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*Draft Regulations laid before the Scottish Parliament under section 22 and paragraph 1(6) of Schedule 7 of the European Union (Withdrawal) Act 2018 for approval by resolution of the Scottish Parliament.*

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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2020 No.**

**EXITING THE EUROPEAN UNION  
PUBLIC PROCUREMENT**

**The Public Procurement etc. (EU Exit)  
(Scotland) (Amendment) Regulations 2020**

*Made - - - - 2020*

*Coming into force in accordance with regulation 1*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972<sup>(1)</sup>, paragraphs 1(1) and (3) of Part 1 and 11G(1) and (3) of Part 1B of schedule 2 of the European Union (Withdrawal) Act 2018<sup>(2)</sup> and all other powers enabling them to do so.

In accordance with paragraph 4(a) and (b) of schedule 2 of the European Union (Withdrawal) Act 2018<sup>(3)</sup>, the Scottish Ministers have consulted with the Secretary of State.

In accordance with section 22 and paragraph 1(6) of schedule 7 of the European Union (Withdrawal) Act 2018, a draft of this instrument has been laid before and approved by the Scottish Parliament.

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- (1) [1972 c.68](#) (“the 1972 Act”). The 1972 Act was repealed by section 1 of the European Union (Withdrawal) Act [2018 \(c.16\)](#) (“the 2018 Act”) with effect from exit day (see section 20 of the 2018 Act), but saved, subject to modifications, until IP completion day by section 1A of that Act. Section 1A of the 2018 Act was inserted by the European Union (Withdrawal Agreement) Act [2020 \(c.1\)](#) (“the 2020 Act”) and defined “IP completion day” by reference to section 39(1) to (5) of the 2020 Act. Section 2(2) was amended by the Scotland Act [1998 \(c.46\)](#) (“the 1998 Act”), schedule 8, paragraph 15(3) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act [2006 \(c.51\)](#) (“the 2006 Act”). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by the European Union (Amendment) Act [2008 \(c.7\)](#) (“the 2008 Act”), section 3(3) and schedule, Part 1. The functions conferred upon the Minister of the Crown under section 2(2), insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act.
- (2) [2018 c.16](#). Paragraph 11G was inserted by section 19 of the 2020 Act.
- (3) Paragraph 4 of schedule 2 of the 2018 Act was amended by section 27(7)(a) of the 2020 Act.

## PART 1

### GENERAL

#### Citation, commencement and extent

1.—(1) These Regulations may be cited as the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020.

(2) Except for the provisions mentioned in paragraphs (3) and (4), these Regulations come into force on IP completion day.

(3) Regulation 2(2) comes into force immediately before IP completion day.

(4) Regulations 5, 7, and 9 come into force 12 months after IP completion day.

(5) Regulation 13 extends to Scotland only.

#### Transitional and savings provisions and revocation

2.—(1) The Schedule has effect making—

(a) provision in relation to procurements that are ongoing on IP completion day, including provision—

(i) disapplying in relation to such procurements certain amendments made or to be made (whether by these Regulations or otherwise) in relation to public procurement,

(ii) modifying references in certain regulations that apply to such procurements,

(b) other savings in relation to certain provisions of these Regulations.

(2) The following are revoked—

(a) the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019(4),

(b) the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019(5), and

(c) the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment (No. 2) Regulations 2019(6).

## PART 2

### AMENDMENT OF PRIMARY LEGISLATION

#### The Procurement Reform (Scotland) Act 2014

3.—(1) The Procurement Reform (Scotland) Act 2014(7) is amended as follows.

(2) For section 8(4) (general duties), substitute—

“(4) A relevant economic operator is an economic operator who is a national of, or is established in, the United Kingdom or Gibraltar.”.

(3) In each of sections 8(5) (general duties), 11(1) (supported businesses), 27(1) (exclusion of economic operators on grounds of criminal activity), 28(1) (selection of tenderers), 32(1) (giving

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(4) S.S.I. 2019/112.

(5) S.S.I. 2019/114.

(6) S.S.I. 2019/414.

(7) 2014 asp 12.

reasons to unsuccessful participants), 33(1) (request for further information) and 37(1) (actionable duties) for “an EU-regulated procurement” substitute “a higher value regulated procurement”.

(4) In section 30(1) (technical specifications), for “EU-regulated procurements” substitute “higher value regulated procurements”.

(5) For section 37(3) (actionable duties), substitute—

“(3) A relevant person is an economic operator who is a national of, or is established in, the United Kingdom or Gibraltar.”.

(6) In section 41 (the Directive, Public Contracts Regulations and EU-regulated procurements)—

(a) for the heading substitute “Public Contracts Regulations and Higher Value Regulated Procurements”,

(b) omit subsections (1)(a) and (2)(a),

(c) in subsection (1)(c)(8) for “an “EU-regulated procurement”” substitute “a “higher value regulated procurement””.

(7) In section 42 (general interpretation)—

(a) for the meaning of “public contract” substitute “means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services”,

(b) for the meaning of “public works contract” substitute—

“means a public contract having as its object one of the following—

(a) the execution or the design and execution of works related to one of the activities within the meaning of schedule 2 of the Public Contracts Regulations,

(b) the execution or the design and execution of a work,

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work,

(except in a subsidised public works contract),”.

(c) at the end of subsection (1) insert—

““work” means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.”.

## PART 3

### AMENDMENT OF SECONDARY LEGISLATION

#### CHAPTER 1

#### THE PUBLIC CONTRACTS (SCOTLAND) REGULATIONS 2015

#### Amendments commenced on IP completion day

4.—(1) The Public Contracts (Scotland) Regulations 2015(9) are amended as follows.

(2) In regulation 2 (interpretation)—

(a) in paragraph (1)—

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(8) Section 41(1)(c) was amended by [S.S.I. 2015/446](#), regulation 1(2) and schedule 6, paragraph 2(4)(c).

(9) [S.S.I. 2015/446](#), amended by [S.S.I. 2016/47](#).

- (i) omit the definition of the “Commission”,
  - (ii) in the definition of “common technical specification”, after “standardisation” insert “as it has effect in EU law”,
  - (iii) for the meaning of “contracting entity” substitute—
    - “means a utility within the meaning of regulation 4(1) of the Utilities Contracts (Scotland) Regulations 2016<sup>(10)</sup>”
  - (iv) after the definition of “contracting entity” insert—
    - ““covered by regulation 3(2)”, in relation to an element, a part of a contract, or procurement, means that regulation 3(2)—
    - (a) applies to that element, part or procurement, or
    - (b) would do so if Part 2 applied,”
  - (v) omit the definition of “ESPD”,
  - (vi) in the definition of “GPA”, after “amended” insert “before IP completion day”,
  - (vii) in the definition of “innovation”, omit “the Europe 2020 strategy for smart,”,
  - (viii) after the definition of “public works contract” insert—
    - ““the Retained Treaties” means anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018<sup>(11)</sup> because of the effect which the Treaty on European Union or TFEU had immediately before IP completion day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section,”
  - (ix) after the definition of “selection criteria” insert—
    - ““SPD” means the Single Procurement Document referred to in regulation 60(1),”
  - (x) after the definition of “TFEU” insert—
    - ““the UK e-notification service” has the meaning given by regulation 52(5), and references (in whatever terms) to the submission of notices to that service are to be construed in accordance with regulation 52(6),”
  - (xi) omit the definition of “Utilities Directive”,
- (b) omit paragraphs (2) and (3).
- (3) For regulation 3(2), (subject matter and application of these regulations) substitute—
- “(2) This Part—
  - (a) does not oblige any contracting authority to supply information the disclosure of which it considers contrary to the essential interests of the security of the United Kingdom,
  - (b) does not preclude any contracting authority from taking such measures as it considers necessary for the protection of the essential interests of the security of the United Kingdom and which are connected with the production of or trade in arms, munitions and war material, provided that such measures do not adversely affect the conditions of competition regarding products which are not intended for specifically military purposes.

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<sup>(10)</sup> S.S.I. 2016/49 as relevantly amended by S.S.I. 2019/173.

<sup>(11)</sup> 2018 c.16 (“the 2018 Act”). Section 4 of the 2018 Act was amended by section 25 of the European Union (Withdrawal Agreement Act 2020 (c.1).

(3) The arms, munitions and war material to which paragraph (2)(b) applies are those included in the 1958 List.

(4) Any measures which, if they had been taken immediately before IP completion day, would have been covered by Article 346 of TFEU shall be regarded as measures covered by paragraph (2)(b).

(5) In this regulation, “the 1958 List” means the list of arms, munitions and war material adopted by the Council of the European Economic Community in its Decision 255/58 of 15 April 1958 as that list is to be treated for the purpose of Part 2 of the Public Contracts Regulations 2015(12).”.

(4) In regulation 4 (mixed procurement)—

(a) in paragraph (1), for “Article 346 of the TFEU” substitute “regulation 3(2)”,

(b) in paragraph (2)—

(i) for “Utilities Directive” substitute “Utilities Contracts (Scotland) Regulations 2016(13)”,

(ii) for “Art 5 and 6 of the Utilities Directive” substitute “regulations 5 and 6 of those Regulations”.

(5) In regulation 5 (thresholds)—

(a) in paragraph (1)—

(i) in sub-paragraph (a), for “the amount specified in Article 4(a) of the Directive” substitute “£4,733,252”,

(ii) in sub-paragraph (b), for “the amount specified in Article 4(b) of the Directive” substitute “£122,976”,

(iii) in sub-paragraph (c), for “the amount specified in Article 4(c) of the Directive” substitute “£189,330”,

(iv) in sub-paragraph (d), for “the amount specified in Article 4(d) of the Directive” substitute “£663,540”,

(b) in paragraph (3)(a)(i), for “80,000 euros” substitute “£70,778”,

(c) in paragraph (3)(a)(ii), for “1 million euros” substitute “£884,720”,

(d) omit paragraph (5).

(6) After regulation 5 insert—

#### **“Review and amendment of certain thresholds**

**5A.**—(1) Every two years the Scottish Ministers must review the thresholds specified in regulation 5(1)(a), (b) and (c) (“the reviewable thresholds”) to verify whether they correspond with the thresholds established for those purposes in the GPA.

(2) The Scottish Ministers must do so by calculating the sterling value of each of the reviewable thresholds on the basis of the average daily value of sterling in terms of the special drawing rights mentioned in the GPA over a period of 24 months ending with 31 August.

(3) The Scottish Ministers must make that calculation using the applicable conversion rates in the monthly International Financial Statistics published from time to time by the International Monetary Fund.

(4) If the sterling value of a reviewable threshold so calculated differs from the sum for the time being set by regulation 5(1) in respect of that threshold, the Scottish Ministers must

(12) S.I. 2015/102, amended by S.I.s 2016/275 and 696; there are other amendments that are not relevant to this instrument.

(13) S.S.I. 2016/49.

make regulations amending regulation 5(1) so as to substitute for that sum the sum equal to that value.

- (5) Such regulations—
- (a) must be made and laid before the Scottish Parliament before 1 November following the end of the 24 month period covered by the review, and
  - (b) must provide for the substitution to come into force on the following 1 January.
- (6) The first review under this regulation must relate to the 24 month period ending with 31 August 2021.”.
- (7) In regulation 7 (exclusions: utilities)—
- (a) in paragraph (a) for “Articles 8 to 14 of the Utilities Directive” substitute “regulations 8 to 14 of the Utilities Contracts (Scotland) Regulations 2016”,
  - (b) in paragraph (b)—
    - (i) for “Utilities Directive” substitute “Utilities Contracts (Scotland) Regulations 2016”,
    - (ii) for sub-paragraph (i) substitute—
      - “(i) under regulations 17 (exclusion: contracts awarded for the purpose of resale or lease to third parties), 22 (exclusion: contracts awarded by certain utilities for the purchase of water and for the supply of energy or of fuels for the production of energy) or 32 (activities directly exposed to competition), or”,
      - (iii) in sub-paragraph (ii), for “Article” substitute “regulation”,
      - (iv) for “that Directive” substitute “those Regulations”.
  - (c) in paragraph (c)—
    - (i) for “paragraph (b) of Article 13(2) of the Utilities Directive as amended from time to time” substitute “regulation 13(2) of the Utilities Contracts (Scotland) Regulations 2016”,
    - (ii) in sub-paragraph (ii) for “paragraph (d) of Article 21 of the Utilities Directive” substitute “paragraph (1)(e) of regulation 20 of the Utilities Contracts (Scotland) Regulations 2016”.
- (8) In regulation 8 (exclusions: concessions)—
- (a) in paragraph (1)—
    - (i) for “works or services concessions” substitute “a works concession contract or a services concession contract”,
    - (ii) for sub-paragraph (a) substitute—
      - “(a) is subject to the application of the Concession Contracts (Scotland) Regulations 2016(14),”,
      - (iii) in sub-paragraph (b) for “that Directive” substitute “those Regulations”,
  - (b) for paragraph (2) substitute—
    - “(2) In this regulation “works concession contract” and “services concession contract” have the meaning given in regulation 3 (meaning of “concession contract”) of the Concession Contracts (Scotland) Regulations 2016.”.
- (9) In regulation 10(1)(a) (exclusions: public contracts awarded, and design contests organised, pursuant to international rules)—
- (a) before “Treaties” insert “Retained”,

