

EXPLANATORY MEMORANDUM TO
THE PUBLIC PROCUREMENT (AMENDMENT ETC.) (EU EXIT) REGULATIONS
2019

2019 No. 560

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Cabinet Office and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 This instrument is being made in order to address deficiencies in retained EU law in relation to public procurement arising from the withdrawal of the United Kingdom (UK) from the European Union (EU), ensuring the legislation continues to operate effectively after the UK leaves the EU.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The EU legal framework for the regulation of public procurement by public authorities and utilities consists of a package of directives (the EU Procurement Directives) that govern procedures for the award of public contracts over specified financial thresholds to suppliers of works, goods and services. They are aimed at ensuring that the EU public procurement market is open and competitive and that suppliers are treated equally and fairly.

The EU Procurement Directives were implemented for England, Wales and Northern Ireland by the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 (the Regulations).

This instrument also relates to certain directly applicable EU legislation in the field of public procurement, such as Regulation 2195/2002 on the Common Procurement Vocabulary that aims to standardise the references used by contracting authorities and entities to describe procurement contracts. Further information on this legislation can be found at section 7.23 to 7.27 of this Memorandum.

Why is it being changed?

- 2.3 This instrument addresses deficiencies in retained EU law that arise as a result of the withdrawal of the UK from the EU. It amends or removes provisions that are inoperable, inappropriate or would otherwise prevent the legislation from functioning effectively after exit day within the meaning of section 8 of European Union (Withdrawal) Act 2018. For example, provisions that relate to the publication of notices in the Official Journal of the EU (OJEU) and to the submission of reports to the European Commission (the Commission) would no longer be appropriate because they impose requirements and confer functions in respect of EU entities that no longer have such functions in relation to the UK after exit. These have been removed or replaced with provisions that relate to the functions of ‘domestic’ bodies and entities. Other examples are given in section 7 below.

What will it now do?

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

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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

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

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is set out in Section 3.3 under "Matters relevant to Standing Orders No. 83P of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

- 5.1 Oliver Dowden, the Minister for Implementation, has made the following statement regarding Human Rights:
- "In my view the provisions of the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights".

6. Legislative Context

- 6.1 The Regulations implement a legal framework set out in EU Procurement Directives for procurement by contracting authorities and other contracting entities (Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (utilities), Directive 2014/23/EU on the award of concession contracts and Directive 89/665/EEC and Directive 92/13/EEC, as amended, on remedies and review

procedures for public procurement and on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors).

- 6.2 The EU Procurement Directives govern the procedures for the award of contracts over specified financial thresholds, subject to certain exclusions from their scope. The legal framework is based on the principles of transparency, non-discrimination, equal treatment and proportionality. Its intention is to create an open public procurement market that supports the free movement of supplies, services and works within the EU. The EU is a member of the WTO Agreement on Government Procurement (GPA), and is party to a number of international agreements with countries outside the EU that contain procurement provisions. The EU procurement regime reflects the obligations arising out of membership of these agreements as well as the EEA Agreement.
- 6.3 The Regulations apply principally to England, Wales and Northern Ireland. The Scottish Ministers transposed the EU Procurement Directives separately, in parallel sets of regulations. The Defence and Security Public Contract Regulations 2011 implement a related EU scheme for Defence procurement and are outside the scope of the present instrument (a separate draft instrument, to be made by the Secretary of State for Defence, is being laid on the same day as this instrument). The Public Contracts Regulations 2015 also include (in Part 4), a package of rules that are domestic in origin. Part 4 does not apply to contracting authorities with functions that are wholly or mainly devolved to Wales, Scotland and Northern Ireland.
- 6.4 Under the European Union (Withdrawal) Act 2018, EU-derived domestic legislation forms part of retained EU law. In order to ensure the legislation operates effectively after exit, this instrument makes amendments to fix deficiencies which arise from the UK's withdrawal, for example references that are based on the UK's status as a member State, and transfers certain powers that are currently exercisable by the Commission as regards the UK to UK public authorities.
- 6.5 This instrument primarily amends the Regulations. The instrument also amends (and in one case revokes) retained direct EU legislation that contains deficiencies arising out of the UK's exit (see paragraph 7.23-7.27). Further, amendments are made to primary and secondary legislation, in some cases because that legislation contains references to the EU procurement regime that are no longer appropriate in light of EU withdrawal and in other cases because it envisages a continued role for the EU Publications Office in publishing procurement notices submitted by UK authorities. These include the Greater London Authority Act 1999, the Equality Act 2010 and the Public Services (Social Value) Act 2012. Finally, the Regulations include saving provisions under which certain procurements remain governed by the revoked Public Contracts Regulations 2006 or the revoked Utilities Contracts Regulations 2006. Accordingly, amendments have been made to deal with the deficiencies that arise from exit where these provisions continue to apply.
- 6.6 There are some deficiencies in the Regulations that have not been fixed in this instrument. These require further review and discussion with other government departments, the devolved authorities or stakeholders.

