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## Public Procurement

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### 22.1 Introduction

Public procurement is a large sector of economic activity, estimated to account annually for spending of approximately £290 billion in the UK,<sup>1</sup> and some €2 trillion in the EU.<sup>2</sup> Freeing this expenditure from the constraints of the public procurement regime featured in the objectives of those advocating Brexit, with Dominic Cummings, director of Vote Leave, an organization which campaigned for Britain's exit from the European Union, characterizing government procurement as 'the horror, the horror' and criticizing the EU framework as 'complex, slow and wasteful' and favouring 'large established companies with powerful political connections – true corporate looters'.<sup>3</sup> This chapter considers the post-Brexit procurement law landscape.

While the UK procurement regime has undoubtedly changed, post-Brexit procurement remains both relatively detailed and relatively prescriptive, once the Trade and Cooperation Agreement (TCA), the position arising from the Protocol, and current UK government proposals for the future of public procurement are considered together. That said, the potential for greater flexibility in the future remains. Greater latitude clearly arises in respect of sub-threshold contracts, although increased flexibility may result in small and medium-sized enterprises (SMEs) losing important market-access opportunities. Incorporation of secondary policies – social, labour and environmental objectives – into the procurement process has previously been closely regulated by the EU due to concerns of facilitating disguised 'economic nationalism',<sup>4</sup> and thus an opportunity for expanding their use

<sup>1</sup> UK Cabinet Office, Green Paper, *Transforming Public Procurement*, December 2020, 5.

<sup>2</sup> European Commission, Internal Market, Industry, Entrepreneurship and SMEs, [https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en).

<sup>3</sup> Dominic Cummings, Blog Posts, <https://dominiccummings.com/tag/procurement/>.

<sup>4</sup> P Kunzlik, 'The Procurement of "Green" Energy' in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Law* (Cambridge University Press 2009) 5.

arises post-Brexit. Early indications are that there is an interest in pursuing this opportunity.

## 22.2 General Framework

Post-Brexit UK public procurement is governed by three separate international agreements:

- (1) the WA, of which the Protocol is a part;
- (2) the TCA, in particular, Part 2, Heading One, Title VI and its associated Annex (which incorporates and supplements the framework of the World Trade Organization's General Procurement Agreement (GPA); and
- (3) the GPA itself, which, from 1 January 2021, the UK has been a member of in its own right.<sup>5</sup>

Transitional provisions facilitating legal certainty are found in the (WA),<sup>6</sup> which provides that there is no change to the rules applicable to any process launched before the end of the transition period (namely, before 11.00 pm on 31 December 2020).<sup>7</sup> For processes launched after this, the TCA applies, and the framework is primarily based on the provisions of the GPA,<sup>8</sup> of which the EU is also a member.

The purpose of Title VI TCA is 'to guarantee each Party's suppliers access to increased opportunities to participate in public procurement procedures and to enhance the transparency of public procurement procedures'.<sup>9</sup> However, there is a critical distinction in Title VI between 'covered procurement'<sup>10</sup> and treatment 'beyond covered procurement', with the former being subject to greater regulation in the form of incorporated GPA provisions plus supplemental TCA rules.

The GPA provisions impose extensive obligations as to how procurements are to be carried out, and, while not as detailed and prescriptive as the EU regime, nonetheless introduce significant constraints of principle on UK procuring entities post-Brexit. These constraints are then

<sup>5</sup> World Trade Organization, *Parties, Observers and Accessions*, [www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm).

<sup>6</sup> WA Part Three, Title VIII.

<sup>7</sup> WA Arts 75 and 76. See also Art 78 on UK access to e-certis for a period not exceeding nine months after the end of the transition period.

<sup>8</sup> See TCA Art 277(1) and ss B1 and B2 of TCA Annex 25.

<sup>9</sup> Art 276 TCA.

<sup>10</sup> Art 277(2) TCA.

supplemented by the TCA adding additional procuring entities to those listed in GPA Annex 1 (central government entities), GPA Annex 2 (sub-central government entities) and GPA Annex 3 (other entities); additional services to those listed in GPA Annex 5; and additional rules for covered procurement. The additional procuring entities and services are listed at section B of TCA Annex 25, while the additional rules are specified in TCA Title VI itself.

