

JOINT WINNER OF THE SOCIETY OF LEGAL SCHOLARS BEST
PAPER PRIZE 2024

The Procurement Act 2023's kaleidoscopic view of the public interest

Albert Sanchez-Graells[†] 

University of Bristol Law School, Bristol, UK
Email: a.sanchez-graells@bristol.ac.uk

(Received 18 October 2024; revised 12 March 2025; Accepted 13 March 2025)

Abstract

In this paper, I explore the notion of public interest embedded in the Procurement Act 2023. I use this new piece of post-Brexit legislation as a contemporary example of the difficulty in designing a 'public interest centred' system of public procurement regulation. I show how a mix of partly overlapping explicit, referential, and implicit public interest goals results in a situation where there are multiple sources of objectives contracting authorities need to consider in their decision-making, but there is no prioritisation of sources or objectives. I also show that, despite this kaleidoscopic proliferation of sources and objectives, and due to the unavailability of effective means of judicial challenge or administrative oversight, contracting authorities retain almost unlimited discretion to shape the public interest and 'what it looks like' in relation to the award of each public contract. This challenges the centralised approach to procurement policy taken by recent and current UK Governments and, in particular, raises significant questions on the likely effectiveness of 'mission-driven' procurement. I close with a call to reconsider how public procurement can foster the public interest, in light of its limitations as a regulatory tool.

Keywords: public procurement; public interest; value for money; public benefit; mission-driven procurement; national procurement policy statement

Introduction

Public procurement is concerned with the award of contracts for the supply, for pecuniary interest, of goods, services or works to the public sector. At its heart, public procurement governs the expenditure of public funds and, ultimately, *should ensure that such expenditure is in the public interest*.¹ In the UK, this basic proposition on good government has acquired extraordinary salience after the Covid-19 pandemic, given the eye-watering sums of taxpayers' funds involved in the award of public contracts

[†]I am grateful for feedback on seminal ideas for this paper given by the colleagues that participated in the workshop 'Regulating in the public interest at a time of regulatory fragmentation: interdisciplinary perspectives' held at the University of Bristol Law School on 25 April 2024. I am particularly grateful to Margherita Pieraccini, John Coggon and Ed Kirton-Darling for comments on an earlier version of this draft. I am also grateful for their feedback to participants in the public law section stream of the Society of Legal Scholars' 115th Annual Conference, held at the University of Bristol, 3–5 September 2024. I am honoured and thankful for the joint award of the Best Paper Prize 2024 in that conference. I am also grateful to the *Legal Studies* editorial team, in particular Niamh Dunne, and the two anonymous reviewers for their helpful feedback and suggestions. Despite all this feedback and the lucky recognition of the prize, the standard disclaimer applies and all remaining errors and mistakes are my own.

¹HM Treasury *Managing Public Money* (May 2023) Annex 4.6.

under pared-down emergency rules² – which were not always appropriately managed, to put it conservatively³ – and public concerns of corruption, cronyism, profiteering and waste. Ensuring that future procurement is in the public interest is thus a critical challenge in regaining public trust in the functioning of government.

The general consensus that public interest considerations must drive procurement decision-making seems stronger than ever. Yet, the policymaking and scholarly debates on the ‘precise’ goals and principles of public procurement, and how best to achieve them, remain open. This issue is not unique to the regulation of procurement in the UK. For example, the ongoing evaluation of the EU public procurement rules explicitly focuses on the extent to which they have been effective in achieving their multiple objectives – following the recommendation by the European Court of Auditors to ‘formulate and prioritise fewer, but clearer and more measurable objectives’ to boost effectiveness.⁴ However, the recent reform of procurement legislation in the UK⁵ offers a particularly interesting context for focused analysis, given its explicit attempt to chart the UK’s own path to promoting the ‘public good’ through procurement⁶ by ‘introducing revised objectives ... that better meet the UK’s domestic needs’,⁷ and the current Labour Government’s commitment for ‘the value of contracts to go into delivering for citizens’.⁸

In this paper, I explore the notion of public interest embedded in the Procurement Act 2023 (PA 2023).⁹ I use this new piece of post-Brexit legislation as a contemporary example of the difficulty in designing a ‘public interest centred’ system of public procurement regulation. I show how a mix of partly overlapping explicit, referential, and implicit public interest goals results in a situation where there are multiple sources of objectives contracting authorities need to consider in their decision-making, but there is no prioritisation of sources or objectives. I also show that, despite this proliferation of sources and objectives, and due to the unavailability of effective means of judicial challenge or administrative oversight, contracting authorities retain almost unlimited discretion to shape the public interest and ‘what it looks like’ in relation to the award of each public contract. This challenges the centralised approach to procurement policy taken by recent and current UK Governments and, in particular, raises significant questions on the likely effectiveness of ‘mission-driven’ procurement.¹⁰ I conclude with a call to reconsider how public procurement can foster the public interest, in light of its limitations as a regulatory tool.

²A Sanchez-Graells *Public Procurement during Emergencies. Report for the UK Covid-19 Inquiry* (24 January 2025), available at <https://covid19.public-inquiry.uk/documents/inq000539153-report-for-the-uk-covid-19-public-inquiry-titled-public-procurement-during-emergencies-by-professor-dr-albert-sanchez-graells-dated-24-01-2025/>.

³National Audit Office (NAO) *Investigation into How Government Increased the Number of Ventilators Available to the NHS in Response to COVID-19* (2019–21, HC 731); NAO *The Supply of Personal Protective Equipment (PPE) during the COVID-19 Pandemic* (2019–21, HC 961); NAO *Investigation into Government Procurement during the COVID-19 Pandemic* (2019–21, HC 959); NAO *Investigation into the Management of PPE Contracts* (2021–22, HC 1144).

⁴European Court of Auditors (ECA) *Public Procurement in the EU. Less Competition for Contracts Awarded for Works, Goods and Services in the 10 years up to 2021* (2023, Special Report 28) recommendation 1(a), at para [114].

⁵It should be made clear that there is no such thing as ‘UK procurement law’, as there are currently two separate regimes. The PA 2023 applies in England, Wales and Northern Ireland, while an EU-derived regime has been retained in Scotland. In this paper, the analysis focuses primarily on English law, although aspects of policy with a distinct treatment in relation to Wales are also included.

⁶Cabinet Office *Transforming Public Procurement* (December 2020, CP 353) at para [2].

⁷Government Commercial Function *Guidance: Covered Procurement Objectives* (December 2024) available at https://assets.publishing.service.gov.uk/media/6753121720bcf083762a6d23/Guidance_-_Covered_Procurement_Objectives_FINAL.pdf.

⁸Statement by the Parliamentary Secretary for the Cabinet Office, Georgia Gould MP, made on 13 February 2025, UIN HCWS449.

⁹2023 c 54. Interestingly, and perhaps puzzlingly, the PA 2023 explicitly uses the term ‘public interest’ 11 times, but it mostly does so in relation to an ‘overriding public interest’ capable of deactivating some of the specific duties under the Act (eg on transparency or debarment). A detailed analysis of how the explicit term ‘public interest’ features in the Act is thus not particularly helpful for the purposes of the discussion covered in this paper.

¹⁰Nesta and Institute for Government *Mission-driven Government. What Does a ‘Mission-Driven’ Approach to Government Mean and How Can it be Delivered?* (2024) IfG Report, available at <https://www.instituteforgovernment.org.uk/sites/default/files/2024-07/mission-driven-government.pdf>.

The rest of the paper is organised as follows. Before diving into the analysis of the PA 2023, [Section 1](#) contextualises the relevant issues by reviewing ongoing debates on the goals of public procurement and linking them to the current UK policymaking context. [Section 2](#) then provides an overview of the objectives of the PA 2023, including its explicit, referential and implicit objectives. It queries whether there is clarity on the Act's view of 'what' or 'which' are the relevant public interest/s to be pursued through public procurement. This is followed in [Section 3](#) by a discussion of the ways in which those objectives will require trade-offs in the operationalisation of procurement decisions, 'who' will ultimately be making those decisions, and the avenues for accountability and challenge of those decisions. I close in [Section 4](#) with a call to reconsider the ways in which public procurement can foster the public interest, in light of its limitations as a regulatory tool.

1. Public procurement's contested goals

The question of which goal/s public procurement ought to pursue is evergreen. One could be forgiven for simplifying the goal of procurement to *ensuring that public money is well spent*.¹¹ This approach could be further elaborated to encompass promoting integrity and value for money in the award of public contracts, and acting transparently to facilitate accountability.¹² This simplified position is taken as the benchmark to assess the design of procurement systems in international frameworks such as the United Nations' Convention Against Corruption, which requires its state parties to 'take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption'.¹³ The same benchmark is used in the centralised oversight of procurement within the EU,¹⁴ and in the UK's domestic parliamentary oversight of procurement.¹⁵ This is also my own view.¹⁶

This entails strong reliance on competition for public contracts as the *mechanism* to promote integrity, value for money and transparency. The National Audit Office has recently stressed that

Effective competition between potential suppliers of goods and services can improve value for money by allowing suppliers to demonstrate how they can improve quality, reduce costs and increase the scope for innovation. It also supports confidence in the integrity and transparency of public spending by introducing benchmarks and alternatives, to inform decisions.¹⁷

However, even at this level of relative simplicity, there is scope for contestation of, for example, what value for money entails (with a long-running debate on price/quality trade-offs), or whether it can or must (solely) be promoted through the mechanism of market-based competition. Disagreements on these issues can be underpinned by normative positions concerning the desirability of market-based competition, or the perception that embracing this approach implies a (neoliberal) normative claim that economic efficiency trumps (all) other considerations.¹⁸

¹¹NAO *Making Public Money Work Harder* (29 July 2024, HC 131).

