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The Public Procurement Common Framework

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This paper explores issues arising from the Public Procurement Common Framework, to assist the Committee for Finance in its scrutiny role.

This information is provided to Members of the Legislative Assembly (MLAs) in support of their duties, and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice, or as a substitute for it.

Introduction

This briefing paper is prepared for the Committee for Finance (the Committee), to assist it in its scrutiny of the Public Procurement Common Framework (PPCF). The paper begins providing background information on Common Frameworks (CFs) and the related CF process (Section 1). That general contextual information provides a basis to examine all CFs, including the PPCF.

The paper then considers the PPCF in particular (Section 2). It first outlines relevant UK legislative and international contexts relating to public procurement; followed by an overview of the current draft PPCF proposal. Next, the paper outlines a number of issues directly relating to the PPCF, from a Northern Ireland (NI) perspective. Thereafter, the background information and analysis are used to highlight key concluding remarks (Section 3).

1 Background to Common Frameworks

This section outlines context-setting information on CFs generally and the CF process in particular, to help inform the PPCF analysis provided in Section 2 of the paper. Also included are key general points that the Committee may wish to consider, as well as share with other Assembly Committees, to facilitate Assembly scrutiny of CFs. These points concern considerations such as how a particular CF interacts with the agreed principles that are supposed to underpin all CFs, or how they might interact with the Protocol on Ireland/Northern Ireland. Each of these considerations interact with CFs in general. The subsection below also notes implications for the PPCF where these arise.

1.1 What are Common Frameworks

When the United Kingdom (UK) was a Member State of the European Union (EU) and during the transition period (i.e. 31 January 2020 – 31 December 2020), EU law helped to create common UK-wide approaches to policy, even when policy areas fell within devolved competences. The prevailing devolution settlements ensured that the devolved administrations (DAs) could not act in a way that was incompatible to EU law.¹

Following the UK's exit from the EU, powers that were previously exercised at EU level were returned to the UK. In areas where EU law intersects with devolved competences, those powers now are to be exercised by the DAs.² In order to prevent or limit divergence across the UK, the UK Government (UKG) and the DAs have agreed to develop CFs, which are:

¹ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](#)

² [Devolution: common frameworks and Brexit | The Institute for Government](#)

*...to ensure a common approach is taken where needed on policy areas where powers are returning/have returned from the EU and which intersect with devolved competence...*³

CFs are to be developed under principles agreed between the UKG and Scottish and Welsh Governments at the Joint Ministerial Committee (European Negotiations) (JMC(EN)) in October 2017.⁴ Those principles, which were subsequently endorsed by the NI Executive in June 2020, are set out below:⁵

- CFs will be established where they are necessary in order to:
 - enable the functioning of the UK internal market, while acknowledging policy divergence;
 - ensure compliance with international obligations;
 - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
 - enable the management of common resources;
 - administer and provide access to justice in cases with a cross-border element; and,
 - safeguard the security of the UK.
- CFs will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:
 - be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
 - maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules; and,
 - lead to a significant increase in decision-making powers for the devolved administrations.
- CFs will ensure recognition of the social linkages between NI and the Republic of Ireland (RoI), and that NI will be the only part of the UK which shares a land frontier with the EU. They will also adhere to the Belfast/Good Friday Agreement.

A CF's design will depend on the specific policy area being addressed. This may require legislative and non-legislative approaches. The UKG's most recent Framework Analysis (September 2020) identified 154 areas of EU law that intersect with devolved competence in one or more devolved administration. Of these, 115 require no further action. In these areas:

³ [UK Common Frameworks - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

⁴ NI Executive did not agree principles in October 2017 due to the collapse of the Executive on 16 January 2017. The NI Executive subsequently endorsed the principles following its formation in 2020. [UK Common Frameworks - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

⁵ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

*...the UK Government and devolved administrations will continue to cooperate. Policy areas in this category will remain open for review.*⁶

A total of 22 policy areas were identified as areas where non-legislative CFs would be required. A further 18 policy areas were identified as areas where legislative CFs would be required.⁷

In general, the process for developing a CF has five distinct phases:

- Phase One: consists of engagement between officials in the UKG and the DAs on where common frameworks might be needed;
- Phase Two: consists of detailed policy development, including joint work between the UKG and the DAs. This work results in a jointly drafted and agreed Outline Framework.
- Phase Three: consists of technical stakeholder engagement with sector-specific stakeholders;
- Phase Four: is the scrutiny stage, during which the CF undergoes simultaneous scrutiny by the UK Parliament and the devolved legislatures. This is the stage at which the Public Procurement CF is currently at.
- Phase Five: consists of the development of post-implementation arrangements. These are likely to vary between CFs.⁸

1.2 Common Frameworks: general points of consideration

The following subsections outline a range of issues with respect to CFs in general, along with those that the Committee may wish to consider in its scrutiny of the PPCF.

1.2.1 Underlying CF principles

The three underlying principles – which have been endorsed by the DAs - are intended to apply across all CFs. As such, these principles offer a lens through which to assess each CF and to determine whether that CF has successfully fulfilled those principles. As noted in subsection 1.1, above, the first principle states that CF frameworks are to be developed only where needed. The first principle also outlines six different reasons explaining why a CF could be required. (Note: these reasons are outlined above.)⁹

Potential scrutiny point:

1) Is the Department of Finance (DoF) satisfied that the Public Procurement CF is required? Please detail to fully explain response.

