

**EXPLANATORY MEMORANDUM TO**  
**THE PUBLIC PROCUREMENT (AMENDMENT ETC.) (EU EXIT) REGULATIONS**  
**2020**

**2020 No. [XXXX]**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 This instrument is being made in order to address deficiencies in retained EU law in relation to public procurement arising from the withdrawal of the United Kingdom (UK) from the European Union (EU) and to give effect to Title 8 of Part 3 of the Withdrawal Agreement and Title 5 of Part 3 of the EEA EFTA Separation Agreement (together, the relevant withdrawal provisions), to ensure that retained EU law in the field of public procurement operates effectively after the Implementation Period ends on 31 December 2020.
- 2.2 This instrument revokes the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (2019/560) (the 2019 EU Exit Regulations) and the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (2019/623) (which amends the 2019 EU Exit Regulations) before they come into force. Those Regulations were made before the UK and EU had entered into the Withdrawal Agreement or the EEA EFTA Separation Agreement.

***Explanations***

*What did any relevant EU law do before exit day?*

- 2.3 The EU legal framework for the regulation of public procurement by public authorities and utilities consists of a package of directives (the EU Procurement Directives) that govern procedures for the award of public contracts over specified financial thresholds to suppliers of works, goods and services. They are aimed at ensuring that the EU public procurement market is open and competitive and that suppliers are treated equally and fairly.
- 2.4 The EU Procurement Directives were implemented for England, Wales and Northern Ireland by the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 (the Regulations).
- 2.5 This instrument also relates to certain treaty provisions and directly applicable EU legislation in the field of public procurement, such as Regulation 2195/2002 on the Common Procurement Vocabulary that aims to standardise the references used by contracting authorities and entities to describe procurement contracts. Further information on this legislation can be found in paragraphs 7.19 to 7.22 and 7.36 to 7.42 below of this Memorandum

Why is it being changed?

- 2.6 This instrument implements the UK's obligations in respect of ongoing public procurement and procedures relating to the performance of ongoing framework agreements under Withdrawal Agreement and the EEA EFTA Separation Agreement.
- 2.7 It also fixes deficiencies under the power in section 8 of the European Union (Withdrawal) Act 2018. It addresses deficiencies in retained EU law that arise as a result of the withdrawal of the UK from the EU. It amends or removes provisions that are inoperable, inappropriate or would otherwise prevent the legislation from functioning effectively after exit day within the meaning of section 8 of European Union (Withdrawal) Act 2018. For example, provisions that relate to the publication of notices in the Official Journal of the EU (OJEU) and to the submission of reports to the European Commission (the Commission) would no longer be appropriate because they impose requirements and confer functions in respect of EU entities that no longer have such functions in relation to the UK after exit. These have been removed or replaced with provisions that relate to the functions of 'domestic' bodies and entities. Other examples are given in section 7 below.

What will it now do?

- 2.8 In most respects, the framework and principles underlying the procurement regime remain unchanged. Changes have been limited to those that are appropriate to reflect the UK's new status outside the EU, and to give effect to the Withdrawal Agreement. Changes are made only to the extent permitted to correct deficiencies.

### **3. Matters of special interest to Parliament**

*Matters of special interest to the [Joint Committee on Statutory Instruments]*

- 3.1 None.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 The territorial application of this instrument varies between provisions.
- 3.3 Parts 2 and 3 of the instrument make amendments to primary and secondary legislation. Those amendments are of the same territorial application as the underlying provision being amended so that, for example, the amendments to the Greater London Authority Act 1999 made by regulation 3 apply only in respect of England and Wales; the amendments to the Equality Act 2010 made by regulation 4 apply to England, Wales and Scotland; and the amendments to the Public Contracts Regulations 2015 effected by regulations 6 and 7 apply principally in respect of England, Wales and Northern Ireland only (the exception being paragraphs (61) to (63) of regulation 6 which amend provisions which extend to Scotland and apply in respect of contracting whose functions are not wholly or mainly Scottish devolved functions). Part 4 of the instrument makes amendments to retained direct EU legislation for the whole of the United Kingdom and therefore applies to England, Wales, Northern Ireland and Scotland (the exception being regulation 23 which does not extend to Scotland). The same is the case in respect of Part 5.

### **4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is set out in section 3.3 under “Matters relevant to Standing Orders No. 83P of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)”.

## **5. European Convention on Human Rights**

5.1 The Minister for the Cabinet Office has made the following statement regarding Human Rights:

“In my view the provisions of the Public Procurement (Amendments etc.)(EU Exit) Regulations 2020 are compatible with the Convention rights.”

