

EXPLANATORY MEMORANDUM TO
THE DEFENCE AND SECURITY PUBLIC CONTRACTS (AMENDMENT) (EU
EXIT) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is being made to implement the UK's obligations under Title VIII of Part Three of the Withdrawal Agreement and Title V of Part Three of the EEA EFTA Separation Agreement in relation to those public procurement procedures, governed by the Defence and Security Public Contracts Regulations 2011 ("the DSPCR 2011"), launched but not finalised prior to Implementation Period (IP) completion day.
- 2.2 The instrument also addresses deficiencies in the DSPCR 2011, making minor changes that will ensure that they operate seamlessly after IP completion day.
- 2.3 The instrument also corrects some outdated references and corrects a minor omission in the DSPCR 2011, these changes are not connected to withdrawal.

Explanations

What did any relevant EU law do before exit day?

- 2.4 The DSPCR 2011 implement Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and services contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC ("the Defence and Security Directive"). They govern public contracts in the fields of defence and security above a set financial threshold and require procurements to be competed transparently. They also ensure economic operators from the EU are treated equally and in a non-discriminatory manner.
- 2.5 On the 26 March 2019, the Secretary of State for Defence made a statutory instrument to amend the DSPCR 2011; The Defence and Security Public Contracts Regulations (Amendment) (EU Exit) Regulations 2019 (the "2019 Regulations").
- 2.6 The EU exit-related amendments to the DSPCR 2011 contained in regulation 3 of the 2019 Regulations, together with the savings and transitional provisions in regulation 4 were due to come into force on exit day had a deal with the European Union not been reached¹. However, in accordance with the European Union (Withdrawal) Act 2018 (as amended by the European Union Withdrawal Agreement Act 2020), regulations 3 and 4 of the 2019 Regulations (as amended by this instrument) will now come into force on IP completion day.

¹ Regulation 2 came into force the day after the Regulations were made.

2.7 The 2019 Regulations address deficiencies in the retained DSPCR 2011 which arise as a consequence of the withdrawal of the UK from the EU. They make corrections to provisions in that legislation that are redundant, inappropriate or otherwise deficient within the meaning of section 8 of the European Union (Withdrawal) Act 2018. They limit guaranteed access to UK public procurements that are conducted in accordance with the DSPCR 2011, to economic operators in the UK and Gibraltar and establish that there will be little or no distinction between the treatment of economic operators from the EU and other countries outside the UK and Gibraltar. Changes have been limited to those which are appropriate to reflect the UK's new status outside the EU. The framework and the principles underlying the procurement regime remain unchanged.

Why is it being changed?

2.8 This instrument is required to:

- implement the UK's obligations under Withdrawal Agreement and the EEA EFTA Separation Agreement in respect of ongoing public procurement procedures commenced prior to IP completion day and procedures (including call-off contracts) relating to the performance of ongoing framework agreements or procurements for framework agreements commenced prior to IP completion day but not yet concluded;
- amend the 2019 Regulations to take account of the fact that amendments to the DSPCR 2011 now come into effect on IP completion day (to the extent this is not given effect to under the EU Withdrawal Act 2018) and to update certain references to financial thresholds set by the EU (and revised during the Implementation Period), above which the DSPCR 2011 apply; and
- make minor updates and correct a minor omission to the DSPCR 2011 (relating to outdated references to the Common Military List and European technical approvals) which are unrelated to the UK's withdrawal from the EU.

What will it now do?

2.9 This instrument amends the 2019 Regulations before they come completely into effect, to give effect to the relevant provisions of the Withdrawal Agreement and of the EEA EFTA Separation Agreement in respect of procurements to which the DSPCR 2011 apply that were launched but not finalised prior to IP completion day. It ensures, via the substitution of new transitional, savings and interpretative provisions, that the law applicable to such procurements under the DSPCR 2011 continues to be that which applied prior to IP completion day. It also corrects a small number of outstanding deficiencies arising from EU Exit, as detailed in Section 7 of this Explanatory Memorandum. The instrument also makes a small number of amendments that will come into effect immediately to update the DSPCR 2011, which are not related to EU exit.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument is being laid in draft before Parliament under the affirmative procedure in accordance with paragraph 1(3) of Schedule 7 to the EU (Withdrawal) Act 2018. Whilst these Regulations do not contain provision falling within paragraph 1(2) of Schedule 7 to the EU (Withdrawal) Act 2018, the Minister considers that the

context in which the amendments described in section 2 of this Explanatory Memorandum are being made, and in particular the fact that this instrument would amend two statutory instruments, one of which was subject to Parliament's prior approval, make it appropriate that this instrument is laid before and approved by a resolution of both Houses of Parliament before being made.

- 3.2 Unless this instrument is made, the 2019 Regulations will come into force at the end of the Implementation Period unamended. This is likely to create confusion and legal uncertainty because the DSPCR 2011 will not, as a result, reflect the UK's obligations under the relevant withdrawal provisions.

