Written Evidence submitted to the House of Commons International Trade Committee, following up on the Oral Evidence provided during the session of 9 March 2022 on "UK trade negotiations: Agreement with Australia"

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Executive summary

- Potential clashes between the procurement chapter of the UK-Australia Free Trade Agreement (UK-AUS FTA) and the World Trade Organisation Government Procurement Agreement (GPA) on which it is based are regulated by Art 30(4) of the Vienna Convention on the Law of Treaties.
- This means that the UK and Australia can give effect to deviating norms between themselves but need to leave intact the rights of GPA parties. This is unlikely to create any problems where the UK-AUS FTA goes beyond the GPA regulatory baseline (GPA+), but will be problematic in those areas where the UK-AUS FTA varies or reduces obligations under the GPA (GPA-).
- The situation is also complicated by the triangular nature of most procurement covered by the UK-AUS FTA, which is also covered by the GPA. In those cases, pragmatically, most GPA+ obligations are likely to benefit all GPA parties (or even third parties). Conversely, concerning GPA- issues, to avoid infringing their GPA obligations towards third parties, the UK and Australia are bound to accept an interpretation of the UK-AUS FTA that brings it back in line with the GPA, thus eliminating any practical effects of their deviating (GPA-) rules.
- This is particularly the case of the treatment of UK and AUS suppliers offering goods or services from other GPA jurisdictions, which are likely to benefit from national treatment despite the seemingly restrictive approach of the UK-AUS FTA. To avoid breaching their international obligations under the GPA, both the UK and Australia must refrain from any discrimination of UK/AUS suppliers offering goods or services originating anywhere in the 'GPA club'. However, the existence of legal uncertainty on this issue is likely to cause undesirable chilling effects.
- By exception to the 'gravitation' towards GPA standards, where only UK and Australian economic operators are concerned, the deviating (GPA-) rules of the UK-AUS FTA can prevail, which can have the counterintuitive effect of placing those economic operators in a worse legal position despite the existence of the FTA in addition to the GPA.
- This is particularly the case of restricted access to remedies under the UK-AUS FTA, which can however be the object of challenges both on grounds of GPA-related interpretation and, more generally, under common law doctrines of access to justice.
- A direct incorporation of the GPA rules and an explicit conflict clause giving the GPA precedence over the UK-AUS FTA (or any other FTAs) would be a preferable regulatory technique, and one that has already been used by the UK, eg in the UK-EU Trade and Cooperation Agreement.
- The GPA+ obligations on the conduct of procurement by electronic means under the UK-AUS FTA will have no or very limited practical effects.
- The headline figure of £10bn of new legally guaranteed market access for UK businesses per year indeed needs to be cautiously assessed, both regarding how much market access is 'new, or likely to be of true practical relevance to UK businesses, and considering increasing possibilities to de facto localise procurement opportunities (either directly or indirectly) as a result of the inclusion of environmental and social value considerations.

Submission

00. This written submission provides additional details on some of the questions on the regulation of procurement posed by Committee Members during the Oral Evidence Session indicated above.

Q1. What are the legal consequences of a bilateral international agreement replicating, but deviating from, a previous multilateral agreement to which both parties are of the bilateral agreement are members – in particular concerning deviations in a bilateral Free Trade Agreement from the World trade Organisation Government Procurement Agreement?

1. General regulatory background regarding conflicting treaty norms

01. Art 30 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[1] controls the matter of conflicting treaty norms. Before engaging in an assessment of its conflict rules, it is worth stressing that a conflict between treaty norms will only arise where an interpretation of the later treaty that avoids it is either not possible, or not accepted by the parties.[2] Equally, or in a mutually reinforcing manner, understanding how the conflict norms would operate can have an effect on the interpretation of an obligation under the later treaty that the parties are likely to (voluntarily) adopt. In reality, in cases of potential conflict between treaty norms, there will be a clear interpretive 'pull' to try to ensure coherence, or minimise divergence, through interpretation of the later treaty which takes account of the obligations owed to others through the earlier agreement. It is a practical approach which can lessen (but cannot eliminate) the difficulties resulting from treaty clashes. In particular because Art 30 VCLT applies to successive treaties relating to the same subject matter and establishing the subject matter of a treaty can in itself be a disputed issue.[3]

02. *Explicit regulation.* In case of conflict between treaty norms other than the Charter of the United Nations (which has precedence; ex Art 30(1) VCLT), Art 30(2) VCLT foresees the possibility of explicit regulation via a conflict clause, in which case: '*When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail*'.

