Written Evidence to the House of Lords International Agreements Committee on "UK-Australia trade negotiations"

Submitted 27 January 2022

By Professor Albert Sanchez-Graells

Professor of Economic Law
Co-Director, Centre for Global Law and Innovation
University of Bristol Law School
a.sanchez-graells@bristol.ac.uk

Submission

00. This submission addresses one of the questions formulated by the House of Lords International Agreements Committee in relation to the UK-Australia Free Trade Agreement signed on 16 December 2021 (UK-AUS FTA).[1] In particular, this submission addresses question 16: '*What is your assessment of the procurement chapter of the signed agreement?*'.[2] In addressing the question, this submission considers to what extent the UK-AUS FTA meets the UK Government's stated negotiating objectives, and concentrates on legal issues resulting from the dual regulation of UK-Australia procurement liberalisation in the FTA and in the World Trade Organisation Government Procurement Agreement (WTO GPA), to which both the UK and Australia are parties.

1. Background

01. In the early stages of the negotiation of the UK-AUS FTA, the UK Government set out its strategic priorities and negotiating objectives.[3] 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 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 WTO GPA schedules, and built on the substantive provisions of the WTO GPA and improved upon them, where appropriate, to ensure access to procurement based on clear and enforceable rules and standards.

---

[1] 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 27 Jan 2022).
[2] The procurement chapter of the Agreement is available at https://www.gov.uk/government/publications/uk-australia-fta-chapter-16-government-procurement (last accessed 27 Jan 2022).
[3] Department for International Trade, UK-Australia free trade agreement: the UK's strategic approach (17 Jul 2020), available at https://www.gov.uk/government/publications/uks-approach-to-negotiating-a-free-trade-agreement-with-australia/uk-australia-free-trade-agreement-the-uks-strategic-approach (last accessed 27 Jan 2022).

2. The GPA+ approach to the procurement chapter in the UK-AUS FTA

03. In seeking to create a GPA+ regime, the procurement chapter in the UK-AUS FTA takes an approach that diverges from the one followed in the Trade and Cooperation Agreement with the EU (TCA). The TCA explicitly incorporates by reference the coverage and obligations of the UK and the EU under the WTO GPA (Art 277 GPA) 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 WTO GPA.

04. By contrast, the procurement chapter in the UK-AUS FTA replicates the text of the WTO GPA and seeks to create the GPA+ regime by including additional commitments either as part of those provisions (eg by reducing optionality and making specific requirements mandatory, such as in relation to the electronic publication of procurement notices, Art 16.6), or by creating additional provisions (eg in relation to environmental, social and labour considerations, Art 16.17, or procurement integrity, Art 16.18).[4] This approach to the creation of a GPA+ procurement chapter in the UK-AUS FTA creates significant scope for legal uncertainty where the text of the WTO GPA is altered in the process of its inclusion in the FTA, as it will not always be clear whether the parties actively sought to deviate from their WTO GPA obligations, or the reasons for and limits of that deviation.

05. Importantly, where the UK-AUS FTA deviates from the WTO GPA in a way that is not clearly adding obligations or expanding the scope of coverage (GPA+), but rather changes or limits the parties' obligations towards each other in the way detailed below ('GPA-', below para 06), it is uncertain whether the incompatibility between the FTA and the WTO GPA will change the legal position of the parties or have practical effects. This is particularly unclear regarding 'dual coverage' procurement subject both to the WTO GPA (at least in relation to the rest of the WTO GPA members) and the UK-AUS FTA. Given that the schedules of coverage in the UK-AUS FTA provide incremental liberalisation in relation to the general schedules of coverage of the WTO GPA for both the parties, most of the procurement opportunities covered by the UK-AUS FTA will be subject to such dual regulation.

3. Analysis

06. There are two primary areas where the UK-AUS FTA deviates from the WTO GPA in a 'GPA-' fashion, creating significant legal uncertainty that undermines the UK Government's negotiating goal of grounding the increased procurement liberalisation on clear and enforceable rules and standards (above para 01). One deviation concerns the primary substantive obligation under the WTO GPA and the FTA: the obligation of national treatment. The other deviation concerns the possibility to exclude access to remedies on grounds of public interest, which the FTA takes well beyond the narrow confines of interim relief applications to which the WTO GPA constrains this possibility.

3.1. National treatment obligation

[4] For an article-by-article comparison of the UK-AUS FTA and the WTO GPA, see the Appendix in A Sanchez-Graells, 'The procurement chapter in the UK-Australia free trade agreement – GPA+ or GPA complex?' (21 Jan 2022), available at https://ssrn.com/abstract=4014409 (last accessed 27 Jan 2022).

07. Under the WTO 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.

08. Both WTO 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 WTO 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 WTO GPA party.

09. A literal interpretation of Article 16.4(1) would suggest that suppliers of either of the parties are protected under the national treatment regime, even if they offer goods or 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 obligation under the FTA compared to the WTO GPA in relation to (non-GPA) third country goods and services, which does not seem to plausibly represent the parties' intent. 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, it does create problems in case of dual regulation procurement, as UK and/or AUS suppliers offering goods or services of a different GPA origin could seek national treatment under the WTO GPA, which attempted exclusion (under a 'GPA-' approach) would raise interpretive issues under Article 30 of the 1969 Vienna Convention on the Law of the Treaties.

3.2. Exclusion of access to remedies on public interest grounds

10. The second major 'GPA-' deviation concerns access to remedies for breaches of the obligations included in the procurement chapter of the UK-AUS FTA, or domestic UK or AUS rules implementing them. 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.

11. In the WTO GPA, the obligation to provide for rapid interim measures is caveated as follows: 'The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing' (Art XVIII(7)(a) GPA). This is clearly meant to allow a review body not to adopt interim measures, but without prejudice of an eventual decision on corrective action or financial compensation, which are separately regulated (Art XVIII(7)(b) GPA).

12. The UK-AUS FTA deviates from the WTO GPA by placing the public interest clause at the end of the relevant provision (Art 16.19(7)), 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.

13. However, such exclusion is unlikely to be upheld in case of challenge, especially bearing in mind that the UK-AUS FTA has already significantly limited the scope for financial compensation by allowing the parties to '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 16.19(5)). The possibility to completely exclude financial compensation for breach of the UK-AUS FTA obligations would render the system toothless. Moreover, this is clearly a 'GPA-' deviation that would be disputed in terms of legal interpretation – eg in relation to dual coverage procurements under the WTO GPA and the FTA, but perhaps also on other (common law) grounds based on the right to access justice.

4. Conclusion

14. Despite the UK Government's negotiating goal of securing 'access that goes beyond the level set in the [WTO GPA] and is based on clear and enforceable rules and standards' (GPA+ aspiration), the procurement chapter in the UK-AUS FTA contains some GPA- deviations that alter or limit fundamental obligations under the WTO GPA (paramount, the national treatment regime and access to remedies). This creates legal uncertainty by raising difficult interpretive questions, in particular concerning procurement subjected to dual coverage by the WTO GPA and the UK-AUS FTA. It is submitted that UK interests would be better served if, in the future, free trade agreements including the regulation of procurement matters with GPA parties adopted the approach of incorporating the parties' obligations and coverage under the WTO 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-AUS FTA 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.