## 22.3 Covered Procurement

### 22.3.1 *Additional Procuring Entities*

The additional procuring entities to which the TCA/GPA regime applies are contracting authorities or public undertakings that operate in the gas and heat distribution sectors and that are covered by the Utilities Contracts Regulations 2016 (UCR), as well as privately owned utilities that act as a monopoly in the gas and heat distribution sectors. However, such entities are covered only insofar as the procurement is equal to or above the following thresholds: 400,000 Special Drawing Rights (SDR) for procurement of goods and services (approximately £410,000), and 5,000,000 SDR (approximately £5,148,000) for procurement of construction services.<sup>11</sup>

### 22.3.2 *Additional Services*

There is a range of additional services covered by the TCA,<sup>12</sup> including (by way of example only) hotel and restaurant services,<sup>13</sup> food serving services,<sup>14</sup> telecommunication-related services<sup>15</sup> and education services,<sup>16</sup> although coverage is subject to specific thresholds in respect of certain of these services.<sup>17</sup> However, several services are specifically excluded from the TCA, namely human health services,<sup>18</sup> administrative health-care services,<sup>19</sup> and supply services of nursing and medical personnel.<sup>20</sup>

<sup>11</sup> See s B2 (1) of TCA Annex 25.

<sup>12</sup> See s B2 (3) of TCA Annex 25.

<sup>13</sup> Central Product Classification (CPC) 641.

<sup>14</sup> CPC 642.

<sup>15</sup> CPC 754.

<sup>16</sup> CPC 92.

<sup>17</sup> See s B2 (2), Note 1 of TCA Annex 25.

<sup>18</sup> CPC 931.

<sup>19</sup> CPC 91122.

<sup>20</sup> CPC 87206 and CPC 87209, respectively.

### 22.3.3 *Additional Rules*

Article 277(1) TCA provides for the incorporation of certain provisions of the GPA.<sup>21</sup> These address a range of issues<sup>22</sup> including definitions (Article I GPA), scope of coverage (Article II GPA) and security and general exceptions (Article III GPA).

In the context of covered procurement, a general principle of equal treatment, that is, treatment no less favourable than that applicable to domestic goods, services and suppliers, is required in respect of goods, services and suppliers of the other party.<sup>23</sup> Meanwhile, the important Article IV.2 GPA provides that a party

shall not: a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or b) discriminate 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.

Also relevant in this regard is Article XV(1) GPA, which deals with treatment of tenders and awarding contracts, and requires procuring entities to ‘receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders’.

Several aspects of the procurement process are regulated by the GPA, including transparency, open tendering, selective tendering, prevention of conflicts of interest and corruption (Article IV.4 GPA); rules of origin (Article IV.5 GPA); offsets (Article IV.6 GPA); and customs duties (Article IV.7 GPA).

Meanwhile, Article VIII sets out detailed provision on conditions for participation, including that procuring entities must evaluate the financial capacity and the ‘commercial and technical abilities of a supplier on the basis of that supplier’s business activities both inside and outside the territory of the Party of the procuring entity’<sup>24</sup> and providing for grounds for exclusion.<sup>25</sup> Article IX addresses qualification of suppliers and imposes an obligation on each party to ensure that its procuring entities

<sup>21</sup> Section A of Annex 25, namely Arts I–III, IV.1.a, IV.2–IV.7, VI–XV, XVI.1–XVI.3, XVII and XVIII GPA.

<sup>22</sup> World Trade Organization, *Revised Agreement on Government Procurement*, as amended on 30 March 2012.

<sup>23</sup> Art IV.1.a GPA.

<sup>24</sup> Art VIII.3 GPA.

<sup>25</sup> Art VIII.4 GPA.

make efforts to minimize differences in their qualification procedures. Technical specifications and tender documents, time periods, negotiations, limited tendering, and electronic auctions are also addressed in detail.<sup>26</sup> In particular, technical specifications must be set out 'in terms of performance and functional requirements, rather than design or descriptive characteristics'.<sup>27</sup>

Supplemental provisions include Article 280 TCA, which provides that procuring entities shall not require suppliers to submit all or part of the supporting evidence to demonstrate satisfaction of competition requirements. Article 281 TCA provides for conditions for participation, but specifically provides that requirements for prior experience cannot 'require that the supplier has such experience in the territory of that Party'. Article 282 TCA addresses registration systems and qualification procedures. Article 283 TCA provides for selective tendering and requires, where such tendering is used, that procuring entities must address 'invitations to submit a tender to a number of suppliers that is sufficient to ensure genuine competition without affecting the operational efficiency of the procurement system'.

