

POLICY NOTE

The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019

SSI 2019/XXX

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of Schedule 2 to the European Union (Withdrawal) Act 2018. The instrument is subject to affirmative procedure.

Purpose of the instrument. This instrument is made in order to address deficiencies in retained EU law relating to public procurement which arise from the withdrawal of the United Kingdom from the EU. It will ensure that the legislation continues to operate effectively after the UK leaves the EU.

Policy Objectives

1. This instrument is drafted with the intention of maintaining, as far as possible, the current legislative and policy framework for public procurement, whilst recognising that the UK will no longer be a member State of the EU. The amendments are also made to ensure that the legislation complies with the requirements of the World Trade Organisation's Government Procurement Agreement (the GPA), which the UK intends to join in its own right after leaving the EU. Amendments are intended to remove the distinction between the treatment of economic operators (potential bidders for contracts) which are established in a member State other than the UK and those established outside of the EU.

Explanation of the law being amended by the regulations

2. This instrument principally amends the Public Contracts (Scotland) Regulations 2015; the Utilities Contracts (Scotland) Regulations 2016; and the Concession Contracts (Scotland) Regulations 2016.
3. These regulations implement the requirements of Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors; and Directive 2014/23/EU on the award of concession contracts, respectively. They also implement the requirements of 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 telecommunications sectors.
4. These EU Procurement Directives govern the procedures for the award of contracts worth more than 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. The EU is a member of the 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 from these agreements, as well as the EEA Agreement.

5. The Public Contracts (Scotland) Regulations 2015 and the Utilities Contracts (Scotland) Regulations 2016 include saving provisions under which certain procurements remain governed by the revoked Public Contracts (Scotland) Regulations 2012 or the revoked Utilities Contracts (Scotland) Regulations 2012, which implement Directive 2004/18/EC on public procurement, and 2004/17/EC on the procurement procedures of entities operating in the water, energy, transport and postal services sectors, respectively, as well as the remedies Directives. This instrument makes amendments to deal with the deficiencies which arise from the UK's exit from the EU where those provisions continue to apply.
6. This instrument also amends the Procurement Reform (Scotland) Act 2014, and the Procurement (Scotland) Regulations 2016 made under that Act. These pieces of legislation impose additional requirements beyond those imposed by the EU Directives, but rely on references to the EU Directives in order to do so.

Reasons for and effect of the proposed change or changes on retained EU law

The UK e-notification service

7. This instrument replaces the requirement to send notices to the EU Publications Office (for publication in the Official Journal of the European Union (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.
8. 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. Transitional provisions have been made in respect of procurement procedures which straddle exit day and in relation to which earlier notices have been published on OJEU/TED.
9. The instrument makes no change to the requirement arising from the Procurement Reform (Scotland) Act 2014 for some of these notices to also be published on Public Contracts Scotland.

Transfer of functions

10. The EU Procurement Directives provide the European 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 exit. There are also delegated powers to make tertiary legislation whose effects it is appropriate to recreate by conferring those powers on Scottish Ministers.
11. This instrument transfers to the Scottish Ministers the Commission's function to revalue the main financial thresholds. The 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 and confers on the Scottish Ministers the power to make regulations following a biennial review. The Scottish Ministers will be required to conduct the reviews on the same basis as the Commission, but rather than adopting the Commission's two-stage process, the Scottish Ministers 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.

12. 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 Scottish Ministers. The scope of the Scottish Ministers' 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 23A, which this instrument inserts into the Public Contracts (Scotland) Regulations 2015, is based on the powers conferred by Article 22(7) of Directive 2014/24/EU).
13. Provision has been made to confer on the Scottish Ministers 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.
14. 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.
15. Requirements to provide the Commission with reports have been either removed or converted into an obligation to provide reports to the Scottish Ministers.

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

16. The regulations amended by this instrument do not apply to contracts that fall within the scope of the Defence and Security Regulations 2011 (the 2011 Regulations). In addition, the regulations amended by this instrument are subject to the derogation set out in Article 346 of TFEU that has the effect of overriding the obligation to comply with those regulations or particular requirements in them, where this would undermine EU member States' essential security interests.

