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The UK's Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication?

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ABSTRACT

In December 2020, seeking to start cashing in on its desired 'Brexit dividends', the UK Government published the Green Paper 'Transforming Public Procurement'. The Green Paper sets out a blueprint for the reform of UK public procurement law that aims to depart from the regulatory baseline of EU law and deliver a much-touted 'bonfire of procurement red tape'. The Green Paper seeks 'to speed up and simplify [UK] procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery'. The Green Paper seeks to do so by creating 'a progressive, modern regime which can adapt to the fastmoving environment in which business operates' underpinned by 'a culture of continuous improvement to support more resilient, diverse and innovative supply chains.' I argue that the Green Paper has very limited transformative potential and that its proposals merely represent an 'EU law +' approach to the regulation of public procurement that would only result in an overcomplicated regulatory infrastructure, additional administrative burdens for both public buyers and economic operators, and tensions and contradictions in the oversight model. I conclude that a substantial rethink is needed if the Green Paper's goals are to be achieved.

KEYWORDS

Public procurement, reform, deregulation, green paper, transforming public procurement, Brexit.

JEL CODES

H57, K23, K42, L59.

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I. Introduction

On 15 December 2020, the UK Government published a Green Paper entitled ‘Transforming Public Procurement’ (the ‘Green Paper’),¹ which is presented as ‘an historic opportunity to overhaul [the UK’s] outdated public procurement regime’ and ‘a dividend from the UK leaving the EU’.² The UK Government seemed keen to start cashing in on its desired ‘Brexit dividends’ and to signal its vision for post-Brexit public procurement, which not only included a reform of procurement law, but also a much more protectionist approach to trade-based access to UK procurement markets—as evidenced in the Public Procurement Notice 11/20 (PPN 11/20) on ‘Reserving below threshold procurements’,³ which accompanied the Green Paper and sought to create a ‘Buy UK’ policy. Arguably, the publication of the Green Paper and PPN 11/20 could have been delayed until after the then imminent conclusion of the EU-UK Trade and Cooperation Agreement (EU-UK TCA),⁴ which not only largely deactivated the ‘Buy UK’ approach for EU tenderers with a local presence in the UK,⁵ but which could also have included significant constraints on the de- or re-regulation of public procurement law in the UK. Ultimately, however, given the ‘thin’ nature of the procurement chapter in the EU-UK TCA,⁶ the Green Paper proposals remain deliverable without infringing that agreement.

The Green Paper sets out a blueprint for the reform of UK public procurement law that seeks to depart from the regulatory baseline of EU law and to deliver a much-touted ‘bonfire of procurement red tape’.⁷ The main goal of the Green Paper ‘is to speed up and simplify [UK] procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery’. It seeks to do so by creating ‘a progressive, modern regime which can adapt to the fastmoving environment in which business operates’ underpinned by ‘a culture of continuous improvement to support more resilient, diverse and innovative supply chains’.⁸ The Green Paper is formulated in aspirational and ambitious terms and contains proposals that would alter a broad array of issues of procurement regulation.

Indeed, the Green Paper groups its proposals in eight chapters comprising: the general principles of the envisaged system (ch 1); a strategy for the simplification of the regulatory and statutory architecture through the creation of a ‘single, uniform framework’ (ch 2); procedural reform, including a reduction in the number of available tender procedures and the creation of a ‘competitive flexible procedure’ (ch 3); a changed approach to contractor selection and to contract award (ch 4); a proposal on new commercial tools (or vehicles), such as ‘open’ framework agreements and revised dynamic purchasing systems (‘DPS+’) (ch 5); transparency and openness in contracting (ch 6); increased access

Note: all websites last accessed on 17 Feb 2021.

¹ Available at <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>.

² Green Paper, Ministerial Foreword.

³ <https://www.gov.uk/government/publications/procurement-policy-note-1120-reserving-below-threshold-procurements>.

⁴ https://ec.europa.eu/info/sites/info/files/draft_eu-uk_trade_and_cooperation_agreement.pdf.

⁵ A Sanchez-Graells, ‘Public Procurement Regulation’ in H Kassim, S Ennis and A Jordan (eds), *UK Regulation after Brexit* (UKICE, 2021) 23.

⁶ M Bowsher QC, ‘The Public Procurement Provisions in the UK-EU Trade and Cooperation Agreement’ (EU Relations Law, 28 Dec 2020) <https://eurelationslaw.com/blog/the-public-procurement-provisions-in-the-uk-eu-trade-and-cooperation-agreement>; S Cairns, C Murray and C Gamage, ‘Brexit: the end of public procurement rules or business as usual?’ (2021) <https://www.twobirds.com/en/news/articles/2021/uk/brexit-the-end-of-public-procurement-rules-or-business-as-usual>.

⁷ C Hope, ‘Boris Johnson orders a “bonfire” of red tape to give small firms a bigger slice of Government contracts after Brexit’ (Telegraph, 4 Nov 2019), <https://www.telegraph.co.uk/politics/2019/11/04/boris-johnson-orders-bonfire-red-tape-give-small-firms-bigger/>.

⁸ Green Paper, Ministerial Foreword.

to procurement challenges and a review of the available remedies, including a limitation of damages awards (ch 7); and new rules for contract management and modification (ch 8). Spread across different chapters, there are additional proposals for the creation of high-level policy directions that would become binding on public buyers (ie a 'National Procurement Policy Statement'); a new oversight unit entrusted with monitoring procurement from a 'quality control' perspective and with promoting a high level of 'commercial capability' in contracting authorities and a culture of constant improvement; or the creation of a system of feedback to encourage contractors to also engage in a culture of constant improvement.

At first sight, the Green Paper could seem to encompass a root and branch review of procurement regulation in the UK and to be laying down the foundations of an alternative, simpler, principles-based regulatory model with a more commercial approach and higher degrees of discretion for public buyers and lower compliance costs for economic operators than under the current regime resulting from the transposition of EU rules. Such is, at least, the claim of the Green Paper,⁹ as well as that of Professor Arrowsmith,¹⁰ whose views and proposals have influenced the Green Paper.¹¹ As it is presented, the Green Paper is likely to attract significant attention throughout the EU and the wider EEA, as it could represent a useful experiment in the reimagining of procurement and, if successfully delivered, it could put pressure on the reform of EU public procurement law itself. Realistically, some echoes of the UK's discontent with the strictures of the EU procurement regulatory blueprint can be heard in almost every corner of the EU and the wider EEA (at least to some extent), so the rejection of the EU's regulatory model claimed by the Green Paper and the design of an alternative regulatory regime is likely to be followed with interest.

However, in my view, a close analysis of the Green Paper reveals that there is very little truly innovative in its proposals,¹² which not only remain very closely pegged to the EU regulatory baseline (as discussed throughout this paper), but also carry a risk of continuation of some of the difficulties and uncertainties inherent in the current state of development of the principles of public contract law under English law in the absence of a comprehensive statutory treatment of the applicable rules¹³—the English approach being the most influential in the design of the Green Paper.¹⁴ The Green Paper also falls short of addressing crucial aspects of a modern procurement regime, such as the level of centralisation, cooperation and specialisation of public buyers; the need to ensure a proper adoption

⁹ Ibid, chapter 1.

