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EXAMINING BREXIT THROUGH THE GPA’S LENS:
WHAT NEXT FOR UK PUBLIC PROCUREMENT
REFORM?

Pedro Telles and Albert Sanchez-Graells

II. Untangling U.K. Procurement Regulation from E.U. Law.............. 4
   A. Great Repeal Bill or the Continuation of “EU-Derived”
      Procurement Law in the United Kingdom .......................... 8
   B. U.K.-E.U. FTA or the Start and End of Procurement Reform
      in the United Kingdom ......................................................... 11
III. Whither United Kingdom’s GPA Membership? ............................. 13
   A. Is the United Kingdom Today a GPA Member in its Own
      Right? .................................................................................. 15
   B. Will the UK Be Subject to a Full Accession Process? .......... 18
IV. GPA Baseline Regulatory Requirements: What Scope for UK
    Reform Outside of the E.U.? ...................................................... 19
   A. GPA Principles-Based Regulation: Scope for Regulatory
      Diversity.................................................................................. 21
   B. GPA-Compliant UK Procurement Reform: What to Keep and
      What to Ditch? ..................................................................... 23
      1. Qualification: Rethinking the List Regime .................. 25
      2. Negotiation: Much Ado About Nothing ....................... 27
      3. Remedies: Procedural Measures and Money Damages ...... 29
      4. A New Baseline for Evolving Procurement Practices .... 30
V. Conclusion...................................................................................... 32

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I. INTRODUCTION: AN UNCERTAIN FUTURE? A FRESH START?

On March 29, 2017, the United Kingdom began leaving the European Union by giving formal notice under Article 50 of the Treaty on European Union (the so-called Brexit). This has immersed the U.K. government and E.U. Institutions in negotiations to disentangle the United Kingdom from E.U. law by the end of March 2019—barring any extension—and to devise a new legal framework for U.K.-E.U. trade. The United Kingdom will also need to adjust its trading arrangements with the rest of the world. In this context, public procurement regulation is broadly seen as an area where, “unshackle[d]” from E.U. law, the United Kingdom would be able to turn to a lighter-touch and more commercially oriented regulatory regime. This poses a unique set of questions and difficulties from an international trade law perspective. The United Kingdom is the first member state to leave the European Union’s single market and the ever-thicker network of international trade deals the European Union has entered into on behalf of its member states—which, crucially, includes the World Trade Organization (WTO) Agreement on Government Procurement (GPA). Therefore, Brexit raises significant challenges not only in the European dimension but also on a global scale.

Moreover, there are indications that the United Kingdom would use the opportunity of Brexit to attempt to create a particularly close trade relationship with the United States. Although recent changes in U.S. international trade policy may pose some questions on that trade strategy, this seems likely to remain in the negotiating agenda in the medium and long term. Regardless of timing, entering a U.S.-U.K. trade deal that covers procurement would also impact the U.K. regulation of these markets. Given the close relationships between the European Union and the United States, this creates a sort of trilemma. Any changes the United Kingdom may want to introduce to its procurement regulatory and enforcement architecture will need to comply with the likely demands of both the European Union and the United States. In that regard, it seems both timely and necessary to assess the extent to which Brexit actually creates an opportunity for significant regulatory reform.

2. European Council Guidelines, supra note 1, at 5, 8.
The extent to which a real possibility for procurement reform in the United Kingdom exists crucially depends on the framework of the future E.U.-U.K. trading relationship. A closely knit E.U.-U.K. trade agreement covering procurement would likely result in the United Kingdom’s continued full compliance with E.U. rules. Nonetheless, this is not necessarily guaranteed, and barring specific requirements in future free trade agreements between the United Kingdom and the European Union or third countries, including the United States, the GPA seems to be the only regulatory constraint with which future U.K. public procurement reform needs to follow. However, the U.K. status and standing under the GPA is far from clear, and GPA members may see Brexit as an opportunity to obtain new concessions from both the United Kingdom and the European Union—both in terms of scope of coverage or regulatory conformity. Further, given the current trend of creating GPA plus procurement chapters in free trade agreements, such as the U.S.-Korea Free Trade Agreement (FTA), the GPA regulatory baseline will gain even more importance as a benchmark for any future reform of U.K. public procurement regulation, even beyond the strict scope of the GPA’s coverage. Given the diversity of GPA-compliant procurement systems, such as those used in the European Union and the United States, the extent to which the GPA imposes significant restrictions on U.K. public procurement reform is unclear.

In this context, this paper attempts to disentangle the multi-layered complexities of Brexit and to explore the issues that Brexit created in international public procurement regulation—both from the perspective of internal E.U. law-related issues and broader external issues of international trade regulation. It also aims to assess the GPA baseline regulatory requirements and to reflect on the impact these may have on post-Brexit U.K. public procurement reform. This paper considers the process of untangling U.K. procurement regulation from E.U. law as the first step in freeing the system from the constraints derived from the current E.U. regulatory baseline. It then assesses the possible opportunities and constraints derived from the U.K. par-

6. There are multiple scenarios that could be covered, such as the United Kingdom’s potential retention of access to the single market despite this not being part of the government’s strategy or the United Kingdom’s membership of the European Economic Area (EEA), which is also not currently on the cards. ROPES & GRAY, IMPLICATIONS OF THE U.K.’S BREXIT REFERENDUM 3–4 (2016), available at https://www.ropesgray.com/-/media/Files/alerts/2016/09/20160901_Brexit_Audit.pdf [https://perma.cc/E8UJ-P7CP]. Both solutions would impose full compliance with existing (and future) E.U. public procurement rules (including their judicial interpretation at E.U. level), which would render the discussion moot. See id. Therefore, those scenarios are not considered in any detail in this paper.


ticipation in the GPA—first assessing the U.K. current and post-Brexit position as a GPA party and then establishing a comparison between the European Union and the GPA regulatory baselines to identify the actual space for substantive regulatory reform of U.K. procurement law post-Brexit in a manner remaining compatible with international trade commitments. That section also identifies areas of U.K. procurement regulation and practice that could benefit from policy developments within both the E.U. and the GPA regulatory baselines, which we submit would be more productive than wasting policy-making and legislative efforts in any other areas. This paper concludes with some reflections on the limited scope for significant reform of the U.K. public procurement regime post-Brexit.

II. UNTANGLING U.K. PROCUREMENT REGULATION FROM E.U. LAW

The E.U. public procurement market size is estimated at around fourteen percent of GDP, or USD 2.31 trillion per year. As part of the E.U. single market, public procurement within the European Union is subject to a set of harmonization measures that shape how each member state may regulate its public procurement markets. This regime imposes both negative and positive obligations. E.U. Directives, transposed into the member states’ national legal orders, significantly restrict their discretion to regulate public procurement by establishing a common regulatory baseline. Some rules derive from primary E.U. law—the EU treaties establishing the four fundamental freedoms of movement. These contain negative obligations, thus foreclosing certain practices such as discrimination or unequal treatment.

that are detrimental to achieving an E.U. single market.\textsuperscript{15} In addition, secondary legislation under the form of Directives provides positive obligations, such as European Union-wide advertisement of contract opportunities, mutual recognition of documentary requirements, or specific and rather prescriptive procedural rules.\textsuperscript{16}

From a U.K. domestic constitutional perspective, E.U. law—both primary and secondary—constitutes a source of law resulting from the European Communities Act 1972 (ECA 1972)\textsuperscript{17} or as put by the U.K. Supreme Court in the context of the recent Brexit litigation,

EU law enjoys its automatic and overriding effect only by virtue of the [ECA 1972], and thus only while it remains in force . . . . so long as that [ECA 1972] remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice [of the European Union] are direct sources of UK law.\textsuperscript{18}

Thus, as long as the United Kingdom remains a member of the European Union, barring any unilateral repeal of the ECA 1972 that could wipe out the internal effectiveness of E.U. law in the United Kingdom, E.U. law will continue to enjoy this automatic and overriding effect, and the U.K. judiciary and executive powers will remain bound to apply it.\textsuperscript{19}


Taken together, these Directives constitute the bulk of public procurement regulation within the European Union, although the member states

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{15} Id. art. 36–37.
\item \textsuperscript{16} See Directive 2014/24, supra note 9, at 65, 109 (repealing Directive 2004/18/EC).
\item \textsuperscript{17} European Communities Act 1972, c. 68 (Eng.).
\item \textsuperscript{18} R v. Sec’y of State for Exiting the European Union, [2017] UKSC 5, [61] (N. Ir.).
\item \textsuperscript{19} Id.
\item \textsuperscript{20} For discussion of the reform process, see Grith Skovgaard Ølykke & Albert Sanchez-Graells, Reformation or Deformation of the EU Public Procurement Rules (2016).
\item \textsuperscript{22} Directive 2014/24, supra note 9, at 65.
\item \textsuperscript{24} Council Directive 2009/81, 2009 O. J. (L 216) 76 (EC).
\item \textsuperscript{26} Council Directive 92/13, 1992 O.J. (L 76) 1, 5 (EEC).
\item \textsuperscript{28} Even if the general discussion below applies to the entirety of the 2014 Public Procurement Package, the bulk of the detailed analysis in this paper will be limited to the substantive rules of Directive 2014/24/EU and the remedies rules after their reform by Directive 2007/66/EC.
\end{enumerate}
\end{footnotesize}
are free to regulate areas that are not covered, such as contracts with a value below the financial thresholds that trigger compliance with the E.U. rules. 29