¹²SL Schooner 'Desiderata: objectives for a system of government contract law' (2002) 11 *Public Procurement Law Review* 103. See also SL Schooner et al 'Public procurement systems: unpacking stakeholder aspirations and expectations' (2008) *GW Law Faculty Publications & Other Works* 111, available at https://scholarship.law.gwu.edu/faculty_publications/111.

¹³United Nations, Treaty Series, vol 2349, p 41; Doc A/58/422, Art 9(1).

¹⁴ECA, above n 4.

¹⁵NAO *Competition in Public Procurement: Lessons Learned* (2022–23, HC 1664); House of Commons Committee of Public Accounts *Competition in Public Procurement* (2023–24, HC 385).

¹⁶A Sanchez-Graells *Public Procurement and the EU Competition Rules* (Oxford: Hart Publishing, 2nd edn, 2015) pp 101–114.

¹⁷NAO, above n 11, p 12.

¹⁸Sanchez-Graells, above n 16, pp xiii–xvii, addressing the objections by S Arrowsmith 'The purpose of the EU Procurement Directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies' (2012) 14 *Cambridge Yearbook of European Studies* 1; and P Kunzlik 'Neoliberalism and the European public procurement

In that regard, such simplified account of the core goals and principles of public procurement would not ring true to scholars and practitioners who see procurement as a tool to foster the public interest in relation to a myriad of other goals, such as: fostering business compliance with human rights in complex supply chains;¹⁹ upholding the rule of law;²⁰ addressing gender injustice;²¹ enforcing labour standards;²² supporting the green transition by fostering sustainability and innovation;²³ promoting social value;²⁴ supporting the development of micro-, small-, and medium-sized enterprises (SMEs),²⁵ the third sector, and alternative business models;²⁶ industrial policy goals;²⁷ or geopolitical and national security goals.²⁸ Others, however, have reservations²⁹ or oppose this approach on grounds such as its ineffectiveness.³⁰

The goals of public procurement have been contentious for a long time, but it seems fair to say that there never have been so many contenders.³¹ The longer the list of public procurement goals, the more difficult it is for procurement to achieve them (all, meaningfully) and the higher the risk that performance of its ‘core function’ (to the extent that we can agree on it) is eroded – both due to goal dispersion and to the related increase in red tape and compliance checks. However, the current trend is one of expansion of the ‘relevant considerations’ that need to be taken into account in procurement decision-making, with limited attention paid to its impact on the functioning and effectiveness of procurement.³²

Identifying ‘the’ relevant public interest and how to foster it through the award of public contracts is, thus, far from straightforward.

regime’ (2013) 15 Cambridge Yearbook of European Studies 283. The debate has been particularly intense in relation to the ‘principle of competition’ that would encapsulate the relevance given to the promotion of competitive tension for public contracts. See eg C Methven O’Brien and R Caranta ‘Due diligence in EU institutions’ own-account procurement: rules and practices’ (2024) European Parliament CONT Committee Study PE 738.335, Annex II; TH Losnedahl ‘The general principle of competition is dead’ (2023) 32 Public Procurement Law Review 85; D Sabockis ‘The principle of competition in the context of green public procurement – the case of green award criteria’ (2023) 18(4) European Procurement and Public Private Partnership Law Review 237; and A Sanchez-Graells ‘Competition and procurement regulation’ in C Risvig Hamer et al (eds) *Into the Northern Light – In memory of Steen Treumer* (Copenhagen: Ex Tuto, 2022) p 65.

¹⁹O Martin-Ortega and C Methven O’Brien (eds) *Public Procurement and Human Rights. Opportunities, Risks and Dilemmas for the State as Buyer* (Cheltenham: Edward Elgar, 2019); O Martin-Ortega and L Treviño-Lozano (eds) *Sustainable Public Procurement of Infrastructure and Human Rights* (Cheltenham: Edward Elgar, 2023).

²⁰E Manunza ‘Public procurement law as an expression of the rule of law: on how the legislature and the courts create a layered dynamic legal system based on legal principles’ (2023) 32 Public Procurement Law Review 319.

²¹S Williams ‘Gender-responsive public procurement in Africa: barriers and challenges’ (2024) 68(2) Journal of African Law 157.

²²See most of the contributions to A Sanchez-Graells (ed) *Smart Public Procurement and Labour Standards. Pushing the Discussion after RegioPost* (Oxford: Hart Publishing, 2018).

²³WA Janssen and R Caranta (eds) *Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift* (Oxford: Hart Publishing, 2023).

²⁴K Selviaridis et al ‘How strategic public procurement creates social value: evidence from UK anchor institutions’ (2023) Public Management Review 1.

²⁵E McEvoy *Small and Medium-Sized Enterprise (SME) Participation in Public Procurement* (2020) National University of Ireland, Maynooth (Ireland) ProQuest Dissertations Publishing, 27949922.

²⁶N Boeger *Rethinking Governance in Public Service Outsourcing. Private Delivery in Sustainable Ownership* (Bristol: Bristol University Press, 2024).

²⁷E Uyarra et al ‘Public procurement, innovation and industrial policy: rationales, roles, capabilities and implementation’ (2020) 49(1) Research Policy 103844.

²⁸M Kania and M Andhov ‘Restricting freedom of contract – the EU foreign subsidies regulation and its consequences for public procurement’ (2024) 24(1) Journal of Public Procurement 21.

²⁹P Telles and GS Ølykke ‘Sustainable procurement: a compliance perspective of EU public procurement law’ (2017) 12(3) European Procurement and Public Private Partnership Law Review 239.

³⁰S Lundberg et al ‘Is environmental policy by public procurement effective?’ (2015) 44(4) Public Finance Review 478; KM Halonen ‘Is public procurement fit for reaching sustainability goals? A law and economics approach to green public procurement’ (2021) 28(4) Maastricht Journal of European and Comparative Law 535.

³¹Eg given the relatively recent addition of goals of digital technology regulation, as discussed in A Sanchez-Graells ‘Responsibly buying artificial intelligence: a “regulatory hallucination”’ (2024) 77(1) Current Legal Problems 81.

³²Albeit with notable exceptions, such as in recent reports by the NAO, above n 15, or ECA, above n 4.

It is also unclear ‘who’ should be responsible for such decisions and under which accountability and review mechanisms. The practical difficulties and normative clashes on the conceptualisation and operationalisation of the public interest are visible in relation to several dimensions of procurement regulation and decision-making. And those difficulties and clashes are exacerbated by several layers of multi-level governance and decision-making in public procurement – which create additional scope for conflict and contestation in the process of translating general legislative and policy goals into decisions on the design of public tenders and the award of public contracts. In this context, accountability for and review of decisions on ‘what the public interest looks like’ in relation to the award of a specific public contract are also not necessarily straightforward. Despite increasing regulation concerning the goals and considerations to which contracting authorities ‘must have regard’ in making procurement decisions, it is unclear that contracting authorities’ discretion can be bound in a way that actually supports the goals established at higher levels of legislating and policymaking.

Following Brexit, the UK has had an opportunity to revisit these issues and to take ‘its own’ approach to regulating public procurement to foster the public interest.³³ This is not the place to revisit the criticism of EU public procurement law that has been increasingly dominating in UK policymaking and scholarship in the last decade or so. Suffice it to say that, while leading voices sought to limit the goals of EU public procurement law to fostering cross-border trade at the potential expense of regulatory space for domestic priorities,³⁴ as mentioned above, the European Court of Auditors recently criticised the proliferation of goals assigned to EU public procurement law and called for the European Commission to ‘formulate and prioritise fewer, but clearer and more measurable objectives’.³⁵ There is clearly a disconnect between the views that the EU rules are solely concerned with strengthening the internal market, and those that stress how the 2014 EU Public Procurement Package already (problematically) included a broad range of policy goals, such as supporting environmental, social, and innovation policies, fostering SME participation and generally simplifying the regulatory framework and increasing its flexibility – all of which will feature as key considerations in the UK’s post-Brexit regime, as I discuss later in this paper. Like on many other fronts, it seems to me that there has been a misunderstanding or lack of update in the analysis of EU law and policy underpinning calls for the UK to do things differently – rather than exploiting the flexibilities and policy space within the EU framework.³⁶

Be that as it may, the post-Brexit process of reconsideration of public procurement regulation has resulted in the adoption of the PA 2023, which came into force on 24 February 2025. Perhaps unsurprisingly, the Act sets a wide range of potentially conflicting objectives and duties, and relies on multi-level decision-making for the operationalisation of its approach to satisfying the public interest. The PA 2023 thus offers a contemporary example of the difficulty in designing a ‘public interest centred’ system of public procurement regulation. Using the formulation of objectives in the PA 2023 and the avenues for their delivery and enforcement, in the remainder of this paper, I reflect on its kaleidoscopic view of the public interest in the regulation of public procurement.