¹⁰ S Arrowsmith, 'Reimagining Public Procurement Law: Proposals for Post-Brexit Reform' [2021] *Public Law* 69.

¹¹ S Arrowsmith, 'Transforming Public Procurement Law after Brexit: Early Reflections on the Government's Green Paper' (15 Dec 2020) <https://ssrn.com/abstract=3749359>.

¹² I submitted a response to the public consultation, where such detailed analysis was carried out. See A Sanchez-Graells, 'Response to Consultation on the Green Paper "Transforming Public Procurement"' (howtocrackanut.com, 15 Jan 2021) <https://www.howtocrackanut.com/blog/response-green-paper-transforming-public-procurement>. With a similar view regarding the Green Paper's limited transformative potential, see C Cram, 'What's wrong with the procurement green paper?' (CIPS blog, 10 Feb 2021) <https://www.cips.org/supply-management/opinion/2021/february/whats-wrong-with-the-procurement-green-paper/>.

¹³ Y Marique, 'Principles in English Public Contracts. Law, Ethics and Administrative Management' (2019) 1 *Ius Publicum* art 3, http://www.ius-publicum.com/repository/uploads/29_07_2020_15_19-9_07_2020IusPublicum_PrincipleinEnglishPC_Marique_ym.pdf.

¹⁴ It should be noted that the Green Paper proposals can have a different effect on the regulation of procurement across the four UK jurisdictions, as procurement falls partly or totally within the powers of the devolved administrations. However, addressing that issue exceeds the scope of this article. For simplicity, the paper will refer to the UK only. For some analysis of the risks of break up of the UK's 'single procurement market' as a result of the implementation of the Green Paper, see Sanchez-Graells, above n 12.

of a technologically robust platform for full cycle e-Procurement;¹⁵ or the interaction of the new rules with the possibility of deploying digital technologies to enhance procurement governance and to lead on the ‘Fourth Industrial Revolution’.¹⁶ Another of the main shortcomings of the Green Paper is the lack of governmental commitment to proper and sustained funding of the training programme required to support its rollout, as the Green Paper itself recognises that the proposed reforms ‘will not in themselves deliver unless contracting authorities act to ensure their commercial teams have the right capability and capacity to realise the benefits. To support this the Government will, *subject to future funding decisions*, provide a programme of training and guidance on the reforms’.¹⁷ In my view, the implementation of the proposals in the Green Paper should be made conditional upon a binding commitment to a sufficient level of investment in training, in particular in the context of the uncertain economic circumstances ahead of us. In the absence of such a firm commitment, the implementation of the Green Paper reforms would, at best, have little to no practical effect and, more likely, result in an increased burden for all agents involved, which would further erode the commercial capabilities in the public sector—and in relevant parts of the private and third sectors currently competing for public contracts.

Here, I argue that the Green Paper has very limited transformative potential and that one of its foundational shortcomings stems from the absence of an underpinning regulatory model capable of replacing the hybrid EU law model,¹⁸ which the UK had simply copied-out into domestic legislation.¹⁹ Indeed, an analysis of the Green Paper shows that it simply seeks to introduce higher levels of flexibility and some ‘corrections’ to the existing EU/UK rules—although the true remit and extent of those ‘corrections’ remains largely undefined pending the publication of future guidance on a large number of relevant issues. In the end, the Green Paper adopts an ‘EU law +’ approach that is unable to spur a true transformation of procurement regulation in the UK (section II). I also argue that the implementation of the Green Paper would not only not be transformative, but also result in an overcomplicated regulatory infrastructure with a significant ‘offloading’ of detailed rules to statutory guidance which applicability and enforceability generate significant legal uncertainty (section III). The Green Paper’s proposals, in particular concerning the reform of the available tendering procedures and commercial vehicles, would also create significant additional administrative burdens for both public buyers and economic operators (section IV). Further, the Green Paper would create tensions and contradictions in the oversight model, which would be based on a system of sanctions that would create perverse incentives capable of chilling the innovation it seeks to spur (section V). I conclude that a substantial rethink is needed if the Green Paper’s goals are to be achieved through a post-Brexit reform of public procurement regulation in the UK (section VI).

¹⁵ Along similar lines, see Roger Bickerstaff, ‘Procurement Green Paper Briefings: eProcurement Proposals’ (2021) <https://www.twobirds.com/en/news/articles/2021/uk/bird-and-bird-procurement-green-paper-briefings-eprocurement-proposals>.

¹⁶ Sanchez-Graells, above n 12; Cram, above n 12; P Telles, ‘The lack of automation ideas in the UK Gov Green Paper on procurement reform’ (telles.eu, 13 Jan 2021) <http://www.telles.eu/blog/2021/1/13/the-lack-of-automation-ideas-in-the-uk-gov-green-paper-on-procurement-reform>

¹⁷ Green Paper, para 13, emphasis added.

¹⁸ For discussion of some of the problems inherent to the latest iteration of the hybridisation process in EU public procurement law, see the contributions to G Skovgaard Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar 2016). See also R Caranta, ‘The changes to the public contract directives and the story they tell about how EU law works’ (2015) 52(2) *Common Market Law Review* 391.

¹⁹ For details, see A Sanchez-Graells, ‘The copy-out of Directive 2014/24/EU in the UK and its limited revision despite the imminence of Brexit’ [2019] 5 *Public Procurement Law Review* 186.

II. An ‘EU law +’ approach cannot transform public procurement regulation in the UK

As mentioned above, the Green Paper presents itself as a ‘Brexit dividend’ and as a proposal to rid the UK from the EU’s regulatory blueprint through a *transformation* of both procurement law and culture, leading to speedier and simpler procurement processes focused on delivering value for money and on increasing the opportunities for small businesses, charities, and social enterprises to innovate in public service delivery. However, an analysis of the proposals shows that, with some clear exceptions concerning procedural requirements (as discussed later), most of the changes advocated in the Green Paper²⁰ are either a relatively small tweak or ‘correction’ of the current EU/UK rules, or policy positions that could have been adopted under EU law²¹—even if this meant engaging in ‘gold-plating’, and thus contrary to the UK Government’s minimalistic approach to the transposition of EU law.²²

Indeed, some of the most notable changes proposed by the Green Paper involve ‘corrections’ (or rather, a flexibilization) of EU law concerning the debated concepts of ‘most economically advantageous tender’ (MEAT),²³ ‘link to the subject matter of the contract’ (LTSM),²⁴ or the need to assess tenders ‘from the point of view of the contracting authority’.²⁵ In all these cases, the Green Paper criticises the rigidity of the EU rules, but it does not go much further. Indeed, the Green Paper either confirms that there is no real scope for much substantive change—e.g. when indicating that replacing MEAT for the alternative ‘Most Advantageous Tender’ (MAT) involves an approach ‘already provided for in the current regulations under MEAT, so this change would be about reinforcing and adding clarity rather than changing scope’²⁶—or proposes very minimal and yet to be specified exceptions—such as in its proposal to retain the rules on LTSM ‘but amending it to allow specific exceptions ... limited to specific circumstances set out in statutory guidance’;²⁷ or to remove ‘the requirement for evaluation to be made solely from the point of view of the contracting authority, but only within a clear framework ... [setting] out in guidance how [the relevant] criteria can be objectively taken into account and assessed by contracting authorities’.²⁸