## **6. Legislative Context**

### *Background*

- 6.1 The EU legal framework for the regulation of public procurement by public authorities and utilities consists of a package of directives (Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (utilities), Directive 2014/23/EU on the award of concession contracts and Directive 89/665/EEC and Directive 92/13/EEC, as amended, on remedies and review procedures for public procurement and on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors).
- 6.2 The EU Procurement Directives govern the procedures for the award of contracts over specified financial thresholds, subject to certain exclusions from their scope. The legal framework is based on the principles of transparency, non-discrimination, equal treatment and proportionality. Its intention is to create an open public procurement market that supports the free movement of supplies, services and works within the EU. The EU is a member of the WTO Agreement on Government Procurement (GPA), and is party to a number of international agreements with countries outside the EU that contain procurement provisions. The EU Procurement Directives reflect the obligations arising out of membership of these agreements as well as the EEA Agreement.
- 6.3 The EU Procurement Directives were implemented for England, Wales and Northern Ireland by the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 (the Regulations).
- 6.4 The Regulations apply principally to England, Wales and Northern Ireland. The Scottish Ministers transposed the EU Procurement Directives separately, in parallel sets of regulations. The Defence and Security Public Contract Regulations 2011 (the 2011 Regulations), implements a related EU scheme for Defence procurement and are outside the scope of the present instrument. (A separate draft instrument making further amendments to the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019, to be made by the Secretary of State for Defence, is being laid on the same day as this instrument). The Public Contracts Regulations 2015 also include (in Part 4), a package of rules that are domestic in origin. Part 4 does not apply to contracting authorities with functions that are wholly or mainly devolved to Wales, Scotland and Northern Ireland.
- 6.5 In addition, Directive 2014/55/EU of the European Parliament and of the Council of 16th April 2014 on electronic invoicing in public procurement (the E-invoice Directive), requires member States to adopt the necessary provisions to ensure that

contracting authorities and other contracting entities are precluded from refusing electronic invoices issued as a result of the performance of contracts which fall within the scope of the EU Procurement Directives, where those electronic invoices comply with the European Standard on electronic invoicing. The Public Procurement (Electronic Invoices etc.) Regulations 2019 implements the E-invoicing Directive, including in respect of the Regulations.

*The 2019 EU Exit Regulations and how the present instrument differs*

- 6.6 The 2019 EU Exit Regulations were made to fix certain deficiencies in retained EU law relating to public procurement. Those Regulations were subsequently amended in intricate ways. Rather than making further amendments to the 2019 EU Exit Regulations, the present instrument revokes them and starts again. Section 7 below explains ‘what is being and done and why’ in relation to the whole instrument. Most of what is being done is unchanged from the 2019 EU Exit Regulations (as already amended). The main changes are as follows.
- 6.7 The relevant withdrawal provisions require major changes to the transitional approach (see section 7, paragraphs 7.62 to 7.65 below). This means that the Schedule to this instrument is very different from the Schedule to the 2019 EU Exit Regulations. For the same reason, the amendments made to the Public Contract Regulations 2006 and the Utilities Contract Regulations 2006 (the 2006 Regulations), most of the provisions of which apply only to transitional cases, are very different from those made by the 2019 EU Exit SI (see section 7, paragraphs 7.55 to 7.57 below).
- 6.8 Additional, or altered, fixes are made to various provisions of the Regulations concerning common technical specifications (see paragraph 7.51 below), the sterling amounts of various thresholds (see paragraph 7.35 below), exemptions for the procurement of legal services (see paragraph 7.33 below), advanced electronic signatures (see paragraph 7.52 below), exemptions relating to the award of concession contracts (on the basis of special or exclusive rights, or for air transport services (see paragraph 7.53 below)), tenders comprising products originating in third countries (see paragraph 7.54 below).
- 6.9 Certain amendments to the Regulations that would otherwise have come into force 18 months after the end of the Implementation Period will now do so 12 months after its end (see paragraphs 7.27 to 7.32 below).
- 6.10 Amendments are made to retained direct EU legislation concerning the European Single Procurement Document and electronic invoicing in the public procurement context (see paragraph 7.41 below in relation to electronic invoicing). A new technical amendment is also made to Article 16 of the EEA Agreement. Certain rights etc derived from treaty provisions that were not switched off by the 2019 EU Exit Regulations are now switched off (see paragraphs 7.19 to 7.22 below).
- 6.11 The opportunity has also been taken to make various minor drafting improvements.

## **7. Policy background**

### *What is being done and why?*

- 7.1 This instrument corrects deficiencies arising as a result of the UK’s withdrawal from the EU. Changes have been made where they are appropriate and within the scope of section 8 of the European Union (Withdrawal) Act 2018. The aim is for the Regulations to reflect the UK’s status as a non-Member State at the same time as

ensuring they continue to facilitate a functioning UK internal market and comply with the requirements of the GPA (which the UK intends to join in its own right). Where possible, amendments support a level playing field between economic operators established outside the UK, whether or not they are member States.