17. To ensure that contracting authorities can continue to override particular requirements of those regulations where necessary, this instrument inserts provisions (which are intended to correspond to provisions in 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).
18. 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 that the regulations amended by this instrument 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.
19. Consideration was also given to whether Article 346(1)(a) should be replicated in the instrument. Regulation 16(2)(b) of the Public Contracts (Scotland) Regulations 2015 and parallel provisions in the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) 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 16(2)(b) (or the parallel provisions) and a strict application of regulation 16(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.
20. 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 (Scotland) Regulations 2015).

Scope of duty owed by contracting authorities

21. Regulation 3(58) of the instrument includes amendments to Regulation 87 of the Public Contracts (Scotland) Regulations 2015 (and there are also amendments to the parallel provisions in the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) 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 post exit.

22. It would also be inappropriate to retain the obligations under Part 2 and 3 of the Public Contracts (Scotland) 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 exit, and save in respect of procurements which are on-going as of exit day, this duty is owed only to economic operators from the UK.
23. Similarly, it would be inappropriate to continue to retain the obligations set out in the Procurement Reform (Scotland) Act 2014 in respect of economic operators from a member State or the EEA. The instrument amends the scope of these obligations so that after exit they will extend only to economic operators from the UK.
24. For the avoidance of doubt, Gibraltar is added as an express reference to make clear that the duty owed to economic operators in the UK extends to those in Gibraltar. Prior to exit, 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. As 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.
25. After the UK's exit, 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, it is appropriate to continue to include Gibraltarian economic operators in the duties owed by contracting authorities.

The GPA and other international agreements

26. It is the intention of the UK to join the GPA in its own right (the UK currently participates in its capacity as an EU member State). If the UK does not accede to the GPA by exit, as a matter of international law economic operators established in territories and states which are party to the GPA would no longer have the guaranteed access (and associated remedies) that they currently have in relation to UK public procurements.
27. The UK Government, in amending the procurement regulations applying to England, Wales and Northern Ireland, has 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 point of the UK's withdrawal from the EU, 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, and for a period of eight months after exit. This is in anticipation of the UK's accession to the GPA on or shortly after exit, though in the event that the UK does not accede to the GPA on exit day, other GPA signatories would not be obliged to offer reciprocal treatment in the intervening period until UK accession.

28. The UK Government has asked that the Scottish regulations replicate this provision in order to support the UK's swift accession to the GPA. This instrument therefore modifies the relevant provisions of the regulations from exit day so that they continue to accord guaranteed access and remedies to economic operators established in states which are party to the GPA, including member States, despite the UK not being a member State or, until accession, party to the GPA. Regulations 4, 6 and 8 of this instrument remove these provisions eight months from exit day.
29. The instrument also removes from the regulations the provision that extends the application of the duties on contracting authorities and remedies to suppliers from third countries that have other agreements covering procurement with the EU.

Exclusion grounds

30. In respect of procurement procedures commenced after exit day, contracting authorities 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. To avoid 'moving the goalposts' in ways that could produce unfairness in the context of procurements that are already underway, this ground of exclusion will, under the transitional provisions in the Schedule to this instrument, continue to apply to ongoing procurement procedures commenced before exit.

Consequential amendments to primary and secondary legislation

31. The instrument makes a number of amendments to primary and secondary legislation that arise as a consequence of the amendments to the Regulations.
32. The application of some provisions of the Procurement Reform (Scotland) Act 2014, and of the Procurement (Scotland) Regulations 2016, made under that Act, is currently determined by reference to "EU-regulated procurement". This concept remains unaltered, but is amended to read "higher value regulated procurement". A number of interpretative provisions which refer to the European Directives are also updated.

