



Oifig um Sholáthar Rialtais  
Office of Government Procurement

Information Note

# **Brexit and Public Procurement**

**Update July 2021**

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## National Public Procurement Policy Framework

Public procurement is governed by EU and national rules. The National Public Procurement Policy Framework sets out the overarching policy framework for public procurement in Ireland and comprises five strands.

1. Legislation (Directives, Regulations)
2. Government Policy (Circulars etc.)
3. Capital Works Management Framework for Public Works
4. General Procurement Guidelines for Goods and Services
5. More detailed technical guidelines, template documentation and information notes as issued periodically by the Policy Unit of the Office of Government Procurement

The framework sets out the procurement procedures to be followed by Government Departments and State Bodies under national and EU rules. The framework supports contracting authorities, including the Office of Government Procurement, the four key sectors (Health, Education, Local Government and Defence), individual Departments, Offices, commercial and non-commercial State bodies, and private entities which are subsidised 50% or more by a public body, when awarding contracts for works, goods and services. It supports and enables public bodies to adopt procedures to meet their public procurement obligations and facilitates compliance with EU and national procurement rules.

This information note is dynamic in nature and will be subject to amendment and review periodically. Therefore, the Office of Government Procurement would encourage officials to check our website [www.ogp.gov.ie](http://www.ogp.gov.ie) for the most up-to-date version.

It should be noted that this information note is not intended as legal advice or a legal interpretation of Irish or EU law on public procurement.

## 1. Introduction

The UK left the European Union on 31 January 2020 after both sides had concluded a Withdrawal Agreement, including the Protocol on Ireland / Northern Ireland, to facilitate an orderly exit. The transition period provided for in the Withdrawal Agreement ended on 31 December 2020. On account of the Protocol on Ireland / Northern Ireland, no new checks or controls apply to goods moving between Ireland (or the rest of the EU) and Northern Ireland in either direction.

The UK now lies outside the EU Single Market and the EU Customs Union. Its interaction with the EU is now governed, in the main, by the terms of the EU-UK Trade and Cooperation Agreement, which was agreed just before Christmas 2020 and has since been formally ratified by the EU and the UK.

This is the fifth in a series of information notes prepared by the OGP's Policy Unit aimed to provide guidance for public bodies charged with dealing with public procurement and the management of public contracts in the context of changes which will arise due to Brexit. It serves to reinforce the guidance of the December 2020 Information Note while seeking to clarify the public procurement aspects contained in the EU-UK Trade & Cooperation Agreement (TCA).

As of 1 January 2021 the UK participates in the World Trade Organisation (WTO) on the basis of its own schedules and is subject to (WTO) rules in its trading interactions. In tandem it applied for accession to the Government Procurement Agreement. Its trading interactions with EU Member States is now governed by the TCA. In respect of both aspects the UK is to be treated as a third country subject to the agreements contained in the TCA.

The updated information Note issued in December 2020, provided guidance to public bodies on the procurement and management of public contracts which may have Brexit-related aspects. In the case of existing contracts public bodies have been encouraged to carry out a walk-through of those contracts with the providers to assess any potential difficulties which may arise. Where new contract requirements may have UK-related aspects, public bodies are advised to place the onus on UK providers to ensure full compliance with EU rules and regulations especially in respect of standards and legal obligations. The advice in that Note should be read in conjunction with this current update.

## 2. Public Procurement and Brexit in 2021

The response of public bodies to the changed trading relationship between the EU and the UK in 2021 should be focused on two aspects in respect of public procurement: tendering and management of contracts.

Tendering – public bodies should act to ensure that tenders received from UK-providers have the same level of access to opportunities in the Irish public service as previously. No restriction on access to tender opportunities should be applied to UK providers. The principles of openness and transparency should be strictly observed in respect of UK-based tenders.

Management of contracts – tender competitions leading to the award of public contracts must pay close attention to the operability of the contract where it may involve a tender proposal from a UK-based provider. The awarding body must scrutinise such a proposal to ensure that a contract award to a UK-based provider is fully compliant with all aspects of EU and national legislation and that it may be managed through the course of the contract *ex aequo*, or on an equal basis, with the award of contract to an EU-based provider. The onus for establishing compliance should be placed firmly with the tenderer.

The national procurement stance in 2021 is provided for under EU procurement law, the EU-UK Trade & Cooperation Agreement (TCA) and the relevant provisions of the 2019 Withdrawal Agreement incorporating the Protocol on Ireland and Northern Ireland (NI Protocol).

EU public procurement legislation does not, in the main, provide for exclusion of tenders from third country economic operators including the UK<sup>1</sup>.

The public procurement provisions of the December 2020 EU-UK Trade & Cooperation Agreement (TCA) are specifically designed to support a continuance of transparency of public procurement interaction between both jurisdictions

In this regard the TCA provides that both the EU and the UK will, in terms of public procurement treat providers from the corresponding jurisdiction *no less favourably* than the most favourable treatment accorded, in like situations to providers in their own jurisdiction.

