Brexit and public procurement: the state of play and the future of public procurement regulation in the UK

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Amended as at 21.06.2019

1. Introduction

This paper presents an overview of the impact that Brexit may have on public procurement for both the UK and other European Union (EU) Member States, and a brief sketch of the author’s own vision of what would be a desirable approach for the UK in post-Brexit world.

It is now three years since the author began to talk and write about the implications of Brexit for public procurement, following the referendum in which the UK voted to leave the EU. At that time there was no indication of what the likely outcome of Brexit would be in terms of the UK’s future relationship with the EU, and therefore it was only possible to outline different possible Brexit scenarios and consider the implications of those various scenarios for procurement. No-one could have predicted that three years on things would have moved on very little, and that there would still be no clear indication of how things will turn out. At the time of completing this piece, however, on June 21 2019, that was the case. The UK had not, as expected, left the EU on March 2019 two years after invoking the departure mechanism under Article 50 of the Treaty on European Union, but had been granted an extension of its departure date until October 31 2019. There was also much political uncertainty in the UK: talks between the governing Conservative Party and Labour opposition aimed at reaching a compromise agreement that would have the support of Parliament have failed, Theresa May has resigned as Prime Minister, and the Conservative party is now the process of electing a new leader. Thus it is impossible to make meaningful predictions of where we will be in the medium or even short term, and it is still necessary to talk only in terms of different Brexit scenarios, and to consider what they might mean for procurement.

This article will look first at the implications for procurement in the short term of two main possible scenarios, namely a Brexit with a transition arrangement and a “no deal” Brexit.

The article will then outline the main possible scenarios for the EU-UK relationship in the longer term and consider what the implications might be for public procurement under each of these possible scenarios. Finally, the article will very briefly present the author’s own preferred vision of a post-Brexit procurement world for the UK and will also suggest that this could even provide a future model for the EU to follow.

2. The short term

2.1. Brexit with a transition arrangement

It was intended that the UK would leave the EU in March 2019 with the terms of departure set by a Withdrawal Agreement between the EU and UK, which would do two things: set out transition arrangements for the departure to prevent a sudden disruption to business; and set out the main features of the future relationship of the EU and UK that would apply at the end of the transition period, with some further details of that relationship possibly to be filled out by negotiation during that transition period.

A detailed draft Withdrawal Agreement negotiated between the UK Government and EU was published in March 2018 and a further draft in November 2018, which was endorsed by EU leaders
on 25 November 2018\(^1\). As regards transition, the draft provides for a transition period of 21 months from March 2019, ending at the end of 2020, with the possibility for a further extension. During this transition period, even though it will have formally left the EU and have no role in decision making, the UK would continue to apply the EU Single Market rules. It would also continue to have access to the Single Market on the basis of those same rules. The jurisdiction of the European Court of Justice would also continue to apply during the transition period. As regards the future UK-EU relationship, the draft Withdrawal Agreement deals with, in particular, the key issues of the UK’s financial commitments to the EU on withdrawal (the “divorce bill”) and citizens’ rights and was also accompanied by a Political Declaration outlining in rather general terms aspirations for other aspects of the UK-EU relationship.

This draft Withdrawal Agreement, however, failed to gain the support of the UK Parliament because of controversy over the issue of the border between Northern Ireland (part of the UK) and the Republic of Ireland (a separate EU Member State), which is dealt with in a protocol attached to the agreement. This aims to ensure there is no “hard” border between the two. However, it has proved contentious because of the so-called “backstop” arrangement which will apply if no other arrangement is put in place, providing for the UK to remain in a customs union with the EU\(^2\) and to maintain some temporary harmonisation of laws with the EU. This arrangement is unacceptable to many Members of the UK Parliament. As a result the Withdrawal Agreement was rejected by the UK Parliament in three “meaningful votes” in January and March 2019, in which the UK sought to obtain Parliamentary support for the Agreement (under section 13 of the Withdrawal Act) prior to its formal approval from the EU side.

As mentioned, the UK Prime Minister has now resigned, and the Conservative Party is in the process of selecting a new leader. The likely winner, Boris Johnson, is apparently willing to leave the EU without any kind of agreement (a no deal Brexit) if unhappy with what is on offer. However, it is clear from earlier votes that the UK Parliament does not support this possibility. It is thus rather unclear how future negotiations will proceed and what will be the fate of the various provisions in the current Withdrawal Agreement. However, if UK-EU negotiations proceed and some kind of agreement made to avoid a no-deal Brexit, it is quite likely that the agreement will contain something identical or similar to the present agreement in terms of the transition arrangements affecting public procurement, whatever the fate of the other parts of the agreement, since these are not the controversial matters. Further, the EU has also insisted that it will not renegotiate the Agreement as it stands so if there are any changes at they are certain to be minimal and to avoid reopening anything that is not essential. Thus the provisions of the current draft Withdrawal Agreement need to be considered in this regard.

In fact, if the UK does leave the EU on the basis of this Withdrawal Agreement or a slightly amended agreement, very little will change in the public procurement field during the transition period. As noted, the Agreement provides for the UK to continue to apply - and benefit from - the Single Market rules during a transition period, and this includes the EU rules on public procurement. The European Union (Withdrawal) Act 2018 (“Withdrawal Act”) enacted by the UK Parliament already provides for existing UK legislation that is based on EU law – mainly domestic legislation that transposes directives - to be preserved automatically when the UK leaves the EU. This includes the UK legislation that transposes the EU procurement directives, the main legislation for England, Wales and Northern Ireland being the Public Contracts Regulations 2015, which transpose the EU’s Public Contracts Directive 2014/24/EU. If the UK leaves the EU with a Withdrawal Agreement along

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\(^2\) However, unlike under the EU’s Common Commercial Policy the UK would retain some freedom to make trade agreements on public procurement with third countries.
the lines of the draft referred to above, at the time of leaving it will thus merely then be necessary to make some small and very technical tweaks to the (retained) current procurement regulations to reflect the fact that the UK is no longer, technically speaking, an EU Member State; there will be no changes of substance\(^3\).

Obviously, if a Withdrawal Agreement along the lines of the current draft Agreement is concluded on or before October 31 2019 – or in some extended period thereafter – it is possible that the transition period will be adjusted to take account of the later leaving date, by extending that transition period beyond December 2020.