⁶ [Frameworks-Analysis-2020.pdf \(publishing.service.gov.uk\)](#)

⁷ *Ibid*

⁸ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

⁹ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](#)

2) Is the DoF satisfied that the development of the PPCF satisfies at least one of the six reasons for CF development, as agreed by the DAs? Please detail to fully explain response.

The second underlying principle agreed by the DAs maintains that all CFs are to “respect the devolution settlements” and are to be “based on established conventions and practices”. Moreover, it also states that the CF should deliver “a significant increase in decision-making powers for the devolved administrations”.¹⁰

Potential scrutiny points:

3) Is the DoF satisfied that the Public Procurement Common Framework (PPCF) respects the NI devolution settlement? Please detail to fully explain response.

4) Is the DoF satisfied that the PPCF is based on established conventions and practices? Please detail to fully explain response.

5) Is the DoF satisfied that the PPCF delivers “a significant increase in decision making powers” for the NI Executive? Please detail to fully explain response, including, as appropriate, what those powers are.

The third underlying principle endorsed by the DAs has a specific NI focus. This principle states that CFs are to recognise the “social linkages” between NI and the RoI, and that NI is the only part of the UK which shares a land frontier with the EU. It also holds that the CFs are to adhere to the Belfast/Good Friday Agreement.¹¹

Potential Scrutiny Points

6) Is the DoF satisfied that the PPCF recognises the social linkages between: NI and the RoI; and, the land frontier with the EU? Please detail to fully explain response.

7) Is the DoF satisfied that the PPCF adheres to the Belfast/Good Friday agreement? Please detail to fully explain response.

1.2.2 The Protocol on Ireland/Northern Ireland

In addition to those broader principles discussed above, NI is in a unique position within the UK. Article 12 of the Protocol on Ireland/Northern Ireland (the Protocol),¹² which formed part of the Withdrawal Agreement between the UK and the EU, ensures the continued application of a range of EU law in NI. As per Article 12 of the Protocol, the following EU law continue to apply in NI post-transition:

¹⁰ *Ibid*

¹¹ *Ibid*

¹² HM Government, New Protocol on Ireland/Northern Ireland (18 October 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

- EU Customs Code;¹³
- EU product standards and regulations;¹⁴
- EU rules on Value Added Tax (VAT) and excise;¹⁵
- EU rules on State Aid – with respect to trade in goods and wholesale electricity;¹⁶ and,
- A range of EU law with respect to wholesale electricity.¹⁷

As noted in subsection 1.1, a key driver of the CF process is to ensure that a “*common approach*” to policy is maintained across the UK in areas where EU law created common UK-wide approaches to policy. The Protocol ensures the continued application of EU law in NI, but not in the rest of the UK. This means that any CFs that intersect with an aspect of EU law outlined in the Protocol, should be designed to ensure they are compatible with that law. In addition, it is important to note that the continued application of EU law in NI may in some circumstances limit just how common a CF can be.

As such, important considerations are:

1. Whether, and how, a particular CF interacts with the Protocol? and,
2. Whether a CF impacts on the application of the Protocol – either directly or indirectly?

With regard to the PPCF, the draft Outline Framework explicitly states that:

*There is no intersection between procurement and the Northern Ireland Protocol.*¹⁸

The Protocol does not include any provisions directly relating to procurement. That said, that does not necessarily rule out any indirect or unforeseen interactions with the Protocol. For example, it is unclear whether the public procurement of goods is likely to have any interaction with the EU law on product standards, i.e. those that remain applicable to NI through Article 12 of the Protocol.

Potential scrutiny points:

- 8) Is the DoF satisfied with the assessment that there is “no intersection” between procurement and the Protocol? Please detail to fully explain response.**

¹³ *Ibid* Article 5

¹⁴ *Ibid*

¹⁵ *Ibid* Article 8

¹⁶ *Ibid* Article 10

¹⁷ *Ibid* Article 9

¹⁸ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

9) Is the DoF satisfied that there are no indirect interactions between procurement and the Protocol? Please detail to fully explain response.

1.2.3 Interactions with the Internal Market Act

At the same time, as the UKG and the DAs have been developing the CFs, the UKG has introduced and enacted the UK Internal Market Act 2020 (the Act).¹⁹ In its most recent update on the CF process (December 2020, prior to the passing of the Act), the UKG noted that:

... the UK Internal Market legislation will intersect with frameworks that have a 'market' component (i.e. policy areas that include regulation of services or goods production or sale), many of the components of each framework, or in many cases entire frameworks, will fall out of scope of the legislation.²⁰

The update also noted that:

Whilst the devolved administrations have been clear that they disagree with the UK Government's approach to the internal market, discussions between the UK Government and the devolved administrations on the interaction between the UK Internal Market Bill and Common Frameworks continue.²¹

In regard to the above, devolved legislatures have complained about the Internal Market Bill's proposed market access principles.²² The devolved legislatures have argued that these provisions would constrain their ability to utilise the new powers gained from the EU following the end of the transition period. The Scottish Government has argued that the Bill also undermines "the agreed process of negotiating and agreeing common UK frameworks where these are required to replace existing EU structures".²³

The enacted Internal Market Act included provisions empowering the UK Secretary of State to make regulations that exclude CF areas from the Act's market access principles.²⁴ Additionally, the Scottish Parliament's Finance and Constitution Legacy Expert Panel Report recommended the Scottish Parliament should clearly define its scrutiny role in response to Brexit. This included consideration of the "appropriate and proportionate level of scrutiny" of "common frameworks and the market access principles and how these interact".²⁵