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

- 3.3 The territorial application of this instrument includes Scotland and Northern Ireland.
- 3.4 The powers under which this instrument is made, and under which the DSPCR 2011 and 2019 Regulations were made, cover the entire United Kingdom (see the European Union (Withdrawal) Act 2018 and the European Communities Act 1972) and the territorial application of this instrument is not limited by either Act or by this instrument, the 2019 Regulations or the DSPCR 2011.

4. Extent and Territorial Application

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

5. European Convention on Human Rights

- 5.1 The Minister of State for the House of Lords, The Baroness Goldie DL has made the following statement regarding Human Rights:

“In my view the provisions of The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The DSPCR 2011 implement the legal framework set out in the Defence and Security Directive for procurement by contracting authorities of certain work contracts, supply contracts and services contracts in the field of defence and security. The DSPCR 2011 apply to the whole of the UK.
- 6.2 The main legal framework for government procurement is the Public Contracts Regulations 2015 (PCR 2015) which implement Directive 2014/24/EU in the UK. The Defence and Security Directive introduced a tailored regime for procurement of defence and security requirements. A separate instrument, to be made by the Minister for the Cabinet Office, making amendments to the PCR 2015, Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016, is being laid on the same day as this instrument. It is desirable for the changes that are being made to the DSPCR 2011 be consistent as far as possible with those being made in that instrument.

7. Policy background

What is being done and why?

- 7.1 As outlined at Section 2.8 of this Explanatory Memorandum, this instrument makes changes to implement the UK's obligations under the Withdrawal Agreement and the EEA EFTA Separation Agreement, corrects deficiencies in the 2019 Regulations arising from IP completion and updates the DSPCR 2011.

Pre-exit amendments of the DSPCR 2011

- 7.2 Regulation 2 of this instrument makes amendments under the powers set out in section 2(2) of the European Communities Act 1972 (ECA) (as preserved by the European Union (Withdrawal) Act 2018). They come into force on the day after the day on which this instrument is made.

Common Military List

- 7.3 The current outdated reference to the Common Military List (CML) of the European Union (which forms part of the definition of "military equipment" covered by the DSPCR 2011) in regulation 3(1) of the DSPCR 2011, is updated to refer to the CML of 17 February 2020.

Technical Specifications

- 7.4 In regulation 12(1), the definition of 'European technical approval' is deleted and replaced with a definition of 'European technical assessment.' European technical approvals have been replaced by European technical assessments and so the definition is outdated. The references to 'European technical approval' in regulations 12(5)(b) and 12(10)(b) are replaced by 'European technical assessment'.

Criteria for the rejection of economic operators

- 7.5 In regulation 23(4)(k), '(12) and (13)' is substituted with '(12), (13) and (14)' to remedy an omission in the drafting of the DSPCR 2011 in relation to an exemption from the requirement to be registered on the professional or trade registers of EU Member States.

Amendments of the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019

Amending References to Exit Day

- 7.6 Regulation 3(3) of the 2019 Regulations inserts regulations 6(3A) to 6(3C) into the DSPCR 2011 to ensure the preservation of the effect of Article 346 of the Treaty on the Functioning of the European Union in respect of defence and security procurements. This instrument replaces references to 'exit day' with 'IP completion day' in regulations 3(3)(b) and (c) of the 2019 Regulations to correct the drafting and preserve the intended effect of the legislation.

Thresholds

- 7.7 Regulation 3(5)(c) updates two of the financial thresholds over which the full requirements of the DSPCR 2011 apply. These came into effect on 1 January 2020 and replace the sums that were correct at the time the 2019 Regulations were laid.

Transitional and savings provisions

- 7.8 Regulations 3 and 4 of the 2019 Regulations were drafted on the basis that the UK would leave the EU without a deal being agreed on its withdrawal resulting in, for example, the immediate removal of access to the EU's systems such as the Official Journal of the EU ("OJEU"). The transitional provisions in regulation 4 of the 2019 Regulations were drafted to take such changes into account even where procurements had been commenced under the DSPCR 2011 as it was prior to exit day. The UK has agreed with the EU and the EEA/EFTA that the relevant rules in relation to public procurement as defined in the Withdrawal Agreement and the EEA EFTA Separation Agreement will continue to apply to procurements launched and not yet finalised prior to IP completion day (which includes, for example, continued access to OJEU). Therefore, the transitional provisions in regulation 4 of the 2019 Regulations do not give effect to the UK's obligations under those Agreements.
- 7.9 Regulation 3(3) of this instrument deletes the transitional provisions in regulation 4 (which is yet to take effect) of the 2019 Regulations and inserts new transitional provisions in their place so that amendments made by regulation 3 of the 2019 Regulations do not apply to procurements launched and not yet completed before IP completion day ("Transitional Procurements"). The new regulation 4(4) of the 2019 Regulations, as inserted by this instrument, provides that a procurement procedure is "launched" when either a call for competition or any other invitation to submit applications has been made in accordance with the 2011 Regulations or where the 2011 Regulations do not require such a call or invitation, when the contracting authority contacted economic operators in relation to the specific procedure.
- 7.10 A procedure is finalised upon publication of a contract award notice in accordance with the 2011 Regulations, or where the 2011 Regulations do not require the publication of such a notice, upon conclusion of the relevant contract or where the contracting authority 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.
- 7.11 Also included are provisions providing that Transitional Procurements will include the award of contracts made under framework agreements until the framework ends but only where the procurement of the framework agreement was concluded and not terminated before IP completion day or launched but not concluded before IP completion day.
- 7.12 In practice this means that Transitional Procurements will be unaffected by the amendments made by regulation 3 to the 2019 Regulations. For example, procurement notices in respect of procurements which are still ongoing as of the end of the implementation period will still be sent to the OJEU via Tenders Electronic Daily (the online portal for EU public procurement) rather than the Find a Tender Service, the new single UK e-notification service. EU and relevant EEA economic operators participating in procurements will continue to have rights and remedies under the DSPCR 2011 in respect of Transitional Procurements. Procurements launched after IP completion day, however, will follow the DSPCR 2011 as amended by regulation 3 of the 2019 Regulations. For those procurements, procurement notices will be sent to the UK e-notification service and rights and remedies under the DSPCR 2011 (as amended by regulation 3) will be limited to UK and Gibraltar economic operators only, as detailed in the Explanatory Memorandum to the 2019 Regulations.

