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POLICY DEPARTMENT **A**
ECONOMIC AND SCIENTIFIC POLICY



Consequences of Brexit in the Area of the Public Procurement

Economic and Monetary Affairs

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Consumer Protection**

Consequences of Brexit in the Area of the Public Procurement

Study for the IMCO Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Consequences of Brexit in the area of the public procurement

STUDY

Abstract

This paper examines the implications of the UK's departure from the EU for the EU-UK legal relationship in the field of public procurement. It assesses, in comparison with the position under EU membership, the implications of four approaches found in the EU's relationships with other trading partners: the EEA model; the GPA model; and, between these two, what we call an "EEA-minus" approach and a "GPA-plus" approach. It also notes the procurement-specific issues that may need to be addressed in any withdrawal agreement (or later transition arrangement).

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LIST OF ABBREVIATIONS

CETA Comprehensive Economic and Trade Agreement

DCFTA Deep and Comprehensive Free Trade Agreement

EEA European Economic Area

ESPD European Single Procurement Document

GATT General Agreement on Tariffs and Trade

GATS General Agreement on Trade in Services

GDP Gross Domestic Product

GPA Agreement on Government Procurement

OJEU Official Journal of the European Union

SER Special or Exclusive Right

TFEU Treaty on the Functioning of the European Union

TTIP Transatlantic Trade and Investment Partnership

WTO World Trade Organization

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EXECUTIVE SUMMARY

Background

“Public procurement” refers to the purchase of goods, works and services by the public sector (and entities subject to public sector influence). The European Commission has estimated that (excluding utilities) public expenditure on goods, works and services in 2015 amounted to 13.1% of EU GDP and 13.6% of UK GDP, and that the value of tenders published in the EU’s electronic database for public procurement represented 3.1% of GDP for the EU and 4.9% of GDP for the UK. The EU has sought to include provisions on opening up of these procurement markets in all its trade agreements and is likely to be concerned to ensure a future opening of these markets between the EU and UK after the UK’s withdrawal from the EU (Brexit).

The EU’s trade agreements for opening up procurement generally feature four key elements, which are also found in the EU’s internal regime and can be expected to be the cornerstone also of the procurement-specific measures sought in any agreement with the UK. These are: a set of provisions defining which procurement is covered (which entities and which types and size of contracts); rules that prohibit discrimination in awarding covered contracts, including discrimination against the undertakings and works/services/products of trading partners as compared with national undertakings and works/services/products; rules governing the drafting of specifications and award of contracts which aim, in particular, to ensure transparency; and provisions for enforcement, including rights for affected undertakings to enforce the rules before national review bodies. The conditions of access to public procurement markets are also, of course, affected by measures that affect the relevant market as a whole (public and private).

Aims

This main aims of this paper are:

- to outline the EU’s internal rules on public procurement that currently govern the mutual access to public procurement of the UK and the EU27;
- to analyse the legal implications of Brexit for this relationship in public procurement;
- to outline the main legal models and approaches for procurement-specific provisions referred to above that could be used in opening markets between the EU and UK; and
- to assess the implications of these models and approaches for the EU27 against a baseline of the current EU procurement regime, in particular with regard to the four key elements referred to above.

The concept of public procurement is used here in its widest sense to refer to the whole market that is covered by the EU’s internal procurement regime; this includes procurement not just of entities traditionally treated as “public” in Member States but also that of some entities typically considered private but regulated by the EU because of a risk of government influence, as well as procurement by way of concessions (traditionally considered a separate field from public contracts in some Member states, although not in the UK).

Four models and approaches are used for the purpose of this legal analysis and assessment. First, at one end of the spectrum is the model of the European Economic Area (EEA) Agreement. Secondly, at the other end of the spectrum is a model based on the World Trade Organization (WTO) Agreement on Government Procurement (GPA). In between these two extremes the papers considers also two other approaches. One is an approach that, like the EEA Agreement, uses the EU procurement *acquis* as a starting point for procurement-specific rules, but without necessarily including all the elements of the EEA Agreement (an approach

largely adopted in the Deep and Comprehensive Free Agreements (DCFTAs) with some neighbourhood countries) – the “EEA-minus” approach. The fourth approach is one that takes as its starting point the rules of the GPA, but supplements these with additional rules covering one or more of the four key elements, possibly drawn from the EU *acquis*, in order to provide for deeper or broader regulation – the “GPA-plus” approach. This is an approach which is being pursued in current negotiations with the US for a Transatlantic Trade and Investment Partnership (TTIP).

In addition, the paper outlines the issues that might need addressing in relation to public procurement in a withdrawal agreement (or, in the event of a provision in a withdrawal agreement for interim application of the EU procurement regime following Brexit, in any final EU-UK agreement that involves a later move away from the EU regime).

Findings

So far as the current **EU procurement regime** is concerned, major public contracts are regulated by four directives, covering different types of procurement/entities (the Public Contracts Directive, Utilities Directive, Concessions Directive and Defence and Security Directive – the procurement directives) - along with supplementary and additional measures. Inter alia, these directives prohibit discrimination in awarding covered contracts and require the use of specified transparent award procedures to support this prohibition and promote competition. Although they differ slightly in detail, these directives all include core obligations of advertising and competition, minimum time limits for the procedure, limits on the criteria that may be used in making decisions, and obligations to set out selection and award criteria in advance. The Directives also provide for a rigorous system of remedies before national review bodies for affected EU undertakings, which was strengthened in 2007. Contracts which are below the directives’ thresholds but still of cross-border interest are subject to non-discrimination and (limited) transparency requirements under the TFEU, which are enforceable by affected undertakings under general TFEU rules.

Some other Single Market measures, including those on product standards and mutual recognition of qualifications, as well as the Acquired Rights Directive and Posted Workers Directive, are important for public procurement. Public procurement also has an important connection with other rules of the *acquis* in that contracts may involve unlawful state aid, including if not on commercial terms ; but compliance with the procurement directives is relevant to showing that no unlawful state aid exists.

Under the **EEA Agreement model** the above rules in the procurement directives and the provisions on remedies for undertakings generally apply in the same way as within the EU. This includes the requirement to use the EU’s common advertising system for notices, Tenders Electronic Daily (TED), and to submit notices in one of the EU’s official languages, as well as to use other EU practical tools, such as e-Certis. The same obligations as within the EU also largely apply with regard to below-threshold contracts of cross-border interest. Related rules of a general nature that are important for public procurement also apply under the EEA Agreement, including the rules on posted workers, the Acquired Rights Directive and rules on mutual recognition of qualifications, harmonised standards etc. Further, the same disciplines also apply regarding public procurement and state aid as within the EU.

However, against the background of the fact that the EEA Agreement does not provide for a customs union, products originating outside the EEA appear not to have guaranteed access to the public procurement market even when offered by EEA undertakings. Further, the EU’s Proposed Regulation on Third Country Access to Procurement, which proposes a common approach to excluding third countries from EU markets when these countries do not provide reciprocal access, will not apply; and nor do the (limited) current provisions on third country access that are contained in the EU procurement directives.

So far as the WTO is concerned, there are no significant multilateral obligations precluding discriminatory policies in government procurement undertaken for governmental purposes. Procurement is addressed instead mainly in a plurilateral agreement, the **Agreement on Government Procurement (GPA)**, to which both the EU, including the UK as an EU Member State, and many of the EU's main trading partners are Parties.

The position of the UK in relation to the GPA post-Brexit is not clear. One view is that the UK needs to rejoin the GPA after Brexit if it is to undertake commitments and receive benefits under the Agreement. Another view is that succession to the Agreement by the UK is possible, with no new application required. The approach that is taken to the UK's position in practice seems likely to depend on the legal interpretations that are acceptable to the current GPA Parties as a whole, and the extent of consensus on this matter. Whatever the approach taken, however, if the Parties agree that it is desirable for the UK to continue with the rights and obligations that it has under the GPA as an EU Member State, it may be possible for this to be arranged very swiftly, and even for this to take/remain in effect at the time of Brexit.

The GPA itself provides a relatively robust framework for addressing public procurement, in particular in that, and unlike most WTO rules, it provides for remedies for affected undertakings before national review bodies. The GPA « model » has therefore been used by the EU in public procurement agreements with many of its trading partners who are not party to the GPA itself. It provides a feasible model for a significant EU-UK agreement on procurement, either temporary or as the final governing agreement.

As regards the first key element referred to above, namely the scope of entities and contracts covered, current EU/UK coverage under the GPA is narrower than under the EU procurement directives in relation to a few utility sectors and to 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, much of this procurement, at least above the directives' thresholds, could easily be added to the GPA if desired. Further, some of the differences are not hugely significant : for example, many of the utilities activities covered in principle by the directives but not at all by the EU's GPA Annexes are not in fact regulated within the UK even under the directives, because they are exempt under the « competitive markets » exemption or are carried out by unregulated entities. Arguably the most significant « missing » element of entity/contract coverage that needs addressing is that of concessions. The GPA also does not, however, include detailed and explicit rules on when existing contracts may be modified without a new award procedure or on coverage of procurements by one public body from another.

As regards the second key element, award procedures, GPA contains the same « core » transparency requirements as the EU procurement directives, including advertising and competition obligations. Further, UK participation in the EU's common advertising system could also be applied as an element of the UK's commitments under the GPA if desired, and this seems a practical and realistic possibility for the particular situation of the UK, even though this is not a requirement even in some of the EU's trade agreements that are based on the EU procurement *acquis*. The GPA's transparency rules are, however, less detailed and stringent than those of the EU in some respects. The key differences include absence of any requirement for mandatory electronic procurement in the GPA; wider scope in the GPA for use of negotiation in most public sector contracts and for use of qualification systems ; more limited GPA rules regarding criteria and evidence for qualification, and no requirement for mutual recognition of certificates or registrations, or use of the e-Certis database ; and more limited regulation in the important area of framework agreements, other recurring purchasing arrangements and electronic auctions. The exact significance for market access of these rules, and other individual rules in the directives, is not known, however.

The GPA's rules on remedies for undertaking are also more limited than those under the EU directives, although still relatively robust : key differences are the absence of any "standstill" requirement in the GPA after notifying affected undertakings of an award decision; absence of any automatic suspension of award decisions (although suspension of award decisions and other decisions must be available on request); and more limited remedies, including limitations on damages (damages for lost profits are not required to be given) and the possibility of limiting final remedies to damages only (including the absence of any requirements relating to ineffectiveness of concluded contracts, even when not advertised).

The position of procurement, including access to markets, under a WTO/GPA-only regime will depend on the extent to which more general measures address barrier to access in the sector in question, including the extent of tariffs and commitments relating to services, and will be affected by the absence of other Single Market measures affecting access, such as on mutual recognition of qualifications, as well as by the fact that EU rules on posted workers and under the Acquired Rights Directive will not apply. Such matters might, of course, be addressed in a wider agreement between the EU and UK. As regards aid to industry, the WTO's Subsidies Agreement controls aid through public procurement contracts for goods, but there are no comparable rules relating to procurement of services.

The GPA also does not guarantee access for products of non-GPA Parties or of undertakings from the Parties that offer such products. Under a WTO-only regime there would, as under the EEA model, also be no common policy between the EU and UK towards third countries.

As regards an **EEA-minus approach** that uses the EU *acquis* as the basis of procurement-specific rules, this would maintain EU access to above-threshold UK markets on the same basis as at present as regards contracts and entities covered, award procedures and remedies. Further, as noted above, the UK's use of the common EU advertising system could feasibly be maintained, even though not applied in all other *acquis*-based agreements. However ensuring application and development of *acquis*-based rules in light of future developments in legislation and case law will be difficult in such a complex and technical area.

Finally, a **GPA-plus approach**, involving access based on the GPA but supplemented by additional rules, would provide access to markets to the same extent as under the GPA, as outlined above, but could also address any issues that are considered to be important but not covered by the GPA, including rules based on the EU *acquis*. These could be additional rules that are suitable for eventual inclusion in the GPA itself (thus possibly giving impetus to further development of that Agreement) – for example on recurring purchases or modification of concluded contracts – or rules considered of specific relevance for the UK relationship – for example, *acquis*-based rules on qualification, as mentioned above.

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

Under either an EEA-minus or GPA plus approach, application of related general rules such as those in the Posted Workers Directive and Acquired Rights Directive and on mutual recognition of qualifications and harmonised standards would again depend on what else is agreed in any wider EU-UK agreement, and again there would be no common rules on third countries.

As regards any **withdrawal agreement**, this may need to consider :

i) Measures to address the consequences of changing from one procurement regime (the EU regime) to another (whether a permanent or interim regime), if a change were to occur at the time of Brexit. If there were to be a commitment to retain the current EU regime on an interim basis following Brexit such measures would be needed in a later agreement should any move from the EU regime occur later.

ii) Transitional measures to address the fact that the ultimate shape of the EU-UK relationship is undetermined at the time of Brexit.

If the final relationship is indeed undetermined when Brexit occurs, it seems likely that the UK's current procurement regulations transposing the EU directives will remain in place pending any final determination of that relationship in public procurement. However, given the absence of significant WTO rules at multilateral level, an interim EU-UK access arrangement might still be needed in a withdrawal agreement to secure rights for EU undertakings to access UK procurement markets and to enforce the UK procurement regulations pending any final agreement or, at least, pending the UK's accession/succession to the GPA. An interim arrangement will be less necessary, however, if it is arranged for the GPA to apply to the UK as at the time of Brexit.

Another interim issue relevant for a withdrawal agreement is provision for continuing UK access to the EU's common publication system (TED) and to other EU tools, such as e-Certis. This is relevant for any interim period and also for facilitating use of these tools in any final agreement. This includes their use for EU-funded contracts, since use of EU tools by UK entities may be required by the funding agreement.

Issues that may need addressing in relation to any change of procurement regime (which will be relevant for a withdrawal agreement should the EU regime not be retained in place at the time of Brexit by an interim agreement) include: i) treatment of ongoing award procedures ; ii) remedies for violations when proceedings are instituted after Brexit ; iii) retention of records ; iv) treatment of ongoing procurement arrangements in the form of framework agreements, qualification systems and dynamic purchasing systems ; and v) treatment of contracts concluded before any regime change, including : a) the risk of contracts being terminated or reduced in scope for reasons of nationality ; b) continued application of termination rights for UK procuring entities that derive from EU law ; c) application of the e-Invoicing Directive ; and d) application of the rules controlling modification of concluded contracts. Some of the issues in group v) may also be considered relevant for contracts concluded under award procedures that are ongoing at the time of regime change, even if the contract itself is not yet concluded.

1. INTRODUCTION AND OUTLINE

KEY FINDINGS

- Public procurement is an important area to consider in the Brexit negotiations
- Key elements of trade agreements on public procurement are provisions on coverage; non-discrimination rules; rules requiring use of transparent award procedures, including to allow for monitoring of discriminatory behaviour; and provisions on enforcement, including review procedures that allow affected undertakings to enforce the rules
- The WTO's rules on procurement in the Agreement on Government Procurement (GPA) differ in important respects from the rules governing most other trade areas and have potential importance in this area as a post-Brexit model, at least as a starting point. This GPA framework could be combined with some additional rules in important areas - a « GPA-plus » approach.
- Another important possible approach is an « EEA-minus » approach, applying the EU's procurement rules as a starting point but without full application of the EU's other Single Market rules.

On June 23 2016 the UK voted in a referendum in favour of leaving 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 the EU under Art.50 of the Treaty on European Union by the end of March 2017¹. At the time of writing it was expected that this would be done on March 29th 2017.

One of the areas for consideration in the Brexit negotiations is the treatment of public procurement, which refers to the purchase by the public sector (and entities subject to public sector influence) of the goods, works and services needed to carry out their functions². The European Commission has estimated that government expenditure on goods, works and services in 2015 in the EU (excluding utilities) represented 13.1% of EU GDP in the EU as a whole and 13.6% in the UK³; and that the value of tenders published in Tenders Electronic Daily (TED) (the EU's electronic database for public procurement) was 450.21 billion Euros, of which 127.56 billion Euros – well over a quarter - was for contracts tendered by UK procuring entities⁴, representing 3.1% of GDP for the EU overall and as high as 4.9% of GDP for the UK⁵. For works (excluding utilities and defence) a third of the value of procurement awards published in TED (excluding utilities and defence) was represented by contracts of a value of 100 million Euros or more⁶ – the kind of contracts most likely to be of interest to cross-border trade on an EU-wide basis - and of these a huge proportion in value, 66%, was attributable to the UK⁷. In the area of services (again excluding utilities and defence) 70%

1 See "Theresa May's keynote speech at Tory conference in full", <http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html>.

2 The term "public procurement" as used here includes reference to concession contracts and also to the contracts of some entities that are not "public" in the sense either of the EU system or many national systems (such as entities operating utility activities under special or exclusive rights) but are nevertheless regulated by the EU's system of regulating procurement because, like public bodies, the risk of their practices creating barriers to trade is considered sufficient to warrant regulation. The rules regulating all these situations in the EU are frequently referred to as falling under the EU's "public procurement" regime.

3 European Commission, Public Procurement Indicators 2015, available at <http://ec.europa.eu/DocsRoom/documents/20679>.

4 European Commission, Public Procurement Indicators 2015, p.10. These figures include utilities and defence markets; without utilities and defence the figures are 349.18 billion Euros (EU) and 101.19 billion Euros (UK): p.12.

5 European Commission, Public Procurement Indicators 2015, p.16.

6 European Commission, Public Procurement Indicators 2015, p.6.

7 European Commission, Public Procurement Indicators 2015, p.2.

of the value of EU contracts above 100 million Euros published in TED were attributable to the UK⁸, as were 36% of contracts of a value between 5 million and 100 million Euros⁹. As these figures show, public procurement markets, including those of the UK, represent a significant opportunity for trade.

However, practices in public procurement can operate as barriers to trade, which become more important as other barriers to trade are gradually removed. Many international trade systems/agreements, as well as the EU's own Single Market rules, therefore include rules to address public procurement. Most commonly such agreements, in particular those involving the EU, include four main elements¹⁰. The first is a set of provisions defining which procurement is covered, including which entities (Federal, regional, municipal, State-owned Enterprises etc) and what type and value of contracts. A second element is rules that prohibit discrimination in awarding covered contracts, including discrimination against the undertakings and works/services/products of trading partners as compared with national undertakings and works/services/products. A third element is a set of rules governing the drafting of specifications and award of contracts which aim, in particular, to ensure transparency in the award procedure. Such procedures generally aim to ensure that contract opportunities are widely known, that the rules and criteria of the procedure are known to participants, that the discretion available to procuring officers is limited, and that participants are informed of reasons behind those discretionary decisions with the aim, inter alia, of allowing interested parties to detect and redress discriminatory behaviour. Finally, agreements also now tend to make provision for undertakings interested in contracts to enforce the above rules, including by providing those undertakings with remedies before national review bodies (as an addition to any inter-governmental enforcement possibilities).

The main aim of this paper is to explain the different ways in which public procurement is addressed, first, under the EU's own internal market regime and, secondly, under the key approaches used in the EU's trade agreements with third countries, and then to assess the implications for the EU27 of using various models and approaches as the basis for a final trade agreement between the EU and UK. It also outlines the issues that might be addressed in this field in a withdrawal agreement (or, in the event of a provision in a withdrawal agreement for interim application of EU procurement rules following Brexit, in any final EU-UK agreement that involves a change away from the EU rules).

To this end, the paper will first briefly explain the EU's own system for regulating public procurement, including outlining the current and projected legal instruments that are specific to the public procurement sector (Chapter 2).

It will then turn to the approach adopted to public procurement under other EU trade agreements, and assess the features of the main relevant approaches by reference to the EU baseline standards.

In this regard the paper will first, in Chapter 3, note the way in which public procurement is regulated under EEA rules – the EEA Model – and how this compares with the EU baseline approach. Since this involves, almost entirely, the application of the same disciplines that apply within the EU this can be addressed only briefly.

The next part of the analysis (Chapter 4) then examines regulation of procurement under the World Trade Organization (WTO) rules on procurement, notably under the WTO's Agreement on Government Procurement (GPA) – the GPA model – and assesses the key differences between this and the baseline EU system from the perspective of the EU27. The GPA governs

⁸ European Commission, Public Procurement Indicators 2015, p.7.

⁹ European Commission, Public Procurement Indicators 2015, p.7.