A kaleidoscope is ‘a tube that has mirrors and loose pieces of colored glass or plastic inside at one end so that you see many different patterns when you turn the tube while looking in through the other end’.³⁷ In this paper, I use the term kaleidoscope and its adjectival equivalent in its related meaning of ‘a constantly changing pattern or sequence of elements’.³⁸

³³S Arrowsmith ‘The conceptual reorientation of procurement regulation in the UK: the new objectives of the post-Brexit regulatory regime and the enhanced role of hard law as a domestic policy tool’ (2024) 33 Public Procurement Law Review 161.

³⁴For discussion see A Sanchez-Graells ‘Against the grain? Member State interests and EU procurement law’ in M Varju (ed) *Between Compliance and Particularism: Member State Interests and European Union Law* (Heidelberg: Springer, 2019) p 171.

³⁵ECA, above n 4, recommendation 1(a).

³⁶A Sanchez-Graells ‘The UK’s green paper on post-Brexit public procurement reform: transformation or overcomplication?’ (2021) 16(1) European Procurement and Public Private Partnership Law Review 4.

³⁷*The Britannica Dictionary*, available at <https://www.britannica.com/dictionary/kaleidoscope>.

³⁸*Oxford Languages Google Dictionary*, available at <https://tinyurl.com/yc3r6pck>.

I use the image of the kaleidoscope to stress that the PA 2023 does not set a fixed view of procurement law's public interest objectives – as it would if it had woven them into a quilt or piece of patchwork – but rather creates a seemingly simple but deceptively complex regulatory device with several moving parts, containing a large number of uneven and differently coloured loose pieces that will combine and overlap in different ways every time we use the device to take a look at the public interest in the award of a public contract – so that, ultimately, the encapsulation of the public interest in the Act is 'constantly changing'. This makes it impossible to ascertain 'a single' view of the public interest in the PA 2023. It also evidences the limitations of procurement as an effective policy delivery tool where the mix of goals, or their concretisation in the context of specific implementing decisions, very much depends on the particular shape the kaleidoscope shows at that time in the subjective view of the relevant decision-maker.

I believe this insight is of legal and policy salience in the current context. The PA 2023 was initially scheduled to enter into force on 28 October 2024.³⁹ However, the incoming Labour Government decided to postpone it until February 2025.⁴⁰ The reason given⁴¹ was that, as formulated by the previous Conservative Government, the National Procurement Policy Statement (NPPS) – one of the key moving parts in the kaleidoscope, as I explore later in this paper – did 'not meet the challenge of applying the full potential of public procurement to deliver value for money, economic growth, and social value'.⁴² Labour thus wanted to have time to produce 'a new National Procurement Policy Statement that clearly sets out this Government's priorities for public procurement in support of our missions'.⁴³

This reflects the view that it is possible to design law and policy to make procurement 'mission-driven'.⁴⁴ And it refers to Labour's five missions.⁴⁵ In this paper, I will show how such an approach ignores the limited role of the NPPS in constraining procurement decision-making – or, at the very least, is overly optimistic about the practical impact of centralised policymaking on atomised procurement decision-making. Placing such an emphasis on a weak policy instrument can create complacency and prevent the adoption of the more decisive legal interventions needed to achieve the Government's missions. I will seek to exemplify this in relation to decisions concerning the mission to 'Make Britain a clean energy superpower', which directly maps onto the embedding of green procurement and climate change mitigation criteria in procurement decision-making.

2. Objectives in the PA 2023

Public procurement regulation usually seeks to achieve several objectives simultaneously.⁴⁶ Even at its most simplified – in seeking to promote integrity, transparency and value for money – this includes external and internal objectives, or rather process and output objectives. These can also be understood as aspects of regulating 'how' procurement is to be conducted, and 'what for'. Framings of the desirable objectives of procurement tend to concern both aspects, but there seems to be a distinction in that the

³⁹Procurement Act 2023 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2024, SI 2024/716.

⁴⁰Statement by the Parliamentary Secretary for the Cabinet Office, Georgia Gould MP, made on 12 September 2024, UIN HCWS90.

⁴¹Whether these were the 'true' reasons or not can be questioned, though: A Sanchez-Graells 'A good excuse? Delaying the Procurement Act 2023 to make procurement mission-oriented' *How to Crack a Nut* (12 September 2024), available at <https://www.howtocrackanut.com/blog/2024/9/12/delaying-the-procurement-act-2023-to-make-procurement-mission-oriented>.

⁴²Above n 40.

⁴³Ibid.

⁴⁴See eg a recent presentation of this approach in M Mazzucatto and D Wainwright 'Mission-led procurement and market-shaping: lessons from Camden Council' (2024) UCL Institute for Innovation and Public Purpose Policy Report no. 2024/06, available at <https://www.ucl.ac.uk/bartlett/public-purpose/policy-report-2024-06>. For discussion of this approach see A Sanchez-Graells 'How to rethink the role of procurement to foster economic recovery and the green transition – re Mazzucatto (2021, 2020)' *How to Crack a Nut* (6 August 2021), available at <https://www.howtocrackanut.com/blog/how-to-rethink-procurement-for-economic-and-green-transition-re-mazzucatto>.

⁴⁵Labour Party Manifesto 2024, available at <https://labour.org.uk/change/mission-driven-government/>.

⁴⁶Schooner, above n 12.

‘how’ tends to be subjected to legal rules and principles, whereas the ‘what for’ tends to be left to policy instruments.⁴⁷

There is no clear bright line distinction between law and policy in this context, though. And, as a matter of (practical) bindingness on the relevant decision-maker, under English law, it could seem that most of the time there is no meaningful difference because there is a common law duty to comply with published policies absent good reason to depart from them.⁴⁸

Overall, there is a lack of clarity on what procurement objectives *must* be complied with and which *should (or could)* be pursued. This is exacerbated where ‘hard law’ mechanisms are used to enforce policy priorities or preferences,⁴⁹ or where legal principles are open-ended in such a way that, in practical terms, they do not offer meaningful constraints on the exercise of administrative discretion. This is a particularly salient issue where the courts tend to afford significant deference to administrative decision-makers, as is the case in England.⁵⁰

Both sources of further complication are at play in the regulatory approach underpinning the PA 2023. The Act addresses its objectives and makes them explicit – which could be seen as the authoritative formulation of the legislator’s view of ‘the’ public interest to be pursued through public procurement. However, the PA 2023 also provides the legal basis for non-explicit objectives, which become complicating factors that undermine that interpretation, to the extent that: (i) the (partially overlapping) policy objectives set out in a NPPS must *also* be taken into account by contracting authorities; and (ii) specific provisions within the PA 2023 implicitly pursue additional policy goals. This creates a situation where there are multiple sources of objectives contracting authorities need to consider, but there is no prioritisation of sources or objectives. Statutory guidance does not provide additional clarity on the unavoidable prioritisation of objectives.

(a) *Explicit objectives*

Part 2 of the PA 2023 is titled ‘Principles and Objectives’. Within it, section 12 is titled ‘Covered procurement: objectives’ and contains its *explicit objectives*, which are set out as follows:

- (1) In carrying out a covered procurement, a contracting authority must have regard to the importance of –
 - (a) delivering value for money;
 - (b) maximising public benefit;
 - (c) sharing information for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions;
 - (d) acting, and being seen to act, with integrity.
- (2) In carrying out a covered procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.
- (3) If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage.

⁴⁷P Trepte ‘The contracting authority as purchaser and regulator: should the procurement rules regulate what we buy?’ in GS Ølykke et al (eds) *EU Procurement Directives – Modernisation, Growth & Innovation* (Copenhagen: DJØF Publishing, 2012) p 85.

⁴⁸R (*Good Law Project & Others*) v *Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) (18 February 2021) paras [132] and [135].

⁴⁹For discussion, see Arrowsmith, above n 33.

⁵⁰*Siemens Mobility Ltd v High Speed Two (HS2) Ltd* [2023] EWHC 2768 (TCC) (6 November 2023). For discussion see P Henty ‘Challenges to procurement relating to the HS2 project under the Utilities Contracts Regulations 2016: *Siemens Mobility Ltd v High Speed Two (HS2) Ltd*’ (2024) *Public Procurement Law Review* NA96.

- (4) In carrying out a covered procurement, a contracting authority must –
 - (a) have regard to the fact that small and medium-sized enterprises may face particular barriers to participation, and
 - (b) consider whether such barriers can be removed or reduced.

At first look, by including value for money, public benefit, transparency and integrity as its explicit objectives, section 12(1) of the PA 2023 may seem to present a slight variation of the simplified formulation of the goals of procurement presented in [Section 1](#) above. However, the distinction between ‘value for money’ and ‘public benefit’ is already a marked deviation from that simplified framing. Equally, in sections 12(2) and 12(3), the principles of non-discrimination and fair treatment are relatively uncontroversial, but the explicit inclusion of a pro-SME goal in section 12(4) is also a notable deviation from the standard procurement goals – at least to the extent that it goes beyond facilitating effective competition as a mechanism to attain value for money (if it does).