Abnormally low prices are addressed in Article 284 TCA, and, notably, verification of pricing by reference to subsidies is expressly and specifically facilitated, which appears to reflect separate concerns related to control of state aid in the UK post-Brexit. Meanwhile, Article 285 TCA requires each party to ensure that the procuring entities *may* take account of environmental, labour and social considerations in procurement processes. Thus, it is compulsory for each party to ensure that a possibility of incorporation of secondary policies arises, albeit that Article 285 TCA contains no detail on how this is to be achieved.

Notices and information are also regulated and Article XVII GPA sets out provisions on communication of procurement decisions. These provisions are extensively supplemented by the TCA, including by Article 278 TCA, which makes provision for use of electronic means in procurement, requiring it to be used 'to the widest extent practicable', and requiring that such means be 'non-discriminatory, [and] generally available and interoperable with the information and communication technology products in general use and [that they] shall not restrict access to the procurement procedure'. 'Electronic publication' is addressed in Article 279 TCA, and all notices are required to be 'directly

<sup>26</sup> Arts XI–XIV GPA.

<sup>27</sup> Art X.2 GPA.

accessible by electronic means, free of charge, through a single point of access on the internet’.

Requirements are imposed in respect of domestic review procedures, and Article XVIII GPA requires access to timely, effective, transparent and non-discriminatory administrative or judicial review procedures. This is supplemented by Article 286 TCA, pursuant to which – and reflecting a recent concern of Court of Justice of the European Union (CJEU) case law<sup>28</sup> – where an administrative authority ‘is designated by a Party under paragraph 4 of Article XVIII of the GPA’ to undertake review, the relevant party ‘shall ensure’ that the members of the designated authority are independent, impartial and free from external influence during the term of appointment; that they are not dismissed during office unless required by provisions covering the governing body; and that the president or at least one other member of the designated authority has legal and professional qualifications equivalent to those necessary for judges, lawyers or other legal experts.

In terms of remedies, it is mandatory for each party to provide for ‘rapid interim measures to preserve the supplier’s opportunity to participate in the procurement’.<sup>29</sup> Such interim measures ‘may’ result in suspension of the procurement process or performance of the contract, and notably there is the possibility of having regard to overriding adverse consequences for the interests involved, including the public interest. Where a challenge has been submitted, it is mandatory ‘in principle’ for each party to provide for an automatic suspension, albeit that, ‘in unavoidable and duly justified circumstances, the contract can be nevertheless concluded’.<sup>30</sup> Each party ‘may’ provide a standstill period or a sufficient period to submit a challenge, which may constitute grounds for suspension of contract execution;<sup>31</sup> and corrective actions ‘may include’: removal of discriminatory specifications; repetition of the procurement without changing the conditions; setting aside of a contract award decision and adoption of a new contract award decision; contract termination or declaration of ineffectiveness; adoption of other measures to remedy breach, such as an order to pay a particular sum until the

<sup>28</sup> See, eg, Case C-216/18 *LM* EU:C:2018:586; Case C-619/1 *Commission v Poland* EU:C:2019:531; Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117; Case C-506/04 *Wilson* EU:C:2006:587, §51; see also Case C-619/18 *Commission v Poland* EU:C:2018:1021.

<sup>29</sup> Art 286(2) TCA.

<sup>30</sup> Art 282(3) TCA.

<sup>31</sup> Art 282(4) TCA.

breach has been effectively remedied; and compensation.<sup>32</sup> While much of Article 286 TCA on remedies is discretionary, the following aspects are mandatory: independence of the reviewer; availability of rapid interim measures; and automatic suspension.

