

Information note:

## Brexit and Public Procurement

December 2017



Oifig um Sholáthar Rialtais  
Office of Government Procurement



An Roinn Caiteachais Phoiblí  
agus Athchóirithe  
Department of Public  
Expenditure and Reform

## Contents

1. National Public Procurement Policy Framework .....	1
2. Brexit .....	1
3. Irish Government Approach .....	1
4. Cabinet Committee on Brexit .....	2
5. EU Negotiations .....	2
6. Article 50 of the Treaty on European Union .....	2
7. Article 50 - Issues Unique to Ireland .....	2
8. Key Issues for EU .....	2
9. EU Negotiation Guidelines.....	3
10. Key Issues for Ireland.....	3
11. Position of the European Union.....	3
12. EU Commission Paper Consequences of Brexit in the area of public procurement .....	4
12.1 Potential Issues for Ireland .....	6
13. European Commission Position paper - On-going Public Procurement Procedures.....	6
14. Joint EU-UK letter to the WTO Membership .....	7
15. Advice for Public Bodies .....	7
Appendix .....	9
EU Commission Paper Consequences of Brexit in the area of public procurement .....	9
THE EU REGIME ON PUBLIC PROCUREMENT .....	9
THE EEA MODEL .....	10
THE WTO (GPA) MODEL .....	10
OTHER TRADE AGREEMENTS AND NEGOTIATIONS ON PUBLIC PROCUREMENT, INCLUDING “EEA-MINUS” AND “GPA-PLUS” APPROACHES KEY FINDINGS.....	11
ISSUES FOR A WITHDRAWAL AGREEMENT KEY FINDINGS .....	12

## 1. National Public Procurement Policy Framework

The National Public Procurement Policy Framework consists of 5 strands:

- 1) Legislation (Directives, Regulations)
- 2) Government Policy (Circulars etc.)
- 3) Capital Works Management Framework for Public Works
- 4) General Procurement Guidelines for Goods and Services
- 5) More detailed technical guidelines, template documentation and information notes as issued periodically by the Policy Unit of the OGP

The framework sets out the procurement procedures to be followed by Government Departments and State Bodies under national and EU rules. The framework supports contracting authorities, including the OGP, the four key sectors (Health, Education, Local Government and Defence), individual Departments, Offices, commercial and non-commercial State bodies, and private entities which are subsidised 50% or more by a public body, when awarding contracts for works, goods and services. This information note on Brexit and Public Procurement forms part of Strand 5 of the Framework.

The note is not intended as legal advice or a legal interpretation of Irish or EU law on public procurement. Legal or other professional advice should be obtained if there is any doubt about the correct procedure to be followed.

## 2. Brexit

On 29 March 2017, the UK Prime Minister, Theresa May, formally notified the European Council of the UK's intention to leave the EU. This marked the formal commencement of the process set out in Article 50 of the Treaty on European Union – the withdrawal of a Member State from the Union.

## 3. Irish Government Approach

The Irish Government has undertaken extensive preparatory work and consultations at EU level and on the island of Ireland and this work will be brought to bear in Ireland's approach to the negotiations. The current focus of the negotiations is on the conditions for the UK's withdrawal which, if successful, will lead to a Withdrawal Agreement. The future EU-UK relationship is of also critical importance to Ireland, but will be the subject of a separate negotiation between the EU and the UK once the UK leaves the EU. However, in line with the phased approach agreed by the European Council on 29 April, discussion on the future relationship may, run alongside the formal exit negotiations with a view to agreeing the parameters and principles on which the future relationship will be based. These discussions could include agreeing transitional arrangements as part of the Withdrawal Agreement.

Contingency planning began in advance of the UK referendum, involving coordinated analysis of all the issues across Government and extensive consultation, including through the All-Island Civic Dialogue, and with a range of stakeholders.

The Government has been engaging with all of our EU partners with a view to ensuring that our unique priorities and concerns are clearly understood by them in advance of the negotiations. This has also been essential in building our own understanding of the concerns and perspectives of other Member States and of the EU Institutions.

## 4. Cabinet Committee on Brexit

A major focus of the Cabinet Committee on EU affairs is Brexit. This committee, which, chaired by the Taoiseach, ensures a whole-of-government approach to the identification of Ireland's particular concerns and our priorities for the Article 50 ("withdrawal") negotiations as well as for a future EU-UK relationship. This committee will remain active in monitoring progress during the negotiations and in guiding the approach of the Government.