¹⁹ [United Kingdom Internal Market Act 2020 \(legislation.gov.uk\)](https://legislation.gov.uk)

²⁰ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

²¹ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

²² The principles of mutual recognition and the principle on discrimination with respect to the flow of goods and services across the UK

²³ [The UK Internal Market Bill – The Devolved Administrations Responses – SPICe Spotlight | Solas air SPICe \(spice-spotlight.scot\)](https://spice-spotlight.scot.nhs.uk)

²⁴ [United Kingdom Internal Market Act 2020 \(legislation.gov.uk\)](https://legislation.gov.uk)

²⁵ [Legacy_Final.pdf \(parliament.scot\)](https://parliament.scot)

Potential scrutiny points:

- 10) What is the DoF's assessment of the potential interactions between PPCF and the Internal Market Act?**
- 11) If any such interactions have been identified, what are they? Please detail to fully explain response.**
- 12) If so, what is the DoF's assessment as to whether any regulation is required to exclude the PPCF from the market access principles specified in the Internal Market Act? Please detail to fully explain response.**

1.2.4 Ongoing NI Assembly Scrutiny

As noted in subsection 1.1, the PPCF is currently at Phase 4 of its development. Phase 4 provides legislatures across the UK with an opportunity to scrutinise CFs. All CFs are “living documents” in the sense that they set in place practices and procedures that at to govern how the UKG and DAs interact in specific areas going forward. They are also “living documents” in the sense that they are open to future revision and refinement. The PPCF, for example, includes provision for its future review and amendment.²⁶

Both these points suggest the need for ongoing scrutiny of CFs by legislatures across the UK. This aims to enable continued assessment of how the CFs are functioning and scrutiny of any proposed CF changes. It is unclear, however, through what process this ongoing scrutiny will take place. This point has been taken up by the House of Lords Common Frameworks Scrutiny Committee (CFSC) in a letter to the Minister for the Constitution and Devolution on 17 December 2020. Commenting on the provisional CFs developed at the time of the letter, the CFSC stated:

None of them have considered future scrutiny of these frameworks, despite these forming a key part of UK policymaking in these areas after the end of the transition period. Parliamentary scrutiny is an essential part of this process and so future Provisional Frameworks should consider how they will facilitate ongoing scrutiny, such as by publishing reports or updates.²⁷

In response to this, the Minister for the Constitution and Devolution stated that:

... continuing to give thought to how departments might facilitate robust scrutiny of their frameworks by relevant Parliamentary committees.²⁸

To which the CFSC replied:

²⁶ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

²⁷ Letter from the House of Lords Common Frameworks Scrutiny Committee to Minister for the Constitution and Devolution (17 December 2020) <https://committees.parliament.uk/publications/4043/documents/40358/default/>

²⁸ Letter from Minister for the Constitution and Devolution to the House of Lords Common Frameworks Scrutiny Committee (23 December 2020) <https://committees.parliament.uk/publications/4184/documents/43147/default/>

We believe that in order to conduct effective scrutiny of the frameworks after they have been implemented, committees will need to receive information on the functioning of each individual framework.²⁹

The CFSC allows requested confirmation from the Minister that this would be the case. At the time of writing, no subsequent reply had been published on the CFSC's correspondence page.

The PPCF does not appear to include any provisions concerning its scrutiny.

Potential Scrutiny Points:

13) How does the DoF plan to ensure that the Committee for Finance can scrutinise both the functioning and amendment of the PPCF on an ongoing basis?

14) Has the DoF received any direction from UKG in this regard? Please detail to fully explain response.

1.2.5 Stakeholder consultation

Phase 3 of the CF process provides an opportunity to consult sector stakeholders on the development of specific CFs. It is not apparently clear what stakeholders have been consulted, and why. In its letter dated 17 December 2020, the CFSC (Common Framework Scrutiny Committee) noted that:

Transparency more generally, in particular stakeholder engagement, is an area where the entire common frameworks programme could be improved.³⁰

To which the Minister replied:

The Government is committed to transparency in this process. The Government lays a statutory report every quarter on the progress of the programme reflecting on the previous three months, the most recent iteration of this was published on 10 December 2020, and produces a Frameworks Analysis on an annual basis, with this year's iteration being published on 24 September 2020. The Government is also continuing to deliver a programme of engagement with key industry stakeholders on individual frameworks. We will continue to assess where there are opportunities to provide greater clarity on how stakeholders will continue to be able to provide input.³¹

²⁹ Letter from the House of Lords Common Frameworks Scrutiny Committee to Minister for the Constitution and Devolution (20 January 2021) <https://committees.parliament.uk/publications/4366/documents/44318/default/>

³⁰ Letter from the House of Lords Common Frameworks Scrutiny Committee to Minister for the Constitution and Devolution (17 December 2020) <https://committees.parliament.uk/publications/4043/documents/40358/default/>

³¹ Letter from Minister for the Constitution and Devolution to the House of Lords Common Frameworks Scrutiny Committee (23 December 2020) <https://committees.parliament.uk/publications/4184/documents/43147/default/>

Potential Scrutiny Points:

- 15) What stakeholders were consulted at Phase 3 of the development of the PPCF?
- 16) What was the underpinning rationale for their inclusion in the consultation process?
- 17) What role did the DoF play in the shortlisting of stakeholders for consultation and in the development of any rationale that underpinned stakeholder selection?
- 18) Does the DoF believe there were gaps? Please detail to fully explain response.