One consequence of the U.K. exit from the European Union is the possibility for the United Kingdom to reform its regulation of public procurement, which thus far, mostly is limited to the rules arising from E.U. law. 30

The United Kingdom has traditionally followed a “copy-out approach” to the transposition of E.U. Directives 31—resulting in a number of domestic statutory instruments that, by and large, replicate the E.U. rules’ structure and content. In its extreme, the possibility for regulatory reform deriving from Brexit could allow for the United Kingdom to move away from the current statutory architecture. Potentially, the United Kingdom could decide not to regulate public procurement at the statutory level at all, provided that other regulatory methods (such as policy directions and administrative practices) allowed the United Kingdom to meet the requirements of the United Nations Convention Against Corruption 32—which requires a signatory party “in accordance with the fundamental principles of its legal system, [to] take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.” 33


33. Id. The minimum requirements of an Art. 9(1) UNCAC are further specified in the sense that its Parties must ensure that:

Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia: (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders; (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication; (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures; (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed; (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

Id.
However, the wide range of possibilities for reform likely is to be constrained beyond this very minimum standard by the U.K. interest in securing a free trade agreement with the European Union.\footnote{34. Dep’t for Exiting the European Union, Policy Paper: The United Kingdom’s Exit from, and New Partnership with, the European Union, Gov.UK, https://www.gov.uk/government/publications/the-united-kingsdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingsdoms-exit-from-and-new-partnership-with-the-european-union [https://perma.cc/6XHM-GNXD] (last updated May 15, 2017).} Needless to say, Brexit has not altered the U.K. economy (although there are increasing inflationary pressures), and the United Kingdom will continue needing to import from and to export to E.U. markets.\footnote{35. Id.} In 2016, “[a]bout [forty-four percent] of U.K. exports in goods and services went to other countries in the EU,” and fifty-three percent of imports into the United Kingdom came from other E.U. countries.\footnote{36. Amy Sippitt, Everything You Might Want to Know About the UK’s Trade with the EU, FULL FACT (Aug. 15, 2017), https://fullfact.org/europe/uk-eu-trade/ [https://perma.cc/37ZR-J9P9].} Indeed, it is the U.K. government’s objective to have “an ambitious and comprehensive Free Trade Agreement” with the European Union; it is arguable that it may cover public procurement.\footnote{37. HM GOV’T, THE UNITED KINGDOM’S EXIT FROM AND NEW PARTNERSHIP WITH THE EUROPEAN UNION 35 (2017) [hereinafter UNITED KINGDOM’S EXIT], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589189/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Print.pdf [https://perma.cc/CB7T-9ZYP].} It is also possible for regulatory areas to include public procurement among those where the United Kingdom and the European Union may decide to retain current rules on a reciprocal basis.\footnote{38. Id.} As the U.K. government has indicated, the future agreement may take in elements of current Single Market arrangements in certain areas as it makes no sense to start again from scratch when the UK and the remaining Member States have adhered to the same rules for so many years. Such an arrangement would be on a fully reciprocal basis and in [the UK’s and the EU’s] mutual interests.\footnote{39. Id.}

Thus, it seems likely that, after Brexit, U.K. procurement regulation may to some extent continue to be constrained or at least heavily influenced by E.U. law. Further constraints derive from the U.K. interest in retaining access to liberalized international procurement markets in terms of the GPA or other FTAs.\footnote{40. See infra Part IV. DEP’T FOR INTERNATIONAL TRADE, PREPARING FOR OUR FUTURE UK TRADE POLICY, https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy [hereinafter PREPARING FOR OUR FUTURE TRADE].}

This paper proceeds on the assumption that the United Kingdom will retain some form of regulation of public procurement. This section explores the extent to which E.U. law likely is to continue to constrain and/or influence U.K. procurement regulation. It assesses two key legal milestones in the Brexit process as currently envisaged: (1) the proposed Great Repeal Bill, which will enshrine E.U. law as national law in the United Kingdom,\footnote{41. DEP’T FOR EXITING THE EUROPEAN UNION, LEGISLATING FOR THE UNITED KINGDOM’S WITHDRAWAL FROM THE EUROPEAN UNION 12 (2017) [hereinafter LEGISLATING FOR THE UNITED
and (2) a prospective U.K.-E.U. free trade agreement to regulate their trade relationships after Brexit. International legal constraints beyond those of E.U. law are discussed later in the paper.

A. Great Repeal Bill or the Continuation of “EU-Derived” Procurement Law in the United Kingdom

In March 2017, the U.K. government published a policy paper, known as the Great Repeal Bill White Paper, detailing how it would deal with the legal uncertainty from the country’s departure from the European Union. The government subsequently published the European Union (Withdrawal) Bill (commonly known as the Great Repeal Bill) that—after receiving Parliamentary approval and becoming an Act of Parliament—will repeal the ECA 1972 and convert E.U. law into U.K. law at the time of Brexit.\footnote{Id. At the time of writing (Oct. 23, 2017), the Bill is being considered at the U.K. Parliament. See European Union (Withdrawal) 2017-19 Bill, http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html.} Repealing the ECA 1972 is a logical, and needed, step since it contains the Parliamentary assent to the country being an E.U. member state and gives effect to E.U. law.\footnote{European Communities Act 1972 c.68 (Eng.).} The immediate consequence of repealing the ECA 1972 is the disappearance from the U.K. legal order of over forty years of acquis\footnote{By acquis we mean the accumulation and evolution of the body of E.U. law composed of treaties, secondary legislation, and decisions from the Court of Justice since 1957. The acquis is monitored particularly in the context of the expansion of the EU via accession of new member states. For background, see Acquis, EUR. COMMISSION, https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/acquis_en [https://perma.cc/W2MP-RRNJ] (last updated June 12, 2016).} arising from E.U. law, including the bulk of the rules governing the country’s public procurement.\footnote{However, the extent to which E.U. law has been conflated with the common law, through judicial activity over this period, and whether it would be possible to roll back the United Kingdom’s legal order to an E.U.-free state pre-dating the United Kingdom’s accession to the then European Communities remains an academic question.}

To avoid a legal cliff edge and allegedly provide legal clarity and certainty, the government decided to convert E.U. law into national law at the time Brexit occurs.\footnote{See generally LEGISLATING FOR THE UNITED KINGDOM’S WITHDRAWAL, supra note 41, at 12.} This does not mean importing all E.U. legal sources but instead (1) selectively converting directly applicable E.U. law (E.U. Regulations and an occasional Directive), (2) preserving existing U.K. regulatory instruments implementing E.U. law (such as the Public Contracts Regulations 2015),\footnote{Public Contracts Regulations 2015 (SI 2015/102) (Eng.).} (3) determining what rights in the E.U. treaties will be kept, and (4) giving historic Court of Justice of the European Union (CJEU) case law the same binding effect as that of decisions from the U.K. Supreme Court.\footnote{LEGISLATING FOR THE UNITED KINGDOM’S WITHDRAWAL, supra note 41, at 14.}
These legal instruments will become known as “E.U.-derived law.” The main purpose of the Great Repeal Bill is thus ensuring—regardless of the formal source of law—that the substantive content and enforceability of E.U. law remains untouched, unless and until, Parliament decides to introduce future regulatory reforms.

The U.K. approach is prone to legal uncertainty irrespective of the government’s assurances. “Copying and pasting” E.U. law into the national legal order will not magically make it compatible with E.U. law. For example, recent advances in electronic cross-border public procurement integration (European Single Procurement Document and e-Certis) are available only to E.U. and European Economic Area member states. These are not available to third countries—which the United Kingdom becomes on Brexit day—unless there is a free trade agreement in place on that date. Moreover, the Commission’s Implementing Regulation (EU) 2016/7 establishing the standard form for the European Single Procurement Document, a directly applicable E.U. legal source, will be incorporated into the U.K. legal order without making any sense.