## 22.4 Beyond Covered Procurement

Procurement ‘beyond covered procurement’ includes the sub-threshold market, so it is critical for Irish, Northern Irish and GB SMEs. While the individual contract values may be relatively low in this sector, cumulatively the value of this business represents possibly as much as 20 per cent of the UK government’s annual spend of £290 billion on public procurement. The relevant provisions regulating ‘beyond covered procurement’ are found in the TCA and the Protocol.

### 22.4.1 *The TCA*

Article 287(1) TCA provides that each party must afford ‘treatment no less favourable than the most favourable treatment accorded, in like situations, to suppliers of the’ other party. There are different definitions of a ‘supplier of’ each party provided by Article 287(2) TCA. For the Union, it is ‘a legal person constituted or organised under the law of the Union or at least one of its Member States and engaged in substantive business operations’. As understood by the Union, this is equivalent to the concept of ‘effective and continuous link’ with the economy of a member state enshrined in Article 54 of the Treaty on the Functioning of the European Union (TFEU). For the UK, a legal person is an entity ‘constituted or organised under the law of the United Kingdom and engaged in substantive business operations in the territory of the United Kingdom’.

Article 288 TCA provides for national treatment of locally established suppliers, and, subject to security and general exceptions set out in GPA Article III, a measure for a party shall not result for suppliers of the other party ‘established in its territory’ in ‘treatment less favourable’ than that accorded to domestic suppliers. Simply put, this Article provides that contracting authorities in the UK must treat EU-owned suppliers established in the UK, in like situations, no less favourably than UK-owned suppliers based in the UK and vice versa. Otherwise, no principles of

<sup>32</sup> Art 282(5) TCA.

transparency or equal treatment appear to apply for this sector. Given that the EU Treaties no longer apply in the UK, reliance can no longer be placed on a cross-border interest to engage application of the general principles of transparency and equal treatment.<sup>33</sup>

#### 22.4.2 *The Protocol*

The Protocol creates a partial exception to this general position, and, as noted in a UK Cabinet Office Procurement Policy Note (PPN 11/20):

EU Treaty rights relating to the free movement of goods will continue to apply in Northern Ireland beyond the end of the transition period under the terms of the Northern Ireland Protocol. This means that below threshold procurements involving the provision of goods into Northern Ireland will continue to be subject to a cross-border interest test (i.e. which may be of interest to suppliers from EU Member States including the Republic of Ireland).<sup>34</sup>

This is a reference to Article 7(1) of the Protocol and means that, given the general principles of equal treatment and transparency, contracts for goods which fall outside the scope of ‘covered procurement’, such as below threshold contracts, may still need to be opened up to competition, including from potential suppliers located in other EU member states.<sup>35</sup>

While Article 7(1) refers only to ‘the lawfulness of placing goods on the market in Northern Ireland’, it would seem to follow from the applicability of the Treaty provisions on free movement of goods in Northern Ireland that sub-threshold contracts for goods in Ireland must also be considered to be of cross-border interest. However, this is not clear, since such contracts will not involve ‘placing goods on the market in Northern Ireland’. The implications of this approach are also not clear. For example, if a contract tendered in Ireland is correctly categorized as a works contract with works as the ‘main purpose’,<sup>36</sup> but involves an incidental element of cross-border transfer of goods to enable the works to be performed, would this be sufficient to trigger a cross-border interest on the basis of the application of Articles 34 and 36 TFEU in Northern

<sup>33</sup> See, eg, Joined Cases C-147/06 *SECAP SpA* and C-148/06 *Santorso* EU:C:2008:277.

<sup>34</sup> Cabinet Office, Procurement Policy Note – Reserving Below Threshold Procurements, Action Note PPN 11/20, December 2020, p 1, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/943915/PPN\\_11\\_20\\_-\\_Reserving\\_Below\\_Threshold\\_Procurements.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943915/PPN_11_20_-_Reserving_Below_Threshold_Procurements.pdf).

<sup>35</sup> *Ibid.*, 9.

<sup>36</sup> Case C-412/04 *Commission v Italy* EU:C:2008:102, § 47.



Ireland? Article 7(1) is not precisely worded, but it is certainly not qualified by a materiality or ‘main purpose’ threshold. Resolution of such an issue would likely require a reference to the CJEU, as provided for by Article 12(4) of the Protocol.