Of these variations on the simplified benchmark, and from the perspective of the treatment of the public interest as the (main) public procurement objective, the inclusion of the duty to have regard to the importance of ‘maximising public benefit’ is the most interesting. This can be reflective of a unique or peculiar understanding of the public interest as something inclusive of potential benefits other than value for money – or that could even potentially trump value for money considerations. However, the extent to which this will hold true hinges on the understanding of value for money and public benefit within the Act.

The Explanatory Notes to section 12 of the PA 2023⁵¹ simply state that ‘Subsection (1) requires that contracting authorities have regard to the importance of the objectives listed when carrying out a covered procurement.’⁵² This does not offer any clarification on the meaning of ‘public benefit’ or its relationship with ‘value for money’ under the same subsection.

It is worth noting that the introduction of the concept of ‘public benefit’ stems from the initial proposal in the green paper *Transforming Public Procurement*,⁵³ which foresaw the inclusion of ‘public good’ as one of a closed list of interdependent principles,⁵⁴ highlighting that ‘procurement should support the delivery of strategic national priorities including economic, social, ethical, environmental and public safety’.⁵⁵ The green paper provided additional explanations on the intended content of the ‘public good’:

The decision to invest public funds into policies, services, projects and programmes is subject to analysis and appraisal to assess the public good that is expected to accrue as a result of the expenditure ... Procurement should draw a clear link between the objectives, outcomes and anticipated benefits that underpin the investment decision and the selection of contracting parties to deliver those benefits.

*Public procurement should also be leveraged to support strategic national priorities ... These will be set out in the National Procurement Policy Statement ... This is consistent with international practice where public procurement is regularly leveraged to achieve social and environmental value beyond the primary benefit of the specific goods, services and capital works through operational delivery that contributes additional social value.*⁵⁶

⁵¹ Available at <https://www.legislation.gov.uk/ukpga/2023/54/notes/division/1/index.htm>.

⁵² Ibid, para [104].

⁵³ *Transforming Public Procurement*, above n 6.

⁵⁴ Public good featured alongside value for money, transparency, integrity, fair treatment of suppliers and non-discrimination: *Transforming Public Procurement*, above n 6, para [27].

⁵⁵ Ibid, para [27]. Value for money was described as requiring that ‘procurement should enable the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case’.

⁵⁶ Ibid, paras [28] and [29] (emphasis added).

In turn, in relation to value for money, the green paper explained that:

... it is critical to maintain the ‘golden thread’ from government priorities via the business cases through to procurement specifications and the assessment of price and quality when awarding contracts. Value for money does not therefore mean simply selecting the lowest price, it means securing the best mix of whole-life quality and effectiveness for the least outlay over the period of use of the goods, works or services bought. Value for money also involves an appropriate allocation of risk and an assessment of the procurement to *provide confidence about its probity, suitability, and economic, social and environmental value over its life cycle*.⁵⁷

This initial approach suggested that, in pursuing the ‘public good’, procurement should be used not only as a tool to achieve the operational outcomes of the intended expenditure (which arguably rather relate to value for money), but also to support broader policies and strategic national priorities. It explicitly linked this pursuit of the ‘public good’ to the (then) future NPPS. Understandably, this created some confusion on the remit of the ‘public good’ and the extent to which trade-offs may be required between operational benefits and strategic policy goals where those were not entirely aligned – or in other words, this created a potential clash between ‘local’ value for money and ‘national’ public good. There was also scope for confusion in the overlap that including consideration of ‘government priorities via the business cases’ as part of value for money could create with the classification of ‘support [to] strategic national priorities’ as public value. This lack of clarity must have featured in submissions to the public consultation (which have, however, not been published) and triggered a slight change of approach.

In its response to the green paper’s public consultation,⁵⁸ the Government clarified that “The concept of “public good” will be framed [in the future Act] as an objective of maximising the “public benefit” to support wider consideration of social value benefits, and address concerns about any potential conflict with local priorities. Similarly, value for money and integrity will be statutory objectives.”⁵⁹ This could seem to point to a focus on ‘local’ public interest within value for money as opposed to ‘national’ public interest driving public benefit – perhaps on the view that local priorities *could* be markedly different from national ones, even if the latter are arguably a mere aggregation of local ones. But this was not clear at all.

Overall, the initial proposals and the Government’s response to the public consultation do not provide much of a helpful guide for the interpretation of section 12 of the PA 2023. Similarly, debates held during the legislative process offer no further clarity, though they are too extensive to analyse here.

The most recent guidance stresses that ‘[e]ach of the objectives set out in section 12(1) has its own merit, and the significance given to each objective when carrying out a procurement must be considered independently’,⁶⁰ and that ‘[i]t is not the intention of the Act that any of the objectives, for example value for money, disapply, override or take precedence over the obligation on contracting authorities to have regard to the other objectives’.⁶¹ In particular, the guidance underlines that ‘[t]he public benefit objective has its own merit, and must be considered independently from the objective to deliver value for money’.⁶²

However, the guidance also stresses that section 12 of the PA 2023 does not define either ‘value for money’ or ‘public benefit’. In relation to ‘value for money’, this is to ‘leave a degree of flexibility for different types of contracting authorities, with different drivers, to place a different emphasis on the concept’.⁶³ Similarly, regarding ‘public benefit’, this is to ‘to leave a degree of flexibility in how this is interpreted. As such, the public benefit objective allows for a range of, for example, social, environmental

⁵⁷ Ibid, paras [31] and [32] (emphasis added).

⁵⁸ Cabinet Office *Transforming Public Procurement: Government Response to Consultation* (December 2021, CP 556).

⁵⁹ Ibid, para [40].

⁶⁰ *Covered Procurement Objectives*, above n 7, para [13].

⁶¹ Ibid, para [14].

⁶² Ibid, para [22].

⁶³ Ibid, para [17].

and labour factors to be considered where these factors are appropriate and relevant to the public contract being awarded.⁶⁴ As a result:

[t]he public benefit objective ... requires contracting authorities to think about the extent to which public money spent on their contracts can deliver greater benefit than it otherwise would. Contracting authorities are therefore still able to structure their procurements so as to give more weight to bids that address such broader public benefits. Contributing to socio-economic development in this way is absolutely in line with the objective of achieving value for money.⁶⁵

Ultimately, to the extent that they are undefined terms and their respective 'own merit' and alignment can be seen in different ways by different contracting authorities, it seems difficult to establish a clear boundary between 'value for money' and 'public benefit' within section 12 of the PA 2023. Additionally, the overall picture is even more complicated than that because the issue of the level of 'bindingness' of national strategic priorities over localised procurement decision-making has been brushed aside. Indeed, the link between 'public benefit' and the NPPS was unaddressed in the Government's response,⁶⁶ and remains unclear in the PA 2023 itself. However, this is of crucial relevance in ascertaining the many facets of the public interest that contracting authorities must have regard to – and in particular the relationship between the legislator's (fixed) view in the PA 2023 and the Government's (variable) view as encapsulated in the NPPS.

(b) Referential objectives: the NPPS

The issue of the level of 'bindingness' of national strategic priorities over localised procurement decision-making reemerged in the legislative proposal⁶⁷ and is now (obliquely) addressed in section 13(9) of the PA 2023, which states that 'A contracting authority must have regard to the national procurement policy statement'.⁶⁸ This effectively expands the list of *procurement objectives by reference to the NPPS*.

In its first iteration, dating back to 2021,⁶⁹ the NPPS set out three groups of national priorities for public procurement around social value, commercial and procurement delivery, and skills and capability for procurement. In relation to social value, it established that:

All contracting authorities should consider the following national priority outcomes alongside any additional local priorities in their procurement activities:

- creating new businesses, new jobs and new skills;
- tackling climate change and reducing waste, and
- improving supplier diversity, innovation and resilience.

On 13 May 2024, a revised NPPS was adopted by the then Conservative Government and was planned to come into effect on 28 October 2024 alongside introduction of the PA 2023.⁷⁰ This revised NPPS never entered into force, though, given the current Labour Government's decision to further revise the NPPS ahead

⁶⁴Ibid, para [20].

⁶⁵Ibid, para [22].

⁶⁶There is only an oblique reference in *Transforming Public Procurement: Government Response*, above n 58, para [41].

⁶⁷Procurement Bill [HL] (HL Bill 4), cl 12.

⁶⁸An equivalent duty is imposed in relation to the Wales procurement policy statement in relation to procurement by a devolved Welsh authority, with caveats, in s 14(8) of the PA 2023.

⁶⁹Procurement Policy Note 05/21: National Procurement Policy Statement, available at <https://www.gov.uk/government/publications/procurement-policy-note-0521-national-procurement-policy-statement>.

