

Written evidence submitted by Dr Kamala Dawar (TB03)

BREXIT and the UK's Government Procurement Law and Policy

A. Executive Summary

- Government procurement is a significant economic and government activity. In 2013/14, the UK public sector spent a total of £242 billion on procurement of goods and services. This sum accounted for 33% of UK public sector spending and 13% of GDP.¹
- Currently, the UK's procurement laws fall under the application of the EU's 2014 Procurement Directives for Goods and Services, Utilities and Concessions. The EU has also negotiated the coverage of the WTO Government Procurement Agreement on behalf of all 28 EU Member States, and various RTAs, including the EU-Canada CETA with a comprehensive chapter of public procurement provisions.
- Following Brexit, the UK will no longer be legally obligated to follow either the EU Directives, nor will it be subject to the commitments the EU has signed up to on behalf of the UK in the WTO GPA or other RTAs. The UK must undertake a negotiating phase that formalizes the participation of relevant stakeholders from the devolved nations.
- The UK's withdrawal from the EU will impact on procurement laws and policies internally. Following the Devolution Settlement of 1998, some EU laws relate to competences that have been devolved within the UK down to these regions. Public procurement is one of these devolved competences. This could fragment a coherent UK wide procurement strategy towards the WTO GPA, the EU and other bilateral or regional procurement agreements.
- The Trade Bill should explicitly state that new international procurement agreements such as the WTO Government Procurement Agreement will be negotiated with full and equal participation of the devolved regions to ensure coherence in the internal UK market, equal representation and transparency. This will increase accountability and the monitoring of the implementation of new commitments to ensure value for money, integrity and competition in the devolved regions procurement systems.
- This submission identifies a competition response to the potential fragmentation of procurement laws, policies and markets that could occur after Brexit, with negative repercussions for transparency, value for money and legal consistency.

B. The UK relationship to the WTO and FTAs

1. The UK is not a WTO Member with independent rights and obligations relating to its Most Favoured Nation status coverage in goods and services. A crucial initial element of repositioning the UK's trade terms post-Brexit is going to involve establishing the UK's MFN commitments at the WTO with all the existing 164 Members - including the EU - before it can seek formal regional or bilateral exceptions to these MFN obligations.

¹ Department for Business, Innovation and Skills (2012a) *No Stone Unturned in Pursuit of Growth*. BIS, London. Cited in Barbara Morton, Gregg Paget, Carlos Mena. What role does Government procurement play in manufacturing in the UK and internationally and how? Cranfield University October 2013. Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/283898/ep24-government-procurement-manufacturing.pdf

2. The UK does not possess the legal competence to sign any trade agreement until it has i) withdrawn from the EU and ii) repositioned itself with regard to both the WTO and the EU itself. The UK is constrained by its good faith obligations towards the EU, which are applicable until the UK has detached itself from these laws.
3. Additionally, under WTO rules for both goods and services, every Member is obligated to provide its most favoured nation treatment (MFN) in market access to the other WTO Members. One of the few exceptions to this is through establishing a free trade area (FTA) or customs union that is, among other things, more trade liberalising.
4. The UK needs to detach itself from its current position within the EU and reposition itself anew independently under the framework of the WTO. For it is only once this WTO Membership has been formalized that the UK will be able to negotiate a free trade agreement with the EU or any other country or trading bloc.
5. After the UK leaves the EU, the EU will still be the world's largest market and the UK's biggest and nearest trading partner. The EU is more important to the UK's economic well-being than any other trading partner and therefore the UK has an overriding economic interest in accessing the EU market on preferential terms. The UK needs to secure the good will of the EU to have sufficient time to ensure the best outcomes for the UK's transition away from the EU. The Article 50(3) TEU withdrawal process gives the EU an advantage over the UK - not least because the two-year negotiation period can only be extended by a unanimous European Council decision.
6. The WTO GPA is a plurilateral agreement housed within the framework of the WTO, with voluntary membership for existing WTO Members to mutually open-up government procurement markets in goods and services to competition among its parties.
7. Until Brexit, the UK is a party to the 2014 Revised WTO GPA through its membership of the EU. When the UK leaves the EU, the EU will remove the UK's coverage from the EU's WTO GPA schedules by notifying the other parties to the WTO GPA of any proposed modifications to their commitments, pursuant to Article XIX.²
8. Once the EU has removed the UK from its schedules and the UK has reset its relationship with the EU, the UK can decide to become an independent party to the WTO GPA and access the significant value of scheduled procurement markets of the 47 countries.
9. The UK will need to apply to re-join the WTO GPA as with any other accession country. This is because the 1996 WTO GPA agreement entered into force only for those governments who have, "by signature, accepted the Agreement on 15 April 1994, or have, by that date, signed the Agreement subject to ratification and have subsequently ratified the Agreement before 1 January 1996."³ The UK did not sign this agreement as an individual party, and as a result it is not a separate signatory party to the WTO GPA, with the right to individual membership after Brexit.
10. The WTO GPA's coverage of the procurement of services has a specific 'relationship of correspondence' with the coverage set out under the GATS schedules. The WTO GPA Members cannot make commitments of procurements for certain services - unless they