03. *Unregulated conflicts between the same parties.* In the absence of an explicit conflict clause, the VCLT establishes residuary rules, distinguishing two situations. First, in the case of successive treaties with identical parties, Art 30(3) VCLT establishes precedence for the later treaty,[4] and '*the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*'.

04. *Unregulated conflicts between different parties.* The second situation concerns successive treaties with different parties, for example a successive treaty between some but not all the

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Note: All websites last accessed on 9 March 2022.

[1] https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[2] Indeed, in some cases, they can avoid the 'conflict' altogether by agreeing to a GPA-compliant interpretation; see eg A Orakhelashvili, 'Article 30' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties. A Commentary*, vol. 1 (OUP 2011) 764, 776 at para 31; see also J Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 192, 203.

[3] However, as this is not a difficulty concerning the specific field of public procurement, this submission will not address it in any detail. For discussion, see A Orakhelashvili, 'Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter' (2016) 31(2*) ICSID Review - Foreign Investment Law Journal* 344-365.

[4] Subject to other general principles, such as those resulting from a conflict between *lex posterior* and *lex specialis*, see R Kolb, *The Law of Treaties. An Introduction* (Edward Elgar 2016) 190.

signatories of the previous treaty. In this case, Art 30(4) VCLT establishes two rules, based on a distinction between the effects of the new treaty between its signing parties, and its effects vis-à-vis the other signatories of the previous treaty. Between the parties to both treaties, the rule in Art 30(4)(a) is the same as in Art 30(3) VCLT. That is, the newer treaty takes precedence and '*the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*'. Conversely, and due to the relativity of treaty rights (Art 34 VCLT), under Art 30(4)(b) VCLT, '*as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.*' Or, in other words, Art 30(4) VCLT establishes that '***the newer treaty may be applied by its parties but only by leaving intact the rights of those that are only parties to the earlier treaty***'.[5]

05. *Modification of treaties between certain of their parties only.* Art 30(5) VCLT clarifies that the two rules in Art 30(4) are subject to Art 41 VCLT concerning agreements to modify multilateral treaties between certain parties only, under the rules of those multilateral treaties. Art 41 VCLT covers two situations: (a) the possibility that such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty, it does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, and it does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

06. *Art 30 VCLT does not provide explicit residual rules concerning 'triangular situations'*, where the same action by one of the parties to both conflicting treaties affects the rights resulting from both treaties at the same time (albeit for different parties), and thus unavoidably breaches one of the treaties[6] due to the 'variable geometry' of treaty-resulting obligations. In that case, the possibility of international responsibility of a State for the breach of one of the treaties arises (Art 30(5) VCLT)– especially in the cases falling under Art 30(4)(b) VCLT.[7]

07. Given this possibility, as mentioned above (para 01), where a State is party to two treaties imposing different obligations for triangular situations, it will have a strong incentive to try to resolve the conflict through interpretation or, to the extent allowed by the respective treaties, it will have a strong incentive to comply with the most demanding treaty in order to avoid incurring in international responsibility. Where avoiding breach of either of the treaties in those ways is not possible, States retain discretion to choose which treaty to breach[8] (under the so-called 'principle of political decision'[9]) and may have an incentive to breach the treaty that would trigger the least (potential) international responsibility, which may well be the newer treaty with a more limited number of parties.

2. Application to the procurement context

08. The issue of conflicting treaty norms and their potential effect on the interpretation of the deviating clauses of the later treaty is relevant in the context of public procurement, in particular given the regulatory overlap and divergence between the multilateral World Trade Organisation Government Procurement Agreement (GPA),[10] to which both Australia and the UK were parties prior

[5] Klabbers, above n 2, 194.
[6] Orakhelashvili, above n 2, 792 at para 75.
[7] International Law Commission, Draft Articles on the Law of Treaties with commentaries (1966) 271, para (11), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf. See also K von der Decken, 'Article 30' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (Springer 2018) 539, 551.
[8] Kolb, above n 4, 186.
[9] Klabbers, above n 2, 195 and 204-205.

to December 2021,[11] and the government procurement chapter of the UK-Australia Free Trade Agreement (UK-AUS FTA) of December 2021.[12] This issue, which also arises in the context of other overlaps and potential treaty clashes between the GPA and other plurilateral or bilateral free trade agreements to which the UK is party or seeks to become a party, needs to be assessed under the general regulatory background above (section 1).