- (b) for “third” substitute “other”.
- (10) In regulation 11(1)(e) (exclusions: specific service contracts)—
- (a) in sub-paragraph (i)—
- (i) omit “within the meaning of Article 1 of the Lawyers’ Services Directive”,
- (ii) in sub-paragraph (aa), for “a member State, a third” substitute “the United Kingdom, another”,
- (iii) in sub-paragraph (bb), for “a member State or a third” substitute “the United Kingdom or another”,
- (b) in sub-paragraph (ii), in the wording before (aa), omit “within the meaning of Article 1 of the Lawyers’ Services Directive”,
- (c) in sub-paragraph (iv) omit “in the member State concerned”,
- (d) in sub-paragraph (v) omit “, in the member State concerned”,
- (e) in paragraph (2), for sub-paragraph (c) substitute—
- “(c) “lawyer” means a person practising as an advocate, barrister or solicitor in any part of the United Kingdom or in Gibraltar;”.
- (11) In regulation 12 (exclusions: service contracts awarded on the basis of an exclusive right), for “the TFEU” substitute “anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018 because of the effect which the TFEU had immediately before IP completion day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section”.
- (12) In regulation 13 (exclusions: public contracts between entities within the public sector), in paragraphs (2)(c) and (5)(c), before “Treaties” insert “Retained”.
- (13) In regulation 14(1) (specific situations: contracts subsidised by a contracting authority)—
- (a) in sub-paragraph (a), for “Article 13(a) of the Directive” substitute “regulation 5(1)(a)”,
- (b) in sub-paragraph (b), for “Article 13(b) of the Directive” substitute “regulation 5(1)(b)”.
- (14) In regulation 16(2)(a) (specific situations: defence and security), omit “or another member State”.
- (15) In regulation 17 (mixed procurement involving defence or security aspects), in paragraphs (1) and (5)(a), for “Article 346 of the TFEU” substitute “regulation 3(2)”.
- (16) In regulation 18(1) (public contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules)—
- (a) in sub-paragraph (a)—
- (i) before “Treaties” insert “Retained”,
- (ii) for “third” substitute “other”,
- (b) in sub-paragraph (b), for “a third” substitute “another”.
- (17) In regulation 19 (principles of procurement)—
- (a) in paragraph (4) after “agreements or” insert, “, subject to paragraphs (4A) and (4B),”,
- (b) after paragraph (4), insert—
- “(4A) Where—
- (a) the United Kingdom has ratified an international agreement establishing obligations in any of the fields mentioned in paragraph (4), and
- (b) the agreement is not already referred to,

the Scottish Ministers may make regulations providing that paragraph (4) is to have effect as if the agreement were referred to.

(4B) Where the United Kingdom has ceased to ratify an international agreement that is already referred to, the Scottish Ministers may make regulations providing that paragraph (4) is to have effect as if the agreement were not referred to.

(4C) In paragraphs (4A) and (4B)—

- (a) “referred to” means referred to in Annex X mentioned in paragraph (4), and
- (b) where paragraph (4) already has effect as if an agreement were referred to, “already referred to” includes that agreement.”.

(18) In regulation 20 (economic operators), omit paragraph (1).

(19) In regulation 21(3) (reserved contracts), for “Article 20 of the Directive” substitute “this regulation”.

(20) In regulation 23 (rules applicable to communication)—

(a) in paragraph (15)—

- (i) for “in the Official Journal” substitute “on the UK e-notification service”,
- (ii) for “sent” substitute “submitted”,
- (iii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,

(b) in paragraph (18)(d) for the words from “accept” to the end substitute “act in accordance with Article 27 of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market<sup>(15)</sup> (and for this purpose the submission of the tender or request is to be treated as the use of an online service to which those Regulations apply)”.

(c) in paragraph (23), for the words from “procurement” to the end substitute “procurement within the scope of this Part”,

(d) in paragraph (24)—

- (i) in the words before sub-paragraph (a), for the words from “in accordance” to “time to time,” substitute “in a format other than those referred to in Article 1 of Commission Implementing Decision (EU) 2015/1506<sup>(16)</sup> laying down specifications relating to formats of advanced electronic signatures and advanced seals to be recognised by public sector bodies”,
- (ii) in sub-paragraph (b), for the words from “allow” to the end substitute “comply with the requirements of Article 2(1)(b) of that Decision (or would simply comply with those requirements if the person seeking to validate the signature were a public sector body for the purpose of that Decision)”.

(21) After regulation 23 insert—

**“Powers to amend regulation**

**23A.—**(1) The Scottish Ministers may make regulations amending paragraph (3) of regulation 23 by—

- (a) omitting any of the situations described in that paragraph where the Scottish Ministers consider that technological developments render it inappropriate for that

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(15) EUR 2014/910 as amended by S.I. 2019/89.

(16) EUDN 2015/1506 as amended by S.I. 2019/89.



situation to continue to be an exception from the obligation to require electronic means of communication, or

- (b) inserting a description of a new situation where the Scottish Ministers consider that it should become a new exception because of technological developments.

(2) Where the Scottish Ministers consider that technological developments render it inappropriate for there to continue to be any exceptions from the obligation to require electronic means of communication, the Scottish Ministers may make regulations omitting paragraph (3) from regulation 23.

(3) Where regulations have been made under paragraph (2) and the Scottish Ministers consider that a new exception should be provided for because of technological developments, the Scottish Ministers may make regulations re-inserting paragraph (3) into regulation 23 in terms which give effect to that new exception (and the powers conferred by paragraphs (1) and (2) of this regulation may subsequently be exercised in relation to paragraph (3) as re-inserted).

(4) The Scottish Ministers may make regulations amending the technical details and characteristics set out in regulation 23(17) if the Scottish Ministers consider it appropriate to do so to take account of technical developments.”.

(22) In regulation 26 (conditions relating to the GPA and other international agreements)—

- (a) in the heading for “relation” substitute “relating”,
- (b) in the body of the regulation, the text of the existing regulation becomes paragraph (1) and is amended as follows—
  - (i) for “is bound” substitute “was, immediately before IP completion day, bound”,
  - (ii) for “EU” where it last appears substitute “United Kingdom”,
- (c) after that paragraph (1) insert—

“(2) For the purposes of paragraph (1)—

  - (a) each country that was a member State immediately before IP completion day is deemed to be a signatory to the GPA, and
  - (b) the EU’s Appendix 1 to the GPA has effect as if each such country were referred to in the same way that Iceland is referred to in the following places in that Appendix—
    - (i) paragraph 2(a) of Annex 1,
    - (ii) Annex 6.”.

(23) In regulation 28 (open procedure)—

- (a) in paragraph (3), for “sent” substitute “submitted”,
- (b) in paragraph (4)—
  - (i) in sub-paragraph (a), for “for the contract notice in section I of part B of Annex V to the Directive” substitute “by regulation 49(2)”,
  - (ii) in sub-paragraph (b), for “sent” (in both places) substitute “submitted”,
- (c) in paragraph (5), for “sent” substitute “submitted”.

(24) In regulation 29 (restricted procedure)—

- (a) in paragraph (3)(a), for “sent” substitute “submitted”,
- (b) in paragraph (7)—
  - (i) in sub-paragraph (a), for “in section I of part B of Annex V to the Directive” substitute “by regulation 49(2)”,
  - (ii) in sub-paragraph (b), for “sent” (in both places) substitute “submitted”,

- (c) in paragraph (11)(a), for “sent” substitute “submitted”.
- (25) In regulation 30 (competitive procedure with negotiation)—
  - (a) in paragraph (5)(a), for “sent” substitute “submitted”,
  - (b) in paragraph (7)—
    - (i) in sub-paragraph (a), for “in section I of Part B of Annex V” substitute “by regulation 49(2)”,
    - (ii) in sub-paragraph (b), for “sent” (in both places) substitute “submitted”,
  - (c) in paragraph (11)(a), for “sent” substitute “submitted”.
- (26) In regulation 31(3) (Competitive Dialogue), for “sent” substitute “submitted”.
- (27) In regulation 32(11) (Innovation Partnership), for “sent” substitute “submitted”.
- (28) In regulation 33(1)(a) (use of the negotiated procedure without prior publication), for “to the Commission where it so requests” substitute “to the Scottish Ministers if they so request”.
- (29) In regulation 35 (dynamic purchasing systems)—
  - (a) in paragraph (8)(a), for “sent” substitute “submitted”,
  - (b) in paragraph (24), for “ESPD” substitute “SPD”,
  - (c) in paragraph (25)—
    - (i) omit “European”,
    - (ii) for “ESPD” substitute “SPD”,
  - (d) for paragraph (27) substitute—
 

“(27) Where the period of validity is changed without terminating the dynamic purchasing system, the contracting authority shall submit for publication on the UK e-notification service a notice of the kind used initially for the call for competition for the dynamic purchasing system.

(27A) Where a dynamic purchasing system is terminated before the end of the period of validity that had most recently been indicated under paragraph (26) or (27), the contracting authority shall submit for publication on the UK e-notification service a contract award notice under regulation 51 (contract award notices).”
- (30) Omit regulation 40 (procurement involving contracting authorities from different member States).
- (31) In regulation 43 (technical specifications)—
  - (a) in paragraph (8), for “adopted by a legal act of the EU” substitute “imposed by retained EU law”,
  - (b) in paragraph (10), in the words before sub-paragraph (a), after “compatible with” insert “retained”,
- (32) In regulation 49 (prior information notices)—
  - (a) in paragraph (2), after “Directive” insert—
 

“, but as if—

    - (a) in paragraph 2, “the second and third sub-paragraph of Article 53(1)” were a reference to regulation 54(3) and (4) of these Regulations, and
    - (b) in paragraph 9, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”,
  - (b) in paragraph (3)(a)—

- (i) for “send” substitute “submit”,
  - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (c) in paragraph (3)(b) for “at national level” substitute “otherwise than on the UK e-notification service”,
  - (d) in paragraph (4)—
    - (i) for “send” substitute “submit”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (e) in paragraph (5) after “Directive” insert “, but as if, in paragraph 6, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”,
  - (f) in paragraph (6)—
    - (i) in sub-paragraph (c)—
      - (aa) for “set out in section 1 of Part B of Annex V to the Directive” substitute “required by paragraph (2)”,
      - (bb) for “that Part” substitute “Part B of Annex V to the Directive, but as if paragraph 12 of that Part (financing by EU funds) were omitted”,
    - (ii) in sub-paragraph (d)—
      - (aa) for “sent” where it first occurs substitute “submitted”,
      - (bb) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (g) in paragraph (7)—
    - (i) for “sending” substitute “submitting”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
    - (iii) for “at national level” substitute “otherwise than on the UK e-notification service”.
- (33) For regulation 50 (contract notices) substitute—

#### “Contract notices

##### 50. Contract notices must—

- (a) contain the information set out in part C of Annex V to the Directive, but as if—
  - (i) in paragraph 2, “the second and third sub-paragraphs of Article 53(1)” were a reference to regulation 54(3) and (4) of these Regulations,
  - (ii) paragraph 24 (financing by EU funds) were omitted,
  - (iii) in paragraph 26, “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Public Contracts (Scotland) Regulations 2015)”, and
  - (iv) in paragraph 28, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations, and
- (b) be submitted for publication in accordance with regulation 52 (publication on the UK e-notification service).”.

- (34) In regulation 51 (contract award notices)—
- (a) in paragraph (1)—
    - (i) for “send” substitute “submit”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (b) for paragraph (2) substitute—
    - “(2) Such notices must—
      - (a) contain the information set out in part D of Annex V to the Directive, but as if—
        - (i) in paragraph 9, “Article 67” were a reference to regulation 67 (contract award criteria) of these Regulations,
        - (ii) in paragraph 11(b), the words “Member State or from a third” were omitted,
        - (iii) paragraph 15 (financing by EU funds) were omitted,
        - (iv) in paragraph 17, “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Public Contracts (Scotland) Regulations 2015)”, and
        - (v) in paragraph 18, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations, and
      - (b) be submitted for publication in accordance with regulation 52 (publication on the UK e-notification service),”,
  - (c) in paragraphs (5)(a) and (b), for “send” substitute “submit”.
  - (d) in paragraph (5)(a) for ‘form and manner of sending notices for publication at EU level’ substitute ‘publication on the UK e-notification service’.
- (35) In regulation 52 (form and manner of sending notices for publication at EU level)—
- (a) for the heading, substitute “Publication on the UK e-notification service”,
  - (b) in paragraph (1)—
    - (i) for “sent” (in both places) substitute “submitted”,
    - (ii) for “EU Publications Office” substitute “UK e-notification service”,
    - (iii) omit sub-paragraph (b) and the immediately preceding “; and”,
  - (c) in paragraph (2), for “sent to the EU Publications Office” substitute “submitted to the UK e-notification service”,
  - (d) in paragraph (3)—
    - (i) for “EU Publications Office” substitute “UK e-notification service”,
    - (ii) omit “the receipt of the notice and of”,
    - (iii) for “sent” substitute “submitted”,
  - (e) in paragraph (4)—
    - (i) for “send” substitute “submit”,
    - (ii) for “EU Publications Office” substitute “UK e-notification service”,
    - (iii) omit the words from “, provided” to the end,
  - (f) after paragraph (4) insert—

“(5) In these Regulations, “the UK e-notification service” means a single web-based portal which is provided, for purposes which include the purposes of this Part, by or on behalf of the Cabinet Office.

(6) For the purposes of these Regulations, a notice of any description is submitted to the UK e-notification service if the information comprising the notice is entered in the portal in such form or manner as the portal may elicit it and in compliance with any specific instructions that are given within the portal about how the information, or any particular element of it, is to be entered.”.