Come Brexit day, the Great Repeal Bill will keep the validity of the current transposition of public procurement Directives. As such, the following instruments and their Scottish equivalents will not disappear from the legal order: (1) Public Procurement (Amendments, Repeals and Revocations) Regulations 2016, (2) Utilities Contracts Regulations 2016 (transposing Directive 2014/25/EU), (3) Concession Contracts Regulations 2016 (transposing Directive 2014/23/EU), (4) Public Contracts Regulations 2015 (transposing Directive 2014/24/EU), (5) Defence and Security...
Consequently, the majority of public procurement rules derived from E.U. law will remain unaffected. The government must then decide how to evolve the legal procurement framework, as with any other E.U.-derived law. Depending on the existence or not of an E.U.-U.K. free trade agreement covering public procurement, the scope for change may be bigger or smaller. If such agreement does not exist, at the very least, existing legislation will have to be adapted to purge references to E.U. processes and institutions. For example, Regulation 51 of the Public Contracts Regulations 2015 establishes the rules on the form and manner of sending notices for publication at E.U. level; once Brexit happens, U.K. contracting authorities simply will not have access to the E.U. publications office.

The Great Repeal Bill White Paper does not fully address the issue of CJEU case law. It mentions that existing case law will have the same value as that coming from the Supreme Court—effectively giving the latter scope to deviate from CJEU rulings in the future as it sees fit. As for CJEU decisions after Brexit, they will simply have no binding force in the country, making them no different from any other source of E.U. law. In consequence, it is not hard to foresee a progressive divergence on the interpretation and application of E.U.-derived law by the Supreme Court in comparison with the CJEU’s interpretation and application of E.U. law. This is problematic due to the declaratory nature of CJEU case law and certainly an issue that will require significant fine-tuning during the Brexit negotiations—not least due to the European Union’s stated objective of preserving the jurisdiction of its Court of Justice.

As far as the Great Repeal Bill and E.U.-derived law are concerned, from the moment of Brexit, there appear to be no limitations on how the United Kingdom may decide to re-shape its procurement regulation. The possibil-

63. Public Contracts (Amendment) Regulations 2009 (SI 2009/2992) (Eng.).
65. Public Contracts Regulations 2015 (SI 2015/102), ¶ 51 (Eng.).
67. LEGISLATING FOR THE UNITED KINGDOM’S WITHDRAWAL, supra note 41, at 14.
69. Id.
70. Which is, indeed, one of the core principles of the European Union’s Brexit negotiating guidelines. European Council Guidelines, supra note 1, at 3.
ity of reshaping remains open to debate, however, since the current legal regime creates significant scope for adaptation of rules during transposition and virtually no limitations on the regulation of contracts valued below-thresholds. The scope for variation was not used for the transposition of Directive 2014/24/EU, and for low-value contracts, there is some very limited regulation in Chapter 8 (Regulations 109-112) of the Public Contracts Regulations 2015. Would there be real interest in spending political capital, time, and money significantly revising the rules? And if so, why? In comparison, Scotland has instead used its power to regulate public procurement to provide a more substantial set of rules for contracts below thresholds.

Having established that post-Brexit there may not be internal constraints restricting the United Kingdom from potential reform of public procurement regulation in a way that deviates from the E.U.-derived law as much as considered appropriate, it is, however, worth stressing that those constraints may arise from the future E.U.-U.K. relationship.

B. U.K.-E.U. FTA or the Start and End of Procurement Reform in the United Kingdom

As an E.U. member, the United Kingdom enjoys unrestricted access to the E.U. single market and offers the other twenty-seven member states identical access to its own national market. With the U.K. departure from the European Union, trade between both moves from internal to external (or international), subject to a new regulatory agreement or the default of WTO rules. Assuming the United Kingdom and the European Union are interested in signing a FTA covering public procurement, such an agreement is likely to foreclose major changes to the current U.K. public procurement regulation. This can be explained by the European Union’s desire to limit the differences between public procurement regimes associated with the block via trade agreements. This perspective is clearly observable in the January 2016 E.U.-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA), whereby Chapter 8 establishes a set of rules regulating public procurement access.

74. See Sanchez-Graells & Telles, supra note 72.
77. Id. at 4.
78. See EU-Ukraine Association Agreement art. 148, 2014 O.J. (L 161) 13, 71. This title constitutes the DCFTA part of the Association Agreement between the EU and Ukraine. Id.
E.U.-Ukraine DCFTA Article 148 states the agreement “provides for the progressive approximation of the public procurement legislation in Ukraine with the E.U. public procurement acquis”—leaving no doubt about which legal system will have to change and adapt as to comply with the requirements of the other.79 The E.U.-Ukraine DCFTA does not require a line-by-line implementation of E.U. public procurement Directives in Ukraine, but does provide a clear indication that basic standards and practices should be similar.80 In addition, the country is under the obligation of working toward legislative approximation with the E.U. acquis.81 The agreement also requires Ukraine to keep up with the evolution of the E.U. acquis, including CJEU case law and implementing measures adopted by the European Commission.82

While it is true that the United Kingdom currently complies with E.U. public procurement rules—and as such, there is currently no issue of standards or compatibility between both regimes—any substantial U.K. legal reform could soon break that compatibility.83 Moreover, such deviation would be less politically acceptable than differences between the European Union’s and Ukraine’s (or third countries’) domestic rules for the simple fact that, while in the latter case such differences pre-exist the cooperation relationship, in the U.K. case, such differences would be created ex nvo.84 A direction of travel away from regulatory convergence would, thus, be prone to trigger more resistance. For example, if the United Kingdom decided that contracting authorities would be completely free to design their own procedure or even take away any limitations on the grounds for negotiations,85 it would clearly make the country’s legal framework incompatible with the European Union’s and thus, be in breach of an agreement similar to the E.U.-Ukraine DCFTA.86

The compatibility requirement(s), particularly the need to accept the jurisdiction of the CJEU that is to be set aside according to the Brexit White Paper, make it very unlikely that from a political perspective, the United Kingdom would be willing to settle for a FTA similar to that of Ukraine.87 As such, it seems implausible that the United Kingdom would be able to achieve a comprehensive free trade agreement with the European Union covering public procurement.

79. Id.
80. Id. art. 151.
81. Id. art. 152, 153.
82. Id. art. 153.
83. Koutrakos, supra note 71.
84. Id.
86. EU-Ukraine Association Agreement art. 148, 2014 O.J. (L 161) 13, 71.
87. UNITED KINGDOM’S EXIT, supra note 37, at 13. It would also make it similar in its downsides to the EEA and “EEA-minus” models put forward by Sue Arrowsmith, IP/A/IMCO/2017-27, CONSEQUENCES OF BREXIT IN THE AREA OF PUBLIC PROCUREMENT 23–27, 51–56 (2017) [hereinafter ARROWSMITH, CONSEQUENCES OF BREXIT].
Lesser alternatives available for a E.U.-U.K. free trade agreement might provide a wider scope for reform. For example, the proposed Chapter on public procurement currently being negotiated in the E.U.-Indonesia free trade agreement is much lighter in terms of compatibility requirements and makes no mention of the CJEU’s jurisdiction. On a similar note, Chapter 10 of the current E.U.-Singapore free trade agreement—clearly inspired and based on GPA provisions—also provides significant scope for differences between the two procurement regimes.

In addition to the above, we believe that due to the pre-existing relationship between the European Union and the United Kingdom, as well as the nature of those other countries the European Union has signed free trade agreements with (i.e., developing countries), there is only a limited likelihood the European Union would agree to a “looser” procurement regime. Studies highlighting the limited openness of the U.K. procurement system under the current best case scenario from a perspective of a legal framework convergence compound this opinion.

Leaving for now the European perspective, and to assess external constraints that would be relevant even in the absence of a U.K.-E.U. free trade agreement (or precisely in that event), the remainder of this paper will concentrate on an assessment of the international trade law constraints to the future (potential) reform of U.K. public procurement regulation and, notably, on the GPA. To begin with, we will consider the changing U.K. status under the GPA as a result of Brexit. We will then assess the constraints derived from a GPA regulatory baseline, as compared with the tighter E.U. constraints discussed so far.

### III. WHITHER UNITED KINGDOM’S GPA MEMBERSHIP?

The GPA is a plurilateral agreement within the WTO framework to which members can accede. Of relevance for our discussion, the European
Union, the United States, and the United Kingdom are currently covered by this agreement. Presently, E.U. public procurement law ensures U.K. compliance with the GPA—primarily through the equal treatment provision of Article 25 of Directive 2014/24/EU on public procurement as transposed into U.K. domestic law by regulation 25 of the Public Contracts Regulations 2015. Additionally, Directive 2014/24/EU and the rest of the 2014 E.U. Public Procurement Package were drafted with the explicit aim of ensuring substantive compliance with the GPA. It is generally assumed as uncontroversial that the E.U. public procurement system complies with the GPA, and that, consequently, the U.K. transposition of those rules also ensures compliance with the GPA. The current version of the agreement (Revised GPA) establishes harmonized rules regulating bilateral access to procurement mar-

92. Directive 2014/24, supra note 9, at 65, 68. Art. 25 reads:

In so far as they are covered by Annexes 1, 2, 4[,] and 5 and the General Notes to the European Union’s Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting authorities shall accord to the works, supplies, services[,] and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services[,] and economic operators of the Union.