As presented, the proposals of the Green Paper simply try to create the appearance of more flexibility for contracting authorities, but they fail to clarify how broad that flexibility would be and, importantly, how the envisaged exceptions would make a practical difference. More importantly, implementing those proposals would overcomplicate the system and increase administrative and compliance burdens (below, section IV), as well as generate oversight and litigation costs (as discussed below, section V). Similar issues arise with the intended clarification of the rules on emergency procurement through the creation of a new grounds of ‘crisis procurement’, which would be accompanied by a new administrative procedure whereby contracting authorities would no longer be able to self-assess the need to engage in extremely urgent limited tendering, but would rather have to seek a formal

²⁰ For a useful summary, see Bird & Bird, ‘Green Paper consultation: Synopsis of the changes proposed to public procurement law’ (2021) <https://www.twobirds.com/~media/pdfs/news/articles/2021/uk/green-paper-consultation--synopsis-of-proposed-changes-feb-2021.pdf>.

²¹ A detailed analysis of all proposals exceeds the possibilities of this article. For such analysis, see my response to the public consultation, above n 12.

²² Sanchez-Graells, above n 19.

²³ Green Paper, paras 100-102.

²⁴ Ibid, para 107.

²⁵ Ibid, para 109.

²⁶ Ibid, para 101.

²⁷ Ibid, para 103.

²⁸ Ibid, para 109.

declaration of crisis from the Cabinet Office.²⁹ How this could reduce uncertainty and administrative burdens, and speed up procurement, is very difficult to fathom.

Along the same lines, some of the potentially transformative proposals ‘to embed transparency by default throughout the commercial lifecycle from planning through procurement, contract award and performance’,³⁰ while also seeking to ‘strike the right balance between transparency and data protection’,³¹ are severely constrained by the retention of the protections for commercially sensitive information in the Freedom of Information Act 2000 (FOIA), Environmental Information Regulations 2004 and the Data Protection Act 2018. In that regard, it should be recalled that the UK is one of the opaqueness procurement systems under the current EU-based rules,³² largely as a result of FOIA constraints and some difficulties in their interpretation concerning the disclosure of commercially sensitive information.³³ This is thus another area where very limited practical change would be effected by the Green Paper’s proposals—which, incidentally, could also delivered through the reform of domestic legislation in compliance with EU law, as comparative analysis shows very different approaches to the regulation of procurement transparency across EU (and EEA) jurisdictions.³⁴

Similarly, there is a large number of additional proposals that could be adopted under EU law. These concern, for example, proposals on increased transparency of the procurement system through the mandatory adoption of the open data contracting standard (OCDS) for the publication of procurement data,³⁵ including in relation to call-offs within framework agreements,³⁶ or a broader array of contract modifications than those mandated by EU law;³⁷ a more muscular enforcement of discretionary exclusion grounds,³⁸ including on the basis of poor past performance³⁹ or, more controversially, to fight tax evasion,⁴⁰ and leading to the creation of a debarment list or register;⁴¹ or even the proposed reforms in the system of procurement challenges and remedies,⁴² with the only potential exceptions of the proposals on the limitation of damages awards.⁴³ The proposal to create a central information platform providing the functionalities of a contract register⁴⁴ is also susceptible of implementation

²⁹ Ibid, paras 78 and ff.

³⁰ Ibid, para 165.

³¹ Ibid, para 167.

³² A Sanchez-Graells, ‘Transparency and competition in public procurement: A comparative view on their difficult balance’ in K-M Halonen, R Caranta and A Sanchez-Graells (eds), *Transparency in EU Procurements. Disclosure Within Public Procurement and During Contract Execution* (Edward Elgar 2019)33-56.

³³ See P Henty and R Ashmore, ‘Disclosure rules within public procurement procedures and during contract period in the United Kingdom’ in Halonen, Caranta and Sanchez-Graells, above n 32, 296-322.

³⁴ See the rest of the contributions to Halonen, Caranta and Sanchez-Graells, above n 32.

³⁵ Ibid, para 170 and ff. Which is very much in line with the new EU rules on eForms; see Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 (eForms) [2019] OJ L 272/7

³⁶ Green Paper, para 155.

³⁷ Ibid, paras 233 and ff.

³⁸ Ibid, paras 110 and ff.

³⁹ Ibid, paras 120 and ff.

⁴⁰ Ibid, para 112.

⁴¹ Ibid, paras 116 and ff.

⁴² Ibid, chapter 7.

⁴³ However, even this can be doubted, given that the proposal is premised on the presumption of a generalised misconception of UK and EU law on this issue. See my response to the public consultation, above n 12, Q35.

⁴⁴ Green Paper, paras 174 and ff.

under EU law and, in fact, has been one of the policy priorities of the European Commission in recent years.⁴⁵

All in all, the number of proposals that would significantly deviate from the current blueprint of EU law is limited and these concern procedural issues, such as the reduction in the number of available (default) procedures and the creation of a new 'competitive flexible procedure',⁴⁶ or the creation of a new model of 'open' framework agreement⁴⁷ and also a new 'Dynamic Purchasing Systems (DPS+)'.⁴⁸ The other major deviation from the current reception of EU law in the UK system would be the attempt to create a single, uniform regulatory framework by amalgamating the current multiple statutory instruments transposing EU procurement directives, as well as a significant reduction in the number of rules retained in statute, which would be largely offloaded to statutory guidance. As discussed below, these deviations would come at significant costs in terms of legal uncertainty (section III), administrative and compliance costs (section IV) and oversight difficulties (section V). In my view, even these changes fail to depict a true *transformation* of the regulatory system, which very much remains rooted in the EU's regulatory baseline and, at most, can be labelled 'EU law +'. As Bowsher QC has put it, 'Most of what is put forward as some great reform is something [that] could probably have been done within the context of the EU directives if they had been properly implemented by the UK in the first place. On the whole [the Green Paper] seems to reflect the beginnings of the sort of grown up conversation about procurem[e]nt which we have been prevented from having for a decade or so. However, perhaps out of some nostalgic regret the whole document is bizarrely EU-centric'.⁴⁹

Indeed, despite its Brexit-infused rhetoric, the Green Paper does little to generate a blueprint for public procurement regulation that looks sufficiently different from the current rules to consider it *transformative*. Granted, the limited transformative potential of the Green Paper is partly a result of the narrow regulatory space existing between, on the one hand, the now to be abandoned EU regulatory benchmark and, on the other, that of the World Trade Organisation's Government Procurement Agreement (GPA) to which the UK remains bound after its accession on 1 January 2021.⁵⁰ This is a major constraint on post-Brexit procurement reform that was already flagged up,⁵¹ but the Green Paper seeks to significantly downplay it by simply stating that the 'new regulatory framework will ... be founded on the principles and rules set out in the GPA, namely: non-discrimination, transparency and impartiality. Competitive procurement will continue to be the standard approach,

⁴⁵ Indeed, the Commission has long recommended 'setting up publically accessible contract registers ... providing transparency on awarded contracts and their amendments'; European Commission, 'Making Public Procurement Work in and for Europe', COM(2017) 572 final, part D.