(36) In regulation 53 (publication at national level)—

- (a) in the heading, for “at national level” substitute “otherwise than on the UK e-notification service”,
- (b) in paragraph (1), for “by the EU Publications Office” substitute “on the UK e-notification service”,
- (c) in paragraph (3), for the words from “at national level” to “Office” substitute “otherwise than on the UK e-notification service before they are published on that service”,
- (d) in paragraph (4)—
  - (i) for “at national level” substitute “otherwise than on the UK e-notification service”,
  - (ii) for the words from “by the EU” to “Directive” substitute “on that service within 48 hours after the notice was submitted to that service”,
- (e) in paragraph (5)—
  - (i) for “at national level” substitute “otherwise than on the UK e-notification service”,
  - (ii) for “sent to the EU Publications Office” substitute “submitted to that service”,
  - (iii) for “sending of the notice to the European Publications Office” substitute “submission of the notice to that service”,
- (f) in paragraph (6)—
  - (i) in sub-paragraph (a), for “sends to the EU Publications Office” substitute “submits to the UK e-notification service”,
  - (ii) in sub-paragraph (b), for “sending” substitute “submission”.

(37) In regulation 54 (electronic availability of procurement documents), in paragraph (1), for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”.

(38) In regulation 55(5)(d) (invitations to candidates)—

- (a) omit “European”,
- (b) for “ESPD” substitute “SPD”.

(39) In regulation 57 (general principles)—

- (a) in paragraph (2)—
  - (i) omit “EU law”,
  - (ii) after “agreements or” insert “, subject to paragraphs (2A) and (2B),”,
- (b) after paragraph (2) insert—
  - “(2A) Where—
    - (a) the United Kingdom has ratified an international agreement establishing obligations in any of the fields mentioned in paragraph (2), and
    - (b) the agreement is not already listed,

the Scottish Ministers may make regulations providing that paragraph (2) is to have effect as if the agreement were listed.

(2B) Where the United Kingdom has ceased to ratify an international agreement that is already listed, the Scottish Ministers may make regulations providing that paragraph (2) is to have effect as if the agreement were not listed.

(2C) In paragraphs (2A) and (2B)—

- (a) “listed” means listed as described in paragraph (2), and
- (b) where paragraph (2) already has effect as if an agreement were listed, “already listed” includes that agreement.”.

(40) In regulation 58 (exclusion grounds)—

- (a) in paragraph (1)—
  - (i) omit sub-paragraph (e),
  - (ii) in sub-paragraph (k) for “Article 57(1)” substitute “Article 57(1)(a), (b), (d), (e) or (f)”,
- (b) in paragraph (8)(i)—
  - (i) omit “European”,
  - (ii) for “ESPD” substitute “SPD”.

(41) In regulation 59 (selection criteria), omit paragraph (5).

(42) In regulation 60 (European Single Procurement Document: use, content and form of the ESPD)—

- (a) in the heading—
  - (i) omit “European”,
  - (ii) for “ESPD” substitute “SPD”,
- (b) in each of paragraphs (1) to (7), for “ESPD” substitute “SPD”,
- (c) in paragraph (11)(a), for “any member State” substitute “the United Kingdom”.

(43) In regulation 61 (means of proof)—

- (a) in paragraph (4)(a) and (b), omit “member State or”,
- (b) in paragraph (5) omit “member State or” and “member States or” where they occur.

(44) Omit regulation 62 (recourse to e-Certis).

(45) In regulation 63 (quality assurance standards and environmental management standards)—

- (a) omit paragraph (2),
- (b) in paragraph (4)—
  - (i) omit sub-paragraphs (a) and (b),
  - (ii) in sub-paragraph (c), omit “other”,
  - (iii) omit the words after sub-paragraph (c).

(46) Omit regulation 65 (recognition of official lists of approved economic operators and certification by certification bodies).

(47) In regulation 68 (life-cycle costing)—

- (a) in paragraph (3)(c)—
  - (i) omit ‘third’,
  - (ii) for “is bound” substitute “was, immediately before IP completion day, bound”,

- (b) omit paragraphs (5) and (6).
- (48) In regulation 69 (abnormally low tenders)—
  - (a) in paragraph (2), omit sub-paragraph (f),
  - (b) omit paragraphs (6) and (7).
- (49) In regulation 71 (subcontracting)—
  - (a) in paragraph (7), for “ESPDs” substitute “SPDs”,
  - (b) in paragraph (9), for “regulations 60” to “e-Certis)” substitute “regulations 60 (single procurement document: use, content and form of the SPD) and 61 (means of proof)”.
- (50) In regulation 72 (modification of contracts during their term)—
  - (a) in paragraph (3)—
    - (i) for “send” substitute “submit”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (b) in paragraph (4), after “Directive” insert—
    - “, but as if—
      - (a) paragraph 9 (financing by EU funds) were omitted,
      - (b) in paragraph 11, “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Public Contracts (Scotland) Regulations 2015)”, and
      - (c) in paragraph 12, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”.
- (51) In regulation 73(1) (termination of contracts)—
  - (a) after sub-paragraph (a), insert “or”,
  - (b) after sub-paragraph (b), omit “or”,
  - (c) omit sub-paragraph (c).
- (52) In regulation 75 (publication of notices)—
  - (a) in paragraph (4), for “send” substitute “submit”,
  - (b) in paragraph (5)—
    - (i) for “send” substitute “submit”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”.
- (53) In regulation 78 (notices)—
  - (a) in paragraph (1) after “Directive” insert—
    - “, but as if—
      - (a) in paragraph 2, “the second and third sub-paragraphs of Article 53(1)” were a reference to regulation 54(3) and (4) of these Regulations,
      - (b) in paragraph 16, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”,
  - (b) in paragraph (3)—
    - (i) for “send” substitute “submit”,

- (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
- (c) in paragraph (4)—
  - (i) in sub-paragraph (a)—
    - (aa) for “send” substitute “submit”,
    - (bb) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (ii) in sub-paragraph (b), for “of dispatch of such notice” substitute “on which the notice was submitted to the UK e-notification service”.
- (d) in paragraph (5), after “Directive” insert—
  - “, but as if—
    - (a) paragraph 12 (financing by EU funds) were omitted,
    - (b) in paragraph 13, “in the *Official Journal of the European Union* “ read “on the UK e-notification service (within the meaning of the Public Contracts (Scotland) Regulations 2015”, and
    - (c) in paragraph 14, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”.
- (54) In regulation 79 (rules on the organisation of design contests and the selection of participants), omit paragraph (2).
- (55) In regulation 82 (retention of contract copies)—
  - (a) in paragraph (1)—
    - (i) in sub-paragraph (a), for “1 000 000 EUR” substitute “£884,720”,
    - (ii) in sub-paragraph (b), for “10 000 000 EUR” substitute “£8,847,200”,
  - (b) in paragraph (2), for “applicable EU or national rules on access to documents and data protection” substitute “rules on access to documents and data protection applicable in the relevant part of the United Kingdom”.
- (56) In regulation 83 (reporting and documentation requirements)—
  - (a) omit paragraph (4),
  - (b) in paragraph (5), omit the words from “or to such” to the end,
  - (c) omit paragraph (6).
- (57) After regulation 83 insert—

#### “CHAPTER 4A

#### REGULATIONS UNDER THIS PART

##### **General provisions about regulations under this Part**

**83A.**—(1) Regulations under this Part are to be made by Scottish statutory instrument subject to the negative procedure.

(2) Regulations under this Part may make supplementary, incidental, transitional or saving provision.”.

- (58) In regulation 87 (duty owed to economic operators)—
  - (a) in paragraph (1)—



- (i) for “enforceable EU obligation” substitute “retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018”,
  - (ii) for “an EEA state” substitute “the United Kingdom or Gibraltar”,
- (b) for paragraph (2) substitute—
  - “(2) The duty owed in accordance with paragraph (1) is a duty owed also to an economic operator from a country other than the United Kingdom, but only where Condition 1, Condition 2 or Condition 3 applies to the procurement concerned.”,
- (c) for paragraph (3) substitute—
  - “(3) Condition 1 is that—
    - (a) at the relevant time the economic operator is from a GPA state,
    - (b) the procurement may result in the award of a contract of any description, and
    - (c) immediately before IP completion day that GPA state had agreed with the EU that the GPA shall apply to a contract of that description.
  - (3A) Condition 2 is that—
    - (a) at the relevant time the economic operator is from a country which, immediately before IP completion day, was a member State other than the United Kingdom,
    - (b) the procurement may result in the award of a contract of any description, and
    - (c) immediately before IP completion day the EU had agreed with a GPA state that the GPA shall apply to a contract of that description.”,
- (d) in paragraph (4)—
  - (i) for “For the purpose of paragraph 2(b), a relevant bilateral agreement applies if” substitute “Condition 3 is that”,
  - (ii) in sub-paragraph (a)—
    - (aa) for “there is” substitute “immediately before IP completion day there was”,
    - (bb) for “is bound” substitute “was bound”,
  - (iii) after paragraph (4) insert—
    - “(4A) Paragraph (4)(b) is to be applied as if the United Kingdom were a member State.”,
- (e) in paragraph (5)—
  - (i) in the definition of “GPA state”, for “, other than an EEA state, which at the relevant time is” substitute “which immediately before IP completion day was”,
  - (ii) in the definition of “relevant time”—
    - (aa) for “sent” substitute “submitted”,
    - (bb) for “EU Publications Office” substitute “UK e-notification service”.
- (59) In regulation 88(5)(a) (enforcement of duties through the courts)—
  - (a) for “sent” substitute “submitted”,
  - (b) for “Official Journal” in each place where it occurs substitute “UK e-notification service”,
  - (c) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (d) for “publication of the notice in the Official Journal” substitute “ submission to the UK e-notification service”.
- (60) In regulation 91 (ineffectiveness orders)—

- (a) in paragraph (6)—
    - (i) for “sending” substitute “submitting”,
    - (ii) for “Official Journal” substitute “UK e-notification service”,
  - (b) for paragraph (7)(a) substitute—
    - “(a) the contracting authority submitted to the UK e-notification service for publication a voluntary ex ante transparency notice expressing its intention to enter into the contract or to conclude the framework agreement and containing—
      - (i) the name and contact details of the contracting authority,
      - (ii) a description of the object of the contract or framework agreement,
      - (iii) a justification of the decision of the contracting authority to award the contract or conclude the framework agreement without prior publication of a contract notice,
      - (iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement, and
      - (v) any other information which the contracting authority considered useful, and”,
  - (c) in paragraph (7)(b) for “in the Official Journal” substitute “on the UK e-notification service”.
- (61) In schedule 2 (activities constituting works), after “[Council Regulation \(EEC\) No 3037/90](#) on the statistical classification of economic activities in the European Community” insert “as that Regulation had effect in EU law immediately before IP completion day”.
- (62) Omit schedule 5 (professional and trade registers etc.).

### **Amendments commenced 12 months after IP completion day**

- 5.—**(1) The Public Contracts (Scotland) Regulations 2015 (as amended by regulation 4) are further amended as follows.
- (2) Omit regulation 26 (conditions relating to the GPA and other international agreements).
  - (3) In regulation 68(3)(c) (life-cycle costing), omit the words from “, including” to the end.
  - (4) Omit regulation 87(2) to (5) (duty owed to economic operators).

## CHAPTER 2

### THE UTILITIES CONTRACTS (SCOTLAND) REGULATIONS 2016

### **Amendments commenced on IP completion day**

- 6.—**(1) The Utilities Contracts (Scotland) Regulations 2016<sup>(17)</sup> are amended as follows.
- (2) In regulation 2 (interpretation)—
    - (a) in paragraph (1)—
      - (i) in the definition of “commenced”—
        - (aa) in sub-paragraphs (a) and (b) for “sent to the Official Journal” substitute, “submitted to the UK e-notification service”,
        - (bb) in sub-paragraph (e) for “sent a notice to the Official Journal” substitute “submitted a notice to the UK e-notification service”,

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(17) [S.S.I. 2016/49](#) as last relevantly amended by [S.S.I. 2019/173](#).

- (ii) omit the definition of “the Commission”,
  - (iii) in the definition of “common technical specification”, after “standardisation” insert “as it has effect in EU law”,
  - (iv) after the definition of “contracting authority” insert—
    - “covered by regulation 3(2)”, in relation to an activity, an element, a part of a contract or a procurement, means that regulation 3(2)—
    - (a) applies to that activity, element, part or procurement, or
    - (b) would do so if these Regulations applied,”
  - (v) omit the definition of “ESPD” and in the appropriate alphabetical order insert—
    - ““SPD” means the standard procurement document referred to in regulation 60 of the Public Contracts (Scotland) Regulations,”
  - (vi) omit the definition of “EU Publications Office”,
  - (vii) in the definition of “GPA”, after “amended” insert “before IP completion day”,
  - (viii) in the definition of “innovation”, omit “the Europe 2020 strategy for smart,”,
  - (ix) omit the definition of “Official Journal”,
  - (x) after the definition of “Public Contracts (Scotland) Regulations” insert—
    - ““the Retained Treaties” means anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018(18) because of the effect which the Treaty on European Union or TFEU had immediately before IP completion day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section,”
  - (xi) after the definition of “TFEU” insert—
    - ““the UK e-notification service” has the meaning mentioned in regulation 69(5), and references (in whatever terms) to the submission of notices to that service are to be construed in accordance with the provisions applied (and adapted) by regulation 69(5),”
- (b) omit paragraphs (2) and (3).
- (3) In regulation 3 (subject-matter and application of these regulations)—
- (a) for paragraph (2) substitute—
    - “(2) Parts 1 to 4—
    - (a) do not oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security,
    - (b) do not preclude the United Kingdom from taking such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material, provided that such measures do not adversely affect the conditions of competition regarding products which are not intended for specifically military purposes.
- (2A) The arms, munitions and war material to which paragraph (2)(b) applies are those included in the 1958 List.

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(18) 2018 c.16 (“the 2018 Act”). Section 4 of the 2018 Act was amended by section 25 of the European Union (Withdrawal Agreement Act 2020 (c.1).

(2B) Any measures which, if they had been taken immediately before IP completion day, would have been covered by Article 346 of the TFEU shall be regarded as measures covered by paragraph (2)(b).

