

NZT0038 - Professor Albert Sanchez-Graells

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Submission

00. This submission addresses one of the questions formulated by the House of Lords International Agreements Committee in relation to the UK-New Zealand Free Trade Agreement signed on 28 February 2022 (UK-NZ FTA).¹ In particular, this submission addresses question 15: ‘*What is your assessment of the procurement chapter of the signed agreement?*’.² In addressing the specific question concerning the procurement chapter of the UK-NZ FTA, this submission considers to what extent the UK-NZ FTA meets the UK Government’s stated negotiating objectives.

This submission considers this question in the broader context of the interaction of the procurement chapter in the UK-NZ FTA with the equivalent chapter in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)³—concerning which the UK has proceeded to the second and final stage of accession on 18 February 2022⁴—as well as in conjunction with the procurement chapter of the UK-Australia Free Trade Agreement (UK-AUS FTA)⁵—on which earlier written evidence was submitted.⁶ To avoid unnecessary repetition of issues that are identical to those raised by the procurement chapter in the UK-AUS FTA,⁷ this submission solely concentrates on legal issues resulting from the potential triple regulation of UK-NZ procurement liberalisation in the UK-NZ FTA, CPTPP and in the World Trade Organisation Government Procurement Agreement (GPA), to which both the UK and New Zealand are parties (or are very likely to soon be, in relation to CPTPP).⁸

¹ Available at <https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-new-zealand> (last accessed 13 Mar 2022).

² The procurement chapter of the Agreement is available at <https://www.gov.uk/government/publications/uk-new-zealand-fta-chapter-16-government-procurement> (last accessed 13 Mar 2022).

³ Available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/> (last accessed 13 Mar 2022).

⁴ Department for International Trade, *Trade Secretary secures major trade bloc milestone ahead of Asia visit* (18 February 2022), <https://www.gov.uk/government/news/trade-secretary-secures-major-trade-bloc-milestone-ahead-of-asia-visit> (last accessed 13 Mar 2022).

⁵ Available at <https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-australia> (last accessed 13 Mar 2022).

⁶ Available at <https://committees.parliament.uk/writtenevidence/43300/pdf/> (last accessed 13 Mar 2022).

⁷ Most importantly, the issue concerning the legal uncertainty derived from the deviations in the UK-NZ FTA from the national treatment obligations under the GPA, which are identical to those concerning the UK-AUS FTA, as detailed in the earlier written submission, above (n 6) paras 07-09.

⁸ This submission is based on the analysis in A Sanchez-Graells, ‘The growing thicket of multi-layered procurement liberalisation between WTO GPA parties, as evidenced in post-Brexit UK’ (10 Mar 2022), available at <https://ssrn.com/abstract=4054711> (last accessed 13 Mar 2022).

1. Background

01. In the early stages of the negotiation of the UK-NZ FTA, the UK Government set out its strategic priorities and negotiating objectives.⁹ Concerning government procurement, the negotiating priorities were as follows:

Secure access that goes beyond the level set in the World Trade Organisation (WTO) Government Procurement Agreement (GPA) and is based on clear and enforceable rules and standards.

Develop improved rules, where appropriate, to ensure that procurement processes are simple, fair, open, transparent and accessible for all potential suppliers in a way that supports and builds on our commitments in the WTO's GPA.

Ensure appropriate regard to public interests and services, including the need to maintain existing protections for key public services, such as NHS health services.

02. In its general aspects, this set of negotiating priorities could be synthesised as an aspiration to reach a 'GPA+' agreement that extended economic coverage beyond that of the GPA schedules and built on the substantive provisions of the GPA and improved upon them, where appropriate, to ensure access to procurement based on clear and enforceable rules and standards. The goal of ensuring the clarity and enforceability of rules and standards will be the main concentration of this submission.

2. The GPA+ approach to the procurement chapter in the UK-NZ FTA and its interaction with CPTPP

03. In seeking to create a GPA+ regime, the procurement chapter in the UK-NZ FTA takes an approach that diverges from the one followed in eg the Trade and Cooperation Agreement with the EU (TCA), which explicitly incorporates by reference the coverage and obligations of the UK and the EU under the GPA (Art 277 TCA) and then proceeds to establish additional rules for covered procurement (Arts 278-286), additional requirements for not covered procurement (Arts 287-288), as well as a specific set of rules on modification of coverage, dispute resolution and cooperation (Arts 289-294). This approach to the creation of a GPA+ procurement chapter in the TCA is quite straightforward and minimises the risk of contradiction or incompatibility with the provisions of the GPA.