### 22.4.3 *SMEs*

While not directly addressing procurement, it is also important to note that TCA Title VII deals specifically with SMEs. The Title is not limited to procurement and Article 295 TCA refers to the objective of enhancing ‘the ability of small and medium-sized enterprises to benefit from Heading One’ (that is, trade generally). Provision is made in this title for information sharing,<sup>37</sup> including an obligation to establish or maintain a publicly accessible website for SMEs conveying information relevant to SMEs arising from Heading One, as well as information on tariffs, customs duties, excise duties, taxes and so on. The TCA also provides for SME contact points, to ensure that the needs of SMEs are taken into account when implementing Heading One, and to consider ways to strengthen co-operation on matters of relevance to SMEs.<sup>38</sup>

### 22.4.4 *Responses*

To date, the EU Commission has had little to say on procurement ‘beyond covered procurement’ other than in its ‘Questions and Answers’ issued on 24 December 2020, in which it notes: ‘[t]he Agreement further provides for non-discrimination of EU companies established in the UK (and vice versa) for small-value procurement, i.e. below the threshold of the GPA (from EUR 139,000 to EUR 438,000, depending on the contracting entity, and EUR 5,350,000 for construction services)’. This seems to imply that, subject to the Protocol, contracting authorities in the UK, Northern Ireland and the EU may ‘reserve’ or limit sub-threshold contracts to entities ‘established’ within their jurisdictions and thereby exclude all other would-be cross-border operators from tendering for such contracts. The prohibitive cost of cross-border ‘establishment’ could effectively exclude many SMEs from competing across borders for sub-threshold contracts.

The UK government seems to share this view, and its plans for this sector are set out in PPN 11/20. Subject to the Protocol and contracts in

<sup>37</sup> Art 296 TCA.

<sup>38</sup> Art 297 TCA.

Northern Ireland involving goods, it is envisaged that procuring entities will have discretion to reserve contracts 'beyond covered procurement' for local suppliers, albeit that procuring entities may continue to invite and accept tenders from EU member states (including Ireland) if they consider that doing so will deliver better value for money. Interestingly, it is clear that procuring entities *must consider* reservation, and PPN 11/20 provides that a justification for the decision to reserve or not to reserve must be recorded in all cases. In the case of reserved contracts, contracting authorities must satisfy themselves that the tenderers have a substantive business presence in the UK and are not simply 'brass-plate' operations registered in the UK to circumvent the reservation policy.<sup>39</sup> The impact of these provisions on market access, in practical terms, will turn on the extent to which procuring entities decide to opt for protectionism.

## 22.5 Modifications, Rectifications and Dispute Resolution

There are no bespoke dispute-resolution mechanisms for TCA Title VI. Article 289 TCA provides for modifications and rectifications of market access commitments, according to the procedures for modifications set out in Article 290 TCA and for rectifications set out in Article 291 TCA. Article 293 TCA provides for amendment or rectification where there is agreement, while Article 294 TCA requires that the parties recognize the benefits that may arise from 'cooperating in the international promotion of the mutual liberalisation of public procurement markets' and share annual statistics on covered procurement. Where there is lack of agreement in respect of modifications and rectifications, Article 292 TCA provides that resolution can be pursued in consultations, but if agreement is not reached within sixty days, the party seeking to modify or rectify may refer the matter to dispute settlement in accordance with Title I of Part Six.

## 22.6 Procurement Reform in the UK

### 22.6.1 Amendments

Amendments have been made to the UK procurement regime by the Public Procurement (Amendment etc) (EU Exit) Regulations 2020, which mostly deal with obvious anomalies post-Brexit. For example,

<sup>39</sup> PPN 11/20 (n 34).

Regulation 73 of the Public Contracts Regulations 2016 (PCR) and equivalent provisions in the UCR and the Concession Contracts Regulations 2016 (CCR), which identify grounds of mandatory rights of termination where certain breaches of the procurement rules have occurred, no longer include the possibility of termination as a result of ‘a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU’.