09. *Modification of the GPA between certain of its parties only.* Given that both the UK and Australia are GPA parties, one possibility would be to consider their bilateral agreement as a modification of the GPA. In that regard, the GPA includes a specific clause on modifications (Art XXII(11) GPA) that would trigger Art 41 VCLT. However, Art XXII(11) GPA requires acceptance of the intended treaty modification by two thirds of the GPA parties, which makes bilateral modification of the agreement impossible (other than concerning schedules of coverage, which are structurally negotiated on a bilateral basis). Therefore, the relevant analysis is based on Art 30 VCLT.

10. *Explicit conflict clause in the UK-AUS FTA?* In relation to Art 30(2) VCLT, it should be stressed that the procurement chapter of the UK-AUS FTA does not contain any explicit reference or conflict clause regarding its interaction with the GPA.[13] However, the UK-AUS FTA does include a general clause on its relation to other international agreements. According to Art 1.2(1) UK-AUS FTA, '*The Parties affirm their existing rights and obligations with respect to each other under existing international agreements to which both Parties are party, including the WTO Agreement*.' Notwithstanding, it is not clear that this qualifies as an explicit conflict clause meeting all requirements of Art 30(2) VCLT, as Art 1.2(2) UK-AUS FTA establishes that: '*If a Party considers that a provision of this Agreement is inconsistent with a provision of another agreement to which it and the other Party are party, the Parties shall, on request, consult with a view to reaching a mutually satisfactory solution.*' This may be insufficient to meet the automaticity threshold required to conclude that the UK and Australia have established a sufficiently precise conflict clause to the effect that previous international agreements have precedence over the UK-AUS FTA, as the resolution of the conflict seems to depend on further consultations between the UK and Australia.

11. *An unregulated conflict.* Therefore, the potential conflict between the UK-AUS FTA procurement provisions and the GPA seems to be governed by the rule in Art 30(4)(a) VCLT: ie **the FTA prevails in the procurement relationship between the UK and Australia, with the GPA provisions applying only to the extent they are compatible with the FTA** – that is, unless the parties reach a different conclusion under Art 1.2(2) UK-AUS FTA. In any case and regardless of this interpretation, however, the rule of Art 30(4)(b) stands and, **in their relationships with other GPA members, both the UK and Australia are bound by the GPA, regardless of any conflict with the FTA**.

12. This makes the existence of unregulated 'triangular situations' particularly challenging where the UK-AUS FTA deviates from the GPA in a manner that changes or limits the parties' obligations towards each other ('GPA-'), as well as practically making the deviations that increase the parties' obligations ('GPA+') of benefit to all GPA parties.[14] Given that the extensions of coverage under the

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[10] https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

[11] https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. Australia joined on 5 May 2019, and the UK joined on 1 January 2021.

[12] https://www.gov.uk/government/publications/uk-australia-fta-chapter-16-government-procurement.

[13] It also does not include any reference or conflict clause regarding its interaction with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to which the UK wants to accede and to which Australia is already a signatory. This can compound the issue of multi-layered regulation of procurement rules raised by the interaction of the UK-AUS FTA and the GPA in the future. The CPTPP is available at https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/15.-Government-Procurement.pdf.

[14] A Sanchez-Graells, Written Evidence submitted to the House of Lords International Agreements Committee on

UK-AUS FTA are only incremental above the general coverage included in the GPA schedules for each of the parties, **most of the procurement opportunities covered by the UK-AUS FTA will be subject to dual regulation—or, in other words, most procurement covered by the UK-AUS FTA will generate 'triangular situations'**.[15]

13. GPA- situations pose significant legal uncertainty and, while it is possible that some of them remain in place (counterintuitively, to the detriment of either UK or Australian economic operators vis-à-vis other GPA parties *despite* the existence of the UK-AUS FTA), other deviations will likely lack any practical relevance if the UK and Australia want to avoid international responsibility for breach of the GPA. Deviations concerning restricted access to procurement remedies by aggrieved UK or Australian bidders fall in the first category, although they are likely to be challenged both on grounds of GPA-related interpretation and, more generally, under common law doctrines of access to justice,[16] while deviations in national treatment obligations fall under the second one, as below Q2.