² Under the WTO GPA, Article XIX Modifications and Rectifications to Coverage stipulates that a Party shall notify the Committee of any proposed rectification - whether it be a transfer of an entity from one annex to another, or the withdrawal of an entity or other modification of its annexes to Appendix I.

³ Pursuant to Article XXII of the 2012 WTO GPA Protocol. See Adoption of The Results of The Negotiations Under Article XXIV:7 of The Agreement on Government Procurement, Following Their Verification and Review, as Required by the Ministerial Decision Of 15 December 2011(GPA/112), Para 5.

have been previously ‘opened-up’ under their GATS schedules.⁴

11. It is only once the UK has set out its independent schedules under the WTO GATT and GATS, that it has the possibility to negotiate its new position in the WTO GPA, or procurement chapters in its RTAs.
12. Given that the value of market access under the WTO GPA is greater than any other existing FTA,⁵ the UK would access international procurement markets far more quickly and efficiently if it were to join the WTO GPA. It could then use its schedules under the WTO GPA as the basis for improving upon the WTO GPA benchmark during regional and bilateral negotiations. The WTO GPA is based on key EU concepts surrounding the appropriate design and execution of procurement contracts. As a result, the current UK procurement regime is highly compatible with the existing GPA legal framework.⁶
13. Any Party proposing modification of existing commitments under the WTO GPA must include evidence as to the likely consequences of the change in its notification. Removing the UK from the EU’s schedules will therefore entail re-negotiating the EU’s coverage with all the current GPA parties due to the gap in the value of the EU’s schedules after the removal of the UK schedules.
14. The UK accounts for 84 % of the total value procured at EU level in awards of more than 100 million euros.⁷ The EU’s need either to modify its schedules and market access commitments on the basis of reciprocity, or compensate the other parties to the WTO GPA on the loss of coverage follow the UK’s detachment.
15. It is highly unlikely that the UK will be able to simply rollover its current coverage as part of the EU because there are elements of the UK’s coverage that are tied into EU procurement directives. For example, under Annex 2, the EU’s sub-central government entities coverage includes regional or local contracting authorities. These are bodies governed by public law as defined by the EU procurement directive. However, the Annex only sets out indicative rather than clearly defined coverage for each Member State.⁸ This suggests that before the UK can negotiate its own coverage under the GPA, the UK will again first need to re-negotiate its relationship with the EU.

C. WTO GPA Negotiating Modalities

⁴ Dawar, Kamala (2017) *The government procurement agreement, the most-favored-nation principle, and regional trade agreements*. In: Georgopoulos, Aris C, Hoekman, Bernard and Mavroidis, Petros C (eds.) *The internationalization of government procurement regulation*. Oxford University Press.

⁵ It is estimated that the GPA parties have opened procurement activities worth an estimated US\$ 1.7 trillion annually to suppliers from GPA parties offering goods, services or construction services. See: www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (accessed 19/09/2017); See Robert D. Anderson, Philippe Pelletier, Kodjo Osei-Lah and Anna Caroline Müller. *Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession*. WTO Staff Working Paper Staff Working Paper ERSD-2011-15. 6 October 2011.

