Written Evidence submitted to the House of Commons Public Bill Committee on the Procurement Bill 2022-23

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Submission

00. This written submission focuses on selected issues in the Bill as it entered the House of Commons.[1] It concentrates on three high-level issues: (1) the Bill's passive and unnecessarily complicated approach to managing the UK's international obligations and access from third-country suppliers to UK procurements; (2) the costs and legal uncertainty resulting from the lack of detailed procedural regulation and the inadequacy of the only default procedure included in the Bill; and (3) missing rules for key issues in procurement governance, in particular those concerning (i) restrictions of competition, including anticompetitive practices, and (ii) procurement of digital technologies.[2]

1. Managing international obligations and access to the UK procurement market

01. The Bill's Explanatory Notes[3] stress that 'Procurement is covered by a number of the UK's international trade agreements including the [World Trade Organisation's Agreement on Government Procurement (GPA)]. The regime in the Bill is compliant with these obligations and will allow a degree of future-proofing through targeted delegated powers to update the regime in the event that new agreements are signed'.[4] While it is correct that the regime in the Bill is generally aligned with current UK international obligations, the approach in the Bill is both unnecessarily complicated and takes a passive approach to managing third-country supplier access at odds with the declared policy goal of increasing the chances of British businesses being awarded contracts.

A. Unnecessarily complicated regime due to the disconnect between defined terms

02. First, the regime is unnecessarily complicated due to the disconnect between the regime in Part 7 and the distinction between 'procurement' and 'covered procurement' in Clause 1 of the Bill. This creates a duplication of the functional definition of 'covered procurement' for the general purposes of the Bill and for Part 7 on international obligations.

03. Clause 89(1) establishes that 'A contracting authority may not, in carrying out a procurement, discriminate against a treaty state supplier' (emphasis added). Read in isolation, this would seem to indicate that the non-discrimination obligation concerns any 'procurement' as defined in Clause

[1] https://publications.parliament.uk/pa/bills/cbill/58-03/0218/220218.pdf.
[2] It should be noted that, given the limited changes resulting from non-Governmental amendments to the Bill in the House of Lords, most of the issues identified in the assessment of the initial Bill remain largely unaddressed and there is thus scope for much more comprehensive and extensive amendments to the current version of the Bill than those covered in this submission. For detailed analysis, see A Sanchez-Graells, 'Initial Comments on the UK's Procurement Bill: A Lukewarm Assessment' (19 May 2022).
[3] https://publications.parliament.uk/pa/bills/cbill/58-03/0218/en/220218en.pdf (hereafter EN).
[4] EN at [12].

1(1)(a): ie 'the award, entry into and management of a contract'—which, crucially, includes below-threshold procurements (see Clause 3 and Schedule 1). However, this would go beyond the UK's international obligations, which are limited to above-threshold procurements.

04. Indeed, Clause 88(2) establishes that 'a supplier only meets the definition of "treaty state supplier" where the individual procurement being carried out or challenged is one for which provision is made in the relevant Schedule 9 agreement'. Agreements in Schedule 9 cover above-threshold procurements. Given the regulatory approach of limiting international obligations to above-thresholds procurement, it would be simpler to amend Clause 89(1) to refer to 'covered procurement' rather 'procurement'. 'Covered procurement' is defined in Clause 1(1)(b) as 'the award, entry into and management of a public contract', with 'public contract' being defined as a non-exempted above-thresholds contract in Clause 3 and Schedules 1 and 2. This would also allow for the suppression of Clause 88(2) to provide both simplification and more clarity to the regime.

05. The only potential exception concerning an international agreement imposing below-threshold obligations could be found in the national treatment of locally established suppliers under the UK-EU Trade and Cooperation Agreement (TCA, Art 288).[5] Art 288(1) TCA establishes that 'With regard to any procurement, a measure of a Party shall not result for suppliers of the other Party established in its territory through the constitution, acquisition or maintenance of a legal person in treatment less favourable than that Party accords to its own like suppliers' (emphasis added). While the protection applies to all procurement and not only covered procurement,[6] as defined in Clause 1 of the Bill, Art 288 TCA only imposes below-threshold obligations concerning UK-based EU-owned suppliers and only protects against actions by UK contracting authorities seeking to disregard the (formal) UK nationality of the UK-based legal person based on its foreign (EU) ownership. This is a rather narrow protection and can hardly be seen as an effective extension of the general international procurement liberalisation regime to below-threshold contracts.