Accordingly the OGP advice remains as set out in the Update Information Note of December 2020: tenderers from third countries, now including the UK, may continue to submit tenders for public contracts but the onus for proof of compliance with EU rules and regulations should be placed on such tenderers. Particular scrutiny should be applied to UK-based providers in relation to:

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<sup>1</sup> Some specific provisions are set out in Directive 2014/25/EU governing procurement by contracting entities.

## Standards – including qualifications and certification.

Those engaging in regulated professions in Ireland require specific professional qualifications. In principle, non-EU professional qualifications can be recognised in a relevant Member State on the basis of that state's individual rules applicable to the qualifications of third-country nationals. In the majority of cases, arrangements are in place to provide a pathway to continue to recognise UK professional qualifications in Irish law. The TCA also provides a mechanism whereby the EU and the UK may later agree, on a case-by-case basis and for specific professions, on additional arrangements for the mutual recognition of certain professional qualifications.

Products imported from the UK to the EU must comply with EU technical regulations and are subject to all applicable regulatory compliance obligations, checks and controls for safety, health and other public policy purposes. The TCA does provide for the possibility to address technical barriers and provide for simplification in conformity assessment procedures.

Additionally, a comprehensive framework for cooperation on market surveillance and product safety underpins the robust enforcement of product safety rules and the high levels of protection of consumers.

These provisions for cooperation will require detailed implementation over time across all covered market sectors. Hence public bodies are encouraged to continue to place the onus of proof of compliance with the provider.

## Logistics – including barriers to trade and trade movements.

The EU-UK TCA provides for zero tariffs and zero quotas where the product specific rules of origin contained in the TCA are met. However, new customs arrangements have the potential to affect supply chains which have operated heretofore between Great Britain and Ireland within the internal market. Not all goods being imported from Great Britain, including EU origin goods, will be able to meet the requirements of the product specific rules, and in those cases tariffs will apply. This has the potential to create re-orientation in market supply requiring identification and agreed administration prior to mitigating such effects. All imports from Great Britain, irrespective of their country of origin, will be subject to customs formalities and will need to comply with the rules set out in the Union Customs Code and Official Controls Regulation where the goods are subject to sanitary and phytosanitary requirements.

**Under the Protocol on Ireland/Northern Ireland, no checks or controls apply to goods moving between Ireland (and the rest of the EU) and Northern Ireland in either direction.**

## Legal

Public contracts will operate under the jurisdiction of the state and this should always be made explicit in each public contract. UK-based providers seeking to challenge public procurement matters are required to do so under the EU Directives only. Similarly contract disputes are only actionable under the law of this State.

### 3. Compliant Public Procurement in 2021 – the post-Brexit context.

Public bodies meeting public procurement requirements and managing public contracts should continue to comprehensively assess their exposure to British-related supply and service risk in the planning, establishment and management of all public contracts. However, public bodies must also take into account the provisions in the TCA relating to public procurement and the provisions of the Northern Ireland Protocol in the management of procurement processes and contracts where UK tenderers and providers are concerned. The purpose of this Note is to reinforce the need for public bodies in making procurement decisions to reference EU law, national regulations the TCA and the NI Protocol in tandem to guide the compliance of such decisions.

Public bodies should continue to note that the Withdrawal Agreement, which was agreed in October 2019, and which came into force on 31 January 2020, includes the Protocol on Ireland / Northern Ireland. This avoids a hard border on the island of Ireland, protects the Good Friday Agreement and the gains of the peace process, and safeguards the integrity of the Single Market and Ireland's place in it.

The Protocol provides that Northern Ireland is legally part of the UK customs territory but subject to certain provisions of EU law. These provisions are effectively those necessary to avoid a hard border on the island and include the Union Customs Code and EU legislation across a range of areas necessary to protect the integrity and operation of the Single Market in goods. The Protocol does not significantly address services trade. For further information on the Protocol, please see [here](#).

The provisions of EU legislation, the TCA and the Protocol apply to the compliant management of public procurement procedures.

Ireland's public procurement framework is governed, in the first instance by EU procurement rules. External interaction with tenderers or providers from other Member States or from recognised third countries, including the UK, continue to be subject to compliance with EU rules and regulations. The main principle in our national obligations is to conduct procurement processes in an open and transparent manner. Under the TCA providers from both jurisdictions have presumption of access to the corresponding procurement platforms. For contracting authorities and other public bodies, open and transparent tender procedures should ensure that they treat UK-related tenders no less favourably than EU-based tenders at the tender stage.

However, as advised in the December 2020 Note, public bodies should at all times be conscious of the altered profile of UK-related tenders brought about by Brexit. In relation to tenders from a third country, the compliance of such tenders can no longer carry with them a presumption of compliance with EU law. Such tenders, therefore, require to be scrutinised as to the modes of compliance or equivalence and the onus for assertion of compliance should be placed with the UK-related tenderer.