⁶ The total value contracted by the 28 Member States of the EU and covered by GPA in 2012 was EUR 283.4 billion. Bilateral UK-EU procurement-related trade can be estimated at around 15% of the total value of procurement, or close to 2.5% of GDP. This includes both direct and indirect cross-border procurement-related trade. This is approximately £85 million. Albert Sanchez Graells. *Written evidence for UK Parliament*. (TAS0083) <http://data.parliament.uk/writtenevidence/committeeevidence/svc/evidencedocument/eu-internal-market-subcommittee/brexit-future-trade-between-the-uk-and-the-eu-in-services/written/44483.pdf>

⁷ Albert Sanchez Graells. *Written evidence for UK Parliament*. (TAS0083).

⁸ See WTO Webpage:

egpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=EuropeanUnion&AnnexNo=2&ContentCulture=en (accessed 19/09/2017)

16. The WTO GPA depends on highly complex bilateral negotiations between the different Parties and a signatory party is not required to give the same commitments to all trading partners. From its inception, the plurilateral Government Procurement Code sought to address the free-rider problem with conditional reciprocity.
17. The WTO GPA's Annexes⁹ are negotiated along four basic parameters, consisting of: i) the value of procurement - covering only contracts estimated to exceed a certain value threshold; ii) the identity of the procuring entity - covering only those listed by each party in its annexes; iii) the type of goods or services procured - consisting of all goods, apart from some expressly excluded by each party, and only services listed by each party in its annexes; and iv) the origin of the goods or services - including only countries that are GPA parties.
18. Parties to the GPA also commonly qualify the scope of the coverage of their obligations within their Annexes to Appendix 1. Although this strict reciprocity approach to negotiations addressed the free-rider problem among WTO GPA parties, the OECD has estimated that if the GPA commitments were applied on an unconditional MFN basis, the average level of GPA commitments would be 16% higher in market access value than with strict reciprocity.¹⁰
19. In the legislative procedure leading to the adoption of the 2014 EU Procurement Directives, one of the main focuses was to improve the participation of SMEs in public procurement covered by the EU rules.¹¹ Approximately 20.8 million SMEs are registered in the EU, representing 99.8% of all enterprises, and SMEs produce more than a half of European GDP.
20. The challenge for the EU is that it is legally constrained by the WTO GPA when promoting or protecting SMEs in those government procurement markets covered by the agreement. For while the WTO provides *ex ante* options for the parties to negotiate to promote their SMEs and various parties have inscribed such possibilities in their Annexes, it is significant for the legality of EU SME promotion in procurement markets, that the EU did not seek to negotiate carve out protections from the GPA's obligations for SMEs and it did not aim to negotiate concessions that matched the SME objectives of other parties.¹² This is because the EU procurement directives were promulgated to liberalize the internal market among its Member States.¹³
21. The EU did not exclude SME's from the scope of the access to the EU's public procurement market, EU negotiators rather sought to explicitly discriminate against and penalise the US, Korea and Japan for their promotion of SMEs under their respective GPA Appendix 1 Annexes.¹⁴ This historical stance has placed the EU at odds with the policy

⁹ The coverage of the Agreement is set out for each signatory party in Appendix I, which is divided into Annexes concerning the specific coverage of the obligations. The Annexes address: 1) central government entities covered by the Agreement; 2) covered sub-central government entities; 3) "other" covered entities (e.g. utilities); 4) goods; 5) services coverage; 6) coverage of construction services; and 7) General Notes.

¹⁰ Asako Ueno. Multilateralising Regionalism on Government Procurement. OECD Trade Policy Paper No. 151. 2013.

¹¹ As defined under the Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). This focus was initiated in the Commission's *Europe 2020 A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, and was clearly visible in the *Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final and was one of five main aims in the 2011 Proposal.

¹² Dawar, Kamala and Skalova, Monika (2016) *The evolution of EU public procurement rules and its interface with WTO: SME promotion and policy space*. In: Sanchez Graells, Albert and Skovgaard Ølykke, Grith (eds.) *Reformation or deformation of the EU Public Procurement Rules*. Edward Elgar, Cheltenham.