04. By contrast, the procurement chapter in the UK-NZ FTA replicates *but also modifies and alters* the text of the GPA, and seeks to create the GPA+ regime by including additional commitments as part of the GPA provisions (eg by reducing optionality), or by creating additional provisions. This approach to the creation of a GPA+ procurement chapter in the UK-NZ FTA generates significant scope for legal uncertainty where the text of the GPA is altered in the process of its inclusion

⁹ Department for International Trade, UK-New Zealand Free Trade Agreement: The UK's Strategic Approach (17 Jul 2020), available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901870/uk-strategy-uk-nz-free-trade-agreement.pdf (last accessed 13 Mar 2022).

in the FTA, as it will not always be clear whether the parties actively sought to deviate from their GPA obligations, or the reasons for and limits of that deviation. Importantly, where the deviation from the GPA standard varies or limits the parties' obligations towards each other in the way detailed below ('GPA-'), it is uncertain whether the incompatibility between the FTA and the GPA will change the legal position of the parties or have practical effects.¹⁰

05. This approach (replication of and tinkering with the GPA text), which is also followed in the UK-AUS FTA and in the CPTPP, creates further problems in the context of an interaction of multiple treaties deviating from the GPA, as the deviations from the GPA are not identical in the three treaties. This creates further scope for legal uncertainty, as well as a random risk of variation of the legal position of the parties under international law, depending on the order in which the successive treaties (in this case, the UK-NZ FTA and the CPTPP as it refers to the UK) enter into force (as below).

3. Access to procurement remedies as an example of paramount practical importance

06. To ensure the enforceability of its substantive obligations other than through the general dispute resolution mechanism, the GPA develops a rather robust set of requirements for the design of domestic review procedures concerning procurement decisions (Art XVIII GPA). There are two sets of procedural requirements of particular relevance: procedural rights and access to remedies.

07. Concerning procedural rights, the GPA states that *'the participants to the proceedings [involving the challenge of a procurement decision for breach of the GPA or the Party's domestic legislative measures implementing it] ... shall have the right to be heard prior to a decision of the review body being made on the challenge'* (Art XVIII(6)(b) GPA, emphasis added).

08. Concerning access to remedies, the GPA sets rather stringent minimum requirements, including access both to *'rapid interim measures to preserve the supplier's opportunity to participate in the procurement'* (Art XVIII(7)(a) GPA), and *'corrective action or compensation for the loss or damages suffered [due to a breach of the Agreement or the domestic rules implementing it], which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both'* (Art XVIII(7)(b) GPA). The GPA also foresees the possibility to exclude interim measures in view of *'overriding adverse consequences for the interests concerned, including the public interest'* (Art XVIII(7)(a) *in fine* GPA). This does not apply to claims for corrective action or compensation for loss or damage.

09. One of the important differences between the procurement chapter of the UK-NZ FTA and the procurement chapter of the CPTPP (and the UK-AUS FTA) relates to access to procurement remedies. The rules on remedies in the UK-NZ FTA

¹⁰ See the analysis of the national treatment obligation regarding the UK-AUS FTA, above (n 6) paras 07-09, which is entirely applicable to the UK-NZ FTA, as Art 16.4(1) UK-AUS FTA and Art 16.4(1) UK-NZ FTA are identical, as are Art 16.4(2)(b) UK-AUS FTA and Art 16.4(2)(b) UK-NZ FTA.

directly map on to those of the GPA *without deviation*,¹¹ whereas the rules in the CPTPP (and the UK-AUS FTA) include GPA- deviations in two important respects. First, CPTPP (and UK-AUS FTA) reduces the procedural rights of the parties involved in the challenge of a procurement decision.¹² The second, and more important, 'GPA-' deviation concerns the possibility of excluding on public interest grounds access to remedies for breaches of the obligations included in the procurement chapter of the CPTPP (and the UK-AUS FTA), or implementing domestic rules. The deviation results from the displacement of the public interest clause allowing the review body deciding on a procurement challenge to deny relief due to overriding adverse consequences under the CPTPP (and the UK-AUS FTA).