Id. at 109. A similar provision in Article 43 of Directive 2014/25/EU on utilities procurement ensures compliance with commitments in that field. Council Directive 2014/25, 2014 O.J. (L 94), 243, 298 (EU). Finally, compliance with obligations concerning works concessions under Annex 6 is ensured by means of Directive 2014/23, supra note 21, at 2. It is worth noting that the revised scope of coverage of the GPA entered into force in April 2014 (i.e., after Directive 2014/24/EU, supra note 9, was adopted in February of the same year). In the 1994 version of the GPA, the coverage was structured in five annexes plus general notes. See generally Agreement on Government Procurement, 8 n.1, available at https://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf [https://perma.cc/RN3H-A8NW] [hereinafter Agreement on Government Procurement]. In the revised 2011 version (effective 2014), the coverage was reorganised in seven annexes, the last being the general notes themselves. See generally Revised Agreement on Government Procurement, art. 2, ¶ 4, available at https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm [https://perma.cc/VV3T-3W7V] [hereinafter Revised Agreement on Government Procurement]. This should be taken into account when reading the relevant provisions of the current E.U. public procurement directives.

93. See Sanchez-Graells & Telles, supra note 72. This applies to England, Wales, and Northern Ireland. Albert Sanchez-Graells & Pedro Telles, Regulation 1—Citation, Commencement, Extent and Application, PUB. CONT. REG. COMMENT., http://pcr2015.uk/regulations/regulation-1-citation-commencement-extent-and-application/ [https://perma.cc/82R2-TLJH] [last updated June 2, 2016]. The devolved administration of Scotland carried out a separate transposition by means of the Public Contracts (Scotland) Regulations 2015 (S.I. 2015/446) (Scot.), and regulation 26 has the same content.

94. Recital (8) of the Dec. 20, 2011 Proposal for a Directive of the European Parliament and of the Council on Public Procurement, at 16, COM (2011) 896 final (Dec. 20, 2011) explicitly indicated that “[f]or contracts covered by the [GPA], as well as by other relevant international agreements by which the Union is bound, contracting authorities fulfil the obligations under these agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.” The text has been amended in the final version and recital (17) of Directive 2014/24, supra note 9, at 68, now reads: “For contracts covered by . . . the GPA, as well as by other relevant international agreements by which the Union is bound, contracting authorities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements” (emphasis added).

95. See Cantore & Togan, supra note 7, at 160; Ping Wang, Brexit and the WTO Agreement on Government Procurement (GPA), 26 PUB. PROCUREMENT L. REV. 34, 37 (2017).
kets,96 which we will analyze in detail in Section IV below. Before doing so, we will look, instead, into the U.K. status as a party (or not) to the Revised GPA. Due to the agreement’s plurilateral and optional nature, the U.K. status is currently beyond unclear, although we posit that the United Kingdom is not a member in its own right for the following reasons.

A. Is the United Kingdom Today a GPA Member in Its Own Right?

Its E.U. membership achieves the U.K. participation in the Revised GPA.97 The European Union, representing all member states, acceded to the Revised GPA in 2012, but the member states themselves are not parties since the accession to this type of agreement is an exclusive E.U. competence under Article 3(1)(e) and (2) TFEU.98 Furthermore, the United Kingdom was not a party in its own right to the Revised GPA 2012’s predecessor, the GPA 1994.99 Although the United Kingdom did sign the agreement in April 1994, it never actually submitted its ratification,100 benefiting instead from the then European Community’s accession. There is considerable debate over the consequences from Brexit to the U.K. status as a party to the GPA because it is the first time a member state is departing the EU.101 There are two opposing perspectives: (1) that the United Kingdom is not a GPA party on its own right and (2) that it is.

The first school of thought argues that the United Kingdom currently is not a member in its own right.102 Effectively this means the country will no longer be a party once it leaves the European Union—leading to an immediate loss of access to the procurement markets of all GPA parties.103 This loss of access, of course, cuts both ways, and other GPA parties would simultaneously lose access to the U.K. public procurement market since there

97. The GPA “consists of 19 parties covering 47 WTO members (counting the EU and its 28 member states, all of which are covered by the Agreement, as one party).” Agreement on Government Procurement: Parties, Observers and Accession, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm [https://perma.cc/6VLE-L4P4] (last visited July 11, 2017) [hereinafter Agreement on Government Procurement]. “Another 29 WTO members and four international organizations participate in the GPA Committee as observers. 10 of these members with observer status are in the process of acceding to the Agreement.” Id.
100. WORLD TRADE ORG., STATUS OF WTO LEGAL INSTRUMENTS 125 (2015). And it is pos- ited that even if it wanted to, the United Kingdom would not be able to ratify it today. See Wang, supra note 95, at 36–37.
102. Wang, supra note 95, at 36.
103. Id. at 34–37.
would be no reciprocity agreement between the United Kingdom and any GPA party. Having said this, the Public Contracts Regulations 2015 Regulation 25 (“Conditions relating to the GPA and other international agreements”) leaves open the question of what actually will happen:

In so far as they are covered by Annexes 1, 2[,] and 4 to 7 and the General Notes to the EU’s Appendix 1 to the GPA and by the other international agreements by which the EU is bound, contracting authorities shall accord to the works, supplies, services[,] and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services[,] and economic operators of the EU.\(^{104}\)

At the time of transposing the E.U. Directive, this was the correct way to address the access of undertakings based on other GPA parties to the procurement markets of England and Wales because the country’s participation in the GPA was achieved via its E.U. membership.\(^{105}\) The problem, however, arises once the United Kingdom leaves the European Union because the text of the Public Contracts Regulations 2015 would remain unaltered and still make sense, at least, from a literal perspective—reducing the possibility for it to be suppressed as a result of the European Union (Withdrawal) Act without further Parliamentary intervention.\(^{106}\) Assuming the United Kingdom is no longer a party to the GPA at the time of Brexit, it is arguably illogical for the United Kingdom to keep such a provision without reciprocity, but that does not change the fact that the provision would remain in force and might even remain meaningful in a scenario whereby the European Union and United Kingdom reach an agreement that gives E.U. undertakings access to the U.K. public procurement market. In any case, it constitutes another example of the pitfalls arising from the E.U.-derived law approach taken in the Brexit White Paper.\(^{107}\)

Conversely, another school of thought argues that the U.K. GPA position post-Brexit is secure—based mostly on customary international law on the succession of states to treaties and the practice under the GATT 1947.\(^{108}\) Neither of those arguments is particularly compelling in this setting due to the specificity of the U.K. current position within the GPA and the nature of the European Union itself, which, although a contracting party, it is not a state.\(^{109}\)

\(^{104}\) Public Contracts Regulations 2015 (SI 2015/102) ¶ 25 (Eng.).

\(^{105}\) Also, explicitly acknowledged in Regulation 2 of the Public Contracts Regulations 2015, with reference to the Council Decision 2014/115, 2014 O.J. (L 68) 1 (EU), which consubstantiates the entry into force in the EU of the Revised GPA and “to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014).” Public Contracts Regulations 2015 (SI 2015/102) ¶ 2 (Eng.).

\(^{106}\) Id.

\(^{107}\) See supra Part II.A.


\(^{109}\) See id.
As for the state succession argument, while it is true that longstanding customary law on state succession exists, most of it is based on pure international treaty succession, whereby a new state emerges where a prior existed and succeeds on its international obligations. First, the U.K. E.U. departure is not a traditional state succession: neither the European Union is a state itself nor is the United Kingdom a new one, so any use of the concept of state succession in international treaties needs to be adapted. Second, the nature of the Revised GPA makes the situation even more complex since this is not a free standing international treaty but a plurilateral agreement contained within the WTO’s legal framework. As Lorand Bartels recognizes, state succession within the membership of international organizations has a mixed record. There are varied examples of practice within the GATT 1947, i.e., the Federation of Rhodesia and Nyasaland in 1953 and 1963, Czechia and Slovakia succession to Czechoslovakia in 1993 and, most recently, Timor-Leste and Portugal. We perceive it a stretch to apply customary law of state succession to what is not a traditional state succession and within the legal framework of an international organization.