'Steady state' amendments and the relevant withdrawal provisions

- 7.2 The 'steady state' amendments apply to new procurement procedures commenced after the end of the Implementation Period to ensure the Regulations operate effectively. For example, provisions that relate to the publication of notices in the Official Journal of the EU (OJEU), and to the submission of reports to the European Commission (the Commission), have been removed or replaced with provisions that relate to the functions of 'domestic' bodies and entities; retained direct EU legislation that contains deficiencies arising out of the UK's withdrawal is amended or revoked; in respect of procurement procedures commenced under these which concluded before the end of the Implementation Period, the steady state amendments remove any ongoing obligations on contracting authorities and entities to report to the Commission. These and other examples are detailed further in paragraphs 7.5 to 7.61 below.
- 7.3 The relevant withdrawal provisions provide for the continued application of the general principles of Union law applicable to the award of public contracts, the EU Procurement Directives and certain direct EU legislation governing public procurement procedures. These procedures include those which, before the end of the Implementation Period, were launched but not yet finalised (normally when a contract has been awarded and the fact published or notified to those involved), and, in respect of live framework agreements (and the award of contracts based on such agreements), those concluded before the end of the Implementation Period.
- 7.4 The Schedule to the instrument provides certain savings and modifications to the Regulations to ensure that the Regulations are applied in accordance with the relevant withdrawal provisions (see paragraph 7.62 below).

The UK e-notification service

- 7.5 This instrument replaces the requirement to send notices to the EU Publications Office (for publication in OJEU via Tenders Electronic Daily (TED)), with a requirement to submit notices to a new UK e-notification service. This is intended to reflect the publication requirements in the GPA.
- 7.6 Contract opportunities that would have been published on OJEU/TED will be published on the new UK e-notification service. Publication will take place electronically and the service will be free for all users.
- 7.7 The instrument makes no substantive changes to the restriction on the publication of notices at a local level, for example, on Contracts Finder, Sell2Wales or e-TendersNI. Notices must not be published on such national portals before they are published on the UK e-notification service.

Transfer of functions

- 7.8 The EU Procurement Directives provide the Commission with a number of functions to fulfil its supervisory role over EU public procurement that are reflected in retained EU law and that it would not be appropriate to retain after the end of the Implementation Period. There are also a number of delegated powers to make tertiary

legislation whose effects it is appropriate to recreate in the Regulations by conferring those powers on UK public authorities.

- 7.9 This instrument transfers the Commission's function to revalue the main financial thresholds to the Minister for the Cabinet Office (Minister for the Cabinet Office). The EU Procurement Directives require the Commission to review these thresholds every two years to establish whether they continue to correspond to the relevant thresholds laid down by the GPA (see, for example, Article 6 of Directive 2014/24/EU). If they do not correspond, the Commission, by delegated act, makes the necessary amendment to the euro figures set out in the EU Directive to bring them back into line. At the same time, the Commission also determines the sterling value of these thresholds. The Regulations currently make ambulatory reference to the thresholds laid down in the relevant EU Directive (as determined in sterling by the Commission). This instrument replaces these ambulatory cross-references with the actual sterling figures (see paragraph 7.35 below), and confers on Minister the power to make regulations following a biennial review. The Minister for the Cabinet Office will be required to conduct the reviews on the same basis as the Commission, however, rather than adopting the Commission's two-stage process, the Minister for the Cabinet Office must value the GPA thresholds, which are expressed in special drawing rights, directly into the equivalent sterling values. The conversion rates to be used for this purpose are those published in the monthly International Financial Statistics published by the International Monetary Fund, which is the methodology applicable under the GPA.
- 7.10 The Commission has the power to update the exceptions to the circumstances in which contracting authorities are obliged to require the use of electronic means of communication in light of technological developments and to update the technical requirements relating to tools and devices for the electronic receipt of tenders and requests to participate to take account of technological developments. The instrument transfers these powers to the Minister for the Cabinet Office. The scope of the Minister for the Cabinet Office's powers to amend the Regulations has been closely based on the scope of the Commission's existing powers to amend the corresponding passages of the EU Procurement Directives (for example, new regulation 22A which this instrument inserts into the Public Contracts Regulations 2015, is based on the powers conferred by Article 22(7) of Directive 2014/24/EU). Regulations made pursuant to the Minister for the Cabinet Office's powers will be subject to the prior consent of Welsh Ministers or the relevant Northern Ireland Department in respect of devolved Welsh or Northern Ireland authorities.
- 7.11 Provision has been made to confer on the Minister for the Cabinet Office the power to treat the list of international agreements in the field of environmental, social and labour law set out in the annexes to the EU Directives as though certain international agreements were removed and others that are not covered were listed. An equivalent, delegated power to amend the list of international agreements in these annexes currently rests with the Commission.
- 7.12 This is relevant to the ability of a contracting authority to refuse to award a contract to the bidder submitting the most economically advantageous tender where the contracting authority has established that the bidder does not comply with certain applicable obligations in the field of social, environmental and labour law. The power can only be exercised by the Minister for the Cabinet Office in relation to devolved

authorities with the prior consent of Welsh Ministers or, as the case may be, the relevant Northern Ireland Department.

- 7.13 Requirements to provide the Commission with reports have been either removed or converted into an obligation to provide reports to the Minister for the Cabinet Office. Where the power to request reports has been transferred, a similar power has been created for the Welsh Ministers and the relevant Northern Ireland Department in respect of devolved Welsh and Northern Ireland authorities.

