



## WHAT FUTURE FOR PUBLIC PROCUREMENT REGULATION IN THE UK POST-BREXIT?<sup>1</sup>

On the morning after the UK's momentous vote to leave the EU in June 2016, a dazed public sector client asked me: what happens now to the rules on public procurement? The short answer was: nothing ... yet. Those EU rules have been implemented into UK regulations which will remain on the statute book unless and until repealed. There are no immediate signs that the UK Government wishes to ditch the rules, since it supports the core principles of transparency and competitive procurement embodied in those rules. Nonetheless, there have been calls for the rules to be simplified and made more flexible.

The extent to which the UK Government will eventually be free to modify or even repeal the regulations on public procurement, post-Brexit, will depend largely on the outcome of the ongoing negotiations between the EU and the UK Government, as well as the policy choices of the UK Government post-Brexit. Several recent developments in the Brexit saga have given some clues as to the possible future treatment of public procurement in the UK, following Brexit. In particular, the EU Withdrawal Bill, combined with Theresa May's recent speech in Florence, make it more likely that the UK procurement regulations will remain in force and largely unchanged for the foreseeable future.

Nonetheless, some key questions remain unanswered. In particular, what happens if the UK and EU fail to reach *any* agreement prior to Brexit, leading to a *de facto* "hard Brexit"?

### UK procurement regulations safeguarded under the EU Withdrawal Bill

On 12 September, the UK Parliament (House of Commons) voted in favour of the European Union (Withdrawal) Bill on its second reading. The Bill now goes to Committee stage and then to the House of Lords. It may be subject to considerable amendment before being passed, but it is the best guide we have to the future of EU law in the UK.

Once enacted by Parliament, this bill is intended to ensure that all "EU-derived domestic legislation" continues to have effect in English law on and after the date when the UK exits the EU. This will help to maintain "business as usual" in the immediate aftermath of Brexit. The UK Government can then take its time, post-Brexit, in deciding which EU-derived legislation to repeal, amend or retain.

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The UK regulations on public procurement form a small part of the huge body of "EU-derived domestic legislation". These regulations principally comprise the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concessions Contracts Regulations 2016, the Defence and Security Public Contracts Regulations 2011 and the equivalent sets of regulations applicable in Scotland (collectively, the "**UK Procurement Regulations**").

The UK Procurement Regulations are "EU-derived" because they implement into English (and Scottish) law a series of EU Directives on public procurement. Those Directives are aimed at ensuring that the purchasing of goods and services by public bodies in each EU Member State is opened up to EU-wide advertising and competition, thereby creating an EU "single market" for public procurement. The UK Procurement Regulations therefore specify that a duty to comply is owed to any economic operator from the UK or from any other EU or EEA country, and that those operators have a right to bring a legal challenge under the Regulations if they are discriminated against. The same duty is owed to operators from countries that are party to the Government Procurement Agreement (such as the USA, Canada and Japan), provided the GPA applies to the procurement in question.

Once adopted, the EU (Withdrawal) Act should ensure that the UK Procurement Regulations remain in force following the date when the UK formally exits the EU, which is currently expected to be on 29 March 2019. After that date, the Government could in principle seek to modify or even repeal those Regulations. In reality, the extent of the Government's freedom to move away from the current regime will depend on the outcome of the ongoing UK-EU negotiations and the nature of the future UK-EU trading relationship, as well as the UK's relationship with the GPA.

## European Commission position paper on public procurement

On 6 September 2017, the European Commission's Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TFEU issued a "position paper" on public procurement. The front page states that this paper contains the "main principles" of the EU's position on public procurement in those negotiations. However, the paper is very short.

In essence, the paper states only that public procurement procedures launched before the UK's exit from the EU must continue, even post-Brexit, to be carried out in accordance with the EU procurement rules and the principle of non-discrimination until the procedure has been completed. The non-discrimination principle must be complied with by contracting authorities (primarily, public bodies) from the UK or the remaining 27 EU Member States ("**EU27**") with regard to tenderers from the EU27 or the UK. The position paper adds that any award procedures which straddle the Brexit date must also remain subject to the review procedures and legal remedies available pre-Brexit.

The Commission's position paper therefore deals only with the transitional situation of public procurement procedures which are launched before the Brexit date (likely late March 2019) but not completed until after that date. The paper does not purport to address procurement procedures which are *commenced* after Brexit. For clarification of the possible treatment of UK procurement procedures launched post-Brexit, it is more relevant to consider a much longer paper issued by the European Parliament in May this year.