¹³ For discussion, see S. Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2012) 14 *Cambridge Yearbook of European Legal Studies* 1-47.

¹⁴ The EU's Notes to Annex 1 stipulate that: The provisions of Article XVIII requiring Domestic Review Procedures *shall not* apply to suppliers and service providers of Japan, Korea and the US in contesting the

objectives of most other WTO GPA parties, as well as more recent EU efforts to promote SMEs in procurement markets under the WTO GPA and its RTAs.

22. Under Brexit, the UK has the option of avoiding this legal constraint on promoting SMEs or other horizontal policies through procurement, ex ante, when negotiating its accession terms to the WTO GPA. These negotiations will reset the UK's procurement commitments and exceptions, which can then be built upon in bilateral and regional trade agreements. In effect, the UK is now able to negotiate a comprehensive policy framework to promote SMEs, or other sectors of the economy, in line with other parties such as the US, Japan and S. Korea. A 2013 study based on EU TED data,¹⁵ assessing the use of public procurement for promoting the environment – or green public procurement (GPP), social responsible public procurement (SRPP) and public procurement for innovation indicates that the UK is the leader in all three categories.¹⁶
23. However, greater policy freedom to implement other policy objectives into government procurement policy could lead to a greater divergence between the different regional jurisdictions of the UK. This centrifugal dynamic could operative undermine legal coherence, as well as competition and value for money in post Brexit procurement processes within the UK, particularly if the different regions follow different horizontal policy objectives through their procurement processes.
24. To further promote transparency and increase competition, the UK should also set up a centralized electronic data collection system and public tender awards centrally, based on the existing EU TED system, or more advanced e-procurement systems such as in South Korea.
25. The UK, as the signatory party of any agreements signed in the WTO GPA or FTAs, will need to ensure the legality of such policies not only under their negotiated schedules in any potential membership of the WTO GPA, but also under other multilateral rules including the WTO Agreement on Subsidies and Countervailing Measures and the GATT and GATS National Treatment Obligations.
26. In the recent WTO disputes *Canada – Feed-in-Tariff*¹⁷ and *India – Solar Cells* disputes,¹⁸ the local content requirements implemented with the aim of promoting renewable energy were scrutinized under WTO GATT, Trade Related Investment Measures Agreement (TRIMs) and ASCM rules, but not the WTO GPA. This indicates that even if the UK were to negotiate certain exemptions for the purposes of promoting specific industries or regions under the WTO GPA, this will not exempt the measures from other non-discrimination commitments for goods and services under the WTO's multilateral agreements, including the GATT, TRIMs, GATS and ASCM.

D. Promoting Competitiveness in UK Public Procurement

award of contracts to a supplier or service provider of Parties other than those mentioned, *which are small or medium sized enterprises under the relevant provisions of EU law, until such time as the EU accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses* (emphasis added).¹⁴

¹⁵ “Strategic use of public procurement in promoting green, social and innovation policies” Final Report DG GROW Framework Contract N° MARKT/2011/023/B2/ST/FC for Evaluation, Monitoring and Impact Assessment of Internal Market DG Activities.

¹⁶ A caveat with these figures is the variable quality of information in the different Member State's TED files.

¹⁷ Appellate Body Report, *Canada – Measures Relating to the Feed-In Tariff Program*, 6 May 2013, WT/DS412/AB/R and WT/DS426/AB/R, ¶1.31.

¹⁸ Report of the Appellate Body. *India – Certain Measures Relating to Solar Cells and Solar Modules AB-2016-3 Report of the Appellate Body*. WT/DS456/AB/R. 16 September 2016 ¶5.32.