Article 346 of the Treaty on the Functioning of the European Union (TFEU)

- 7.14 The Regulations do not apply to contracts that fall within the scope of the 2011 Regulations. In addition, the Regulations are subject to the derogation set out in Article 346 of TFEU that has the effect of overriding the obligation to comply with the Regulations or particular requirements in them, where this would undermine EU member States' essential security interests.
- 7.15 To ensure that contracting authorities can continue to override particular requirements of the Regulations where necessary, this instrument inserts provisions (which correspond to amendments made to the 2011 Regulations by the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019), which replace the cross-reference to Article 346 TFEU with the text of Article 346 (with some minor adjustments to make it operable).
- 7.16 It is arguable that Article 346 TFEU has direct effect through section 2(1) of the European Communities Act 1972, and so is retained through section 4 of the European Union (Withdrawal) Act 2018 in some circumstances. However, given the Regulations are made under the alternative implementing powers in section 2(2) of the European Communities Act 1972, inserting the text of Article 346 is considered to provide the most legal certainty in ensuring the continued effect of Article 346 after exit.
- 7.17 Consideration was also given to whether Article 346(1)(a) should be replicated in the instrument. Regulation 15(2)(b) of the Public Contracts Regulations 2015 and parallel provisions in the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 (the parallel provisions), (which permit procurements to be excluded from the application of the Regulations where they would oblige a contracting authority to supply information which would be contrary to the UK's essential security interests), arguably already replicate its effect. However, the courts have not clarified the interaction between Article 346(1)(a) TFEU and regulation 15(2)(b) (or the parallel provisions) and a strict application of regulation 15(2)(b) (or the parallel provisions), disapplying the entirety of the Regulations in all circumstances could be considered disproportionate, so it was considered prudent to make the position entirely clear by replicating Article 346(1)(a) in the Regulations.
- 7.18 Article 346(1)(b) provides that a member State may take such measures as it considers necessary for the protection of the essential interests of its security that are connected with the production of, or trade in, arms, munitions and war material. The scope of products referred to is determined by a list that was drawn up by the Council of Ministers of the EEC (as it then was), in 1958 (the 1958 List). The amendments made by this instrument reproduce the significance of the 1958 List (for example, the new paragraphs (2) to (6) that this instrument substitutes for regulation 3(2) of the Public Contracts Regulations 2015). Article 346(2) empowers the Council to make changes to the 1958 List. This instrument confers an equivalent regulation-making power on

the Secretary of State for the purposes of the Regulations (as the new paragraph (5) in the example quoted above). Given the nature of this power, and its potential to affect the scope of the Regulations, its exercise is made subject to the affirmative procedure (see, for example, the new regulation 84A(2) which this instrument inserts into the Public Contracts Regulations 2015).

Directly Effective Treaty Rights

- 7.19 Article 18 TFEU prohibits any discrimination on grounds of nationality within the scope of the application of EU Treaties and without prejudice to any special provisions contained therein. It comes into play where a national of one member State suffers discriminatory treatment in relation to nationals of another member State solely on the basis of nationality in connection with a right in the TFEU or another EU Treaty.
- 7.20 The Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, disapplying Article 18 TFEU so far as it relates to the cessation of directly effective rights arising out of the provisions in TFEU relating the freedom of establishment and free movement of services.
- 7.21 Since the policy intent is to treat non-UK economic operators equally, this instrument disappplies for the whole of the UK, rights derived from Article 18 of TFEU and parallel provisions in Article 4 of the EEA Agreement and Article 9 of the Ankara Agreement in the field of public procurement to the extent that these are not disappplied by the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019.
- 7.22 Retaining these rights would leave a lack of clarity as to whether EU parties within the scope of the Article 18 TFEU would have additional rights in the UK compared to other non-EU countries. Economic operators from, for example, the EU, may be provided with additional rights compared to third country economic operators.

Scope of duty owed by contracting authorities

- 7.23 The instrument includes amendments to Regulation 89 of the Public Contracts Regulations 2015 (and parallel provisions in the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016). It would no longer make sense to provide remedies for breaches of ‘enforceable EU obligations’, so the amendment refers instead to any retained EU obligation that is saved under section 4 of the European Union (Withdrawal) Act 2018. This would include directly effective rights and obligations that previously flowed through section 2(1) of the European Communities Act 1972 and which continue to be recognised in domestic law after the end of the Implementation Period (see however, paragraphs 7.19 to 7.22 above).
- 7.24 It would also be inappropriate to retain the obligations under Part 2 and 3 of the Public Contracts Regulations 2015 in respect of economic operators from EEA States in circumstances where the UK is likely to be treated as a third country by contracting authorities in member States. After the end of the Implementation Period, and save in respect of procurements within the scope of the relevant withdrawal provisions and subject to the extension of existing duties towards economic operators from GPA parties and parties from states which have relevant international agreements (see paragraphs 7.27 to 7.32 below), this duty is owed only to economic operators from the UK.