The draft Withdrawal Agreement also deals with various incidental issues in public procurement, such as what happens to contract award procedures that are still ongoing at the end of the transition period. These rules were agreed some time ago and are not particularly controversial. Thus again they are certainly likely to be included in any Withdrawal Agreement that applies, even if some other parts of the current draft Withdrawal Agreement are changed. Therefore it is worth noting their main contents in relation to public procurement. The specific provisions on public procurement are contained in Title VIII, Arts 75-78 of the Withdrawal Agreement, and the Agreement’s more general provisions (e.g. on the jurisdiction of the ECJ) are also relevant.

In this respect, the main issue is: what happens to award procedures that have been started during the time of the UK’s membership or during the transition period (when the same EU rules apply as during membership) but which have not been completed at the end of the transition period\(^4\).

The basic answer is that under the current draft Withdrawal Agreement the existing EU rules would continue to apply to in respect of procedures launched\(^5\) by contracting authorities or contracting entities (both those of the UK and of other Member States) before the end of the transition period and not yet finalised on the last day of the transition period (draft arts 75-76(1)). This is stated to include any procedures using dynamic purchasing systems as well as any procedures in which the call for competition was made by PIN or a notice on the existence of a qualification system. The same applies to framework agreements concluded before the end of the transition period or concluded under procedures launched before the end of the transition period (Art.76(1)(b)). The principle of non-discrimination on grounds of nationality continues to apply during the procedure (Art.76(2)).

This application of the current rules expressly includes the EU rules on remedies.

As noted above, for the short term the UK’s Withdrawal Act already provides for the current procurement regulations to continue to apply. Should the regulations be changed substantially after the end of any transition period, however (see below), the current rules would still need to be applied in the cases referred to above. These could have quite a long application in the case of some framework agreements: for example, they could apply to call offs made several years into the future.

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\(^3\) This might be done either by a specific set of regulations on procurement (probably very short) amending the Public Contracts Regulations 2015 and other current regulations, or might be done by a more general piece of legislation which amend these regulations alongside amendments to legislation on other topics.

\(^4\) Some further details/discussion of the draft transition arrangements and of the problems with those arrangements in relation to modification can be found in Ch.23 of S. Arrowsmith, *The Law of Public and Utilities Procurement* (3rd.ed, Vol.2 2018.).

\(^5\) A procedure is “launched” for this purpose when a call for competition or any other invitation to submit applications has been made in accordance with the relevant rules (Art.76(3)) or, where the rules allow a procedure without a call for competition, when the procuring entity contacted economic operators in relation to the specific procedure (Art.76(3)). It is “finalised” when the award notice is published or (when none is required) when the contract is concluded, or (in the case of no award) when the procuring entity informs the economic operator that no contract will be awarded (Art.76(4)).
One thing that is not entirely clear under the current draft Withdrawal Agreement, as it is not dealt with explicitly, is the extent to which EU rules applicable to the contract execution phase will continue to apply. For example, if a contract awarded under the EU rules is later modified, will the EU rules on modification continue to apply? It seems desirable to deal with these issues more explicitly to avoid uncertainty. The author has analysed these issues in detail elsewhere.

2.2. Brexit without a transition arrangement (“no-deal Brexit”)

If no agreement can, however, be reached that will prevent a no-deal Brexit, and the UK therefore leaves on October 31 2019 or at some point in the future without a deal, what will the position then be with public procurement?

We will first consider the position that will apply on leaving as regards the applicable award procedures and remedies. We will then consider the issue of mutual access to procurement markets – that is, how will a no deal Brexit may affect the access of UK suppliers to the procurement markets of the EU and its other trading partners, and of the suppliers of those countries to UK procurement markets.

Award procedures and remedies under no-deal

First, even should the UK leave without a deal, the award procedures and remedies applicable to the public procurement field will not immediately change very much. This is because, as we have mentioned above, the Withdrawal Act will preserve current EU legislation in general, including on procurement, when the UK leaves. Thus the current Public Contracts Regulations 2015, as well as the other procurement regulations, will remain in place. This seems likely to remain the position until it is known exactly what the future constraints will be on the UK’s public procurement regime. In particular, any changes to the public procurement regime are likely to wait until the conclusion of any trade agreement with the EU, which will determine whether or not the UK must follow EU procurement rules, or some aspects of those rules, in the future: the UK will not want to design new procurement rules that are out of line with those of the EU, only to have to change them back again later if required by an EU trade deal.

We should also mention that even in the case of no deal the UK’s domestic Withdrawal Act provides that past ECJ case law must be used in interpreting these rules (s.6(3)). Thus all the existing ECJ case law on procurement will generally continue to be relevant even in the event of a no deal. However, there is provision for the Supreme Court to depart from ECJ case law in the same circumstances that it could depart from its own case law (s.6(4) and (5)). The Withdrawal Act also provides that ECJ decisions after the day of the UK’s departure from the UK “may” be taken into account by UK courts and tribunals (s.6(2)).

However, while the current procurement regulations will remain essentially in place in the event of “no deal” and are likely to be there for some time to come, there will be a few immediate changes. These have been provided for in a series of regulations which have already been adopted and will come into force if and when the UK leaves the EU with no deal. These can be referred to as “the Exit Regulations”.

The main set of Exit Regulations for England, Wales and Northern Ireland is the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No 560). This instrument introduces the changes required for the Public Contracts Regulations 2015, as well as for the Utilities Contracts Regulations 2016 and Concessions Contracts Regulations 2016 (which transpose the EU Utilities Directive 2014/25/EU and Concessions Directive 2014/23/EU). The Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (SI 2019 No 560) makes some small amendments to the first

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6 Arrowsmith, note 4 above.
set of regulations above, to deal with issues relating to foreign suppliers (see the section on mutual access below). The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 (SI 2019 No 697) introduce the required changes for the current Defence and Security Contracts Regulations.

These Exit Regulations appear very long and complex. However, this is because of the need to amend quite a lot of very specific provisions in the regulations to achieve changes that are quite small in number and scope, rather than because the changes themselves are very substantial.