⁴⁶ Green Paper, paras 63 and ff.

⁴⁷ Ibid, paras 148 and ff.

⁴⁸ Ibid, paras 146-147.

⁴⁹ M Bowsher QC, 'UK Procurement Law Going Forward' (Mostly Procurement Bulletin, 27 Dec 2020) <https://mostlyprocurement.typepad.com/my-blog/2020/12/uk-procurement-law-going-forward.html>. See A Sanchez-Graells, 'An Early Winter Present? The UK's "Transforming Public Procurement" Green Paper' (howtocrackanut.com, 15 Dec 2020) <https://www.howtocrackanut.com/blog/transforming-public-procurement-green-paper-hot-take>. Much along the same lines, but based on analysis pre-dating the Green Paper, see T Sasse, 'The government doesn't need to scrap EU procurement rules to spend more with small businesses' (Institute for Government, 4 Nov 2019) <https://www.instituteforgovernment.org.uk/blog/government-doesnt-need-scrap-eu-procurement-rules>.

⁵⁰ The UK's coverage schedules are now available at https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm.

⁵¹ P Telles and A Sanchez-Graells, 'Examining Brexit Through the GPA's Lens: What Next for UK Public Procurement Reform?' (2017) 47(1) *Public Contract Law Journal* 1.

with single source procurement remaining the exception, to be used only in strictly defined circumstances.⁵²

Regardless of how this is presented in the Green Paper, there are many more constraints in the GPA that limit the possibilities for post-Brexit UK procurement law reform, as well as some additional ones resulting from the procurement chapter of the EU-UK TCA—which retains most of the pre-Brexit status quo in terms of reciprocal market access and non-discrimination requirements, including for ‘below-threshold’ procurement, in line with the earlier treatment of procurement in the UK’s EU Withdrawal Agreement.⁵³ To put it simply, as a result of the GPA and the EU-UK TCA, an incomplete and hybrid regulatory model continues to constrain the UK’s regulatory choices in a way that the Green Paper fails to objectively acknowledge.

Importantly, though, beyond those regulatory constraints resulting from international procurement law,⁵⁴ the lack of transformative potential of the Green Paper mostly results from its own general fixation with trying to ‘correct’ (perceived) deficiencies in EU procurement law, or to implement limited deviations from its rules—which means that *EU law ultimately remains the relevant regulatory baseline as a matter of policy choice, with the Green Paper following the ‘EU law +’ approach* discussed above. It is also worth highlighting that the Green Paper’s omission of all discussion on the potential to automate procurement processes and to deploy some artificial intelligence solutions further evidences the lack of a true *transformative* aspiration.⁵⁵ All of this is important because, beyond the rhetoric of the Green Paper and discussions on the extent to which it adequately portrays the likely impact of its proposals, the objective reality is that there is at best potential for incremental change in its implementation.⁵⁶ This insight is important in two regards. First, to manage expectations and to make sure that Government action does not cause undesired effects with the cover of a narrative based on a presumed radically different approach to ‘standard’ procurement justifying the exercise of unfettered discretion—e.g. as has been found to be the case in relation to emergency procurement.⁵⁷ Second, and more importantly, so that an adequate regulatory impact assessment can be carried out prior to the implementation of the Green Paper and the likely costs of its rollout are assessed against deliverable changes in policy and practice objectively determined. Otherwise, the Brexit-infused tone of the Green Paper could spur deleterious legal reform that would end up not delivering on its stated goals.

⁵² Green Paper, para 23.

⁵³ As discussed in P Telles and A Sanchez-Graells, ‘Brexit and Public Procurement: Transitioning into the Void?’ (2019) 44(2) *European Law Review* 257; A Sanchez-Graells, ‘EU-UK procurement-based trade relations after Brexit: Some thoughts’, in F Kainer & R Repasi (eds), *Trade Relations after Brexit* (Nomos/Hart, Berlin, 2019) 379-396.

⁵⁴ For extended discussion of the increasing role of international law in the domestic regulation of public procurement, see the contributions to A Georgopoulos, B Hoekman and P C Mavroidis, *The Internationalization of Government Procurement Regulation* (OUP 2017).

⁵⁵ For further discussion, see Telles, above n 16.

⁵⁶ See also Cram, above n 12.

⁵⁷ House of Commons Public Accounts Committee, ‘COVID-19: Government procurement and supply of Personal Protective Equipment’ (2021) HC 928. National Audit Office, ‘The supply of personal protective equipment (PPE) during the COVID-19 pandemic’ (25 Nov 2020) HC 961. For discussion, see A Sanchez-Graells, ‘COVID-19 PPE Extremely Urgent Procurement in England. A Cautionary Tale for an Overheating Public Governance’, in D Cowan and Ann Mumford (eds), *Pandemic Legalities* (Bristol University Press, forthcoming), <https://ssrn.com/abstract=3711526>.

III. Offloading statutory rules into guidance does not generate simplification

In relation to the need to assess the likely practical or deliverable changes that can result from the Green Paper, it should be stressed that, beyond the limited transformative potential of the proposals (section II above), the Green Paper should also be criticised for the likely overcomplication it would generate in the regulatory and statutory architecture, contrary to its stated aim to create a ‘single, uniform framework’. Indeed, one of the main aims of the Green Paper is to ‘reduce complexity and give greater clarity to contracting authorities on which processes and behaviours are or are not permitted during contract awards’.⁵⁸ This is premised on the claim that ‘[t]he current regimes for awarding public contracts are too restrictive with too much red tape for buyers and suppliers alike, which results in attention being focused on the wrong activities rather than value and transparency.’⁵⁹ Although the Green Paper presents a narrative of regulatory simplification, its content and proposals rather point to *regulatory substitution by means of the offloading of regulatory content from statute to guidance*. This would not result in the overall systemic simplification to which the Green Paper declares to aspire, but rather in rule dispersion, partial opacity and complexity. It would be naïve to think that only statutory rules generate regulatory burden and that, somehow, voluminous guidance generates less complications than identical rules contained in primary and secondary legislation.⁶⁰ Measuring the true regulatory burden of any system requires an aggregate view on both statutory and guidance-based requirements, so a substitution or displacement across both categories cannot reduce the overall burden.⁶¹

In that regard, it should be noted that the Green Paper only seeks to achieve formal simplification at statutory level by replacing four of the existing sets of regulations transposing EU procurement directives (that is, the PCR,⁶² UCR,⁶³ CCR⁶⁴ and DSPCR⁶⁵) with a single rulebook (or ‘single, uniform framework’) and, simultaneously, both reducing the level of detail established in the new statutory instrument and significantly increasing the volume of statutory guidance that contracting authorities will need to take into account in the future. However, even from this perspective, the Green Paper falls short of aspiring to the creation of a true single rulebook for two reasons: first, it explicitly avoids integrating several important legislative instruments of direct relevance to procurement practice.⁶⁶ Contrary to what the Green Paper states, this omission is likely to result in complication, not least given e.g. the duplicity of duties imposed by the Public Services (Social Value) Act 2012 and the planned new rulebook,⁶⁷ or the tension between the planned (exceptional) pursuit of non-economic

⁵⁸ Green Paper, para 51.