¹⁰ They may also include other elements and have other objectives, as is the case with the EU's own procurement rules.

the mutual access to public procurement markets within the WTO framework between the EU and many of its main trading partners. The GPA deserves considerable attention since it is of particular importance and interest as a model in the context of Brexit, for a number of related reasons. These include the consideration that the GPA is a plurilateral agreement; the fact that it is a robust agreement that parallels the EU regime in many respects and, in particular, unlike many WTO rules includes an obligation to provide remedies for undertakings before independent national review bodies; the fact that it need not be applied on a MFN basis; and the fact that it has provided a model for treatment of procurement in many of the EU's other trade agreements with third countries that are not potential accession candidates. For these reasons, which distinguish the WTO rules on procurement from most other WTO rules, the WTO procurement framework (either in its pure form or in the form of a "GPA-plus" approach) is of potential importance as a possible solution for post-Brexit EU-UK relations even under a Deep and Comprehensive Free Trade Agreement (DCFTA).

The paper will then in Chapter 5 examine the approach taken to procurement in the EU's other trade agreements or negotiations for such agreements, focusing mainly on those that are actually of relevance in the context of Brexit and public procurement. It will be explained that most of the agreements made other than in a pre-accession context involve one of two general approaches. One is substantial application of the EU procurement regime but without the background of the full Single Market rules – what can be called an "EEA-minus" approach to procurement. The other is the application of some or all of the rules of the GPA approach, but in some cases with additional elements going beyond the GPA – an approach labelled in the context of the negotiations for a Transatlantic Trade and Investment Partnership (TTIP) as a "GPA-plus" approach. Chapter 5 will assess the implications for the EU27 of using EEA-minus or GPA-plus approaches.

Finally, the paper notes the main issues that need considering either in the context of the withdrawal agreement or - in the event of an interim access agreement based on EU procurement rules - in any later agreement that results in an ultimate change in procurement regime.

2. THE EU REGIME ON PUBLIC PROCUREMENT

KEY FINDINGS

- Major public contracts in the EU are regulated by four directives, covering different types of procurement/entities (the Public Contracts Directive, Utilities Directive, Concessions Directive and Defence and Security Directive – the procurement directives) - along with supplementary and additional measures
- Inter alia, these directives prohibit discrimination in awarding covered contracts and require the use of specified transparent award procedures to support this prohibition and promote competition
- Although they differ slightly in detail, all the procurement directives include core obligations of advertising and competition, minimum time limits for the procedure, limits on the criteria that may be used in making decisions, and obligations to set out selection and award criteria in advance
- Directives also provide for a rigorous system of remedies before national review bodies for affected EU undertakings, which was strengthened in 2007
- Contracts which are below the thresholds of the procurement directives but still of cross-border interest are subject to non-discrimination and (limited) transparency requirements under the TFEU, which are enforceable by affected undertakings under general TFEU rule
- Some other Single Market measures, including those on product standards and mutual recognition of qualifications, as well as the Acquired Rights Directive and Posted Workers Directive, are important for public procurement
- Public procurement contracts may involve unlawful state aid, including if not on commercial terms, but compliance with the procurement directives is relevant to showing that there no unlawful state aid exists

2.1. Introduction¹¹

Major public procurement contracts in the EU are regulated by a series of directives that confirm the principles of non-discrimination (that are also found in the Treaty on the Functioning of the European Union (TFEU)), and also lay down detailed procedures that must be followed in drafting specifications and in awarding contracts. These are the Public Procurement Directive, Utilities Directive, Concessions Directive and Defence and Security Directive (see Table 1). These are referred to in this paper as “the procurement directives”. These are supported by several other legal instruments that define the scope of the obligations (for example, by revising the threshold values at which the directives apply), fill out the directives’ obligations (see again Table 1 below) or regulate certain limited types of contract (Passenger Transport Regulation and Licensing Regulation). There are also some other legal instruments that include obligations applying specifically to public procurement (for the main ones see again see Table 1 below). The early directives date back to the 1970s and were most recently comprehensively revised and expanded in 2014 (with nearly all the 2014 provisions now having been required to be transposed by Member States).

These obligations are supplemented by specific rules on remedies for undertakings seeking contracts in the public market (referred to in the directives as economic operators). These

¹¹ For a detailed analysis of the core EU regime see Sue Arrowsmith, *The Law of Public and Utilities Procurement Vol.1* (Sweet & Maxwell: 3rd ed. 2014) and for an overview Abby Semple, *A Practical Guide to Public Procurement* (OUP: 2015).

are contained in the Remedies Directive, Utilities Remedies Directive and (for defence and security contracts) Defence and Security Directive (see again Table 1).

The approach to regulation adopted in these directives is explained further briefly in the following sections. Given the complexity of the procurement rules this is necessary by way of background in order to convey the impact that use of various other models would have an access to procurement markets.

For contracts that are not covered by the procurement directives obligations still apply under the free movement rules of the TFEU for those contracts considered to be of cross-border interest. These obligations include requirements not to discriminate and also limited (and rather uncertain) requirements of transparency, including an obligation to publicise the contract in question; these transparency requirements the ECJ has ruled are to be derived from the free movement rules, in order to ensure that compliance with the obligation not to discriminate can be monitored¹². These TFEU rules may be enforced by affected individuals in national courts in accordance with the usual rules that apply to enforcement of individual rights. These Treaty obligations were important prior to 2014 in providing some regulation of important contracts that were previously outside the scope of the directives, notably services concessions. However, in 2014 the scope of regulation was expanded by the Concessions Directive both to cover services concessions for the first time and to regulate works concessions more extensively; thus the obligations derived from the TFEU are mainly now relevant for the limited case of contracts that are below the directives' financial thresholds but still considered of cross-border interest.

There are two significant pending legal measures that contain rules specific to public procurement. These are: the proposed Regulation on Third Country Access to Procurement; and the proposed Accessibility Act, a proposed directive that will, inter alia, fill out the current obligations in the procurement directives to include specifications that provide for accessibility and design for all users when the subject matter of a contract is for use by natural persons. (See Table 2 below.)

Table 1: Main EU public-procurement specific measures of a general nature

Legal measure	Main content
Public Contracts Directive (2014/24/EU)	Award procedures for most major public contracts (not concessions, utilities, and defence and security contracts)
Utilities Directive (2014/25/EU)	Award procedures for major contracts of entities in certain utilities sectors (water, energy, transport and postal services); includes contracts of public undertakings and entities with special or exclusive rights
Concessions Directive (2014/23/EU)	Award procedures for most types of major concessions (including utilities and defence)

¹² C-324/98 Telaustria Verlags GmbH v Telekom Austria Ag [2000] E.C.R. I-10745.

Defence and Security Contracts Directive (2009/81/EC)	Award procedures and remedies for major contracts in defence and security fields
Remedies Directive (89/665/EEC)	Remedies for contracts covered by Public Contracts Directive and Concessions Directive (other than concessions in the utilities sectors)
Utilities Remedies Directive (92/13/EEC)	Remedies for contracts covered by Utilities Directive and, for entities in utilities sectors, Concessions Directive
Passenger Transport Regulation (1073/2009/EC)	Award procedures for services concessions for the award of services concessions for passenger transport services by bus, tram, rail and metro
Licensing Regulation (1008/2008/EC)	Award procedures for concessions for air transport procedures
Standardisation Regulation (1025/2012/EU)	Designation of certain IT standards as available for use within the rules on drafting specifications in the procurement directives (Art.14)
E-invoicing Directive (2014/55/EU)	Provision for developing a European standard on e-invoices to be used in contracts covered by all the procurement directives
Thresholds Regulation (2015/2172/EU)	Sets the threshold values for rules in the procurement directives, including the rules on which contracts are covered
Regulation on standard form of notices (2015/1986/EU)	Sets out the standard form for submitting procurement notices to the <i>Official Journal of the European Union</i> (OJEU)
Utilities Exemption Decision (Commission Decision 2016/1804)	Lays down rules on application of the exemption mechanism of the Utilities Directive under Art.34 of that directive for entities operating in competitive markets
Energy Efficiency Directive (2012/27/EU)	Requires entities of the central government to purchase energy-efficient versions of certain products, services and buildings

Clean Vehicles Directive (2009/33/EC)	Requires certain entities regulated by the procurement directives to take account of pollution and energy-efficiency aspects when purchasing certain vehicles
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Table 2: Main proposed general EU legal measures specific to public procurement or containing public procurement-specific provisions or containing public procurement-specific provisions

Proposed legal measure	Main content
Proposed Regulation on Third Country Access to Procurement (COM/2016/034 final)	Provision for removing access to EU public procurement markets for countries that do not provide reciprocal access to markets for EU industry
Accessibility Act (COM(2015) 615 final)	Concrete provisions to fill out obligations in the procurement directives concerning accessibility in specifications (Art.21 and Annex I section IX)

Of course, the Single Market acquis in general is relevant for access to public procurement markets since such access, just like access to private markets in the EU, is affected by general barriers to market access that are addressed by the Single Market rules. These include rules on mutual recognition of qualifications, rules on standards and rules on posted workers under the Posted Workers Directive (96/71/EC) and related Enforcement Directive (2014/67/EU). Another significant piece of legislation in the context of public procurement is the Acquired Rights Directive (2001/23/EC), which provides protection for workers upon transfer of an undertaking, which includes the situation of a change of contractor or outsourcing; this can significantly affect the content of tenders for public contracts and the “level” nature of the playing field¹³. These are matters that are, however, of more general relevance rather than specific to public procurement and which require to be addressed at a general level; thus they are not appropriate for inclusion in a paper focused on public procurement (and where they fall within the subject matter of the Internal Market and Consumer Protection Committee are within the area of related papers). However, the value of market access rules in public procurement will be affected by the solutions reached in any EU-UK trade agreement on these general matters, and the effect of such rules may be substantial in relation to some products and services when access to the market may be difficult or impossible without mutual recognition or common standards¹⁴.

It is also relevant to mention that public procurement activity may constitute unlawful state aid under Art.107 TFEU as a public contract may amount to an economic advantage which

13 On application and significance in the public procurement context in the UK see Ijeoma Omombala and Nadia Motraghi, “The Implications of Brexit for TUPE in the Area of Public Procurement” (2017) 26 Public Procurement Law Review 62. The author suggest that UK law is unlikely to change in this regard after Brexit even if application of the Acquired Rights Directive is not required by any trade agreement; and it can be noted that the subsequent Brexit White Paper, above, Ch.7, suggests that labour rights relating to employment benefits and conditions will generally be unaffected (or strengthened), although it does not, however, refer to the particular areas of the Acquired Rights Directive and posted workers.

14 A 1997 EU Study found that technical incompatibility of national standards was one major reason for the limited success of the public procurement directives in opening government markets for high-tech strategic products at that time – for example, railway equipment and power distribution systems: Commission of the European Communities, The Single Market Review subseries III, volume 2, Public Procurement (1997).

an undertaking would not have received under normal market conditions”, when the procurement is not in the nature of a “normal commercial transaction”. This may apply when the contract is awarded on particularly favourable terms - for example, when an excessive price is paid; when a contract is amended that benefits the contractor without corresponding consideration from the contractor; when the state purchases something for which it has no genuine need; and in certain cases in which the purchaser takes into account considerations not related to the subject matter of the contract when making a purchase. The fact that a contract is awarded under the EU’s procurement rules is a significant consideration in helping to determine whether or not the award involves state aid (following the EU procurement rules being considered as a mechanism to ensure that the transaction is a normal commercial transaction)¹⁵.

Two main issues arise here so far as an EU-UK agreement is concerned. One is whether a state aid regime will apply under any such agreement, resulting in constraints in this area in public procurement. This – like the application of Single Market rules in general – is a wider issue outside the scope of this paper. The second is whether changes to the applicable procurement rules in the UK will weaken the application of any state aid regime that might apply. This will be covered in the discussions below.

A final general point to mention that has been highlighted by commentators¹⁶ and raised very frequently in practice, although perhaps a minor issue and not unique to procurement, is that UK government, practice and academia has played a significant role in developing, disseminating and analysing EU procurement law both within the EU (in a more significant way for some of the EU27 than for others) and outside the EU, including because of EU-wide and global knowledge of the English language. This has occurred through both formal channels (governmental input into legislation, and governmental and non-governmental input into EU stakeholder groups) and informal, such as through publications, journals, conferences/presentations and training courses (including for accession states) by academics, individual professionals or groups such as the Procurement Lawyers Association. This is, in a sense, the flip-side of – or an EU27 perspective on - the often-mentioned point that Brexit may lead to the UK being subject to procurement rules over which it has no or little influence.

2.2. Coverage of the procurement directives

As noted, a key element of any public procurement trade regime is the rules on coverage, which establish the size and nature of the market to which access is given. Under the EU regime the contracts to which access must be given are the same in principle for all Member States, and the scope of access is defined by common definitions and rules set at EU level (for example, it does not depend on what is defined as a “public” body at national level).

The directives contain, first, what can be called basic coverage rules defining which entities and contracts are covered. So far as entities are concerned they cover what are referred to in most of the directives as “contracting authorities”, in particular, the State at both Federal and regional level and municipal bodies, as well as all other bodies that are mainly financed controlled or subsidised by other contracting authorities. In addition, the directives also cover entities operating in the utility sectors that are public undertakings, and also all entities (even private entities) that operate on the basis of special or exclusive rights (SERs) (e.g. in the UK private water companies that have monopoly rights of supply).

So far as contracts are concerned, the directives cover only contracts that are generally considered to be of interest for cross-border bidding (even though most trade in procurement

¹⁵ See European Commission, Notice on the Notion of State Aid (19 May 2016) http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html

¹⁶ Christopher R. Yukins, « Brexit and Procurement : A US Perspective on the Way Ahead » (2017) 26 Public Procurement Law Review 71, at p.74.

markets actually occurs indirectly through local companies). These contracts are defined by reference to financial value, with the financial threshold for applying the rules varying according to the nature of the contract and sector. As can be seen from Table 1, different procurement directives apply depending on the nature of the contract and/or sector: there are separate directives for public contracts in general (Public Contracts Directive), contracts of entities operating in certain utilities sectors that relate to those activities (Utilities Directive), concessions (public sector and utilities) (Concessions Directive) and contracts in the defence and security fields, which includes contracts for hard defence purchases (Defence and Security Directive). Regulated utility procurement is not a large proportion of the regulated market: procurement advertised under the (2004) Utilities Directive accounted for only 20% of procurement advertised at EU level in 2008¹⁷.

In addition to the basic coverage rules the directives also include detailed supplementary coverage rules elaborating on the application of the basic coverage rules and preventing avoidance/evasion (such as rules on calculation of thresholds, valuation of contracts, and requiring aggregation of similar and/or related contracts for the purpose of the thresholds, and rules on when arrangements between different parts of the public sector or the same corporate group must be awarded under the rules).

The directives also contain extensive rules on when existing contracts can be modified without a new award procedure under the directives (for example, they can be modified to increase the size of the contract marginally, but changes to the economic balance in favour of the contractor (such as a price increase without corresponding increased obligations) are normally prohibited as this would undermine the competition held to award the contract). These rules can also be classified as coverage rules in that they designate transactions that fall within the directive (essentially, which are regarded as giving rise to a new contract for the purpose of regulation).

2.3. Procedures under the procurement directives

The directives' rules on award procedures, in common with the award procedures laid down in many international procurement agreements, aim to ensure transparency in award procedures to allow monitoring of whether there is discrimination in favour of national industry and hence to deter such discrimination. This includes by limiting the discretion of procurement officers in the way the award procedure is operated. The directives also include other obligations designed to enhance access to markets and to promote competition.

The core elements of the rules that have for the most part existed since the earliest directives and which fulfil one or more of these functions include:

1. an obligation to advertise in a single forum by sending a notice to the EU's Official Journal (OJEU) (advertising obligation);
2. an obligation to award contracts by a competitive award procedure (competition obligation);
3. minimum time limits for different stages of the award procedure;
4. limits on the criteria that may be used in making decisions (for example, in choosing between tender – the award criteria); and
5. obligations to set out selection and award criteria for each procedure (within the permitted criteria) in advance.

17 European Commission, Staff Working Paper, Evaluation Report Impact and Effectiveness of EU Public Procurement Part 1, SEC(2011) 853 final (June 2011), p.99, p.xii.

Contracts must generally¹⁸ be awarded using one of a number of set procedures (varying slightly according to which directive applies), all of which involve the above obligations: an open procedure (a formal tendering procedure involving a single tendering stage, in which all interested firms may bid); a restricted procedure (a formal tendering procedure involving a single tendering stage but with a limited number of invited tenderers); or a more flexible competitive procedure (although still involving tendering) during which substantial discussions with tenderers are permitted (competitive procedure with negotiation; competitive dialogue; negotiated procedure with a prior call for competition; and innovation partnership).

It is possible to dispense with the above rules to make a “direct award”, only in exceptional cases defined in the directives (such as cases of extreme urgency, and then only under certain conditions. (The procedure for making directive awards is generally called the negotiated procedure without a prior call for competition.)

As the directives have evolved over the years the explicit rules have become ever more detailed, both as new rules have been added by the legislator and as the rules developed in the case law (see below) have been codified in the directives.

As well as including explicit obligations on particular steps in the process the directive now also state certain general principles (originally developed by the ECJ), in particular, transparency, equal treatment, non-discrimination on grounds of nationality, and proportionality. These principles have been applied very extensively by the ECJ to add to, as well as to interpret, the directives’ more explicit rules. For example, until 2014 there were no explicit rules in the directives on the extent to which a regulated entity may allow tenderers to correct errors and other defects in their tenders after the tender deadline, and the current directives’ barely mention this issue. Thus it is left to be addressed by the case law, even though it is an extraordinarily difficult situation to deal with given the range of factual scenarios and complex policy considerations involved. Thus there is much uncertainty over this issue as well as others.

It is relevant for the purpose of this paper to highlight that the very expansive role played by the ECJ in this field and the complexity of the field present particular issues for the application of the EU rules as they may develop after Brexit.

As regards the precise details of the award procedures, the core elements described above are common to all the procurement directives and many of the detailed rules are also common, or very largely, common. However, there are some differences. In particular the Public Contracts Directive is stricter in some important respects than the other directives, including in that flexible competitive procedures involving significant negotiation are available only for certain defined cases rather than being generally available. The extent of differences between the regime in the Public Contracts Directive and its predecessors, on the one hand, and the utilities regime, on the other, have been greatly reduced over time, including because of the gradual extension of grounds for using flexible procedures under both the 2014 Public Contracts Directive and its 2004 predecessor, tighter regulation of framework agreements (a type of on-going arrangement for purchasing repeat requirements) under the 2014 Utilities Directive, and extension of detailed rules on evidence for proving qualifications to the Utilities Directive. The differences are also much less than they appear to be superficially. For example, the rules on frameworks in the Utilities Directive appear more skeletal than those under the Public Contracts Directive but in fact are little different since many of the “extra” rules in the latter are merely clarifications of general principles that also apply to utilities or confirmation of flexibilities that are clearly applicable to the more flexible utilities rules

18 Except under the Concessions Directive 2014/23/EU, which does not involve designated procedures, although the result is little different in practice since the same core obligations apply, as indicated later below.

anyway. The different presentation of the Concessions Directive as involving free choice in designing award procedures, rather than merely application of named award procedures, is also more a difference of form than substance since the same core obligations, and many of the detailed obligations of the other directives, still apply. Some differences are merely because of lack of updating in that the Defence and Security Directive was not updated in 2014 to add the new rules applied to the other directives even when just as suitable for the defence and security sector. The exact extent of differences is also unclear since it is sometimes now known how far the different directives are to be interpreted differently. Some of the remaining differences between directives are rather idiosyncratic and may depend more on accidents of historical development than a considered policy.

The existence of these multiple directives, leading to boundary disputes, exacerbates the complexity of the system and the costs of operating it.

In all cases the directives' rules on award procedures are not exhaustive and in principle leave room for Member States to supplement them. However, the increasingly detailed, complex and uncertain nature of the rules has gradually reduced the space for national regulation, as well as (because of the uncertainty over the scope of EU law) the inclination for, national regulation. One effect of this has been that the procurement rules of Member States have become more similar over time. Similarity of rules can per se promote market access (although it is questionable whether there is a power under the internal market provisions to regulate specifically for this purpose and it is not the stated purpose of the directives). It has also been pointed out in the context of Brexit that different rules can create barriers to cross-border collaboration, which is particularly relevant in the defence field¹⁹; however, this can generally be addressed by agreeing on applicable rules on an ad hoc basis.

