

Provisional common framework: Public procurement Research Briefing

August 2022



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Provisional common framework: Public procurement

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The UK and devolved governments published the **provisional common framework on public procurement** in January 2022, following an earlier version in March 2021.

Common frameworks are agreements between the UK and devolved governments on how to work together and manage divergence in areas previously governed at EU level.

Provisional common frameworks are being published for scrutiny. In early 2022, the Senedd's **Public Accounts and Public Administration Committee** scrutinised the provisional common framework on public procurement, and made recommendations to the Welsh Government.

Once all parliaments have completed scrutiny, the UK and devolved governments intend to respond to recommendations and agree a final version.

This briefing provides an overview of the provisional common framework on public procurement.

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Summary

EU law on public procurement aims to ensure that the EU's public procurement market is open and competitive and that suppliers are treated in a way that is equal, non-discriminatory, proportionate and transparent. Now that the Brexit transition period is over, the UK and devolved governments ('the governments' hereafter) can take different approaches to public procurement law. The UK Government has introduced the Procurement Bill to reform procurement law. The Welsh Government is using this Bill to change procurement rules for devolved public authorities.

The provisional common framework on public procurement ('the framework') sets out how the governments will work together to manage divergence in EU-derived procurement law. The governments agree normally to notify and consult the other governments of new policy initiatives with an impact on them with at least one month's notice. They aim to notify and consult each other on the introduction of primary legislation or making of secondary legislation with at least three months' notice.

The governments will seek to agree whether to take the same approach to law and policy or diverge. If the governments do not agree on whether to take the same approach or diverge, they will seek to resolve the disagreement at the lowest possible level. They may then escalate the disagreement to senior officials and to Ministers.

The governments also agree to work together on EU and international obligations through the framework. Where a UK-EU meeting agenda includes an item concerning implementation in an area of devolved competence, the UK Government agrees to facilitate the attendance of representatives of the devolved governments of a similar level to that of the UK Government representatives. If the UK Government plans to make an intervention in an **Agreement on Government Procurement** (GPA) Committee meeting at the World Trade Organisation, it will involve the devolved governments and seek to agree the approach and wording.

The framework does not require the governments to update parliaments and stakeholders on how it is working, or to involve parliaments and stakeholders in review and amendment. The governments have agreed in principle to report regularly to parliaments on common frameworks. The Welsh Government has also agreed unilaterally to report to the Senedd on common frameworks and to consult the Senedd and stakeholders during review and amendment.

1. Background

While the UK was a member of the EU, large parts of UK procurement law were derived from EU law.

Now that the transition period has ended, the governments can amend EU-derived law on procurement within their competence. They must also continue to comply with the UK's international obligations, including the WTO Agreement on Government Procurement, the UK's trade agreements and post-Brexit agreements with the EU.

Legislation

EU-derived legislation

EU law aims to ensure that the EU's public procurement market is open and competitive and that suppliers are treated in a way that is equal, non-discriminatory, proportionate and transparent.

The EU Treaties set high-level principles for procurement, while Directives govern how public and utilities contracts over certain values are awarded in more detail.

The Directives are transposed into domestic law by regulations. These regulations apply in England, Wales and Northern Ireland. Separate regulations transpose the same directives in Scotland in a similar way:

- the **Public Contracts Regulations 2015** implement the **Public Procurement Directive 2014/24/EU**. This Directive sets out the procedures contractors must follow before awarding contracts, when the contract value exceeds certain thresholds and with certain exceptions;
- the **Concession Contracts Regulations 2016** implement the **Concessions Directive 2014/23/EU** on the award of concession contracts; and
- the **Utilities Contract Regulations 2016** implement the **Utilities Directive 2014/25/EU** on procurement by contracting utilities in the water, energy, transport and postal services sectors.

Changes after the end of the transition period

Following the end of the transition period, the regulations transposing EU Directives have been preserved as 'retained EU law' under the *EU (Withdrawal) Act 2018*. The governments can now make changes to them.

To ensure that retained EU law would continue to function after the end of the transition period, the UK Government amended the regulations transposing the Directives in the **Public Procurement (Amendment etc.) (EU Exit) Regulations 2020**. The **Welsh Government consented** to the regulations. The Scottish Government also amended the equivalent Scottish regulations.

The correcting regulations aim to ensure that UK procurement law can still function after the end of the transition period. The main practical change is that contracting authorities must now send notices of contracting opportunities to a UK notification service, rather than the EU Publications Office. The regulations also transfer certain powers from the European Commission to UK and Welsh Ministers.