- 7.25 For the avoidance of doubt, Cabinet Office have added Gibraltar as an express reference to make clear that the duty owed to economic operators in the UK extends to those in Gibraltar. Prior to the end of the Implementation Period, Gibraltar came within the territorial scope of the EU Treaties in accordance with Article 355(3) of TFEU that applies the Treaties to European territories for whose external relations, a member State is responsible, subject to some exceptions that are material to public procurement (such as in relation to the Channel Islands), set out elsewhere in Article 355 but which are not relevant to Gibraltar. Since the UK is responsible for Gibraltar's external relations, the UK and Gibraltar are effectively treated as one member State under EU law. Contracting authorities in other member States owe the same duties to economic operators from Gibraltar as economic operators from the UK.
- 7.26 After the end of the Implementation Period, Gibraltar will no longer come within the scope of the EU Treaties. It may therefore, be treated by member States as having the same third country status as the UK. In order to preserve continuity and to reflect the UK's special relationship with Gibraltar, it is appropriate to continue to include Gibraltarian economic operators in the duties owed by contracting authorities.

*The GPA and other international agreements*

- 7.27 It is the intention of the UK to join the GPA in its own right rather than in the capacity as an EU member State. If the UK does not accede to the GPA by the end of the Implementation Period, as a matter of international law economic operators established in territories and states which are GPA parties would no longer have the guaranteed access (and associated remedies) that they currently have in relation to UK public procurements. It has been decided that for procurements within the scope of the Regulations, economic operators established in territories and states which are party to the GPA (including EEA states), as at the end of the Implementation Period should continue to be afforded the same rights and remedies as the UK currently gives to economic operators established in territories and states which are party the GPA, on the basis of the EU's coverage schedules.
- 7.28 In addition, as a member State, the UK was party to a number of international agreements with non-EU countries containing provisions relating to public procurement. After the end of the Implementation Period, these agreements will cease to apply to the UK. The Government's intention is that the UK should continue to reap the economic benefits of these agreements. The UK has, therefore, sought to replicate, or 'transition', these bilateral trade agreements so that they will apply to the UK after the end of the Implementation Period.
- 7.29 In order to ratify, and give full effect to, these transitioned international agreements, the UK needs to ensure that its domestic legislation, in particular the Regulations, reflects the obligations by which the UK will be bound.
- 7.30 The Trade Bill which is currently before Parliament, once it comes into force, will provide the necessary powers to enable UK Ministers and devolved authorities to implement both the obligations in the GPA and the transitioned international agreements on behalf of the UK as an independent party, specifically, clauses 1 and 2 respectively. Due to delays to the Bill's passage through Parliament, secondary legislation under these powers is highly unlikely to have completed its parliamentary passage and have been made in time to come into force before the end of the Implementation Period.

- 7.31 The Minister considers it appropriate, via this instrument, to preserve in Regulations, the duties owed, and remedies currently afforded, to economic operators from GPA parties and countries with which the EU has entered into an international agreement which contain provisions relating to public procurement and by which the EU is, before the end of the Implementation Period, bound. This preservation of existing obligations, for a period of twelve months, will enable the UK to demonstrate compliance with the GPA and the procurement provisions contained in the newly transitioned international agreements, pending appropriate secondary legislation being brought forward to implement them. That is because the Government has sought to replicate the EU's coverage schedules under the GPA and its international agreements in a form that is as close to the form of the EU's agreements as possible.
- 7.32 Once the powers under the Trade Bill are available, it is likely that the extension of existing duties towards economic operators from GPA parties and parties from states which have relevant international agreements will be revoked and replaced. In the meantime, these contingency provisions will expire twelve months from the end of the Implementation Period (but will continue to apply to procurements commenced before the expiry, by virtue of Part 4 of the Schedule to the instrument).

Specific exclusions for service contracts

- 7.33 The Regulations exclude certain legal services by a 'lawyer' within the meaning of the Lawyers' Services Directive. To maintain the exclusion of lawyers from member States practising under their domestic designation would be to provide preferential treatment to EU lawyers compared to lawyers from third countries. Accordingly, the instrument amends the definition of 'lawyer' to mean a person practising as an advocate, barrister or solicitor in any part of the United Kingdom or in Gibraltar. This includes those Swiss lawyers entitled to practice under their domestic designation in accordance with the Swiss Citizens' Rights Separation Agreement.

Exclusion grounds

- 7.34 In respect of procurement procedures commenced after the end of the Implementation Period, contracting authorities and other entities, will not be bound by the mandatory requirement to exclude an economic operator established as having a conviction where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities.

Thresholds

- 7.35 The financial thresholds which govern the award of public contracts in the Regulations were updated in October 2019 and came into effect in the UK on 1 January 2020. In amending the Regulations to substitute sterling figures (see paragraph [7.9] above) this instrument (unlike the 2019 EU Exit Regulations) takes account of the new figures.

Retained direct EU legislation

- 7.36 Section 3 of the European Union (Withdrawal) Act 2018 provides that, so far as it is operative immediately before the end of the Implementation Period, direct EU legislation, with certain exemptions, forms part of domestic law on and after the end of the Implementation Period. It incorporates legislation into domestic law that had legal effect through s. 2(1) of the European Communities Act 1972.