1.2.6 Financial implications

As noted in subsections 1.1 and 1.2.1, according to the CFs' underlying principles, they are to deliver "a significant increase in decision-making powers for the devolved administrations". A "significant increase" in powers has the potential to necessitate an increase in public expenditure by the DAs.³² It is therefore important to examine what a particular Outline Framework says within regard to the financial implications of the proposed CF. The PPCF does not include any detailed analysis of the financial implications of its proposals.

Potential Scrutiny Points:

- 19) What is the DoF assessment of the financial implications of the PPCF? Please detail to fully explain response.
- 20) In the view of the DoF, if the PPCF does have financial implications, how are these to be funded? Please detail to fully explain response.

1.2.6 The impact of COVID-19 on timescales

A final area of general consideration is related to the ongoing impact of COVID-19 on the delivery of CFs. In the UKG's most recent update on the CF process (December 2020), it noted that COVID-19 had continued to place "capacity pressures on officials working across the UK Common Frameworks programme"; and that this pressure was experienced by officials in both the UKG and the DAs. That pressure has ensured that the CF programme is to continue into 2021.

Potential Scrutiny Points:

- 21) What is the DoF assessment of the potential for ongoing delays to the PPCF resulting from COVID-19? Please detail to fully explain response.

³² [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](#)

22) Given the ongoing pressure on officials, when do the DoF estimate the final PPCF will be operational? Please detail to fully explain response.

2 The Public Procurement Common Framework

The following section focuses on the PPCF itself. The section first examines the legislative and international context that frames the PPCF. It then provides an overview of the proposed content of the PPCF. This is sourced from the PPCF draft Outline Agreement that the DoF shared with the Committee on 2 December 2020.³³ The section concludes outlining potential points for consideration, based on what is and what is not in the PPCF, along with comments regarding wider ongoing developments in procurement policy in the UK and NI.

2.1 The PPCF – legislative and international context

2.1.1 Legislative context

The UK public procurement legislative framework contains a number of regulations, which transpose and implement a range of EU directives.³⁴ In NI, England and Wales, those regulations are:

- The Public Contract Regulations 2015;
- The Concession Contracts Regulations 2016 and,
- The Utilities Contract Regulations 2016.

In Scotland, the regulations are:

- The Public Contracts (Scotland) Regulations 2015;
- The Concession Contracts (Scotland) 2016; and,
- The Utilities Contracts (Scotland) Regulations 2016.³⁵

All the above-stated regulations provide “rules for the procurement of goods, services and works above certain thresholds by public authorities and utilities”. They also “regulate the process for awarding concession contracts³⁶ above certain thresholds by public authorities and utilities”. Although there was “considerable flexibility” allowed in

³³ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

³⁴ These were: 2014/23/EU Concession Contracts Directive; 2014 2014/24/EU Public Contracts Directive; 2014 2014/25/EU Utilities Contracts Directive; and, 2014 89/665/EEC Remedies Directive as amended by 2007/66/EC

³⁵ *Ibid*

³⁶ Concessions are broadly similar to “normal” contracts between contracting authorities/entities and suppliers, but with one key difference: the consideration in a concession contract consists in the right to exploit the work, or services, that are the subject of the contract, or that right to exploit together with a payment. Examples of concessions might include car parks built on local authority-owned land, or toll roads and toll bridges. [Microsoft Word - 20160607 Handbook for the Concession Contracts Regulations 2016 final.xml \(publishing.service.gov.uk\)](#)

transposing and implementing the relevant EU directives, Scotland and the rest of the UK did not diverge “significantly” from one another.

To ensure the PPCF is not viewed as “Day One Critical” both the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 and the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020¹ were laid to amend the prevailing procurement regulations at the end of the transition period, ensuring continuity.

2.1.2 International context

From an international perspective, the World Trade Organisation (WTO) Government Procurement Agreement (GPA) provides an overarching structure for the PPCF. The GPA is a pluri-lateral agreement within the broader WTO framework. Not all WTO member are parties to the GPA; 21 members are, comprising of 48 WTO members.^{37 38}

The GPA aims to:

*... ensure fair, transparent and non-discriminatory conditions of competition for purchases of goods, services and construction services by the public entities covered by the Agreement.*³⁹

It is a binding international treaty based on the following elements:

- National treatment and non-discrimination;
- Minimum standards regarding national procurement procedures; and,
- Transparency of procurement-related information.⁴⁰

It is important to note that the UK previously acceded to the GPA as an EU Member State. And, on the 1 January 2021, following the end of the transition period, the UK acceded to the GPA in its own right.⁴¹

The PPCF holds that public procurement policy brought forward by the UKG and the DAs is to comply fully with the UK’s international obligations. In addition to the GPA, this includes international obligations resulting from international trade agreements. For example, the Trade and Cooperation Agreement (TCA) between the UK and EU includes provisions on public procurement.⁴² The TCA states that as Members of the GPA, UK and EU procurement markets will be open to bidders from each other’s jurisdiction to the extent covered by the GPA. The TCA goes further than the GPA, by opening up a number of procurement markets that would otherwise be excluded under the GPA, including procurements that are:

³⁷ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

³⁸ Note the variation between parties and members here is accounted for by the EU 27 being signed up as single party, but being counted as individual members.