Since 2008, the Court of Justice of the EU (CJEU) has established that the rules and general principles contained in the EU's Treaty on the Functioning of the EU (TFEU), apply to cases where below-threshold procurements are of a certain cross-border interest (most recently in the 2016 ruling of **Tecnoedi**). The principles of equal treatment and of non-discrimination on grounds of nationality, and the consequent obligation of transparency, applies to such contracts which fall outside of the EU Directives listed above.

The TFEU and its principles ceased to apply to Great Britain following the end of the transition period except insofar as they have been transferred into domestic law. For procurement, this means that some rights will persist, including freedom of movement of goods and freedom to provide services. However, legal challenges can no longer be brought on the grounds of the principles as they exist in TFEU.

Procurements in Wales, England and Scotland which are below the UK's established thresholds (discussed below) no longer need comply with the principles described above, regardless of their potential cross-border interest to EU Member States.

However, the TFEU's principles continue to apply to the UK with respect to Northern Ireland. In practice, this means they will continue to apply to below-threshold procurements of a cross-border interest involving the provision of goods to Northern Ireland. This arrangement would be subject to, and impacted by, the Northern Ireland Protocol Bill, if passed.

Reform of EU-derived procurement law

In May 2022, the UK Government introduced a bill to repeal and replace EU-derived procurement law, following the **Transforming Public Procurement** consultation.

The **Procurement Bill** aims to “speed up and simplify public procurement processes, place value for money at their heart and create greater opportunities for small businesses and social enterprises to innovate public service delivery”.

The Welsh Government is using the Bill to reform rules for devolved Welsh public authorities. In the legislative consent memorandum on the Bill, the **Minister for Finance and Local Government said:**

My officials have worked closely with officials in Cabinet Office to ensure that Welsh policy objectives have been included and I consider that these provisions would provide a simplified, transparent procurement regime in Wales.

The Northern Ireland Executive is also taking provision for devolved authorities in the Procurement Bill, but the Scottish Government is not. This could increase the likelihood of divergence within the UK, and between the UK and the EU.

Welsh Government policy and legislation

The Welsh Government has introduced a **Social Partnership and Procurement (Wales) Bill** to the Senedd.

The Bill will set a statutory duty on certain public bodies to consider socially responsible public procurement when carrying out procurement, to set objectives in relation to well-being goals, and to publish a procurement strategy.

In August 2021, the **Welsh Government stated** that it had sought and received written assurances from the UK Government that the Procurement Bill “would not fetter our ability to achieve the important policy outcomes we seek through the Social Partnership and Public Procurement (Wales) Bill”.

Current **Welsh Government procurement policy** focuses on achieving the goals in the *Well-being of Future Generations Act 2015* through procurement policy, including by:

- maximising social and economic value;
- supporting more sustainable procurement to reduce carbon emissions; and
- supporting ‘place-based’ (national, regional and local) procurement.

The **UK Government’s procurement policy** for England and reserved authorities requires contracting authorities to follow national priority outcomes of creating new businesses, jobs and skills; tackling climate change and reducing waste; and improving supplier diversity, innovation and resilience.

International obligations

International law

Public procurement is primarily regulated in public international law in the following ways:

World Trade Organisation (WTO)

According to **the WTO**, government procurement accounts for 10-15 per cent of the GDP of an economy on average. There are three main areas in which the WTO has worked to develop procurement liberalisation.

Agreement on Government Procurement (GPA)

The main international agreement, the **Agreement on Government Procurement (the GPA)**, applies only to contracts above certain threshold amounts. The latest version of the GPA was adopted in 2012 and entered into force in 2014. It replaced 1994's original agreement.

There are two features of the GPA – the text of the agreement itself and the parties' market access schedules of commitments. The **WTO explains** how:

The text of the Agreement establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. However, these rules do not automatically apply to all procurement activities of each party. Rather, the coverage schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not.

Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the Agreement.

The UK's schedules are publicly **available**. They are organised as 'central government entities' (Annex 1) and sub-central government entities (Annex 2). Wales' local authority areas are listed as 'Territorial Units' for the purposes of Annex 2 and Annex 3 (Other entities) and in Annex 7.

As the UK's thresholds are set under the WTO's regime, they did not change as a result of Brexit.

GPA governance

48 WTO member states are party to the GPA. Around 35 states which have not ratified the GPA have observer status at its administering committee, the **Committee on Government Procurement**, alongside four international organisations (International Monetary Fund (IMF), Organisation for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development and the International Trade Centre).

