked Questions on No-deal Exit](#), 8 May 2019

³² Richard Bonnar, Joe Lyons, [No-deal Brexit: Impact on public sector procurement contracts](#), Law firm DLA Piper, 1 September 2019, [accessed 5 November 2019]

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.

Pointing towards potential drawbacks, the Institute for Government has said:³³

This could lead to greater divergence between the devolved procurement legislation in the UK. Perhaps more importantly, this risks undermining competition and transparency in the procurement markets within the UK and detracting from a unified external strategy in the negotiations with the EU.

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.³⁴ 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.³⁵

The UK government has said that it believes that this framework may need to be legislative.³⁶

³³ Institute for Government, explainer [Public Procurement](#), 22 May 2019

³⁴ Cabinet Office, [Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland](#), 9 March 2018

³⁵ [Joint Ministerial Committee communiqué: 16 October 2017](#)

³⁶ Cabinet Office, [Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland](#), 9 March 2018

The Scottish government are concerned that common frameworks could legally be imposed without the Scottish Parliament's consent.³⁷

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

³⁷ 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.³⁸

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.³⁹

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." ⁴⁰

³⁸ [Labour Party Manifesto 2017](#)

³⁹ ["Build it in Britain again" – Corbyn's full speech](#), 24 July 2018

⁴⁰ [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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