Overall, thus, it seems that the argument for international legal succession is not as strong as it has been claimed. In consequence, and in light of the potential for inflexibility from the European Union, we fear that the United Kingdom will not retain its status as a GPA member and will have to seek, if it desires, a new accession. Such process will be conditioned by the U.K. position

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12. Id. at 19.
13. Id. at 19 nn.91–92. Regarding the examples of practice within the GATT 1947, such as the Federation of Rhodesia and Nyasaland in 1953 and 1963, and Czechia and Slovakia succession to Czechoslovakia in 1993, the same can be said. Id. Those constitute very different examples of state succession and it is quite challenging to consider that by themselves they would constitute customary law of the treaties and provide the United Kingdom with a clear basis for claiming party status to the GPA post-Brexit. The Federation of Rhodesia and Nyasaland case is by and large an issue of colonial succession in the GATT 1947, as per Article XXVI:5(c) of the GATT 1947 and not a straightforward state succession. The fact that the UK Government provided its own unilateral declaration in addition to the Southern Rhodesia’s one, can be interpreted only in this context. Id. Bartels contends that a subsequent succession of the Federation of Rhodesia and Nyasaland by Southern Rhodesia in 1963 is another example of GATT 1947 practice at play that would be of use to the UK. Id. We do not follow the same line of thought, since Southern Rhodesia was effectively recovering the status it lost in 1953. It is one thing for a former party to “succeed its successor,” another for a non-party to succeed a current party. Id. The Czechoslovakia GATT 1947 succession in 1993 by Czechia and Slovakia also does not back up the claim that the United Kingdom will retain its current status and in fact, constitutes an example of the opposite. Both countries submitted their own applications to the GATT and even though they kept Czechoslovakia’s rights and obligations, they have done so following an accession process and not a succession one. Id.
14. See Wang, supra note 95, at 37.
15. ARROWSMITH, CONSEQUENCES OF BREXIT, supra note 87, at 48–49. On the cost-benefit analysis of GPA participation, see Wang, supra note 95, at 37–42.
under WTO law more generally, but this paper will restrict the ensuing analysis to GPA accession *stricto sensu*, on the assumption that the United Kingdom retains WTO membership despite the need to renegotiate its terms.116

B. Will the UK Be Subject to a Full Accession Process?

A WTO member may initiate the process of joining the GPA by assuming the position of observer in preparation to submit its offer.117 The actual accession is done by the submission of an offer, which includes the coverage of entities and contracts and constituting the Appendix I offer or coverage offer.118 If applicable, this process brings considerable difficulties to the United Kingdom. There is no precedent of such a compliant potential party seeking accession to the GPA.119

It is conceivable the U.K. access to the GPA follows one of three broad pathways. First, the United Kingdom wants to keep its current commitments, and all GPA parties120 agree that the United Kingdom should be able to keep the current E.U. coverage and schedules so as not to disrupt the existing GPA balance. If that is the case, then there is effectively no change for any GPA party: the EU27 + UK commitments will be identical as they were before Brexit, making the change in coverage notification under Art. XIX of the GPA a mere formality.121 There would be some transitional issues since the United Kingdom would be out of the GPA while the accession process runs, but there is no reason why it could not be done relatively quickly; especially bearing in mind, the U.K. current procurement legislation is already GPA compliant, assuming it is not changed post-Brexit in a way that breaks such compliance.122 It is important to anchor expectations though; even a quick accession, like New Zealand’s in 2015, took three years.123


119. Since international trade agreements remain an exclusive E.U. competence, it is unlikely that the country will be able to obtain GPA observer status during the withdrawal process. Even if it does, the United Kingdom surely cannot submit a formal Appendix I offer for consideration. In other words, the United Kingdom will only be able to start its accession process once Brexit happens. On that date, the United Kingdom will be out of the GPA, even though it may or may not be bound to grant market access to the undertakings of GPA members under its current national rules. Wang, *supra* note 95, at 47–48.

120. Currently the agreement has forty-seven members, including the E.U. and its twenty-eight member states, and there are ten observers in the process of accession. *Agreement on Government Procurement, supra* note 97.

121. Wang, *supra* note 95, at 47–48, is of a similar opinion, although with a more cautious view on the probability of other parties demanding compensation or re-negotiation; ARROWSMITH, *CONSEQUENCES OF BREXIT*, supra note 87, at 32.

122. Wang, *supra* note 95, at 37.

Second, the United Kingdom does not want to keep its current schedules and decides to propose its own—possibly using the current E.U. commitments as a starting point.\(^\text{124}\) If that is the case, then a full accession process will be required for the parties to negotiate and eventually accept the U.K. offer.\(^\text{125}\) Once this Pandora’s box is open, it is hard to predict where and when the negotiations will actually end, and theorizing on the likelihood of rational/emotional negotiations within the GPA is beyond the scope of this paper. Furthermore, it is unlikely that recent accessions to the GPA, such as that of New Zealand, can provide us with much information relevant for this scenario.\(^\text{126}\) This scenario includes further uncertainty because the European Union would be under the obligation to submit a change of schedules/coverage as required by Article XIX of the Revised GPA, potentially leading to consultation or arbitration with one or more of the existing parties.\(^\text{127}\)

The final accession scenario assumes the United Kingdom will want to fully renegotiate its schedule of coverages—perhaps along the lines of a GPA plus model\(^\text{128}\) or modeled after existing trade agreements that cover procurement in more detail, such as the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada.\(^\text{129}\) In terms of accession process, the implications are similar to the prior scenario, i.e., full accession needed but with added uncertainty and scope for negotiation delays.

In consequence, if the first scenario happens, the U.K. accession should be reasonably straightforward and most of the obstacles are procedural rather than substantive, although it will take time. If, on the other hand, the United Kingdom tries to deviate from the status quo, the more likely result is that the accession will end up looking as a fresh accession, implying long and protracted negotiations with the other GPA parties.

IV. GPA BASELINE REGULATORY REQUIREMENTS: WHAT SCOPE FOR UK REFORM OUTSIDE OF THE E.U.?

Despite the difficulties surrounding the U.K.’s post-Brexit status under the GPA and the fact that the Brexit White Paper does not mention the GPA in its section on the U.K. WTO membership,\(^\text{130}\) it seems clear that the U.K. government will aim to secure GPA coverage to support its future

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124. See Wang, supra note 95, at 45–46.
125. On the details of the process and documents required, see General Overview, supra note 91, and Yukins & Schnitzer, supra note 118, at 94.
126. On New Zealand’s accession, see Schnitzer, supra note 123, at NA185–88.
128. ARROWSMITH, CONSEQUENCES OF BREXIT, supra note 87, at 56–61.
130. UNITED KINGDOM’S EXIT, supra note 37, at 56.
international trade strategy. Barring regulatory constraints derived from free trade agreements with the European Union or third countries, the GPA seems likely to remain the only regulatory baseline with which a post-Brexit U.K. public procurement reform would need to conform with. Further, given the current trend of creating GPA plus procurement chapters in free trade agreements, such as the U.S.-Korea FTA, the GPA regulatory baseline will gain even more importance as a benchmark for any future reform of public procurement regulation in the United Kingdom, even beyond the strict scope of coverage of the GPA.

Given the more limited scope and prescriptiveness of the GPA as compared with the 2014 E.U. Public Procurement Package, this can be viewed as:

- a significant opportunity for better regulation, which should be based on a single and simple approach for all regulated procurement with more flexible procedures; and, indeed, the opportunity that the GPA-based approach presents in this regard provides a strong argument for the UK to opt for such an approach if it is realistically available.

Regardless of whether this is likely in the short term, the practitioner community is also interested in exploring avenues for regulatory reform. However, enthusiasm about the opportunities created by a GPA-based reform is not necessarily the majority view, with arguments to the effect that “[a]ccession to the GPA would necessitate the implementation of a regime all but indistinguishable from that in the EU.” Therefore, there is a clear need to further this debate and to assess the extent to which a GPA-compliant reform of U.K. public procurement regulation would likely result in a significantly different regulatory landscape.

With all the caveats that a complex process such as Brexit requires, it seems that the possibility of creating a lighter new regulatory regime for public procurement likely will remain on the legislative agenda. However,
it is difficult to foresee whether procurement reform will be a priority post-Brexit or if trade negotiations with the European Union and third countries will exclude this possibility by imposing additional requirements in the context of an FTA or otherwise. While we are skeptical of the will and ability to pursue reform,\textsuperscript{140} in this section, we will assume that a reform of the U.K. public procurement system founded on the GPA baseline of regulatory requirements is politically possible and legally feasible.\textsuperscript{141} Indeed, if and when the Public Contracts Regulations 2015 are reformed, continued compliance with the GPA will need to be at the core of the process.\textsuperscript{142}

Thus, this section briefly recalls the substantive constraints that derive from the GPA as a regulatory baseline and assesses the extent to which different aspects of current U.K. public procurement law could be suppressed or significantly altered in a GPA-compliant form.\textsuperscript{143} Given the U.K. copy-out approach to the transposition of the current E.U. public procurement rules,\textsuperscript{144} most considerations concerning the compatibility of reforms of the U.K. system in light of the GPA would also apply to potential future reforms of E.U. public procurement law itself. The analyses in this and the following section will also serve to flesh out the broader point that sophisticated (or minimalistic) principles-based procurement regulation can result in both regulatory convergence or divergence across jurisdictions but that the trade-facilitation goal of the GPA (and of future U.K. FTAs) is likely to push for significant technical convergence\textsuperscript{145}—which, ultimately, raises important questions about the desirability and practicality of reforming the U.K. public procurement regime post-Brexit.