⁵⁹ Ibid, para 1.

⁶⁰ Similarly, M Stanley ‘The Regulatory Burden’ (undated) https://www.regulation.org.uk/deregulation-the_regulatory_burden.html.

⁶¹ Indeed, it has been stressed that ‘To determine the incremental increase in administrative burden costs, the proposed regulatory change must be assessed against existing requirements in guidance, policy, regulation or law, whether they are voluntary or mandatory’; Government of Canada, ‘Controlling Administrative Burden That Regulations Impose on Business: Guide for the “One-for-One” Rule’ (2012) <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/controlling-administrative-burden-guide-one-for-one-rule.html>.

⁶² Public Contracts Regulations 2015 (PCR).

⁶³ Utilities Contracts Regulations 2016 (UCR).

⁶⁴ Concession Contracts Regulations 2016 (CCR).

⁶⁵ Defence and Security Public Contracts Regulations 2011 (DSPCR).

⁶⁶ Green Paper, para 49.

⁶⁷ As it is premised on the principle of ‘public good’, see *ibid*, paras 28-29.

considerations in procurement under the new rules⁶⁸ and the prohibition on taking non-commercial considerations into account under Part II of the Local Government Act 1988; but also e.g. the likely perpetuation of a dual procurement regime for the healthcare sector,⁶⁹ which concentrates a significant volume of total procurement spend and for which a separate set of proposed rules has been presented by the UK Government.⁷⁰

Second, and perhaps more relevant, the Green Paper is simply attempting to *displace or offload* regulation from legislative instruments to statutory guidance, but that is only going to generate regulatory substitution, and perhaps even inflation, as the total number of rules criteria and requirements that contracting authorities need to take into account will not decrease. This is implicit in the Green Paper's position that 'contracting authorities will need to ensure compliance with the law as currently set out in the regulations *and as subsequently amended by any legislation or statutory guidance arising out of these reforms*',⁷¹ which clearly stresses that the aggregate volume of regulation will include the voluminous foreseen guidance. Parsing through the Green Paper shows that such future guidance should cover crucial issues such as: the envisaged National Procurement Policy Statement—including any required separate legislation to support it (para 37); competitive flexible procedure (para 70); limited tendering procedure (para 72); programme of training, guidance and case study selection/publication (paras 13, 90) 'Most Advantageous Tender' (MAT), including restrictions on 'gold-plating' (paras 101-102); exceptions to 'link to the subject matter' requirements (para 107); exceptions to evaluation of bids from the point of view of the contracting authority (para 109); discretionary exclusion due to poor past performance (para 125); non-disclosable information (para 168) and, more generally, transparency requirements (para 187); test for the lifting of automatic suspension (para 206); new rules on crisis procurement (paras 6, 80) and managing competition within them (para 216); best practice in debriefing tenderers (para 219); contract amendments requiring disclosure (para 234); guidelines for the calculation of profit in case of challenge by incumbent (para 241). This list is not necessarily comprehensive, as there are other aspects of the Green Paper that are likely to also require guidance, even if that is not explicitly announced (e.g. on DPS+, or on the calculation of value for money over the 'whole-life' of the procurement⁷²).

From a substantive perspective, this regulatory approach does not generate simplicity, but rather complexity. It also generates risks of rule dispersion (and contradiction) as the guidance evolves, and risks of opacity if the guidance is not clearly cross-referenced in all relevant documents. All these effects, and in particular the complexity of the system, would only be compounded by the aspirational level of flexibility in the Green Paper (as discussed below, section IV). It is also worth noting that the Green Paper conflates issues of regulatory complexity at system and at operational level. Even if the proposals of the Green Paper could be a simplification of the current regulatory system (which they cannot), they would not create operational simplification. This is also likely to reduce the practical impact of the reform. The reason is that few contracting authorities are operationally troubled by the coexistence of four regulatory regimes because most of them operate solely within one regime—and

⁶⁸ See eg *ibid*, paras 101-102.

⁶⁹ *Ibid*, para 50.

⁷⁰ The Department of Health & Social Care published its legislative proposals for a Health and Care Bill on 11 February 2021: <https://www.gov.uk/government/publications/working-together-to-improve-health-and-social-care-for-all>. It includes a vague proposal to develop a new 'provider selection regime' to replace the current sectoral rules.

⁷¹ *Ibid*, para 41, emphasis added.

⁷² For extended discussion of the complexities of this very point, see the contributions to M Andhov, R Caranta and A Wiesbrock (eds), *Cost and EU Public Procurement Law. Life-Cycle Costing for Sustainability* (Routledge 2019).

the majority do so under the PCR. Therefore, they are also unlikely to benefit from the creation of a single rulebook (if one can be achieved). Conversely, most contracting authorities are operationally affected by legal uncertainty and by the constraints on the pursuit of more innovative procurement—to simplify, expertise and cost burdens.

This means that any reform that does not reduce operational complexity is unlikely to simplify procurement *in practice*, regardless of how procurement law reads *on the books*. Once more, this points to the need to rethink the possibility of creating simpler procurement solutions—rather than worrying about the formal architecture of the regulation—as well as the need to ensure proper enforceability of the relevant rules, which offloading into guidance will not achieve, as the degree to which contracting authorities will be bound by such guidance will clearly not be the same as that ensured by the duties owed to act lawfully and in compliance with statutory requirements.

IV. Increasing procedural flexibility significantly raises the administrative burden

In addition to the issues discussed above, the regulatory approach of the Green Paper is based on a conflation of flexibility and simplification.⁷³ As mentioned, the Green Paper aspires to fundamentally simplify UK public procurement law to reduce the regulatory burden and red tape for both contracting authorities and economic operators. However, by introducing more flexibility on both procedural and substantive rules, it would complicate the system.