(2C) In this regulation, “the 1958 List” means the list of arms, munitions and war material adopted by the Council of the European Economic Community in its Decision 255/58 of 15 April 1958 as that list is to be treated for the purpose of Parts 1 to 4 of the Utilities Contracts Regulations 2016(19).”.

(4) In regulation 5(1) (mixed procurement covering the same activity), for “Article 346 of the TFEU” substitute “regulation 3(2)”.

(5) In regulation 6(1) (procurement covering several activities), for “Article 346 of the TFEU” substitute “regulation 3(2)”.

(6) In regulation 15 (thresholds)—

(a) in paragraph (1)(a), for “the amount specified in Article 15(a) of the Utilities Contracts Directive” substitute “£378,660”,

(b) in paragraph (1)(b), for “the amount specified in Article 15(b) of the Utilities Contracts Directive” substitute “£4,733,252”,

(c) in paragraph (1)(c), for “the amount specified in Article 15(c) of the Utilities Contracts Directive” substitute “£884,720”,

(d) in paragraph (2)(a)—

(i) in sub-paragraph (i), for “80,000 Euros” substitute “£70,778”,

(ii) in sub-paragraph (ii), for “1 million Euros” substitute “£884,720”.

(e) omit paragraph (3).

(7) After regulation 15 insert—

**“Review and amendment of certain thresholds**

**15A.**—(1) Every two years the Scottish Ministers must review the thresholds specified in regulation 15(1)(a) and (b) (“the reviewable thresholds”) to verify whether they correspond with the thresholds established for those purposes in the GPA.

(2) The Scottish Ministers must do so by calculating the sterling value of each of the reviewable thresholds on the basis of the average daily value of sterling in terms of the special drawing rights mentioned in the GPA over a period of 24 months ending with 31 August.

(3) The Scottish Ministers must make that calculation using the applicable conversion rates in the monthly International Financial Statistics published from time to time by the International Monetary Fund.

(4) If the sterling value of a reviewable threshold so calculated differs from the sum for the time being set by regulation 15(1) in respect of that threshold, the Scottish Ministers must make regulations amending regulation 15(1) so as to substitute for that sum the sum equal to that value.

(5) Such regulations—

(a) must be made and laid before the Scottish Parliament before 1 November following the end of the 24 month period covered by the review, and

(b) must provide for the substitution to come into force on the following 1 January.

- (6) The first review under this regulation must relate to the 24 month period ending with 31 August 2021.”
- (8) In regulation 17 (exclusion: contracts awarded for the purpose of resale or lease to third parties), omit paragraph (2).
- (9) In regulation 18 (exclusion: contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity in a third country)—
- (a) in the heading, for “in a third country” substitute “outside the United Kingdom”,
  - (b) in paragraph (1)(b)—
    - (i) for “in a third country” substitute “outside the United Kingdom”,
    - (ii) for “EU” substitute “United Kingdom”,
  - (c) omit paragraph (2).
- (10) In regulation 19(1)(a) (exclusion: contracts awarded and design contests organised pursuant to international rules)—
- (a) before “Treaties” insert “Retained”,
  - (b) for “third” substitute “other”.
- (11) In regulation 20 (exclusion: specific exclusions for service contracts)—
- (a) in paragraph (1)(d)—
    - (i) in sub-paragraph (i)—
      - (aa) in the words before (aa), omit the words from “within” to “Lawyers’ Services Directive”,
      - (bb) in sub-paragraph (aa), for “a member State, a third” substitute “the United Kingdom, another”,
      - (cc) in sub-paragraph (bb), for “a member State or a third” substitute “the United Kingdom or another”,
    - (ii) in sub-paragraph (ii) before (aa), omit the words from “within” to “Lawyers’ Services Directive”,
    - (iii) in sub-paragraph (iv) omit “in the member State concerned”,
    - (iv) in sub-paragraph (v), omit “, in the member State concerned”,
  - (b) in paragraph (2), for the definition in sub-paragraph (b) substitute ““lawyer” means a person practising as an advocate, barrister or solicitor in any part of the United Kingdom or in Gibraltar.”.
- (12) In regulation 21 (exclusion: service contracts awarded on the basis of an exclusive right), for “the TFEU” substitute “anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018 because of the effect which the TFEU had immediately before IP completion day in giving rise to any of the powers, rights etc. mentioned in that section”.
- (13) In regulation 23(2)(a) (defence and security), omit “or another member State”.
- (14) In regulation 24 (mixed procurement covering the same activity and involving defence and security aspects), in paragraphs (1) and (5)(a), for “Article 346 of the TFEU” substitute “regulation 3(2)”.
- (15) In regulation 25 (procurement covering several activities and involving defence or security aspects), in paragraphs (1) and (5)(a), for “Article 346 of the TFEU” substitute “regulation 3(2)”.
- (16) In regulation 26(1) (contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules)—
- (a) in sub-paragraph (a)—

- (i) before “Treaties” insert “Retained”,
  - (ii) for “third” substitute “other”,
  - (b) in sub-paragraph (b), for “a third” substitute “another”.
- (17) In regulation 27 (exclusion: contracts between contracting authorities), in paragraphs (2)(c) and (5)(c), before “Treaties” insert “Retained”.
- (18) In regulation 28(5) (exclusions: contracts awarded to an affiliated undertaking)—
- (a) for sub-paragraph (a), substitute “any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of Part 15 of the Companies Act 2006<sup>(20)</sup>”,
  - (b) in sub-paragraph (b), in the words before paragraph (i), for “Directive” substitute “Part”.
- (19) Omit regulation 30 (notification of information).
- (20) In regulation 32(2) (activities directly exposed to competition), omit sub-paragraph (b) and the preceding “or”.
- (21) Omit regulation 33 (procedure for establishing whether regulation 32(2)(b) is applicable).
- (22) In regulation 34(4) (principles of procurement), omit from “or international law measures” to the end.
- (23) In regulation 35 (economic operators) omit paragraph (1).
- (24) In regulation 36(2) (reserved contracts), for “Article 38 of the Utilities Contracts Directive” substitute “this regulation”.
- (25) In regulation 38 (rules applicable to communication)—
- (a) in paragraph (15)—
    - (i) for “in the Official Journal” substitute “on the UK e-notification service”,
    - (ii) for “sent” substitute “submitted”,
    - (iii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (b) in paragraph (18)(d), from “accept” to the end substitute “act in accordance with Article 27 of Regulation (EU) No 910/2014<sup>(21)</sup> (and for this purpose the submission of the tender or request is to be treated as the use of an online service to which that Regulation applies)”,
  - (c) in paragraph (23), after sub-paragraph (b), from “the Utilities” to the end substitute “these Regulations”,
  - (d) in paragraph (24)—
    - (i) before sub-paragraph (a), from “in accordance” to “time to time” substitute “in a format other than those referred to in Article 1 of Commission Implementing Decision (EU) 2015/1506<sup>(22)</sup> laying down specification relating to formats of advanced electronic signatures and advanced seals to be recognised by public sector bodies”,
    - (ii) in sub-paragraph (b), from “allow” to the end substitute “comply with the requirements of Article 2(1)(b) of that Decision (or would comply with those requirements if the person seeking to validate the signature were a public sector body for the purpose of that Decision)”,
  - (e) in paragraph (25), omit the definition of “Electronic Signature Commission Decision”.

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<sup>(20)</sup> 2006 c.46.

<sup>(21)</sup> EUR 2014/910 as amended by S.I. 2019/89.

<sup>(22)</sup> EUDN 2015/1506 as amended by S.I. 2019/89.

(26) After regulation 38 insert—

**“Powers to amend regulation 38**

**38A.**—(1) The Scottish Ministers may make regulations amending paragraph (3) of regulation 38 by—

- (a) omitting any of the situations described in that paragraph where the Scottish Ministers consider that technological developments render it inappropriate for that situation to continue to be an exception from the obligation to require electronic means of communication, or
- (b) inserting a description of a new situation where the Scottish Ministers consider that it should become a new exception because of technological developments.

(2) Where the Scottish Ministers consider that technological developments render it inappropriate for there to continue to be any exceptions from the obligation to require electronic means of communication, the Scottish Ministers may make regulations omitting paragraph (3) from regulation 38.

(3) Where regulations have been made under paragraph (2) and the Scottish Ministers consider that a new exception should be provided for because of technological developments, the Scottish Ministers may make regulations re-inserting paragraph (3) into regulation 38 in terms which give effect to that new exception (and the powers conferred by paragraphs (1) and (2) of this regulation may subsequently be exercised in relation to paragraph (3) as re-inserted).

(4) The Scottish Ministers may make regulations amending the technical details and characteristics set out in regulation 38(17) if the Scottish Ministers consider it appropriate to do so to take account of technical developments.”.

(27) In regulation 41 (conditions relating to the GPA and other international agreements)—

(a) in the body of the regulation, the text of the existing regulation becomes paragraph (1) and is amended as follows—

- (i) for “is bound” substitute “was, immediately before IP completion day, bound”,
- (ii) for “EU” where it last appears substitute “United Kingdom”,

(b) after that paragraph (1) insert—

“(2) For the purposes of paragraph (1)—

- (a) each country that was a member State immediately before IP completion day is deemed to be a signatory to the GPA, and
- (b) the EU’s Appendix 1 to the GPA has effect as if each such country were referred to in the same way that Iceland is referred to in the following places in that Appendix—
  - (i) paragraph 2(a) of Annex 1,
  - (i) Annex 6.”.

(28) In regulation 43 (open procedure)—

(a) in paragraph (3), for “sent” substitute “submitted”,

(b) in paragraph (4)—

- (i) in sub-paragraph (a), for “Section I and II of Part A of Annex VI to the Utilities Contracts Directive” to the end substitute “regulation 65(2) and (6)(c)”,
- (ii) in sub-paragraph (b), for “sent” (in both places) substitute “submitted”,

(c) in paragraph (5), for “sent” substitute “submitted”.

(29) In regulation 44(3)(a) (restricted procedure), for “sent” substitute “submitted”.

- (30) In regulation 45(3)(a) (negotiated procedure with prior call for competition), for “sent” substitute “submitted”.
- (31) In regulation 46(3)(a) (competitive dialogue), for “sent” substitute “submitted”.
- (32) In regulation 47(11)(a) (innovation partnership), for “sent” substitute “submitted”.
- (33) In regulation 50 (dynamic purchasing systems)—
- (a) in paragraph (8)(a)(i), for “sent” substitute “submitted”,
  - (b) in paragraph (23) for “ESPD” substitute “SPD”,
  - (c) for paragraph (25) substitute—
    - “(25) Where the period of validity is changed without terminating the dynamic purchasing system, the utility must submit for publication on the UK e-notification service a notice of the kind used initially for the call for competition for the dynamic purchasing system.
    - (25A) Where a dynamic purchasing system is terminated before the end of the period of validity that had most recently been indicated under paragraph (20)(a)(ii) or (25), the utility must submit for publication on the UK e-notification service a contract award notice under regulation 68.”.
- (34) Omit regulation 55 (procurement involving utilities from different member States).
- (35) In regulation 58 (technical specifications)—
- (a) in paragraph (8), for “adopted by a legal act of the EU” substitute “imposed by retained EU law”,
  - (b) in paragraph (10), after “compatible with” insert “retained”.
- (36) In regulation 65 (periodic indicative notices)—
- (a) in paragraph (2), after “Directive” insert “, but as if both references to “dispatch of the notice” in paragraph 4 were references to the submission of the notice to the UK e-notification service for the purposes of these Regulations”,
  - (b) in paragraph (3)(a)—
    - (i) for “send” substitute “submit”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (c) in paragraph (4)—
    - (i) for “send” substitute “submit”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (d) in paragraph (5), after “Directive” insert “, but as if “date of dispatch” in paragraph 5 were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”,
  - (e) in paragraph (6)—
    - (i) in sub-paragraph (c)—
      - (aa) for “set out in section I of Part A of Annex VI to the Utilities Contracts Directive” substitute “required by paragraph (2)”,
      - (bb) for “section II of that Part; and” substitute—
 

“section II of Part A of Annex VI to the Utilities Contracts Directive, but as if—



- (i) in paragraph 7, “the third and fourth sub-paragraph of Article 73(1)” were a reference to regulation 71(4) and (5) of these Regulations, and
  - (ii) in paragraph 21—
    - (aa) “Article 82” were a reference to regulation 80 of these Regulations, and
    - (bb) “point (b) of Article 67(2)” were a reference to regulation 65(6)(b) of these Regulations; and”,
  - (ii) in sub-paragraph (d)—
    - (aa) for “sent” where it first occurs substitute “submitted”,
    - (bb) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (f) in paragraph (7)—
    - (i) for “sending” substitute “submitting”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
    - (iii) for “publication at national level” substitute “publication otherwise from on the UK e-notification service”,
  - (g) in paragraph (9), for “sent” substitute “submitted”.
- (37) In regulation 66 (notices on the existence of a qualification system)—
- (a) in paragraph (2), omit the words from “which” to “Directive”,
  - (b) after paragraph (2) insert—
    - “(2A) Such a notice must include the information set out in Annex X to the Utilities Contracts Directive, but as if, in paragraph 10, “Article 82” were a reference to regulation 80 of these Regulations.”,
  - (c) in paragraph (3) in sub-paragraph (b), for “notify the EU Publications Office” substitute “give notice”,
  - (d) in paragraph (4)—
    - (i) before sub-paragraph (a), for “using the following standard forms” substitute “submitting to the UK e-notification service”,
    - (ii) in sub-paragraph (a), for “the form for notices” substitute “a notice”.
- (38) For regulation 67 (contract notices) substitute—

#### **“Contract notices**

**67.—(1)** A contract notice must contain the information set out in the relevant part of Annex XI to the Utilities Contracts Directive, but as if—

- (a) in paragraph 10 of Part A, “the third and fourth sub-paragraph of Article 73(1)” were a reference to regulation 71(4) and (5) of these Regulations (electronic availability of procurement documents)”,
- (b) in—
  - (i) paragraph 19 of Part A,
  - (ii) paragraph 16 of Part B,
  - (iii) paragraph 15 of Part C,“Article 82” were a reference to regulation 80 of these Regulations,

(c) in—

- (i) paragraph 20 of Part A,
- (ii) paragraph 18 of Part B,
- (iii) paragraph 18 of Part C,

“in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Utilities Contracts (Scotland) Regulations 2016)”, and

(d) in—

- (i) paragraph 22 of Part A,
- (ii) paragraph 20 of Part B,
- (iii) paragraph 20 of Part C,

“date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.