The most important practical change under these Exit Regulations is that notices connected with contracts – contract notices and other calls for competition, award notices etc – will no longer be in the EU’s Official Journal but in a new UK e-notification service (that will be provided for in amendments to reg.49 in the PCR 2015). This will essentially replace the Official Journal of the European Union (OJEU) for the UK, and will involve placing notices with the same contents as those in the OJEU. The Government has issued a Procurement Policy Note explaining the changes, including practical implications.\(^7\)

There will also be a number of other changes under the Exit Regulations should they come into force, relating to matters that would either no longer be relevant when the UK is not an EU Member State, or which are not considered useful to retain. For example, reg.73 of the Public Contracts Regulations 2015, as required by the Public Contracts Directive, gives a contracting authority a right to terminate a contract (under a term implied into contracts when they are concluded) when the ECJ declares that the contract was concluded following a serious infringement of EU law (such as where an entity awards a contract without the required call for competition). This regulation will be repealed since it would no longer be relevant were the UK to leave the EU without a deal and no longer be subject to the jurisdiction of the ECJ. Other examples are removal of the provisions requiring contracting authorities to make reference to e-Certis – an EU-wide electronic database of certificates – and of explicit provisions dealing with joint procurements between different Member States. The regulations make it clear that this latter does not mean the UK would not be able to do joint procurement with other states – just that the EU measures on this would no longer govern this matter.

Under the Exit Regulations these changes will take effect immediately if a no-deal Brexit occurs, even for award procedures that have already started. For example, with an award procedure already started with a call for competition in the OJEU but not yet completed, the award notice for the procedure would need to be published in the UK e-notification system rather than the OJEU. (This rule has to apply since in the event of a no deal Brexit the UK will no longer have access to the OJEU.) This is different from the position that governs the regime change under the Withdrawal Agreement but is not a concern in light of the minor nature of the changes introduced by the Exit Regulations themselves. (Were the UK to later introduce more significant changes to the procurement regime then it might take a different approach to applying any new rules to ongoing procedures: see the long term scenario below.)

In addition, and importantly, it appears that obligations for below-threshold contracts might no longer apply: these arise from the TFEU’s free movement Articles that would no longer apply, rather than from secondary legislation that has been retained.

**Mutual access to the procurement markets of trading partners under no-deal**

UK industry currently has access to public procurement contracts of other EU Member States, and vice versa, because of its membership of the EU. It has access to the contracts of other main trading partners under the mutual access provisions of the TFEU. Under the Exit Regulations these mutual access arrangements will continue to apply, though there will need to be a separate agreement on mutual recognition of standards in the case of medical devices and in vitro diagnostic medical devices.

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partners – and they to those of the UK - because it is a party to the World Trade Organization’s Agreement on Government Procurement (GPA), which is an agreement between a number of WTO members to open up procurement markets to each other on a reciprocal basis. However, it is a party to the GPA only because of its EU membership.

As regards access to contracts above the thresholds of the EU directives and (with regard to third parties) contracts covered by the GPA this position is likely to remain very largely unchanged, even if the UK leaves the EU without a general trade deal with the EU and with no transition period. This is because agreement has now been reached for the UK to accede to the GPA in its own right when it leaves the EU. In effect, even in the event of a “no deal” Brexit the UK does in fact have at least one new “deal” with the EU – a deal on public procurement. The Decision on the UK’s GPA Accession was made on 27 February 2019. This has now been ratified by the UK. Once ratification is complete the instrument of accession must be deposited with the WTO and accession then takes place 30 days later (unless there is EU-UK Withdrawal Agreement in that time). In practice, however, the instrument of accession will not be deposited, until close to the known time of departure from the EU without a deal (or until near the end of any transition period under a Withdrawal Agreement), since accession by the UK in its own right is considered unnecessary and inappropriate during the transition period. (The current draft Withdrawal Agreement itself provides for the UK to offer access to contracts to the EU and other GPA parties during the transition period and the Accession Decision also accepts that the UK will benefit from access in accordance by the GPA during that period, although the legal basis on which any purported right of access of the UK to the procurement markets of the non-EU GPA Parties exists based on the GPA is actually unclear and possibly open to doubt.) This delay before depositing the instrument of Accession is envisaged in the terms of the Accession Decision itself, which was drafted to take account of the possibility of both a Withdrawal Agreement and no-deal scenario.

It should be mentioned that a slight complication arises from the fact that in the absence of any transition agreement between the UK and EU the Accession Decision requires submission of the UK’s instrument of accession within six months of the Accession Decision. This period will expire prior to the current period of extension of the UK’s EU membership to October 31 2019. However, it seems unlikely that there will would be a problem in getting agreement to extending the six month period if that is required.

Under the Accession Decision the UK gives access to its procurement to all GPA on the same basis as it currently gives access to these Parties in its GPA commitments as an EU Member State, and has also opened up to the EU under the GPA all its contracts that are covered by GPA commitments. From the domestic perspective this is already dealt with in domestic law by The Exit Regulations (No.1 as amended by No.2) which already make provision for access to procurement by trading

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6 In practice, this really amounts to dealing with the EU – and other countries - on “WTO terms” in the sense of the terms already applied by countries under WTO rules. However, it was necessary for the UK to make a specific agreement in this regard in the procurement area, both because the WTO’s Most Favoured Nation principle does not apply to government procurement and because the UK does not enjoy any rights – or undertake any commitments – in its own right in this field under the GPA, but only (as the text notes) as an EU Member State.

9 Accession of the United Kingdom to the Agreement on Government Procurement in its own right, Decision of the Committee on Government Procurement of 27 February 2019.

10 Para 1 of the Accession Decision states: “It is acknowledged that the United Kingdom is covered by the Agreement on Government Procurement, as a member State of the European Union, until the date of its withdrawal from the European Union or, if the European Union and the United Kingdom conclude an agreement that provides for a transition period during which European Union law would apply to and in the United Kingdom, until the date of expiry of that transition period.”

11 As regards access of other GPA Parties to UK procurement markets, regardless of whether or not the GPA itself still applies during any transition period a legal basis for this would be provided by the current draft Withdrawal Agreement under which the UK is obliged by agreement with the EU to retain benefits of access to its markets for third countries as under its current arrangements.
partners for the next eighteen months\textsuperscript{12} on the same basis as the current Public Contracts Regulations 2015 and other regulations do. This 18 month period will in due course now need to be extended to give permanent access to trading partners for contracts covered by the GPA.