This is particularly clear in relation to the regulation of procurement procedures, which the Green Paper seeks to reduce to just three (open procedure, ‘competitive flexible procedure’ and limited tendering procedure, or direct award), down from the existing seven—and, remarkably, proposing the suppression of the restricted procedure. The most innovative aspect of this proposal is the creation of a new ‘competitive flexible procedure’ which main characteristic is that there are no procedural constraints, other than the need to make sure that whichever specific procedural rules are to be followed in a given tender are compliant with the general principles of the system and adequately advertised. As presented in the Green Paper:

‘The rules for the new competitive, flexible procedure would be that:

- the process is consistent with the proposed principles of public procurement;
- the opportunity is advertised and notices are published in line with the proposed transparency requirements;
- the contract notice contains the basic information regarding the contracting authority and the opportunity (e.g. specification, timelines and any conditions for participation);
- the process remains consistent with the information provided in the contract notice (i.e. the buyer does what they said they would do at the outset);
- the process complies with the proposed requirements on selection and evaluation;
- time limits on participation and submission of final tenders are reasonable and proportionate and within the GPA minimum time periods ...’⁷⁴

In effect, there are no rules other than compliance with general principles and requirements, including transparency and advertisement. This means that the proposed competitive flexible procedure is an ‘anti-procedure’, in the sense that it seeks to allow contracting authorities maximum flexibility to design their own procedural rules and engage in negotiations⁷⁵—that is, it seeks to ‘give commercial

⁷³ P Telles, ‘Mixing up flexibility for simplification - some thoughts on the UK Gov Green Paper on procurement reform’ (telles.eu, 7 Jan 2021) <http://www.telles.eu/blog/2021/1/7/mixing-up-flexibility-for-simplification-some-thoughts-on-the-uk-gov-green-paper-on-procurement-reform>.

⁷⁴ Green Paper, para 64.

⁷⁵ Ibid, paras 56-82.

teams maximum flexibility to design a procurement process that meets their needs and the needs of the market'.⁷⁶ This is not more than a mere authorisation to create bespoke procedural rules, rather than the regulation of a proper and consistently identifiable set of rules. In that regard, it mirrors the transposition of the light-touch regime procedure in the PCR or the procedural rules for the award of concession contracts under the CCR, both of which have been notably underused.⁷⁷

Similar issues arise in relation to the proposed 'open' framework agreements and DPS+ commercial vehicles, with which the Green Paper seeks to create a mechanism to reduce the regulatory burden associated with repeat purchases. Concerning 'open' frameworks, the Green Paper proposes a new modality consisting of frameworks of a maximum duration of eight years, provided that the framework is opened at least once after the third year for new entrants to join.⁷⁸ Open frameworks are effectively a strange permutation of the current rules applicable to the re-tendering of framework agreements. As presented in the Green Paper, unless competition was reopened more than once, open frameworks would effectively be 3 + 5 year-long closed frameworks with the possibility for incumbents to remain within the framework without even revising their offer, depending on decisions on the maximum number of suppliers to be included in the framework. This seems to deliver very limited administrative savings (save for incumbent suppliers) and creates a longer period of market foreclosure and further potential incumbency effects. For the rest, the rules on the administration of framework agreements would remain largely the same. Concerning DPS+, the Green Paper proposes the following bare minimum requirements:

- the advertising notice must notify the market of a contracting authority's intention to set up a DPS+ and describe the details of conditions for participation;
- it must remain continuously open with a live advertising notice on Find a Tender service to allow new suppliers who wish to apply to do so at any time;
- if an applying supplier meets the conditions for participating, they must be admitted; the number of suppliers cannot be limited;
- it need not have a maximum duration, although any means to terminate the list must be detailed in the original advertising notice;
- supplier applications for inclusion at qualification stage should be evaluated as they are received;
- suppliers cannot submit a tender until the contracting authority decides to run a procurement to award a contract under the DPS+;
- there is no award in the DPS+ without a procurement to select one winner from all eligible suppliers;
- a procurement under the DPS+ must be conducted using the new competitive flexible procedure;
- a contract award notice must be published when any contract is awarded following a procurement under a DPS+.⁷⁹

While all of this is clearly an attempt to introduce procedural flexibility, it would also cause a much-increased level of complexity in the conduit of procurement procedures and in the setting up of commercial vehicles. The absence of detailed regulation of the competitive flexible procedure (and the commercial vehicles that can be combined with it: open frameworks and DPS+) will generate significant complexity and costs. More importantly, it goes frontally against the stated goal of freeing public buyers up from paying excessive attention to procedures, so they can concentrate on value and transparency. Particularly in a setting where the likelihood of pre-award challenge is to be raised and where contracting authority's 'commercial capability' is to be closely scrutinised (as discussed below, section V), public buyers seeking to carry out a competitive flexible procedure will unavoidably have

⁷⁶ Ibid, para 63.

⁷⁷ Ibid, para 60.

⁷⁸ Ibid, para 152.

⁷⁹ Ibid, para 147.

to spend significant resources in the design and advertising of their tender procedures, as well as subjecting them to robust legal compliance checks. To that extent, procedural flexibility not only goes against the simplicity of the system (as there can be as many versions of the competitive flexible procedure as public buyers capable of imagining them), but also against the more strategic goal of recalibrating the focus of the exercise of administrative discretion.

Ultimately, one of the main practical difficulties with the implementation of the proposals in the Green Paper lies in the potentially significant increase in transaction costs resulting from the flexibility it seeks to create. A reduction in the standardisation of procedures and substantive criteria to be applied, as well as the possibility for each contracting authority to design the procurement process as it sees fit, could 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.

In essence, the Green Paper disregards the value that default rules have in public law settings,⁸⁰ and in particular in a public procurement context where the tendering relationships or transactions are one-to-many and, consequently, where the transaction costs faced by the economic operators tend to be several multiples of those faced by the contracting authority (save concerning tender evaluation, where the situation reverses). Default rules not only lower transaction costs for repeated players, but also lower the entry barriers for newcomers and generate additional benefits, such as a reduction in error costs. In a setting where legal advice is often sought, default rules can also reduce that source of cost, even in non-contentious scenarios.

A big unanswered question in the Green Paper is thus whether the aggregate increase in transaction costs that it would generate can be exceeded by the aspirational advantages of a more flexible system—which in large part will depend on the volume of high-value, complex procurement that takes place across the UK in any given financial year. Somehow, it seems that the model foreseen in the Green Paper is one that could only outperform the current system for extremely high-value and complex procurement procedures. The extent to which this is the prevalent case remains an empirical issue—although it should be doubted that most of the procurement taking place in the UK, even if measured by value, is of such complexity as to justify this approach to the reform. To put it simply, it seems that the Green Paper has forgotten the operational needs of ‘bread and butter’ procurement and seeks to create a system of premium regulation that will be inadequate for the vast majority of procurement procedures.

Indeed, the likely practical effects of the procedural proposals in the Green Paper seem overstated. For example, the Green Paper provides evidence that procedures not involving negotiations are the most used in the UK, by up to 90% of total procurement procedures.⁸¹ At the same time, it proposes to retain the open procedure because it is the ‘most popular’ and because it will ‘be useful to have a default standard procedure for inexperienced buyers’.⁸² The Green Paper attributes the lack of use of more flexible procedures to the fact that their ‘restrictive nature ... makes them unsuitable for many procurements and the detailed rules tie buyers’ hands in using them’.⁸³ There is no evidence to

⁸⁰ For some useful observations, see A Chayes, ‘The Role of the Judge in Public Law Litigation’ (1976) 89(7) *Harvard Law Review* 1281.