- 7.37 This instrument modifies and in one case, revokes, for the whole of the UK, direct EU legislation in respect of which the Cabinet Office is the lead department.
- 7.38 The instrument modifies Regulation 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV), to transfer the powers of the Commission to amend the annexes to the Regulation to the Minister for the Cabinet Office.
- 7.39 The instrument also modifies Commission Decision 2006/211/EC (electricity generation in England, Scotland and Wales), Commission Decision 2007/141/EC (supply of electricity and gas in England, Scotland and Wales), and Commission Decision 2010/192/EC (exploration for and exploitation of oil and gas in England, Scotland and Wales). It replaces references to the application of Directive 2004/17/EC with references to the relevant provisions of domestic law and omits redundant Articles.
- 7.40 The instrument revokes Commission Implementing Regulation (EU) No 2015/1986 establishing standard forms for the publication of notices in the field of public procurement. That Regulation sets out the forms required for the publication of notices in OJEU. The forms will not be required for the purposes of the new UK e-notification service. The service itself will be designed to elicit the information in the form and manner in which it is to be submitted. Accordingly, the instrument also modifies Annex 16 to the EEA Agreement by removing the reference to the regulation in point 6g.
- 7.41 The instrument amends Commission Implementing Regulation (EU) (EU) No 2016/7 establishing the standard form for the European Single Procurement Document to replace this reference with the domestic Single Procurement Document. Article 1 is also amended so that rather than reference to Article 59 of Directive 2014/24/EU, it refers to regulation 59 of the Public Contracts Regulations 2015. The amendment of (EU) No 2016/7 does not extend to Scotland. The Scottish Government plans to undertake their own amendments of (EU) No 2016/7 in a separate instrument.
- 7.42 The instrument amends Commission Implementing Decision (EU) 2017/1870 on the publication of the reference of the European standard on electronic invoicing and the *list of its syntaxes pursuant to Directive 2014/55/EU*. It confers on the Minister for the Cabinet Office, the power to make regulations to substitute a reference to a different standard, a different reference to the same standard or to amend Article 1 and the Annex so as to substitute, add or remove references to syntaxes. This is to ensure technological developments and full and ongoing interoperability in electronic invoicing in public procurement.
- Consequential amendments to primary and secondary legislation*
- 7.43 The instrument makes a number of amendments to primary and secondary legislation that arise as a consequence of the amendments to the Regulations.
- 7.44 The Greater London Authority Act 1999 is amended to replace references to the sending of notices to the Publications Office of the EU with references to the submission of notices to the new UK e-notification service. Section 355(8) now provides that where the Mayor revises the provisions of the London Environment Strategy dealing with municipal waste management after an authority has submitted a contract notice relating to the award of that contract to the UK e-notification service, then, in discharging their obligations under section 355, authorities are to disregard the amendments made to the London Environment Strategy. However, under the

general principles of the transitional provisions in the Schedule to this instrument, the amendment will not apply to the extent that section 355 of that Act relates to the sending of a notice before Implementation Period completion. Similar considerations apply in respect of the power in section 356 for the Mayor to give directions to a waste collection or waste disposal authority.

- 7.45 The instrument amends the definition in the Equality Act 2010 of ‘public procurement functions’, reflecting the fact that after the Implementation Period, public procurement functions exercised by UK contracting authorities will not be regulated by the EU Directive to which the Act currently refers. Instead, ‘public procurement functions’ will be defined by reference to the domestic legislation that implements the Directive in the different parts of the UK. The statement in Part 2 Annex A confirms that these amendments have no wider policy impact on the Equality Act 2010.
- 7.46 The instrument amends the Social Value (Public Services) Act 2012 to replace a reference to a notice being sent to the Publications Office of the EU with a reference to a notice being submitted to the UK e-notification service.
- 7.47 This instrument amends the definition of 'public notice' in regulation 2 of the Service Charges (Consultation Requirements) (England) Regulations 2003 so as to refer to the UK e-notification service.
- 7.48 The amendment to the Provision of Services Regulations 2009 reflects the omission of regulation 58(5) of, and Schedule 5 to, the Public Contracts Regulations 2015 relating to requirements on economic operators to be enrolled in one of the professional or trade registers kept in their member State of establishment, as described in Schedule 5 or to comply with any other request set out in that Schedule.
- 7.49 The instrument amends Schedule 2 to the Water Industry (Specified Infrastructure Projects)(English Undertakers) Regulations 2013. The 2013 Regulations modify specific provisions of the Utilities Contracts Regulations 2016 in their extended application for the purposes of the 2013 Regulations. The amendments that this instrument makes to Schedule 2 take account of the amendments that this Instrument makes to some of those specific provisions.

#### Specific amendments

- 7.50 The definition of affiliated undertaking in both the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 by reference to the requirements in Directive 2013/34/EU has been replaced with a reference to the domestic legislation which implements the Directive, namely, Part 15 of the Companies Act 2006.
- 7.51 In respect of procurements with an information and communication technology (ICT) component, the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016, permit contracting authorities and utilities to define their technical specifications by reference to common technical specifications. These are defined as technical specifications in the field of ICT laid down in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 on European standardisation. The instrument makes clear by express reference that this is a reference to the EU law version of Regulation (EU) No 1025/2012. Common technical specifications recognised by the Commission via Commission Implementing Decisions after the end of the Implementation Period may be referred to by contracting authorities and utilities.