⁷⁰This has now been removed from the gov.uk website, but is available at https://www.addleshawgoddard.com/globalassets/insights/procurement/public-procurement/e03126162_-_un_act_-_national_procurement_policy_statement_v2_elay.pdf. A copy is also on file with the author.

of the delayed entry into force of the Act,⁷¹ as explained in Section 1 above. However, a close look at the NPPS revision in May 2024 is still instructive of some of the issues raised by the broader regulatory approach, and some of the pitfalls implicit in the dual regulation of procurement objectives in the Act and the NPPS.

The May 2024 revision rejigged the NPPS' policy content to include five groups of national priorities around value for money, social value, SMEs, commercial and procurement delivery, and skills and capability for procurement. In relation to social value, the revised NPPS similarly (but not identically, and with a few more caveats than the first NPPS) established that:

All contracting authorities should have regard to the following outcomes in their procurement activities, alongside any additional local priorities, *where it is relevant to the subject matter of the contract and proportionate to do so*:

- Creating resilient businesses and opportunities for quality employment and skills development.
- Improving innovation, supply chain resilience and security of supply.
- Tackling climate change and reducing waste.⁷²

On 13 February 2025, a new and now current NPPS was published to replace the 2021 version.⁷³ It entered into force with the PA 2023 on 24 February 2025. As announced, the current NPPS seeks to make procurement 'mission-driven' and to align with Labour's broader five missions,⁷⁴ including 'Kickstart economic growth' and 'Make Britain a clean energy superpower'. The current NPPS perpetuates the difficulties in drawing a meaningful distinction between 'value for money' and other aspects of the public interest. It states that

*Achieving value for money is always the overarching priority in public procurement ... This means optimising the use of public funds by balancing effectiveness, efficiency and economy over the life-cycle of a product, service or works to achieve the intended outcomes of the procurement. This includes wider socio-economic and environmental benefits and impacts.*⁷⁵

It also states that contracting authorities can deliver value for money by 'delivering social and economic value that supports the Government's missions',⁷⁶ and that

a contracting authority must have regard to the importance of maximising public benefit. Applying social and economic value requirements in procurement can have a significantly positive impact by broadening the public benefits that are delivered through the life of the contract.⁷⁷

The Explanatory Memorandum to the NPPS also highlights that, in the exercise of its procurement functions, a contracting authority 'must consider whether the procurement can contribute to achieving one or more of the policy objectives stated in the NPPS *in a manner that is appropriate, proportionate and relevant*; and take steps to address this where it can'.⁷⁸

The content of the NPPS is thus also conceptually unclear and the difficulty in disentangling 'value for money' from 'public benefit' in section 12 of the PA 2023 (as discussed above in Section 2(a)) carries over to the NPPS. Moreover, whatever the specific content of the NPPS in effect at any given time, the status of

⁷¹Above n 40.

⁷²Emphasis added.

⁷³National Procurement Policy Statement, available at <https://www.gov.uk/government/publications/national-procurement-policy-statement>.

⁷⁴Above n 45.

⁷⁵NPPS, above n 73, at p 2 (emphasis added).

⁷⁶Ibid, p 3.

⁷⁷Ibid, p 4.

⁷⁸Explanatory Memorandum to the National Procurement Policy Statement, at [5.1], available at https://assets.publishing.service.gov.uk/media/67c59c25750837d7604dbd83/Annex_A_EM_for_NPPS_-_Final_Version.pdf.

the referential objectives arising from the NPPS and their relationship with the explicit objectives in section 12 of the PA 2023 are also unclear.

On the one hand, the PA 2023 presents both sets of (explicit and referential) objectives as having equal value or ranking because, in both cases, the PA 2023 establishes that contracting authorities ‘must have regard to’ the relevant objective, whether it is directly set out in the PA 2023 (section 12) or the NPPS (section 13(9)).⁷⁹ The fact that section 12(1) directs contracting authorities to have regard to ‘the importance’ of those objectives while section 13(9) refers without qualification to the obligation to have regard to the NPPS (rather than its importance) does not seem to me to make any difference.⁸⁰

On the other hand, and in contrast with that seeming equality of ‘ranking’ and ‘bindingness’, the NPPS can itself modulate the stringency of the duty to have regard to its intended outcomes. This was clearly the case in the May 2024 revised NPPS which, as stressed above, explicitly reduced its likely effectiveness by limiting the duty to have regard to its social value objectives to situations ‘where it is *relevant to the subject matter of the contract and proportionate to do so*’.⁸¹ And this is also the case of the current NPPS because, as stressed in its Explanatory Memorandum,⁸² the expectation is that contracting authorities will have regard to NPPS priorities to the extent that this is ‘appropriate, proportionate and relevant’, and only take action if possible.

It seems to me that there is a clear difference between owing a duty to have regard to the NPPS outcomes *in all cases* that is only excepted or limited where considering those outcomes would create disproportionate negative operational impacts, and a contrasting duty to have regard to those outcomes *only where they are appropriate, proportionate and relevant in relation to the contract at hand*.⁸³ In the latter case, arguably, such outcomes should be taken into account *anyway* because they fall within the concept of ‘value for money’.

This raises some further questions on the extent to which different considerations must be taken into account as the default approach. Especially, as the current NPPS states that ‘[a]chieving value for money is always the overarching priority in public procurement’, and that this ‘means optimising the use of public funds by balancing effectiveness, efficiency and economy over the life-cycle of a product, service or works to achieve the intended outcomes of the procurement. This includes wider socio-economic and environmental benefits and impacts’.⁸⁴ Whether the wider socio-economic and environmental benefits and impacts that can arise from a procurement should be classed as ‘value for money’ outcomes or as ‘social value’ outcomes under the NPPS is thus unclear – and further blurs the distinction of the overall logic of distinguishing between ‘value for money’ and ‘public benefit’ across sections 12 and 13 of the PA 2023.

The guidance on the NPPS (which was adopted in April 2024 and has not been updated after the latest review) does not shed any light on this issue and, if anything, it adds further complications.⁸⁵ First, the guidance proceduralises the duty to have regard to the NPPS by stressing that:

⁷⁹The Explanatory Notes, above n 51, do not provide any clarification, as they use identical language to indicate that s 12(1) and s 13(9) require ‘that contracting authorities have regard to’ the relevant objectives.

⁸⁰Compared to the implications of the use of ‘have regard to’ in the PA 2023 rather than the arguably more stringent ‘have *due* regard to’ in other pieces of legislation with relevance to public procurement, such as the Public Services (Social Value) Act 2012; see Arrowsmith, above n 33, at 169.

⁸¹The reference to the ‘subject matter of the contract’ also carried significant technical baggage as it is a term that has been generally used to limit the discretion of contracting authorities in taking into account matters that go beyond the specific supply or works: A Semple ‘The link to the subject matter. A glass ceiling for sustainable public contracts?’ in B Sjäfjell and A Wiesbrock (eds) *Sustainable Public Procurement under EU Law New Perspectives on the State as Stakeholder* (Cambridge: Cambridge University Press, 2015) p 50.

⁸²Above n 78.

⁸³Put simply, introducing the qualification of relevance inverts the default position so that the contracting authority needs to exercise discretion to opt into the policies, rather than to opt out of them.

⁸⁴NPPS, above n 73, p 2.

⁸⁵Government Commercial Function *Guidance: National Procurement Policy Statement*, available at https://assets.publishing.service.gov.uk/media/664dab1cf34f9b5a56adcbf6/Guidance_-_NPPS.pdf.

As the Act places a statutory duty on contracting authorities to have regard to the NPPS, contracting authorities should document their thinking on which NPPS policies an individual procurement can contribute to and how this will be addressed, as well as note why any disregarded policies are irrelevant or inappropriate or would be disproportionate to consider.⁸⁶

While this could indicate a positive duty to make an effort to meet those NPPS outcomes, the guidance itself reduces the level of actual demand in those considerations by stressing that:

While contracting authorities have a duty to consider whether and how to address the policies, *there is no absolute obligation to do so*. There may be cases where the priorities are irrelevant to a specific procurement or it would be disproportionate to introduce measures to address them. This decision not to address one or more of the policies will be procurement-specific as will the means by which any policies to be considered are incorporated into a procurement.⁸⁷

Ultimately, all that seems to be required by the guidance is for the contracting authority to leave a record of the consideration of the NPPS, but there is no indication of how contracting authorities should assess the (dis)proportionality of the relevant goals or what level of ‘tolerance’ for (difficult and expensive) proportionate complications should be applied. Given that ‘there is no absolute obligation’ to address the policies within the NPPS, there are open questions as to the ‘degree of obligation’ that arises from the duty to have regard to the relevant objectives.

By reference to section 12, Arrowsmith argued that:

There are numerous different commercial and social value elements that could be introduced in any procurement which will often need to be traded off. *It is clear that there is no obligation to have regard to how to implement such benefits irrespective of their costs but only to address how to achieve public benefit when this can be done without cost or with acceptable costs*, a matter that will in principle be for the discretion of the contracting authority, given that it is also required to have regard to the importance of value for money. However, the language of ‘maximising’ public benefit tends to indicate that the legislature attaches some importance to this area. This may have little impact on the scope of discretion under s.12(1) itself, given the vague nature of the duty to ‘have regard to the importance of’.⁸⁸

This interpretation, which can be extended to section 13, comes to place value for money first and, conceptually, reflects the broader problematic confusion between what should be taken to constitute ‘value for money’ and what should be considered (further, different) ‘public benefit’. If something can be achieved at no additional cost, then the contracting authority definitely ought to seek to capture that value. When something can be achieved for a cost, the question arises whether the benefit is commensurate with the cost, and this seems to me to be squarely a question of what is the best value for money. For it to mean something different, ‘public benefit’ may need to be disentangled from value for money more clearly. And perhaps it should be about issues that very quickly become quite difficult to compare, such as completely different modes of provision of the same service where the different modes carry different broader public implications.