## Options for the future UK-EU trading relationship

In May, the European Parliament issued an in-depth paper entitled "Consequences of Brexit in the Area of Public Procurement". This paper noted that the EU had sought to include provisions on the opening up of public procurement markets in all of its trade agreements with third countries and that it was therefore likely to seek similar provisions in the trade deal to be agreed with the UK. The paper put forward two main, alternative models which could form the basis of the post-Brexit arrangements between the EU and the UK regarding public procurement.

### The EEA Agreement ("**Norway-style**") model

The EEA Agreement provides for close market integration between the EU and the three non-EU members of the European Economic Area: namely, Norway Iceland and Liechtenstein. Under the EEA Agreement, the rules and remedies of the EU directives on public procurement apply equally in those three EEA territories. Consequently, public authorities in those three countries are obliged to advertise above-threshold public contracts in the EU Official Journal (using one of the EU's official languages) and to comply with the Directives' detailed rules on award procedures. Public contracts worth less than the Directives' thresholds but still of cross-border interest are subject to non-discrimination and transparency requirements under the EU Treaty.

Applying the EEA Agreement model to the UK post-Brexit would mean that the EU's Directives on public procurement continue to apply in full to UK contracting authorities and that suppliers in the UK and the EU27 would continue to have full rights of access to each other's markets for public contracts.

The EEA Agreement model may ultimately be considered too similar to full EU membership to be acceptable, politically, to the UK Government. The Parliament report therefore floats the possibility of an "EEA-minus" approach, whereby some elements of the EEA model would be dis-applied.

### The GPA model

The Government Procurement Agreement (GPA) is a multilateral agreement to which the EU and many of its leading trading partners (such as USA, Canada, Japan, Israel, etc.) are party. The GPA gives its parties qualified access to each other's public procurement markets.

The UK is currently a party to the GPA by virtue of its membership of the EU. There is some uncertainty over whether, post-Brexit, the UK will automatically convert to being a GPA party in its own name or whether it will have to formally "re-apply" for membership. Putting that legal complication to one side, the GPA model would be the obvious fall-back option for the future relationship between the UK and the EU in the field of public procurement, if no more detailed provisions are agreed in any EU-UK trade agreement.

The GPA provides an extensive set of rules and remedies for regulating procurement by public entities, which are broadly similar to those found in the EU procurement directives. However, the GPA rules are much less detailed on issues such as how to award concessions, the modification of existing contracts and the exemptions for procurement between public bodies. The GPA also has less extensive coverage than the EU directives and current UK Regulations: for example, the GPA does apply to private utilities or to the defence sector. The European Parliament therefore suggests that any EU-UK trade agreement could expand upon certain elements of the existing GPA rules, under a "GPA-plus" option.

### Impact of Theresa May's speech in Florence on 22 September

Speaking in Florence on 22 September, British Prime Minister, Theresa May, seemed to reject both a "Norway-style" or "Canada-style" free trade agreement between the EU and the UK, post-Brexit. She suggested that both of these models would be too restrictive, compared to the free trade that currently exists between the EU and the UK. Instead, Mrs May called for a "creative solution" that takes account of the pre-existing regulatory relationship between the UK and the EU. This might mean that, in the field of public procurement, the UK ultimately looks for a deal which varies from the "EEA" or "GPA" models put forward in the European Parliament report and is even closer to the current position of unimpeded access to each party's public procurement markets.

Mrs May also proposed that the UK's relationship with the EU be subject to a transitional "implementation period" of around two years, following the date of UK exit. During this period, the UK would continue to enjoy unfettered access to the single market and, in return, would remain fully subject to EU laws. It therefore appears that, during this two-year period (at least), lasting until March 2021, the UK would be obliged to retain the UK Procurement Regulations in their current form, fully implementing the terms of the EU directives on procurement and guaranteeing non-discrimination against suppliers from EU Member States. Likewise, the EU27 would be obliged to continue to afford UK suppliers non-discriminatory access to their own public procurement markets.

### Local Government Association calls for more flexibility in procurement, post-Brexit

While the UK-EU negotiations rumble on, the Local Government Association (LGA), which represents councils across England and Wales, recently called for simplified rules over how councils buy goods and services post-Brexit. On 17 August, the LGA issued a press release proclaiming the benefits of a "lighter touch" system which simplifies procurement processes and provides more flexibility to promote local growth.

The LGA proposes that changes could include giving councils greater ability to use local suppliers, to specify a minimum local living wage for their suppliers' employees or to specify additional social value, such as a requirement that the successful tenderer employs or trains a number of local people. It also claims that processes under the procurement rules can take twice as long as typical private sector procurements. The LGA does, though, recognise that some regulation of public procurement will remain necessary post-Brexit in order to ensure that councils continue to demonstrate best value for money and ensure effective and fair competition.