It is very difficult to assess the actual value of the directives' individual detailed rules for market access, let alone the cost-benefit implications of individual rules. Studies for the EU relating to earlier directives show that holding an advertised competition under the directives leads to economic savings in comparison with making a direct award²⁰. There are also some smaller studies that touch on specific areas – various qualitative studies on the UK market, for example, suggests that an award procedure involving full tenders followed by very limited discussions to finalise terms, rather than more skeletal tenders followed by extensive negotiations with a preferred bidder, also produces better value outcomes²¹. However, there is no comprehensive data on the specific benefit of the myriad different rules included in the directives (say on the impact of limiting national discretion over correction of errors or omissions in tenders that do not impact on the award criteria, to take but one example of

¹⁹ Albert Sanchez Graells, "Additional thoughts on Brexit and Public Procurement", <http://www.howtocrackanut.com/blog/2016/11/30/brexit-and-public-procurement-some-thoughts-after-kcl-seminar>

²⁰ A 2004 EU Study found price savings in the order of 40% when notices were published and received at least one response, as compared with direct awards, after controlling for other factors : European Commission, A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future. This, however, says nothing about how the directives (as at that time) compare with other procurement regimes that include similar core obligations. A 2007 Study found savings of 2.5–10 per cent when comparing the position under the directives with what the Study considered would have been the position without the directives (and concluded that savings would have been even greater with full compliance), but again does not provide data on the directives' individual elements and what the position might have been under alternative regimes : Europe Economics, Evaluation of Public Procurement Directives (2007). (Both studies, as well as a 2010 study of the impact of the directives from 2006-2009 (European Commission, Commission Staff Working Paper, Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation SEC (2011) 853 final), also showed evidence of greater import penetration and the 2004 study of this being a result of the directives, as demonstrated, in particular, by price convergence between Member States.) These studies are available at https://ec.europa.eu/growth/single-market/public-procurement/studies-networks_en.

²¹ Sue Arrowsmith and Richard Craven, "Competitive dialogue in the United Kingdom", Ch.3 in Sue Arrowsmith and Steen Treumer (eds.) Competitive Dialogue in EU Procurement (CUP 2012).

hundreds) or of their individual costs²². While some of the rules certainly appear to be significant, the lack of data on these matters makes it difficult to determine how far departing from all of the detailed rules of the directives themselves in any trade agreement will detract from – or possibly even enhance, in some cases – mutual access to procurement markets.

2.4. Remedies and enforcement for contracts covered by the procurement directives

As noted above, there are also procurement-specific rules on remedies for parties affected by legal violations. These are set out in the Remedies Directive (for violations of EU law in relation to contracts covered by the Public Contracts Directive and Concessions Directive other than utilities); in the Utilities Remedies Directive (for violations of EU law in relation to contracts covered by the Utilities Directive and Concessions Directive in the utilities fields); and in the Defence and Security Directive for contracts covered by that directive (see again Table 1).

These rules require a system of remedies for economic operators before national courts or other judicial-type bodies. Under the Remedies Directive remedies must be, *inter alia*, effective and timely and the review body must have the possibility of suspending award procedures, setting aside or correcting unlawful decisions, and awarding damages, including for lost profits, although there is debate over the conditions under which damages must be available. In 2007 the Remedies Directive was substantially revised by Directive 2007/66/EC to enhance its effectiveness (in particular to prevent suspension or set aside remedies being lost by conclusion of a contract) via: a mandatory requirement to notify award decisions to losing participants and to delay the contract for a certain time after notification (usually ten days) to allow time for challenges (the “standstill and notification obligation”); a specific minimum time limit for legal actions; automatic suspension of the award decision following a challenge; and a requirement for concluded contracts to be declared ineffective in the case of failure to advertise, or (in certain significant cases) of violation of the suspension and standstill rules, along with penalties of fines or contract shortening in some of these cases. The first two, to a large extent, gave effect to requirements already developed in ECJ case law.

There are slight variations between remedies under the different remedies regimes but nothing significant.

There remedies for undertakings exist alongside the system of Commission monitoring and ECJ infringement proceedings (which is also enhanced by some procurement-specific provisions in the Remedies Directive).

²² The costs include resource costs of compliance, over-compliance due to uncertainties, reduced focus on commercial issues, reduced supplier participation from lack of flexibility and/or red-tape, and inability to take optimum decisions (for example, through use of subjective judgement in evaluating service quality) because of constraints on flexibility. The 2010 study *Impact and Effectiveness of EU Public Procurement Legislation*, above, section 9.3, concluded that overall the savings for a specific procurement of running procedures under the directives generally exceeded the costs of the procedures by four or fivefold (although acknowledging that there may be specific cases under the rules in which costs outweigh benefits, and also that the rules may create costs by contributing to problems such as uncompetitive supply markets); but this study again sheds no light on whether all the rules of the directives contribute to this effect and whether an equivalent or better cost-benefit ratio might be achieved by slightly different rules.

3. THE EEA MODEL

KEY FINDINGS

- Under the EEA Agreement the rules in the procurement directives and the provisions on remedies for undertakings generally apply in the same way as within the EU, as do the obligations on below-threshold contracts deriving from the free movement rules
- EFTA members of the EEA are required to use the EU's common advertising system for notices as well as other EU tools, such as e-Certis
- Important related rules also apply (Posted Workers Directive, Acquired Rights Directive, mutual recognition of qualifications, harmonised standards etc)
- The same disciplines also apply regarding public procurement and state aid as within the EU
- However, products originating outside the EEA probably are not given guaranteed access to the public procurement market. Further, the EU's Proposed Regulation on Third Country Access to Procurement will not apply, and nor do current (limited) rules on third country access that are contained in the EU's procurement directives.

3.1. Introduction

The features of the EEA model for dealing with the area of public procurement are briefly highlighted in section 3.2 below, and an assessment in comparison with the EU baseline system, from which it differs little, is provided in table form in Table 3.

It can be assumed that this model will not be applied in its entirety, however. Obviously, and not least, this is because its application now appears to have been definitely rejected by the UK itself, in rejecting in the Brexit White Paper the possibility of free movement of workers and the jurisdiction of the ECJ.

3.2. Explanation and assessment of the EEA model for public procurement

Under the EEA agreement (or a separate agreement following the EEA model) there would be applied, in the same manner as other Single Market acquis, the procurement directives and associated measures, the two remedies directives and the other current EU measures listed in Table 1. As regards the pending measures the Accessibility Act would also apply in the same manner. This means that the EU27 would enjoy access to UK procurement markets to the same extent as at present in terms of coverage, and that this access would be supported to the same degree as at present by both rules governing contract award procedures and remedies for affected undertakings before national review bodies.

This is subject to some sectoral adaptations for public procurement²³. In particular, EFTA states may not send procurement notices to the *Official Journal* in their own language, but must use one of the official languages of the EU²⁴, and there is also no official provision for documents such as the European Single Procurement Document (explained further in section 5 below) in languages that are not official EU languages (although a Norwegian version of the ESPD has been produced). However, this would not create any particular issues with regard to the UK since English will remain an official language of the EU after Brexit.

²³ EEA Agreement Art.65(1) and Annex XVI (headed "sectoral adaptations").

²⁴ E.g. EEA Agreement Annex XVI point 2(b).

The EFTA Surveillance Authority, which is responsible for monitoring and enforcement at a central level, grants exemptions under Utilities Directive Art.34 for utility activities carried out in competitive markets.

The EEA model would also involve application of legislation for the general market place, including the legislation that is important for public procurement, as mentioned above, for ensuring effectiveness of access to public procurement markets (as private markets) and to provide a level playing field. These include rules on products standards and mutual recognition of qualifications, the rules on posted workers, and the Acquired Rights Directive.

The general EU rules on state aid would also apply under this model. This would mean that the possible use of procurement to provide aid to UK industry would be controlled; and the fact that the EU *acquis* would govern the award of public procurement contracts would help control the possibility of procurement being used to provide state aid contrary to the state aid rules.

A further merit of the EEA approach would be that by involving entirely, or almost entirely (if the UK could become a member of EFTA itself), the application of a current “off-the-shelf” model, substantive negotiations would not be needed to determine the content of the rules, whether on coverage, award procedures or remedies.

It should finally be mentioned that there is no customs union between the EU and EEA. The UK likewise appears to have rejected the idea of a customs union between the EU and UK under any post-Brexit agreement. Since there is no customs union, Art.8(2) EEA provides that that Agreement applies only to goods originating in the EEA countries. Under the TFEU goods originating in third countries, even third countries that have no rights of access to the public contract in question, must generally be treated in the same manner as goods originating in the EU for the purpose of measures in public contracts because of the principle of free circulation of goods within the EU, subject to an exception in the Utilities Directive concerning third countries that do not provide for reciprocal access (see below) and - in future if the Regulation is adopted - to the Proposed Regulation on Third Country Access to Procurement. However, in view of Art.8(2) EEA an equivalent rule that requires procuring entities to disregard the third country origin of products probably does not apply to public contracts under the EEA Agreement. This means that under an EEA-type model the UK could exclude or otherwise discriminate against products originating in third countries and not guaranteed access under other arrangements, even when those products are offered by EU undertakings²⁵. This might not, however, be a real issue in practice, in view, first, of the difficulties of differentiating between products based on their origin in practice, which means that this possibility might not be applied by procuring entities even if permitted by the UK Government (see further the discussion of this issue in section 6 below) and secondly, at least immediately, of the fact that the current UK Government has even opposed exclusion of third country products under the proposed EU trade instrument. (Such discrimination is also ruled out under current UK domestic law anyway for bodies governed by the Local Government Act 1988.)

In addition, in the absence of a customs union, provisions in the Utilities Directive dealing with third country access²⁶, including allowing and requiring discriminatory treatment in certain cases of the products of third countries that do not provide reciprocal access rights, do not apply under the EEA Agreement²⁷.

²⁵ We can also note here that there is no guarantee provided by the GPA of access for EU undertakings supplying products from countries that are not Party to the GPA.

²⁶ Utilities Directive Arts.85 and 86.

²⁷ EEA Agreement Annex XVI.4. Also inapplicable are Public Contracts Directive Art.25 and Utilities Directive Art.23 extending the benefit of the directives' procedures to certain third countries providing reciprocal access.

Given that the EEA model does not involve any customs union, the UK would not under this model – or presumably under any other agreement that does not provide for a customs union - be subject either to the requirements in the Utilities Directive regarding third country products or to the proposed Proposed Regulation on Third Country Access to Procurement; thus, in particular, the UK would not be required to exclude from its markets the industry of third countries in accordance with measures that might be taken under the Regulation. Under an EEA model UK industry would, of course, not itself be subject to the possibility of exclusion by the EU under the Proposed Regulation, given the reciprocal access to procurement that the UK would provide under such a model.

Table 3: Assessment of the EEA model in relation to public procurement from the perspective of the EU27

Feature	Assessment
Political acceptability	UK probably will not accept the model; EU might not accept the model; EFTA states might not accept UK membership of EFTA and hence EEA itself (although same model could be adopted in a separate agreement EU-UK agreement if desired)
Ease of process for concluding an agreement on procurement issues	Easy and swift as negotiations not needed to establish content (except to extent that new structure needed if UK did not join EFTA)
Coverage of public procurement markets for mutual access purposes	Same coverage as at present, under the EU <i>acquis</i>
Access supported by robust rules on award procedures	Supported by same rules as at present, under the EU <i>acquis</i>
Common advertising system through the EU's Official Journal providing for same access to UK contracts in EU languages?	Applicable as under EU rules
Access and award procedures supported by robust remedies for undertakings	Supported by same rules as at present, under the EU <i>acquis</i>
Access and award procedures supported by other enforcement mechanisms	Significant centralised enforcement Inter-governmental enforcement Requirement for national enforcement authorities
Extent of similarity of award procedures with EU Member States	Same degree (limited) scope for divergence as at present under the EU <i>acquis</i>

Application of state aid rules to control use of public procurement as state aid	Same state aid regime as under EU rules
Procedural safeguards against public procurement constituting state aid	Same as present via application of award procedures of EU <i>acquis</i>
System for application of new EU legislation (important in such a technically complex area)	Very good system
System for application of new ECJ judgements (important in such a technically complex area, especially given the significant role of the ECJ in practice)	Very good system
Application of other important rules affecting public procurement to support market access and fair competition (Posted Workers Directive, Acquired Rights Directive, mutual recognition of qualifications, harmonised standards etc)	Applicable as at present, under the EU <i>acquis</i>
Access for EU undertakings supplying third country products	Does not confer rights of access for products from third countries even when offered by EU undertakings
Common policy on exclusion of third country undertakings that do not provide reciprocal access	No. Utilities Directive provisions on third countries do not apply and exclusion of third party industry from UK markets not available under Utilities Directive Arts 85-86 or Proposed Regulation on Third Country Access to Procurement
UK input into development and analysis of EU procurement rules (governmental and independent), training, technical assistance etc	Limited UK input at formal, including governmental, level; other input likely to be unaffected

4. THE WTO (GPA) MODEL

KEY FINDINGS

- Under WTO rules there are no significant multilateral obligations on government procurement, which is governed instead mainly by the Agreement on Government Procurement (GPA). This is a plurilateral agreement (that is, optional for WTO Member States). Both the EU, including the UK as an EU Member State, and many of the EU's main trading partners are Parties to the GPA.
- There is some uncertainty as regards the legal position of the UK after Brexit in relation to the GPA. One view is that the UK will need to rejoin the GPA after Brexit by following the same process as any new Party to the Agreement, if it is to undertake commitments and receive benefits under the Agreement. Another view, however, is that the UK can succeed to its current rights and obligations under the GPA without needing to make a new application to join, although the exact processes that would be involved are not clear. How the UK's position will be treated will in practice probably depend on the views of current GPA Parties and the extent of consensus between them. Whatever the approach taken, however, if the Parties agree that it is desirable for the UK to continue with the rights and obligations that it has under the GPA as an EU Member State, it may be possible for this to be arranged very swiftly, and even for this to take/remain in effect at the time of Brexit.
- Pending the UK being Party to the GPA or any other EU-UK agreement on procurement, or in the ultimate absence of any agreement, the default position under WTO rules will apply between the EU and UK, namely that there are no mutual rights of access to public procurement. Given this scenario, it may be desired to include interim provisions on access to public procurement in the withdrawal agreement.
- The GPA itself provides a relatively robust framework for addressing public procurement; in particular, and unlike most WTO rules, it provides for remedies for affected undertakings before national review bodies, although less stringent in several respects than those for enforcing the EU directives.
- The GPA « model » has therefore been used by the EU in public procurement agreements with many of its trading partners who are not party to the GPA itself, and it provides a feasible model for a significant EU-UK agreement on procurement, either in the short term pending a final EU-UK trade agreement, or as a long term solution.
- 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. As regards below-threshold procurement, the practical importance of covering this may depend on the extent to which regional or local discrimination is prohibited internally in the UK, since this kind of discrimination may provide the greatest barrier to market access.
- The GPA also does not include detailed and explicit rules on modifications to concluded contracts, or on the extent to which arrangements between different public bodies are covered by the rules

- The GPA contains the same « core » transparency requirements as the EU procurement directives, including advertising and competition obligations ; and UK participation in the EU's common advertising system could also be applied as an element of the UK's commitments under the GPA if desired. The GPA's transparency rules are, however, less detailed and stringent than those of the EU in many respects, although the exact significance of all these rules for access to markets is not known. Key differences include absence of any requirement for mandatory electronic procurement in the GPA; wider scope in the GPA for use of negotiation in most public sector contracts and for use of qualification systems ; more limited GPA rules regarding criteria and evidence for qualification, and no requirement for mutual recognition of certificates or registrations or use of the e-Certis database ; and more limited regulation relation to the important area of framework agreements, other recurring purchasing arrangements and electronic auctions.
- The greater discretion available to Member States under the GPA rules also means that if agreement were based on the GPA only UK procurement rules might become less similar to those of the EU27 and might also come to differ more between UK jurisdictions, which can create a practical barrier to market access.
- The WTO's Subsidies Agreement controls aid to industry through public procurement contracts for goods. However, there are no comparable rules relating to procurement of services.
- The GPA does not guarantee access for products of non-GPA Parties or of undertakings from the Parties that offer such products.

4.1. Introduction

This Chapter considers the position that would apply if the EU-UK relationship on public procurement were to be governed solely by World Trade Organization (WTO) rules.

Most of the trade rules agreed within the WTO framework are multilateral. However, the multilateral rules have only very limited relevance to public procurement. This is because public procurement ("government procurement" in WTO parlance) is largely excluded from even the basic national treatment and MFN rules of the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS); thus governments are not precluded from applying discriminatory policies in procurement of goods, work or services for governmental purposes, at least when these are embodied in binding general measures²⁸.

Public procurement is, however, extensively regulated under the Agreement on Government Procurement 2012 (GPA)²⁹, which 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, on the one hand, current EU Member States – including the UK – and, on the other hand, many of the EU's main trading partners, as well as governing the

28 GATT Art.III.8 on national treatment, which probably also defines the scope of measures covered by the MFN obligation in GATT Art.I ; GATS Art.XIII.1. For interpretation see Appellate Body Reports, Canada-Certain Measures Affecting the Renewable Energy Generation Sector and Canada-Measures Relation to the Feed-In Tariff Program, WT/DS412/AB/R and WT/DS426/AB/R, adopted 24 May 2013 ("Canada Renewable Energy") ; India — Certain Measures Relating to Solar Cells and Solar Modules case in 2016 (India Solar Cells, DS456, Panel Report circulated on 24 February 2016, Appellate Body Report circulated on 16 September 2016, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm). Some limited rules apply relating to publication of general measures (including laws) on public procurement, and to procurement of state enterprises.

29 Revised Agreement on Government Procurement 2012 (GPA), texts available at https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm. On the 2012 GPA see generally Sue Arrowsmith and Robert D. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP, 2011) ; Robert D. Anderson and Anna Caroline Mueller, WTO Staff Working Paper, «The Revised WTO Agreement on Government Procurement : Key Design Features and Significance for Global Trade and Development » (2017). An earlier version of the GPA (GPA 1994) still also applies to govern some of these relationships, generally pending ratification of the 2012 version.

relationship of other GPA Parties *inter se*³⁰. As already noted above, its disciplines are relatively robust: it includes, *inter alia*, national treatment obligations, a requirement to award covered procurement using transparent and competitive award procedures, and provision for enforcement by affected undertakings before national review bodies.

The UK is currently a Party to the GPA only through its EU membership. In the absence of clear precedent for the current situation there is some uncertainty over the legal position that will apply at the time of Brexit and over what, if anything, needs to be done for the UK to continue with the rights and obligations that currently apply under the Agreement.

One view³¹ is that when the UK leaves the EU it will lose its status as a GPA Party, and will therefore need to apply for GPA accession in the same manner as any state that seeks to join the GPA for the first time³². Thus formally speaking the WTO “default” option in the absence of any specific EU-UK agreement may be that there will effectively be no legal measures at all to guarantee the mutual opening of public procurement markets. This may give rise at least to the need for an interim agreement on access to procurement markets in any withdrawal agreement (even if there is no temporary access on agreement in other fields), to avoid this “rock-bottom” default position coming into effect. Such a default position does not necessarily mean, however, that markets will be mutually closed *de facto* or even that undertakings from the EU27 and/or UK will not be unilaterally granted enforceable legal rights to access each other’s public procurement markets. As is discussed in section 6.2 below in the context of a withdrawal agreement the position in this regard is quite complex, and it is far from clear what would happen to access both *de facto* and *de jure* – either temporarily or permanently - in the case of this default position at the international level coming into effect; it will depend on factors such as the approach taken to bargaining by both Parties in a wider context and, on the EU side, the progress of the current Proposal for a Regulation on Third Country Access to Procurement.

Another view is that the above is not in fact the default position, however, and that the UK can succeed to all rights and obligations to the GPA in its own right in accordance with rules of customary international law on succession to treaties and past practice under GATT 1947, and, indeed, that such succession is automatic³³. In the absence of precedent for succession in the exact situation of Brexit and given the general uncertainty over the extent of automatic accession to Treaties in other contexts, the precise processes that might need to be followed for succession and the extent to which notification or consent is required of the parties involved is not clear³⁴. Further, given in particular that the scope of the obligations of the GPA Parties are determined by bilateral agreements, some difficulties are presented by the fact that the GPA does not currently apply at all to govern the rights and obligations of the EU Member States *inter se*, but only includes commitments relating to the rights and obligations of those states *vis-à-vis* third country Parties to the GPA. However, even if

30 The current Parties to the GPA are Armenia ; Canada ; the European Union (including with regard to the 28 Member States) ; Hong Kong, China ; Iceland ; Israel ; Japan ; Republic of Korea ; Liechtenstein ; Republic of Moldova ; Montenegro ; Netherlands with respect to Aruba ; New Zealand ; Norway ; Singapore ; Switzerland ; Chinese Taipei ; Ukraine ; and United States.