06. Addressing this type of non-discrimination obligation (which could be included in future agreements with parties other than the EU) by creating a parallel functional definition of covered procurement for the general purpose of the Bill in Clause 1 and another for the application of Part 7 in Clause 88 is not a straightforward approach and certainly not the only possible one.

07. It is not a straightforward approach because Clause 88(6) excludes UK-based suppliers from the protections in Part 7. The Explanatory Notes stress that 'the term treaty state suppliers (sic) does not include United Kingdom suppliers who only have rights arising from the UK being party to an international agreement'.[7] Given the (formal) UK nationality of the suppliers covered by Art 288 TCA, this creates a difficulty in the systematic legal interpretation of the provisions in Part 7. If (EU-owned) UK-based suppliers are excluded from the regime, that could in itself imply a breach of the TCA. Conversely, if the obligations under the TCA (and Clause 89 in relation to Schedule 9) trump the exclusion of (formally) UK-based suppliers from the Part 7 protection under Clause 88, at least in some circumstances, then than Clause needs amendment or deletion.

08. Moreover, the current approach is partial and only implicitly addresses the requirements applicable when a contracting authority is faced with the potential need to carry out a (complicated) assessment of (perceived) potential abuses of UK-based (straw) legal persons to gain third-country

[5] https://www.gov.uk/government/publications/ukeu-and-eaec-trade-and-cooperation-agreement-ts-no82021.
[6] Procurement Policy Note 02/21 Requirements for contracts covered by the WTO Government Procurement Agreement and the UK-EU Trade and Co-operation Agreement.
[7] EN at [540].

suppliers access to the UK procurement market. This is a broader issue that would require much more active management and explicit rules if the UK Government and Legislator want to effectively limit access to the UK procurement market to suppliers covered by international agreements—which is, however, a protectionist policy not necessarily in the public interest in all cases.

B. The potential need for active and explicit rules to manage access to the UK procurement market

09. Under the current approach, limiting access to the UK procurement market to third-country suppliers covered by international agreements is not a given, as the regime in the Bill only provides a passive framework—ie prevents discrimination of treaty state suppliers—but does not mandate exclusion of other third-country suppliers. Actively limiting or excluding access for non-treaty state third-country suppliers is currently left to policy guidance,[8] and lacks legislative footing. This can create a disparity of approaches and legal uncertainty. Importantly, there are no rules on how to determine the origin of a supplier—eg on the basis of its effective management or beneficial ownership, which would be the case covered by Art 288 TCA—and decisions to exclude could be challenged on that ground alone (ie *ultra vires*, at least in principle). The lack of legislative framework and detailed guidance can make it unlikely that a contracting authority will take it upon itself to carry out the analysis of effective origin and ban access to the procurement, especially if the third-country provider can potentially offer eg interesting commercial terms, or a specific technology. There are also potential complications concerning investment protection obligations that may arise from international agreements other than those covering procurement.

10. Therefore, the Bill fails to establish a mechanism to actively manage access to the UK procurement market by non-treaty state third-country suppliers. While this could be a wanted feature of an open and anti-protectionist procurement regime, given the stated policy goal of increasing the share of procurement opportunities available to UK suppliers and the practical inexistence of regulatory space for a 'Buy British' policy—especially at above-threshold level—this rather seems a potentially significant shortcoming of the Bill. If UK contracting authorities are to take active steps to limit or exclude access to the UK procurement market by non-treaty state third-country suppliers, the existence of a clear legislative framework is preferable to its absence. In designing such a framework, the UK Government and Legislator may want to take into consideration the European Union's International Procurement Instrument,[9] which creates a specific legal framework, including criteria for a determination of origin of economic operators (Art 3).

11. The Bill also fails to provide rules to solve potential contradictions or inconsistencies in the growing thicket of international agreements included in Schedule 9. This is an issue likely to gain more and more prominence as the UK expands its post-Brexit Free Trade Agreements (eg with Australia and New Zealand) and accedes to plurilateral agreements (eg the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, CPTPP).[10] The Bill should include a 'most beneficial access clause' that established that treaty state suppliers covered by more than one agreement in Schedule 9 are entitled to the most beneficial access regime resulting from the multiple agreements. This would preserve compliance with the UK's international obligations and could easily be placed in Clause 89.

[8] Procurement Policy Note 11/20: Reserving below threshold procurements.
[9] Regulation (EU) 2022/1031 [2022] OJ L173/1.
[10] For discussion, see A Sanchez-Graells, 'The growing thicket of multi-layered procurement liberalisation between WTO GPA parties, as evidenced in post-Brexit UK' (2022) 49(3) LIEI 247-268.