⁸¹ *Ibid*, para 60.

⁸² *Ibid*, para 71.

⁸³ *Ibid*, para 59.

counter the argument that those procedures are less used because they are complex and time-consuming, and because procurement teams are more concerned with the object of the procurement than with second-guessing the design of the procedure, or simply because procurement teams have a shortage of commercial skills (as is largely implicit throughout the Green Paper) and there is no relevant guidance on how to use those procedures in practice. By contrast, there is evidence that legal uncertainty and risk aversion operate as deterrents for contracting authorities engaging in more complex procurement.⁸⁴ In the absence of a serious qualitative analysis of the reasons for the massive prevalence of the use of open and restricted procedures pointing to the contrary, there is a clear likelihood that the open procedure would remain the most used also *after* the implementation of the Green Paper—especially as the Green Paper proposes to abolish the restricted procedure—and in part precisely because the transaction costs associated with the use of the foreseen competitive flexible procedure far exceed those of resorting to any of the procedures involving negotiations under the current rules, and due to the enhanced access to remedies intended by the Green Paper (as discussed below, section V).

This increase in transaction costs and administrative burdens jeopardises the attainment of the main goals of the Green Paper. As already mentioned, with the Green Paper, '[t]he government's goal is to speed up and simplify [the UK's] procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery.' At this point, it should be stressed that the complexity that derives from the guidance-based and flexibility-orientated regulatory approach makes it unlikely that the Green Paper will achieve its primary stated goals. Complexity triggers costs, which will deter contracting authorities—and, more importantly, small businesses, charities and social enterprises—from engaging with the flexibility intended by the Green Paper. It should also be stressed that innovation is expensive, as it also requires high levels of investment that specific actors (again, small business, charities and social enterprises, but also contracting authorities) may be unwilling or unable to undertake. This can be particularly relevant in the context of the economic difficulties that the pandemic will leave behind. In that regard, one of the omissions in the Green Paper is the formulation of a clear view of how to incentivise (and subsidise) innovation in procurement—e.g. through covering tendering costs, or through procurement prizes—and how to make that compatible with post-Brexit requirements on the domestic control of subsidies.⁸⁵ In general, a lack of attention to the need to create new ways of economically incentivising participation in (complex) procurement processes undermines the practical likelihood that some of the innovation-orientated flexibility will be used in practice.

There are clear indications of this likely outcome in the long-standing marginal use of procedures seeking to generate innovation,⁸⁶ and the proposals in the Green Paper do not point at any practical solution for the obstacles to their adoption, including costly complexity that does not have to do with the specific rules governing the procedures, but rather with the required investment in uncertain tender outcomes by all agents involved. Complexity also generates delays, in particular at the preparatory stages of a tender and throughout e.g. negotiation rounds, and the Green Paper seems

⁸⁴ E Aspey and R Craven, 'Regulating Complex Contracting: A Socio-legal Study of Decision-Making Under EU and UK law' (2018) 81(2) *Modern Law Review* 191-221.

⁸⁵ This is currently under open consultation; see UK Government, Department for Business, Energy & Industrial Strategy, 'Subsidy control: designing a new approach for the UK' (3 Feb 2021) <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk>. For a discussion of the constraints under EU State aid law, which may be largely replicated in the new regime, see A Sanchez-Graells, 'State aid and EU public procurement: more interactions, fuzzier boundaries' in L Hancher & JJ Piernas López (eds), *Research Handbook on European State Aid Law* (2nd edn, Edward Elgar 2020) 329-346.

⁸⁶ Green Paper, para 60.

to fail to recognise that even the minimum duration of procurement procedures that it proposes e.g. for the new competitive flexible procedure (30+25 days;⁸⁷ plus evaluation and award, plus standstill period) is the same that currently applies for contracts tendered under most of the procedures regulated by the PCR.⁸⁸ This raises questions on the ability of the Green Paper's proposals to effectively 'speed up procurement'. Finally, there are also open questions regarding the ability of the proposed system to deliver value for money in relation to the higher costs of running procurement procedures that can derive from the proposals in the Green Paper. And these difficulties can only increase in a context of likely heightened litigation, as discussed below.

V. Challenges, oversight, and culture of continuous improvement?

Another of the areas where the Green Paper seeks to introduce significant reforms concerns procurement challenges and oversight, which the Green Paper wants to use to support its aspiration of generating a culture of continuous improvement. The Green Paper indeed proposes 'reforming Court processes, including through the introduction of a tailored expedited process, to speed up the review system and make it more accessible.'⁸⁹ While these proposals are presented as relatively disconnected from the rest of the Green Paper and as an attempt to resolve shortcomings in the UK's procurement remedies system that predated Brexit, their interaction with the rest of the proposals in the Green Paper deserves careful consideration.

Linked to the issue of increased information and compliance costs (discussed above, section IV), it can be expected that flexible rules and more scope for the exercise of administrative (or commercial?) discretion will create more difficulties in their interpretation and practical application.⁹⁰ Together with the expected broadening of access to procurement remedies envisaged in the Green Paper, this can result in an increase in litigation and the ensuing costs. Even if there was a shift towards pre-contractual remedies⁹¹ and the threat of damages awards was significantly reduced in line with the Green Paper's intentions,⁹² the fact remains that creating more access to procurement challenges will likely also generate a more litigious culture—which can be justified if pre-contractual remedies indeed become the norm and, consequently, challenges become the tool economic operators have to preserve their options of being awarded public contracts. All of which can result in a volume of cases that is difficult to estimate beforehand. However, given the big difference between the current very low level of procurement challenges in the UK and those in European jurisdictions with more open challenge systems,⁹³ it does not seem like the best course of action to create legal uncertainty at the same time as opening up access to remedies.

This likely increase in litigation (or, more generally, disputes and complaints) resulting from legal uncertainty is also problematic in the context of some of the transparency proposals (eg the creation of a register of complaints⁹⁴ and register of legal challenges⁹⁵), in particular if this information is also

⁸⁷ Ibid, para 64.

⁸⁸ See eg the summary available at <https://blog.tendersdirect.co.uk/2018/08/29/timescales-under-the-2015-public-contracts-regulations-updated/> [accessed 8 Jan 2021].

⁸⁹ Green Paper, chapter 7.

⁹⁰ This is immanent to the system. For extended discussion, see the contributions to X Groussot, J Hettne & S Bogojevic (eds), *Law and Discretion in EU Public Procurement*, vol 26: Studies of the Oxford Institute of European and Comparative Law (Hart 2019).

⁹¹ Green Paper, paras 203-206.

⁹² Ibid, paras 207 and ff. For discussion of the proposals, see Sanchez-Graells, above n 12.

⁹³ For background discussion, see R Craven and S Arrowsmith, 'Public procurement and access to justice: a legal and empirical study of the UK system' [2016] 6 *Public Procurement Law Review* 227.

⁹⁴ Ibid, para 186.