³⁹ [The GPA in Brief \(wto.org\)](https://www.wto.org)

⁴⁰ *Ibid*

⁴¹ [WTO : Government procurement - The plurilateral Agreement on Government Procurement \(GPA\)](https://www.wto.org)

⁴² [EU-UK Trade and Cooperation Agreement 24.12.2020.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk)

- conducted by privately owned utilities operating with special and exclusive rights;
- associated with gas or heat networks;
- of services such as hotels, food and drink, telecommunications, certain real estate services and education services.⁴³

2.2 What is the PPCF?

The PPCF is a non-legislative CF, which means that it seeks to establish agreed working practices between the devolved administrations and the UKG with respect to domestic and international public procurement policy. Specifically, it is to establish rules on:⁴⁴

- Consultation and exchange of information;
- Development of policy and legislation;
- Engagement with the devolved administrations with respect to World Trade Organisation Government Procurement Agreement (WTO GPA) business;
- International agreements;
- Procurement related proceedings; and
- Resolution of disputes.

The PPCF is to take the form of “multilateral Concordat which will be signed at Ministerial level” and an “Outline Framework”. To date, the Committee for Finance (the Committee) has had sight of the draft Outline Framework; provided to Committee by the DoF on 2 December 2020⁴⁵. That draft Outline Framework forms the basis for the analysis provided below,⁴⁶ in that it sets out the proposed approach and operational detail of the PPCF. The Committee must note, however, that the operation detail is to be agreed amongst the DAs. At the time of writing, there is no published time frame as to when this will occur.

Based on the draft Outline Framework, the PPCF is to have the following features:⁴⁷

- The UKG and the DA (the Parties) is to continue to “develop and publish” their own procurement policies. The PPCF is to provide a vehicle to discuss those policies.
- In this respect, the PPCF recognises both the benefits of a common approach across the UK and the right for the Parties to the CF to “develop policy and regulate independently”.

⁴³ [Brexite: the end of public procurement rules or business as usual? \(twobirds.com\)](#)

⁴⁴ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

⁴⁵ Note a further update was considered by the Committee on the 27 July 2021. This update did not provide any further detail on the draft Outline Amendment or any changes to that draft.

⁴⁶ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

⁴⁷ *Ibid*

- Procurement policy is to be developed on a “no surprises” basis, with the Parties giving full consideration of others’ views and seeking consensus in areas of mutual interest. Such consensus is to be “without prejudice” to respective competence of the Parties.
- Any common approach is to be subject to agreement between the Parties.
- Parties will provide other Parties with one-month notice of any policy initiatives and associated announcements likely to impact on one more of the Parties.
- Parties is to provide other Parties with three-months’ notice of any legislation or subordinate regulation likely to impact on one more of the Parties.
- Where one or more of the Parties seeks to take an approach different to the other Parties, that Party is to assess the impact of that approach on the other parties and its compatibility with the PPCF. They also are to notify and consult the other Parties.
- Existing working level meeting are to be formalised into monthly official level working group meetings. These monthly meetings are to include representatives from each of the parties and are to discuss “general operational matters”.
- In addition to the monthly official level working group, a PPCF liaison meeting is to take place twice a year. This is to provide the Parties with the “opportunity to consult on any matters relating to the operation of this Concordat or the furtherance of its objectives”. The Parties are to chair this meeting on a rotating basis.
- Discussions are to be confidential. Decisions will be tracked through the sharing of minutes of the meetings and documented in the Framework Agreement.
- Ministers are to continue to correspond in writing as appropriate.

In addition to the operational elements outlined above, the draft Outline Framework provides details of monitoring and enforcement, review and amendment, and dispute resolution within the PPCF. These include the following:

- **Monitoring and enforcement:** the twice-yearly Liaison Meeting will assess:
 - intergovernmental cooperation and collaboration as a result of the PPCF;
 - whether Parties are implementing and complying with the Common Framework;
 - whether divergence has taken place in contravention of the Common Framework principles; and
 - divergence across the UK and ensure that any impacts on the policy area covered by the CF would not have an adverse effect on any of the Parties.⁴⁸
- **Review and amendment:** the PPCF is to be reviewed after one year of coming into operation, and every three years thereafter. During periodic review Parties to the PPCF are to:

⁴⁸ *Ibid*

...discuss whether the governance and operational aspects of the [PPCF] are working effectively, and whether decisions made over the previous three years need to be reflected in an updated non-legislative agreement.⁴⁹

Parties may request an exceptional review if they consider it necessary. Exceptional reviews may be triggered by a 'significant issue' – for example, a time sensitive issue.

If either review requires amendment to the PPCF, the Parties are to enter the Amendment Stage. During this Stage, parties are to discuss the nature of any necessary amendments. All amendments to the PPCF must be agreed by all Parties and a new non-legislative agreement is to be signed by all Parties.⁵⁰

- **Dispute resolution:** a disagreement between Parties to the PPCF is to become a "dispute" when it enters formal dispute avoidance and resolution process set out in the overarching Memorandum of Understanding on Devolution (MoU-D). The MoU-D states that:

Where a dispute cannot be resolved bilaterally, or through the offices of the relevant territorial Secretary of State, the matter may formally be referred to the JMC Secretariat by any one administration. Each bilateral concordat will include a reference to the process for triggering formal JMC intervention. Where this appears likely, the JMC Secretariat should be consulted at an early stage in order to ensure a consistent interpretation of the devolution settlements, and to provide advice on handling of any differences of view.⁵¹