This generalised confusion between value for money and public benefit is not problematic in relation to all issues covered in the current NPPS – especially as some parts of the statement primarily focus on issues of general public sector organisation policy that have little or nothing to do with the practical implementation of procurement processes (such as skills and capability for procurement, which must

⁸⁶Ibid, para [8].

⁸⁷Ibid, para [7] (emphasis added).

⁸⁸Arrowsmith, above n 33, at 181 (emphasis added).

logically precede the launch of a procedure). However, the confusion can be very problematic in relation to some of the intended policy outcomes.⁸⁹

Remarkably, given that the NPPS covers, for example, considerations on ‘Making Britain a clean energy superpower’ through accelerating to net zero, reducing greenhouse emissions, minimising waste, promoting the use of green energies, or taking account of environmental risks and ensuring commitment to high environmental standards and the protection of natural habitats and biodiversity – a lax approach (eg to only pursue environmental goals where they are directly relevant to the subject matter of the contract or when they can be attained at no or low cost) is problematic and seems to me too meek.⁹⁰ This indicates that the NPPS could in itself be an unhelpful instrument, given the variety of policies it can cover and their differing relevance, as well as the overlaps it can create between ‘wider socio-economic and environmental benefits and impacts’ to be included as part of the ‘value for money’ objective and the (potentially identical) goals listed as part of the broader social and economic value objective.

Second, and perhaps more problematic, the guidance states that:

*The policy objectives established in the NPPS are separate from the procurement objectives at section 12 of the Act. Those objectives go to the heart of the purpose of public procurement regulation rather than linking to wider governmental policies to which public procurement can contribute. Contracting authorities must ensure that any attempts to address NPPS priorities do not conflict with the procurement objectives at section 12, for example by treating suppliers (unjustifiably) differently or failing to consider barriers to small and medium-sized enterprises.*⁹¹

This paragraph suggests, for example, that there is an objective of ‘delivering value for money’ for the purposes of section 12(1)(a) of the PA 2023 that is ‘separate’ from the NPPS’ ‘value for money’ overarching priority for the purposes of section 13(9) of the PA 2023. It also suggests that there is a possibility to ‘maximise public benefit’ under section 12(1)(b) in ways that are ‘separate’ from the pursuit of ‘social and economic value’ in the NPPS. I find this very confusing and do not think it makes any sense. It is also unhelpful to suggest there is a potential conflict with the objectives (or duties) of non-discrimination and fair treatment under section 12 of the PA 2023 without providing further explanations on when pursuing NPPS outcomes will provide adequate justification for different treatment of potential suppliers or for not removing what could be perceived as a barrier for SMEs – which, again, could be of particular importance in the context of environmental considerations. As drafted, if anything, the guidance provides a clear disincentive for the integration of NPPS outcomes, at least to the extent that claims of discrimination are more actionable than breaches of section 12 or section 13 of the PA 2023 (as discussed in more detail below in Section 3(b)).

Overall, and regardless of the specific content of the (current or any future) NPPS, the analysis above has shown that the expansion of the PA 2023 objectives by reference to those included in the NPPS creates a non-negligible risk of further confusion and does not necessarily provide a clear and consistent view of the concepts of ‘value for money’ and ‘public benefit’. It is hard to see how the multiple different dimensions of the public interest are meant to be synthesized and how the Act, NPPS and relevant guidance are to be understood and implemented. Moreover, given the need to keep the NPPS under review and the unforeseeability of future policy priorities, there is significant scope for contradictions and an open incompatibility between section 12 and section 13 objectives. All of this can pose significant

⁸⁹For discussion of the extent to which some regulatory goals can be embedded through social value or public benefit considerations in tech procurement see A Studman and M Machirori ‘Buying AI. Is the public sector equipped to procure technology in the public interest?’ (2024) Ada Lovelace Institute Discussion Paper, available at <https://www.adalovelaceinstitute.org/report/buying-ai-procurement/>.

⁹⁰On mainstreaming environmental considerations, see eg K Sugar et al ‘Local decarbonisation opportunities and barriers: UK public procurement legislation’ (2022) 3(1) Buildings & Cities 895.

⁹¹*Guidance: National Procurement Policy Statement*, above n 85, para [9] (emphasis added).

difficulties, which can only grow in view of the fact that these explicit and referential objectives are *still* not the only objectives in the PA 2023.

(c) *Implicit objectives*

Indeed, it is worth highlighting that the PA 2023 also includes a series of *implicit procurement objectives*, for example in relation to the grounds for the exclusion of economic operators in relation to national security (section 29 of the PA 2023), or a broad range of mandatory and discretionary exclusion grounds related to terrorism, organised crime, labour market, slavery and human trafficking offences, tax offences, anti-competitive offences, environmental misconduct, breach of contract or poor performance, etc (section 57 of, and Schedules 6 and 7 to, the PA 2023). Each of these ‘technical’ rules embed different objectives and broadly reflect the use of procurement to strengthen the implementation of other legislative or policy instruments. In that regard, the implicit objectives are also partially referential and subject to change if there is a reform of the relevant legal or policy instrument.

Interestingly, and perhaps counterintuitively, some of the implicit objectives may be more binding on contracting authorities than the explicit objectives of the PA 2023 and the NPPS, where the rules embedding those objectives must be applied without room for discretion. For example, save in narrowly defined circumstances (section 41 of the PA 2023), contracting authorities will have to refrain from awarding contracts to suppliers debarred on grounds of having been convicted of tax offences, or having been found to pose a threat to national security (section 26(1) of the PA 2023). In these cases, contracting authorities will not be able to trade off those specific aspects of the (broader) public interest against other considerations (such as value for money).

(d) *Recapitulation*

The PA 2023 sets out its explicit objectives in section 12. These include ‘delivering value for money’ and ‘maximising public benefit’ as separate objectives. This could indicate that the PA 2023 takes a normative position that deviates from the simplified framework advocating for the promotion of integrity, transparency and value for money. However, I have submitted that this would only be true if the concept of ‘public benefit’ was sufficiently distinguishable from ‘value for money’ and added to (or deviated from) it.

However, the analysis above has shown that there is no clearly discernible distinction between ‘value for money’ and ‘public benefit’ in the broader context of the objectives of the PA 2023, especially once the referential objectives in the NPPS are taken into account. Value for money is understood broadly and can encompass wider socio-economic and environmental considerations. Public benefit, especially in the NPPS, largely relates to the same considerations. The implicit or obscure difference that the guidance on the NPPS seeks to make between local and national considerations is unhelpful and further blurs the boundaries between the two concepts. These issues are structural or inherent to the regulatory design and arise from the equality of ‘ranking’ and ‘bindingness’ given to the objectives in section 12 and in the NPPS via section 13(9) of the Act, which creates enduring complications.

Overall, the PA 2023 does not seem to have crystallised a particularly clear or fixed articulation of the different dimensions of the public interest that can be affected (or promoted) by public procurement. This perpetuates the state of conceptual confusion that existed under the previous, EU-derived rules. The PA 2023 projects such a kaleidoscopic, constantly changing view of the public interest that makes it impossible to identify an authoritative formulation of the legislator’s view of ‘the’ public interest to be pursued through public procurement. More importantly, the Act and associated guidance do not provide clear guidelines for procurement decision-making and, ultimately, shift the relevance of the conception of the public interest from the legislative and policy spheres to that of operational decision-making. In other words, this regulatory approach leaves contracting authorities with almost unrestricted discretion to determine ‘what the public interest in a given contract looks like’. [Section 3](#) focuses on this issue and

stresses the ultimate potential ineffectiveness of legislative and policymaking understandings of the public interest in the context of public procurement.

3. Shaping the public interest under the PA 2023

The above discussion has shown how the PA 2023 falls short of establishing a clearly defined framework for the promotion of the public interest through the award of public contracts. This section stresses how, despite efforts to create a series of (soft) constraints on the exercise of administrative discretion through legislative requirements (section 12 of the PA 2023) and centralised policymaking (section 13 of the PA 2023 and NPPS), contracting authorities retain almost unlimited discretion to shape the public interest and ‘what it looks like’ in relation to the award of each public contract. This is in large part due to the practical non-reviewability on public interest grounds of such decisions in civil proceedings, difficult access to and deference to administrative discretion under judicial review, and the unlikelihood that they will be effectively challenged through weak policy oversight.