A. GPA Principles-Based Regulation: Scope for Regulatory Diversity

The current version of the GPA adopts a hybrid regulatory technique and specifies both general principles (notably, of non-discrimination/equal treat-
ment)\textsuperscript{146} and detailed procedural requirements,\textsuperscript{147} geared toward the formation of public contracts,\textsuperscript{148} with which domestic public procurement regulation by GPA signatories must comply.\textsuperscript{149} Due to this minimalistic and hybrid principles-based approach to procurement regulation,\textsuperscript{150} the GPA creates significant space for regulatory diversity among its members.\textsuperscript{151} It is generally seen as solely creating minimum standards based on international best practices\textsuperscript{152} that are in themselves insufficient to create a fully operative regulatory framework and must rely on further regulatory elements at the domestic level.\textsuperscript{153} This derives, in good measure, from the need for significant flexibility if the GPA is to secure expanded membership in the


\textsuperscript{148} That is, there are no rules concerning contract execution, except for the anticircumvention prohibition to modify contracts in a way that avoids compliance with GPA obligations. Revised Agreement on Government Procurement, supra note 92, art. 15, ¶ 7.

\textsuperscript{149} It is worth noting that some of the detailed procedural rules are, in turn, qualified by general or principles-based elements, such as the need to apply requirements proportionately and in ways that do not create unnecessary obstacles to international trade. This is in common with the first principles of most public procurement systems. See United Nations Comm’n on Int’l Trade Law, Preamble to UNCITRAL Model Law on Public Procurement 3 (2014), http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-en.pdf [https://perma.cc/HQ6A-ZNZP]; see also Caroline Nicholas, Work of UNCITRAL on Government Procurement: Purpose, Objectives and Complementarity with the Work of the WTO, in The WTO Regime on Government Procurement: Challenge and Reform 746, 754 (Sue Arrowsmith & Robert D. Anderson eds., 2011).


\textsuperscript{151} Or, in other words, “expressed in an exaggerated manner, markedly divergent national laws could all be non-discriminatory and therefore of limited concern under the GPA.” Arwel Davies, The Evolving GPA: Lessons of Experience and Prospects for the Future, in The Internationalization of Government Procurement Regulation 23, 23, 27–28 (Aris Georgopoulos et al. eds., 2017).

\textsuperscript{152} See generally Anderson & Muller, supra note 147, at 10; Bernard Hoekman, International Cooperation on Public Procurement Regulation, in The Internationalization of Government Procurement Regulation 568, 568 (Aris Georgopoulos et al. eds., 2017).

\textsuperscript{153} This is true both in relation to monist and dualist jurisdictions and goes beyond the issue of the availability of remedies for the direct enforcement of the GPA, which is resolved in Revised Agreement on Government Procurement, supra note 92, art.18, ¶ 1(b). On this point of the interaction between the GPA and domestic regulatory regimes (as supported by the UNCITRAL Model Law), see generally Nicholas, supra note 149, at 747–48.
future.\textsuperscript{154} However, even in its current form, the GPA contributes to regulatory convergence between its parties.\textsuperscript{155} By creating a common substantive core, it can be seen as an important catalyst of further technical harmonization among GPA members,\textsuperscript{156} as well as third countries—not least, due to the use of the GPA as a blueprint for procurement chapters in FTAs.\textsuperscript{157}

Overall, other than in relation with very detailed rules concerning notices and time periods, most of the GPA requirements are rather general in nature and mainly seek to create a significant level of *ex ante* transparency (to foster international competition and cross-border trade), as well as *ex post* reporting (to inform renegotiations of the agreement on the basis of the procurement that actually results on cross-border trade), and a rather basic core of substantive requirements aimed at operationalizing the general principles of transparency, non-discrimination and equal treatment, competition, impartiality, and proportionality—all of which, but particularly the two latter, are targeted at controlling the discretion of procuring entities.\textsuperscript{158} These requirements must be amenable to control through review procedures oriented at preserving the suppliers’ opportunities to participate in the procurement.\textsuperscript{159}

From this perspective, it seems clear that the United Kingdom would need to do nothing to ensure GPA conformity of its current procurement rules.\textsuperscript{160} However, if it decided to introduce post-Brexit reforms and move away from the E.U. regulatory baseline, it would need to avoid creating GPA compliance gaps.

B. GPA-Compliant UK Procurement Reform: What to Keep and What to Ditch?

A general comparison of the regulatory constraints derived from the GPA and from E.U. public procurement law shows that their main differences derive from the more detailed level of regulation provided by the E.U. regime.\textsuperscript{161} Therefore, compliance with E.U. law ensures compliance with

\begin{footnotesize}
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\item \textsuperscript{154} Recital 4 of the revised GPA indeed stresses that “the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party.” Revised Agreement on Government Procurement, \textit{supra} note 92, Preamble.
\item \textsuperscript{157} See Anderson et al., \textit{supra} note 133, at 58.
\item \textsuperscript{158} See Anderson & Müller, \textit{supra} note 147, at 10.
\item \textsuperscript{159} Revised Agreement on Government Procurement, \textit{supra} note 92, art. 18.
\item \textsuperscript{160} See Anderson & Müller, \textit{supra} note 147, at 17.
\item \textsuperscript{161} Michael Steinicke, \textit{Government Procurement—Can the WTO Learn from the EU Regime?}, in \textit{LIBERALISING TRADE IN THE EU AND THE WTO} 360, 368 (Sanford E. Gaines et al. eds., 2012).
\end{itemize}
\end{footnotesize}
the GPA, and in some sense, it can be considered that E.U.-compliant states have gone beyond the GPA requirements. Thus, the United Kingdom can identify in Brexit an opportunity to retrace some of the steps taken down the road of stringent procurement regulation and to move away from what is perceived as an excessively constraining standard.

However, this does not seem a desirable direction of travel. It should be borne in mind that GPA accession and membership generally triggers aspects of regulatory convergence and the development of domestic rules along international best practices. From this perspective, a move by the United Kingdom (or any other GPA member) toward a significant deregulation of public procurement, based on a departure from a more prescriptive (and, for the purposes of this argument, possibly more stringent) E.U. baseline toward a less prescriptive GPA baseline, could be problematic in itself. Unless the new rules were perceived (by other GPA members) to provide closely comparable procedural guarantees and protections, such a move could trigger claims of GPA infringement—or else, such approach may at least increase the likelihood of rejection of the U.K. offer if the country is subject to a GPA accession process, as seems likely.

Beyond those tactical issues and concentrating on aspects of substantive regulation where there is divergence between the E.U. and GPA regulatory baselines, it is worth noting that it has been suggested that the main advantages of moving from an E.U.-compliant to a GPA-compliant U.K. procurement system would be allowing for a number of fundamental changes in the shape of the legal procurement framework of the country. For example, contracting authorities could reduce red tape through the creation of mandatory registries of qualified economic operators or allowing negotiations at all stages of the procurement procedure. It has also been suggested that the remedies regime could be rolled-back to the minimum requirements CJEU case law, most of which have been consolidated into the successive generations of E.U. rules. See id. at 384. Conversely, the GPA has given rise to extremely limited interpretive decisions by either the Committee on Government Procurement (Art XXI) or the WTO Dispute Settlement Body. Id. at 383–84. Moreover, both regulatory sets are embedded in different regulatory systems (WTO law and E.U. law), and this can introduce further complications in their direct comparison. See id. at 368.

162. See id.
163. Wang, supra note 95, at 37.
164. Anderson & Müller, supra note 147, at 10.
165. See supra Part IV.A. In our opinion, it should be stressed that there is a relatively intangible element in the assessment of regulatory reform that pivots around the thrust of the GPA requirements and links more generally to international public law duties of good faith as included in United Nations, Vienna Convention on the Law of Treaties, May 23, 1969, No. 18232, art. 26, and to a certain extent in UNITED NATIONS OFFICE ON DRUGS & CRIME, supra note 35, art. 9. In that regard, a move away from a current system of (high) procedural safeguards and guarantees toward a regulatory framework that provided less assurance of compliance with the main principles underpinning the GPA, could be open to challenge—not only politically, but also legally, for example, in the GPA access negotiations the United Kingdom will have to undertake, or if after accession, on a dispute before the WTO Dispute Settlement Body. 166. See Wang, supra note 95, at 46.
that applied before the revision carried out by the European Union in 2007.\textsuperscript{167}

Contrary to that assessment, in our view, the claim that a transition from current compliance with the E.U. regulatory baseline to a GPA-compliant reformed procurement system would bring a significant opportunity for otherwise unattainable improvements in the U.K. public procurement system may be overstated and instead reflect a criticism of the E.U. public procurement system at the margins.\textsuperscript{168} We do not view the current E.U. system as perfect, and there are certainly areas where it can be further improved. However, those are not necessarily the areas mentioned above. In those areas, current E.U. rules may be less constraining than it seems or encapsulate advances in regulatory harmonization that are desirable from the perspective of freer international trade in public procurement markets—as well as on the basis of their embedded market integrative logic. This applies in good measure to all suggested areas for improvement as a result of a move from an E.U.-compliant to a GPA-compliant regulation of procurement in the United Kingdom.\textsuperscript{169} The following sub-sections address specific issues where U.K. reform would be based on a shift from E.U. to GPA baseline and provide our views on their unnecessariness or undesirability. We also provide a list of issues where we consider that setting a new regulatory baseline and investing policy reform efforts would provide larger gains.