(2) Such notices must be submitted for publication in accordance with regulation 69 (publication on the UK e-notification service).”.

(39) In regulation 68 (contract award notices)—

(a) in paragraph (1)—

- (i) for “send” substitute “submit”,
- (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,

(b) for paragraph (2) substitute—

“(2) A contract award notice must—

- (a) contain the information set out in Annex XII to the Utilities Contracts Directive, but as if—
  - (i) in paragraph 5(b), “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Utilities Contracts (Scotland) Regulations 2016)”,
  - (ii) in paragraph 5(c), “Article 50” were a reference to regulation 48 (use of the negotiated procedure without prior call for competition) of these Regulations,
  - (iii) in paragraph 9, “Article 50(h)” were a reference to regulation 48(4)(d) of these Regulations,
  - (iv) in paragraph 17, the words in brackets were omitted,
  - (v) in paragraph 19, “Article 64(1)” were a reference to regulation 62(1) (variants) of these Regulations,
  - (vi) in paragraph 20, “Article 84” were a reference to regulation 82 (abnormally low tenders) of these Regulations,
  - (vii) in paragraph 21, “date of transmission” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations, and

(b) be submitted for publication in accordance with regulation 69 (publication on the UK e-notification service).”.

(c) in paragraphs (4), (5) and (6)(a) and (b), for “send” substitute “submit”,

- (d) in paragraphs (5) and (6) in each place where it occurs, for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”.
- (40) In regulation 69 (form and manner of sending notices for publication at EU level)—
- (a) for the heading substitute “Publication on the UK e-notification service”,
  - (b) in paragraph (1)—
    - (i) for “sent” (in both places) substitute “submitted”,
    - (ii) for “by electronic means to the EU Publications Office” substitute “to the UK e-notification service”,
    - (iii) omit sub-paragraph (b) and the preceding “and”,
  - (c) in paragraph (2), for “sent to the EU Publications Office” substitute “submitted to the UK e-notification service”,
  - (d) in paragraph (3)—
    - (i) for “EU Publications Office” substitute “provider of the UK e-notification service”,
    - (ii) omit “the receipt of the notice and of”,
    - (iii) for “sent” substitute “submitted”,
  - (e) in paragraph (4)—
    - (i) for “send” substitute “submit”,
    - (ii) for “EU Publications Office” substitute “UK e-notification service”,
    - (iii) omit “, provided” to the end,
  - (f) after paragraph (4) insert—
    - “(5) In these Regulations, “the UK e-notification service” has the meaning given by regulation 52(5) of the Public Contracts (Scotland) Regulations,
    - (6) For the purposes of these Regulations, a notice of any description is submitted to the UK e-notification service if the information comprising the notice is entered in the portal in such form or manner as the portal requires and in compliance with any specific instructions given within the portal about the entry of information or any part of it.”.
- (41) In regulation 70 (publication at national level)—
- (a) in the heading, for “at national level” substitute “otherwise than on the UK e-notification service”,
  - (b) in paragraph (1)—
    - (i) after “regulations” insert “50 and”,
    - (ii) for “by the EU Publications Office” substitute “on the UK e-notification service”,
  - (c) in paragraph (3)—
    - (i) after “regulations” insert “50 and”,
    - (ii) from the words from “at national level” to the end substitute “otherwise than on the UK e-notification service before they are published on that service.”,
  - (d) in paragraph (4)—
    - (i) for “at national level” substitute “otherwise than on the UK e-notification service”,
    - (ii) for the words from “by the EU” to the end substitute “on that service within 48 hours after the notice was submitted to that service”,
  - (e) in paragraph (5)—

- (i) for “at national level” substitute “otherwise than on the UK e-notification service”,
  - (ii) for “sent to the EU Publications Office” substitute “submitted to that service”,
  - (iii) for “sending of the notice to the EU Publications Office” substitute “submission of the notice to that service”,
- (f) in paragraph (6)—
- (i) in sub-paragraph (a), for “sends to the EU Publications Office” substitute “submits to the UK e-notification service”,
  - (ii) in sub-paragraph (b), for “sending” substitute “submission”.
- (42) In regulation 71(1) (electronic availability of procurement documents), for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”.
- (43) In regulation 74 (general principles)—
- (a) in paragraph (6)—
    - (i) omit “EU law,”,
    - (ii) after “agreements or” insert “, subject to paragraphs (6A) and (6B),”,
  - (b) after paragraph (6) insert—
    - “(6A) Where—
      - (a) the United Kingdom has ratified an international agreement establishing obligations in any of the fields mentioned in paragraph (6), and
      - (b) the agreement is not already listed,
 the Scottish Ministers may make regulations providing that paragraph (6) is to have effect as if the agreement were listed.
    - (6B) Where the United Kingdom has ceased to ratify an international agreement that is already listed, the Scottish Ministers may make regulations providing that paragraph (6) is to have effect as if the agreement were not listed.
    - (6C) In paragraphs (6A) and (6B)—
      - (a) “listed” means listed as described in paragraph (6), and
      - (b) where paragraph (6) already has effect as if an agreement were listed, “already listed” includes that agreement.”.
- (44) In regulation 79 (quality assurance standards and environmental management standards)—
- (a) omit paragraph (2),
  - (b) in paragraph (4)—
    - (i) omit from “the Eco-Management and Audit Scheme” to the end of sub-paragraph (b),
    - (ii) in sub-paragraph (c), omit “other”,
    - (iii) omit the words after sub-paragraph (c).
- (45) In regulation 81 (life-cycle costing)—
- (a) in paragraph (3)(c)—
    - (i) omit ‘third’,
    - (ii) for “is bound” substitute “was, immediately before IP completion day, bound”,
  - (b) omit paragraphs (5) and (6).
- (46) In regulation 82 (abnormally low tenders)—

- (a) in paragraph (2), omit sub-paragraph (f),
  - (b) omit paragraphs (6) and (7).
- (47) In regulation 83 (tenders comprising products originating in third countries)—
- (a) in paragraph (1), after “has not” insert “, before IP completion day,”,
  - (b) in paragraph (2)—
    - (i) from “in accordance” to “time to time” substitute “as it would be determined for the purposes of Part 1 of the Taxation (Cross-Border Trade) Act 2018<sup>(23)</sup> if the products were chargeable goods within the meaning of that Part”,
    - (ii) in sub-paragraph (c), after “Directive has” insert “, before IP completion day,”.
- (48) In regulation 85(7) (subcontracting), for “ESPDs” substitute “SPDs”.
- (49) In regulation 86 (modification of contracts during their term)—
- (a) in paragraph (2)—
    - (i) for “send” substitute “submit”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (b) in paragraph (3), after “Directive” insert “, but as if paragraph 10 (financing by EU funds) were omitted”.
- (50) In regulation 87(1) (termination of contracts)—
- (a) at the end of sub-paragraph (a) insert “or”,
  - (b) omit sub-paragraph (c) and the immediately preceding “; or”.
- (51) In regulation 89 (publication of notices)—
- (a) in paragraph (4), for “send” substitute “submit”,
  - (b) in paragraph (5), after “Directive” insert “, but as if, in paragraph 4 of part D, “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Utilities Contracts (Scotland) Regulations 2016)”,
  - (c) in paragraph (6)—
    - (i) for “send” substitute “submit”,
    - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”.
- (52) In regulation 92 (notices)—
- (a) in paragraph (1) after “Directive” insert “, but as if, in paragraph 15, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”,
  - (b) in paragraph (3)—
    - (i) in sub-paragraph (a) after “Directive” insert “, but as if, in paragraph 11, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”,
    - (ii) in sub-paragraph (b)—
      - (aa) for “send” substitute “submit”, and
      - (bb) for “EU Publications Office” substitute “UK e-notification service”,
  - (c) in paragraph (5)—

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(23) 2018 c.22. See section 17 (place of origin of chargeable goods).

- (i) for “send” substitute “submit”, and
  - (ii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”.
- (53) In regulation 93 (rules on the organisation of design contests and the selection of participants and the jury), omit paragraph (2).
- (54) In regulation 95 (retention of contract copies)—
- (a) in paragraph (1)—
    - (i) in sub-paragraph (a), for “1,000,000 Euros” substitute “£884,720”,
    - (ii) in sub-paragraph (b), for “10,000,000 Euros” substitute “£8,847,200”,
  - (b) in paragraph (2), for “applicable EU or national rules on access to documents and data protection” substitute “rules on access to documents and data protection applicable in the relevant part of the United Kingdom”.
- (55) In regulation 96 (reporting and documentation requirements)—
- (a) omit paragraph (7),
  - (b) in paragraph (8), omit from “or to such” to the end,
  - (c) omit paragraph (9).
- (56) In regulation 100 (duty owed to economic operators)—
- (a) in paragraph (1)—
    - (i) for “enforceable EU obligation” substitute “retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018”,
    - (ii) for “an EEA state” substitute “the United Kingdom or Gibraltar”.
  - (b) in paragraph (2)—
    - (i) in sub-paragraph (a)—
      - (aa) for “GPA state” substitute “country other than the United Kingdom”,
      - (bb) for “the GPA” substitute “Condition 1, Condition 2 or Condition 3”,
    - (ii) omit sub-paragraph (b) and the preceding “; and”,
  - (c) for paragraph (3) substitute—
    - “(3) Condition 1 is that—
      - (a) at the relevant time the economic operator is from a GPA state,
      - (b) the procurement may result in the award of a contract of any description, and
      - (c) immediately before IP completion day that GPA state had agreed with the EU that the GPA shall apply to a contract of that description.
    - (3A) Condition 2 is that—
      - (a) at the relevant time the economic operator is from a country which, immediately before IP completion day, was a member State other than the United Kingdom,
      - (b) the procurement may result in the award of a contract of any description, and
      - (c) immediately before IP completion day the EU had agreed with a GPA state that the GPA shall apply to a contract of that description.”,
  - (d) in paragraph (4)—
    - (i) for “For the purpose of paragraph 2(b), a relevant bilateral agreement applies if” substitute “Condition 3 is that”,
    - (ii) in sub-paragraph (a)—

- (aa) for “there is” substitute “immediately before IP completion day there was”,
- (bb) for “is bound” substitute “was bound”,
- (e) after paragraph (4) insert—
  - “(4A) Paragraph (4)(b) is to be applied as if the United Kingdom were a member State.”,
- (f) in paragraph (5)—
  - (i) omit “except in paragraph (1), references to an “economic operator”, include a reference to a GPA economic operator;”,
  - (ii) in the definition of “GPA state”, for “, other than an EEA state, which at the relevant time is” substitute “which immediately before IP completion day was”,
  - (iii) in the definition of “relevant time”—
    - (aa) for “sent” substitute “submitted”,
    - (bb) for “EU Publications Office” substitute “UK e-notification service”.
- (57) In regulation 101(5)(a) (enforcement of duties through the courts)—
  - (a) for “sent” substitute “submitted”,
  - (b) for “the Official Journal” where it first occurs substitute “the UK e-notification service”,
  - (c) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
  - (d) for “in the Official Journal” substitute “on the UK e-notification service”.
- (58) In regulation 104 (ineffectiveness orders)—
  - (a) in paragraph (6)—
    - (i) for “sending” substitute “submitting”,
    - (ii) for “Official Journal” substitute “UK e-notification service”,
  - (b) in paragraph (7)—
    - (i) in sub-paragraph (a), for “sent to” to “Implementing Regulation (EU) No 842/2011” substitute “submitted to the UK e-notification service a voluntary ex ante transparency notice”, and
    - (ii) in sub-paragraph (b), for “in the Official Journal” substitute “on the UK e-notification service”.
- (59) After regulation 108 (financial penalties) insert—

## “PART 5A

### AMENDING THESE REGULATIONS

#### **General provisions about regulations under these Regulations**

**108A.**—(1) Regulations under these Regulations are to be made by Scottish statutory instrument subject to the negative procedure.

(2) Regulations under these Regulations may make supplementary, incidental, transitional or saving provision.”.

(60) In schedule 1 (activities constituting works), after “[Council Regulation \(EEC\) No 3037/90](#) on the classification of economic activities in the European Community” insert “as that Regulation had effect in EU law immediately before IP completion day”.

### Amendments commenced 12 months after IP completion day

7.—(1) The Utilities Contracts (Scotland) Regulations 2016 (as amended by regulation 6) are further amended as follows.

- (2) Omit regulation 41 (conditions relating to the GPA and other international agreements).
- (3) In regulation 81 (life-cycle costing), in paragraph (3)(c), omit the words from “, including” to the end.
- (4) Omit regulation 83 (tenders comprising products originating in third countries).
- (5) Omit regulation 100(2) to (5) (duty owed to economic operators).

## CHAPTER 3

### THE CONCESSION CONTRACTS (SCOTLAND) REGULATIONS 2016

### Amendments commenced on IP completion day

8.—(1) The Concession Contracts (Scotland) Regulations 2016(24) are amended as follows.