As regards access for UK industry, the EU is opening up to the UK all the contracts that the EU opens up to other trading partners under the GPA. Other trading partners also offer access to the UK on the same basis as before (other than some small complications with Chinese Taipei).

It can be noted that for the EU and UK the mutual access under this arrangement will be slightly less than under the EU rules themselves: in particular, the GPA does not provide any coverage of below-threshold contracts, hard defence contracts, some utility contracts and some services contracts (those that used to be largely outside the EU directives before 2014, which are generally referred to as “Part B” services contracts). There is also much uncertainty – and disagreement between certain Parties – on the extent to which the GPA applies to concessions\textsuperscript{13}, an issue which it is perhaps slightly surprising was not addressed in the context of EU-UK negotiations over the UK’s GPA’s accession. These differences and their practical significance for access to the UK’s markets by its EU trading partners are explained in detail by the author elsewhere\textsuperscript{14}. However, it can be noted that in the Political Declaration accompanying the draft Withdrawal Agreement the EU/UK refer to their intention to negotiate for a procurement agreement with procurement coverage that goes beyond the GPA (para.48-49 of the Political Declaration).

Whatever access is provided to public contracts under the GPA itself, however the ability to access public markets under those arrangements will be subject to other trade barriers that exist, such as tariffs and restrictions on setting up subsidiaries. These could increase significantly in the short term under a no-deal Brexit, in which (so far as legal rights are concerned) the UK would trade with the EU simply under the same “WTO” terms as most other WTO members – although the UK itself has announced a temporary regime under which in practice most imports into the UK itself would be tariff free\textsuperscript{15}.

3. The possible long-term scenarios and their implications

3.1. Introduction

Regardless of whether the UK leaves the EU with a transition period under a Withdrawal Agreement or with no deal, the long term future of public procurement in the UK still remains unresolved. In practice, both the shape of the domestic system in terms of legal regulation of award procedures and remedies, and the mutual access to procurement markets of the UK and its European trading partners, will depend on two main things. One is the final form of any trade agreement between the UK and EU, which will set the constraints for the UK’s freedom of action in this field\textsuperscript{16}. The second is the choices that the UK makes within the framework set by any trade agreement.

As regards the former of these, the form of a UK-EU trade deal, in a study commissioned by the European Parliament’s Internal Market and Consumer Protection Committee completed in February

\textsuperscript{12} The Exit Regulations No.1 referred to a period of 8 months but the Exit Regs No.2 were adopted to provide for the longer 18 month period.


\textsuperscript{16} Of course, it is also theoretically possible that the UK may conclude a trade agreement with other third countries that includes greater constraints than any agreement with the EU.
2017\(^{17}\) the current author identified four possible models for the future UK-EU trade relationship in public procurement. These represent shades on a spectrum (of an infinite number of possibilities) that provide, however, a useful basis for analysis.

First, at one end of the spectrum is the model of the European Economic Area (EEA) Agreement, which means the application of substantially the same regime in both public procurement and related areas as applies at present. Secondly, at the other end of the spectrum is a model based simply on the GPA. In between these are what we can term an “EEA-minus” approach, which 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 itself; and a “GPA-plus” approach, which takes as its starting point the rules of the GPA, but supplements the GPA with additional rules on coverage, award procedures and/or remedies.

Now, as then, these four models represent the four main possible scenarios for constraints on the UK’s position after Brexit, and thus remain relevant as the starting point for analysis. We will therefore consider each briefly below, both from the perspective of UK domestic policy and from the perspective of mutual UK-EU access to procurement markets. For each we will, where relevant, consider how the position of public procurement might be affected by various choices made by the UK.

Another possible scenario for the UK which was also identified by the author in earlier writing on Brexit and procurement\(^{18}\) was the “blank canvas” scenario, under which there is no trade deal at all covering public procurement, allowing the UK complete freedom to design its own procurement regime. However, as the author argued, this never seemed likely, and the one major development since the UK first voted to leave the EU is that it has now become almost certain that this scenario will not apply, given the Decision on the UK’s accession to the GPA that we referred to above. We will thus not consider this possibility further.

3.2. The EEA model

In outline\(^{19}\), the European Economic Area (EEA) Agreement is an agreement applying to the EU Member States (including the UK) and certain states of the European Free Trade Area (EFTA), Norway, Iceland, and Liechtenstein, that creates a single market for all these countries, essentially by applying the EU’s own single market rules (although not certain other rules, such as those on agriculture and fisheries) across this whole area. Although this model for a post-Brexit relationship - sometimes referred to as “the Norway option” - was apparently ruled out by the UK Government for several reasons shortly after the referendum, with the changed and ever-changing political situation it is not impossible that the UK still might join the EEA or enter into some similar arrangement with the EU.

Under this kind of arrangement the EU rules on public procurement would continue generally to apply. This includes the EU’s public procurement rules, both those in the EU procurement Directives and the free movement rules which prohibit discrimination and (based on the Telaustria judgment\(^{20}\)) require the application of transparent award procedures for contracts of cross-border interest that are *not* covered by the directives.

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\(^{17}\) Arrowsmith, note 14 above.


\(^{19}\) For further detail and references see Arrowsmith, note 4 above, paras 21-37-21-40.

Thus under this approach the UK would essentially carry on applying EU procurement procedures and remedies both for contracts covered by the EU directives and for those outside the Directives.

The EU and UK would also continue to enjoy access to each others’ procurement markets as now in accordance with the same rules and remedies. Since all the single market rules apply, UK firms seeking to win contracts in other EEA states, and vice versa, will benefit from all other relevant rules of the Single Market just as EU firms do – for example, from not having to pay any tariffs on goods imported for use in public procurement contracts, from mutual recognition of qualifications, and from rights to set up subsidiary companies in other states of the EEA.

Under this scenario, the current UK procurement regulations would no doubt simply be retained, with the minor technical adjustments needed to reflect the UK’s new status.

Under this kind of model other rules of the Single Market that are important for public procurement would also apply, including the rules on posted workers and the Acquired Rights Directive (implemented in the TUPE Regulations), as well as the state aid rules, which also have important implications for public procurement.

