



Public procurement

SEPTEMBER 2019

The Public Contracts Regulations 2015 ('PCR'), the Concession Contracts Regulations 2016 ('CCR') and the Utilities Contracts Regulations 2016 ('UCR') require UK public authorities and certain utilities to award contracts for the provision of goods, works and services in a transparent, competitive and non-discriminatory manner and to afford equal treatment to bidders from any EU Member State. Although these Regulations are based closely on EU Directives, they will remain largely unchanged post-Brexit, whether or not there is a deal. This is partly because the UK intends to remain a party to the WTO's Government Procurement Agreement ('GPA') post-Brexit. The GPA requires non-discrimination between its member parties in the field of public procurement and lays down similar tendering rules to those found in the EU Directives.

No-deal Brexit

The UK's procurement regulations (PCR, CCR and UCR) will remain in force in the event of a no-deal Brexit, but they will be subject to some minor, consequential amendments, as from exit day.

In March 2019, the UK Government enacted a statutory instrument, entitled [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (SI 2019 number 560). In the event of a no-deal Brexit, these Regulations will apply as from exit day (whereas, if there is a deal, these Regulations are likely to be postponed or revoked). The most significant changes introduced by these

Regulations would be to end the current obligation on contracting authorities to publish contract notices (effectively, calls for tenders) in the Official Journal of the European Union (OJEU) and replace it with a requirement to submit notices to a new UK e-notification service. The Regulations also provide that various monitoring functions will transfer from the European Commission to the Minister for the Cabinet Office. They also remove certain redundant references to the EU. Apart from these few changes, the substantive rules in the existing Regulations would remain unchanged.

The section is part of our [Brexit Legal Guide](#).

No Deal

- If the [Withdrawal Agreement](#) endorsed by the EU Council on 25 November 2018 or the [Political Declaration](#), or some version of both, are not approved by 31 October 2019 and there is no change to the exit date, the UK will cease to be a member state on that date without any transitional period
- The body of EU law in force at that time will be imported into UK law (with necessary amendments) under the [European Union \(Withdrawal\) Act 2018](#) and UK legislation made to implement EU law will be retained, with suitable amendments – this is called 'retained EU law'
- A lot of the secondary legislation to adjust retained EU law for the post-Brexit world has already been made, see the accompanying section: [The UK's new legal order post-Brexit](#)
- See main body of this note for implications of a no-deal for the UK's public procurement

Whether or not the EU and UK reach a deal or after Brexit, the UK intends to remain a party to the GPA which obliges UK contracting authorities to follow very similar rules to those laid down in the EU Directives. The GPA regime greatly limits the scope for the UK to significantly amend its existing procurement Regulations, even in the event of a no-deal Brexit.

In the unlikely event that this does not happen and in the absence of any provisions to the contrary in any bilateral EU-UK trade deal, it would in principle be possible for the UK and the EU27 to start discriminating against each other in their respective public procurement markets. It would also be open to the UK to decide to repeal or substantially amend the UCR, CCR and UCR. However, given the general policies of the UK and EU in favour of open, non-discriminatory procurement markets, such an outcome currently seems unlikely.

Withdrawal Agreement

If there is a deal, the position is likely to be similar to that foreseen under the [Withdrawal Agreement](#) agreed between Prime Minister May and the EU, but subsequently rejected by Parliament.

The current version of the Withdrawal Agreement provides that the application of EU law will be extended during an "implementation period" ending on 31 December 2020 (with the possibility of an extension of up to two years). Consequently, the current procurement Regulations (PCR, CCR and UCR) would continue to apply, un-amended, until the end of that implementation period. Article 76 of the Withdrawal Agreement also provides that the EU procurement Directives would continue to apply to any UK public procurement procedures launched before the last day of the transition period, even if the procedure was not completed until after that date. Similar transitional provisions would likely be agreed in any new or resurrected version of the Withdrawal Agreement.

Any bilateral trade deal subsequently agreed between the EU and UK post-Brexit is likely to provide for continued mutual access to each side's public procurement markets and to prohibit discrimination against tenderers based in the territory of the other party. Even if there is no such trade deal, however, the UK intends to remain a party to the GPA.

The rules under the GPA are very similar to those set out in the EU Directives: the only significant differences are that the GPA covers a (marginally) narrower range of public and utility contracts and lays down less effective provisions on remedies. Under the GPA, the UK will remain subject to the requirement not to discriminate against suppliers from other GPA states (including the EU27) when awarding public contracts within the scope of the GPA. Similarly, contracting authorities in the EU27 states will be bound by the GPA not to discriminate against UK suppliers in such procedures.

"Although the UK public procurement Regulations are based on EU Directives, it is expected that they will remain largely unchanged post-Brexit, regardless of whether or not there is a deal".

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regime and [here](#) for the UK Government's guidance on public procurement in either deal or no-deal Brexit scenario

Deal/transitional period

- If approved by the UK Parliament, the Withdrawal Agreement, or some version of it, will set out arrangements for the UK's withdrawal from the EU - when the UK will cease to be a member state
- A transition period will follow the date of the UK's EU exit up till at least the end of 2020, possibly the end of 2021 or 2022
- During transition, EU law will continue to apply in and to the UK and the UK will continue to trade as part of the Single Market
- The Withdrawal Agreement will be accompanied by the Political Declaration on the future relationship between the UK and the EU. This will comment on the future trading relationship between the EU and the UK
- Whether or not the Withdrawal Agreement or the Political Declaration, or some version of both, are approved by 31 October 2019, the UK will cease to be an EU member state on that date, unless the date for the UK to leave the EU is extended again by agreement between the UK and the EU27 or the Article 50 notice is withdrawn. If there is an approved deal and the UK enters transition as explained above, the legal position during transition will be very similar for businesses as if the UK were still an EU member state

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