The PPCF notes that the MoU-D is "under review". The Dunlop review - launched by the UKG in July 2019 – was to be:

...short, focused independent review to ensure that, within the context of the existing devolution settlements, we are working in the most effective way possible to realise fully all the benefits of being a United Kingdom.⁵²

The review is now completed at the time of writing this briefing paper. However, the review panel has not issued a report on its findings. On 8 February 2021, the Secretary of State for Wales, in answer to a written question in the House of Commons regarding publication of the review report, stated:

The UK Government's ambition is to publish the Dunlop Report as soon as possible alongside a full response from the Government. The report is an important contribution to the debate on strengthening the Union, a key Government priority.⁵³

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ [MoU between the UK and the Devolved Administrations.pdf \(publishing.service.gov.uk\)](#)

⁵² [Microsoft Word - 20190704 ToRs for independent review.docx \(publishing.service.gov.uk\)](#)

⁵³ [Written questions and answers - Written questions, answers and statements - UK Parliament](#)

2.3 The PPCF: key points for consideration

The content included in the draft Outline Framework suggest the areas where the Committee may wish to focus its scrutiny of the PPCF at this time, given currently available information:

- Issues arising from what is included in the PPCF;
- Issues arising from what is *not* included in the PPCF; and,
- Issues arising given ongoing developments relating to both the PPCF and the wider public procurement policy landscape.

Each area is explored in the subsections which follow.

2.3.1 Issues arising from what is included in the PPCF

Subsection 2.2 provided an overview of the proposed process to underpin UK public procurement policy following the UK's exit from the EU. As noted in earlier, the PPCF's overall purpose is establish "agreed working practices" between DAs and UKG in relation to domestic and international procurement policy. It is underpinned by the idea that governments in each jurisdiction are open and transparent with each other, developing their procurement policy on a "no surprises" basis.⁵⁴

A key facilitator of this transparency across government are monthly official level working group meetings and biannual liaison meetings. Although these meetings are to be tracked through the sharing of minutes, the PPCF states that the Parties to it are to:

*...agree to the need for confidentiality of discussions, without which it would be impossible to maintain such close working relationships.*⁵⁵

It is important to highlight for the Committee that the stated need for confidentiality could be contrary to the Nolan Principles. In particular, the Principle of Openness states:

*Holders of public office should act and take decision in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reason for so doing.*⁵⁶

It may be the case that the UKG and the DAs have agreed there are "clear and lawful" reasons for curtailing openness in relation to the PPCF. The Committee may be interested in exploring the reasons to justify lack of outward transparency, particularly if that opaqueness curtails the Committee's ability to robustly scrutinise the PPCF's operation following its implementation, as outlined in subsection 1.2.4 above.

⁵⁴ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

⁵⁵ *Ibid*

⁵⁶ [The Nolan principles | Good Governance Institute \(good-governance.org.uk\)](https://www.good-governance.org.uk)

Potential Scrutiny Points:**23) What is the DoF's assessment regarding the need for PPCF meeting confidentiality? Please detail to fully explain response.**

Section 3 of the draft Outline Framework concerns the PPCF's operational detail and makes up the bulk of the draft document. This includes elements of proposed PPCF, such as the:

- decision making processes;
- roles and responsibilities of each party to the framework;
- roles and responsibilities of existing or new bodies;
- monitoring and enforcement;
- review and amendment; and,
- dispute resolution.⁵⁷

The title to section 3 notes that it has *not* been agreed by the DAs. The DoF's introduction to the draft Outline Framework states that:

*... once ministerial agreement has been reached in all 4 administrations, the framework will be recommended as a Provisional Framework to portfolio Ministers. Collective agreement on policy approach will then be sought prior to approval from JMC(EN) to prepare for implementation.*⁵⁸

The Committee may wish to seek the DoF's view on the operational matters contained within the draft Outline Framework; and, whether these are to secure ministerial agreement in all four administrations.

Potential Scrutiny Points:**24) What is the DoF's assessment of the likelihood of the PPCF operational detail, as currently drafted, securing ministerial agreement across all four administrations. Please detail to fully explain response.**

As noted in subsection 2.3, the draft Outline Framework states that the dispute mechanisms for the PPCF are to rely on those set out in the MoU-D. It notes too that the MoU-D is under review. The analysis in subsection 2.3 found that the review of the MoU-D has not yet been published. As such, it is unclear whether the dispute mechanism included in the draft Outline Framework is to be the same as that in the final PPCF Outline Framework.

Potential Scrutiny Points:**25) Is the DoF content with the proposed dispute mechanisms outlined in the PPCF's draft Outline Framework? Please detail to fully explain response.**

⁵⁷ *Ibid*

⁵⁸ *Ibid*

26) Has the DoF any insight into to whether this dispute mechanism will be affected by the ongoing review of the MoU-D? Please detail to fully explain response.

2.3.2 Issues arising from what is *not* included in the PPCF

As noted in subsection 2.1, the draft Outline Framework sets out the UK's international obligations for public procurement. It also notes that:

The parties [are to] ensure that the policy and legal framework for public procurement in their respective areas of responsibility complies fully with the UK's international obligations and will not prejudice the UK's objective seeking to negotiate future international trade agreement with third countries.⁵⁹

It notes too that:

The negotiation of international trade agreements is the responsibility of the UK Government. The Government recognises that the devolved administrations have a legitimate interest in the UK's international public procurement policy. The UK Government will, therefore involve the devolved administrations directly and fully in the decision-making process regarding international public procurement policy.⁶⁰

Significantly, the draft Outline Framework states that the following two areas are "still under discussion" between the Parties:

- Engagement with the DAs on WTO GPA business; and,
- Wording to reflect International Agreements.⁶¹

Potential Scrutiny Points:

27) Has the DoF received any further details on either WTO GPA engagement or International Agreements? Please detail to fully explain response.