10. Indeed, the CPTPP (and the UK-AUS FTA) deviates from the GPA by placing the public interest clause at the end of the relevant provision (Art 15.19(6) CPTPP and Art 16.19(7) UK-AUS FTA), which then covers both procedures relating to interim measures to preserve the supplier's opportunity to participate in the procurement; *and* procedures concerning corrective action for breaches of the applicable rules, which may include compensation. This can hardly be seen as a clerical error, and ostensibly has the intended effect of allowing for the exclusion of financial compensation on grounds of an overriding public interest.

11. However, the intended effect of excluding financial compensation on grounds of an overriding public interest is, in my view, unlikely to be upheld in case of challenge, especially bearing in mind that the CPTPP (and the UK-AUS FTA) has already significantly limited the scope for financial compensation in establishing that *'If the review authority has determined that there has been a breach or a failure [of the claimant's rights under the CPTPP/FTA or the domestic rules implementing them] a Party may limit compensation for the loss or damages suffered to either the costs reasonably incurred in the preparation of the tender or in bringing the complaint, or both'* (Art 15.19(4) CPTPP and Art 16.19(5) UK-AUS FTA). The possibility to completely exclude financial compensation for breach of the obligations under the CPTPP (or the UK-AUS FTA) would render the system toothless, and this is putatively the reason why the UK-NZ FTA has not deviated from the GPA on this very point.

12. Be it as it may, even if the deviation from the GPA ended up not having a practical effect, it does create legal uncertainty and can have potential chilling effects on cross-border participation in tender procedures for public contracts.¹³ Moreover, other than showing that there is no joined up approach to the design of the substantive rules across the procurement chapters of the FTAs which the UK is simultaneously concluding or seeking to accede—which runs against the goals of clarity and simplicity set for the negotiations (above para 01)—this variety of approaches also jeopardises the enforceability of the rules under the different treaties and, in particular, the UK-NZ FTA.

¹¹ See Art.16.20(6) and (7) UK-NZ FTA, which keep to the GPA wording.

¹² Both by limiting the beneficiaries to the supplier that initiates a concern and substituting the right to be heard with a right to reply in writing to the public buyers' response to the initial challenge.

¹³ As discussed in Oral evidence: UK trade negotiations: Agreement with Australia, HC 1002, Q150 and Q151.

13. The relevance of the different approaches to the regulation of procurement remedies—ie strict GPA standard in the UK-NZ FTA and GPA- standard under the CPTPP—becomes especially clear when the issue is not considered in a static manner, but rather by taking into account the different dynamics that can result from the as yet unknown sequence for the entry into force of the new treaties signed by the UK. It should be borne in mind that, under the rules of the 1969 Vienna Convention on the Law of Treaties,¹⁴ the later treaty regulating the same subject-matter binding the parties takes precedence over the earlier treaty.¹⁵ Therefore, the order of entry into force of potentially conflicting treaties can be crucial.

14. In that regard, it is useful to consider the example of a UK supplier seeking to offer EU goods or services in New Zealand assuming, first, that the UK accedes to the CPTPP later than the entry into force the UK-NZ FTA (below, para 15); and, second, the opposite sequence (below, para 16).

15. Currently, and by virtue of the UK's and New Zealand's GPA membership, the position of the UK supplier is controlled by the GPA—which guarantees access to remedies inclusive of *'corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both'*, without the possibility of excluding such compensation on public interest grounds. Given the identical regulation under the GPA and the UK-NZ FTA, the position would also remain unchanged once the UK-NZ FTA enters into force. However, this situation would change when the UK accedes the CPTPP, as the latter foresees the possibility of excluding financial compensation on public interest grounds (above, paras 09-10).

16. Conversely, it can be envisaged that the current GPA position is first altered by the entry into force of the CPTPP, which would introduce the risk of exclusion of financial compensation on public interest grounds, but which would then be reversed and realigned with the GPA standard if the UK-NZ FTA was the latest to enter into force.

