

Written Evidence to the House of Commons European Scrutiny Committee on “The institutional framework of the UK/EU Trade and Cooperation agreement”

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Submission

This document addresses some of the questions formulated by the House of Commons European Scrutiny Committee in its inquiry on “The institutional framework of the UK/EU Trade and Cooperation agreement” and, in particular:

- *What are the most important powers of the Trade and Cooperation Agreement (TCA) Partnership Council and the different Specialised Committees and what could the practical impact of the exercise of these powers be?*
- *What are the key features of the dispute resolution procedures provided for in the TCA and what are the likely legal and policy implications of these for the UK? How closely do they follow precedent in other trade agreements and do they raise any concerns with respect to the UK’s regulatory autonomy?*
- *How could the UK/EU TCA institutions be utilised by the UK and EU to raise and, where possible, address, concerns about legal and policy developments on the other side which are of importance to them respectively (e.g. for the UK, changes in EU regulation in key areas like financial services, pharmaceuticals and energy)?*
- *What should the Government’s approach to representing the UK in meetings of the TCA’s joint bodies be? Should the Devolved Administrations be involved in discussions that relate to devolved competences?*

1. Background

01. This submission focuses on the field of public procurement, which is of primary economic interest to both the UK and the EU. According to a recent report for the European Commission,¹ cross-border procurement from the EU27 represented on average 20% by value of the UK’s total procurement expenditure for the period 2016-2019.² In turn, cross-border procurement from the UK represented on average 15% by value of EU27 procurement expenditure for the same period.³ Most of this cross-border procurement was indirect (17.6% for EU27 in UK, and 9% for UK in EU 27), meaning that tenders were won by companies located in the same country as the contracting authority but controlled by companies in a foreign country⁴—in most common cases, this meant that public contracts were awarded to subsidiaries of large foreign corporate groups, or to SMEs controlled by those groups. Direct cross-border procurement—where contracts are awarded to companies located in a foreign country, which are either independent or controlled by companies in the same or a third foreign country—had a smaller but still relevant economic scale (2.3% for EU27 in UK, and 6% for UK in EU 27).

Note: all websites last visited on 20 July 2021.

¹ Prometeia SpA, BIP Business Integration Partners – Spa, Economics for Policy a knowledge Center of Nova School of Business and Economics Lisboa, *Study on the measurement of cross-border penetration in the EU public procurement market. Final report* (Mar 2021), available at <https://op.europa.eu/s/pmUR>.

² These figures aggregate direct and indirect procurement as reported in Table 2-5 of the Report (n 1).

³ These figures aggregate direct and indirect procurement as reported in Tables 2-6 and 2-8 of the Report (n 1).

⁴ Report (n 1) 18.

02. The economic relevance of both types of cross-border procurement is reflected in the bilateral market access commitments resulting from the UK's accession to (and the EU's continued membership of) the World Trade Organisation Government Procurement Agreement (WTO GPA),⁵ and the additional bilateral market access commitments in the UK-EU Trade and Cooperation Agreement (TCA)⁶—which Annex 25 largely replicates the pre-Brexit reciprocal market access commitments between the UK and EU27,⁷ with the only exception of the explicit exclusion of healthcare services. However, given that the pre-Brexit procurement-related import penetration for human health services had an average value close to null percent of public expenditure in both the UK and most EU27 countries,⁸ this exclusion is unlikely to have significant practical effects.

03. The TCA contains several relevant provisions to facilitate direct and indirect cross-border trade through the award of public contracts in Title VI of Heading One of Part Two (Arts 276 and ff). Of those provisions, and particularly in view of the UK's intended reform of domestic procurement rules,⁹ the rules more likely to trigger practical implementation issues seem to be: Article 280 on supporting evidence; Article 281 on conditions for participation relating to prior experience; Article 282 on registration systems and qualification procedures; Article 284 on abnormally low prices, in particular as it relates to subsidy control issues;¹⁰ Article 285 on environmental, social and labour considerations;¹¹ Article 286 on review procedures; and Article 288 on the national treatment of locally established suppliers, which is applicable beyond 'covered procurement' (Art 277) and of particular importance to indirect cross-border procurement. The TCA also includes specific rules for the modification and rectification of market access commitments (Arts 289 to 293), which can become highly relevant if new trading patterns emerge during the implementation of the TCA that show a rebalancing of previous trends (see above para 01).