## 5. EU Negotiations

Extensive engagements have been undertaken by Ministers and senior officials with our EU27 partners and the EU institutions. The impact of this outreach has been clear in the explicit recognition of Ireland's unique concerns in the EU Negotiation Guidelines and the European Parliament's Brexit resolution. Given the centrality of the European Council, its President, Donald Tusk, consulted extensively with EU leaders to prepare the Negotiation Guidelines which were successfully agreed by the European Council in April. The European Commission, through the office of Chief Negotiator Michel Barnier, is leading on the negotiations, under the direction of the European Council. The European Parliament will also have an important role to play in the negotiations.

## 6. Article 50 of the Treaty on European Union

Article 50 of the Treaty of the European Union will govern the negotiations on the UK's withdrawal from the European Union. It is important to underline that Article 50 only deals with the withdrawal of a Member State from the EU and does not provide for the negotiation of an agreement on the future relationship between the EU and the UK. It is vitally important that the withdrawal of the UK from the EU is done in an orderly manner. In order to provide legal certainty and to avoid any 'cliff edge effect', including with regard to trade, customs and key sectors, transitional arrangements should be agreed as part of the withdrawal agreement.

## 7. Article 50 - Issues Unique to Ireland

The UK's decision to leave the EU has raised a number of specific and very significant issues which are unique to Ireland, in particular in relation to Northern Ireland, the border and the Common Travel Area (CTA). These issues have been identified as matters to be addressed as part of the Article 50 process and in the withdrawal agreement between the EU and the UK. The Government has made clear its priority that there be no visible, "hard" border on the island of Ireland. This will require a political and not just a technical solution, as well as recognition that the land border on the island represents a unique and unprecedented set of circumstances that requires flexible and imaginative solutions.

## 8. Key Issues for EU

The key issues for the EU in the negotiations are:

- Rights of EU and UK Citizens
- Prevent Legal Vacuum after Brexit
- UK financial commitments
- Protecting the Good Friday Agreement and the gains of the peace process, including avoiding hard border in Ireland

Only when sufficient progress has been made on these core exit issues can the parallel discussions on the future relationship between the EU and UK begin.

## 9. EU Negotiation Guidelines<sup>1</sup>

On 29 April 2017, on foot of the letter of notification from the UK on its intention to withdraw from the EU under Article 50 of the Treaty on the European Union, the European Council adopted Guidelines setting out the EU's position on the negotiations with the UK on its withdrawal from the EU. As the Guidelines themselves state, they "define the framework for the negotiations under Article 50 TEU and set out the overall positions and principles that the Union will pursue throughout the negotiations". They, therefore, provide an over-arching political framework for the Article 50 negotiations and establish the political direction for the EU in the forthcoming negotiations process. Importantly, it has been agreed that the Guidelines will be updated by the European Council as required, as negotiations progress, and most particularly before discussions on a future EU-UK relationship would begin. The Guidelines detail the core principles that will shape the EU's approach to the negotiations, and, where necessary highlight specific priority issues which need to be addressed. Critically, this includes significant strong language on the unique Irish issues.

## 10. Key Issues for Ireland

The Government is clear about Ireland's Brexit priorities:

- Minimising the impact on **trade and the economy**
- Protecting the **Northern Ireland Peace Process**
- Maintaining the **Common Travel Area**
- Influencing the **future of the European Union**.

The Irish Government is determined that all possible preparations are made ahead of the UK leaving the EU. All Departments and Agencies have been charged with making Brexit a priority, with strong co-ordination at key levels across Government.

More detail on these can be seen in 'Brexit – Ireland's Priorities Information Booklet' and 'The Government's Approach – Ireland and the negotiations on the UK's withdrawal from the European Union'.

<https://dbei.gov.ie/en/What-We-Do/EU-Internal-Market/Brexit/Government-Brexit-Priorities/Brexit-Irelands-Priorities.pdf>

<https://dbei.gov.ie/en/What-We-Do/EU-Internal-Market/Brexit/Government-Brexit-Priorities/The-Government%E2%80%99s-Approach.pdf>

## 11. Position of the European Union

The Government is satisfied that the EU Guidelines provide the necessary strong political framework for the complex negotiations process ahead. Of particular importance are the following key aspects of the Guidelines:

- The first priority is to achieve an orderly withdrawal of the UK from the EU and the Guidelines set out a strong framework to achieve this;
- The inclusion of persuasive and detailed language in relation to Ireland's particular concerns and priorities, including on protecting the Good Friday Agreement, avoiding a hard border and maintaining the Common Travel Area, is especially welcome;
- The strong language on putting citizens first in terms of minimising disruption and securing an ambitious agreement on citizens' rights is very important in terms of offering EU citizens

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<sup>1</sup> <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>

currently residing in the UK and UK citizens currently residing in the EU and their families a degree of certainty;