- 7.52 The instrument amends the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016 in respect of advanced electronic signatures. This is to reflect the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019, in particular in respect of amendments to Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the eIDAS Regulation), in connection with the use of advanced electronic signatures. Where contracting authorities or utilities consider that the security risks associated with electronic communications may make it appropriate to use advanced electronic signatures, they are to continue to be required to accept advanced electronic signatures supported by a qualified certificate for electronic signature (including a certificate which would have qualified status for the purpose of EU law); and are required to establish the required advanced electronic signature format on the basis of the formats referred to in Commission Implementing Decision 2015/1506 (which is to be retained as direct EU legislation). In case a different format of electronic signature is used, it must be a signature which complies with Commission Implementing Decision 2015/1506.
- 7.53 Regulation 10(2) and (3) of the Concession Contracts Regulations 2016 is amended to exclude references to TFEU and EU legal acts laying down common rules on access to the market. Services concession contracts awarded to an economic operator on the basis of an exclusive right are excluded in relation to an activity listed in Schedule 2. Regulation 10(4) is amended so that the exclusion for air transport services will now be based on the economic operator's status as a qualifying air carrier within the meaning of Regulation (EC) No 1008/2008 (as amended, as retained direct EU legislation, by the Operation of Air Services (Amendment etc.) (EU Exit) Regulations 2018).
- 7.54 Regulation 85 of the Utilities Contracts Regulations 2016 applies to tenders relating to products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries. Utilities are entitled to reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender. The instrument retains this provision for a time-limited period to reflect the obligations owed by UK contracting authorities and other entities towards economic operators established in territories and states which are party to the GPA and non-UK suppliers under international agreements signed by the EU immediately before the end of the Implementation Period. However, the instrument replaces the applicable rules for determining the origin of the products. Rather than in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992, these are amended to be in accordance with Part 1 of the Taxation (Cross-border Trade) Act 2018.

#### *The 2006 Regulations*

- 7.55 The effect of the original transitional provisions in the Regulations means that the 2006 Regulations continue to apply to contract award procedures commenced in accordance with the Public Contracts Regulations 2006 before 26th February 2015; to contract award procedures or design procedures commenced in accordance with the Utilities Contracts Regulations 2006 before 18 April 2016; and to concession contract award procedures commenced in accordance with the Public Contract Regulations 2006 before 18 April 2016.

- 7.56 The Schedule to the instrument provides that the steady state amendments do not affect those procurement procedures launched and finalised before the end of the Implementation Period, including under the 2006 Regulations. In respect of such procurements, effectively, concluded contracts, the instrument amends the 2006 Regulations to remove, or transfer to the Minister for the Cabinet Office, ongoing reporting obligations to the Commission. Technical provision is also made to preserve the effect of existing exemptions from the 2006 Regulations.
- 7.57 In respect of procurement procedures which launched before the end of the Implementation Period but are not yet finalised, these come within the scope of the relevant withdrawal provisions and are subject to the transitional provisions in the Schedule to the instrument, notably the modifications made by paragraph 5 of the Schedule.

*Abnormally low tenders and State aid*

- 7.58 In respect of abnormally low tenders submitted by bidders who may have been in receipt of State aid, the intention is to treat non-UK economic operators on a level playing field. Under regulation 69 of the Public Contracts Regulations 2015, and of regulation 84 of the Utilities Contracts Regulations, a contracting authority or utility can investigate an abnormally low tender and ask further questions of the economic operator. Where the contracting authority or utility establishes that the tender is abnormally low because the economic operator has obtained State aid, it may (not must), following consultation with the tenderer and only if the tenderer is unable to meaning of Article 107 TFEU, reject the tender on that ground alone. Any such rejections have to be reported to the EU Commission. From the end of the IP there is not a policy justification to either continue to effectively use the procurement regulations to treat EU economic operators differently to those from other third countries, or 'police' state aid given by other member States. Accordingly, the provisions in the Regulations relating to State aid have been removed (for example, regulation 69(2)(f), (6) and (7) of the Public Contracts Regulations 2015).
- 7.59 Guidance is to be provided in respect of the Commission's ongoing jurisdiction in respect of State aid granted before the end of the Implementation Period and aid granted in breach of Article 10 of the Northern Ireland Protocol under the Withdrawal Agreement.

*E-Certis*

- 7.60 E-Certis is the EU's free, online database that lists the eligibility criteria and documentary evidence needed in each EEA country to take part in public procurement. It helps companies and contracting authorities cope with the different forms of documentary evidence required for cross-border tenders for EU public contracts. It provides links to the bodies providing certificates and evidence that a supplier has not breached an exclusion ground such as for non-payment of taxes. After the end of the Implementation Period, it would be inappropriate to continue to require UK contracting authorities to have recourse to e-Certis.