2. Underestimated costs and complications resulting from procedural deregulation

12. The Bill's Explanatory Notes stress that 'The Government's policy objectives for these reforms are to speed up and simplify public procurement processes…',[11] and that '[s]treamlined new procedures are intended to save time for public bodies and suppliers and mean better commercial outcomes that deliver more value for money for taxpayers'.[12] This is far from being the case. The Bill has inherited the Green Paper's conflation of flexibility and simplification.[13] The Bill aspires to simplify UK procurement law to reduce the regulatory burden and red tape for both contracting authorities and economic operators. However, by introducing more flexibility, it will complicate the system and raise compliance costs.

13. This is particularly clear in relation to the regulation of procurement procedures, which the Bill reduces to three: an open procedure, a competitive flexible procedure, and direct award (Clauses 20 and 41). However, of those three, direct awards are meant to be exceptional, and the 'innovative' competitive flexible procedure is merely a placeholder or 'anti-procedure', in the sense that it seeks to allow contracting authorities maximum flexibility to design their own procedural rules and engage in negotiations—thus equating to a mere authorisation to create bespoke procedural rules,[14] rather than the regulation of a proper and consistently identifiable set of rules. This places the open procedure as the single default procedure generally available to contracting authorities.

14. While this is an attempt to introduce flexibility, it causes a much-increased level of complexity in procurement other than through the open procedure. The absence of detailed regulation of the competitive flexible procedure generates significant complexity and costs. A reduction in the standardisation of procedures, as well as the possibility for each contracting authority to design the procurement process as it sees fit, can generate a level of disparity that would make it prohibitive for economic operators to participate. The increase in transaction costs is likely to be most acute in terms of search and information costs, as economic operators need to familiarise themselves with the specifics of each procurement procedure. They could also result in much higher costs linked to clarifications of the tender documentation, as well as higher litigation costs. This can be particularly problematic for SMEs and structurally raise the costs of participation in procurement procedures, despite the much-touted inclusion of a pro-SME duty in Clause 12(4).

15. The main issue is that the Bill creates a system where the open procedure is the only default procedure—a single-stage procedure (Clause 20(2)(a)) not tailored to the procurement of complex goods or services, or to the creation of evaluative space to consider environmental, social, or other considerations. This implies the suppression of the restricted procedure regulated in the Public Contracts Regulations 2015: a two-stage alternative default procedure (reg.26(3)(a) PCR2015). The suppression of the restricted procedure can have a negative effect in terms of overuse of the open procedure as the only default procedure left in the rulebook. Currently, inexperienced buyers, or buyers not willing to engage in negotiations, can reduce their administrative burden of tender evaluation using the restricted procedure (reg.28 PCR2015), which allows them to screen potential suppliers and only engage in the evaluation of the tenders submitted by five invited potential suppliers (reg.65 PCR2015). Under the Bill, this will not remain the case, as those buyers would have

[11] EN at [10].
[12] EN at [4].
[13] See the documents relating to the public consultation on the Green Paper *Transforming Public Procurement*: https://www.gov.uk/government/collections/transforming-public-procurement. For discussion of this issue in relation to the Green Paper, see A Sanchez-Graells, 'Response to Cabinet Office's Green Paper "Transforming Public Procurement"' (15 Dec 2020).
[14] See eg EN at [144].

to either (i) use an open procedure and, consequently, potentially have to engage in a much larger tender evaluation effort; or (ii) take responsibility for the design of a competitive flexible procedure that replicates the current restricted procedure, with the intrinsic legal risks if anything in the way this is implemented in the relevant tender documentation and transparency notices goes wrong. Losing the ability to limit the number of candidates invited to tender to five without having to design their own procurement procedure, with the costs and legal risks it entails, is clearly a loss of potential administrative efficiency generated by the Bill. The restricted procedure should thus be reinstated through an amendment of Clause 20(2) and the addition of a new Clause that incorporates the content of reg.28 PCR2015.

3. Missing Rules on Key Issues

16. The Bill lacks rules on crucial aspects of procurement governance, in particular: (i) restrictions of competition, including anticompetitive practices, and (ii) procurement of digital technologies.