One important change, however, in public procurement as in other areas, would be loss of influence by the UK over future developments. In the past, the UK has played an important role in shaping EU procurement rules along commercial rather than bureaucratic lines most notably, in the author’s view, in the provisions on framework agreements and competitive dialogue introduced in 2004 and also in the 2014 Directives to a degree in, for example, in expanding the possibility for negotiation under the Public Contracts Directive. Under the EEA Agreement itself future amendments will apply only if explicitly adopted by the Joint Committee of the EEA (i.e. both EU and non-EU EEA members), giving non-EU members of the EEA a chance to reject them, and any similar arrangement covering the UK might also adopt that approach, but it can be noted that to date all the rules of EU procurement legislation have been adopted for the EEA. There would also no doubt be different centralised enforcement arrangements. (For Norway, Iceland and Liechtensten the European Commission’s role in the EU in this regard is carried out by the EFTA Surveillance Authority while EFTA also has its own EFTA Court rather than being subject to ECJ jurisdiction.)

Other differences from the present regime would result from the fact that the EEA Agreement does not provide for a customs union or common commercial policy in other respects – although, of course, it is always possible that some kind of customs union might be agreed alongside an EEA-type arrangement for the UK. This would probably mean that products originating outside the EEA would not have guaranteed access to the public procurement market even when offered by EEA undertakings. The UK would also not be bound to the exact same policies as the EU with respect to third countries in procurement so that, for example, 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 would the (limited) current provisions on third country access that are in the current EU procurement

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24 Arrowsmith, note 14 above, section 3.2.
25 See Arrowsmith, note 4 above, paras 21-70-21-77.
26 European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries COM/2016/034 final - 2012/060 (COD).
directives. The UK would also have the right to negotiate its own future trade agreements on public procurement. An independent policy on public procurement for the UK is perfectly possible even under an arrangement which – unlike the EEA itself – does include a customs union.

3.3. The EEA minus model

As mentioned earlier, the approach that we call “EEA-minus” is one whereby the UK and EU use the EU procurement acquis as a starting point for procurement-specific rules in a trade agreement, but without necessarily including all the elements of the EEA Agreement itself. It is perfectly possible that the EU might choose to negotiate to include its own procurement rules in any bespoke trade agreement with the UK, even if the Single Market rules are not applied as a whole. Most of the EU’s trade agreements that include provisions on procurement are modelled on those of the GPA. However, the EU has in the past concluded agreements based on the EU acquis on procurement in two types of case. One is the case of accession/potential accession states, and the other is under the Deep and Comprehensive Free Trade Agreements (DCFTAs) with Ukraine, Moldova and Georgia. Of course, the situation of the UK is quite different from both of these: EU rules are relevant for states seeking to accede to the EU as those EU rules must be applied on accession, and may be considered important for the DCFTA states as part of a more deep and general reform of procurement markets. However, this approach may also be considered appropriate for the UK given that – unlike for most trade partners – it would not involve a significant burden or disruption to the procurement system to adopt such technical and complex rules, as they already apply. This makes adoption of the EU system a more practical aspiration for negotiations with the UK than for other countries. Use of EU tools such as the OJEU and e-Certis is also a practical option for the UK in a way it is not for some other states, especially since English will remain an official EU language after Brexit. On the other hand, ensuring application and development of acquis-based rules in the UK in light of future developments in legislation and case law could be difficult in such a complex and technical area in the absence of a rigorous centralised enforcement system and common judiciary. Whether continued application of the EU procurement rules in the UK is something that the EU will even wish to see, let alone prioritise in negotiations, is not clear.

Should the EU rules form part of any trade agreement, then again there could be little change for procurement award procedures and remedies in the UK, at least for contracts above the thresholds of the procurement Directives. (The EU may well be less interested in maintaining the current approach for contracts below the thresholds.)

In terms of mutual market access, a solution based on the existing EU rules would also entail retention of existing rights to access contracts in accordance with the EU rules and tools. However, in practice access would be affected to some degree by the fact that not all Single Market rules would necessarily continue to apply – for example, absence of the right to set up and trade with subsidiaries or mutual recognition of qualifications could have a significant impact on practice on access to public services contracts. The extent of this impact would, of course, depend on the exact contents of any trade agreement in both goods and services, something on which there are infinitite possible variations.

3.4. The GPA model

As we noted, a third possible model is the GPA model, whereby it is only the GPA that places any significant constraints on UK procurement policy. As already explained above, while the UK is not currently a Party to the GPA in its own right, a Decision has been adopted that makes provision for

27 See Arrowsmith, note 4 above, Ch.21.
28 Arrowsmith, note 4 above, Ch.21.
29 Arrowsmith, note 4 above, paras 21-43-21-44.
the UK to accede to the GPA in its own right when it leaves the EU, so that GPA will impose at least a certain minimum constraint on the UK’s freedom of action in the procurement field.

Were the GPA alone to provide the constraints on UK action, how would the position differ from that which currently applies?

It is convenient to deal here first with the mutual access issue. This we have already largely covered above, where it was explained that membership of the GPA will provide for mutual access to procurement markets on the same basis as under the UK’s current arrangements, with mutual EU-UK coverage being based on the access that the EU Member States (including the UK) offer to other Parties, where those Parties are willing to reciprocate. Essentially, that coverage is based on the EU regime but narrower in certain respects meaning, as we saw, that mutual UK-EU market access would be slightly diminished: thus, as mentioned, the GPA does not cover below-threshold contracts, certain services and utility contracts covered by the EU regime and hard defence contracts, and coverage of concessions is uncertain.

For those contracts that are covered, mutual access must be provided on a national treatment basis. This means that EU Member States must allow access to the UK based on the procedural rules and remedies of the procurement Directives, as these rules apply to their national suppliers. The UK must in turn provide access to EU industry to its own markets based on whatever procurement rules the UK applies. (We have seen that provision has already been made in this respect for the time of Brexit, with the UK adopting legislation to allow suppliers who have rights under the GPA to enforce the UK’s current procurement regulations.) Should the UK decide to change the rules and remedies of its own regime - a point discussed immediately below - the rights of EU industry in UK markets for GPA-covered contracts would be based on whatever new regime the UK decided to adopt, rather than on the basis of the EU rules that EU suppliers are familiar with. At present the UK procurement regulations are merely largely a “copy out” of the text of the the Directives themselves so that the rules in fact appear quite familiar to those from other EU Member States. This would no longer be the case were the UK to decide to change its rules. So far as the UK market is concerned, EU industry also would no longer benefit from tools such as the Official OJEU to find UK contracts and use of the European Single Procurement Document with UK procuring entities. There could again also be other barriers to access springing up (for example, again from removal of mutual recognition of qualifications or rights to set up subsidiaries) that affect public procurement markets depending, as with the EEA minus approach, on the exact nature of any trade agreement adopted between the EU and UK. So far as non-EU states are concerned, the UK would gain the same flexibility to enter into its own agreements on access to procurement markets as it would have under an EEA or EEA-minus arrangement.