- (2) In regulation 2(1) (interpretation)—
  - (a) omit the definition of “Commission”,
  - (b) after the definition of “contracting entity”(25) insert—
    - “covered by regulation 7(2)”, in relation to an activity, an element, a part of a concession contract or a procurement, means that regulation 7(2)—
    - (a) applies to that activity, element, part or procurement, or
    - (b) would do so if these Regulations applied;”,
  - (c) in the definition of “exclusive right”—
    - (i) omit “of a member State”,
    - (ii) before “Treaties” insert “Retained”,
  - (d) after the definition of “execution of works” insert—
    - ““GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15 April 1994 as amended before IP completion day(26),”,
  - (e) omit the definition of “Official Journal”,
  - (f) after the definition of “procurement” insert—
    - ““the Retained Treaties” means anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018(27) because of the effect which the Treaty on European Union or TFEU had immediately before IP completion day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section;”,
  - (g) omit the definition of “the Treaties”,
  - (h) before the definition of “utility” insert—
    - “the UK e-notification service” has the meaning given in regulation 35(5),”.

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(24) S.S.I. 2016/65, amended by S.S.I. 2016/125.

(25) The definition in S.S.I. 2016/65 was amended by S.S.I. 2016/125, regulation 2(2)(a).

(26) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council Decision 2014/115/EU (OJ No L 68, 7.3.2014, p.1), to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014, p.2).

(27) 2018 c.16 (“the 2018 Act”). Section 4 of the 2018 Act was amended by section 25 of the European Union (Withdrawal) Agreement Act 2020 (c.1).



- (3) In regulation 5(4)(b) (meaning of “utility”)—
- (a) delete “of a member State”,
  - (b) before “Treaties” insert “Retained”.
- (4) In regulation 7 (subject-matter and application of these regulations), for paragraph (2) substitute—
- “(2) These Regulations—
- (a) do not oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security,
  - (b) do not preclude the United Kingdom from taking such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material, provided that such measures do not adversely affect the conditions of competition regarding products which are not intended for specifically military purposes.
- (3) The arms, munitions and war material to which paragraph (2)(b) applies are those included in the 1958 List.
- (4) Any measures which, if they had been taken immediately before IP completion day, would have been covered by Article 346 of TFEU shall be regarded as measures covered by paragraph (2)(b).
- (5) In this regulation, “the 1958 List” means the list of arms, munitions and war material adopted by the Council of the European Economic Community in its Decision 255/58 of 15 April 1958 as that list is to be treated for the purpose of the Concession Contracts Regulations 2016(28).”.
- (5) In regulation 8 (thresholds and methods for calculating the estimated value of the concession contract)—
- (a) in paragraph (1), for the words from “the amount” to the end substitute “£4,733,252”,
  - (b) omit paragraph (2),
  - (c) in paragraph (4), for “sent” substitute “submitted”.
- (6) After regulation 8 insert—

**“Review and amendment of the threshold in regulation 8(1)**

**8A.**—(1) Every two years the Scottish Ministers must review the threshold specified in regulation 8(1) to verify whether it corresponds with the threshold established in the GPA for works concessions.

(2) The Scottish Ministers must do so by calculating the sterling value of the threshold on the basis of the average daily value of sterling in terms of the special drawing rights mentioned in the GPA over a period of 24 months ending with 31 August.

(3) The Scottish Ministers must make that calculation using the applicable conversion rates in the monthly International Financial Statistics published from time to time by the International Monetary Fund.

(4) If the sterling value of the threshold so calculated differs from the sum for the time being set by regulation 8(1) in respect of the threshold, the Scottish Ministers must make regulations amending regulation 8(1) so as to substitute for that sum the sum equal to that value.

(5) Such regulations—

- (a) must be made and laid before the Scottish Parliament before 1 November following the end of the 24 month period covered by the review, and
  - (b) must provide for the substitution to come into force on the following 1 January.
- (6) The first review under this regulation must relate to the 24 month period ending with 31 August 2021.”.
- (7) In regulation 9 (exclusions: concession contracts awarded on the basis of an exclusive right)—
- (a) in paragraph (1)(b), for “in accordance with the TFEU and European Union legal acts laying down common rules on access to the market applicable to” substitute “for the exercise of”,
  - (b) in paragraph (2), for “European Union sectoral legislation referred to in paragraph (1)(b) does not provide for” substitute “exclusive right referred to in paragraph (1)(b) was not granted following the application of”.
- (8) In regulation 10(1)(a) (exclusions: concession contracts awarded pursuant to international rules)—
- (a) before “Treaties” insert “Retained”,
  - (b) for “third” substitute “other”.
- (9) In regulation 11 (exclusions: concession contracts involving defence or security aspects which are awarded or organised pursuant to international rules)—
- (a) in paragraph (1)—
    - (i) in sub-paragraph (a)—
      - (aa) for “one or more member States” substitute “the United Kingdom”,
      - (bb) for “third” substitute “other”,
    - (ii) in sub-paragraph (b), for “a member State or a third” substitute “the United Kingdom or another”,
    - (iii) in sub-paragraph (c), for “a member State” substitute “the United Kingdom”,
    - (iv) in sub-paragraph (f), for “a member State or a State which is not a member State” substitute “the United Kingdom, Gibraltar or another country”,
    - (v) in sub-paragraph (g)—
      - (aa) for “third country” substitute “country other than the United Kingdom or Gibraltar”,
      - (bb) for “territory of the European Union” substitute “United Kingdom and Gibraltar”,
  - (b) in paragraph (2), omit “or another member State”.
- (10) In regulation 12 (Exclusions: Specific service contracts)—
- (a) in paragraph (1)(e)—
    - (i) in sub-paragraph (i)—
      - (aa) in the words before sub-paragraph (aa), omit the words from “within” to “services”,
      - (bb) in sub-paragraph (aa), for “a member State, a third” substitute “the United Kingdom, another”,
      - (cc) in sub-paragraph (bb), for “a member State or a third” substitute “the United Kingdom or another”,
    - (ii) in sub-paragraph (ii) omit “within the meaning of Article 1 of Council [Directive 77/249/EEC](#)”,

- (iii) in sub-paragraph (iv) omit “in the member State concerned”,
  - (iv) in sub-paragraph (v), omit “, in the member State concerned”,
- (b) in paragraph (1)(k), for “granting of an operating licence” substitute “economic operator’s status as a qualifying air carrier”**(29)**,
- (c) in paragraph (1)(o)—
  - (i) for “third country” substitute “country other than the United Kingdom”,
  - (ii) for “European Union” substitute “United Kingdom”.
- (d) paragraph (2), after sub-paragraph (a) insert—
  - “(aa) “lawyer” means a person acting as an advocate, barrister or solicitor in any part of the United Kingdom or Gibraltar.”.
- (11) In regulation 15(5) (exclusions: concession contracts awarded to an affiliated undertaking)—
  - (a) in sub-paragraph (a), for the words from “Directive” to “Council” substitute “Part 15 of the Companies Act 2006**(30)**”,
  - (b) in sub-paragraph (b), for “Directive” substitute “Part”.
- (12) Omit regulation 17 (notification of information by utilities).
- (13) In regulation 19 (exclusions: concession contracts between entities within the public sector), in paragraphs (2)(c) and (5)(c), before “Treaties” insert “Retained”.
- (14) In regulation 22(5) (mixed procurement), for “Article 346 of the TFEU” substitute “regulation 7(2)”.
- (15) In regulation 23 (mixed procurement involving defence or security aspects)—
  - (a) in paragraph (1), for “Article 346 of the Treaty” substitute “regulation 7(2)”,
  - (b) in paragraphs (2) and (6)(a), for “Article 346 of the TFEU” substitute “regulation 7(2)”.
- (16) In regulation 25(1) (contracts covering both activities listed in schedule 2 and activities involving defence or security aspects), for “Article 346 of the TFEU” substitute “regulation 7(2)”.
- (17) In regulation 26(3) (reserved concession contracts), for “Article 24 of the Concession Contracts Directive” substitute “this regulation”.
- (18) In regulation 29 (economic operators), omit paragraph (1).
- (19) In regulation 33 (concession notice)—
  - (a) in paragraph (2)(a), after “Directive,” insert—
    - “but as if—
      - (i) in paragraph 3, “Article 34(2)” were a reference to regulation 36(3) of these Regulations,
      - (ii) in paragraph 10, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations, and
      - (iii) paragraph 15 (financing by EU funds) were omitted.”,
  - (b) in paragraph (2), omit the words after the end of sub-paragraph (b),
  - (c) in paragraph (5)(a), for “European Commission if it so requests” substitute “Scottish Ministers if they so request”.
- (20) In regulation 34 (concession contract award notice)—

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**(29)** See the definition in Article 2(11A) which is inserted into EUR 2008/1008, on IP completion day, by [S.I. 2018/1392](#), schedule 2, paragraph 4(6).

**(30)** [2006 c.46](#).

- (a) in paragraphs (1) and (2), for “send” substitute “submit”,
- (b) in paragraph (3), for “A concession contract award” substitute “Subject to paragraph (4), a concession contract award”,
- (c) after paragraph (3) insert—
  - “(4) In paragraph (3), the reference to Annex VII is a reference to that Annex, but as if—
    - (a) in paragraph (7), “Article 41” were a reference to regulation 44 of these Regulations,
    - (b) in paragraph (11)(c), “Article 8(3)” were a reference to regulation 8(6) and (7) of these Regulations,
    - (c) paragraph (12) (financing by EU funds) were omitted,
    - (d) in paragraph (14), “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Concession Contracts (Scotland) Regulations 2016), and
    - (e) in paragraph (15), “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.”.
- (21) In regulation 35 (form and manner of publication of notices)—
  - (a) in paragraph (1)—
    - (i) in the words before sub-paragraph (a)—
      - (aa) for “sent” substitute “submitted”,
      - (bb) after “a notice)” insert “must be submitted to the UK e-notification service for publication.”,
    - (ii) omit sub-paragraphs (a) and (b),
  - (b) in paragraph (2)—
    - (i) for “EU Publications Office” substitute “the provider of the UK e-notification service”,
    - (ii) omit “the receipt of the notice and of”,
    - (iii) for “sent” substitute “submitted”,
  - (c) in paragraph (3)—
    - (i) for “at national level” substitute “otherwise than on the UK e-notification service”,
    - (ii) for “by the EU Publications Office” substitute “on that service”,
    - (iii) for “by that Office” substitute “on that service”,
    - (iv) for the words from “it confirms” to the end substitute “the notice was submitted to that service”,
  - (d) in paragraph (4)—
    - (i) for “at national level” substitute “otherwise than on the UK e-notification service”,
    - (ii) for “sent to the EU Publications Office” substitute “submitted to that service”,
    - (iii) for “sending of the notice to that Office” substitute “submission of the notice to that service”,
  - (e) after paragraph (4) insert—
    - “(5) In these Regulations, “the UK e-notification service” has the meaning given by regulation 52(5) of the Public Contracts (Scotland) Regulations 2015.

- (6) For the purposes of these Regulations, a notice of any description is submitted to the UK e-notification service if the information comprising the notice is entered in the portal in such form or manner as the portal may elicit it and in compliance with any specific instructions that are given within the portal about how the information, or any particular element of it, is to be entered.”
- (22) In regulation 36(1) (electronic availability of concession documents), for “in the Official Journal” substitute “on the UK e-notification service”.
- (23) In regulation 40 (exclusion grounds)—
- (a) in paragraph (1)—
    - (i) omit sub-paragraph (e),
    - (ii) in sub-paragraph (k) for “Article 38(4)” substitute “Article 38(4)(a), (b), (d), (e) or (f)”,
  - (b) in paragraph (9)(a)—
    - (i) omit “European Union law,”,
    - (ii) after “agreements or” insert “, subject to paragraphs (19) and (20),”,
  - (c) after paragraph (18) insert—
    - “(19) Where—
      - (a) the United Kingdom has ratified an international agreement establishing obligations in any of the fields mentioned in paragraph (9)(a), and
      - (b) the agreement is not already listed,the Scottish Ministers may make regulations providing that paragraph (9)(a) is to have effect as if the agreement were listed.
    - (20) Where the United Kingdom has ceased to ratify an international agreement that is already listed, the Scottish Ministers may make regulations providing that paragraph (9) (a) is to have effect as if the agreement were not listed.
    - (21) In paragraphs (19) and (20)—
      - (a) “listed” means listed as described in paragraph (9)(a), and
      - (b) where paragraph (9)(a) already has effect as if an agreement were listed, “already listed” includes that agreement.”.
- (24) In regulation 42(3) (time limits for receipt of applications and tenders for the concession contract), for “sent” substitute “submitted”.
- (25) In regulation 44(9) (concession contract award criteria), omit “the Europe 2020 strategy for smart”.
- (26) In regulation 46 (modification of concession contract during contract term)—
- (a) in paragraph (3), for “send” substitute “submit”,
  - (b) in paragraph (4), after “Directive” insert—
    - “, but as if—
      - (a) paragraph 9 (financing by EU funds) were omitted,
      - (b) in paragraph 11, “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Concession Contracts (Scotland) Regulations 2016), and
      - (c) in paragraph 12, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations”.

- (27) In regulation 47(1) (termination of concession contract)—
- (a) after paragraph (a), insert “or”,
  - (b) after paragraph (b), omit “; or”,
  - (c) omit paragraph (c).
- (28) In regulation 51 (duty owed to economic operators)—
- (a) in paragraph (1)—
    - (i) for “enforceable EU obligation” substitute “retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018”,
    - (ii) for “an EEA state” substitute “the United Kingdom or Gibraltar”,
  - (b) for paragraph (2) substitute—

“(2) The duty owed in accordance with paragraph (1) is a duty owed also to an economic operator from a country other than the United Kingdom, but only where Condition 1, Condition 2 or Condition 3 applies to the procurement concerned.”.
  - (c) for paragraph (3) substitute—

“(3) Condition 1 is that—

    - (a) at the relevant time the economic operator is from a GPA state,
    - (b) the procurement may result in the award of a concession contract of any description, and
    - (c) immediately before IP completion day that GPA state had agreed with the EU that the GPA shall apply to a concession contract of that description.