The Committee's enforcement depends **on two mechanisms**: the domestic review mechanism and the WTO dispute settlement mechanism at an international level.

Other WTO mechanisms

There are two further WTO mechanisms of note, although they are far less developed:

- the first is the **Doha Development Agenda (DDA)** Working Group on Transparency in Government (known as the Doha Round), which took place between 2001-2015 and is described as 'currently inactive' **by the WTO**; and
- the second is the **General Agreement on Trade in Services negotiations** on government procurement, which is a disputed area.

Bilateral agreements

Procurement provisions are a common feature of bilateral international agreements. They appear most frequently in trade agreements, such as the UK-EU Trade and Cooperation Agreement (TCA), the provisions of which are described below.

United Nations' Commission on International Trade Law (UNCITRAL)

The **United Nations' Commission on International Trade Law**, or UNCITRAL, was established in 1966 and is the UN's legal body in the field of international trade law. It plays an important role in promoting the use of legislative and non-legislative international trade law instruments. Since 1993, **UNCITRAL has issued** a number of procurement-related model laws, guides and explanatory texts.

Welsh Government

On 25 May 2021, the Welsh Government advised that it had granted consent to UK Government regulations which amend existing procurement legislation so that

international procurement obligations are implemented fully across the UK. In **the statement**, the Welsh Government explains how:

There is no divergence between the Welsh Government and the UK Government on the policy for the correction. Therefore, making separate SIs in Wales and England would lead to duplication and unnecessary complication.

However, some amendments rely on GPA annexes, which can be changed by the UK Government. This process does not require the consent of the devolved governments or legislatures. This could therefore introduce new obligations in future which are not supported by the Welsh Government.

Obligations arising from the new UK-EU relationship

The UK and EU agreed new arrangements on public procurement as part of the Trade and Cooperation Agreement (TCA). Their objective is twofold:

- to guarantee the UK and EU suppliers access to increased opportunities to participate in public procurement procedures; and
- to enhance the transparency of public procurement procedures.

The TCA incorporates parts of the WTO's GPA. It contains a mix of existing GPA rules and new rules which build on GPA requirements or define undefined GPA provisions.

Below are some examples of the TCA's provisions, which:

- set out requirements for electronic publications;
- ease the requirements on suppliers to provide supporting evidence so as to prevent their exclusion;
- ease conditions for participation for suppliers so that where they do need to demonstrate prior experience, they are not required to have prior experience in the territory of the other Party;
- require the UK and EU to allow their procuring entities to take into account environmental, social and labour considerations;
- require that the UK and EU27 Member States treat each other's suppliers as no less favourable than the most favourable treatment accorded to their own beyond covered procurement and for suppliers as legal persons; and
- commit the UK and EU to making available to each other annual statistics on covered procurement.

Modifications or rectifications

The TCA sets out a new procedure for making modifications and rectifications of either Party's market access commitments, including potentially having to make 'appropriate compensatory adjustments' for modifications.

The provisions contain a new procedure for disputes over modifications or rectifications which can ultimately lead to the matter being referred to the TCA's overall dispute settlement procedure.

Conditions and exceptions

The UK and EU include lists of their covered procurements as Annex 25. The lists set out conditions for when/how the TCA applies to the following sectors:

Hotel and restaurant services, food and beverage serving services and education services contracts are to be included in the national treatment regime (for suppliers) where the thresholds for these services are either EUR 750,000 (GBP 663,540) or EUR 1,000,000 (GBP 884,720) depending on the GPA provisions under which they are awarded.

1. Exceptions apply to the supply of gas or heat.
2. The only areas to which the TCA does not apply are to the procurement of:
 - human health services;
 - administrative health services;
 - supply services of nursing personnel; and
 - supply services of medical personnel.

Governance

The new arrangements will be administered and overseen by new **UK-EU governing arrangements**.

A new Trade Specialised Committee (TSC) on Public Procurement is one of ten TSCs established by the TCA.

Analysis carried out by Senedd Research shows that the Welsh Government was not part of the UK delegation at the first and only TSC meeting on public procurement to date, held in November 2021.

TSCs are supervised by the Trade Partnership Committee (TPC), which in turn is supervised by the overarching UK-EU Partnership Council.

TSCs have the power to monitor and review the implementation of the TCA and supplementing agreements, assist and report to the TPC. The TSCs will be co-chaired by representatives from the UK and EU and will meet at least once a year, unless provided for in the TCA or unless the co-chairs decide otherwise.