What about the UK’s internal regime on procurement? How could that change under a GPA-only arrangement?

As the author has already analysed elsewhere, a GPA-only arrangement would give the UK significantly more freedom of action over award procedures, particularly for those (overwhelming majority) of contracts currently falling within the Public Contracts Directive, and over the remedies regime. So far as the former is concerned, some key differences of substance between the Public Contracts Directive and GPA rules include the requirement for mandatory electronic procurement in the former but not the latter; the wider scope for procedures involving negotiation under the GPA, which allows free use of such procedures for all public sector contracts in the same way as the EU’s

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30 There are various other public procurement rules in UK law, but no comprehensive code to regulate the activity of the kind that exists in many other countries; these other rules are on limited specific issues and scattered across different instruments. For a full account see Arrowsmith, note 4 above, Ch.2 and passim.

31 Arrowsmith, note 14 above; Arrowsmith, note 18 above.
Utilities Directive and Concessions Directive do, rather than allowing their use only on specific grounds; wider scope for use of general qualification systems to advertise contracts; much less detailed and complex rules on evidence for proving qualifications under the GPA; and no requirement to accept self-declarations (which in the EU Directives take the form of the Single European Procurement Document). The GPA also does not contain detailed rules on framework agreements, dynamic purchasing systems and electronic auctions, but leaves space for these kinds of procurement techniques simply in compliance with the GPA’s general rules. The GPA also does not contain the vast amount of detail on issues such as award criteria that are found in the EU rules (although it is not clear that the main constraints are in fact much different on many matters, such as the type of award criteria that may be used, although these constraints are unclear under the GPA given the absence of interpretations).

How different the UK’s regime will actually be under a GPA-only system will depend, however, on how any new flexibility is actually used in practice. Here four main possibilities can be identified. To understand these it is necessary to understand that the UK’s current approach to regulating public procurement, in particular in England and Wales and Northern Ireland, for the most part merely involves copying out the text of the EU Directives into national law. The UK did not have much of a tradition of regulating procurement through legal means prior to its EU membership, focusing instead on the professional skills and integrity of its purchasing professionals. It simply complied with its EU obligations by adopting regulations that repeated the exact minimum requirement of EU law, without further elaboration and without imposing additional obligations on purchasers, although recently there has been increasing regulation of some limited aspects of procurement policy beyond EU requirements. This means that its procuring entities have generally retained the flexibility they have traditionally enjoyed to set their own procurement policy, constrained only by the (ever-increasing) limits imposed by EU law. It should also be emphasised that the UK is not a single jurisdiction but that the devolved Governments in Scotland, Wales and (potentially) Northern Ireland enjoy power to regulate public procurement to varying degrees.

Against this background, the first possibility for the different UK jurisdictions in dealing with a GPA-only regime is that the UK will decide simply not to change the current regulations that copy out the (GPA-compliant) EU Directives or decide to change them very little, to keep the advantages of familiarity and certainty.

A second possibility is that the UK will continue its traditional approach of regulating procurement only to the limited degree required by its international obligations, and will therefore adopt legislation that simply repeats the requirements of the GPA itself, leaving individual purchasers to decide how to procure within those limits.

A third possibility is that the UK will take advantage of the opportunities offered by a GPA-only regime to reform its systems but will do so in a way that draws as far as possible on current EU-based rules – for example, retaining concepts such as the open procedure, restricted procedure and competitive dialogue - thus retaining a degree of certainty and familiarity but at the same time bringing about certain improvements. This, in the author’s view, would be the best approach to adopt and is, it is submitted, the most likely approach for England; and this is considered further in section 4 below.

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32 See Arrowsmith, note 4 above, ch.2 and the literature cited there.
33 Arrowsmith, above note 4, paras 3-57-3-59.
34 Arrowsmith, note 4 above, ch.2
35 For the full position, which is quite complex, see Arrowsmith, note above, paras 2-04-2-07.
Finally, a fourth possibility is for the UK to design an entirely new domestic system to regulate award procedures within the GPA framework – for example, by designing new types of award procedures with new names that fit within the GPA framework.

In the past, the detailed obligations of EU procurement law have had the effect of ensuring a fairly uniform approach across the UK to a large degree. However, under the wider discretion offered by GPA-only system the approach to regulating public procurement could well become more fragmented across the UK, with the different jurisdictions choosing differently among the different possibilities above and/or implementing their choices in a different way.

So far as supplier remedies are concerned the GPA provisions (in GPA Art.XVIII) again give more flexibility to implementing states than do the EU remedies rules in the Remedies Directives and, in particular, do not feature most of the innovations that were introduced into the EU remedies system in the reforms that took place in 2007 and came into force in 2009. The main differences are that 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; that the GPA has no requirement for automatic suspension of the award decision (although, as under the EU regime, the review body must at least have a general power to suspend decisions, including the final award decision, on application by a supplier); that the GPA does not include any requirement of ineffectiveness; that the GPA regime appears generally to allow states or review bodies to choose damages as an alternative to a final set side, whereas in EU law a set aside must be available as the general rule; that the EU regime requires any damages remedy to include lost profits, whereas the GPA allows damages to be limited only to costs incurred in participating in the award procedure or in bringing legal proceedings (or both); and that the GPA appears to provide for more limited standards for review bodies with regard to, in particular, independence – not, however, an issue in the UK where the problem lies rather at the opposite end of the spectrum of “over-judicialisation” as proceedings are required to be brought in most cases before the High Court.