31 E.g. Ping Wang, “Brexit and the WTO Agreement on Government Procurement (GPA)” (2017) 26 Public Procurement Law Review 34, pp.36-37; Richard Eglin and Piet Eeckhout in Uncorrected Oral Evidence, Brexit: future trade between the UK and the EU, Select Committee on the European Union – External Affairs and Internal Market Sub-Committees, 8 September 2016

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/euexternal-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.pdf>

32 This accession process is described in Robert D. Anderson and Kodjo Oseih-Lah, “Forging a more global procurement market: issues concerning accessions to the Agreement on Government Procurement” in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP, 2011), pp.67-72.

33 Lorand Bartels, “The UK’s Status in the WTO after Brexit”, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747, pp.18-21.

34 Andreas Zimmermann, « Secession and the law of State Succession », in Marcelo G. Cohen (ed.), *Secession – International Law Perspectives* (2009 ; Cambridge).

<https://books.google.co.uk/books?id=ZupSvxSeyV4C&pg=PA208&lpg=PA208&dq=zimmerman+secession+and+the+law+of+state+succession&source=bl&ots=8JEFUzdf1x&sig=OYcU020KnCk35Gx5W6JWleLvkNc&hl=en&sa=X&ved=0ahUKewipkvqt-fSAhVKJMAKHbwrDKAQ6AEINJAF#v=onepage&q=zimmerman%20secession%20and%20the%20law%20of%20state%20succession&f=false>

consents are required, it is arguable that a doctrine of succession might allow for by-passing any argument that the UK cannot negotiate trade agreements with third countries until the time of Brexit, and thus may speed up the process of providing for commitments on procurement to be put in place under the GPA.

Given the element of uncertainty, the way in which the process is treated and whether the UK submits an application to join the GPA is likely in practice to depend on the approach taken by the current Parties, and whether there is consensus between them on the procedure that should be applied. Whatever the approach taken, however, if the Parties agree that it is desirable for the UK to continue with the rights and obligations that it has under the GPA as an EU Member State, it may be possible for this to be arranged very swiftly, and even for this to take/remain in effect at the time of Brexit, given the possibility for expediting the relevant process if the Parties wish to do this. Even if the UK needs to make a wholly new application to join the GPA, the GPA solution can easily be achieved from a technical point of view since GPA accession based on the UK's existing GPA obligations will not even involve the difficulties in adjusting schedules that may arise under some other WTO Agreements. Further, any delay that might normally result from the need for an acceding Party's procurement legislation to be examined and approved by the existing Parties can be avoided by the UK's retaining its existing EU-based legislation until accession is completed. (The UK's White Paper on Brexit indicates an intention to retain current EU-based legislation in "repatriated" form at the time of Brexit³⁵, and it is certainly to be expected that current procurement legislation will be retained pending any GPA accession and also pending the conclusion (or failure) of broader EU-UK trade negotiations³⁶.)

From the UK side, there is no reason at present to suppose that the UK will not wish to join or succeed to the GPA in line with the open trade policy and, specifically, the policy of maintaining current WTO commitments in general, which was announced in the Brexit White Paper³⁷. This is especially the case in view of the significant benefits of accession being Party to the Agreement, including access to the markets of potential new Parties such as China (which is currently negotiating to accede) and the fact that in sectors in which the public sector is a major purchaser current benefits under multilateral rules could be underlined by absence of access to procurement markets³⁸. Theoretically, the UK might take a different approach to public procurement than to other WTO commitments, given the plurilateral nature of the GPA, which (depending on the operation of succession rules) may allow for the possibility of denying immediate access to public procurement as a bargaining tool in wider negotiations. However, this seems highly unlikely, not least because without EU agreement the UK might not be able to be a Party to the GPA as a means to access the procurement markets of its other trading partners. From the EU side, assuming the EU's agreement is required, it has been EU policy to encourage trade partners to join the GPA (and indeed to support this being made a requirement for states seeking to join the WTO itself), and to offer access to those partners on a reciprocal basis to all procurement that is submitted to GPA coverage under the EU's GPA Annexes. The UK's remaining subject to the GPA would also help the EU avoid being required to pay compensation to other GPA Parties following a reduction in the value of EU markets covered by the GPA upon the UK's departure from the

35 The United Kingdom's exit from, and new partnership with, the European Union White Paper (Feb 2017), <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>, para. 1.1.

36 See Chapter 7 below.

37 The United Kingdom's exit from, and new partnership with, the European Union White Paper, above, para.9.18. These remarks refer specifically to the « schedules » on access for goods and services, and thus appear to refer to commitments under the multilateral agreements, but the underlying policy expressed here is equally relevant to public procurement commitments.

38 Robert D. Anderson and Anna Caroline Mueller, WTO Staff Working Paper, «The Revised WTO Agreement on Government Procurement : Key Design Features and Significance for Global Trade and Development » (2017).

EU³⁹. However, the EU could take the view that the UK is in a different position from other trading partners, given that the UK already applies EU procurement rules; from this perspective it might be considered a reasonable expectation for the UK to provide exact reciprocity in terms of award procedures and remedies, rather than merely broadly equivalent access under GPA rules, particularly since the UK's retaining similar award procedures could itself facilitate access of EU undertakings to UK markets. The EU may consider that rejecting immediate GPA accession for the UK may enhance the EU's own power in bargaining for what the EU may consider to be a better solution of applying full EU procurement rules⁴⁰. There is no specific reason to suppose that GPA Parties other than the EU or UK would oppose the UK remaining Party to the GPA on the same basis as applies at present to the UK as an EU Member State, although were such opposition to occur it could certainly preclude a "new" UK accession.

Thus, to summarise the GPA can either provide a default solution for market access in public procurement (if the view prevails that the UK succeeds to the GPA automatically) or, at the very least, offer a simple and swift path towards ensuring mutual market access, that could be in place at the time that the UK leaves the EU, or shortly thereafter, avoiding the possibility for mutual market access being delayed, or even lost altogether, by being tied into broader trade negotiations. This could serve either as a long term solution, or as a shorter term solution pending a later final agreement (for example, under an EEA-minus or GPA-plus approach).

We will discuss below the features of the GPA model as compared with the EU rules and EEA model. A summary assessment of the GPA model as compared with the EU approach is set out in Table 4. It needs to be kept in mind that this model could be accompanied, immediately or in the longer term, by basic coverage that is wider than current GPA coverage and/or by a "GPA-plus" element so far as supplementary coverage rules, award procedures and/or remedies are concerned. The first would be relatively swift and easy to achieve in most areas within the GPA itself, since it depends only on including appropriate coverage in the EU and UK individual Annexes. It would not be required for the EU and UK to extend this coverage to other GPA Parties since there is no MFN rule as regards coverage of the GPA⁴¹. However, a "GPA-plus" approach to award procedures and remedies is technically more difficult because these issues are addressed in rules applicable to all GPA Parties, and would probably be required to be dealt with in a separate EU/UK agreement. Some coverage issues might also need to be dealt with separately, either because they are (or should to be) governed by GPA rules common to all Parties (as with concessions, modifications to concluded contracts, and arrangements between public bodies) or because the GPA procedural rules do not provide a suitable framework for dealing with them ("light touch regime" services and below-threshold contracts). These points are elaborated below.

As with general EU/EEA Single Market rules (those affecting access to both public and private markets), access to the public procurement market is, of course, affected by the content of the general rules regarding recognition of standards and qualifications etc. However, again the treatment of these general multilateral agreements is outside the scope of this paper. The issue of procurement and state aid is covered in section 4.5 below.

We can also note here that there is no guarantee provided by the GPA of access for EU undertakings supplying products from countries that are not Party to the GPA. However, as under an EEA model, discrimination based on the origin of products may not be a problem in practice in the UK context, at least in the immediate future.

³⁹ Ping Wang, "Brexit and the WTO Agreement on Government Procurement (GPA)", pp.47-48.

⁴⁰ An option not, of course, available, if indeed it is the case that the UK succeeds automatically to GPA rights and obligations.

⁴¹ As explained above, no such rule is imposed by GATT or GATS and the GPA also does not include such a rule (see section 4.2 below).

4.2. The GPA model: coverage

In contrast with the approach of the EU, under the GPA the basic coverage in terms of entities and contracts covered is not determined by general rules defining the same scope of application for all states, but by bilateral negotiations between GPA Parties on the basis of reciprocity. Coverage for each Party depends simply on what procurement it agrees to open up as a result of these negotiations, and – assuming that this relationship is not covered automatically by any succession doctrine - mutual coverage for the EU and UK would simply be a matter for negotiation in this way. As mentioned, there is no MFN obligation under either the WTO multilateral rules or the GPA itself, so that any coverage agreed between the EU and UK need not be extended to other WTO members or even to other GPA Parties. The scope of coverage is set out in Appendix I for each Party, which contains for each a number of Annexes referring to different aspects of coverage (Annex 1 listing covered central government entities, Annex 2 dealing with most sub-federal and local coverage, Annex 3 listing other covered entities e.g. utility companies and Annexes 4-6 the type of goods, works and services covered, with Annex 7 setting out any general Notes).

As mentioned above, in principle the EU – including, at present, the UK as an EU Member State – has committed under the GPA to opening up most of the procurement covered by its procurement directives, although there are some exceptions, described below. The thresholds at which the GPA applies for EU procurement (as stated in the relevant Annexes) are the same as those in the directives; definitions used in the directives themselves are generally used to define covered entities; and various limitations and exclusions under the directives (for example, of activities carried in competitive markets in the utilities sector) also apply in the EU's GPA Annexes. To the extent that the other GPA Parties are not willing to reciprocate in this coverage, the EU Annexes limit coverage commitments towards those Parties to the same, or an equivalent, extent. For example, where a Party declines to open up its procurement markets in a particular utility sector, such as railways, the EU's Annexes often provide that the corresponding utility sector in the EU is not open to that other Party.

Like the EU rules, the GPA contains some supplementary coverage rules that apply in principle to all Parties when interpreting the scope of covered procurement, such as rules expanding on some aspects of the definition of "procurement" (Art.II.2), exclusions for certain types of transaction for all Parties (for example, for land employment contracts and certain financial services) unless otherwise stated in the Annexes (Art.II.3), and quite detailed rules on valuation and aggregation of contracts for threshold purposes (Art.II.6-8). However, the supplementary rules are not as extensive as those of the EU; they do not, for example, define how far either concessions or arrangements between different public sector bodies can be considered in principle as "procurement" under the GPA. Further, while to an extent the wording of some of the rules on valuation and aggregation is comparable with that of the EU rules, there is almost no indication of how the GPA rules are to be interpreted because of the very limited number of dispute settlement rulings under the GPA.

A swift and easy approach to UK accession to the GPA, which would not need substantive negotiations, would be simply for the UK to accede on the basis of its current coverage as an EU Member State, with that coverage then determining the scope of mutual access to public procurement markets as between the EU and UK. As noted above, this coverage is largely based on that of the directives but there are some differences, in particular those which will be described below.

In those cases in which the differences are differences in basic coverage because entities or contracts covered by the directives are not currently listed in the EU's GPA Annexes, including these additional entities or contracts in an EU-UK agreement within the GPA framework is in some cases straightforward: commitments relating to those contracts can simply be added to the EU Annexes and included in the UK Annexes (although deciding on the scope of

extensions might cause some delay in finalising the position if it gives rise to debate). Differences in treatment in relation to entities with special or exclusive rights, coverage of excluded utility sectors, coverage of most excluded services, and coverage of subsidised private contracts could be dealt with in this way. Other matters referred to below including concessions, defence, light regime services, and below-threshold contracts, present more complexity, however, as will be explained.

The key differences between coverage of the EU's procurement directives and coverage of EU procurement under the GPA are as follows.

1. No coverage of below-threshold contracts by the GPA

As seen earlier, within the EU, both national treatment obligations and limited transparency requirements, supported by basic remedies for undertakings, apply under the TFEU to all contracts of cross-border interest, even those below the directives' thresholds. However, the GPA does not impose any obligations at all for contracts below the directives' thresholds. The European Commission has collected data on the value of below-threshold contracts in the UK from the UK Government but this data is not publicly available.

Access to markets in this area in the absence of international trade rules may depend to some extent on how this below-threshold procurement is treated internally within the UK after Brexit. Since public procurement is in general a matter for the devolved Governments in the UK there is a risk that without internal regulation obstacles to trade may arise from the application of local preference policies by the devolved administrations. However, this might well be precluded by internal rules agreed by the UK Governments in order to prevent the adverse economic effects of local protectionism, as has been done in Canada in its Agreement on Internal Trade⁴². In that case public procurement markets may well then be de facto relatively open to foreign suppliers (since there is likely to be less political incentive for "UK" preference as opposed to "local" preference).

There seems to be no technical obstacle to the EU and UK using the GPA framework to open up markets for contracts at a lower threshold value than applies in relation to other GPA Parties. This could be done simply by including this within the Annexes, and submitting such procurement to some of the GPA rules, such as the national treatment rules (as has been done with concessions: see below), although it would be inappropriate to apply the full GPA award procedures, which are not designed for low-value contracts. A more comprehensive approach that includes transparency requirements would more naturally fall to be left to a separate agreement, although not impossible to design within the Annexes.

2. More limited coverage of utility markets under the GPA

The coverage of EU utility markets under the GPA is more limited than coverage under the EU's internal regime. This mainly because the limitations on utilities coverage of other Parties have precluded access for the EU to other Parties' corresponding markets, so that extending the EU's own coverage under the directives' would not have been useful. However, it can be noted that the coverage of Ukraine, for example, a recent party, is wider and modelled on coverage of the EU directives.

Utility coverage under the GPA is more limited in two main ways⁴³.

First, the directives cover certain utility sectors not within EU coverage under the GPA, namely activities relating to the supply of gas and heat, postal services, the extraction of oil

⁴² Available at <http://www.ait-aci.ca/>. Ch.V deals with public procurement.

⁴³ It needs to be pointed out here that the "illustrative list" of covered entities in the EU's Annex 3 may be misleading as regards the extent of coverage of UK utilities, since this was compiled based on the list in an old Utilities Directive without editing to take account of the more limited entity coverage of the GPA. The list is clearly stated to be illustrative and does not override the limited coverage rules expressed elsewhere that are discussed in this section.

and gas, and exploration for, or extraction of, coal or other solid fuels. However, this is of limited importance. First, the UK has been granted an exemption from the EU utilities rules for activities concerning extraction of oil and gas⁴⁴ and activities concerned with the supply of gas in England, Scotland and Wales⁴⁵, under the Utilities Directive's exemption procedure for activities carried out in a competitive market, leaving postal services, operation of a gas distribution network, gas supply in Northern Ireland, and heat as the only activities potentially falling into the gap between the GPA and Utilities Directive. Secondly, in the UK these activities are to a significant extent carried on by entities not covered by the directive in the first place as they are neither public in nature nor hold special or exclusive rights (this is the case with most postal service providers, including Royal Mail⁴⁶).

A second way in which EU coverage under the GPA is more limited than the coverage of the EU directives as regards utility markets is that the directives cover all entities, even purely private entities, that operate in the covered utilities sectors on the basis that they have special or exclusive rights in relation to the activity; the EU's GPA coverage, however, extends only to entities that are contracting authorities or public undertakings within the meaning of the directives, and does not cover entities merely because they hold such special or exclusive rights. The significance of this is again, however, limited in the UK by the existence of a "competitive markets" exemption for important sectors in the UK where the operators are private utility companies (generation⁴⁷ and supply⁴⁸ of electricity in England, Scotland and Wales) and the fact that in other important sectors in the UK, including much of the transport sector, many of the companies operating in the sector are private companies that do not even have special or exclusive rights⁴⁹ and so are not even covered in principle by the EU Utilities Directive. However, were the relationship between the EU27 and UK to switch to a GPA model based wholly on the current GPA coverage, much, although not all⁵⁰, of the UK water sector would be removed from market access commitments, since many of the water sector operators in the UK are private companies covered by the EU utilities rules by virtue of special or exclusive rights.

Again there is no technical obstacle to the EU and UK using the GPA framework to open up markets for all the utility sectors and entities covered by the directives to the extent that they are not currently covered by the GPA by including them in the relevant Annexes, with appropriate derogations for access by other GPA Parties.

3. Non-application of the GPA to some defence procurement

The coverage of the GPA for the EU is, as might be expected, more limited for sensitive defence purchases than is the coverage of the EU directives. Under the EU directives the purchase of all types of products, works, and services is in principle covered (mainly by the Defence and Security Directive which is the directive applicable to, inter alia, purchases of hard defence equipment and related services procurement, such as repair and maintenance). However, so far as goods are concerned, while the defence authorities are covered entities under the GPA for the EU, the GPA applies to goods purchased by "Ministries of Defence and Agencies for defence or security activities" only in the case of those goods listed in the EU's Annex 4. This list refers only to non-sensitive products and does not cover, in particular, "hard" defence equipment such as tanks and weapons. In addition, there is a difference of

44 Commission Decision 2010/192/EU [2010] O.J. L84/52. There is a more limited exemption for Northern Ireland: see Utilities Directive Art.27(2).

45 Commission Decision 2007/141/EC [2007] O.J. L62/23.

46 Although not Post Office Ltd - which operates the post office network and some mail services - which is wholly government owned.

47 Commission Decision 2006/211/EC [2006] O.J. L76/6.

48 Commission Decision 2007/141/EC [2007] O.J. L62/23.

49 Often this is because they are required to compete for the concessions or other contracts under which they operate.

50 Scottish Water is a contracting authority.

coverage important for both goods and services in that there is an exemption in GPA Art.III: 1 stating that a party is not prevented from “taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes”. This exemption has some similarities with the security exemption of Art.346 TFEU but is likely to be very much less strictly interpreted than that of Art.346 TFEU⁵¹ and, moreover, to be affected by the extent of defence cooperation activities between the states concerned

However, the importance of this theoretical difference is greatly reduced by the fact that within the EU, an overwhelming proportion of defence contracts by both value and number is awarded outside the scope of the EU directives. Presumably this is because such contracts are treated as within various exemptions that apply relating to national security etc, including under Art.346 TFEU, despite the theoretical strictures of the exemptions. For example, a recent European Commission study found that only 17.7% of UK defence procurement expenditure from 2011-2015 (and 8.5% across the EU as a whole) was on contracts (for products, works and/or services) awarded under the Defence and Security Directive⁵² (and that figure also includes contracts awarded under the directive but without a procedure involving a call for competition⁵³).

4. Limitations and uncertainty in the GPA's coverage of concessions

Concessions are, broadly speaking, arrangements under which an undertaking is remunerated through a right to exploit what is provided under the contract – for example, an arrangement for construction and operation of toll roads. Such arrangements are, as we have seen, governed by a separate Concessions Directive in the EU procurement regime⁵⁴. The current EU Annexes to the GPA appear to be crafted on the basis that works concessions are intended to be within the EU's coverage, but not services concessions. This is indicated by the fact that works concessions are referred to separately in the EU's Annex 6 as being covered in a limited way, whereas service concessions are not referred to at all. In this regard the EU's Annex 6 states: “Works concessions contracts, when awarded by Annex 1 and 2 entities, are included under the national treatment regime for the construction service providers of Iceland, Liechtenstein, Norway, the Netherlands on behalf of Aruba, Switzerland and Montenegro, provided their value equals or exceeds 5,000,000 SDR and for the construction service providers of Korea; provided their value equals or exceeds 15,000,000 SDR.” This approach reflects the EU's approach to regulating concessions under the directives prior to 2014, when services concessions were totally excluded (hence their exclusion from GPA coverage also) and works concessions subject only to very limited explicit obligations.

On the assumption i) that concessions are excluded from the GATT and GATS in the same way as other procurement discussed in this paper and ii) that works but not services

51 To which the ECJ has now applies the usual principle of strict interpretation of derogations and limited the margin of discretion of Member States: see, in particular, Case C-414/97 Commission v Spain, [1999] ECR I-5585; Case C-239/06 Commission v Italy [2009] ECR I-11913; Case C-284/05 Commission v Finland [2009] ECR I-11705; Case C-294/05 Commission v Sweden, [2009] ECR I-11777. On interpretation of the security exemptions in WTO Agreements see Ji Yeong Yoo and Dukgeun Ahn, « Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security? » (2016) 19 J.I.E.L. 417.

52 European Commission Staff Working Document, Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security Accompanying the document Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive (COM(2016) 762 final), p.52. Generally the value of defence contracts awarded under other EU directives was only around ¼ of this so that overall the vast proportion of defence procurement expenditure is spent through award procedures not conducted under the directives at all. Note, however, that while defence procurement excluded from the GPA but currently procured under the EU directives seems, therefore, to account for only a small proportion of the UK defence procurement market, according to the same report UK defence procurement (goods, works and services) accounts for half of the value of all EU procurement awarded under the Defence and Security Directive, so that it is significant in the EU market in that respect: European Commission Staff Working Document, n.xx above, p.33, although this was affected by one single contract with a value of £6 billion (out of a total £17 billion).