28) If not, when does the DoF anticipate discussion ending on these matters? Please detail to fully explain response.

29) How soon after the DoF receives an updated draft Outline Framework reflecting the conclusion of these discussions, will it brief the Committee with same?

⁵⁹ Letter from the Department of Finance to the Committee for Finance 2 December 2020, including draft Outline Framework for Public Procurement Common Framework

⁶⁰ *Ibid*

⁶¹ *Ibid*

2.3.2 Issues arising from given ongoing developments relating to both PPCF and the wider public procurement policy landscape

The PPCF is moving forward at the same time that public procurement policy concurrently develops at UK and NI levels. Two considerations arising for the Committee in this regard, which appear of relevance to this paper are discussed below:

- Green Paper on Transforming public procurement; and,
- The NI Public Procurement Board

2.3.2a Green Paper on Transforming public procurement

The first area of public policy procurement policy that may be relevant to the PPCF is the UKG's Green Paper – entitled “Transforming public procurement” (the Green Paper) – which was published on 15 December 2020.⁶² The Green Paper states that the end of the transition period provides:

*...an historic opportunity to overhaul of outdated public policy regime.*⁶³

Adding that:

*For too long, modern innovative approaches to public procurement have been bogged down in bureaucratic, process-driven procedures. We need to abandon these complicated and stifling rules and unleash the potential of public procurement so that commercial teams can tailor their procedure to meet the needs to the market.*⁶⁴

The Green Paper makes a range of proposals concerning the UKG's “overhaul” of UK procurement policy. These include:⁶⁵

- enshrining in law the principles of public procurement: value for money, the public good, transparency, integrity, efficiency, fair treatment of suppliers and non-discrimination.
- Integrating existing all public procurement regulation into a single framework.
- Replacing current public procurement procedures with three new procedures:
 - “a flexible procedure that gives buyers freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors.”
 - “an open procedure that buyers can use for simpler, ‘off the shelf’ competitions.”
 - “a limited tendering procedure that buyers can use in certain circumstances, such as in crisis or extreme urgency.”

⁶² Cabinet Office, Green Paper: Transforming public procurement (15 December 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf

⁶³ *Ibid*

⁶⁴ *Ibid*

⁶⁵ *Ibid*

- Removing the “Light Touch Regime” and applying the “rules applicable to other contracts to services currently subject to this regime”.
- Establishing a single digital platform for supplier registration requiring data to be entered only once.
- Legislating for a new Dynamic Purchasing System to be used for all types of procurement.
- Embedding transparency by default throughout the commercial lifecycle from planning through procurement, contract award, performance and completion.
- Requiring all contracting authorities to implement the Open Data Standard, to enable data shared across the public sector to be analysed at a contract level.
- Legislating to require contracting authorities to have regard to the Government’s strategic priorities for public procurement in a new National Procurement Policy Statement.
- Using the exclusion rules to tackle unacceptable behaviour in public procurement and providing buyers the tools to properly take account of a bidder’s past performance and exclude them if they clearly do not have the capability to deliver
- Reforming the process for challenging procurement decisions to speed up the review system and make it more accessible.
- Refocusing redress onto pre-contractual measures while capping the level of damages available to bidders, reducing the attractiveness of speculative claims.

Significantly, the Green Paper states:

The Government anticipates that the new rules proposed in this Green Paper would apply in respect of contracting authorities undertaking wholly or mainly reserved functions. We will continue to engage with the Welsh Government, Northern Ireland Executive and Scottish Government about the application of these proposed reforms.⁶⁶

As noted in subsection 2.2 above, that PPCF recognises both the benefits of a common approach across the UK and the right for the Parties to the CF to “develop policy and regulate independently”. Furthermore, as noted in subsection 2.1, the legislative framework the governs public procurement is aligned. Given these two factors, the Committee may wish to seek the DoF’s views on:

- How the DoF sees the proposals in the Green Paper impacting NI public procurement policy going forward; and,
- What level of consultation has the DoF had with the UKG on the Green Paper, given the “no surprises” approach adopted when advancing the PPCF?

Potential Scrutiny Points:

⁶⁶ *Ibid*

30) To what extent does the DoF believe the Green Paper proposal will shape the UK common approach to public procurement policy in future? Please detail to fully explain response.

31) What level of consultation has there been between the DoF and the UKG when developing the Green Paper proposals? Please detail to fully explain response.

2.3.2b The NI Procurement Board

The second area of public procurement policy development that may interact with the PPCF is the restoration of the NI Procurement Board (NIPB) announced by the Minister for Finance on 1 December 2020.⁶⁷ The NIPB is to be restored in a different format to its predecessor. Changes are to include:

- A reduction in size from 20 to ten members to allow more regular meeting;
- The replacement of two Permanent Secretaries who had previously staffed the Board with four procurement practitioners;
- The appointment of five representatives from key sectors of the economy: construction; manufacturing; small and medium enterprise; and, social enterprises;
- Procurement guidance is to be approved by the NI Executive, meaning procurement policy will:

*...carry the authority of Ministers, who are accountable to the public, and their accounting officers, who are legally responsible for ensuring that public expenditure provides value for money.*⁶⁸

- The NIPB is to work to a number of priorities, including:
 - social value; and,
 - security of supply.⁶⁹

With respect to the PPCF, the Committee may wish to explore the DoF's views on how this restored and reformatted NIPB will interact with the proposed structures outlined in the draft Outline Framework.