A GPA-only system would thus allow the UK to provide a less stringent system of remedies than it does now. Whether it would wish to do so is not clear. In fact, as is well known, very few cases anyway proceed to any kind of judgment in the UK, even on interim measures, in comparison with other Member States – about 20 a year – although many are also settled out of court. Primarily this is because the High Court system is expensive, and remedies are also not very effective because of the obstacles to obtaining a suspension, a feature that may mean that the UK does not comply with the EU obligation to provide an effective remedies system. It is possible to speculate that a reform of UK procurement law might, ironically, even serve as a catalyst for an introduction of a more effective system that is easier and cheaper for both suppliers and purchasers, not because of any legal obligation but simply because of the impetus provided by the reform process.

It is finally worth mentioning the implications that a GPA-only system might have for the use of procurement to promote social and economic policies in public procurement within the UK. Showing

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37 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.

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


40 Arrowsmith and Craven, above, note 39.
a major about-turn from hostility to this use of procurement in the 1990s and earlier decades by the (pre-devolution) central Government, the various UK jurisdictions have sought increasingly to promote the use of procurement as a policy tool\footnote{See Arrowsmith, note 4 above, Ch.20.}. More opportunities for this could arise, in particular, as a result of the fact that low-value procurement and defence procurement are no longer covered by the GPA. The former point means that government and individual public bodies may be able to use these procurements to support promote Small and Medium-size Enterprises, including through preferences for local companies, whether those of a local authority’s own area or those of the area of one of the devolved governments. However, it seems quite possible that the different jurisdictions in the UK will join together to outlaw internal discrimination policies, which could prove economically damaging to all parties. Another policy that could prove popular, particularly with local government, but is currently precluded by EU law for contracts covered by the Directives or Treaty is the payment of fair wages, above the national minimum wage, for those working on public contracts\footnote{Dirk Rüffer v Land Niedersachsen (C-346/06) EU:C:2008:189.}. Finally, various obligations – as opposed to powers – that exist under EU law in this area would not apply under a GPA-only solution. Some obligations of this kind currently apply under the Directives - the 2014 Public Contracts Directive, for example, includes an obligation to ensure that suppliers comply with applicable social and environmental laws and international conventions\footnote{2014 Public Contracts Directive Art.18(2).}; an obligation to take into account accessibility considerations and design for all users\footnote{2014 Public Contracts Directive Art.42(2).}; a requirement to give reasons for not dividing procurement into lots (to support SMEs)\footnote{2014 Public Contracts Directive Art.46(1).}; and an obligation to exclude undertakings with convictions for certain offences of EU concern\footnote{2014 Public Contracts Directive Art.57(1).} or adjudicated to be in default with tax or social security payments\footnote{2014 Public Contracts Directive Art.57(2).}. There are also such obligations under other legislation, notably in the environmental field under the Energy Efficiency Directive\footnote{Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC Text [2012] L 315/1, Art.6(1).} and in relation to the purchaser of motor vehicles\footnote{Directive 2009/33/EC on promoting clean, energy-efficient road vehicles [2009] O.J. L120/5, Art.5(1)-(2).}. These would no longer apply under a GPA-only approach, although the UK could again, of course, choose to continue such policies.

Should the UK make substantial changes to its procurement rules under a “GPA-only” regime, then it will ideally need to make some provision for what will happen to contract award procedures that are ongoing when the rules change. It can perhaps be anticipated that the rules that the UK chooses to adopt for this will be similar to those on ongoing procedures that are found in the current draft Withdrawal Agreement.

3.5. GPA-plus

A fourth possible model for the UK-EU procurement relationship we can refer to as GPA-plus. This refers to the fact even if the GPA were to form the main starting point for the UK-EU procurement relationship, the parties might agree some additional obligations that would provide constraints on UK procurement policy. While the GPA is, as we noted, the basis of most of the EU’s trade agreements on procurement, 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, introducing, in particular, additional features modelled on the EU’s own Directives. This latter approach has been characterised by the European Commission in the context of the TTIP negotiations with the USA as
"GPA-plus"\textsuperscript{50}. It seems quite likely that such an approach would be adopted with the UK. So far as coverage is concerned, we have already mentioned above that the draft Political Declaration of November 2018 that accompanied the draft Withdrawal Agreement referred to the ambition of negotiating wider coverage of procurement markets than exists under the GPA. Areas that might be possible priorities for the EU in terms of expanded disciplines on award procedures could include matters such as framework agreements, dynamic purchasing systems and electronic auctions, which are regulated, as just mentioned, in only a skeleton manner by the GPA. However, it is difficult to predict at this early stage what any such negotiations might produce.

4. The author’s vision for procurement post-Brexit – for the UK and for the EU?

Taking public procurement in isolation\textsuperscript{51}, in the author’s view an ideal outcome from Brexit so far as procurement is concerned would involve a number of aspects. Many of the points made below have been elaborated by the author elsewhere and what follows is just a brief sketch of the author’s vision.

First, it is submitted that, as the author has elaborated elsewhere\textsuperscript{52}, whatever the benefits of keeping the current detailed procurement regime, it would be more beneficial to adopt a more simple and less prescriptive regime. In this respect, it seems preferable for the UK to seek a “GPA-only” approach, or a limited GPA-plus approach, under any trade agreement that it might conclude with the EU.

Secondly, if this is achieved, an important priority in any new domestic system should be to adopt a single instrument and set of rules for all types of procurement as far as possible. As the author has again argued in detail elsewhere, having separate regimes for general public sector, utilities, defence and concessions\textsuperscript{53}, is not desirable. On the one hand, the differences between these regimes are minor, in particular, since the introduction of wider possibilities for negotiation under the 2014 Public Sector Directive. (While the new Concessions Directive appears superficially different, in abandoning the concept of specific types of award procedures (open, restricted etc), in reality – as the author has shown in a recently published essay – the actual differences between the substance of that regime and the others are negligible\textsuperscript{54}.) On the other hand, separate regimes cause many problems in terms of, for example, complexity, boundary disputes between the regimes and legal certainty arising from unintended differences of wording. This is not to say that a different approach is not required for different types of procurement – obviously buying a piece of major infrastructure is very different from buying pens and paper clips - but simply that at the level at which legal rules should ideally operate it is not necessary to make many distinctions; differences can be dealt with at


\textsuperscript{51} It is recognised that a public procurement regime that is less than ideal may be a price worth paying for an overall arrangement that might not otherwise be achieved, such as participation in an EEA-type arrangement. However, this section leaves aside this kind of consideration.