53 38% on average in the EU by number of notices, although these were generally for lower value contracts: see European Commission Staff Working Document, Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security, above, p.63.

54 With concessions defined for that purpose in Concessions Directive Art.5(1).

concessions are indeed within the EU's GPA coverage, then EU-UK coverage based on current GPA arrangements would be narrower than the coverage of the EU directives, removing UK services concessions from any commitments and applying only the national treatment discipline to UK works concessions.

It should be mentioned, however, that the legal position of concessions under both GATT/GATS and the GPA is a little more uncertain and complex than the picture painted above⁵⁵. This arises from, first, uncertainty over the extent to which concessions are in principle covered anyway by the GPA unless expressly excluded from a Party's Annexes: an argument can be made that they are "procurement" as referred to in GPA Article II.1, and that since that Article states that the GPA applies to "covered procurement" that concessions for the kinds of works and services listed in the Annexes are prima facie covered unless the Annexes of specific Parties provide otherwise. If that is the case, the question then arises as to whether, however, mere references to particular types of concessions or similar transactions being included, as in the EU Annexes and also the Annexes of some other Parties⁵⁶, implicitly excludes *other* coverage of concessions. If "procurement" is *not*, on the other hand, generally considered to include concessions then two further questions arise namely:

i) whether it is in fact possible to bring certain concessions within the scope of the GPA at all by references in the Annexes, in which case any coverage of concessions may be open to doubt, including that provided for in the EU Annexes: and

ii) whether if concessions are not "procurement" for this purpose they might then be considered as outside the scope of the government procurement exclusions in GATT/GATS so that national treatment and MFN obligations then apply anyway to all WTO Members under those agreements so far as award of concessions is concerned.

The general issue of treatment of concessions is formally under consideration by the GPA Committee at present⁵⁷.

5. More limited coverage of services under the GPA

The coverage of the GPA for the EU is also more limited than the coverage of the directives so far as services are concerned.

First, the GPA is confined to services that were fully regulated under the pre-2014 public procurement directives, rather than applying to the full range of services covered by the directives⁵⁸. Those pre-2014 directives applied only to certain specific services listed in the Annexes to the directives, which were generally referred to as either "priority" or "Part A" services (being listed in Part A of the relevant Annexes); other services – non-priority or "Part B" services – were subject only to extremely limited obligations (relating to specifications and award notices) and not even to the core obligations of advertisement and

55 For analysis see Robert D. Anderson and Sue Arrowsmith, "The WTO Regime on Government Procurement: Past Present and Future", Ch.1 in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO Regime on Government Procurement*, above, pp.48-52.

56 Montenegro Annex 6 similarly provides simply that works concessions are included under the national treatment regime for some GPA Parties. Korea Annex 6 also includes arrangements that fall with the concept of concessions in EU law within the definition of Build-Operate-Transfer contracts as defined in its Annex 6, which covers such contracts.

57 Decision of 30 March 2012 added to work programmes: "a review of the use, transparency and the legal frameworks of public-private partnerships, and their relationship to covered procurement" (concessions are regarded as a type of public-private partnership).

58 The covered services for the EU are listed, designated by reference to the United Nations Provisional Central Product Classification, as follows, services not listed not being covered at all : maintenance and repair services (6112, 6122, 633, 886) ; land transport services, including armoured car services, and courier services, except transport of mail (712 (except 7321), 7512, 87304) ; air transport services of passengers and freight, except transport of mail 73 (except 7321); transport of mail by land, except rail, and by air (71235, 7321); telecommunications services (752); financial services (ex 81) - insurance services (812, 814) and banking and investment services: computer and related services (84); accounting, auditing and bookkeeping services (862); market research and public opinion polling services (864) ; management consulting services and related services (865, 8663); architectural services, engineering services and integrated engineering services, urban planning and landscape architectural services, related scientific and technical consulting services; technical consulting services, and technical testing and analysis services (867); advertising services (871) ; building-cleaning services and property management services (874, 82201-82206); publishing and printing services on a fee or contract basis (88442); sewage and refuse disposal; and sanitation and similar services (94).

competition (although some limited transparency requirements of that kind were held to arise under the TFEU). These services were not fully regulated for a number of reasons, including lack of information and the fact that some were not considered of much cross border interest. However, under the 2014 directives all services are now fully regulated under the directives, with the exception of a small group of services that are expressly excluded (such as central banking services, and legal services connected with litigation), and a group of services that are subject to a special "light touch regime" under the directives. The light touch regime still involves an advertisement but affords a large area of discretion to Member States to decide how award procedures are carried out (Member States being merely required to design their own procedures to ensure equal treatment and transparency), in view of the sensitivity of these services. It also applies only at a much higher threshold than apply under the directives for other services, which is considered appropriate to delimit the area of cross-border interest. This light touch regime applies to, inter alia, health and social services, administrative social, educational, healthcare and cultural services, compulsory social services and benefit services, and hotel and restaurant services.

An agreement on procurement based solely on current GPA coverage would not include these "light regime" services at all, and also would not include other former Part B services not included by the directives, or research and development services. The European Commission's view in proposing the extension of services coverage in the 2014 directives was that some of those former Part B services, such as water transport, hotel services, personnel placement and supply, and security services could not be considered as of less cross border interest than Part A services⁵⁹.

In addition the directives, but not the EU's GPA Annexes, in principle cover research and development services. However, research and development services are outside the directives in many cases in practice since the directives apply only when a) the benefit of the services and accrues exclusively to the procuring entity; and b) remuneration is provided wholly by the procuring entity⁶⁰.

The value for the EU of access to the above services in the UK public procurement market that are not currently within the GPA coverage for the EU will be affected by the content of any trade agreement or unilateral actions to provide access to services markets more generally, since access to public procurement is dependent on access to the general market. In particular, it can be noted that some of these services (such as health and social services) are not covered by significant relevant EU market access commitments under GATS⁶¹ (although this does not necessarily mean that access to the market is not currently available de facto).

One approach to guaranteeing to these services markets in the public sector that are not covered by the EU's GPA Annexes at present might be to address them in wider EU-UK trade negotiations on services. As with the currently non-covered utility procurement, however, there is no technical obstacle to the EU and UK using the GPA framework itself to provide access to public procurement markets for these services by including them in the EU and UK Annexes, with appropriate derogations so far as access by other GPA Parties is concerned. It would be inappropriate to submit "light touch regime" services to the full regime of award procedures, however, since the GPA award procedures for covered contracts go a long way beyond what is required for these services in the explicit rules of the EU directives themselves.

⁵⁹ European Commission, Green Paper on the Modernisation of EU Public Procurement Policy: Towards a more efficient Public Procurement Market COM(2011) 15 final.

⁶⁰ Public Contracts Directive Art.14; Utilities Directive Art.32; Concessions Directive Art.25; Defence and Security Directive Art.13(j).

⁶¹ No commitments exist as regards cross-border supply in relation to health and social services.

6. Coverage of certain subsidised private contracts under the EU directives

As noted above, the Public Contracts Directive (under Art.13) also applies to certain types of works and related services contracts awarded by purely private entities when the individual contracts are subsidised by government. This applies in the case of works contracts for civil engineering activities, or building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes, and for related services. This is relevant in practice, for example, for urban renewal schemes. These contracts are not covered for the EU by the GPA. There is no difficulty in principle in adding them to the Annexes for the EU and UK if desired, referring to the fact they are covered by any entity of any kind that receives such a subsidy.

7. Absence of rules in the GPA on modifications to contracts

As explained, the main EU procurement directives include detailed rules on when existing contracts can be modified without a new award procedure under the directives, effectively determining when a modification counts as a new contract⁶². These rules were originally developed by the ECJ from general principles underlying the directives and then codified and elaborated in the 2014 directives. The GPA does not, however, have any explicit rules of this kind. While it does include a general principle of transparency that can arguably be applied in this way (and might be so applied by UK courts especially in light of the experiences of UK law with the directives), and some extensions would simply be treated as new contracts, in the absence of specific elaboration of controls over modifications procuring entities may be less inclined to exercise restraint in making modifications.

8. Wider GPA exemption for “social” measures in procurement

Finally, the GPA probably allows slightly wider scope than the EU procurement directives for certain types of social measures in public procurement by virtue of GPA 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.

In particular, this seems to allow wider scope for reserving contracts for certain disadvantaged groups than the specific provision that is included in the directives for such reservations⁶³ (which limits these to where at least 30% of workers are disadvantaged persons and does not allow direct awards). These types of reservations account for only a very limited share of procurement markets (in the UK 6 contracts worth under 22 million Euros in total in 2009⁶⁴) and this difference is thus likely to have only a minor impact.

4.3. The GPA model: award procedures

As noted above, the GPA includes detailed requirements on contract award procedures. The starting point of the GPA is that there is one single set of procedures for all covered transactions, although some slightly greater flexibility for non-Federal entities. Broadly speaking, the GPA regime allows sufficient discretion to Parties that the rules of all the EU directives are capable of being accommodated within the GPA framework⁶⁵.

These GPA award procedures include the directives’ « core » obligations as described above, including an obligation to advertise, a competition obligation, minimum time limits for different stages of the award procedure, limits on the criteria that may be used in making

⁶² Found in Public Contracts Directive Art.72, Utilities Directive 89 and Concessions Directive 43.

⁶³ Public Contracts Directive Art.20; Utilities Directive Art.38.

⁶⁴ European Commission, Staff Working Paper, Evaluation Report Impact and Effectiveness of EU Public Procurement Part 1, above, p.32.

⁶⁵ The EU directives are already designed to be aligned with GPA obligations towards third countries, in order to ensure that third countries do not obtain more favourable treatment than EU Member States.

decisions, and obligations to set out selection and award criteria for each procedure (within the permitted criteria) in advance. The GPA refers to only two designated procedures, open tendering (in which any interested undertaking may tender) and selective tendering, the latter being capable of accommodating all the EU procedures other than the open procedure. As under the EU directives, it is possible to dispense with these requirements and make a "direct award" (referred to as « limited tendering ») only in limited and defined cases, which are similar to those of the EU rules.

However, the EU procurement directives also contain numerous specific requirements that are additional to those of the GPA, either explicit in the directives or which have been, or may be, developed by the ECJ based on the general principles of the directives. Obviously such additional obligations would not apply to the UK were any EU-UK agreement on procurement to be confined to the current GPA framework of award procedures (although they would continue to apply from the EU side to UK undertakings under the EU's national treatment obligations). However, as noted earlier, the GPA procedural framework could be supplemented to a greater or lesser degree, in areas of particular importance, with further procedures under a « GPA-plus » approach (see Chapter 5 below). Attempting to negotiate any GPA-plus approach as part of any process of UK accession to the GPA itself would, however, be likely to delay UK accession.

The length and complexity of the EU procurement directives preclude an exhaustive analysis of all differences. Below are set out those differences that may be considered as particularly important or which have been raised as issues of debate, but there also many others⁶⁶. Included are some key areas in which the applicable obligations are less explicitly developed in the GPA, although perhaps not much difference in substance, since the specificity with which obligations are set out may reasonably be assumed to have an impact on compliance and effectiveness. The analysis is most relevant for procurement falling within the Public Contracts Directive. This is the regime relevant for most procurement (as noted earlier, the utility sectors account only for about 20% of the market) and it also has more restrictive rules than the other EU directives and hence the greatest degree of divergence from the GPA; the other directives either (in some respects) generally follow the rules of the Public Contracts Directive or (in other respects) have more flexible rules that are similar to those of the GPA.

Were an EU-UK agreement to be concluded on the basis of the GPA the UK, like other Parties, would be entitled to enforce the award procedures of the EU directives to obtain access to covered EU procurement, under the national treatment rules; and EU undertakings would likewise have access to the UK under whatever rules were adopted nationally. A consideration here is that the UK jurisdictions may well adopt internal legislation that is more detailed than GPA requirements for reasons of legal certainty, to avoid procurement law being created by piecemeal judicial decision-making. In that event, legislation may well be based on existing EU rules in view of their familiarity to UK actors (and in this regard it is relevant to note that the UK has sometimes drawn on EU concepts in developing procurement rules on matters not subject to EU law⁶⁷). In practice, it is plausible that any UK post-Brexit system of legislation might be constructed by taking what are considered to be the beneficial features of EU rules that are economically beneficial, and discarding those considered in the light of UK experience to be of no value or to have a negative effect on value for money and competition. However, this is far from certain and the position is complicated by the fact that,

⁶⁶ So far as explicit rules are concerned they include, for example a slightly wider scope for exclusions, including the absence of any requirement for termination or other sanctions to have been applied in order for poor past performance of contracts to provide a ground for exclusion (although this may have little significance in relation to technical ability to perform since absence of ability is a distinct reason that can be used to reject undertakings under the EU directives).

⁶⁷ See Sue Arrowsmith, "The Implications of Brexit for Public Procurement Law and Policy in the United Kingdom" (2017) 26 Public Procurement Law Review 1, pp.17-18.

as already mentioned above, procurement is largely a devolved function within the UK, potentially resulting in different approaches within the different UK jurisdictions.

As explained earlier, to the extent that the EU directives provide stricter rules on some points than the GPA for procuring entities (as outlined below), there is no data on the exact contribution of most of these different individual rules to achieving the objectives of the procurement regime.

In assessing the differences between the directives and the GPA it is also relevant to mention that numerous rules in the directives do not impose restrictions but merely clarify possibilities for Member States and/or their procuring entities which already exist under the general rules of the directives and which apply under the GPA. For example, the use of life-cycle costing is mentioned explicitly for the first time only in the 2014 directives, but was possible (and widely used in the UK) even before that time under the directives' general rules on award criteria⁶⁸, and is permitted under general GPA rules on award criteria. From an EU internal perspective, such provisions may provide comfort to some Member State to use these possibilities. However, they are not relevant to securing mutual access in EU-UK procurement markets, and their absence from the explicit rules of the GPA is of no consequence from this perspective.

1. Publication of notices

The GPA, like the EU directives, requires covered contracts to be advertised through a readily accessible official medium and widely disseminated, and also requires notices giving information on contracts awarded (contract award notices). Parties must identify the relevant media for such notices in their Appendices to the Agreement. Unlike the EU directives, however, and also unlike under the EEA Agreement (which we have seen provides for use of the EU system), the GPA has no single system for advertisements and other notices for all participating states. In the EU/EEA all notices under all the directives are published in the EU's Official Journal through the searchable TED electronic database, with translation of at least key elements into all official languages. This common EU/EEA system is supported by a host of other features that seek to smooth the submission and processing of notices by the EU and to promote the accessibility of information to interesting undertakings, including a requirement to produce notices using standard forms, to submit notices electronically and to use the EU's Common Procurement Vocabulary in drafting notices (including to describe the subject matter of contracts).

Continued participation of the UK in this common system could help greatly in maintaining the accessibility of contracts to EU undertakings after Brexit. This could be achieved within the existing GPA framework, however, simply by the UK's naming the *Official Journal* as the publication medium. The ability to do this would, of course, depend on the EU's being willing to provide access and the UK's being willing to use the system on terms acceptable to the EU (which might include a financial contribution towards operation of the system).

The DCFTAs with the Ukraine and certain other countries do not provide for use of this system even though those agreements generally otherwise provide for the application of the EU acquis to public procurement⁶⁹. However, the political and practical considerations are clearly different, not least the fact that UK procuring entities are already geared up to using the EU system and that English will remain an official language of the EU after Brexit, so that there are no special language issues involved in submission or translation. (There may, however, be more difficulty involved in use of the standard forms by the UK under the GPA than under

⁶⁸ There was some debate on the specific possibility of using award criteria relating to production of goods but the possibility for this even under the pre-2014 directives was clarified by the ECJ in C-368/10 *Commission v Netherlands* CJEU judgment of May 10.

⁶⁹ See section 6 below.

an EEA or EEA-minus model, in that these are drafted on the assumption that the substantive rules of the procurement directives apply - for example, they refer expressly to concepts in the directives, such as framework agreements and dynamic purchasing systems.)

In practice, the alternative the *Official Journal* as the place for publication of notices would likely be the various electronic advertising systems maintained by the UK Governments (used for both above and below-threshold contracts)⁷⁰.

2. Mandatory use of electronic procurement

The EU Public Contracts Directive and also Utilities Directive *require* the essential elements of the procurement process to be conducted electronically as from October 2018 (earlier for central purchasing bodies). There is no such requirement under the GPA. Such a requirement also does not apply under the Concessions Directive.

3. Use of procedures involving negotiation

Under the Public Contracts Directive the possibility of using flexible award procedures involving negotiation is limited to certain defined cases, although these are now quite broad and appear to take in most non-standard procurement⁷¹, having been expanded first in 2004 and then again in 2014. Under the GPA, on the other hand, negotiation is allowed in any award procedure where signalled in advance⁷², as well (i.e. without advance indication) in the (somewhat rare) case in which no tender is obviously the most advantageous. The other EU procurement directives do not, however, restrict use of such flexible procedures at all.

It may also be that the actual scope for negotiations after the very final tendering stage may be more restricted under the Public Contracts Directive, even in flexible procedures, than under the GPA. However, in the absence of interpretation of either instrument on this question this is simply not clear.

4. Use of qualification systems

A qualification system is a list of undertakings interested in supplying certain goods, works or services. The EU Utilities Directive allows general use of such systems in two important ways:

- i) to advertise contracts – procuring entities under the Utilities Directive may simply advertise the availability of the system through the *Official Journal* and then place contracts with entities registered on the system for any goods, works or services covered by the advertisement, without a further notice;
- ii) to select which undertakings are to be invited to tender in procedures that are not open to all undertakings - procuring entities under the Utilities Directive may in such cases 9and, indeed, must) restrict participation to those registered on the advertised system.

A qualification system may not generally⁷³ be used in either of these ways under the Public Contracts Directive, at least not so far as concerns participation by undertakings from other Member States.

⁷⁰ The Contracts Finder database maintained by the Cabinet Office is at present required by domestic law to be used for both above-threshold contracts and (above £10 000) for advertised below-threshold contracts, by nearly all English bodies that are contracting authorities (<https://www.gov.uk/contracts-finder>). In practice, this has some coverage throughout the UK but there are also formally separate systems for Scotland (Public Contracts Scotland: http://www.publiccontractsscotland.gov.uk/search/search_mainpage.aspx); Wales : Sell2Wales <https://www.sell2wales.gov.wales/>; and Northern Ireland : eSourcing NI : <https://e-sourcingni.bravosolution.co.uk/web/login.shtml>). Some extension to these systems would be needed to cover all GPA-covered entities.

⁷¹ See 2014 Public Contracts Directive Art.26(3) (innovation partnership) and Art.26(4) (competitive dialogue and competitive procedure with negotiation).

⁷² GPA 2012 Art.XII(1).

⁷³ Except that contracts rules allowing use of dynamic purchasing systems might be considered as involving a kind of qualification system that may be advertised through advertisement of the system.

The GPA, however allows for greater use of qualification systems for the types of entities and contracts governed by the Public Contracts Directive in that:

i) first, the GPA allows a notice of such a system to be used to advertise any contracts let by entities other than those listed in Annex 1 for each Party (central/federal entities) – that is, allows regional and municipal authorities, for example, to advertise contracts by advertising general qualification systems; and

ii) secondly, the GPA allows all entities to restrict participation to those registered on advertised systems, except (as also under the EU Utilities Directive) in open procedures. Note that central government entities still need to advertise their contracts individually, however, providing an opportunity for interested undertakings who have not yet registered on the relevant system to attempt to registration on the system in response to the specific opportunity.

An agreement to deal with procurement based on the GPA would thus allow for wider use of qualification systems in the UK than at present.

5. Criteria and evidence for showing competence to participate

The EU procurement directives contain rules which limit the evidence that undertakings may be required to produce to show their capability to perform the contract. These rules are very detailed and complex and the current draft of the Public Contracts Directive provisions (which apply also by cross-reference under the Utilities Directive⁷⁴), which has been developed over time and includes attempts to codify some of the ECJ case law, is rather convoluted, difficult to unravel and uncertain in many of its requirements. The most significant differences between the GPA rules and these rules appear to be as summarised below.

First, and important in practice, the GPA does not contain the rule on self-declarations in the form of an European Single Procurement Document (ESPD) that was introduced into the 2014 Public Contracts Directive (Art.59). This rule generally⁷⁵ allows undertakings to rely on self-declarations that they meet participation requirements, rather than being required to produce to prove evidence for this, such evidence being required only from the undertaking that has actually won the contract. This reduces the burden for undertakings. For an undertaking to rely on this right to recognition of a self-declaration the self-declaration must be provided by way of an ESPD in a standard electronic form designated by the European Commission (which has made the ESPD available in various forms, including to allow integration with national electronic systems⁷⁶).