⁹⁵ Ibid, para 187.

taken into account for the purposes of assessing the commercial capability of procurement teams or general quality assurance mechanisms, in line with the proposals to create a new oversight unit discussed below. On the whole, creating more legal uncertainty in the context of more exposure to procurement challenges (broadly understood) and new scrutiny mechanisms can have a chilling effect that is unlikely to be sufficiently mitigated through training, at least in the early stages of rolling out the system.

In addition to those risks of increased litigation, the Green Paper seems to ignore the diametrically different mindsets and incentives implicit in an approach to developing a culture of continuous improvement—and thus premised on collaborative and supportive approaches to risk-taking—compared with the development of more opportunities for pre-award procurement challenges and litigation—which are, by nature, adversarial and capable of inducing risk aversion. Indeed, on the one hand, the Green Paper aims to ‘ensure that the new regulatory framework drives a culture of continuous improvement to support more resilient, diverse and innovative supply chains’,⁹⁶ and ‘to establish a more innovation-friendly culture as well as practices among contracting authorities.’⁹⁷ Clearly, this could only happen if the regulatory system was one which created some room for experimentation, some tolerance for errors and rewards for those embracing the new culture. However, on the other hand, the Green Paper seeks ‘to make a future review system quicker, cheaper and therefore more accessible to suppliers, with decreased impact on delivery of public services’.⁹⁸ In other words, it seeks to facilitate procurement challenges and litigation. In that context, it is easy to see how the higher likelihood of legal challenge (which is one of the key factors determining decision-making under the current rules)⁹⁹ can create negative incentives for public buyers, which may be unwilling to experiment and innovate¹⁰⁰—at least not until such a time as there is clear evidence that the criteria applied in the review of their decisions support such experimentation and create such a margin for error.

This tension in the Green Paper is only exacerbated by the proposal to create ‘a new unit [within the Cabinet Office], supported by an independent panel of experts, to oversee public procurement with powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities’.¹⁰¹ Crucially, the unit would have ‘powers to issue improvement notices with recommendations to drive up standards in individual contracting authorities. Where these recommendations were not adopted, the unit could have recourse to further action such as spending controls.’¹⁰² This can be problematic where the trigger for intervention are ‘systemic gaps in commercial capability and understanding’¹⁰³ expected to be identified on the basis of ‘information and data generated through improved transparency as well as complaints about systemic issues’.¹⁰⁴

It seems that the design of the new unit has the characteristics of an external audit or quality control institution, which is also unlikely to create such a culture of experimentation and innovation—especially if the consequences of getting that wrong are specific improvement notices (which

⁹⁶ Ibid, para 1.

⁹⁷ Ibid, para 88.

⁹⁸ Ibid, para 200.

⁹⁹ Aspey and Craven, above n 84.

¹⁰⁰ For analysis supporting this generalised claim, see J Meehan et al, ‘Collaborative public procurement: Institutional explanations of legitimised resistance’ (2016) 22(3) *Journal of Purchasing and Supply Management* 160.

¹⁰¹ Green Paper, para 44.

¹⁰² Ibid, para 45.

¹⁰³ Ibid.

¹⁰⁴ Ibid, para 46.

implementation will be costly), or even sanctions such as spending controls. There is not much detail in the Green Paper on how this system would operate, but it seems that it could be based on specified key performance indicators (KPIs), as well as the reporting of complaints. In that context, it would not be surprising if contracting authorities minimised all risks of complaints, as well as designed their procurement practices to make sure not to deviate from the relevant KPIs. Such an approach to 'procurement by numbers' and to error minimisation would be incompatible with the expectations around a culture of continuous improvement.¹⁰⁵ It could also have a negative impact on the expected level of transparency, as contracting authorities would have heightened incentives to minimise the details that become public (or available to the new unit), particularly where they engaged in innovative or experimental approaches, which could justify claims of confidentiality on grounds of commercial sensitivity (see above, section III). A similar tension would exist for economic operators as the Green Paper, on the one hand, proposes to strengthen the rules and procedures for the exclusion of suppliers with poor past performance¹⁰⁶ and, on the other, proposes the creation of a system of user feedback to drive supplier excellence¹⁰⁷ whereby contracting authorities would be providing supplier ratings. If the latter could be used for the purposes of assessing past performance with the purpose of potential exclusion (and there is no reason to exclude that possibility), the tension between both sets of proposals could not be starker and participation by economic operators on the 'voluntary' feedback mechanism could not be high.

On the whole, it seems that the disconnected proposals in the Green Paper fail to recognise that the systems of procurement oversight and procurement remedies interact in complex ways and that creating a coherent set of incentives is difficult. In my view, most of the proposals move in the wrong direction and are likely to generate chilling effects that will neutralise any potential gains from most of the flexibility the Green Paper seeks to introduce. This is, then, another area that requires some careful rethinking, in particular given the higher levels of complexity of the envisaged system.

VI. Conclusion

The analysis above has shown how, despite its Brexit-infused rhetoric of transformation, the Green Paper not only remains very closely pegged to the current regulatory baseline in its adoption of an 'EU law +' approach that severely limits its transformative potential, but also pursues a deregulatory strategy that will increase formal and substantial complexity and thus raise administrative burdens and compliance costs for all actors involved. The proposals for increased access to procurement challenges and the creation of a new oversight unit compound such increase in costs with litigation and regulatory costs, all of which are likely to have significant chilling effects on those expected to embrace the reforms and to experiment and innovate under their increased flexibility. In my view, on the whole, the proposals of the Green Paper are largely antithetical to its stated goal 'to speed up and simplify [UK] procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery'. A substantial rethink is needed if the Green Paper's goals are to be achieved.

In my view, some of the proposals should be implemented, such as those concerning the creation of a solid data and information architecture, as well as those concerning the reform of access to remedies and the modification and oversight of public contracts during their execution. By contrast, most of the other proposals should be abandoned because they are largely based on the wrong approach. The Green Paper seeks to trim down the statute book, produce a large volume of guidance and maximise

¹⁰⁵ For a similar criticism, see Cram, above n 12.

¹⁰⁶ Ibid, paras 120 and ff.

¹⁰⁷ Ibid, paras 242 and ff.

flexibility. In my view, what is required in the development of the statutory framework through secondary legislation, a limitation of the relevant guidance to what are purely issue of practical implementation (not mandatory requirements watered down as best practices), and the prompt rollout of a training programme capable of upskilling the workforce in order to allow it to maximise the flexibility *that already exists in the current EU-based regulatory framework*, and which has not been exploited in large part due to its insufficient development in regulation and to shortfalls in training and continuous professional development investment in recent years. To go back to the beginning, it seems that the Green Paper has identified the need for a very significant investment in training and professionalisation. However, the proposed solution is both an overreaction (in terms of regulatory reform) and insufficient commitment (in terms of funding of the training programme). The likelihood of attaining the Green Paper's goals would be much higher with a stable regulatory framework and an adequately funded and long-lasting training programme than with the current approach to regulatory upheaval, deregulation and only an indicative aspiration to the delivery of the training programme. There may still be time to put the cart behind the horses.