*Joint procurement*

- 7.61 The provisions in the Regulations relating to procurement involving contracting authorities or other contracting entities from other member States (for example, regulation 39 of the Public Contracts Regulations 2015), reflect rules introduced by the Commission to encourage cross-border joint procurements between member States. The omission of these provisions is not intended to imply that joint procedures

should not be undertaken or that there should be any disruption to existing arrangements. However, these provisions are premised on recognition by all the member States of the contracting authorities concerned that the contracting authorities' mutual rights and obligations will be as laid down by, or in accordance with, the arrangements referred to in these provisions (for example, that all the member States will respect the choice of national law made by contracting authorities who procure jointly under these provisions). After the end of the Implementation Period, this common recognition will not necessarily apply. The corresponding provisions of the Directives (for example, Article 39 of Directive 2004/18/EC), which will continue to apply to member States, refers only to "contracting authorities from member States", a category that will no longer include contracting authorities from the UK. It is therefore appropriate to omit these provisions. Cross-border joint procedures may continue to be undertaken (as, in practice, they were to some extent before the Regulations were made, as the previous Procurement Directives and their transposing regulations did not contain such provisions), but on the same basis as cross-border joint procedures with contracting authorities from non-member States, without the legal clarity provided by these provisions which would be impossible to enforce after the end of the Implementation Period.

*The relevant withdrawal provisions*

- 7.62 The relevant withdrawal provisions seek to ensure a level of continuity for procurement procedures which began before the end of the Implementation Period. The Schedule to this instrument contains transitional and saving provisions to ensure that the steady state amendments made to the Regulations by this instrument do not affect any ongoing procedure which straddles the end of the Implementation Period launched by a contracting authority or a utility under the Regulations or under the 2006 Regulations. In addition, framework agreements launched before the end of the Implementation Period which have not expired or been terminated, and call-off procedures under these, are not affected by the steady state amendments. So, for example, notices must continue to be sent to the EU Publications Office and such procedures will continue to be subject to the obligations to provide the Commission with reports.
- 7.63 As an exception, regulation 61 of the Public Contracts Regulations 2015 relating to e-Certis (which is revoked for new procedures launched after the end of the Implementation Period) will cease to apply 9 months after the end of the Implementation Period, even in relation to procedures that remain unfinalised at that point. This 9-month cut-off for e-Certis is specifically provided for in the relevant withdrawal provisions.
- 7.64 The Schedule provides certain modifications to the Regulations and savings to ensure that, in respect of such procedures, the Regulations operate effectively. For example modifications are made to the Regulations so that any reference to member state or EEA state is to be read to include the UK and any reference to a citizen of the EU or EEA includes a UK national.
- 7.65 The definition of 'steady state amendments' in paragraph 2 of the Schedule has been designed to minimise the risk that any future amendments that may be made to the Regulations do not inadvertently bite on transitional procurements in a way that would infringe relevant withdrawal provisions.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under section 8B(1) of that Act in order to implement the public procurement provisions of Part 3 of the withdrawal agreement. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

## **9. Consolidation**

9.1 There are no current plans to consolidate the legislation amended by this instrument.

## **10. Consultation outcome**

10.1 There has been no consultation on how to rectify the deficiencies arising from withdrawal. The changes made are intended to maintain the current legislative and policy framework, in so far as this is possible after the end of the Implementation Period and are within the extent permitted by the European Union (Withdrawal) Act 2018 to correct deficiencies.

10.2 Regular discussions on the content of this instrument have been held with the devolved administrations throughout the drafting process in accordance with the Intergovernmental Agreement. In so far as this instrument makes provision that could be made by the Welsh Ministers, Scottish Ministers and a Northern Ireland Department, there has been regular engagement with the Welsh Government, Scottish Government and Northern Ireland Civil Service throughout the drafting process and in accordance with the terms of the Intergovernmental Agreement on the EUWA.

## **11. Guidance**

11.1 Guidance will be available for stakeholders by the time this instrument comes into force.

## **12. Impact**

12.1 There is no impact, or significant impact on business, charities or voluntary bodies.

12.2 The impact, or significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the framework and principles underlying the Regulations have not been substantially amended. Modifications contained in this instrument have been made to ensure the Regulations function effectively, after the end of the Implementation Period. Contracting authorities and other contracting entities as well as private sector businesses will have to familiarise themselves with the amended provisions and the new UK e-notification service. UK economic operators will have to monitor opportunities on the new UK e-notification service on which above-threshold UK procurement opportunities will be advertised. These impacts are, however, expected to be low and are below the threshold required to carry out a full impact assessment. It will be open to UK economic operators to continue to respond to contract notices published on OJEU by member states. The most significant cost to the public sector



that arises directly from this instrument relates to the development of the IT system for the UK e-notification service.

**13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 We propose no specific action to minimise regulatory burdens on small businesses. The impact on small businesses arising from this instrument is expected to be low. Further guidance on the introduction of the UK e-notification service and in respect of on-going procurement procedures will be published.

**14. Monitoring & review**

- 14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

**15. Contact**

- 15.1 Lois Devey at the Cabinet Office Telephone: 07834172021 or email: [lois.devey@cabinetoffice.gov.uk](mailto:lois.devey@cabinetoffice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Edward Green at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister Lopez at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.