04. Institutionally, in addition to being under the general powers of the Partnership Council (Art 7(3)), public procurement regulation falls within the remit of the Trade Partnership Committee (Art 8(1)(a)), and even more specifically within the remit of the Trade Specialised Committee on Public Procurement (Art 8(1)(h), the 'TSC on Procurement'), which is specifically tasked with addressing matters covered by Title VI of Heading One of Part Two, under the supervision of the Trade Partnership Committee (Art 8(2)(d)).¹² The TSC on Procurement is meant as the primary forum for the Parties to exchange information, discuss best practices and share implementation experience (Art 8(3)(f)), and has the tasks of monitoring the implementation of the

⁵ WTO, *Revised Agreement on Government Procurement and WTO related legal instruments* (2012) available at https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.

⁶ Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part, made in Brussels and London, 30 December 2020. Treaty Series No.8 (2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf.

⁷ In part, this is a result of incorporating the UK's and EU27's market access commitments under the WTO GPA; Article 277(1) UK-EU TCA. See A Sanchez-Graells, 'Public procurement regulation', in H Kassim, S Ennis and A Jordan (eds), *UK Regulation after Brexit* (Feb 2021) 23-24, available at <https://ukandeu.ac.uk/wp-content/uploads/2021/02/UK-regulation-after-Brexit.pdf>.

⁸ See Table 1-6 of the Report (n 1).

⁹ Cabinet Office, *Green Paper Transforming Public Procurement* (15 Dec 2020), available at <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>. For analysis, see A Sanchez-Graells, 'The UK's Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication?' (2021) 16(1) *European Procurement & Public Private Partnership Law Review* 4-18, pre-print version available at <https://ssrn.com/abstract=3787380>.

¹⁰ Subsidy control issues are not covered in detail in this written submission, as they are the object of parallel regulation in the UK-EU TCA.

¹¹ Environmental, social and labour considerations are not covered in detail in this written submission, as they are the object of parallel regulation in the UK-EU TCA.

¹² For a general description of the governance and dispute resolution mechanisms in the TCA, see House of Commons Library (S Fella), *The UK-EU Trade and Cooperation Agreement: governance and dispute settlement* (19 February 2021) Briefing Paper Num. 9139, available at <https://researchbriefings.files.parliament.uk/documents/CBP-9139/CBP-9139.pdf>, and idem, 'Governing the new UK-EU relationship and resolving disputes' (24 Feb 2021), available at <https://commonslibrary.parliament.uk/governing-the-new-uk-eu-relationship-and-resolving-disputes/>.

procurement title of the TCA (Art 8(3)(a)) and discussing technical issues arising from TCA implementation (Art 8(3)(e)).

05. It can be expected that any future disputes over the regulation of public procurement will first emerge in the context of the activities of the TSC on Procurement, with potential escalation to the Trade Partnership Committee so that it can exercise its function of exploring the most appropriate way to prevent or solve any difficulty that may arise in relation to the interpretation and application of the TCA (Art 8(2)(e)); further escalation to the Partnership Council in relation to its power to make recommendations to the Parties regarding the implementation and application of the TCA (Art 7(4)(b)); and, ultimately, the possible launch of a formal dispute under Title I of Part Six of the TCA. Therefore, this submission will be primarily concerned with the configuration and likely operation of the TSC on Procurement and will only touch briefly on the more general powers of the Trade Partnership Committee and the Partnership Council. Dispute resolution mechanisms are not considered, except in relation to the potential overlap with those of the WTO Government Procurement Agreement.

2. Powers of the TSC on Procurement and of the Trade Partnership Committee, and practical impact of their exercise

06. The powers of the TSC on Procurement, like those of all other Trade Specialised Committees, are detailed in Article 8(3) TCA. Other than the general powers to monitor the implementation of the TCA, discuss technical issues and provide an information exchange forum mentioned above (para 04), the most important practical power would seem to be that of adopting decisions where the TCA (or a supplementing agreement) so provides (Art 8(3)(d)). However, it should be noted that the TCA does not foresee this possibility and that the TSC on Procurement is only mentioned in the provision that envisages its creation (Art 8(1)(h)). Therefore, the TSC on Procurement is currently devoid of decision-making powers and it can only be seen as a consultative technical forum primarily geared towards information exchange and technical dialogue. This is reflected in eg the way the European Commission presents the role of the TSC on Procurement, which is only envisaged as a feeder mechanism towards discussions at the Trade Partnership Committee, seen as the 'principal formation for trade matters'.¹³ This is also reflected in the current UK Government's view of the TSC on Procurement.¹⁴ Logically, it should also be the forum for the setting of common approaches to the UK and EU's cooperation in the international promotion of the mutual liberalisation of public procurement markets (Art 294(1)), and the most suitable forum for the mutual provision of annual statistics on covered procurement (Art 294(2)).