(3A) Condition 2 is that—

    - (a) at the relevant time the economic operator is from a country which, immediately before IP completion day, was a member State other than the United Kingdom,
    - (b) the procurement may result in the award of a concession contract of any description, and
    - (c) immediately before IP completion day the EU had agreed with a GPA state that the GPA shall apply to a concession contract of that description.”.
    - (d) in paragraph (4)—
      - (i) for “For the purpose of paragraph (2)(b), a relevant bilateral agreement applies if” substitute “Condition 3 is that”,
      - (ii) in sub-paragraph (a)—
        - (aa) for “there is” substitute “immediately before IP completion day there was”,
        - (bb) for “is bound” substitute “was bound”,
    - (e) after paragraph (4) insert—

“(4A) Paragraph (4)(b) is to be applied as if the United Kingdom were a member State.”.
    - (f) in paragraph (5)—
      - (i) omit the definition of “GPA”,
      - (ii) in the definition of “GPA state”, for “, other than an EEA state, which at the relevant time is” substitute “which immediately before IP completion day was”,
      - (iii) in the definition of “relevant time”—
        - (aa) for “sent” substitute “submitted”,

- (bb) for “Publications Office of the European Union” substitute “UK e-notification service”.
- (29) In regulation 52(5)(a) (enforcement of duties through the courts)—
  - (a) for “sent” substitute “submitted”,
  - (b) for “to the Official Journal” substitute “to the UK e-notification service”,
  - (c) for “in the Official Journal” substitute “on the UK e-notification service”.
- (30) In regulation 55 (ineffectiveness orders)—
  - (a) in paragraph (5) for “in the Official Journal” substitute “on the UK e-notification service”,
  - (b) for paragraph (6)(a) substitute—
    - “(a) the contracting authority submitted to the UK e-notification service for publication a voluntary ex ante transparency notice expressing its intention to enter into the contract or to conclude the framework agreement and containing—
      - (i) the name and contact details of the contracting authority,
      - (ii) a description of the object of the contract or framework agreement,
      - (iii) a justification of the decision of the contracting authority to award the contract or conclude the framework agreement without prior publication of a contract notice,
      - (iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement, and
      - (v) any other information which the contracting authority considered useful, and”,
    - (c) in paragraph (6)(b) for “in the Official Journal” substitute “on the UK e-notification service”.
- (31) In Part 6 (reports), before regulation 60 insert—

#### **“General provisions about regulations under these Regulations**

**60ZA.**—(1) Regulations under these Regulations are to be made by Scottish statutory instrument subject to the negative procedure.

(2) Regulations under these Regulations may make supplementary, incidental, transitional or saving provision.”.

(32) In schedule 1 (activities constituting works), after “[Council Regulation \(EEC\) No 3037/90](#) on the statistical classification of economic activities in the European Community” insert “as that Regulation had effect in EU law immediately before IP completion day”.

#### **Amendment commenced 12 months after IP completion day**

**9.**—(1) The Concession Contracts (Scotland) Regulations 2016 (as amended by regulation 8) are further amended as follows.

- (2) Omit regulation 51(2) to (5) (duty owed to economic operators).

## CHAPTER 4

### Amendment of the Procurement (Scotland) Regulations 2016

- 10.**—(1) The Procurement (Scotland) Regulations 2016<sup>(31)</sup> are amended as follows.
- (2) In regulation 7 (publication of contract notices, prior information notices and award notices on the Public Contracts website)—
- (a) in paragraph (1) for “an EU regulated procurement” substitute “a higher value regulated procurement”,
  - (b) in paragraph (4), after “Directive” insert—
    - “, but as if—
    - (a) in paragraph 2, reference to “for the reasons set out in the second and third subparagraphs of Article 53(1),” were omitted,
    - (b) paragraph 24 (financing by EU funds) were omitted,
    - (c) in paragraph 26, “in the *Official Journal of the European Union*” read “on the Public Contracts website”,
    - (d) in paragraph 28, “date of dispatch” were a reference to the date on which the notice is submitted to the Public Contracts website”,
  - (c) in paragraph (5), after “Directive” insert—
    - “, but as if—
    - (a) in section I—
      - (i) in paragraph 2, reference to “for the reasons set out in the second and third subparagraphs of Article 53(1),” were omitted,
      - (ii) in paragraph 9 “date of dispatch” were a reference to the date on which the notice is submitted to the Public Contracts website, and
    - (b) in section II, paragraph 12 were omitted”,
  - (d) in paragraph (7), after “Directive” insert—
    - “, but as if—
    - (a) in paragraph 9, “referred to in Article 67” were omitted,
    - (b) in paragraph 11(b), the words “member State or from a third” were omitted,
    - (c) paragraph 15 (financing by EU funds) were omitted,
    - (d) in paragraph 17, “in the *Official Journal of the European Union*” read “on the Public Contracts website”,
    - (e) in paragraph 18, “date of dispatch” were a reference to the date on which the notice is submitted to the Public Contracts website”,
- (3) In regulation 8(1) (selection of tenderers: exclusion of economic operators on grounds of criminal activity)—
- (a) omit sub-paragraph (e),
  - (b) in sub-paragraph (k), for “Article 57(1)” substitute “Article 57(1)(a), (b), (d), (e) or (f)”,
- (4) In regulation 10 (selection of tenderers: selection criteria), omit paragraph (5),
- (5) In regulation 11 (technical specifications)—

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<sup>(31)</sup> S.S.I. 2016/145.



- (a) in paragraph (8), for “adopted by a legal act of the EU” substitute “imposed by retained EU law”,
- (b) in paragraph (10), before sub-paragraph (a), omit “to the extent that they are compatible with EU law,”.

## CHAPTER 5

### AMENDMENT OF OTHER SUBORDINATE LEGISLATION

#### **The Public Contracts (Scotland) Regulations 2012**

**11.**—(1) To the extent that the Public Contracts (Scotland) Regulations 2012<sup>(32)</sup> (“the 2012 Public Contracts Regulations”) continue to have prospective effect, their effect is modified as follows.

- (2) The 2012 Public Contracts Regulations have prospective effect as if—
  - (a) all references in them to a “member State” continued to include the United Kingdom,
  - (b) all requirements to send any notice to the Official Journal of the European Union were instead a requirement to submit the notice to the UK e-notification service for publication,
  - (c) all provisions relating or referring to such a requirement, or to the publication of such a notice in that Journal, were instead references to that requirement as modified by sub-paragraph (b) and to the publication of that notice on the UK e-notification service,
  - (d) in regulation 9(5) (which provides for the definition of certain technical specifications), the words “and to the extent that those provisions are compatible with EU obligations” were omitted,
  - (e) regulation 14(2) (which requires certain reports to be supplied to the European Commission on request) were omitted,
  - (f) in regulation 25(4)(a) (which provides for evidence of certain environmental management measures)—
    - (i) in sub-paragraph (i)—
      - (aa) sub-paragraph (aa) were omitted,
      - (bb) in sub-paragraph (ii), the words “European or” were omitted,
    - (ii) in sub-paragraph (ii) for “established in any relevant State conforming to EU law or the relevant European standard or” there was substituted “meeting any”,
  - (g) regulation 30(7)(e), (8) and (9) (which relate to State aid) were omitted,
  - (h) regulation 32(13) (which provides for the provision of certain reports requested by the European Commission) were omitted,
  - (i) regulation 40(2) (which requires certain information to be provided for the European Commission) were omitted,
  - (j) in regulation 47(1)(a) (which makes compliance with certain obligations a duty owed to economic operators), the words “any enforceable EU obligation” referred instead to “any retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018”.
- (3) In paragraph (2)(b) and (c), “the UK e-notification service” has the meaning given by regulation 52(5) of the Public Contracts (Scotland) Regulations 2015.
- (4) Where—

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<sup>(32)</sup> *S.S.I. 2012/88*. The regulations were revoked by *S.S.I. 2015/446* subject to transitional provision and saving specified in *S.S.I. 2015/446*, regulation 98.

- (a) immediately before IP completion day, a procurement has been commenced,
- (b) on or after IP completion day, a contract is awarded or any other act is done, pursuant to that procurement, and
- (c) that award or other act would, if it had occurred before IP completion day, have been covered by an exemption from requirements of the 2012 Public Contracts Regulations by virtue of any provision in those Regulations,

that award or other act is covered by that exemption on and after IP completion day regardless of whether the terms used to define that exemption in the 2012 Public Contracts Regulations would otherwise have been apt to continue to achieve that effect on and after IP completion day.

(5) Paragraph 11 in Part 4 of the schedule applies for the purposes of paragraph (4) as it applies for the purposes of that Part as if the reference to “the second commencement date” was a reference to the date on which paragraph (4) comes into force.

### **The Utilities Contracts (Scotland) Regulations 2012**

**12.**—(1) To the extent that the Utilities Contracts (Scotland) Regulations 2012<sup>(33)</sup> (“the 2012 Utilities Regulations”) continue to have prospective effect, their effect is modified as follows.

(2) The 2012 Utilities Regulations have prospective effect as if—

- (a) all references in them to a “member State” continued to include the United Kingdom,
- (b) all requirements to send any notice to the Official Journal of the European Union were instead a requirement to submit the notice to the UK e-notification service for publication,
- (c) all provisions relating or referring to such a requirement, or to the publication of such a notice in that Journal, were instead references to that requirement as modified by sub-paragraph (b) and to the publication of that notice on the UK e-notification service,
- (d) regulation 7(7) (which relates to information requested by the European Commission) were omitted,
- (e) in regulation 8(3) (which provides for certain information to be sent to or for the European Commission)—
  - (i) in sub-paragraph (a), the words from “5,000,000 euro” in the words before sub-paragraph (i) to “documents” at the end of sub-paragraph (xiii) read “£4,423,600, submit, within 48 days of the award, a contract award notice to the UK e-notification service for publication, containing the information referred to in regulation 68(2)(a) of the Utilities Contracts (Scotland) Regulations 2016”,
  - (ii) in sub-paragraph (b)—
    - (aa) “400,000 euro” read “£353,890”,
    - (bb) “5,000,000 euro” read “£4,423,600”,
    - (cc) sub-paragraph (ii) read as follows—
      - “(ii) if the Minister requests that information in relation to any such contract, forthwith send it to the Minister.”,
- (f) in regulation 12(5) (which provides for the definition of certain technical specifications), the words “and to the extent that those requirements are compatible with EU obligations” were omitted,
- (g) in regulation 24(3)(a) (which provides for evidence of certain environmental management measures)—

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<sup>(33)</sup> *S.S.I. 2012/89*. The Regulations were revoked by *S.S.I. 2016/49* subject to transitional provision and saving specified in *S.S.I. 2016/49*, regulation 111.

- (i) in sub-paragraph (i)—
    - (aa) sub-paragraph (aa) were omitted,
    - (bb) in sub-paragraph (bb) the words “European standard or” were omitted, and
  - (ii) in sub-paragraph (ii) for “established in any relevant State conforming to EU law or the relevant European standard or” there was substituted “meeting any”,
  - (h) regulation 30(7)(e), (8) and (9) (which relate to State aid) were omitted,
  - (i) in regulation 31(2) (which provides for determining the country of origin of goods for certain purposes), the words from “in accordance” to the end read “as it would be determined for the purposes of Part 1 of the Taxation (Cross-Border Trade) Act 2018 if the products were chargeable goods within the meaning of that Part”,
  - (j) regulation 38(2) (which provides for the provision of certain reports requested by the European Commission) were omitted,
  - (k) regulation 39(5) (which makes provision about reports for onward transmission to the European Commission) were omitted,
  - (l) in regulation 44(1) (which makes compliance with certain obligations a duty owed to economic operators), the words “any enforceable EU obligation” referred instead to “any retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018”.
- (3) In paragraph (2)(b), (c) and (e), “the UK e-notification service” has the meaning given by regulation 52(5) of the Public Contracts (Scotland) Regulations 2015.
- (4) Where—
- (a) immediately before IP completion day, a procurement has been commenced,
  - (b) on or after IP completion day, a contract is awarded or any other act is done, pursuant to that procurement, and
  - (c) that award or other act would, if it had occurred before IP completion day, have been covered by an exemption from requirements of the 2012 Utilities Regulations by virtue of any provision in those Regulations,
- that award or other act is covered by that exemption on and after IP completion day regardless of whether the terms used to define that exemption in the 2012 Utilities Regulations would otherwise have been apt to continue to achieve that effect on and after IP completion day.
- (5) Paragraph 11 of Part 4 of the schedule applies for the purposes of paragraph (4) as it applies for the purposes of that Part as if the reference to “the second commencement date” was a reference to the date on which paragraph (4) comes into force.

## PART 4

### AMENDMENT OF RETAINED DIRECT EU LEGISLATION

#### **Commission Implementing Regulation (EU) 2016/7**

**13.**—(1) Commission Implementing Regulation (EU) No 2016/7 of 5th January 2016 establishing the standard form for the European Single Procurement Document<sup>(34)</sup> is amended as follows.

- (2) In Article 1—

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<sup>(34)</sup> EUR 2016/7.

- (a) for the words from the beginning to “2016, the” substitute “The”,
- (b) for “European single procurement document” substitute “Single Procurement Document”,
- (c) for “Article 59 of [Directive 2014/24/EU](#)” substitute “regulation 60 of the Public Contracts (Scotland) Regulations 2015(35)”.