In the UK, anecdotal evidence suggests that it has been very common to adopt a self-declarations approach in the past anyway, since it is efficient for the procuring entity itself, although there is no evidence of the exact extent to which this has been done.

A requirement to accept self-declarations might be a useful subject of a GPA-plus agreement dealing with issues of proof of qualifications in the procurement context (as to which see generally section 6 below). This then raises the issue of whether UK procuring entities would be required to accept declarations in the form of the EU's standard electronic ESPD. As with use of the TED database, this may be more acceptable to the UK than other trading partners because of familiarity and absence of language issues (which have been addressed for Norway by Norway making a Norwegian version available as well as EU official language versions). However, another issue is the fact that the questions in the ESPD assumes that

⁷⁴ The Concessions Directive includes some, but not most, of these rules.

⁷⁵ There is an exception where the evidence is necessary to ensure the proper conduct of the procedure, which may be used, for example, where this is appropriate because the relevant information is used to choose a limited of undertakings to be invited to participate.

⁷⁶ These are available and explained at https://ec.europa.eu/growth/single-market/public-procurement/e-procurement/espd_en

conditions for participation and rules on evidence that may be required of the winner of the contract are delimited by the EU procurement directives, and may not be suitable where this is not the case.

Secondly, the GPA does not generally regulate the exact criteria/evidence that procuring entities may set or require for ensuring capability to perform in as much details as the directives. It merely states generally in Art.VIII.1 that conditions for participation must be limited to those “essential” to ensure that the supplier has the capacities and abilities to undertake the procurement. This may imply some limits on both criteria and evidence demanded, but exactly what is not clear. It does not, in particular:

a) Involve explicit absolute limits akin to those stated in the directives, such as that only three or five years of relevant past experience (depending on the type of contract) can be required. However, Art.VII.2 does specifically restate that only experience “essential” to meeting the requirements of the contract can be required, highlighting that only essential experience can be required.

b) Expressly require (as does the Public Contracts Directive) recognition of certain documents, such as official certificates issued by other Parties to attest matters such as payment of tax and social security contributions and absence of criminal convictions, or registration on national Official Lists and certification systems as evidence of the matters attested therein. This issue is more important for access to UK markets for certain other Member States than for the access of UK undertakings to EU markets, since there are no widespread systems of certificates and registrations in the UK. It seems rather unlikely that UK procuring entities would refuse to recognise such certifications etc. However these kinds of matters relating of public procurement-specific mutual recognition might again be suitable for inclusion in any GPA-plus approach.

Related to the above points, Art.59(4) of the Public Contracts Directive requires information (for example, on such certificates) that is available to contracting authorities in national databases to be made available on the same terms to contracting authorities in all Member States. This both assists contracting authorities and limits the burden on suppliers. Art.59(5) supports the latter objective by requiring authorities to use those databases when available free of charge, while Art.59(6) requires Member States to list relevant databases in e-Certis (see below). There are as yet no obligations to maintain such national databases or include any specific information in them, but it is intended that such databases will be further developed, and that the combination of the use of the electronic ESPD and development of databases that can be linked in that document will facilitate use of electronic means to provide information on qualifications that can be accessed directly by procuring entities. However, use of such databases by UK entities is certainly not dependent on use of the ESPD.

e-Certis itself is an on-line tool developed by the European Commission that is currently in its infancy but intended ultimately to provide a central EU source of qualification information to further facilitate the access of procuring entities to this information without the need to burden participating undertakings. The Public Contracts Directive (Art.61(2)) also contains a general, if imprecise, obligation anticipating the future development of this tool, requiring entities to « have recourse to e-Certis » and « require primarily such types of certificates or forms of documentary evidence that are covered by e-Certis ».

Clearly, these provisions are likely to increase in importance as more information is included in databases and e-Certis is developed. It might therefore be useful to address this whole area in a “GPA-plus” approach (as to which see generally section 6 below), which could both include some of the above provisions (for example, on mutual recognition and use of databases) and provide for UK entities to have access to, and to make reference to, e-Certis, to support this. While the standard ESPD plays a role in the operation of this process within

the EU, the application by the UK of different (GPA) rules on evidence, that might make use of the current standard form ESPD difficult, would not preclude the application of many of the above rules and tools. Such matters are possibly more appropriate for a UK-specific agreement than for long term inclusion in the GPA for trading partners generally.

Finally, the GPA also does not give undertakings any explicit right to rely on the resources of other parties such as sub-contractors or members of the same group, which is given under the EU directives⁷⁷.

6. Level of detail on mechanisms for recurring procurement (framework agreements and dynamic purchasing systems) and on electronic auctions

The public procurement directives⁷⁸ contain more detail than the GPA on a number of purchasing mechanisms. These are mechanisms which operate within the award procedures of the procurement directives (open procedure, restricted procedure etc), but for which additional rules are provided to regulate their special characteristics or adapt them to the directives' rules.

One of these mechanisms is a framework agreement. A framework agreement is an arrangement set up with one undertaking or with a few undertakings (multi-provider arrangement), which establishes through a competition the terms for obtaining future recurring or urgent items (including the price), to avoid going through an entire competition when the time comes to place orders. The EU procurement directives now regulate framework agreements in detail. This is particularly important in the case of multi-provider arrangements, to indicate how final orders should be placed (including how to conduct any "mini-competition" that takes place between the undertakings on the framework, and what criteria should be used to choose between them when no mini-competition is held), to prevent abuses at this stage. To a large extent these merely clarify rules that were previously implicit in the predecessors to the Public Contracts Directive⁷⁹. However, anecdotal evidence suggests that making the permitted processes and criteria clear in the explicit rules of the directives has greatly improved compliance with the directives' (previously implicit) requirements. The EU Public Contracts Directive and Utilities Directive also provide for another type of recurrent purchasing mechanism, a dynamic purchasing system, for off-the-shelf purchases. This is quite different from a framework agreement in that it involves an advertised registration system open to *all* undertakings that are competent to supply (rather than a very limited number who compete at the initial stage to be recognised as the potential suppliers), followed by a competition for each order that is open to all those registered.

The GPA does not yet include explicit rules to govern these kinds of on-going arrangements. However, as with the old procurement directives the same kind of controls as apply under the directives can in fact be derived from the general GPA rules governing award procedures – for example, orders can be placed with registered suppliers (whether by mini-competition or otherwise) only using the "usual" award criteria of the GPA, even though this is not stated expressly, since there is no explicit provision for departing from those usual rules⁸⁰. This lack of explicit regulation of ongoing arrangements, including to clarify what procedures and criteria apply at the ordering stage, is considered by the EU as a gap in the GPA that has

77 Public Contracts Directive Art.63.

78 The Concessions Directive does not, however, deal with these issues explicitly.

79 The very first Utilities Directive did include provisions on framework agreements but these possibly allowed more flexibility than applies at present, with the utilities rules having been brought largely in line with the general public sector rules (other than allowing for greater possibility of negotiations in placing orders, in line with the generally more flexible approach of the utilities rules).

80 Indeed it can be argued that the GPA rules are possibly stricter in some ways than the the directives as regards criteria for placing orders and information to be provided on award decisions, which under the EU directives are sometimes more flexible for orders under framework agreements than under the "standard" rules, whereas the GPA does not provide for any greater flexibility.

been the subject of discussions with the United States in the context of a proposed GPA-plus arrangement in the TTIP negotiations (see later below).

This is an important issue within the EU and in relation to access to UK markets. The value of procurement actually undertaken through framework agreements is notoriously difficult to determine⁸¹ and data needs to be treated with caution. However, it is worth noting that the last detailed study undertaken by the European Commission covering use of different procurement mechanisms estimated that in 2009 these accounted for 25% or more of calls for competition by number in 9 member States, including 25% in the UK⁸², and one seventh of the value of contracts in the EU as a whole⁸³. According to data from the UK Cabinet Office the total value of works/suppliers/services procured under framework agreement let in 2014-15 by the Crown Commercial Service (the main central purchasing body letting framework agreements in the UK) was £13.5 billion⁸⁴. This covers procurement for framework agreements both above and below the directives' thresholds, but does not cover framework agreements let by other bodies in the Westminster jurisdiction or framework agreements in other UK jurisdictions.

The procurement directives also include slightly more detailed rules than the GPA to govern electronic auctions. The main significance of this seems to be that the rules on electronic auctions for the utilities sectors under the Utilities Directive are more constrained than under the GPA as regards the possibility for negotiation after the auction is held, but this is not an important difference (indeed, the EU approach to utilities auctions seems out of line with the flexibility available in other aspects of the utilities rules).

7. Obligations to act to promote certain policies

As well as *restricting* the way in which contract award procedures are conducted to ensure transparency, including by placing limits on discretion, the EU procurement directives (and certain other EU instruments referred to in Table 1 above) impose certain positive duties on procuring entities in support of various EU-level policies, some of which relate at least in part to the public procurement market itself. Some are significant in practice, such as the duty under the Energy Efficiency Directive. Others are probably less so (certainly in their implementation in the UK), not least because of their vague content, as with the duty relating to compliance of the supply chain with social and environmental legislation, and obligation to take account of accessibility considerations (although, as noted earlier, the latter would be made more concrete by the proposed Accessibility Act). In brief, the main duties are as follows (with in some cases provisions to deal with the issue also at sub-contractor level):

- i) A general duty in the procurement directives to take "appropriate measures" to ensure compliance in public contracts with national environmental, social and labour law obligations as well as certain international rules (such as some of the International Labour Organization (ILO) conventions)⁸⁵, along with specific duty to reject tenders that are abnormally low because of violations of these rules;
- ii) A requirement in the procurement directives to exclude economic operators with convictions for corruption, certain types of fraud, money-laundering, participation in a criminal organisation or offences related to terrorism or human trafficking, and⁸⁶ those

81 For example, given the difficulty of making accurate estimates at the time of advertisement, particular with agreements tendered (as is common) by Central Purchasing Bodies: the existence of overlapping arrangements: and the uncertain and limited obligations to provide call-off information.

82 European Commission, Staff Working Paper, Evaluation Report Impact and Effectiveness of EU Public Procurement Part 1, SEC(2011) 853 final (June 2011), p.99.

83 Ibid at vii.

84 Crown Commercial Service Annual Report 2014-2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446765/ccs-annual-report-2014-2015-HC207-web.pdf, p.19.

85 Public Contracts Directive Art.18(2) and Utilities Directive Art.36(2).

86 Other than in the Defence and Security Directive, which has again not been updated.

subject to a judgment relating to current non-payment of tax or social security contributions⁸⁷;

iii) An obligation in the Public Contracts Directive and Utilities Directive⁸⁸ to take into account accessibility criteria for persons with disabilities or design for all users;

iv) An obligation in the Public Contracts Directive⁸⁹ to give reasons when the authority decides not to divide a contract into lots, aimed at enhancing participation of Small and Medium Sized Enterprises;

v) Obligations for entities covered by the procurement directives (as well as some other entities) to take into account energy consumption and certain emissions in the purchasing of vehicles under the Clean Vehicles Directive; and

vi) An obligation on central government bodies to purchase energy efficient products, services and buildings, under the Energy Efficiency Directive.

Unsurprisingly, none of these duties is applicable under the GPA procurement rules, nor under other WTO rules.

4.4. The GPA model: enforcement, including remedies for undertakings

As noted, the GPA, like the EU regime, requires Parties to provide remedies for affected undertakings before national review bodies – referred to in the GPA as “domestic review procedures”. The provisions on this (in GPA Art.XVIII) largely (although not entirely) follow the pattern of the explicit rules on national review in the EU Remedies Directives as they applied prior to the 2007 EU reforms. However, they do not include most of the more stringent provisions introduced in the EU in 2007.

Thus there are several key differences between the EU and GPA rules.

First, the GPA has no requirement for a standstill between notification of award and conclusion of the contract such as exists under the EU regime to allow time for challenge before the contract is concluded.

Secondly, the GPA does not include any requirement for *automatic* suspension of the award decision on challenge as applies in the EU (although, as under the EU regime, the review body must have a power to suspend decisions, including the final award decision, when an application is made to it).

Both of these features of the EU system have been shown to have enhanced enforcement of the procurement rules in the UK⁹⁰.

Thirdly, the GPA does not include any requirement of ineffectiveness such as applies in the EU for unlawful direct awards or certain breaches of standstill and suspension rules, again introduced in 2007 (although it can be noted that this requirement played a much more limited role in supplier enforcement in practice in the UK).

Fourthly, the EU public sector regime also requires the possibility of an eventual set aside of unlawful decisions as a general rule rather than allowing damages as an alternative, which is the case with the GPA (and this system of set asides is operated in the UK for utilities, although an alternative approach of dissuasive payments is available for Member States).

⁸⁷ Public Contracts Directive Art.57(1) and Utilities Directive Art.80(1) (not applicable to entities covered merely as public undertakings or because of special or exclusive rights).

⁸⁸ Public Contracts Directive Art.42(1) and Utilities Directive Art.60(1).

⁸⁹ Public Contracts Directive Art.46(1).

⁹⁰ Sue Arrowsmith and Richard Craven, “Public procurement and access to justice: a legal and empirical study of the UK system” (2016) 25 Public Procurement Law Review 227.

Fifthly, so far as a damages remedy is concerned, the EU regime requires any damages remedy to include lost profits, while the GPA, on the other hand, allows damages to be limited only to costs incurred in participating in the award procedure or in bringing legal proceedings (or both), which is a rather limited remedy⁹¹. In practice, damages has played a very limited role in the UK remedies system both in settlement of complaints and in cases proceeding to court⁹² but the position might, of course, be different in a system that did not also provide for set-asides.

Sixthly, the GPA appears to provide for more limited standards for review bodies with regard to, in particular, independence, providing probably only for review at a level independent of the procuring entity whose decision is being challenged, rather than requiring “judicial-type” independence⁹³. However, this is not, currently in any case, an issue in the UK where the problem lies rather at the opposite end of the spectrum of “over-judicialisation”: proceedings are required to be brought in most cases before the High Court⁹⁴, where the expense involved (much higher than any other Member State⁹⁵) has been shown to be a significant barrier to accessing remedies and arguably non-compliant with the general requirement of for effective remedies under EU law⁹⁶.

This leads to a further point relating to national review proceedings, which is that, while the GPA includes a general requirement for the remedies procedure to be effective and timely, ostensibly paralleling EU requirements for effective and rapid remedies, the EU principles have depended for practical application on being filled out at the judicial level. The more limited operation of centralised/inter-governmental enforcement under the GPA, however, renders general principles governing remedies of less practical significance and it is doubtful how far such principles will be used in practice to tackle issues such as court fees, as they have been in the EU, or other elements of costs of legal proceedings.

So far as centralised enforcement/inter-governmental enforcement is concerned, such systems exist within both the EU and WTO procurement for the government procurement rules, but the system is much weaker within the WTO⁹⁷, in large part because of the absence of centralised enforcement that occurs by the European Commission and reliance instead on proceedings by Governmental Parties. This is not an issue specific to procurement but a more general feature of reliance on WTO rules. However, it is an aspect that is important in the procurement area since centralised enforcement has played an important role in ensuring compliance with the procurement rules, and also – as noted above – in developing the content of the both the substantive rules and the remedies provisions, including through interpretation of the general principles of the directives.

The 2014 EU procurement directives also make provision for a more extensive monitoring and enforcement function at national level that is an addition to the system of review for affected undertakings⁹⁸, but this is in its early stages and has not led to any significant developments in the UK.

91 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.

92 Sue Arrowsmith and Richard Craven, “Public procurement and access to justice: a legal and empirical study of the UK system”, above.

93 Review need only be before a body that is independent of the procuring entity and there is no requirement for review of decisions of a non-judicial other than by a body that follows certain judicial-type procedures, with no mention of judicial-type independence.

94 Scotland, which has a different court system, provides for review before the Court of Session, but with the Sheriff Court as an alternative option.

95 European Commission, *Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*, Final Study Report, MARKT/2013/072/C (April 2015), p.124.

96 Sue Arrowsmith and Richard Craven, “Public procurement and access to justice », above.

97 Even though there are some special features of this system in the procurement field. On this see Sue Arrowsmith, *Government Procurement in the WTO* (2003), Ch.14.

98 E.g. 2014 Public Contracts Directive Art.83.

4.5. The GPA and state aid

Finally, as regards the possibility of procurement being used as a form of aid to industry, the procurement of goods that involves provision of “more than adequate remuneration” generally constitutes an actionable subsidy (defined as a financial contribution conferring a benefit⁹⁹) under the WTO’s Agreement on Subsidies and Countervailing Measures¹⁰⁰. Thus some control over the use of procurement as aid in goods procurement is effectively imposed by the WTO model, although as with many areas of WTO there is not such a stringent enforcement system.

There are, however, no corresponding provisions relating to services.

In practice, the application of GPA procurement rules – as with comparable EU rules - will provide a regime that helps ensure that such aid does not occur.

4.6. Assessment of the GPA model for public procurement: a summary

Table 4: Assessment of the GPA model in relation to public procurement from the perspective of the EU27

Feature	Assessment
Political acceptability	Reasonable likelihood of acceptance by UK and EU (if legally required)
Ease of process for concluding an agreement on procurement issues	<p>Very easy and swift if UK can succeed to current position without a new application to join</p> <p>Also potentially very easy and swift even if new UK application required, if application based on current GPA coverage for EU/UK without new negotiations. Might be easy and swift even if added expanded coverage into Annexes in line with wider coverage of EU directives (although potential for some delay)</p>

⁹⁹ Agreement on Subsidies and Countervailing Measures Art.1(1).

¹⁰⁰ Art.1.1(a)1(iii), stating that the purchase of goods by Government or a public body is within the definition of “financial contribution” under Art.1(1) of the Subsidies Agreement and Art.14 then stating, however, that purchase of goods or services shall not be considered a benefit (necessary for an actionable subsidy) unless purchased for more than adequate remuneration. It can be noted that this is determined in relation to the prevailing market conditions, and this arguably takes into account the possibility of preferential procurement that is not prohibited by WTO rules, so that payment of a higher price because of the absence from the market of suppliers from a county not entitled to access the public procurement in question would not involve any actionable subsidy: see Sue Arrowsmith, Government Procurement in the WTO (2003; Kluwer), pp.85-87.

<p>Coverage of public procurement markets for mutual access purposes</p>	<p>A bit more limited if based on current GPA coverage for EU/UK, in particular no coverage below-threshold or of private contracts subsidised by government; more limited coverage of defence, utilities (limited sectors plus private entities with SERs), concessions and services; and no express rules on modifying concluded contracts or on arrangements between public bodies</p> <p>Many of above limits easily addressed within GPA framework, however, by adding expanded coverage in Annexes</p>
<p>Access supported by robust rules on award procedures</p>	<p>Same core rules as EU directives including advertising and competition.</p> <p>However, more flexible in limited respects. (No good data on impact of flexibilities.)</p> <p>Duties to support EU policies do not apply.</p>
<p>Common advertising system providing for same access to UK contracts in EU languages?</p>	<p>No common mandatory system for all Parties. However, can be realised for EU/UK by including OJEU as advertising medium in UK Appendix</p>
<p>Access and award procedures supported by robust remedies for undertakings</p>	<p>Requirement for national remedies for undertakings, including to seek suspension of contracts.</p> <p>However, no standstill or automatic suspension of award decisions, and more limited remedies, including post-contract. More limited independence requirements for review bodies (but UK remedies are anyway before court at present).</p>
<p>Access and award procedures supported by other enforcement mechanisms</p>	<p>Inter-governmental enforcement</p> <p>No centralised enforcement</p> <p>No requirement for national enforcement authorities</p>
<p>Extent of similarity of award procedures with EU Member States</p>	<p>Scope for greater divergence than under EU rules as less prescriptive; also divergence between different UK jurisdictions likely to be more extensive</p>

Application of state aid rules to control use of public procurement as state aid	EU state aid rules not applicable but some control of aid through procurement of goods (though not services) provided by WTO Subsidies Agreement
Procedural safeguards against public procurement constituting state aid	Significant control via application of GPA award procedures though more flexible than those of EU <i>acquis</i> (see above)
System for application of new EU legislation (important in such a technically complex area)	Not relevant as EU <i>acquis</i> not applicable
System for application of new ECJ judgements (important in such a technically complex area, especially given the significant role of the ECJ in practice)	Not relevant as EU <i>acquis</i> not applicable
Application of other important rules affecting public procurement to support market access and fair competition (Posted Workers Directive, Acquired Rights Directive, mutual recognition of qualifications, harmonised standards etc)	EU rules not applicable but some rules under WTO's multilateral agreements
Access for EU undertakings supplying third country products	Does not confer rights of access for products from countries not Party to GPA, even when offered by undertakings from GPA Parties (including EU undertakings), or rights of access for undertakings offering such non-Party products
Common policy on exclusion of third country undertakings that do not provide reciprocal access	No. Utilities Directive provisions on third countries do not apply and exclusion of third party industry from UK markets not available under Proposed Regulation on Third Country Access to Procurement
UK input into development and analysis of EU procurement rules (governmental and independent), training, technical assistance etc	None at formal level; will be wholly or largely lost at informal level in the longer term?