07. It should also be stressed that the TSC on Procurement and the Trade Partnership Committee are not involved in the procedures leading to the modification or rectification of the market access commitments of the UK and the EU under the TCA (Arts 289 to 293). Indeed, these procedures are foreseen as strictly bilateral. While it is possible (and likely) that any discussions and possible consultations launched by one of the Parties in relation to market access commitments are initially hosted in the TSC on Procurement, it is clear that the latter has no decision-making powers. It is also clear that the only power of the Trade Partnership Committee in relation to market access commitments is to formally amend the relevant Sub-section under Section B of Annex 25 once these have been mutually agreed, or as a result of a final decision ending a dispute (Art 293).

08. On the whole, the TCA does not grant any of its bodies with decision-making powers regarding the regulation of public procurement or their mutual market access commitments and, as a consequence, any future changes and any related disputes will remain strictly inter-governmental, with the TSC on Procurement and the Trade Partnership Committee simply serving as a forum for the discussion of the relevant issues and for the exploration of amicable solutions that could prevent the launch of a formal dispute under Title I of Part Six of the TCA.

3. Dual dispute resolution regime

¹³ European Commission, Trade Policy, UK fact sheet (undated), available at <https://ec.europa.eu/trade/policy/countries-and-regions/countries/united-kingdom/>.

¹⁴ See eg answer to written question UIN 25876 of 1 July 2021, available at <https://questions-statements.parliament.uk/written-questions/detail/2021-07-01/25876>.

09. In case disputes could not be solved, it should be considered that there is a dual regime applicable in case of the TCA's procurement obligations that are 'substantially equivalent' to those resulting from the WTO GPA. Given that the TCA procurement rules are clearly based on the GPA (GPA+ approach), and that a significant part of the market access commitments directly derive from the UK's and the EU's GPA coverage schedules, this can be the case of the majority of potential disputes arising from the implementation of the TCA.

10. In connection to the dual dispute resolution regime, it should be noted that Article XX of the GPA provides that the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes also applies to disputes under the GPA. Therefore, as foreseen in Article 737 TCA, the party seeking redress would be able to select the forum in which to settle the dispute and, once chosen, it would be barred from initiating procedures under the other international agreement, unless the forum selected first failed to make findings for procedural or jurisdictional reasons. It is difficult to establish which of the two available routes is more likely to be used in case of a dispute under the TCA procurement rules, but it would seem that the TCA-specific dispute resolution mechanism would allow the UK and the EU to have their interests taken into account within the specific context of their bilateral relationship, rather than in the broader context of the multilateral relationships emerging from the WTO GPA. In that regard, this could be the preferable route.

4. How to best utilise these fora to address legal and policy developments

11. Like in most other trade areas, one of the challenges in keeping open trade in procurement markets across the UK and the EU concerns non-tariff barriers. This is clearly recognised in the TCA, for example in relation to documentary requirements applicable to the participation in tenders for public contracts (Art 280),¹⁵ or concerning conditions for participation such as prior experience (Art 281).¹⁶ One of the main risks going forward is that, in seeking to leverage public expenditure to achieve environmental and social goals (but also economic recovery goals, post-pandemic), both the UK and the EU are likely to create both mandatory and discretionary requirements that will increase compliance costs for economic operators seeking to tender for public contracts both in the EU and in the UK, as well as potential (implicit) preferential treatment for domestic suppliers. A clear recent example can be found in the UK's policy on 'net zero' for major government contracts, which seeks to impose 'as a selection criterion, a requirement for bidding suppliers to provide a Carbon Reduction Plan (using the template at Annex A) confirming the supplier's commitment to achieving Net Zero by 2050 in the UK, and setting out the environmental management measures that they have in place and which will be in effect and utilised during the performance of the contract'.¹⁷ This could disadvantage tenderers with no specific plans coming from jurisdictions without such a requirement, as well as those with net zero plans with a different time horizon, or with a different geographical concentration, which could nonetheless be in compliance with the requirements applicable in the EU. It is easy to imagine alternative scenarios where the disadvantage could be against UK-based tenderers, or their EU subsidiaries. Therefore, one of the main roles of the TCA fora, and in particular the TSC on Procurement, should be to minimise trade friction resulting from this type of initiatives, ideally by discussion of options and the co-creation of acceptable common solutions ahead of their adoption in law or policy. There is a potential overlap between the work on general standardisation issues, covered by other parts of the TCA, and procurement-specific standardisation. However, given the current trend of leveraging procurement to achieve environmental, social and economic/industrial goals, it is likely that a large number of non-tariff barriers will be procurement-specific.