Another significant practical difference is that contracting authorities in the UK are now required to use Find a Tender, the new UK e-notification service replacing the Official Journal of the European Union’s Tenders Electronic Daily.<sup>40</sup> Regulation 84 of the PCR previously provided for the submission of certain reports to the EU Commission, and now provides for communication to the UK Cabinet Office or the relevant devolved authority. There has been a wholesale deletion of Schedule 5, which set out provisions for recognizing the qualifications of entities listed on identified trade registers within the EU member states. Regulations 89 and 90 of the PCR now also provide that duties owed to economic operators are duties owed to operators who, at the time of the procurement, were registered in a GPA state, provided always that the relevant procurement is within the scope of the GPA.

### 22.6.2 *Green Paper: Transforming Public Procurement*

In terms of future proposals, a consultation arising from the Green Paper on ‘Transforming Public Procurement’ closed for responses on 10 March 2021. In the Ministerial Foreword to that document, Lord Agnew stated that ‘[t]he end of the Transition Period provides an historic opportunity to overhaul our outdated public procurement regime’.<sup>41</sup> However, this perhaps overstates the changes proposed and Albert Sanchez-Graells has commented that, ‘despite its Brexit-infused rhetoric of transformation’, the Green Paper not only ‘remains very closely pegged to the current regulatory baseline’ in adopting an ‘EU law+’ but pursues a deregulatory strategy ‘that will increase formal and substantial complexity and thus raise administrative burdens and compliance costs for all actors involved’.<sup>42</sup>

<sup>40</sup> PPN 11/20 (n 34) 2.

<sup>41</sup> Green Paper (n 1) 5.

<sup>42</sup> Albert Sanchez-Graells, ‘The UK’s Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication?’ (2021) 16 *European Procurement & Public Private Partnership Law Review* 4.

Changes proposed in the Green Paper include, inter alia:

- (1) replacing the separate regimes for public contracts, concessions, utilities, and defence and security with a single, uniform set of rules, supplemented by sector-specific aspects where required for effective operation or in the national interest;
- (2) legislating to require contracting authorities to have regard to the government's strategic priorities for public procurement in a new National Procurement Policy Statement; and
- (3) reforming the process for challenging procurement decisions to speed up the review system and make it more accessible, refocusing redress on pre-contractual measures and capping the level of damages to reduce speculative claims.<sup>43</sup>

While the outcome of the public consultation and the future of public procurement in the UK are not known at the time of writing, it is of interest that regard for secondary policies – and government strategic priorities – has been highlighted. As noted in Section 22.3.3, while there is considerable scope for incorporation of secondary policies under the EU framework, such incorporation is subject to very specific and precise constraints, depending on whether it is pursued through specifications, award criteria, contract performance conditions and so on.<sup>44</sup> Thus, it may be that use of procurement to pursue general government strategies will be a significant feature of the new procurement landscape post-Brexit.

### 22.6.3 *Future Issues*

At present, all of the obligations of the TCA appear to be capable of accommodation within the existing PCR, UCR and CCR, which go further than required by the TCA, and even the new provision in Article 284 TCA on verification for subsidies could arguably be achieved through application of the current provisions on abnormally low tenders. However, potentially very difficult issues will arise if amended regulations are introduced which are not fully compliant with the requirements

<sup>43</sup> Green Paper (n 1) 7–11.

<sup>44</sup> See, eg, C McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press 2007); S Arrowsmith and P Kunzlik, *Public Procurement and Horizontal Policies in EC Law: General Principles* (Cambridge University Press 2009).

of the TCA. The effect of the TCA in domestic law would then be brought into sharp focus. Section 29 of the European Union (Future Relationship) Act 2020 (EUFRA) may provide an answer here, insofar as it suggests that domestic law ‘has effect . . . with such modifications’ as are required to implement the TCA. This may mean, as is suggested by Paul Craig,<sup>45</sup> that the specific provisions of the TCA may be directly invocable at the instance of disappointed tenderers, creating additional burdens for procuring entities not only to comply with national implementing regulations but also to monitor their compliance with the TCA itself.

### 22.7 Conclusion

Overall, as can be seen, the UK will enjoy certain new flexibilities in procurement post-Brexit, of particular importance in relation to sub-threshold contracts and secondary policies. However, the TPA/GPA framework imposes significant constraints of principle, and early indications are that procurement will continue to be quite heavily regulated. Certainly, it is not at all clear that procurement post-Brexit will be any less ‘complex’ than it was considered to have been before Brexit.

<sup>45</sup> See Chapter 3.