Specific amendments

33. The definition of affiliated undertaking in both the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) 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, Part 15 of the Companies Act 2006.
34. Regulation 83 of the Utilities Contracts (Scotland) 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 origin of the products is determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code as amended from time to time. The instrument replaces the reference to the Community Customs Code with a suitable reference that attracts the country of origin rules in the Taxation (Cross-Border Trade) Act 2018.

The 2012 Regulations

35. The effect of the original transitional provisions in the regulations means that the Public Contract (Scotland) Regulations 2012 and Utilities Contract (Scotland) Regulations 2012 (the 2012 Regulations) continue to apply to contract award procedures commenced in accordance with those regulations before 18 April 2016, though in practical terms, we expect that very few ongoing procedures will fall into this category.
36. Since the 2012 Regulations will only ever apply in respect of procedures commenced before exit day, the instrument modifies them to the extent that they continue to apply to subsequent stages of the procurement that have not been completed by exit day. Consistent with the transitional and savings provisions we are making in respect of amendments to the Regulations, references to a member State will be deemed to continue to include the UK whereas all requirements to send notices to OJEU are replaced with a requirement to submit a notice to the UK e-notification service.

Abnormally low tenders and State aid

37. In respect of abnormally low tenders submitted by bidders who may have been in receipt of state subsidies, the intention is to treat non-UK economic operators on a level playing field. Further, although a new UK State aid regime is envisaged in which the function for enforcement is to be conferred on the Competition and Markets Authority, in the area of public procurement, it would be inappropriate for economic operators established in the UK to be required to demonstrate that aid provided by the state was compatible with the UK's State aid regime in contrast to economic operators not established in the UK. 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 (Scotland) Regulations 2015).

E-Certis

38. E-Certis is the EU's 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 exit, it would be inappropriate to continue to require UK contracting authorities to have recourse to e-Certis. The instrument removes that requirement.

Joint procurement

39. The provisions in the regulations relating to procurement involving contracting authorities or other contracting entities from other member States (for example, regulation 40 of the Public Contracts (Scotland) 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.
40. 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 UK ceases to be a member State, this common recognition will not necessarily apply. The corresponding provisions of the Directives (for example, Article 39 of Directive 2014/24/EU), which will continue to apply to member States, refer 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 exit.

Transitional provisions

41. The regulations, as amended by the instrument, will generally apply prospectively, even in relation to procurements that are already underway on exit day. However, there will be some exceptions to this, mainly in cases in which applying the amended provision to such procurements would 'move the goalposts' in ways that would, or could, produce unfairness. Some examples have been mentioned above. Further details of the transitional provisions are in the Schedule to the instrument.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement “In my view the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate. This is the case because it does no more than prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU, examples of which are mentioned in paragraph 7 to 41 of the policy note”.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These reasons are set out in paragraphs 7 to 41 of the policy note”.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement “In my view the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement “In my view the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This heading is not applicable

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable

An indication of how the regulations should be categorised in relation to the significance of the change proposed

High – this instrument is largely concerned with technical detail, and does not seek to change the effect of the underlying legislation. It does, however, transfer a number of functions, including limited EU legislative powers to the Scottish Ministers.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

This SSI is subject to mandatory affirmative procedure under paragraph 1(6) of Schedule 7 of the European Union (Withdrawal) Act 2018. Therefore, the sifting procedure in the SSI protocol is not relevant to this SSI.

Further information

Consultation

There has been no public 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 exit and are within the extent permitted by the European Union (Withdrawal) Act 2018 to correct deficiencies.

Regular discussions on the content of this instrument have been held with the UK Government and the other devolved administrations throughout the drafting process. Where appropriate, the amendments to legislation set out in this instrument are consistent with amendments which the UK Government is proposing to make to its equivalent legislation.

Impact Assessments

Full impact assessments have not been prepared for this instrument because the framework and principles underlying the legislation have not been substantially amended. Modifications contained in this instrument have been made to ensure the legislation functions effectively, once the UK withdraws from the EU.

Financial Effects

The Cabinet Secretary for Finance, Economy and Fair Work confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Scottish Procurement and Commercial Directorate

28 January 2019