Internal EU developments

On 2 June 2021, the EU Member States agreed on a mandate for negotiations with the European Parliament to create an International Procurement Instrument (IPI) based on a **revised proposal** from 2016.

A **background briefing** describes the IPI as follows:

The IPI is a trade policy tool aimed at discouraging the discrimination of EU companies in procurement markets in third countries. It would enable the EU to limit or exclude access to its public procurement market for economic operators from countries that apply discriminatory restrictions to EU businesses.

The main objectives of this regulation are to improve the level playing-field, increase the participation of EU businesses in procurement markets in third countries and provide leverage for the EU in the context of negotiations for opening markets in third countries.

The **accompanying press release** emphasises that the EU's existing external arrangements, such as the GPA and EU bilateral agreements, will not be affected. However, if finalised, the IPI could influence future developments, particularly if the EU's bilateral agreements are subject to renegotiation, amendment or review. This includes the UK-EU TCA, which is reflected in the international obligations of the UK's internal common frameworks.

The European Parliament **agreed the instrument**, known as the 'Caspar report', on 14 December 2021 by a large majority. A provisional agreement, joint statement and Commission statement was approved **on 22 June 2022**. This concluded the Parliament's first reading. The instrument will now be **considered by the Council** for adoption and amendment.

2. The common framework

The **provisional common framework on public procurement** (‘the framework’) was published on 27 January 2022, following an earlier version published in March 2021. The governments intend to agree the framework formally by an exchange of ministerial letters.

The framework sets out how the governments should work together to manage divergence on public procurement law and policy after the end of the transition period.

Principles

The framework affirms the **principles for common frameworks** agreed by the Joint Ministerial Committee (European Negotiations) in October 2017.

The JMC(EN) agreed that frameworks should “maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules” and “respect the devolution settlements and the democratic accountability of the devolved legislatures”.

The framework appears to set most weight on the first three of the JMC(EN)’s six criteria for when frameworks should be established, on:

- enabling the functioning of the UK internal market, while acknowledging policy divergence;
- ensuring compliance with international obligations; and
- ensuring the UK can negotiate, enter into and implement new trade agreements and international treaties.

The framework recognises that “contracting authorities and UK businesses can benefit from consistent approaches to public procurement policy and regulation” and recognises the need for the governments to work together on international matters.

It states that ‘[m]anagement of common resources is not part of the rationale for this Common Framework’. The **Welsh Government told the Senedd** that this was because “the opportunity for sharing resources is not applicable.”

Considering policy proposals

The governments agree to hold monthly official-level meetings to discuss procurement law and policy.

They agree to aim normally to notify and consult the other governments of new policy initiatives with an impact on the other governments with at least one month's notice, and of the introduction of primary legislation or making of secondary legislation with at least three months' notice.

It is not clear how the governments are intended to determine whether a policy will have an impact on the other governments and thus is in scope of the framework.

The JMC principles state that common frameworks should "maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules". This may suggest that only proposals for divergence that would not have been possible within the EU will be considered within scope. However, this is not made explicit.

The Senedd's **Public Accounts and Public Administration Committee has recommended** that the Welsh Government seek agreement that the framework should not lead to any dilution in the role of parliaments and stakeholders in making law and policy, beyond restrictions in the EU. The **Welsh Government has said** the framework does not constrain the powers of the Senedd.

Making decisions

A process is set out for the governments to make decisions on whether to take the same policy approach or diverge:

- if the governments take the same policy approach, they must do this on the basis of agreement; and
- If one government decides to take a divergent approach, it should assess the impact of that proposal on the other governments and whether is compatible with the frameworks principles. It should then notify the other governments. If any other government believes the proposal is not consistent with the framework principles, the governments should aim to agree another approach that would achieve the same outcome. If they cannot agree, the dispute resolution process will be triggered.

The framework does not provide detail on how the governments will decide whether a proposal is compatible with the frameworks principles or not.

Managing international obligations

The framework sets out arrangements for UK representation at international and UK-EU forums.

The framework acknowledges that the governments have been reviewing intergovernmental relations in light of the UK's exit from the EU. It suggests that they will work together on the basis of an updated International Relations Concordat after that review is completed.

The **International Relations Concordat** was last updated in 2013; it was not revised as part of the Intergovernmental Relations Review. The Concordat does not explicitly reflect the UK Government's increased role in agreeing post-Brexit international obligations in areas previously within EU competence, such as trade.