Q2. Given that Article 16.4 UK-AUS FTA modifies the GPA text on national treatment obligations, how should a UK supplier of non-UK/AUS goods interpret their position under the UK-AUS FTA?

14. Under the GPA, the national treatment obligation requires the parties to '*accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party* ***offering the goods or services of any Party****, treatment no less favourable …*' (Art IV(1) emphasis added). The underlined clause leaves the possibility open for differential treatment of suppliers of a GPA party offering goods or services of a non-GPA party but extends the national treatment obligation to suppliers offering goods of services originating anywhere in the 'GPA club'. This is in line with the WTO GPA non-discrimination requirement, which precludes its parties from '*discriminat[ing] against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement* ***are goods or services of any other Party***' (Art IV(2) emphasis added). Again, the possibility is open for differential treatment of suppliers of a GPA party, but only to those offering goods or services of a non-GPA party.

15. Both GPA clauses are altered in the UK-AUS FTA. Art 16.4(1) simply states that the parties '*shall accord immediately and unconditionally to the goods and services of the other Party and to the suppliers of the other Party, treatment no less favourable …*', with no explicit reference to the origin of the goods or services offered by such suppliers. In turn, Art 16.4(2)(b) prevents '*discriminat[ion] against a locally established supplier on the basis that the good or service offered by that supplier for a particular procurement is a good or service of the other Party*.' The omission in Art 16.4(1) and the rewording in Art 16.4(2)(b) ostensibly seek to remove the parts of the national treatment and non-discrimination clauses in the GPA regime that refer to domestically established suppliers offering goods of GPA parties other than the UK and Australia, as that could be seen as going beyond the scope of the UK-AUS FTA. However, in doing so, the UK-AUS FTA raises interpretive issues concerning the possibility of differential treatment of UK or AUS suppliers offering the goods or services of a third party, in particular those of a GPA party.

16. A literal interpretation of Art 16.4(1)–as per Art 31 VCLT–would suggest that suppliers of either of the parties are protected under the national treatment regime, even if they offer goods or

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"UK-Australia trade negotiations", https://committees.parliament.uk/writtenevidence/43300/pdf/.

[15] A Sanchez-Graells, 'The procurement chapter in the UK-Australia free trade agreement – GPA+ or GPA complex?' (January 21, 2022) at 2, https://ssrn.com/abstract=4014409.

[16] Ibid, at 4-6.

services from third parties, whether those are GPA or not (unless domestic suppliers offering goods or services from third parties are also subjected to specific differential treatment—eg exclusion—which would set the benchmark of the national treatment obligation). Such an interpretation would significantly expand the scope of the national treatment under the UK-AUS FTA compared to the GPA in relation to (non-GPA) third country goods and services, which does not seem to plausibly represent the parties' intent under the UK-AUS FTA. However, such literal interpretation would follow Art 30(4)(a) VCLT.

17. Conversely, a systematic interpretation that took account of the fact that Art 16.4(2)(b) only refers to locally established suppliers offering goods or services of the other party (ie either UK or AUS), would suggest an implicit requirement in Art 16.4(1) that suppliers are only protected as long as they offer UK or AUS goods or services. While this interpretation seems more aligned with the putative intention of the parties under the UK-AUS FTA, it does create problems in case of dual regulation procurement (or triangular situations), as UK and/or AUS suppliers offering goods or services of a different GPA origin could seek GPA national treatment of the goods or services themselves, which attempted exclusion (under a 'GPA-' approach) would likely breach Art 30(4)(b) VCLT.

18. To avoid breaching their international obligations under the GPA (Art IV(1)) in relation to the goods or services of other GPA parties offered by UK or AUS suppliers, both the UK and Australia must refrain from any discrimination of UK/AUS suppliers offering goods or services originating anywhere in the 'GPA club'. This means that, by virtue of the operation of the rule in Art 30(4)(b) VCLT in relation to the goods or services of the GPA parties protected by Art IV(1)GPA,[17] the interpretation limiting the scope of protection under Art 16.4(1) cannot have any practical relevance.