- The approach agreed on the UK's financial commitments is sensible and lays the foundations for a constructive engagement with the UK on this issue;
- The pathway set out in the Guidelines to opening discussions with the UK on a future relationship, including with regard to trade, and the wish to have effective transitional arrangements, are also important in view of Ireland's wish to minimise the implications of Brexit for our trade and economy. The fact that the decision on when to move to this phase, based on sufficient progress on the withdrawal issues (Phase 1), will be for the Taoiseach along with colleagues in the European Council, is also very positive;
- In terms of a future relationship agreement with the UK, the strong language on ensuring a level playing field - (including with regard to issues such as environmental and labour standards, tax and state aid, on seeking appropriate enforcement and dispute resolution mechanisms, on managing potential regulatory divergence and protecting the EU's legal order, including the Single Market) is vital for Ireland and for continued economic sustainable development at the heart of a strong and well-functioning EU.

## 12. EU Commission Paper Consequences of Brexit in the area of public procurement<sup>2</sup>

The European Commission (DG for Internal Policies) has prepared a paper on the "Consequences of Brexit in the area of public procurement" which sets out the implications of a number of potential options in the area of public procurement.

The 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 European Economic Area Model (EEA) model; the Government Procurement Agreement (GPA) model; and, between these two, what they 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). This document was prepared for Policy Department A at the request of the Committee on Internal Market and Consumer Protection.

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 World Trade Organisation's (WTO) 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.

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<sup>2</sup> A summary of the Commission Paper is included in the appendix.

In relation to a withdrawal agreement, the paper states it may need to include measures to address:

- (i) the consequences of changing from one procurement regime (the EU regime) to another; and
- (ii) 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 the 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<sup>3</sup> 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;
- (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.

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<sup>3</sup> See para 13 below – ongoing Public Procurement Procedures - the EU position is that the terms and conditions of public procurements entered into prior to Brexit will remain until these procurement processes are completed.

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.

### 12.1 Potential Issues for Ireland

One of the major positives about the EU is a customs free zone where there is also a harmonised safety/certification/specification system. With Brexit, the UK may be able to set its own taxes<sup>4</sup>, duties, tariffs and safety certifications. In the coming years, companies looking to import into the UK, or UK companies looking to export out, may have to comply with different product requirements around efficiency, safety, testing etc. This also applies to food companies in Ireland who export to the UK. These companies may need to meet differing Food Safety specification for the UK as it does for the EU. There may also be the return of country of origin forms as well.

Uncertainty for UK firms may cause supply issues or lack of bids - risks to supply chain on critical items and services. There is the uncertainty as to the time that will be required to establish a new trade agreement. Changes to the regulatory regime (Posted Workers, TUPE) may allow UK firms to reduce prices on exports, potentially undercutting domestic suppliers. There may be a requirement for travel visas for services staff and difficulties for contract management<sup>5</sup>, e.g. termination of contracts by UK suppliers due to uncertainty, foreign exchange fluctuations, etc. Logistical issues may impact on delivery, e.g. Customs clearance, application of tariffs and impacts on supplies shipped through UK and a potential double border

These variables will all, of course, depend on the outcome of the negotiations on Brexit between the UK and Europe.

## 13. European Commission Position paper - On-going Public Procurement Procedures

The European Commission (Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU) has produced a position paper on On-going Public Procurement Procedures. This sets out the essential principles on On-going Public Procurement Procedures.

The paper states that the withdrawal of the United Kingdom from the European Union will create uncertainty in relation to administrative procedures in the area of public procurement on-going on the withdrawal date, as to which law should govern the completion of those procedures and how tenderers and contractors from the EU27 or the United Kingdom should be treated by contracting authorities from, respectively, the United Kingdom or the EU27 Member States. The Withdrawal Agreement should ensure that administrative procedures in the area of public procurement on-going on the withdrawal date continue to be carried out in accordance with the relevant provisions of Union law until their completion, and in accordance with the principle of non-discrimination. The paper was published on the Commission website on 21 September 2017 and is available at

[https://ec.europa.eu/commission/sites/beta-political/files/public\\_procurement.pdf](https://ec.europa.eu/commission/sites/beta-political/files/public_procurement.pdf)

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<sup>4</sup> In this context, it should be noted that EU Member States are already free to set their own taxes with the exception of VAT/some duties and tariffs.

<sup>5</sup> In this context, the Government's stated aim is to maintain the common travel area.