1. Qualification: Rethinking the List Regime

E.U. law largely prevents member states from operating procurement systems based on closed lists.\textsuperscript{170} Member states can only require registration for economic operators of their own jurisdiction, as well as for those of third countries—but of operators from other E.U. jurisdictions, and registration is not necessarily acceptable for those operators from GPA members, as this could be challenged on the basis of the obligation of equal treatment resulting from Article 25 of Directive 2014/24/EU.\textsuperscript{171} Overall, the restrictions derived from E.U. rules mean that contracting authorities need to be able to assess tenderers’ suitability at selection stage on the basis of equivalent means


\textsuperscript{168}. Other issues raised by Arrowsmith refer exclusively to the domestic interpretation of EU requirements by the U.K. courts, in particular in relation to the principle of transparency and its implications. Arrowsmith, supra note 85, at 23–24. In our view, there is no indication whatsoever that the U.K. courts could adopt a different interpretation under the homonymous (if not identical) principle of transparency under the GPA and, in any case, this seems to reflect issues with the unpredictability (or contestability) of judicial interpretation of general principles, which seems inherent to all procurement systems. Therefore, we do not discuss this issue in any further detail.

\textsuperscript{169}. See Wang, supra note 95, at 46.


\textsuperscript{171}. Directive 2014/24, supra note 9, at 109.
of proof, as well as recognize equivalent certificates from bodies established in other E.U. member states. 172

Considering this position excessively restrictive, a suggestion has been made to reduce red tape for procuring entities by requiring the use of a registration system of qualifications as a mandatory condition for participation and as the basis for selecting participants. 173 In our view, it is not clear that this does not encapsulate an inadvertent trade-off of (theoretical) administrative costs against losses in competition for public contracts. In fact, if one were to design a system with stealthy cross-border barriers, this would be a good way to do so. In general, it seems that avoiding registration requirements can facilitate cross-border participation by economic operators as, and when, they are interested in specific tender opportunities—without the need to have a pre-established administrative capability in any given jurisdiction. 174 That is why, under the E.U. rules, member states cannot require registration of economic operators from other member states to participate in a public tender. 175

Functionally, the E.U. approach does not seem too different from the GPA obligation to carry out the same type of assessment in relation with multi-use lists under Art IX:10, which can be applied by analogy to the administration of registration or qualification systems, in particular due to the obligation under GPA Art IX:3—according to which GPA members and their “procuring entities . . . shall not adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of another Party in its procurement.” 176 In our view, it seems likely that the imposition of an absolute obligation of registration or certification prior to the participation in a tender procedure will be interpreted as a significant restriction—particularly in view of the generally accepted position that registration systems can amount to a significant non-tariff barrier to trade in procurement markets. 177

175. Directive 2014/24, supra note 9, art. 64, ¶ 7.
Therefore, it seems arguable that a GPA-compliant registration system must operate in such a manner as not to preclude the participation of suppliers based on their lack of previous registration, unless in normal conditions, they are given sufficient time to register prior to the submission of offers. If this is the case, then both the E.U. and the GPA systems result in the same functional regulatory demands from a contracting authority seeking to benefit from the establishment of a registration or qualification system. Moreover, giving up the advantages of mutual recognition of certificates within the European Union would create an additional administrative burden for U.K. suppliers, and in this case, it is hard to assess whether the net effect of the reform would be positive. This seems to go against the grain of facilitating technical convergence in the areas of exclusion and qualitative selection of economic operators and could result in a very formalistic policy that reduces effective competition for public contracts and, in the end, the possibilities for U.K. public buyers to obtain value for money.\textsuperscript{178} Thus, in our view, this is not an area where a move from an E.U. to a GPA regulatory baseline necessarily creates scope for the development of an alternative desirable system.

2. Negotiation: Much Ado About Nothing

A second area where a shift from E.U. to GPA baseline has been stressed focuses on the scope for negotiations.\textsuperscript{179} Generally, it has been considered that E.U. rules impose significant restrictions on negotiations and that a more flexible approach is possible under the GPA.\textsuperscript{180} In our view, however, it is unclear whether a move away from E.U. requirements would allow for greater use of procedures involving negotiations.\textsuperscript{181}

Despite the fact that the 2014 E.U. Public Procurement Package aimed to provide additional flexibility to procedures involving negotiations, there is a view that the lack of clarity of the specific rules allowing for the use of those procedures may create reticence on the part of contracting authorities—particularly given the traditionally restrictive approach taken by the CJEU to the interpretation of those grounds.\textsuperscript{182} However, in our view, that does not mean that the revised EU rules actually restrict the possibilities to use

\textsuperscript{178} Id.
\textsuperscript{179} Steinicke, supra note 161, at 372.
\textsuperscript{180} Id.
competitive procedures involving negotiations or that regulatory reform is needed but rather, that any uncertainties surrounding the use of competitive procedures can be sorted out through guidance and case law. There is no reason why the United Kingdom could not provide such guidance to its contracting authorities, although it is also clear that guidance issued by the European Commission would be preferable.

A different but related issue concerns whether a move from the E.U. to a GPA baseline would grant U.K. contracting authorities access to procedures involving significant possibilities for negotiation after the final tender stage. E.U. law prescribes this by the so-called ban on negotiations, but in principle, it is permitted under the GPA (Art XII)—allowing for the use of negotiations not only when it has been indicated in the transparency notice as part of the description of the procurement method to be used but also “where it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation.”

This is the point where the GPA baseline differs more markedly from the E.U. rules, particularly if the GPA is interpreted as meaning that if the procurement process had been described in the tender documentation as not involving any negotiations whatsoever, the procuring entity can engage in negotiations anyway. Nonetheless, this possibility seems constrained by the trigger of not being possible to (obviously) identify the most advantageous offer. Either way, for reasons discussed elsewhere, it is not clear that the possibility of engaging in negotiations after the final tender stage necessarily is beneficial to the procuring entity in all, or most, situations.

Moreover, given the significant flexibility created by the rules on the modification of contracts during their term, which is not regulated in the GPA beyond the anticircumvention clause of Art XV:7, there seems to be little advantage in engaging in renegotiations after completing the tendering as compared to engaging in contractual renegotiation during the execution phase. The only advantage from a more flexible approach to negotiations

183. To date, the most it has done is provide a decision tree to help deciding on what procurement procedure to use. See Crown Commercial Serv., Procurement Policy Note: Availability of Procurement Procedures (Decision Tree), ACTION NOTE 12/15 (July 30, 2015), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454417/PPN_12_15.pdf [https://perma.cc/RY92-NNP7].
185. Revised Agreement on Government Procurement, supra note 92, art. 15, ¶ 7.
186. See Telles & Butler, supra note 181, at 158; Pedro Telles, Competitive Dialogue in Spain, in COMPETITIVE DIALOGUE IN EU PROCUREMENT 370, 394–95 (Sue Arrowsmith & Steen Treumer eds., 2012); Pedro Telles, Competitive Dialogue in Portugal, in COMPETITIVE DIALOGUE IN EU PROCUREMENT 399, 418 (Sue Arrowsmith & Steen Treumer eds., 2012).
187. See Directive 2014/24, supra note 9, art. 72.
at the end of the tendering phase could be in terms of preventing the formation of the contract altogether if the offers received at the end of the tendering phase are not able to satisfy the procuring entity’s needs. However, in that case, current E.U. rules allow for a cancelation of the original tender and recourse to negotiations to avoid awarding the contract based on an unsuitable tender;\(^{189}\) thus, negating another perceived substantive distinction between the E.U. and GPA legal regime. Therefore, the differences between both systems may be more formal than functional on this point. Overall, it seems that a move from the E.U. to the GPA regulatory baseline would have a limited impact on the use of negotiations in procurement and that not much more flexibility could be gained.