- 7.13 Although not required by the Withdrawal Agreement or EEA EFTA Separation Agreement, the new transitional provisions provide that the amendments made by regulation 3(30) of the 2019 Regulations, which require that notices be published on the UK e-notification services rather than in the OJEU, do not apply in relation to a voluntary transparency notice that was published in the OJEU, if the notice was sent before IP completion day to be so published. This preserves the validity of such voluntary transparency notices.
- 7.14 Regulations 4(8) and (9) of the 2019 Regulations inserted by this instrument ensures that EU references in that version of the DSPCR 2011 as will apply to Transitional Procurements are capable of being read so as to give effect to the UK's obligations in the Withdrawal Agreement and the EEA EFTA Separation Agreement for Transitional Procurements on and after IP completion day.

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

- 8.1 This instrument is being made using the power in sections 8(1), 8A, 8B(1) and (2) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018, in order to:
- address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union;
 - address the consequences of Part 4 of the Withdrawal Agreement; and
 - implement the UK's obligations in relation to ongoing procurements in the field of defence and security under the Withdrawal Agreement and the EEA EFTA Separation Agreement.
- 8.2 In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.
- 8.3 Alongside the EU (Withdrawal) Act 2018 powers, the instrument is also being made under Section 2(2) of the European Communities Act 1972 as read with paragraph 1A of Schedule 2 to that Act, to correct out of date references and address other matters as detailed in Section 7 of this Explanatory Memorandum.

9. Consolidation

- 9.1 There are no plans to consolidate the legislation at this stage.

10. Consultation outcome

- 10.1 There has been no public consultation on how to rectify the deficiencies arising from withdrawal. The changes made are intended to maintain the current legislative and policy framework so far as possible post IP completion day.
- 10.2 Drafts of this instrument have been provided to the devolved administrations, the Government of Gibraltar and the Crown Dependencies with no issues raised.
- 10.3 The DSPCR 2011 is owned by the MOD but can also apply to security procurements by other Departments and agencies. These Departments and agencies have been consulted on the amendments to the Regulations and are content with the changes proposed.

11. Guidance

- 11.1 To explain the changes to the DSPCR 2011, the overarching pan-government guidance will be updated for stakeholders by IP completion day. This will continue to be hosted on gov.uk.
- 11.2 There are no significant changes to the procedures or the way other government departments implement the DSPCR 2011. Therefore, it is not deemed necessary to provide online or face-to-face training.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the DSPCR 2011 do not fall within the Better Regulations framework process and they do not regulate or deregulate business. The impact of changes proposed are to maintain the operability of the DSPCR 2011 to avoid disruption to procurers and suppliers.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to the monitoring of this legislation is that a 5-year review will be undertaken in accordance with regulation 2 of the DSPCR 2011 (as modified by the European Union Withdrawal Act 2018).

15. Contact

- 15.1 Matthew Gill at the Ministry of Defence Telephone: 07866 135705 or email: Matthew.Gill120@mod.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Matthew Gill, Head of MOD Commercial Policy, Process and Procedures (P3) at the Ministry of Defence, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Baroness Goldie DL, Minister of State for the House of Lords, at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 14, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 15, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 The Minister of State for the House of Lords, The Baroness Goldie DL, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020 do no more than is appropriate.

- 1.2 This is the case because they do no more than prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU, and implement the Withdrawal Agreement and EEA EFTA Separation Agreement”.

2. Good reasons

- 2.1 The Minister of State for the House of Lords, The Baroness Goldie DL, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this draft instrument, and I have concluded that they are a reasonable course of action. These reasons are to maintain a workable set of defence and security procurement rules”.

3. Equalities

- 3.1 The Minister of State for the House of Lords, The Baroness Goldie DL, has made the following statement regarding use has made the following statement:

“The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

- 3.2 The Minister of State for the House of Lords, The Baroness Goldie DL, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Baroness Goldie DL have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

4. Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.