17. Therefore, the final state of affairs concerning the enforcement of procurement liberalisation rules between the UK and New Zealand depends on a time sequence that is beyond the control of the respective treaty negotiators. Compounded, the total volume of potential deviations from the GPA in the growing network of international treaties the UK is seeking to activate, both with GPA and non-GPA parties, is impossible to foresee. This is not entirely consistent with negotiating objectives concerning clarity, simplicity and enforceability and, more generally, with the fact that the UK is generally willing to guarantee GPA procedural rights to other jurisdictions (for now, GPA jurisdictions, but potentially also non-GPA jurisdictions taking a GPA+ approach equivalent to the UK-NZ FTA). Ultimately, this points to a foundational inconsistency in the design

¹⁴ Above (n 8). See also A Sanchez-Graells, 'Deviating from the GPA in bilateral or multilateral FTAs -- how good or effective is that regulatory strategy?' (8 Mar 2022), available at <https://www.howtocrackanut.com/blog/2022/3/8/deviating-from-the-gpa-in-bilateral-or-multilateral-ftas> (last accessed 13 Mar 2022).

¹⁵ See Oral evidence: UK trade negotiations: Agreement with Australia, HC 1002, Q149.

of trade liberalisation policy and its rollout across multiple FTAs regulating procurement in a (quasi) simultaneous manner.

4. Conclusion

18. Despite the UK Government's negotiating goal of securing 'access that goes beyond the level set in the [GPA] and is based on clear and enforceable rules and standards' (GPA+ aspiration), the procurement chapter in the UK-NZ FTA contains some GPA- deviations that alter or limit fundamental obligations under the GPA (paramount, the national treatment regime). Conversely, the UK-NZ FTA succeeds in creating a GPA+ regime in areas (remarkably, access to remedies) where the CPTPP (and the UK-AUS FTA) also deviate from the GPA in a GPA- fashion. Given the parallel development of procurement rules applicable to the UK and New Zealand (and Australia) in a bilateral (UK-NZ FTA) and multilateral (CPTPP) manner, there are important issues of interaction across treaties that need further consideration. The uncertainty and potential randomness in the sequence of entering into force of the different treaties creates legal uncertainty, including the possibility to preserve genuine GPA+ aspects of specific treaties, such as the UK-NZ FTA (as it concerns remedies). It is thus once again submitted that UK interests would be better served if free trade agreements including the regulation of procurement matters with GPA parties adopted the approach of incorporating the parties' obligations and coverage under the GPA by reference, in the same manner as the TCA. If at all possible at this stage, it would also be desirable for the procurement chapter in the UK-NZ FTA (as well as that in the UK-AUS FTA and, perhaps even that of the CPTPP, although its plurilateral nature creates its own challenges) to be revised in the same manner.

Biographical information

Professor Albert Sanchez-Graells is a Professor of Economic Law at the University of Bristol Law School and Co-Director of its Centre for Global Law and Innovation. He is also a former Member of the European Commission Stakeholder Expert Group on Public Procurement (2015-18) and of the Procurement Lawyers' Association Brexit Working Group (2017), as well as a current Member of the European Procurement Law Group.

Albert is a specialist in European economic law, with a focus on competition law and procurement. His research concentrates on the way the public sector interacts with the market and how it organises the delivery of public services, especially healthcare. He is also interested in general issues of sectorial regulation and, more broadly, in the rules supporting the development and expansion of the European Union's internal market, as well as the EU's trade relationships with third countries, including the UK.

His influential publications include the leading monograph *Public Procurement and the EU Competition Rules*, 2nd edn (Bloomsbury-Hart, 2015). He has also co-authored *Shaping EU Public Procurement Law: A Critical Analysis of the CJEU Case Law 2015–2017* (Wolters-Kluwer, 2018), edited *Smart Public Procurement and Labour Standards. Pushing the Discussion after RegioPost* (Hart, 2018), and coedited *Reformation or Deformation of the Public Procurement Rules* (Edward Elgar, 2016), *Transparency in EU Procurements. Disclosure Within Public Procurement and During Contract Execution* (Edward Elgar, 2019) and *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar, 2021). Most of his working papers are available at <http://ssrn.com/author=542893> and his analysis of current legal developments is published in his blog <http://www.howtocrackanut.com>.