3. Remedies: Procedural Measures and Money Damages

Another area of clear divergence in the level of prescriptiveness between the GPA and the E.U. regulatory baselines concerns the requirements of the remedies system.\(^{190}\) A move toward GPA compliance only would create (1) scope for a reduction or suppression of the standstill and automatic suspension requirements mandated by E.U. law; (2) scope for reconsideration of the ineffectiveness of illegally awarded contracts; and (3) some room for tweaking the heads of damages claims (i.e., removing damages for lost profits).\(^{191}\) In our view, from the perspective of well-functioning and effective remedies system designs, there are significant issues around the eventual advantages derived from the United Kingdom being able to create a remedies system without mandatory standstill, automatic suspension, possibly no rules on ineffectiveness of illegally concluded public contracts,\(^{192}\) and limited possibilities to claim damages.\(^{193}\) A regulatory context with weak procurement review procedures hardly seems capable of providing reassurances to foreign bidders,\(^{194}\) and this can potentially either lead to higher prices, due to the increase in uncertainty and risk posed by a weak enforcement system, or to lobbying by undertakings for the inclusion of stronger dispute settlements mechanisms in future free trade agreements involving the United Kingdom.

In any case, such a reform of the U.K. system would represent a half step back from the procedural guarantees currently ensured by the E.U. regula-

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189. Directive 2014/24, supra note 9, art. 32, ¶ (2)(a). Unsuitable tenders are defined as “irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority’s needs and requirements as specified in the procurement documents.” Public Contracts Regulations 2015 (SI 2015/102), ¶ 32 (Eng.).

190. Arrowsmith, supra note 85, at 13.

191. Id.


tory baseline. This is important in relation with jurisdictions that offer access to remedies on a strictly reciprocal basis, which may take issue with a reduction of guarantees by the United Kingdom that already is at the bottom end of the spectrum within the European Union. More generally, there is no obvious advantage in freeing up the public sector from the checks and balances provided by privately initiated litigation through procurement disputes—at least not in the absence of a more developed public oversight infrastructure. This would also be out of step with developments in more advanced procurement regimes, and most recent free trade agreements, and could likely reduce the efficiency (and integrity) of the whole U.K. procurement system. Therefore, even if this aspect of regulatory reform would be possible under a GPA baseline, we do not think it would be a welcome one.

4. A New Baseline for Evolving Procurement Practices

In our opinion, in contrast with the three sets of issues discussed so far, there is significant scope for reform and improvement of the U.K. regulatory regime within the current constraints of the E.U. regulatory baseline, which would also fit in a GPA compliant U.K. system. Regulatory reform efforts would be better invested in this direction. The remainder of this section, thus, fleshes out some of the areas where we consider efforts could be made to improve procurement practice in the United Kingdom without necessarily requiring regulatory reform.

i. Evolving E-Procurement

To begin with, there is urgency in meeting the challenge of fully transitioning to electronic procurement (which legally needs to take place by

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196. An informal survey carried out by Sanchez-Graells among the members of the European Procurement Specialists Group showed that there are two broad models of access to remedies in the EU: a model of unlimited access to remedies open to undertakings from any nationality, and a model of limited access to remedies for undertakings from the EU/EEA, GPA or FTA/RTA. Albert Sanchez-Graells, [Input Sought] Access to Procurement Remedies and Reciprocity in EU/EEA Member States, HOW TO CRACK A NUT (Feb. 22, 2017), http://www.howtocrackanut.com/blog/2017/2/22/input-sought-access-to-procurement-remedies-and-reciprocity-in-eueea-member-states [https://perma.cc/8HK5-XYVR]. This indicates that, for those countries that make access to remedies conditional on reciprocity, the reduced standards eventually adopted by the United Kingdom in the future may create difficulties. For details, see id.

197. Hoekman, supra note 152, at 580, stresses that “many of the more recent vintage [preferential trade agreements] include extensive coverage commitments that are enforceable—including through domestic bid-challenge type mechanisms.”

198. “Neglecting, or crippling, an effective protest system will lead to a loss of transparency, and the shared experience of many procurement systems is that, when transparency is decreased, corruption and related problems increase.” Daniel I. Gordon, Constructing a Bid Protest Process: The Choices Every Procurement Challenge System Must Make, 35 PUB. CONT. L.J. 427, 445 (2006).

199. See Arrowsmith, supra note 13, at 1–47.

200. On its benefits within the E.U., see António Aguiar Costa et al., Evidence of the Impacts of Public E-Procurement: The Portuguese Experience, 19 J. PURCHASING SUPPLY & SUPPLY MGMT. 238,
2018 but should be completed as soon as possible) and to capitalize on the reduced administrative costs that can result from an effective use of dynamic purchasing systems based on electronic catalogues and, more generally, on the extensive use of electronic auctions where at all possible. It is also necessary to develop and resource an effective training strategy that delivers the skills upgrade necessary to manage and oversee a more sophisticated and technologically challenging electronic procurement environment.

ii. Framework Agreements

It is also necessary to carry out an in-depth performance audit of the several mechanisms in place for centralized and collaborative procurement. Anecdotal evidence shows that the use of framework agreements has not been as effective or efficient as it could be and that public buyers sometimes face difficult decisions due to either the multiplicity of alternatives they could use for the same procurement, e.g., due to the existence of both national and regional frameworks for given supplies, or the absence of centralized or collaborative provision in other areas. A mapping exercise could help identify these instances of either overlap or absence of mechanisms and contribute to their rationalization. Simultaneously, that audit could focus on the specific ways in which centralized and collaborative procurement has been carried out and assess the extent to which a change in mechanisms, e.g., a migration from framework agreements to dynamic purchasing systems, could also increase the efficiency of these activities.

iii. Bid Rigging

Related to these operational issues around centralization and collaboration, it would also be necessary to gain a better understanding of the impact that these strategies are having on supply chains and on competitive structures in different markets. A close analysis by the U.K. Competition and Markets Authority, beyond their current activities in bid rigging in public procurement, would be desirable. This analysis would also allow for a better understanding of the level of SME access to public procurement and provide evidence on the ways in which improvements in this area could be achieved—some of which will likely be affected by the technological developments and migration to full e-procurement mentioned above.


iv. Oversight

Last, but not least, there are also important challenges concerning remedies and access to an effective review of public procurement decisions, as well as a strengthening of public oversight mechanisms. The creation of a specialized procurement appeals administrative tribunal should be explored in detail. There are significant potential advantages in a system that allows for a speedier, more transparent, and less costly review of public procurement decisions than bringing cases to the High Court. This would also reduce the scope for confidential settlements that can both impose a relevant volume of unobservable costs on public buyers, as well as, deprive practitioners and society at large of an understanding of the practices and strategies that are considered to run against the existing regulatory framework or other commercial considerations.

This is only a short list of highly challenging issues that require attention with or without Brexit. It is also a list of areas for potential improvement of public procurement regulation that are not dependent, or not significantly dependent, on higher-level trade-related regulatory decisions. Working on these issues would be a way of avoiding Brexit-induced paralysis in public procurement. Importantly, these would be compatible with both the E.U. and the GPA regulatory baselines, and consequently, the results of such efforts for procurement advancement and reform would not be dependent on the currently highly uncertain outcome of trade negotiations.

V. CONCLUSION

Despite the promise that some identify in Brexit as an opportunity for significant reform of the U.K. public procurement system, there is very limited scope for significant near-term legislative change. With the caveats that the complexity of a process such as Brexit requires, the paper has identified several constraints. From an internal perspective, even if the European Union (Withdrawal) Act creates the appearance of granting the United Kingdom a free hand for the (de)regulation of procurement, the conclusion of a comprehensive free trade agreement with the European Union, such as that sought by the U.K. government, would probably tend to perpetuate U.K. compliance with E.U. rules or, at the least, create a significant constraint on the introduction of reforms that would imply regulatory diversity between the United Kingdom and the European Union. A similar trend of containment of (de)regulatory tendencies could derive from advances in the development of a U.K.-U.S. trade relationship and, more generally, from GPA-based procurement liberalization. It seems questionable that the

204. Arrowsmith, supra note 13, at 1–47.
205. See Steinicke, supra note 161, at 363–64.
206. See Wang, supra note 95, at 37.
207. See id.
United Kingdom is currently a party to the GPA, and it will thus need to seek access to the agreement in the future. As for what the accession process might entail, it would appear it depends on how different the United Kingdom wants its commitments to be from the current E.U. ones, and how the remaining parties will use the opportunity to extract concessions.

Ultimately, in substantive terms, the GPA baseline imposes no requirements dissimilar enough to the European Union’s to justify the political and practical cost of carrying out reforms tending to (de)regulate procurement in the United Kingdom in a manner that is significantly different from current rules. On the contrary, a GPA compliant regime may have less flexibility for reform than anticipated. Additionally, there is a range of policy areas where U.K. procurement would benefit from significant policy steers and further investment today, and this is possible without formal regulatory reform. Work in those areas (and most notably on a prompt and full transition to e-procurement) fits within the current net of regulatory constraints. Thus, we conclude that the discussion around a change of regulatory model for procurement in the United Kingdom post-Brexit may well be an exercise in legal futility and that public interest would be best served by ensuring continuation of the existing regulatory framework, a push for more effective policy implementation, and a renewed effort for international technical cooperation.

208. See Steiniticke, supra note 161, at 363–64.
209. See Svidronova & Mikus, supra note 200, at 334.