New contracts, post-Brexit, will require specifications that account for market realities where UK-based service companies participate in the Irish market. Scrutiny of compliance with EU standards and law, examination of undertakings in relation to mitigation of logistical and supply barriers and other trading impediments are additional overheads appropriate to apply to third country tenders.

## 4. The EU-UK Trade & Cooperation Agreement

The UK has left the EU and trade and cooperation between the EU, including Ireland, and the UK is subject to the provisions of the EU-UK Trade and Cooperation Agreement (TCA) and the Withdrawal Agreement, including the Protocol on Ireland / Northern Ireland. On account of the Protocol on Ireland / Northern Ireland, no new checks or controls apply to goods moving between Ireland (and the rest of the EU) and Northern Ireland in either direction.

The TCA provides for the terms for a new interactive relationship between the EU and the UK. It goes beyond the scope of a trade agreement, per se, and provides for jurisdictional cooperation arrangements in areas such as judicial cooperation in criminal matters.

The agreement covers, a number of areas, including the following:

- trade in goods and in services
- digital trade
- intellectual property
- public procurement
- aviation and road transport
- energy
- fisheries
- social security coordination
- law enforcement
- thematic cooperation
- participation in EU programmes.

In general terms, the TCA reflects much of the standard WTO & GPA models but with the application of zero tariffs and zero quotas, subject to product specific rules of origin. The Agreement serves to mitigate the effects of the departure of the UK from the EU; however, barriers to trade and commercial interaction will now apply, that did not apply when the UK was a Member State of the EU. There will undoubtedly be an on-going impact on trade resulting from the financial and logistical impacts of regulatory checks and customs clearance between Ireland and Great Britain.

The TCA on trade provides for zero tariffs and zero quotas on all goods that comply with the appropriate rules of origin. The UK will no longer have automatic trade access (passporting) with EU Member States. UK service suppliers will lose their automatic right to offer services across the EU. They may need to establish themselves within an EU Member State to continue operating.

UK professional qualifications, where not recognised under EU law before 31 December 2020, will require recognition in individual EU Member States. In this regard provision is made for the possible later mutual recognition of certain professional qualifications on a case-by-case basis and for specific professions but this will be a process over time.

The TCA is governed by principles of the 'level playing field' intended to commit both sides to operate their competitive trading positions while maintaining mutual levels of protection and observance in areas including:

- environmental protection
- climate change and carbon pricing
- social and labour rights
- tax transparency and State aid
- effective, domestic enforcement and binding dispute settlement mechanisms with remedial measures.

## 5. The TCA and Public Procurement

The TCA includes specific provisions in the area of public procurement (which are modelled on the GPA). The principal aspects include:

- Continuance and guarantee of access to public procurement opportunities in both jurisdictions to their respective suppliers.
- Reliance on electronic measures to support market access.
- Monitoring through mutual access to e-procurement platforms.
- Less prescriptive measures in the areas of exclusion, past-performance and abnormally low tenders, environmental social and labour measures.
- Review procedures subject to subsequent specification.
- Non-discrimination obligations of the Agreement ensure that service suppliers or investors from the EU will be treated no less favourably than UK operators in the UK, and vice-versa.
- Reciprocal treatment and access for companies to procurement opportunities in each other's jurisdiction for above and below-threshold procurements.
- Modification and divergence from current procurement norms allowed for. The extent to which the UK will act to differentiate its procurement market over time is unclear.
- Consultative arrangements and mechanisms for resolution for such modifications.
- Additionally the TCA provides for access to review procedures in both jurisdictions of public procurement procedures.

## 6. Management of Brexit-related Issues in procurement in 2021

Government will continue to monitor the implementation and outworking of the new trading arrangements in place between the EU and the UK. A range of Government supports including advisory, upskilling and financial supports are available to assist businesses and traders in adapting to these new arrangements. For public bodies there will be changing operational dynamics resulting from the exit of the UK from the EU. Trade flows in goods services and supplies will reflect adaptation to the changed situation through 2021. The altered trading relationship will introduce new complexity to procurement affected by Brexit.

The OGP will continue to offer bi-lateral advice to public bodies seeking guidance on specific aspects of public procurement within the context of Brexit.

## 7. OGP Actions and Guidance

As the post-Brexit trading environment will continue to evolve, OGP will continue to update its guidance as required by on-going developments. OGP will continue to liaise with other Government Departments and the EU Commission to monitor developments across the spectrum of Brexit-related effects. It will also continue to monitor specific issues which arise or which are brought to its attention directly. The Guidance notes on Brexit remain accessible on the OGP website [www.ogp.gov.ie](http://www.ogp.gov.ie) where informational updates may also be published.