(a) Trade-offs by contracting authorities

As we have seen, under the PA 2023, contracting authorities have cumulative duties to ‘have regard to’: (i) ‘the importance of the objectives listed in section 12, which include both delivering value for money and maximising public benefit; and (ii) the NPPS, which (in its current formulation) also refers to value for money and public benefit; as well as (iii) discrete obligations to apply specific rules that implicitly foster other aspects of the broader public interest.

Discharging these duties requires contracting authorities to engage with the multiple objectives and make (and document) a decision of which (ones) they seek to pursue and how, in relation to the specific contract award. Importantly, it requires contracting authorities to make explicit and oftentimes difficult trade-offs between competing objectives. The trouble is that, in making such decisions, contracting authorities do not have a free hand. They are rather significantly constrained by multiple factors, including political pressures and, increasingly, financial difficulties. There are thus looming questions on contracting authorities’ actual capabilities to make (true) decisions in the public interest in the award of public contracts when they, for example, face bankruptcy. They may also be in a weak position to do so when they seek to implement trade-offs across contracts they award simultaneously or sufficiently close in time, and even more if the award of contracts is over an extended time period. These considerations do not seem to have a place in the system foreseen in the PA 2023, but they are likely to be the strongest drivers of ‘frontline’ procurement decision-making. This can have rather negative impacts on procurement outcomes and their contribution to key policies included in the NPPS (and broader government political commitments) – as, once more, is clear in relation to green procurement and its very limited uptake under voluntary or discretionary frameworks.⁹²

Additionally, contracting authorities are not only legally but also operationally required to engage in those trade-offs and eventually shape the public interest. While this may seem quite abstract and it can be difficult for a contracting authority to explicitly and precisely describe its own kaleidoscopic view of the public interest through the lens of the award of a specific contract, *this is an entirely unavoidable task*. Contracting authorities cannot choose not to (or fail to) shape the public interest in their award of public contracts. This is because, even if done inadvertently or reluctantly, the cumulative effect of discrete decisions on a large number of issues throughout the procurement process – including participation requirements, technical specifications, award criteria, sub-contracting specifications, and contractual terms, to name a few – will give such shape to the public interest. To some extent, then, the requirements

⁹²See eg M Mähönen et al *Public Procurement for Climate Neutrality: A Transformative Policy Instrument?* (31 July 2023) D4.2: 4i-TRACTION case study report, University of Eastern Finland & Ecologic Institute, available at <https://www.ecologic.eu/sites/default/files/publication/2023/33007-Report-Public-Procurement-for-Climate-Neutrality.pdf>.

under the PA 2023 could be seen as a simple exhortation to contracting authorities to engage consciously and directly with this process. However, in my view, this would be a naive and excessively permissive take on the subject.

There seems to be limited to no legal value in including provisions on objectives at legislative level if they are not meant to serve as a mechanism to guide and limit the discretion of the contracting authorities.⁹³ It is clear that a mere box-ticking or window dressing exercise whereby the contracting authority simply documented that it considered that pursuing *any of the relevant objectives* would be disproportionate or irrelevant to the subject matter of the contract would not provide any practical benefit or improvement in terms of public governance. Moreover, *in principle and taken at face value*, sections 12 and 13 of the PA 2023 seek to drive contracting authority decision-making in specific directions and reflect the legislator's and policymakers' views on what aspects of the public interest should be prioritised. The difficulty is that, in the way this is regulated in the PA 2023, contracting authorities' decisions will not be subject to review on public interest grounds comparably to their exposure to private interest-led challenges.

(b) Legal challenges to contracting authorities' decisions

Contracting authorities' decisions in relation to sections 12 and 13 of the PA 2023 are either explicitly or pragmatically exempted from the system of remedies of the Act.

Section 100 of the PA 2023 concerns the duties enforceable in civil proceedings under the Act. Whereas, generally, '[a] contracting authority's duty to comply with Parts 1 to 5, 7 and 8 is enforceable in civil proceedings', section 100(5) explicitly foresees that '[a] contracting authority's duty to comply with ... section 13(9) ... (requirement to have regard to procurement policy statements), is not enforceable in civil proceedings'.⁹⁴

This is different for the duty to comply with section 12,⁹⁵ which is *in principle* enforceable in civil proceedings under the Act. However, the requirements for such enforcement exclude public interest challenges to the extent that civil proceedings under the Act may only be brought by a supplier that 'has suffered, or is at risk of suffering, loss or damage in consequence of a breach of the duty' (section 100(3)(b) of the PA 2023). This pragmatically excludes challenges to contracting authorities' decision-making under section 12, other than where there are breaches of the objectives (or rather duties?) of non-discrimination and fair treatment, or in relation to objectives that are explicitly linked to discrete provisions of the PA 2023, such as those concerning transparency and conflicts of interest – in which case challenges are much more likely to be based on those specific rules, or related policies and guidance.

In the absence of discrimination or unfair treatment, it seems almost impossible for an aggrieved supplier to meet the legal tests to make the case that the specific trade-offs between competing 'public interest' objectives of value for money and public benefit cause or risk causing it loss or damage.⁹⁶ Given that the formulations of those goals are also subject to (implicit) proportionality requirements, this further complicates a challenge based on, for example, an insufficient consideration of specific goals or a determination that implementation would be disproportionate or not render sufficient 'public benefit'. It should also be recognised that any such challenges would be based on the private interest of the aggrieved supplier and that this will only randomly or arbitrarily align with the public interest underlying the relevant trade-offs and decisions.

⁹³A Sanchez-Graells 'Some reflections on the "artificial narrowing of competition" as a check on discretion in public procurement' in X Groussot et al (eds) *Law and Discretion in EU Public Procurement* (Oxford: Hart Publishing, 2019) p 79.

⁹⁴The same applies to s 14(8) in relation to procurement by a devolved Welsh authority; see above n 68.

⁹⁵With the exception of the duty to comply with s 12(4) (requirement to have regard to barriers facing SMEs), which is also covered by s 100(5) of the PA 2023.

⁹⁶Similarly, Arrowsmith, above n 33, at 174–175.

Contracting authorities' decisions under sections 12 and 13 are susceptible of challenge in judicial review. However, there are significant hurdles on legal standing⁹⁷ and very strict time limits, and the remedies available are rather limited (eg there is no scope for damages claims),⁹⁸ with injunctive relief posing particular challenges. Even when such hurdles are overcome, the courts can be expected to grant significant deference to the contracting authorities' exercise of discretion, not least due to the difficulty in understanding and balancing conflicting goals. The shared view amongst scholars⁹⁹ and practitioners is that challenges are unlikely to succeed.¹⁰⁰

This leaves compliance with crucial section 12(1) objectives and with the NPPS solely subject to policy challenges, as discussed below. This is a remarkable situation that, in my view, fundamentally undermines the likely effectiveness of the PA 2023 as a policy tool (if it ever had this role to play) – and, in particular, in relation to decisions that can have significant implications for the communities directly affected by those decisions, and for broader policy delivery, with the green transition being at the losing end of this regulatory game. This is, however, not the place to revisit the lost opportunity in the abandonment of plans to investigate the creation of a tribunal system to support the Act.¹⁰¹

(c) Policy challenges to contracting authorities' decisions

Part 10 of the PA 2023 creates rules on procurement oversight that foresee the existence of an 'appropriate authority' to carry out investigations and issue reports and recommendations in relation to breaches of the Act.¹⁰² This will be implemented through the creation of the Procurement Review Unit (PRU),¹⁰³ which will provide a very weak mechanism for policy-based challenges to contracting authorities' decision-making in relation to sections 12 and 13 of the PA 2023.

Within the PRU, a Procurement Compliance Service (PCS) will be tasked with procurement oversight and is expected to use statutory and non-statutory powers to do so. Its statutory powers will allow the PCS to 'investigate a relevant contracting authority's compliance with requirements of this Act' (section 108 of the PA 2023) and, generally, it will have the power to issue specific recommendations (section 109 of the PA 2023) following a procurement investigation that shows that 'a relevant contracting authority is engaging in action giving rise, or that is likely to give rise, to a breach of any requirement of this Act'. The contracting authority must have regard to the section 109 recommendation. This has been interpreted to mean that the 'contracting authority is not obliged to follow the recommendation, but it must properly consider and engage with it and, if a contracting authority decides not to follow it, it must have clear reasons for doing so and should record these in writing'.¹⁰⁴

However, by explicit exception, 'A section 109 recommendation must not relate to how the relevant contracting authority should – (a) comply with section 12 (procurement objectives); [or] (b) have regard to the national procurement policy statement (see section 13) ...' (section 109(3) of the PA 2023).¹⁰⁵ This restricts any statutory intervention in relation to non-compliance with sections 12 and 13 of the PA 2023

⁹⁷J Bell 'The resurgence of standing in judicial review' (2024) 44(2) Oxford Journal of Legal Studies 313 at 327 ff.

⁹⁸Also similarly, Arrowsmith, above n 33, at 174–175.

⁹⁹Ibid, at 169.

¹⁰⁰This was clear and unchallenged in a speech by Ewan West KC at the Global Revolution 24 conference held at the University of Nottingham on 17–18 June 2024.

¹⁰¹*Transforming Public Procurement*, above n 6, paras [201] and [202]; cf *Transforming Public Procurement: Government Response to Consultation*, above n 58, paras [243]–[247].