17. The Bill does not include a general principle of competition or any detailed rules on the contracting authorities' duty to avoid restrictions of competition, including anticompetitive practices. Despite clear calls in the Green Paper public consultation, most notably by the Competition and Markets Authority (CMA),[15] the Bill does not include a principle of competition or an explicit competition objective. This reduces the Bill's potential to mandate pro-competitive approaches and ensure competitive neutrality in the design of tender procedures (*cfr* Clause 12(3)), as well as its likely effectiveness in contributing to the detection and sanctioning of collusion or bid rigging, as well as other types of competition law infringements, as decisions based on those issues remain discretionary for the contracting authority (*see* Clause 43(2)(d) and Schedule 7, sections 7-10). The Bill should be amended to include a specific competition objective in Clause 12. This should be done by replacing Clause 12(3) with the following: 'A contracting authority must interpret and apply this Act in a pro-competitive way, so that its decisions do not hinder, limit, or distort competition. A contracting authority must refrain from implementing any procurement practices that prevent, restrict, or distort competition. A contracting authority must in particular take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage'. The inclusion of this competition objective or principle would be particularly relevant in the context of procurement centralisation due to its higher potential to distort market competition, and on which the Bill contains no rules other than for the purposes of devolution. It would also fill in any regulatory gaps created by the skeletal structure and content of the Bill, in particular in relation to insufficient or defective development in secondary legislation and guidance.[16]

18. Despite the increasing role of the procurement function in regulating the adoption of digital technologies by the public sector, the Bill does not include any rules on the procurement of digital technologies or the role of procurement in setting adequate standards for the use of those technologies and the underpinning data by the public sector. As Lord Clement-Jones stressed during debates in the House of Lords, this is a gap in the Bill to the extent that it does not impose any minimum requirements, nor does it provide a clear legislative basis for the development of mandatory requirements in relation to data or technology governance in the context of procurement in secondary legislation.[17] This is bound to perpetuate the current ineffective approach

[15] CMA's response to transforming public procurement (31 March 2021).
[16] A Sanchez-Graells, 'Competition and procurement regulation' in C Risvig Hamer et al (eds), *Into the Northern Light – In memory of Steen Treumer* (Ex Tuto, 2022) 65-81.
[17] Lord Clement-Jones (LD), HL Deb 11 July 2022, cc354-355GC.

to regulation by contract of the adoption of artificial intelligence by the public sector.[18] The Bill should thus be amended and the easiest way would be to adopt, in a new clause or a sub-clause of Clause 12, a modified version of the relevant amendment,[19] to read:

> "Procurement principles: digital technologies and data ethics
> In carrying out a procurement, a contracting authority must ensure the legal, responsible, safe, fair, inclusive, sustainable and ethical use of digital technologies and data."

Biographical information

Professor Albert Sanchez-Graells is a Professor of Economic Law at the University of Bristol Law School and Co-Director of its Centre for Global Law and Innovation. He is currently a Mid-Career Fellow of the British Academy researching the interaction of procurement and technology governance. Albert is a former Member of the European Commission Stakeholder Expert Group on Public Procurement (2015-18) and of the Procurement Lawyers' Association Brexit Working Group (2017), as well as a current Member of the European Procurement Law Group. Albert has advised international organisations such as the World Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank or NATO on a range of procurement reform matters.

Albert has been researching the reform of UK public procurement law and published a number of analyses of the Government's proposals, the development of procurement chapters in new Free Trade Agreements, and the Procurement Bill as introduced in the House of Lords, including:

- 'Response to Cabinet Office's Green Paper "Transforming Public Procurement"' (15 Dec 2020).
- 'The UK's Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication?' (2021) 16(1) EPPPPLR 4-18.
- 'Public procurement regulation', in H Kassim, A Jordan and S Ennis (coord), *UK Regulation after Brexit* (25 Feb 2021).
- Written Evidence to the House of Commons European Scrutiny Committee on "The institutional framework of the UK/EU Trade and Cooperation agreement" (20 July 2021).
- 'Public procurement', in J Reland, A Menon and J Rutter (eds), *Doing Things Differently? Policy after Brexit* (31 Jan 2022).
- 'The growing thicket of multi-layered procurement liberalisation between WTO GPA parties, as evidenced in post-Brexit UK' (2022) 49(3) LIEI 247-268.
- 'Initial Comments on the UK's Procurement Bill: A Lukewarm Assessment' (19 May 2022).
- 'Public procurement regulation', in H Kassim, A Jordan and S Ennis (coord), UK Regulation after Brexit Revisited (26 Oct 2022).

His research has been highlighted in the House of Commons Library Research Briefing on the Procurement Bill 2022-23 (CBP-9402).

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[18] A Sanchez-Graells, Written Evidence to the House of Commons Science and Technology Committee on "Governance of Artificial Intelligence (AI)" (25 October 2022).
[19] Amendment 45 in Marshalled List of Amendments to be moved in Grand Committee (30 Jun 2022).