5. OTHER TRADE AGREEMENTS AND NEGOTIATIONS ON PUBLIC PROCUREMENT, INCLUDING “EEA-MINUS” AND “GPA-PLUS” APPROACHES

KEY FINDINGS

- 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 be a significant consideration in EEA-minus or GPA-plus agreements
- Under an EEA-minus or GPA plus approach, application of related general rules such as those in the Posted Workers Directive and Acquired Rights Directive and on mutual recognition of qualifications and harmonised standards would depend on what else is agreed in any wider EU-UK agreement ; and there would again be no common rules on third countries

5.1. Introduction

As well as the EEA Agreement and GPA the EU has concluded a huge number of other agreements that deal with trade, often in the context of broader arrangements extending also to other matters. It is notable that public procurement provisions have been an important feature in all these agreements. Provisions on procurement can thus be expected to be a feature of any bespoke trade agreement with the UK.

Most of the agreements can be divided very broadly into two categories so far as their procurement provisions are concerned: agreements based on the EU procurement *acquis*, and agreements based on a GPA or “GPA-plus” approach. These categories – they are actually and potentially too diverse to be called “models” (and none seems directly “transferable” to the UK’s unique situation) - are considered briefly below, since both the EU procurement *acquis* approach and the “GPA-plus” approach are feasible approaches in the context of an EU-UK Agreement.

These are not the only types of agreement, however. For example, some of the public procurement provisions in bilateral agreements with states covered by the European Neighbourhood Partnership (ENP) framework in North Africa, the Middle East and the former Soviet Union¹⁰¹ are much less extensive and concrete than those in the DCFTAs discussed in section 5.2 below (for example, the partnership and cooperation Agreement with Armenia (now a GPA member, however), merely provides for Armenia to “endeavour” to approximate its laws with those of the EU¹⁰² 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”¹⁰³. Another example of a different approach is an early Agreement with Mexico¹⁰⁴, under which the supporting award procedures from the Mexican side were those under the North America Free Trade Agreement (NAFTA), which Mexico was required to apply anyway. None of the other approaches, which are based on a background of the particular stage of development of the parties in question and the existence of other agreements on procurement applicable to those parties, seem worthy of detailed consideration, given the relevant context, namely that the UK already applies the EU rules and that it is also Party to the GPA.

5.2. Application of the EU procurement *acquis* under an “EEA-minus” approach

The EU has concluded agreements based on the EU *acquis* on procurement in two types of case: the case of accession/potential accession states, and under the DCFTAs with Ukraine, Moldova and Georgia.

In the case of actual or potential candidates for EU accession, public procurement provisions have been aimed at ultimate (although generally gradual) complete liberalisation of procurement under rules in line with the EU *acquis*. This is the case with the current Stabilisation and Association Agreements with some of the Balkan states¹⁰⁵. This is also the aim that is ultimately contemplated in the Agreement with Turkey¹⁰⁶, with the important feature that there is also provided for a Customs Union between Turkey and the EU; however, negotiations with Turkey on liberalisation of procurement as part of the potential development of the Customs Union were suspended in 2002. These provisions on procurement have all been agreed in a very different context from agreements with states that are not potential candidates for accession: they are part of an arrangement that envisages a move towards adoption of the EU *acquis* as a whole and of the EU’s internal arrangements for enforcement and interpretation, as well as of a customs union. This is very different from, in particular, the unique context of negotiations with the UK, a country that is moving away from at least some elements of the Single Market *acquis*, as well as apparently rejecting the possibility of the jurisdiction of the ECJ and customs union. Thus these accession-related agreements will not be considered further.

However, more generally a trade agreement with the UK that deals with public procurement essentially on the basis of the EU procurement regime, certainly for major contracts (above the thresholds of the directives), is a possibility should the EU wish to pursue that approach. This is not unrealistic even if there is no full or substantial application of other Single Market

101 The ENP framework covers Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine.

102 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

103 Art.48.

104 Decision 2/2000 of the EC/Mexico Joint Council of March 23, 2000, [2000] O.J. L157 and [2002] O.J. L245, adopted under the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican states, of the other part [2000] O.J. L276/45 (Art.10 of which provides the framework principles for liberalising procurement). Public procurement is dealt with in Decision 2/2000 in Title III (Arts 25-38) and Annexes VI-XI. Negotiations for updating the Agreement commenced in June 2016: see <http://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/>

105 See [2004] O.J. L 084/13 (FYROM), [2009] O.J. L 107/166 (Albania), [2010] O.J. L108/1 (Montenegro), [2013] O.J. L 278/1 (Serbia).

106 Decision No 1/95 of the EU-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC), Art.48.

rules in any EU-UK agreement. This is because, first, the EU's policy aims at reciprocal opening of procurement markets covered by the EU regime (as indicated in GPA negotiations and in the Proposed Regulation on Third Country Access to Procurement Markets) and, secondly, the UK is in a very different position from most other states that are not actual or potential accession candidates as regards the practical and political difficulties of gaining acceptance for the EU *acquis* in this field, since it applies already in the UK¹⁰⁷. While most EU agreements on procurement that do not have possible accession as their context have been based on the GPA rather than EU *acquis*, this seems to be largely because of the political and practical difficulties: as is elaborated in section 5.3 below, the EU has (and has increasingly) tried to introduce provisions reflecting the EU *acquis* to a degree when considered feasible, and there are reasons to adopt this approach with the UK also.

This is not to say that this will necessarily be the UK's own favoured approach, merely that achieving this approach will surely present very much less of a challenge in an agreement with the UK than with most trading partners (for whom this has, realistically, to be ruled out as a general approach).

As mentioned, the EU procurement *acquis* approach is in fact the approach adopted in the EU's Association Agreements concluded in 2014 with the Ukraine and Moldova (now GPA Parties also) and Georgia (which has applied to join the GPA)¹⁰⁸. These have provided for gradual reciprocal liberalisation of procurement, based on transparent tendering and gradual alignment of the procurement laws of those states with the EU, based on the 2004 procurement directives, forming part of a wider package of alignment measures.

The very different context of the EU-UK relationship and the EU's relationships with the Ukraine, Georgia and Moldova, as well as the very different economic and political situation of those countries as compared with the UK has, however, important implications: they both affects the practical possibility of applying aspects of the EU procurement *acquis* – for example, the common advertising system – and related (non-procurement) general legislation, and mean that certain provisions on procurement in the DCFTAs (notably on institutional reform and capacity building) are not relevant for the UK.

Rather than considering directly the DCFTAs with the states above, it is therefore more useful to consider in more general terms - and taking account of the practical and political realities in which negotiations will take place - what are the key issues in relation to public procurement as regards to negotiating a DCFTA with the UK i) in which the procurement element is based on the EU procurement-specific rules but ii) which does not in general include *all* the procurement-related elements found in the EEA Agreement that might impact significantly on public procurement. By analogy with the "GPA-plus" terminology that the EU has adopted in negotiations with the US, this can be referred to as an "EEA-minus" approach.

An assessment is provided in Table 5 below, drawing on Table 3 above dealing with the features of the EEA Agreement itself.

107 Sue Arrowsmith, *The Implications of Brexit for the Law of Public and Utilities Procurement*, Achilles White Paper (2016), <https://www.achilles.com/images/locale/en-EN/buyer/pdf/UK/sue-arrowsmith-brexit-whitepaper.pdf>, p.10.

108 [2014] O.J. L260/1 (Moldova); [2014] O.J. L261/1 (Georgia); [2014] O.J. L161/1 (Ukraine).

Table 5: Assessment of an “EEA minus” approach from the perspective of the EU27

Features	Assessment
Political acceptability	Presumably acceptable in principle to EU; more likely to be accepted by UK than by most other trading partners?
Ease of process for concluding an agreement on procurement issues	Easy and swift on procurement matters if agreement to base on current procurement directives However, may need negotiations on acceptability of this approach to UK, including approach to sub-threshold procurement; and negotiations in context of overall trade agreement could be problematic
Coverage of public procurement markets for mutual access purposes	Same coverage as at present for above-threshold procurement? Negotiation on sub-threshold procurement?
Access supported by robust rules on award procedures	Supported by same rules as at present, under the EU <i>acquis</i> , at least for above-threshold procurement
Common advertising system through the EU’s Official Journal providing for same access to UK contracts in EU languages?	No significant obstacles to applying in same way as under EEA, even though not applied in DCFTAs with Ukraine etc
Access and award procedures supported by robust remedies for undertakings	Supported by same rules as at present, under the EU <i>acquis</i> , at least for above-threshold procurement Could be issue over whether rules will have direct effect?
Access and award procedures supported by other enforcement mechanisms	Need to design such mechanisms, including at inter-governmental level; one of the major issues for the overall agreement
Extent of similarity of award procedures with EU Member States	Same scope for divergence as at present under the EU <i>acquis</i> , as regards public procurement-specific rules
Application of state aid rules to control use of public procurement as state aid	Control of aid through procurement provided by WTO Subsidies Agreement; further control depends on agreement

	(likely to be general in the overall EU/EK agreement, not "procurement-specific")
Procedural safeguards against public procurement constituting state aid	Same as present via application of award procedures of EU <i>acquis</i> , at least for above-threshold procurement
System for application of new EU legislation (important in such a technically complex area)	Needs determining; one of the major issues for the overall agreement
System for application of new ECJ judgements (important in such a technically complex area, especially given the significant role of the ECJ in practice)	UK has rejected possibility of being subject to future ECJ judgments; one of the major issues of difficulty for any agreement based on the <i>acquis</i>
Application of other important rules affecting public procurement to support market access and fair competition (Posted Workers Directive, Acquired Rights Directive, mutual recognition of qualifications, harmonised standards etc)	Depends on agreement (likely to be general in the overall EU/EK agreement, not "procurement-specific")
Access for EU undertakings supplying third country products	Needs discussing if (as assumed) no customs union and no principle of free circulation for products of third country origin
Common policy on exclusion of third country undertakings that do not provide reciprocal access	Presumably not if (as assumed) no customs union. Thus Utilities Directive provisions on third countries would not apply, and exclusion of third party industry from UK markets would not be available under Utilities Directive Arts 85-86 or Proposed Regulation on Third Country Access to Procurement
UK input into development and analysis of EU procurement rules (governmental and independent), training, technical assistance etc	Limited UK input at formal, including governmental, level; other input likely to be (at least largely) unaffected

5.3. The GPA-plus approach

As mentioned, most of the EU's agreements on public procurement that do not deal with pre-accession relationships are based on the approach of the GPA.

In the case of non-GPA Parties such agreements generally provide for opening of markets to a greater or lesser degree (according to what can be negotiated¹⁰⁹), supported by award procedures and remedies for affected undertakings that largely parallel those of the GPA¹¹⁰. This applies, for example, to agreements with Chile¹¹¹; an agreement with the Andean Community countries of Columbia, Peru and Ecuador¹¹²; an agreement with Iraq¹¹³; the Association Agreement concluded with the Central American countries of Panama, El Salvador, Guatemala, Costa Rica, Nicaragua and Honduras¹¹⁴; and a recently negotiated agreement with Vietnam (with temporary derogations from some of the GPA-type procedural requirements for Vietnam¹¹⁵).

In the case of GPA Parties, both past and current trade agreements/negotiations have been largely concerned with expanding access within the framework contemplated in the GPA itself, and their ultimate outcomes have frequently been market-opening commitments that have been written into the GPA. However, in some of these cases – and increasingly – the EU has sought to expand commitments beyond those of the GPA in certain respects, as regards coverage and/or award procedures and/or remedies. This latter approach has been characterised by the European Commission in the context of the TTIP negotiations with the US as “GPA-plus”¹¹⁶.

Thus, the EU's arrangements with Switzerland largely follow the GPA line in the specific agreement (of 2002) that addresses public procurement¹¹⁷ (in this case the GPA 1994¹¹⁸ since Switzerland has not yet ratified the GPA 2012¹¹⁹). Under this agreement liberalisation goes further, however, than the EU's GPA coverage, extending to some of the directives' additional utility sectors and to private utilities with special or exclusive rights, although with supporting award procedures more skeletal than those of the GPA (influenced by what was palatable for such entities). In the case of Canada the Comprehensive Economic and Trade

109 The Agreements often provide for limitations even for covered procurement, however - for example, in the agreements discussed below 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). The GPA itself also contemplates limits for covered procurement for developing countries and includes some special and differential treatment provisions but this kind of approach is not considered relevant for new developed country Parties. The CARIFORUM-EU Economic Partnership Agreement (2008] O.J. L 289/1/4 Arts165-181) also makes provision for disciplines on award procedures based on those of the GPA, with access to challenge mechanisms, but does not yet provide for specific market opening commitments.

110 Johannes Schnitzer, “Regulating Public Procurement Law at Supranational Level: The example of EU Agreements on Public Procurement” (2010) 10 Journal of Public Procurement 301 ; and in relation to recent agreements with the states of central and south America Sangeeta Khorana and Maria Garcia, “Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?” (2014) 48 Journal of World Trade 481 .

111 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.

112 The text is published at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1156>, and will be applied following completion of internal procedures.

113 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.

114 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).

115 EU-Vietnam Free Trade Agreement (currently pending approval and ratification) http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/index_en.htm. 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”.

116 European Commission, EU-US transatlantic Trade and Investment Partnership: Public procurement: Initial EU position paper, 16 July 2013,

http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151623.pdf, at 2.1.

117 Agreement between the European Community and Swiss Confederation on certain aspects of government procurement [2002] O.J. L114/430.

118 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.

119 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.

Agreement (CETA)¹²⁰ has been concerned to expand the scope of open procurement markets between the Parties¹²¹, including covering some sub-federal procurement that Canada does not open to other GPA Parties (such as communes and their utilities, and universities), based on procedures modelled on those of the GPA¹²² and providing for remedies for undertakings (although more limited than under the GPA)¹²³. It also makes provision for a joint Committee on Government Procurement for monitoring and consultation purposes¹²⁴. A general comprehensive trade agreement with Singapore¹²⁵, another GPA Party, again provides (in Art.10) for opening up further procurement (mainly concessions and utilities) 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)¹²⁶.

Finally, negotiations with the US for a Transatlantic Trade and Investment Partnership (TTIP) not only seek significantly expanded basic coverage but, from the EU perspective also aim at developing more detailed disciplines, going beyond those of the current GPA, as mentioned above¹²⁷. The EU has suggested that “plus” elements negotiated in this context might “inspire” enhanced disciplines in the GPA itself¹²⁸, and inclusion of some similar elements in an agreement with the UK could give a boost to this aspiration. The negotiations with the US seem so far, however, to have met with limited success¹²⁹.

As to what issues the EU may want to consider for a GPA-plus agreement, these may in part be informed by the list drawn up in relation to the US TTIP negotiations, which presumably to some extent reflect the general priorities for the EU in developing future procurement agreements with its trading partners (although some of the items reflect peculiarities of the US situation¹³⁰). As regards supplementary coverage rules, coverage of contracts between public bodies is mentioned as an issue¹³¹; as noted above, this matter is dealt with in detail in EU rules defining the circumstances in which agreements between such bodies may be concluded without a competition under the directives, but not in the general disciplines of the GPA, and could be included in a GPA-plus agreement (although it might also be dealt with by referring to the directives’ exclusions in EU Annexes in a “pure” GPA solution). In relation to award procedure, an issue on the agenda has been “task and delivery order contracts”. This concept refers to certain recurring purchase arrangements in the US, an area which Chapter 4 above suggested is also important in relation to the UK.

120 The text is available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf. Art.69 deals with procurement. See Nadiya Nychay and Xavier Van Overmeire, “Public Procurement”, ch.3 in N. Nychay and X. Van Overmeire, *The Comprehensive Economic and Trade Agreement between Canada and the EU: An Overview* (LexisNexis Canada/Butterworth, 2015).

121 CETA Art.19.2 and associated Market Access Schedules.

122 CETA Art.19.5-19.16.

123 CETA Art.19.17.

124 CETA Art.19.9.

125 For the draft text see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>.

126 And the Free Trade Agreement between the European Union and the Republic of Korea [2011] O.J. L127/6 set up a Government Procurement Working Group to address future liberalisation.

127 On TTIP and procurement generally see Stephen Woolcock and Jean Heilman Grier, “TTIP and Public Procurement”, ch. 10 in Daniel S. Hamilton and Jacques Pelkmans, *Rule-Makers of Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership* (Centre for European Studies, 2015) 297 which, however, focuses mainly on expansion of coverage commitments, there being relatively little public information available about the possible detailed content of a “plus” approach to regulatory disciplines.

128 European Commission, *EU-US transatlantic Trade and Investment Partnership: Public procurement: Initial EU position paper*, above, at 2.1.

129 U.S.-EU Joint Report on TTIP Progress to Date,

http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155242.pdf (17 January 2017) states that improving access to procurement markets is one of the areas in which there is still “significant work to do” to resolve differences (p.3)

130 For example, the need for improved transparency in accessing procurement information and coverage of federal funding to the state level.

131 European Commission, *EU-US transatlantic Trade and Investment Partnership: Public procurement: Initial EU position paper*, above, at 3.2.

In addition, it may be appropriate to include some measures that reflect the particular position of the UK as a close trading partner and past EU member. One important area might be qualification criteria - also mentioned in relation to TTIP¹³², but in the UK context potentially including mutual recognition of certificates and use of e-Certis, as mentioned in Chapter 4 above.

As with the “EEA-minus” type agreement, it is not helpful to take any single one of the GPA-plus agreements as a specific model, but more useful instead to assess the GPA-plus approach in a more general way, drawing on the previous assessment of the “pure” GPA approach. This is done in Table 6 below. As explained earlier, however, the “pure” GPA and GPA-plus approach shade into each other to the extent that GPA-plus coverage, in particular in relation to the basic, as opposed to supplementary, coverage dimension of any EU-UK agreement, can be incorporated into the GPA itself, and thus easily separated from the negotiations for any more general EU-UK trade agreement.

The following assessment assumes the negotiation of a GPA-plus approach in the context of broader EU-UK trade negotiations, although it is also, of course, technically possible to conduct procurement negotiations (or negotiations on any other subject) separately.

Table 6: Assessment of a “GPA-plus” approach from the perspective of the EU27

Feature	Assessment
Political acceptability	Reasonable likelihood of acceptance by UK and EU
Ease of process for concluding an agreement on procurement issues	Easier than with other trading partners given that EU rules already apply in the UK. However, will need discussions determine to determine which “plus” elements are to apply; and negotiations in context of overall trade agreement could be problematic.
Coverage of public procurement markets for mutual access purposes	A bit more limited than current rules if based on current GPA coverage for EU/UK, although GPA coverage could itself be expanded (see Table 4 above). Extent to which goes beyond GPA will depend on exact scope of GPA-plus agreement. Supplementary coverage rules (e.g. definition of SERs, application to arrangements between public bodies, and rules on modification to concluded contracts) could be included if not addressed in UK Annexes.

132 European Commission, EU-US transatlantic Trade and Investment Partnership: Public procurement: Initial EU position paper, above, at 3.1., referring merely in general terms to the issue of “qualification procedures and test reports”.