## 14. Joint EU-UK letter to the WTO Membership

The Permanent Representative of the United Kingdom to the International Organisations in Geneva and the Permanent Representative of the European Union to the WTO issued a joint letter<sup>6</sup> to the WTO on 11 October. The joint letter explains the approach the EU and UK intend to take in the WTO in relation to the UK withdrawal from the EU. It marks the start of a cooperative and transparent engagement with the other Members of the WTO. The EU will remain a WTO Member and its schedules of commitments for goods, services and government procurement will remain applicable to its territory, but its quantitative commitments in the area trade in goods<sup>7</sup> require certain adjustments to reflect the UK's withdrawal. The joint letter presents a common approach concerning quantitative commitments. Tariff-rate quotas would be apportioned based on trade flows, so that the existing level of market access available to other WTO Members would be maintained.

The apportionment of tariff-rate quotas will be based on an objective methodology, to reflect the share of the UK in the usage of each tariff-rate quota, based on the most representative recent three-year period.<sup>8</sup>

In the WTO areas of trade in services and government procurement, there would be a basis for cooperation regarding the UK's intentions, but without a commitment to a specific outcome by the EU. The UK wants to establish its own separate services schedules under the WTO General Agreement on Trade in Services (GATS), and remain under the WTO plurilateral Government Procurement Agreement (GPA).

The UK's withdrawal has implications that go beyond the bilateral EU UK relationship. This matter thus requires engagement with trading partners in the WTO. The EU looks forward to engaging on these issues in a spirit of cooperation, openness, inclusiveness with the other WTO Members in the weeks and months ahead.

The joint EU-UK letter is without prejudice to other trade-related matters, notably the future relationship between the EU and UK.

## 15. Advice for Public Bodies

The Office of Government Procurement's (OGP) published the Public Service Spend and Tendering Analysis Report for 2015 in September 2017. This shows that the percentage of analysed procurement spend on goods, services and works that originate from suppliers outside Ireland is in the order of 6%. This would equate to some €700m of the overall estimated spend. It is estimated that the bulk of this is accounted for by UK suppliers. Any change limiting competition from UK suppliers may impact on costs either:

- directly through tariffs / increased administrative burden etc.; or
- indirectly, by reducing competition with Irish suppliers, if any, from the UK.

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<sup>6</sup> [https://ec.europa.eu/commission/publications/joint-letter-eu-and-uk-permanent-representatives-wto\\_en](https://ec.europa.eu/commission/publications/joint-letter-eu-and-uk-permanent-representatives-wto_en)

<sup>7</sup> Tariff-rate quotas (TRQs) and bound commitment level for domestic support in the area of agriculture. TRQs are quantities of certain goods for which the maximum import duty allowed is lower than for imports beyond those quantities. Domestic support in agriculture refers to the annual limit for support on policies of WTO members included in the Aggregate Measure of Support (AMS), the so-called Amber Box support.

<sup>8</sup> The methodology and data per country will be explained in detail during bilateral meetings with WTO Members in Geneva with the involvement of the EU and UK Ambassadors and relevant officials.

While the direct spend on goods, services and works that are supplied by providers outside Ireland is not large in an overall context, it is likely that a much larger amount is spent on supplies which originate in or transit through the UK but are resold by Irish suppliers. Therefore, there are more general supply risks in relation to goods and products that do not originate in Ireland but are provided by Irish Companies.

The lack of competition from UK suppliers combined with any potential tariffs/administration costs may impact on the cost of procuring services or goods that don't have many substitute or equivalents in Ireland.

At this stage, the OGP's advice for Public Bodies is that they cannot discriminate against UK suppliers as they remain members of the EU. However, Public Bodies should be examining their supplier base to assess their exposure to the UK market. This information gathering exercise should identify the extent to which they are relying on this market. The potential impact on their business if there is a disruption to this market should be considered. Public Bodies will then be in a position to conduct a risk assessment and to consider and implement possible mitigation steps to ensure the continuation of services, including early engagement with suppliers where necessary.

## Appendix

### EU Commission Paper Consequences of Brexit in the area of public procurement<sup>9</sup>

The European Commission (DG for Internal Policies) has prepared a paper on the “Consequences of Brexit in the area of public procurement” which sets out the implications of a number of options in the area of public procurement.

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.

#### THE EU REGIME ON PUBLIC PROCUREMENT

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.

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<sup>9</sup> 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). This document was prepared for Policy Department A at the request of the Committee on Internal Market and Consumer Protection.

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602028/IPOL\\_STU\(2017\)602028\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602028/IPOL_STU(2017)602028_EN.pdf)

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

## THE EEA MODEL

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.

## THE WTO (GPA) MODEL

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 re-join 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 relating 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.

#### 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 as 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.

## 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 the 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;
- v) treatment of contracts concluded before any regime change, including:
  - e. the risk of contracts being terminated or reduced in scope for reasons of nationality;
  - f. continued application of termination rights for UK procuring entities that derive from EU law;
  - g. application of the e-Invoicing Directive; and
  - h. 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 change even if the contract was not yet concluded.