The LGA's implied criticisms of the current regime echo claims made by the Vote Leave campaign prior to the referendum. In May 2016, for example, the then government minister Michael Gove claimed that the EU procurement rules added more than £1.5 billion a year to the cost of UK government contracts and caused significant delays.

In reality, the scope for the UK to make substantial modifications to the UK Procurement Regulations is likely to be constrained, post-Brexit. Even if the UK-EU negotiations lead to the adoption of the relatively liberal "GPA model" discussed above, the UK will probably remain obliged to retain most of the core features of the current procurement rules, including prior advertising of above-threshold contracts, minimum time periods for certain stages of the process, the application of transparent, pre-disclosed criteria at the selection and award stages and, crucially, non-discrimination against tenderers from other EU or GPA countries. Any reform may therefore end up being confined to simplifying or clarifying some of the more pernicky aspects of the current rules, such as the minor inconsistencies between different types of award procedure.

## Will the European Court of Justice continue to influence UK procurement law?

The European Court has taken a central role in shaping the development and interpretation of EU (and hence UK) procurement law over the last 25 years. The Court's rulings have established key principles on numerous issues, including the scope for cooperation between public entities, modifications to existing public contracts, the rights of bidders to rely on the capacities of third parties and the need for a standstill period prior to contract signature with the successful bidder.

The EU Withdrawal Bill currently before Parliament will curtail the supremacy of the European Court of Justice, post-Brexit. The Bill provides that, following the date of UK exit from the EU, British courts and tribunals will not be bound by any decisions or principles which are laid down by the European Court after exit day. After exit day, any question as to the validity, meaning or effect of EU law which is retained on the UK statute book will have to be interpreted by first instance courts in accordance with any retained EU case law or principles. Conversely, the Bill states that the Supreme Court, and the High Court when sitting as a court of appeal, will not be bound by any retained EU case law. However, when deciding whether to depart from any retained EU case law, these Courts will have to apply the same test as they would apply when deciding to depart from their own case law, so their hands are still tied to some extent.

Following Prime Minister May's proposal for a two-year "implementation period" after March 2019, it appears that the above changes would not come into effect until March 2021 (at the earliest). After the transitional implementation period expires in March 2021, it follows from the EU Withdrawal Act that the English courts will no longer be obliged to apply any new principles or findings laid down by the European Court. Nonetheless, given that the UK Procurement Regulations are currently based closely on the provisions of the EU procurement directives and are likely to remain so for the foreseeable future, it seems likely that *in practice* UK judges will still take into account any pre- or post-Brexit rulings of the European Court which interpret those rules.

In her Florence speech, Theresa May accepted that, post-Brexit, UK courts should be able to take into account ECJ judgments when interpreting UK law on citizens' rights, whenever there is any uncertainty regarding underlying EU law. It would make sense for the UK courts to take a similar approach, post-Brexit, towards the interpretation of the UK procurement regulations, given that they are based almost entirely on EU law.

## Doomsday scenario: what if no UK-EU agreement is reached by 31 March 2019?

Despite the more conciliatory tone adopted by the British prime minister in her Florence speech, the clock is ticking and the time for reaching a UK-EU agreement on Brexit is steadily dwindling. What if no agreement is reached before the UK's formal exit on or around 31 March 2019?

In this "hard Brexit" scenario, the UK Procurement Regulations would remain in place, but would the UK Government introduce a rapid amendment to remove the duty of compliance that is currently owed to suppliers from the EU27? Such a change would seem unlikely if it is the case that the UK retains its membership of the GPA post-Brexit, since the GPA requires the UK not to discriminate against suppliers from other GPA states (including all of the EU27 states) when running procurement procedures falling within the GPA's scope. Similarly, contracting authorities in the EU 27 would also be bound by the GPA not to discriminate against UK suppliers in such procedures.

However, if the UK were not admitted as a party to the GPA on or following Brexit, all bets would be off. Contracting authorities in the EU27 (and in any other GPA territory) could choose to exclude or discriminate against

UK suppliers in their public procurement procedures. This outcome might lead to the UK swiftly amending the UK Procurement Regulations so that they no longer guarantee rights or remedies to tenderers from EU27 or GPA states, save where these are provided for in any bilateral trade deal with any of those countries. On the other hand, if the UK continues to seek GPA membership, it would probably refrain from taking this step.

Any UK suppliers which regularly tender cross-border for public contracts in the EU27 States, along with any EU27 suppliers which tender cross-border for UK public contracts, will have the most to lose from any failure of the UK and EU to reach an agreement regarding their trading relationship post-Brexit. In that scenario, unless the GPA comes to the rescue, those suppliers could be left high-and-dry, with no rights of access to fair treatment in public procurement procedures in those markets. These suppliers will be watching anxiously to see whether Messrs Davis and Barnier can finally get their act together in the ongoing negotiations.

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