<p>Access supported by robust rules on award procedures</p>	<p>Core rules in EU directives including advertising and competition already provided by GPA standards. Extent to which goes beyond this will depend on exact scope of GPA-plus agreement. However, might easily be extended in some key areas such as regulation of framework agreements and other recurring purchasing arrangements, mutual recognition of certificates and registrations, and provision of information in the area of qualifications (including through e-Certis)</p>
<p>Common advertising system through the EU's Official Journal providing for same access to UK contracts in EU languages?</p>	<p>No significant obstacles to this and might well be provided even in "pure" GPA model</p>
<p>Access and award procedures supported by robust remedies for undertakings</p>	<p>Requirement for national remedies for undertakings, including to seek suspension of contracts, provided in GPA itself. Extent to which goes beyond GPA (e.g. to include automatic suspension, standstill etc) will depend on scope of GPA-plus agreement</p>
<p>Access and award procedures supported by other enforcement mechanisms</p>	<p>Need to design such mechanisms, including at inter-governmental level; one of the major issues for the overall EU/UK agreement</p>
<p>Extent of similarity of award procedures with EU Member States</p>	<p>Less similarity than under the EU <i>acquis</i> as less prescriptive and divergence between different UK jurisdictions likely to be more extensive; extent of this will depend on the extent of the "plus" element</p>
<p>Application of state aid rules to control use of public procurement as state aid</p>	<p>Control of aid through procurement provided by WTO Subsidies Agreement; further control depends on agreement (likely to be general in the overall EU/EK agreement, not "procurement-specific")</p>
<p>Procedural safeguards against public procurement constituting state aid</p>	<p>Provided by application of award procedures of the GPA along with whatever "plus" is agreed</p>
<p>System for application of new EU legislation (important in such a technically complex area)</p>	<p>Not directly relevant</p>

System for application of new ECJ judgements (important in such a technically complex area, especially given the significant role of the ECJ in practice)	Not directly relevant
Application of other important rules affecting public procurement to support market access and fair competition (Posted Workers Directive, Acquired Rights Directive, mutual recognition of qualifications, harmonised standards etc)	Depends on agreement (likely to be general in the overall EU-UK agreement, not "procurement-specific")
Access for EU undertakings supplying third country products	Needs discussing if (as assumed) no customs union and no principle of free circulation for products of third country origin
Common policy on exclusion of third country undertakings that do not provide reciprocal access	Presumably not if (as assumed) no customs union, so exclusion of third party industry from UK markets not available under Proposed Regulation on Third Country Access to Procurement
UK input into development and analysis of EU procurement rules (governmental and independent), training, technical assistance etc	None at formal level; will be wholly or largely lost at informal level in the longer term?

6. ISSUES FOR A WITHDRAWAL AGREEMENT

KEY FINDINGS

- A withdrawal agreement may need to include : i) measures addressing the consequences of changing from one procurement regime (the EU regime) to another; and ii) measures to address the fact that the ultimate shape of the EU-UK relationship is unknown at the time of Brexit.
- Should the withdrawal agreement provide for retaining mutual access to procurement based on existing EU procurement rules pending a final agreement, issues in category i) above will need addressing only if and when the interim agreement is replaced by a different final agreement.
- It seems likely that the UK's current procurement regulations transposing the EU directives will remain in place pending any final determination of the future EU-UK relationship in public procurement. However, since the WTO's multilateral rules do not provide for any substantial rights of access to public procurement markets, an interim EU-UK access agreement might be needed to preserve rights of EU undertakings to access UK procurement markets and to enforce the UK procurement regulations during any period pending final agreement or, at least, until UK is a Party to the GPA. It might, however, be possible for the UK to be a Party to the GPA at the time of Brexit, rendering such an interim access agreement less necessary.
- Another issue relevant for a withdrawal agreement is provision for continuing UK access to the EU's common publication system (TED) and to other EU tools, such as e-Certis ; this is relevant for any interim period and also for facilitating use of these tools in any final agreement. If these tools are not made generally available, it will be necessary to deal with this issue in the specific context of EU-funded contracts involving award procedures that start or continue after Brexit, for which use of EU tools by UK entities may be required by the funding agreement.
- Other issues that may need addressing in the context of any change of procurement regime (interim or final), include : i) treatment of ongoing award procedures ; ii) remedies for violations when proceedings are instituted after Brexit ; iii) retention of records ; iv) treatment of ongoing procurement arrangements in the form of framework agreements, qualification systems and dynamic purchasing systems ; iv) treatment of contracts concluded before any regime change, including : a) the risk of contracts being terminated or reduced in scope for reasons of nationality ; b) continued application of termination rights for UK procuring entities that derive from EU law ; c) application of the e-Invoicing Directive ; and d) application of the rules controlling modification of concluded contracts. Some of the issues in group iv) may also be considered relevant for contracts concluded under award procedures that are ongoing at the time of change even if the contract was not yet concluded.

6.1. Introduction

This Chapter, finally, outlines the procurement-specific issues that may need addressing in a withdrawal agreement.

This may include, first, measures to address the consequences of changing from one regime to another (the EU regime to another regime), including for activities ongoing at the time of change – for example, award procedures begun before the change of regime but completed after the change.

Secondly, the withdrawal agreement may need to include measures to deal with the fact that the ultimate shape of the EU-UK relationship is unknown at the time of Brexit.

The two areas are closely connected in that if there is an interim agreement for mutual access to procurement based on the existing EU directives as part of a withdrawal agreement, then measures to deal with regime-change will need addressing only if and when the interim agreement is replaced by a final agreement that does not provide for the continued use of EU rules.

By way of background, the UK's White Paper on Brexit states that existing EU rules will initially be retained and "repatriated". In the case of public procurement, the UK measures transposing the EU directives¹³³ (hereafter "the procurement regulations") are distinct from other legal rules on public procurement (which are limited rules concerned with specific issues, and do not take the form of a general "Code" or other Law governing procurement, as in many Member States). These procurement regulations are enforceable by affected EU and EEA undertakings, and also by undertakings from third countries with which agreements exist for reciprocal access to the relevant procurement (for example, under the GPA).

Key issues that need to be considered from the perspective of the EU27 are outlined in the following sections.

6.2. Status of EU27 undertakings pending conclusion of a final trade agreement

It may be desirable to include in any withdrawal agreement provision for mutual access to procurement markets on an interim basis.

This will not be needed, of course, if a final agreement on access has been concluded at the time of Brexit. However, this seems unlikely.

It will also be less important, and quite possibly considered unnecessary, if the UK were to become or remain a Party to the GPA at the time of Brexit, since in that case substantial mutual commitments, plus supporting measures, would exist at the time of Brexit. As explained in Chapter 4, it is not clear whether or not this can or will happen, but it is certainly a possibility.

If, however, neither of these things applies, it may be important to address the issue of mutual access in the withdrawal agreement in public procurement given that (in contrast with many other areas covered by WTO rules) the "default" position under WTO rules is the absence of any substantial commitments on access to procurement markets, as discussed in section 4.1.

¹³³ The main legislation transposing the EU directives in the Westminster jurisdiction is the Public Contracts Regulations 2015 (transposing the Public Contracts Directive and the related provisions on remedies), Utilities Contracts Regulations 2016 (transposing the Utilities Directive and related remedies provisions), Concessions Contracts Regulations 2016 (transposing the Concessions Directive and related remedies provisions) and Defence and Security Public Contracts Regulations (transposing the Defence and Security Directive), and in Scotland the Public Contracts (Scotland) Regulations 2015, Utilities Contracts (Scotland) Regulations 2016, Concession Contracts (Scotland) Regulations 2016, and the Defence and Security Public Contracts Regulations 2016 (collectively "the procurement regulations"). There is no specific legislation dealing with obligations for contracts below the directives' thresholds, where the steps to be taken to comply with the transparency and other obligations of the TFEU are for procuring entities to decide (within the framework of (non-legal) guidance and some domestic legislation, such as a requirement for local authorities to provide for competition etc for their works and supply contracts through legally binding "standing orders" adopted by those authorities (Local Government Act 1972, s.135).

As regards the background to any interim access agreement, in public procurement, as in many other areas, it can be expected that the existing UK procurement regulations will generally be retained not only at the time of Brexit but until the final relationship with the EU (and other trading partners) is determined. It is likely that the UK will require procuring entities to continue to procure in accordance with the current procurement regulations, since it is impractical to design new legislation that might be temporary only, especially given that any final agreement might anyway take the same form as the current EU directives.

What would be the position as regards undertakings from the EU27 in such a scenario?

In the absence of any interim agreement with the EU guaranteeing mutual access to procurement markets to cover the period until a final agreement, or at least until the UK is Party to the GPA, the UK could remove the rights of EU undertakings to enforce its procurement regulations. Such a policy would be simple to apply in practice, although it gives rise also to the question of how to treat undertakings from other countries that currently enjoy rights of access to UK markets that depend on the UK's EU membership (including under the GPA): would the UK allow access to those countries even pending conclusion of new agreements if the countries concerned seemed willing to conclude such agreements, while denying access to EU undertakings as a bargaining tool in the EU-UK negotiations?

The UK could alternatively formally limit rights of access only to undertakings from those EU countries that continue individually to give legal rights of access to UK undertakings, or at least that give de facto access. (Since there is no common EU policy towards third countries for most public procurement the position of Member States as regards third countries varies in practice, although the extent to which the different national approaches are lawful is open to debate.) However, these approaches would be difficult to implement, especially by individual procuring entities¹³⁴, since they would require knowledge of the situation of different countries; and it is hard to conceive of measures of this kind being applied in practice, or even formally adopted.

The UK could even, theoretically, adopt measures that require procuring entities positively to exclude EU undertakings/products/services, or those of some EU countries (those not offering reciprocal access), from UK procurement. In the absence of such measures it is likely that de facto access would continue for EU undertakings and products/services even if the UK did not retain the right of EU undertakings to enforce the procurement regulations undertakings¹³⁵.

It can be pointed out that in the absence of a general common policy instrument in the area of public procurement the EU is unable at present to take swift action to adopt EU-wide measures concerning UK access to the EU's own procurement markets. The Proposed Regulation on Third Country Access to Procurement Markets could be invoked if adopted, but the current proposal does not apply to all procurement covered by the directives, but only high-value procurement.

All the above possibilities affecting the access of the EU27 to major UK contracts could be avoided by either a general agreement between the EU and UK on continuing access to the Single Market on a temporary basis or, in the absence of a more general agreement, a procurement-specific agreement preserving the right of EU and UK undertakings to enforce the award procedures in the public procurement directives in accordance with the EU remedies regime.

What else is needed in a withdrawal agreement, as outlined below, will be affected significantly by how the above issue of continued mutual access is dealt with. In particular,

¹³⁴ Who, as indicated in section 4, may anyway be precluded from doing this under the WTO's multilateral agreements.

¹³⁵ And it can be noted that the Local Government Act 1988 in fact currently prohibits local authorities within its scope from taking account of "third country".

as noted above, if there is an interim access agreement on the basis of the existing EU rules some of the issues below will need addressing only if and when such an interim agreement comes to an end and the EU regime is replaced by a different regime. For simplicity we will refer below simply to the scenario of regime-change at the time of Brexit, but the same points will often apply *mutatis mutandis* to change at any later point.

6.3. Use of the OJEU and other EU tools pending final agreement

One issue relevant for a withdrawal agreement is whether provision should be made and, if so, on what terms, for continuing UK access to the common EU system for publication of notices (including notices advertising contracts) and to other EU tools supporting practical access to public procurement markets, such as e-Certis, which can enhance the access of the EU27. This is potentially relevant both for access during any interim period pending final agreement on the EU-UK procurement relationship, and under any final agreement, including a GPA-plus agreement. This is an important practical question to address at the time of Brexit.

If there is no general agreement for use of the OJEU and other EU tools by UK procuring entities it will be necessary to make arrangements for the use or some or all of these tools in the context of projects with EU funding that continue after Brexit and which require use of such tools (notably notices published through the OJEU) under the terms of the funding arrangements. For example, such arrangements are relevant in the UK in the area of energy-efficient housing.

6.4. Ongoing award procedures: general

Were the applicable procurement regime to change in any significant way after Brexit it would be useful to deal explicitly in the withdrawal agreement with the implications of this for award procedures for public contracts that are ongoing at the time of Brexit. The same issues will also arise at the time of transition from any interim arrangement to a (different) final arrangement.

One possibility is simply generally to apply the regime that applied at the start of the award procedure right through to the end. A strong argument for this approach is that the different stages of the award procedure are closely connected. For example, at the stage of awarding the contract the award criteria that must be applied are limited to those that are of the type permitted under the directives and which have been set out by the procuring entity earlier in the award procedure. This would also lead to the same outcomes for both EU27 and UK undertakings (application of EU procurement rules to these award procedures).

Another possibility might be to apply whatever regime is in place at the time of the decision in question. However, this can create difficulties given the close connection of the different stages. For example, if an award criterion used at the award stage was unlawful when first stated under the EU regime but is no longer unlawful at the time of its application, is its application to be treated as lawful or unlawful? A reverse situation would also create significant difficulties.

Issues such as the remedies applicable after Brexit to redress violations occurring before Brexit, and availability of preliminary rulings from the ECJ in such cases, will presumably be dealt with by more general arrangements made on such matters. In the case of violations occurring after Brexit in the context of ongoing award procedures, specific provision may need to be made.

A further question is whether it should be possible to terminate an existing award procedure, and commence a new award procedure for the same goods/works/services under any new regime that might apply. Since in general there is a wide discretion under the directives to terminate procurements completely or to terminate an award procedure and commence a

new one for the same requirement¹³⁶, terminating in order to use a different procurement regime would seem to be permitted under the rules of the directives themselves.

The question might also be raised as to whether some of the rules discussed below in the context of concluded contracts should also be applied to contracts for which the award procedure commenced prior to Brexit, even if the contract was not concluded by that point.

6.5. Concluded contracts, including modifications to such contracts

Transition issues specific to public procurement also arise out of the fact that EU measures specific to public procurement have some application to execution of contractual relationships. In particular, matters below may need to be considered should there be a significant change to the applicable regime.

1. The possibility of termination of current contracts with EU27 undertakings

It is understood that concern has been expressed over whether existing contracts with the EU27 may be affected were EU undertakings to lose their rights of access to UK public contracts. It needs to be emphasised that the issues below will be relevant only in the case of loss of access rights for the EU27, and will not arise at all to the extent that access based on non-discrimination principles is maintained.

In the even that access rights were lost, it can first be noted that Brexit (or the simple fact of loss of access rights) will not per se generally have any implications for concluded contracts in the UK unless there are exceptional cases in which the ordinary private law (for example, under the doctrine of frustration of contract) provides for the particular contracts to come to an end because of the very particular circumstances of the case. This seems unlikely to have much, if any, practical relevance. There are also no principles of UK law special to public contracts or concessions (which have no particular status distinct from other public contracts under UK domestic law) that provide for, or allow for, termination of existing contracts for reasons connected with the nationality of the provider in the Brexit scenario.

Some contracts, especially major contracts, do, however, include general "termination for convenience" clauses, allowing for termination in the sole discretion of the procuring party, which could theoretically be invoked. (This is the case in the private as well as public sector.) The issue may also arise theoretically with ongoing contracts in which there is possibility for termination at various specific points in the contract without specific reason or the possibility for declining to exercise options or invoke extensions, or contracts in the form of single-supplier framework agreements in which the quantities to be purchased are at the discretion of the procuring entity. It seems highly unlikely that there would be widespread decisions to terminate etc made in the UK under these contracts based on the nationality of the provider rather than commercial considerations, and even less so that any legislation would be adopted to provide for termination of contracts of undertakings from the EU27. Were this to be done, however, it is very uncertain whether this would be precluded by either private or public law rules governing the exercise of contractual rights, in the absence of the application of some kind of non-discrimination rules to govern the contract execution process. Thus, for comfort it could be provided explicitly in a withdrawal agreement in which access rights were not guaranteed that discriminatory measures relating to concluded contracts should not be permitted.

This would also follow from any more general provision that might be made for EU rules to apply generally to the execution phase of contracts already concluded under the EU procurement rules prior to Brexit.

136 Although this is not permitted for unlawful considerations, such as to favour a national undertaking.

2. The application of EU remedies' rules that have an impact on enforceability of concluded contracts

Also of relevance to the subject of concluded contracts is the availability of the EU's ineffectiveness remedy in respect of such contracts, including for breach of advertising requirements, were that remedy no longer to be required in the UK, and no longer required to be available to UK undertakings in the EU27. This remedy is generally required to be available only for 6 months after contract conclusion (and in the UK is limited to that period). For contracts concluded before Brexit this issue would presumably be covered by any general agreement on the availability of EU remedies after Brexit to challenge decisions made prior to Brexit.

Some of the directives¹³⁷ also require Member States to ensure that their contracting authorities have the power to terminate concluded contracts in certain cases, including for serious infringements in the award procedure (including not advertising the contract), the aim being to provide an additional possibility for correcting certain violations of EU law. It would be useful to agree for the continuation of any such powers for contracts awarded prior to Brexit to ensure that UK entities retain these powers, where applicable (although this is unlikely to be important since any such powers would anyway remain unless expressly removed by UK legislation, which seems rather unlikely).

3. Application of the e-invoicing directive

It would be useful to agree whether the obligations of the e-invoicing Directive will apply in respect of the execution of contracts already concluded under the EU procurement rules to the extent that those obligations would otherwise cease to apply. Given that the award procedures for such contracts might have been based on the application of the e-invoicing Directive, it might be useful to agree that its rules are to continue to apply (possibly with an exception for award procedures in which the issue is expressly dealt with in the tendering documents).

4. Retention of records of concluded contracts

The EU procurement directives include some obligations to retain copies of certain concluded contracts and allow access to them¹³⁸, as well as other obligations on retaining information relating to the procurement.

As explained below, it would be useful to provide for all these obligations on retention of information to continue for the time period stated in the directives: see the discussion in section 6.7 below.

5. Modifications to concluded contracts

Another issue to consider is whether provision should be made for the directives' obligations controlling modifications to concluded contracts to continue to apply to contracts concluded under the directives, even if the directives no longer apply to the award of new contracts.

This is a rather complex question; the appropriate solution is open to debate and involves a number of arguments and issues that cannot be considered in detail within the scope of this paper, which seeks merely to highlight the issues to be addressed. It should be noted, however, that one view could be that the rules on modifications seek merely to ensure that what are in reality "new" opportunities are put out to competition under the directives. From that perspective continued application of the directives modification rules is not appropriate, and the situation should be governed by whatever procurement regime applies at the time

¹³⁷ Public Contracts Directive Art.73; Utilities Directive Art.90; Concessions Directive Art.44.

¹³⁸ Public Contracts Directive Art.83(6); Utilities Directive Art.99(6);

of the modification. Another view, however, is that one concern of the rules is with preventing the competitive situation that was achieved by regulation of the award procedure from being undermined by later actions, and that thus the modification rules should continue to apply (and arguably to be capable of being invoked during the period of the contract by undertakings that had access rights to the original award procedure). A different argument for applying the directives' modification rules is that the contract may have been concluded on the assumption that these rules will apply - although for contracts concluded after the UK referendum it might be argued that the risk that they might not is foreseeable.

6.6. Ongoing arrangements that are not themselves concluded contracts

Another area to consider is the treatment of contracts/orders that are placed under ongoing purchasing arrangements commenced under the directives in the form of framework agreements, dynamic purchasing systems and qualification systems. This issue is of significant practical importance (perhaps the most important transition issue) given the extent to which such arrangements are used in practice including in the UK.

The launch of these arrangements in fact involves the first step in an award procedure and for the most part they may be regarded as ongoing award procedures. On this basis it might be suggested that they should simply be subject to the same rules as any other ongoing award procedure, as discussed above, which may perhaps mean continuing to apply EU rules to their operation even after Brexit.

This solution is arguably, at least, appropriate for framework agreements, and especially framework agreements involving contractual rights on the part of undertakings on the framework, since a significant part of the competition in the award procedure when a framework agreement is used is intended to be completed at the stage of selecting undertakings to go on the framework (the terms, including price, are required to be established as far as possible at this stage).

However, this might be considered a less suitable solution for dynamic purchasing systems and qualification systems, under which only a small part of the procedure is completed when undertakings are registered on the relevant system (there is no choice made at this stage on the basis of merits of tenders). In these cases the launch of the award procedure for specific contracts is for practical purposes best regarded as commencing at a later point, when the procuring entity contacts registered undertakings in relation to specific contracts. For practical purposes these are new procurement opportunities and there is no obvious reason to award them under the "old" procurement regime rather than the new one.

If it were decided to apply the previous (EU) rules for ongoing arrangements this would presumably be limited to whether those contracts would have been covered by the old regime in the first place. (Such arrangements are also often used for awarding contracts not actually covered - for example, utilities operating in more than one sector use qualification systems advertised under the EU Utilities Directive for contracts in both covered and non-covered sectors.) As discussed above, entities could also (under the applicable EU rules) terminate the system in question and award future contracts under a new regime.

If it were to be provided that procuring entities in the UK need not use the EU rules to place future contracts under these ongoing arrangements, consideration might need to be given to whether and how the old and new regimes can properly be combined (for example, if current arrangements were not set up in accordance with the exact requirements of the new rules), and when it would be necessary in practice to terminate some of the old arrangements and set up new ones (which could be inconvenient for all parties).

One possibility is to provide for a choice for entities over whether or not to continue to use the old regime in the context of such arrangements.

6.7. Retention of records

The EU procurement directives contain some obligations to keep records of award procedures, including to document the progress of the procedure electronically and retain the records of this for three years. It could be useful to provide expressly that obligations of this kind should remain in effect for any award procedures commenced before Brexit (regardless of whether any contract was concluded), as they support monitoring of actions in accordance with the law applicable at the relevant time, and so remain relevant.

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NOTES

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