¹⁰²Government Commercial Function *Guidance: Procurement Oversight*, available at https://assets.publishing.service.gov.uk/media/66aa2fafce1fd0da7b5930d1/Guidance_-_Procurement_Oversight_FINAL.pdf.

¹⁰³Government Commercial Function *Raising Standards: Our Ambition. Improving Procurement Standards across the Public Sector*, available at <https://assets.publishing.service.gov.uk/media/6641cc6e993111924d9d32df/PRU-Ambitions-Documents-v9.pdf>.

¹⁰⁴*Guidance: Procurement Oversight*, above n 102, at para [21].

¹⁰⁵This also applies to the Wales procurement policy statement (s 14) in relation to procurement by a devolved Welsh authority; see above n 68.

to the publication of guidance ‘setting out what the [PCS/PRU] considers to be the lessons of the matters considered in the procurement investigation for compliance with the requirements of this Act by contracting authorities generally’ (section 110 of the PA 2023). Given the existence of guidance on the NPPS,¹⁰⁶ this seems unlikely to create much of a practical difference.

Perhaps puzzlingly (at least to me), recently released guidance stresses that:

... section 109 does not prevent other, non-statutory recommendations being made with a view to addressing non-compliance relating to an individual procurement or to address other areas of procurement practice that fall outside of the boundaries of section 109 recommendations. It is therefore possible for non-statutory recommendations to be made as a result of a complaint raised by a supplier about a specific procurement. And it is possible that an investigation into repeated non-compliance could lead to both statutory and non-statutory recommendations being issued to a contracting authority. The [PRU] will need to be clear about the status of the recommendations issued.¹⁰⁷

Whether any non-statutory intervention would yield practical results is anyone’s guess. Some could hope that the mere opening of an investigation by the PCS could trigger a reconsideration of sections 12 and 13 decisions by a contracting authority. I am not in that camp. I also doubt that non-statutory recommendations would make much of a difference where other forms of (binding) guidance have not been able to steer decision-making in the preferred policy direction.

(d) Recapitulation

The PA 2023 subjects contracting authorities to duties to have regard to conflicting dimensions of the public interest in making procurement decisions. Its regulatory technique not only adds complexity to the identification of ‘the’ public interest/s the Act seeks to mobilise and foster, but also obfuscates accountability for the relevant decisions. Ultimately, the duties created by the PA 2023 are virtually unenforceable in legal proceedings driven by public interest considerations and promoted by parties other than economic operators. Such duties are also not susceptible to direct policy-based challenges within the system of administrative procurement oversight arising from the PA 2023. Ultimately, contracting authorities retain almost unlimited discretion to shape the public interest and ‘what it looks like’ in relation to the award of each public contract.

This sheds further light on the likely (in)effectiveness of the PA 2023 as a policy delivery tool and to the practical (ir)relevance of the NPPS and the associated governance of what could otherwise be seen as ‘high-stakes’ policymaking. The PA 2023 regulates the process of adoption of the NPPS in detail (section 13). A Minister of the Crown is responsible for the formulation of the NPPS, which should be preceded by consultation, and must lay it before Parliament. The NPPS must be withdrawn if either House of Parliament resolves not to approve it within 40 days. The NPPS must be kept under review, which implies that this is an iterative process.

This seems to subject the NPPS to high levels of scrutiny and to the opportunity for stakeholder input and political deliberation of its content. However, these are bound to be narrow and relatively technical exercises and it seems unlikely that Parliament will spend much time discussing the NPPS. Moreover, in light of the analysis in this paper, I submit that the NPPS is not the ‘ultimate word’ on what is public procurement in the public interest – and perhaps not even a significant element in the shaping of the public interest in public procurement, which remains in the hands of the contracting authorities.

More generally, this raises (or rather, reiterates) questions on a regulatory approach that ties high hopes on the protection of the public interest on crucial and urgent issues – such as tackling climate change or, increasingly, regulating public sector digitalisation – to the mast of decentralised, discretion-

¹⁰⁶ Above n 85.

¹⁰⁷ *Guidance: Procurement Oversight*, above n 102, at para [24].

based and virtually non-reviewable decision-making. This requires reconsideration of the ways in which public procurement can foster the public interest.

4. Reflection in lieu of conclusion

The above analysis shows that the PA 2023 fails to crystallise a particularly clear articulation of the different dimensions of the public interest that can be affected (or promoted) by public procurement. It leaves significant scope for conceptual confusion and potential tensions or conflicts between the views of the legislator, centralised policymaking and operational decision-making. In the absence of effective means of judicial challenge and administrative oversight, all decision-making power and, ultimately, all regulatory power, is left in the hands of contracting authorities.

Problematically, in my view, the further implication of this approach is that it exposes contracting authorities to significant risks of regulatory capture and commercial determination, at least in relation to objectives that are not easy to specify and measure, or in relation to which contracting authorities suffer from skills and knowledge disadvantages compared to potential suppliers.¹⁰⁸ This regulatory approach does not end with decision-making by contracting authorities, but rather further funnels regulatory power to providers in many issues that are hard to measure and difficult to subject to meaningful oversight. To return to the metaphor of the kaleidoscope, realising that it is in the hands of the contracting authority should also raise concerns about who exactly is going to determine the specific understanding of ‘what the public interest looks like’ in the award of the public contract – given the likelihood that the regulatory instrument will be passed on to or appropriated by vendors and consultants, especially in relation to complex requirements and solutions, such as those related to net zero and climate change mitigation.

This raises significant questions on the value (and legitimacy) of this regulatory approach and on whether including this sort of considerations and mechanisms in procurement legislation may not solely be an *exercise in legal futility*, but also create the false sense that the issue of the promotion of the public interest through public procurement ‘is sorted’.

Arrowsmith has argued that the formulation of objectives can aid legal interpretation of the PA 2023.¹⁰⁹ While that is in principle possible, the lack of clarity of some of the objectives means this is less than straightforward and the value, in particular, of the objectives of ‘value for money’ and ‘public benefit’ seems to me to be particularly low in a system that affords significant leeway to administrative discretion. In any case, other than to provide an interpretive guide – which could have been given through a more meaningful set of explanatory notes – there seems to be limited to no actual legal value in the inclusion of some objectives in sections 12 and 13 of the PA 2023.

Setting aside issues of legislative technique or interpretation, what I think the analysis in this paper shows is that there are aspects of the interrelationship of public procurement (as a primary means of public expenditure) and the public interest that cannot be legislated or mandated. Overall, it seems to me that the ability of public procurement to act as an effective policy delivery mechanism is generally overestimated. Especially in its positive dimension. It is very difficult to come up with rules that force a positive prioritisation of specific objectives – not least because of their fuzziness and unavoidable trade-offs. In its negative dimension, it is relatively easier to design rules to prevent specific outcomes through prohibitions tailored to the procurement process and through the imposition of binding minimum requirements. Most of this needs to be done through legislation and other forms of regulation, however. Procurement can mostly only operate as a conduit or enforcement mechanism for those other legal and regulatory frameworks. Moreover, most issues will not be particular to the public sector setting and will rather concern the economy as a whole.

¹⁰⁸ Sanchez-Graells, above n 31.

¹⁰⁹ Arrowsmith, above n 33.

Let us take once more the example of measures to tackle climate change and the reduction of waste. It seems unlikely that we will manage meaningful and quick enough progress if we leave the embedding of such considerations into procurement decision-making to each contracting authority. This is a ‘whole of the economy’ issue that cannot be dealt with sectorally, and change will only be meaningfully achieved through specific prohibitions and sanctions put in place by separate legislation with specific enforcement mechanisms¹¹⁰ – and even then, what each country can do by itself is clearly constrained by the globalisation of the economy and supply chains. No amount of (national) policy statements or overtly made references to the possibility of taking environmental impacts into account when assessing value for money will do. And procurement cannot become the (sole) enforcement mechanism for the wide array of policy areas that are currently lacking adequate regulatory infrastructures and resources.

The fact that the public interest can take kaleidoscopic form in public procurement, and that procurement unavoidably affects (and can promote) the public interest in more than one way, does not mean that procurement is the only – or even the best – regulatory tool available. I would argue that, in fact, procurement is a very poor regulatory tool.

When it comes to fostering positive outcomes, this is perhaps even clearer. There is very little that can be mandated in terms of maximising public benefit – social value, or whatever we want to call it. Trying to achieve multiple goals creates complexity and this can only be dealt with, to some extent, through adequate resourcing and capability building. Using public expenditure in ways that achieve the broader outcomes reflected in the NPPS requires careful planning and complex execution. There are also trade-offs between the complexity of ‘smart procurement’ and the basic ability of procurement to discharge its more core function of securing the inputs required for the provision of public services.

To a large extent, the discussion on the objectives of public procurement and how this source of public expenditure affects the public interest is non-legal. This is what explains the awkward, complex and potentially confusing picture that emerges from the PA 2023 (and many other regulatory systems) that ultimately seek to design legal rules and principles to address what are much broader and complex socio-economic and organisational challenges.

¹¹⁰Halonen, above n 30.