19. Conversely, UK or Australian suppliers offering non-GPA goods or services may attempt to push for the maximalist literal interpretation sketched above (para 16), based on Art 30(4)(a) VCLT. However, given the explicit constraints in Art 16.4(2)(b) UK-AUS FTA, this is unlikely to succeed under the broader rules of interpretation in the VCLT.

20. Even if these views are correct and there is no practical effect resulting from the deviation in the UK-AUS FTA text from the GPA standard wording, **the mere existence of the legal uncertainty resulting from such deviation is undesirable.** It is also difficult to ascertain whether any practical effects *intended* by the UK or Australian governments are neutralised by the rules in the VCLT, in which case there may be knock-on effects concerning the balance of reciprocal concessions across the procurement chapter, or even across chapters, of the UK-AUS FTA. **A direct incorporation of the GPA rules and an explicit conflict clause giving the GPA precedence over the UK-AUS FTA (or any other FTAs)**[18] **would be a preferable regulatory technique** from this perspective,[19] and one that has already been used by the UK, eg in the UK-EU Trade and Cooperation Agreement.[20]

Q3 How significant are the GPA+ obligations on the conduct of procurement by electronic means under Art 16.4(4) of the UK-AUS FTA?

[17] Or even by virtue of interpretation in line with Art 31(3)(c) VCLT; see Klabbers, above n 2, 203.
[18] The same issues seem to arise under the UK-New Zealand FTA signed on 28 February 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056327/uk-new-zealand-free-trade-agreement-chapter-16-government-procurement.pdf.
[19] Sanchez-Graells, above n 15, at 2.
[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf. For discussion, see A Sanchez-Graells, Written Evidence to the House of Commons European Scrutiny Committee on "The institutional framework of the UK/EU Trade and Cooperation agreement", https://committees.parliament.uk/writtenevidence/37958/pdf/.

21. Art 16.4(4) UK-AUS FTA establishes that '*When conducting covered procurement, a procuring entity shall use electronic means: (a) for the publication of notices; and (b) to the widest extent practicable, for information exchange and communication, the publication of tender documentation in procurement procedures, and for the submission of tenders.*'

22. While this imposes requirements beyond the GPA, **these obligations are rather modest**, as they fall short of requiring the implementation of an end-to-end e-procurement system or any rules on eg electronic signatures, or e-invoicing. Generally, the requirements do not go beyond what is already required under UK public procurement legislation,[21] or significantly beyond the best endeavours expected from Australia under the CPTPP.[22] It can be expected that the requirements under Art 16.4(4) UK-AUS FTA **will have no or very limited practical effects**, given eg the widespread use of electronic communications in both jurisdictions and the already electronic publication of notices on Find a Tender[23]/Contracts Finder[24] in the UK, and on AusTender[25] in Australia (with perhaps some more impact at Australian sub-federal level under Art 16.6 UK-AUS FTA). At the same time, the lack of harmonisation of eg requirements on electronic signatures or e-invoicing can remain as practical obstacles to tendering in either of the jurisdictions.

23. It is also worth noting that any expansion in the use of electronic means beyond this standard because of domestic policy initiatives—such as, in the UK, the ongoing *Transforming Public Procurement* process[26]—will benefit not only economic operators covered by the UK-AUS FTA, or even the GPA, but any economic operators engaging with procurement opportunities and tender procedures. Given the strong steer for the deployment of end-to-end procurement systems, and for the adoption of open data standards, especially the Open Contracting Data Standard (OCDS),[27] **this type of requirements is likely to be quickly (if not already) superseded by practical developments.**

Q4. The UK-AUS FTA impact assessment indicates that 'Australia has offered the UK more legally guaranteed procurement market access than it has offered in any other FTA, amounting to approximately £10 billion of new legally guaranteed market access for UK businesses per year.' How cautiously should this figure be assessed?

24. The headline figure of £10bn of new legally guaranteed market access for UK businesses per year indeed needs to be cautiously assessed. There are some difficulties in ascertaining the soundness of this estimate included in the UK-AUS FTA impact assessment[28] due to the opacity of the methodology used to set it by the Australian negotiation team and its verification by the Department for International Trade (DIT).

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[21] Regs. 22 and 52 Public Contracts Regulations 2015.

[22] Art 15.4(8) CPTPP establishes that its parties, including Australia, 'shall seek to provide opportunities for covered procurement to be undertaken through electronic means, including for the publication of procurement information, notices and tender documentation, and for the receipt of tenders.'