Potential Scrutiny Points:

32) What role does the DoF believe the NIPB will have in the cross-UK public procurement policy discussions outlined in the PPCF? Please detail to fully explain response.

⁶⁷ [Official Reports \(niassembly.gov.uk\)](https://www.niassembly.gov.uk)

⁶⁸ *Ibid*

⁶⁹ *Ibid*

33) Does the DoF foresee any issues arising from the confidential nature of PPCF meetings and the operation of the NIPB? Please detail to fully explain response.

3 Concluding remarks

CFs are to be introduced in the UK to ensure a common approach to policy in areas where the powers that have been “returned” from the EU to the UK intersect with devolved competences. The CFs are to be developed in accordance with the three underlying principles agreed by the UKG and the DAs, including: the circumstances under which a CF should be established; the requirement that a CF is to respect devolution settlements; and, that a CF should recognise the “social linkages” between NI and the RoI, and adhere to the Belfast/Good Friday Agreement. In addition, they are developed in accordance with the related agreed Five Phase process for developing a CF. Currently, the PPCF is at Phase 4, at which point the CF undergoes simultaneous scrutiny by the UK Parliament and devolved legislatures.

The analysis in subsection 1.2 identified a number of generic questions the Committee may wish to consider when considering the PPCF, or any other CF. Moreover, the Committee may wish to refer those questions to other Assembly Committees, for use when CFs concern their scrutiny. The CF generic questions are as follows; and all apply in the context of the PPCF:

- **Underlying principles:** *Is the CF consistent with the three underlying principles agreed by the UKG and DAs?*
- **The Protocol:** *Whether, and how, a particular CF interacts with the Protocol? and, Whether a CF impacts on the application of the Protocol – either directly or indirectly?*

In the case of the PPCF, the draft Outline Framework states that there are no interactions and the Protocol does not contain any provisions which directly address procurement. However, the Committee may wish to explore the potential for indirect or unforeseen interactions. For example, the potential interaction of the procurement of goods and the EU product regulation that continues to apply to NI by way of the Protocol.

- **The Internal Market Act:** *Are there any potential interactions with the Internal Market Act, which would necessitate the UK Secretary of State to propose regulations excluding areas of the CF from the Act’s market access principles?*
- **Ongoing Scrutiny:** *What process is required to enable the Committee to scrutinise the CF’s operation and potential amendment on an ongoing basis, following the CF’s implementation?*
- **Stakeholder consultations:** *What stakeholders were consulted in the development of the CF and on what basis were they selected for consultation?*

- **Financial implications:** *Are there any financial implications associated with the CF; and, if so, how are they to be funded?*
- **COVID-19:** The ongoing COVID-19 pandemic has placed pressures on officials and delayed the CF process. *What is the outlook for the PPCF timescale given these COVID-19 pressures?*

The PPCF is a non-legislative CF, which seeks to establish agreed working practices between the UKG and the DAs with respect to domestic and international public procurement policy. It recognises both the need for a common approach to procurement across the UK and the right of all Parties to develop policy and regulation independently. It sets out processes for the exchange of information between UKG and DAs with respect to public procurement policy and states policy across all UK administrations is to be developed on a “no surprises” basis *via* consensus and consultation.

Section 2.3 identified the following issues, which the Committee may wish to consider:

- **Transparency and scrutiny:** The PPCF states that meetings to discuss procurement policy should be confidential. This appears to be contrary to the Nolan Principles, in particular the one concerning transparency, and therefore may hamper Committee scrutiny in future.
- **Sections awaiting agreement:** The bulk of the draft PPCF Outline Agreement is dedicated to operational detail. At the time of writing this paper, that draft Outline Agreement has not been agreed by the DAs.
- **Dispute mechanism:** The dispute mechanism proposed in the PPCF is “under review”. It is unclear as to when that review is to publish its report and if this will occur during the Committee’s scrutiny window.
- **Items “still under discussion”:** Two areas of the PPCF have been identified as still under discussion: the processes for engagement between the UKG and the DAs on the WTO GPA; and, the wording on International Agreements. It is unclear when these sections are to be finalised; and whether discussion is to conclude during the Committee’s scrutiny window.
- **UKG Green Paper on Transforming public procurement:** The UKG is proposing an “overhaul” of public procurement. It “anticipates” that this will apply to contracting authorities engaged in wholly reserved matters. The UKG is also engaging with DAs with regard to the Green Paper proposals. Given the PPCF’s commitment to a common UK approach public procurement policy, the right for Parties to develop policy independently and a “no surprises” policy environment based on cross-legislature consultation, the Committee may wish to explore:
 - Views on how the Green Paper proposals are likely to drive NI procurement policy going forward; and,
 - The extent to which the UKG has engaged with the NI Executive, and in particular the DoF, with respect to the development of those proposals.

- **Public procurement board:** The Committee may wish to explore the proposed role for the restored and reformatted Procurement Board relative to the PPCF; and whether the Board's role could be affected by the confidentiality requirement included in the current draft Outline Agreement.