St Andrew’s House,  
Edinburgh  
Date

*Name*  
A member of the Scottish Government

## SCHEDULE

Regulation 2

### TRANSITIONAL AND SAVINGS PROVISIONS

#### PART 1

#### INTERPRETATION

##### **Interpretation of Schedule**

**1.—(1)** In this Schedule—

“amendment” includes modification and revocation,

“the Procurement Regulations” means the following and, in relation to any procedure, means whichever of the following applies to that procedure—

- (a) the Public Contracts (Scotland) Regulations 2012,
- (b) the Utilities Contracts (Scotland) Regulations 2012,
- (c) the Public Contracts (Scotland) Regulations 2015,
- (d) the Concession Contracts (Scotland) Regulations 2016,
- (e) the Utilities Contracts (Scotland) Regulations 2016,

“the second commencement date” is defined by paragraph 10,

“steady state amendments” is defined by paragraph 2.

**(2)** In this Schedule, the following have the same meaning as in the Procurement Regulations—

- (a) contracting authority,
- (b) design contest,
- (c) dynamic purchasing system,
- (d) economic operator,
- (e) framework agreement,
- (f) notices on the existence of a qualification system
- (g) periodic indicative notice,
- (h) prior information notice,
- (i) utility,
- (j) voluntary ex ante transparency notice.

**(3)** None of the savings in this Schedule imply any limitation of the scope of any of the other savings in this Schedule.

#### PART 2

#### PROCUREMENTS PENDING ETC. ON IP COMPLETION DAY

##### **Meaning of “steady state amendments”**

**2.** In this Part, “steady state amendments” means—

- (a) amendments made by these Regulations, and

- (b) any other amendments, including future amendments, to the Procurement Regulations that—
  - (i) come into force on, or begin to apply from, IP completion day or any time after IP completion day, and
  - (ii) are not made by or under any of sections 7A, 7B and 7C and paragraphs 11G and 11M of Schedule 2 of the European Union (Withdrawal) Act 2018<sup>(36)</sup>.

### **Saving for procedures launched, but not finalised, before IP completion day**

3.—(1) Steady state amendments do not affect any procedure launched by a contracting authority or a utility under the Procurement Regulations if the procedure—

- (a) was launched before IP completion day, and
- (b) was not yet finalised by IP completion day.

(2) But regulation 62 (recourse to e-Certis) of the Public Contracts (Scotland) Regulations 2015 (which is omitted by regulation 4(44) of these Regulations) ceases to be saved at the beginning of the day that is 9 months after the day on which IP completion day falls.

#### *Meaning of ‘procedure’*

- (3) In sub-paragraph (1), “procedure” includes—
  - (a) a procedure using a dynamic purchasing system,
  - (b) a procedure for which the call for competition takes the form of—
    - (i) a prior information notice,
    - (ii) a periodic indicative notice, or
    - (iii) a notice on the existence of a qualification system.

#### *Meaning of ‘launched’*

- (4) For the purposes of sub-paragraph (1), a procedure is launched—
  - (a) when a call for competition or any other invitation to submit applications has been made in accordance with the Procurement Regulations,
  - (b) where the Procurement Regulations do not require such a call or invitation, when the contracting authority or utility contacted economic operators in relation to the specific procedure.

#### *Meaning of ‘finalised’*

- (5) For the purposes of sub-paragraph (1), a procedure is finalised—
  - (a) upon publication of a contract award notice in accordance with the Procurement Regulations,
  - (b) where the Procurement Regulations do not require the publication of such a notice, upon conclusion of the relevant contract,
  - (c) where the contracting authority or utility decided not to award a contract, upon informing the tenderers, or persons otherwise entitled to submit applications, of the reasons why the contract was not awarded.

<sup>(36)</sup> 2018 c.16. Sections 7A, 7B, 7C, 8B and 8C were inserted by the European Union (Withdrawal Agreement) Act 2020 (c.1), sections 5, 6, 26(2), 18 and 21 respectively.

### **Saving for call-off procedures under certain framework agreements**

4.—(1) If the condition in sub-paragraph (2) is met, steady state amendments do not affect any procedure relating to the performance of a framework agreement, including the award of contracts based on such an agreement, under—

- (a) regulation 34(3) to (10) of the Public Contracts (Scotland) Regulations 2015,
- (b) regulation 49(3) to (6) of the Utilities Contracts (Scotland) Regulations 2016.

(2) The condition is that the framework agreement—

- (a) was concluded before IP completion day and had neither expired nor been terminated before IP completion day, or
- (b) was concluded after IP completion day in accordance with a procedure to which paragraph 3 applied.

### **Transitional modification of the Procurement Regulations**

5.—(1) In relation to a procedure to which paragraphs 3 or 4 apply, the Procurement Regulations are to be read, on and after IP completion day, and so far as the context permits or requires, as if—

- (a) any reference (however expressed) to a member State or EEA state included the United Kingdom,
- (b) any reference (however expressed) to—
  - (i) EU law,
  - (ii) any particular EU Treaty or any part of it,
  - (iii) any EU instrument, or other document of an EU entity or of the EU, or any part of any such instrument or document,
  - (iv) any part of EU law not falling within sub-paragraph (ii) or (iii),
  - (v) any tax, duty, levy or interests of the EU, or
  - (vi) any arrangements involving, or otherwise relating to, the EU of a kind not falling within sub-paragraph (i), (ii), (iii), (iv) or (v),

were a reference to any such thing (including any such thing as may have existed previously) so far as it is applicable to and in the United Kingdom by virtue of the relevant withdrawal provisions,

- (c) any reference (however expressed) to the area of the EU or of the EEA included the United Kingdom,
- (d) any reference (however expressed) to a citizen of the EU or a national of the EEA included a United Kingdom national (within the meaning given by Article 2(d) of the withdrawal agreement),
- (e) any reference to an enforceable EU obligation were a reference to an obligation that is enforceable by virtue of section 7A or 7B of the European Union (Withdrawal) Act 2018<sup>(37)</sup>, and
- (f) such other modifications were made as are necessary for any purpose of the relevant withdrawal provisions and are capable of being ascertained from any such purpose or otherwise from those provisions.

(2) In sub-paragraph (1), “relevant withdrawal provisions” means—

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(37) 2018 c.16. Sections 7A and 7B were inserted by the European Union (Withdrawal Agreement) Act 2020 (c.1), sections 5 and 6 respectively.

- (a) Title 8 of Part 3 of the withdrawal agreement (ongoing public procurement and similar procedures),
- (b) Title 5 of Part 3 of the EEA EFTA separation agreement (ongoing public procurement and similar procedures).

## PART 3

### PROVISIONS COMMENCED ON IP COMPLETION DAY

#### **Procurement involving contracting authorities or utilities from other member States**

- 6.—(1) This paragraph applies in relation to the omission, by these Regulations, of—
- (a) regulation 40 of the Public Contracts (Scotland) Regulations 2015 (procurement involving contracting authorities from different member States),
  - (b) regulation 55 of the Utilities Contracts (Scotland) Regulations 2016 (procurement involving utilities from different member States).
- (2) Those omissions do not imply—
- (a) any prohibition of the activities authorised by the omitted regulations (which activities might, accordingly, be carried on to any extent that would have been lawful if the omitted regulations had never existed), or
  - (b) that any matters provided for in those regulations are necessarily to have a different effect unless so required by applicable law (including rules for resolving any conflicts between the laws of different jurisdictions).

#### **Saving of implied power to terminate contracts**

- 7.—(1) This paragraph applies where—
- (a) a contract was awarded before IP completion day, and
  - (b) immediately before IP completion day, the contract contained a power—
    - (i) implied by regulation 73(3) of the Public Contracts (Scotland) Regulations 2015 to terminate the contract on the ground mentioned in regulation 73(1)(c) of those Regulations,
    - (ii) implied by regulation 47(3) of the Concession Contracts (Scotland) Regulations 2016 to terminate the contract on the ground mentioned in regulation 47(1)(c) of those Regulations, or
    - (iii) implied by regulation 87(3) of the Utilities Contracts (Scotland) Regulations 2016 to terminate the contract on the ground mentioned in regulation 87(1)(c) of those Regulations.
- (2) On and after IP completion day, that power continues despite the omission, by these Regulations, of regulations 73(1)(c), 47(1)(c) or 87(1)(c), as the case may be.

#### **Saving of regulation 55(5) of the Concession Contracts Regulations 2016**

8. The amendment made by these Regulations to regulation 55(5) of the Concession Contracts (Scotland) Regulations 2016 (application of the first ground of ineffectiveness) does not apply where the contract referred to in regulation 55(5) was awarded before IP completion day.



### **Saving in relation to voluntary ex ante transparency notices**

- 9.**—(1) This paragraph applies in relation to the amendments made by these Regulations to—
- (a) regulation 91(7) of the Public Contracts (Scotland) Regulations 2015,
  - (b) regulation 104(7) of the Utilities Contracts (Scotland) Regulations 2016,
  - (c) regulation 55(6) of the Concession Contracts (Scotland) Regulations 2016.
- (2) Those amendments do not apply in relation to a voluntary transparency notice that was published in the Official Journal of the European Union if the notice was sent, before IP completion day, to be so published.

## **PART 4**

### **PROVISIONS COMMENCED 12 MONTHS AFTER IP COMPLETION DAY**

#### **Saving in relation to procurements commenced before regulations 5, 7 and 9 come into force**

**10.** The amendments made by regulations 5, 7 and 9 do not affect any procurement commenced before the date on which those amendments come into force (“the second commencement date”).

**11.** For the purposes of this Part, a procurement has been commenced before the second commencement date if, before that date—

- (a) a notice has been submitted to the UK e-notification service in accordance with applicable Procurement Regulations in order to—
  - (i) invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract, framework agreement or dynamic purchasing system, or
  - (ii) publicise an intention to hold a design contest,
- (b) the contracting authority or utility has had published any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system, or
- (c) the contracting authority or utility has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system, or
  - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed contract, framework agreement or dynamic purchasing system.

**12.** For the purposes of this Part, a procurement covers the whole of the procedures which stem from that commencement.

**13.** Accordingly, for example, if a contract notice in relation to a proposed framework agreement under the Public Contracts (Scotland) Regulations 2015 has, before the second commencement date, been submitted as described in paragraph 11(a), paragraph 10 applies to the award of any contracts based on that framework agreement regardless of whether the relevant specific procedure for the award of any such contract under regulation 34(6) to (10) of the Public Contracts (Scotland) Regulations 2015 had itself been commenced before the second commencement date.

**14.** Procedures taken for the purpose of modifying a contract or framework agreement are not to be regarded, for the purposes of paragraph 12, as stemming from the commencement of the procurement from which the award of that contract or framework agreement had itself stemmed.

15. A procedure commenced as described in paragraph 11(a)(i), (b) or (c) is not to be regarded, for the purposes of paragraph 12, as stemming from the commencement of any design contest that had previously been held in relation to the subject-matter of the procurement.

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations revoke and replace the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 (S.S.I. 2019/112 – “the first exit S.S.I.”), the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019 (S.S.I. 2019/114 – “the second exit S.S.I.”) and the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment (No. 2) Regulations 2019 (S.S.I. 2019/414 – “the third exit S.S.I.”). The second exit S.S.I. and the third exit S.S.I. amend the first exit S.S.I. As a result, the revoked Regulations will not come into force.

These Regulations are made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 (c.68) and paragraph 1(1) and (3) of Part 1 of the European Union (Withdrawal) Act 2018 (c.16) in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the European Union. Many of the provisions in these Regulations are unchanged from the first S.S.I. (as amended by the second exit S.S.I. and the third exit S.S.I.), but additional deficiencies are addressed and some of the original provisions are changed.

These Regulations make amendments in the field of public procurement. Part 2 amends the Procurement Reform (Scotland) Act 2014 (asp 12). Part 3 amends secondary legislation. In particular, Chapters 1, 2, 3, 4, and 5 of Part 3 amend the Public Contracts (Scotland) Regulations 2015 (S.S.I. 2015/446), the Utilities Contracts (Scotland) Regulations 2016 (S.S.I. 2016/49), the Concession Contracts (Scotland) Regulations 2016 (S.S.I. 2016/65), the Procurement (Scotland) Regulations 2016 (S.S.I. 2016/145), the Public Contracts (Scotland) Regulations 2012 (S.S.I. 2012/88) and the Utilities Contract (Scotland) Regulations 2012 (S.S.I. 2012/89) respectively. Part 4 amends retained direct EU legislation. The schedule makes transitional and savings provisions.

These Regulations are also made in exercise of the powers conferred by paragraph 11G(1) and (3) of schedule 2 of the European Union (Withdrawal) Act 2018 in order to implement Title 8 (ongoing public procurement and similar procedures) of Part 3 of the withdrawal agreement and the corresponding Title 5 of Part 3 of the EEA EFTA separation agreement. For the meaning of “withdrawal agreement”, “EEA EFTA separation agreement” and “IP completion day” see section 39(1) of the European Union (Withdrawal Agreement) Act 2020. In particular, the schedule to these Regulations differs markedly from the schedule to the first exit SI in providing for procedures that are ongoing on IP completion day to continue without being subject to any substantive changes in the procurement rules applicable to them. The schedule also contains various other savings that are unconnected with those agreements.

The power contained in section 2(2) of the European Communities Act 1972 has been relied upon for amendments made by regulation 4(8)(a)(i) and (22)(a).

No business or regulatory impact assessment has been prepared in relation to these Regulations as no, or no significant, impact upon business, charities or voluntary bodies is foreseen.

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**Draft Legislation:** *This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument: The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 No. 468*