\textsuperscript{52} S. Arrowsmith “Modernising the EU’s Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility” (2012) 21 P.P.L.R. 71-82.


the level of guidance or at the individual procurement level, thus avoiding the negative consequences of legal classifications to a large extent.

Thirdly, it is the author’s view that any new domestic system should remain based on EU procurement terminology, concepts and rules to a great extent (albeit a much simplified version of those). Thus, for example, concepts such as the open procedure, restricted procedure and negotiated procedure should be adopted in domestic law, modelled on the EU award procedures. It is suggested that both past and future decisions of the European Court of Justice should be taken into account in interpreting the rules, although this must be done with caution in light of the fact that the domestic regime has wider objectives than a trade system. Such an approach would have very significant advantages in terms of legal certainty for stakeholders in a complex field. It would also have advantages for both the UK and its trading partners in terms of retaining a degree of similarity between the rules of the UK and the rest of the Europe that would facilitate cross border trade.

Fourthly, it is suggested that the substance of any such regime should follow the flexible pattern of the Utilities Directive, which provides the best balance between regulation and discretion. It is submitted that to a large extent such a regime should be modelled on the Utilities Directive as it existed in 199355 (after the original Utilities Directive of 199056 was extended to services), with just the open, restricted and negotiated procedures (with and without a call for competition). Much of the detailed text included since that time on matters such as award criteria, which is largely superfluous and confusing, would then not be carried through into UK legislation; nor would unnecessary complications, such as (arguably) the inclusion of competitive dialogue, since the approach envisaged by competitive dialogue can be adopted under the rules of the negotiated procedure with a call for competition – although it can also be argued that procedure mid-way between the negotiated procedure with a call for competition and restricted procedure could be useful. However, it would be useful to include in such a regime some of the specific additional provisions added since 1993, covering issues such as electronic auctions, framework agreements and dynamic purchasing systems, albeit in a slightly simpler form in some cases.

Finally, an important priority should be cooperation between the different UK jurisdictions to avoid internal discrimination in below-threshold contracts, which could then cause damage in all the UK markets given that internal trade is more significant than external trade. It would also seem desirable to seek a degree of harmony in the approach to regulating award procedures, since fragmentation of such procedures could also operate as a barrier to internal trade.

So far as remedies are concerned, it is submitted that a more balanced approach would be one that, on the one hand, provides for a more accessible system of relief than the current approach – which we mentioned may not comply with EU effectiveness requirements - and, on the other hand, is less costly for both procuring entities and suppliers than the current approach. Both objectives can arguably be achieved by a more rapid system of review before a specialist tribunal with a relatively short time limit for deciding cases which – like the present EU system - focuses on ensuring a remedy before the contract is concluded, including by retention of the standstill period; but which takes advantage of certain flexibilities offered by the GPA, including limiting damages to costs only and

providing (as at present\textsuperscript{57}) for a damages remedy only where there is significant public inconvenience from delay to a procurement.

A system along the lines above, particularly when interpreted by the local judiciary without the contraints of following the sometimes rather over-bureaucratic decisions of the European Court of Justice, would, it is submitted, provide a more balanced approach to regulating procurement than the present system. Such an approach would retain the advantages of a legal framework for achieving procurement objectives – both trade objectives of open markets in accordance with the GPA and domestic objectives such as value for money, integrity and effective implementation of sustainability policies – while at the same time eliminating disproportionate costs that can arise from a complex and bureaucratic system.

The author has long argued for a similar approach at EU level.\textsuperscript{58} We have already mentioned that the UK has had a significant impact on development of the EU procurement regime in the past; perhaps it is unrealistic to hope that the UK could continue to influence the regime from outside by providing a model for a new and improved model that could some day be used by the EU itself.

5. Conclusions

In this paper we have outlined the short term and long term prospects for procurement after Brexit, and the author’s own vision for the domestic procurement system in a post-Brexit world.

We have seen that in the short term – the eighteen months or so after Brexit – not too much is likely to change, either in the domestic system or as regards mutual access to procurement markets between the UK and EU. This would be the case even with a no-deal Brexit, since the continuation of mutual access to most procurement markets is all but assured as a result of the Decision on the UK’s access in its own right to the GPA. However, in the event of a no-deal Brexit the value of that access could be reduced by other trade barriers that might affect procurement markets, such as loss of mutual recognition of qualifications.

In the longer term both the exact prospects for future access and the constraints on UK domestic policy are still unknown, depending on the nature of any future trade agreement between the EU and UK.

At one end of the spectrum an agreement might be concluded, providing for application of the EEA or modelled on the EEA, which could see the current EU procurement rules continue to apply to the UK. This would mean little change from the present, other than reduced UK influence over the future development of the regime.

At the other end of the spectrum the UK-EU relationship in procurement might be based solely on the GPA. The latter provides for broadly the same coverage – and hence market access - as the current EU rules, but with some important exceptions, notably for below-threshold procurement and hard defence procurement. From a domestic perspective, it allows for more flexibility over both the award procedures and remedies applied, and this raises the prospect of reform to the UK procurement regulations, should the UK wish to take advantage of that flexibility.

It was suggested here that such a regime, based on the GPA only, would in fact offer a prospect for useful reforms. Any domestic reform, it was suggested, should involve regulation of all types of procurement by a single instrument and single set of rules. It should be based, it is proposed, on the

\textsuperscript{57} This is effectively the outcome from the High Court’s approach to suspension, suspensions being awarded or kept in place in only about 1/3 of cases, after because the court concludes that the balance of convenience favours the continuation of the procedure: see Arrowsmith, above, note 4, Ch.22.

\textsuperscript{58} Arrowsmith, note 52, above.
terminology, concepts and rules of the EU’s early utilities regime but include also substantive provisions on electronic procurement and auctions, and on dynamic purchasing systems and framework agreements. Such a reform, it is suggested, could retain any benefits that exist with the current regime but reduce the costs, and would in fact provide a good model for reforming the EU’s own regime should the opportunity arise. Whether the UK will take advantage of such an opportunity to improve its procurement system and, whether, indeed, such an opportunity will ever arise, are, however, just two of the many uncertainties thrown up by Brexit, and there could yet be many twists and turns on a long road ahead before there is a clear idea of the long term shape of public procurement regulation in the UK.