[23] https://www.gov.uk/find-tender.

[24] https://www.gov.uk/contracts-finder.

[25] https://www.tenders.gov.au/.

[26] See https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement, especially chapter 6 of the original green paper.

[27] https://www.open-contracting.org/data-standard/.

[28] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041629/impact-assessment-of-the-free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-australia.pdf.

25. Moreover, the additional public details available eg in another DIT document on 'UK-Australia Free Trade Agreement: Benefits for the UK'[29] raise **additional concerns**. These relate **both to how much market access is indeed 'new'**—as eg the claim that 'UK businesses will now have a right to bid for financial and business service contracts procured by the Australian Financial Security Authority' is at least imprecise[30]—**or likely to be of true practical relevance to UK businesses**—eg in relation the expected opportunities in the Australian rail concessions market, given the large penetration of foreign-owned rail operators in the UK itself, which raises some questions as to the industrial base expected to benefit from this liberalisation.[31]

26. More generally, it should be noted that 'guaranteed market access' does not necessarily mean much of an advantage in practical terms, bearing in mind important economic aspects of UK-Australia trade (eg transport costs for goods, or differential regulatory requirements for the provision of services, subject to further harmonisation under the UK-AUS FTA itself, in particular concerning digital services), as well as **increasing possibilities to *de facto* localise procurement opportunities (either directly or indirectly) as a result of the inclusion of environmental and social considerations**, which is explicitly allowed in Art 16.17 UK-AUS FTA, or via the inclusion of data governance constraints (eg under Art 16.9(7) in relation to sensitive government information, including the possibility of imposing 'specifications that may affect or limit the storage, hosting or processing of that information outside the territory of the Party').

27. Environmental considerations can clearly play a role in diminishing the practical relevance of eg access to procurement for goods with a high carbon footprint relating to transport or differences in energy sources used in their production in different jurisdictions. Similarly, although there are legal uncertainties surrounding their compatibility with the UK-AUS FTA[32] (and other international agreements binding Australia, and the UK), it is also important to note that social value and similar considerations—which the UK Government also already promotes,[33] and seeks to maximise as a result of its *Transforming Public Procurement* programme[34]—can practically neutralise the relevance of some of the market access. Noticeably, there is a specific rule in Division 2 of the Australian Commonwealth Procurement Rules[35] requiring Australian public buyers to consider 'the benefit of a procurement above A$4 million in value to the Australian economy', which can have a difficult interaction with international commitments.

28. In practice, foreign tenderers seem to be generally allowed to participate in Australian procurement despite not being covered by an FTA or the GPA.[36] However, less than 4% of Australian public contracts (representing less than 9% of value) are awarded to businesses without an Australian address.[37] Similarly, only 2% of UK contracts by value goes to Australian tenderers.[38] This

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[29] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041548/uk-australia-free-trade-agreement-fta-benefits-for-the-uk.pdf.
[30] For more details, see Sanchez-Graells, above n 15, at 7.
[31] Ibid, at 6.
[32] See G Wood, A L Petterd and S Pierce, The Government Procurement Review: Australia (Law Reviews, 27 May 2021) at para iii on Eligibility, https://thelawreviews.co.uk/title/the-government-procurement-review/australia.
[33] See eg Public Services (Social Value) Act 2012, PPN 06/20 – taking account of social value in the award of central government contracts (24 September 2020), or PPN 06/21: Taking account of Carbon Reduction Plans in the procurement of major government contracts (updated 27 August 2021).
[34] Above, n 26. See also Procurement Policy Note 05/21: National Procurement Policy Statement (3 June 2021).
[35] https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules.
[36] Wood, Petterd and Pierce, above n 32, para iii on Eligibility.
[37] https://www.finance.gov.au/government/procurement/statistics-australian-government-procurement-contracts-.
[38] European Commission, Study on the measurement of cross-border penetration in the EU public procurement market (2021) Table 2-7, https://op.europa.eu/s/vUnu.

reinforces the view that the practical advantages of legally guaranteed procurement market access may be relatively limited, either due to regulatory or economic factors. Consequently, even if the headline figure of £10 billion of new legally guaranteed market access for UK businesses per year is correctly estimated, the conversion rate between those opportunities and contract awards is likely to be very significantly smaller than that.

Biographical information

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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.