Managing UK-EU obligations

The framework sets out arrangements for the devolved governments to be involved in discussions between the UK and EU on the implementation of the TCA.

This arrangement reflects those **communicated to the devolved governments** by the UK Government in May 2021 relating to TCA governance. Senedd Research describes the **role of the devolved governments** in new UK-EU governance structures, including analysis of meetings attended by the Welsh Government.

The first UK-EU **meeting on public procurement** took place on 12 October 2021. This is the only meeting to date. The Welsh Government were not in attendance, although officials have been present at most other meetings.

The framework states that, where a UK-EU meeting agenda includes an item concerning implementation in an area of devolved competence, the UK Government should agree to facilitate the attendance of representatives of the devolved governments of a similar level to that of the UK Government representatives. The UK co-chair will make the final decision.

The UK Government agrees to engage with the devolved governments as fully as possible on preparation for meetings and on implementation.

World Trade Organisation

The UK Government will represent the interests of all parties to the framework at the WTO GPA Committee.

The UK Government agrees to share agenda items on areas of devolved competence as soon as possible when received from the WTO, and to consult the devolved governments on how they should be involved.

If the UK Government plans to make an intervention in a GPA Committee meeting, it will involve the devolved governments and seek to agree the approach and wording. The devolved governments agree to provide timely information to support interventions.

The UK Government remains responsible for the distribution and final clearance of GPA Committee materials, updates and information to the devolved governments.

Resolving disputes

The framework sets out a process for resolving disputes. This process could be engaged if the governments disagree on whether they should be able to take divergent approaches, or if they disagree on proposed amendments to the framework.

The governments agree that they will only use the dispute resolution process if “genuine agreement cannot be reached and divergence would impact on the ability to meet the frameworks principles.”

If a government wishes to raise a dispute, it will notify the other governments in writing. The governments will aim to resolve the dispute at official level, through the officials’ group. If the dispute is not resolved, it will be escalated to senior officials and finally to Ministers. No time limits are set for dispute resolution.

If the dispute cannot be resolved through this process, it may be escalated to the interministerial dispute resolution process set out in the January 2022 **conclusions to the Intergovernmental Relations Review.**

If no agreement is reached, third party advice may be sought and the dispute may be escalated to the Prime Minister and Heads of Devolved Governments Council.

The framework does not provide for disputes to be notified to parliaments or stakeholders. However, the **Welsh Government has committed** to notify the Senedd of disputes.

Monitoring, review and amendment

Officials from the UK and devolved governments will hold a framework liaison meeting twice a year. This will consider:

- the state of intergovernmental cooperation on procurement;
- compliance with the framework principles;
- the impact of divergence; and
- whether any changes to the framework are needed as a result of disputes between the governments.

The chairing of this meeting will be rotated between governments.

The liaison group will review the framework one year after it has come into operation and every three years thereafter. A review will cover “whether the governance and operational aspects of the Common Framework are working effectively, and whether decisions made over the previous three years need to be reflected in an updated non-legislative agreement.”

There will also be a review if a ‘significant issue’ arises that has a ‘fundamental impact’ on the framework’s operation. The same significant issue cannot be discussed within six months of the conclusion of the discussion.

Following a review, the governments may agree to open a discussion of amendments by unanimous agreement. Amendments to the frameworks must be agreed unanimously. If there is no agreement, the dispute resolution process may be used.

Transparency and accountability

The framework does not set out whether or how stakeholders were consulted on its content. The **Welsh Government has said** a ‘light touch’ stakeholder engagement exercise was carried out in October 2020.

The framework notes that the governments will continue to consult third parties on procurement policy and engage with stakeholders. However, it provides that the governments will work together on the basis of confidentiality and does not give external stakeholders any role in the processes for making decisions or resolving disputes.

The framework notes that there is 'an option to consult' stakeholders on amending the framework, but does not oblige the governments to do this.

There is no commitment for reports on the operation of the framework to be produced or published. The **Welsh Government has committed** unilaterally to reporting annually on frameworks. In November, the **Counsel General said** that the governments had all agreed to future reporting to parliaments on common frameworks.

There are no commitments to give parliaments a role in monitoring the operation of the framework or scrutinising amendments. The framework says that the governments may use third parties to advise on review and amendment to the framework. This could include government bodies or external stakeholders. In March, **the Counsel General committed** to notify the Senedd and stakeholders when a common framework is reviewed, and consider their recommendations before the review process concludes.