12. Conversely, another of the challenges in procurement regulation going forward will be tackling challenges that exceed the regulatory capacity and purchasing power of a single State, or which are much more likely to

¹⁵ 'Each Party shall ensure that at the time of submission of requests to participate or at the time of submission of tenders, procuring entities do not require suppliers to submit all or part of the supporting evidence that they are not in one of the situations in which a supplier may be excluded and that they fulfil the conditions for participation unless this is necessary to ensure the proper conduct of the procurement.'

¹⁶ 'Each Party shall ensure that where its procuring entities require a supplier, as a condition for participation in a covered procurement, to demonstrate prior experience they do not require that the supplier has such experience in the territory of that Party.'

¹⁷ Procurement Policy Note 06/21: Taking account of Carbon Reduction Plans in the procurement of major government contracts (15 Jun 2021), available at <https://www.gov.uk/government/publications/procurement-policy-note-0621-taking-account-of-carbon-reduction-plans-in-the-procurement-of-major-government-contracts>.

be successful if undertaken as part of an international collaboration. The development of adequate frameworks for the procurement of Artificial Intelligence (AI), and for the deployment of AI in the management of procurement are clear examples, where the UK has positioned itself as a frontrunner.¹⁸ In these fields, seeking regulatory collaboration would be to both the UK and EU's advantage, as their united approach to procurement regulation should not only encompass market liberalisation (Art 294), but also broader issues.

13. As emerges from the previous two paragraphs, it seems that the best use of the institutional mechanisms created by the TCA is one premised on a *proactive approach to maintaining and developing regulatory convergence*. This could work well, given the starting point of almost complete alignment of UK and EU procurement regulation and policy,¹⁹ and pre-empt the emergence of disputes resulting from uncoordinated legislative and policy reforms.

14. By contrast, one of the worse possible uses of the TCA institutional framework would be to use it to channel disputes concerning single tender procurement disputes, which would likely unavoidably lead to a quick escalation of highly politicised disputes. Both parties should be able to resist political pressures to bring to these fora issues that must be adjudicated through the domestic review procedures implementing the obligations resulting from Article 286 TCA (and equivalent WTO GPA obligations).

5. UK position and participation of the Devolved Administrations

15. There is a Provisional Public Procurement Common Framework of March 2021 that sets out proposed four-nation ways of working for domestic and international public procurement policy and legislation. It is intended to guide the actions of policy officials of all four nations as they develop policies on public procurement.²⁰ Notably, there were two sections of the Common Framework that were still under discussion at the time of its publication: one on UK Government engagement with the Devolved Administrations on WTO GPA business; and another one to reflect International Agreements.

16. It seems impractical to have different arrangements for the participation of the Devolved Administrations on WTO GPA and on UK-EU TCA business, in particular given the significant overlap between both sets of regulatory instruments. A common approach should be developed for both situations and included in the final version of the Public Procurement Common Framework. It would seem advisable to have a flexible system whereby the standard procedure is for a single four-nations position to be agreed ahead of the UK's engagement in discussions with the EU in the context of the TCA institutions, but where it should also be possible for a representative of a Devolved Administration to directly participate in discussions concerning nation-specific matters. This could be the case, for example, where one of the four nations took a different approach to a specific issue and that was queried by the EU.

¹⁸ Office for Artificial Intelligence, Guidelines for AI procurement (8 Jun 2020), available at <https://www.gov.uk/government/publications/guidelines-for-ai-procurement>.

¹⁹ Subject to changes derived from the Government's response to the green paper consultation, above (n 9).

²⁰ Available at <https://www.gov.uk/government/publications/public-procurement-provisional-common-framework>.

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>.