27. One way to ensure legal compliance, legal coherence and competition is to bring the competition authority and the procurement agencies closer together. The influence of competition's economic principles is evident – most notably in the area of bid rigging amongst tenderers for public contracts.¹⁹ Assessments of the economic impact of procurement on competition, including the so-called *buyer power*,²⁰ stress the importance of preventing procurement processes being affected by egregious practices such as collusion, fraud and corruption.²¹ The interdependent nature of competition and procurement laws is also apparent in the impact of government procurement activities in the prospective analysis conducted in merger control cases, or on the impact of subsidies in public markets.
28. The UK could place regional public procurement agencies under the supervision of the UK competition authority. This could help to ensure that public procurement benefits society and the participants in markets. This would allow for centralized competition analysis of procurement policies in the devolved regions of the UK and serve to ensure a harmonized negotiating policy for external trade agreements.
29. These supervision activities could be prioritized with an orientation towards illegal direct award of contracts. For example, in Sweden, the Public Procurement Act of 2010 provides the Swedish Competition Authority the possibility to take cases of illegal direct award of contracts to court. Moreover, a company that infringes the Competition Act risks being debarred from bidding for procurement contracts. Likewise, in the Czech Republic the Office for the Protection of Competition is the central authority of state administration responsible for creating conditions that favour and protect competition, supervision over public procurement and consultation and monitoring in relation to the provision of state aid.
30. Recent EU case law has moved closer towards a competition approach, in the 2015 *EasyPay* case.²² Here the Court of Justice of the European Union (CJEU) imposed the requirement that economic and non-economic activities must be *inseparably connected* to be excluded from competition law analysis.²³
31. A competition approach taken in the UK in the *CAT Bettercare II* case²⁴ involving the conduct of a local authority in Northern Ireland that was procuring nursing home places from private companies whilst also providing some places itself. The UK Competition (Commission) Appeal Tribunal found that the local authority was acting as an economic undertaking in its purchasing activities – and thus covered by EU competition law. This rejected earlier theories of the UK Office of Fair Trade which sought to split the activities in question between "economic activities" and "non-economic activities" on the basis of a distinction between provision and purchasing, or according to the source of funding used by each resident.
32. For the UK to follow such an integrated approach would be beneficial, to both competitive open and procurement markets, legal certainty and enforcement – and moreover in an era of legal and economic uncertainty through devolution under BREXIT.

¹⁹ Weishaar, S.E., *Cartels, Competition and Public Procurement*. Edward Elgar. June 2013.

²⁰ The Bundeskartellamt. *Buyer Power in Competition Law - Status and Perspectives*. See: http://www.bundeskartellamt.de/wEnglisch/Vergaberecht_e/vergaberecht_eW3DnavidW2643.php

²¹ *Public Procurement: The Role of Competition Authorities in Promoting Competition*. The OECD. DAF/COMP. 2007:34.

²² Judgment in *EasyPay and Finance Engineering*, C-185/14, EU:C:2015:716. ^[1]_{SEP}

²³ Sanchez-Graells, Albert and Herrera Anchustegui, Ignacio, *Revisiting the Concept of Undertaking from a Public Procurement Law Perspective – A Discussion on EasyPay and Finance Engineering* (November 26, 2015). Available at SSRN: <https://ssrn.com/abstract=2695742> or <http://dx.doi.org/10.2139/ssrn.2695742>.

²⁴ *BetterCare Group Limited v Director General of Fair Trading*. Case number 006/2/1/01. See: <http://www.catribunal.org.uk/237-570/1006-2-1-01-BetterCare-Group-Limited.html> (accessed 19/09/2017)

E. Conclusions

- This submission argued the UK will still need to formally reset its MFN obligations with the WTO membership, including the EU, before it can seek to negotiate its accession to the WTO GPA, or any other bilateral and regional trade agreements.
- If the UK were to recast its procurement procedures under the framework of the WTO GPA, it would have some flexibility to re-calibrate its procurement rules. However, this greater freedom to pursue horizontal policy objectives could also lead to greater divergence between the different regional jurisdictions of the UK - because of the Devolution Settlement of 1998. Such regional diversity could operate to undermine legal coherence; economies of scale, competition and value for money in post Brexit procurement processes within the UK.
- One way of checking and balancing these regional developments is to establish coordinated measures to foster competition and value for money in procurement policies. This could include, at the limit, integrating the competition and public procurement agencies together within a single agency competent to address anti-competitive practices such as bid rigging, merger control and State aid that affect both open and public procurement markets.
- This UK wide agency could also seek to coordinate domestic horizontal policy objectives such as SMEs, in procurement processes to ensure that they are proportionate to meet their stated objectives, and do not undermine the very policy objective they intend to meet.

January 2018