7. Policy background

What is being done and why?

- 7.1 This instrument corrects deficiencies arising as a result of the UK's withdrawal from the EU. Changes have been made where they are appropriate and within the scope of section 8 of the European Union (Withdrawal) Act 2018. The aim is for the Regulations to reflect the UK's status as a non-member State at the same time as ensuring they continue to facilitate a functioning UK internal market and comply with the requirements of the GPA (which the UK intends to join in its own right after exit). Another goal is to maintain continuity for on-going procedures. Where possible, amendments support a level playing field between economic operators established outside the UK, whether or not they are member States.

The UK e-notification service

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

Transfer of functions

- 7.5 The EU Procurement Directives provide the Commission with a number of functions to fulfil its supervisory role over EU public procurement that are reflected in retained EU law and that it would not be appropriate to retain after exit. There are also a number of delegated powers to make tertiary legislation whose effects it is appropriate to recreate in the Regulations by conferring those powers on UK public authorities.
- 7.6 This instrument transfers the Commission's function to revalue the main financial thresholds to the Minister for the Cabinet Office (MCO). The Procurement Directives require the Commission to review these thresholds every two years to establish whether they continue to correspond to the relevant thresholds laid down by the GPA (see, for example, Article 6 of Directive 2014/24/EU). If they do not correspond, the Commission, by delegated act, makes the necessary amendment to the euro figures set out in the EU Directive to bring them back into line. At the same time, the Commission also determines the sterling value of these thresholds. The Regulations currently make ambulatory reference to the thresholds laid down in the relevant EU Directive (as determined in sterling by the Commission). This instrument replaces these ambulatory cross-references with the actual sterling figures and confers on MCO the power to make regulations following a biennial review. MCO will be required to conduct the reviews on the same basis as the Commission, however, rather than adopting the Commission's two-stage process, MCO must value the GPA

thresholds, which are expressed in special drawing rights, directly into the equivalent sterling values. The conversion rates to be used for this purpose are those published in the monthly International Financial Statistics published by the International Monetary Fund, which is the methodology applicable under the GPA.

- 7.7 The Commission has the power to update the exceptions to the circumstances in which contracting authorities are obliged to require the use of electronic means of communication in light of technological developments and to update the technical requirements relating to tools and devices for the electronic receipt of tenders and requests to participate to take account of technological developments. The instrument transfers these powers to MCO. The scope of MCO's powers to amend the Regulations has been closely based on the scope of the Commission's existing powers to amend the corresponding passages of the EU Procurement Directives (for example, new regulation 22A which this instrument inserts into the Public Contracts Regulations 2015, is based on the powers conferred by Article 22(7) of Directive 2014/24/EU). Regulations made pursuant to MCO's powers will be subject to the prior consent of Welsh Ministers or the relevant Northern Ireland Department in respect of devolved Welsh or Northern Ireland authorities.
- 7.8 Provision has been made to confer on MCO the power to treat the list of international agreements in the field of environmental, social and labour law set out in the annexes to the EU Directives as though certain international agreements were removed and others that are not covered were listed. An equivalent, delegated power to amend the list of international agreements in these annexes currently rests with the Commission.
- 7.9 This is relevant to the ability of a contracting authority to refuse to award a contract to the bidder submitting the most economically advantageous tender where the contracting authority has established that the bidder does not comply with certain applicable obligations in the field of social, environmental and labour law. The power can only be exercised by the MCO in relation to devolved authorities with the prior consent of Welsh Ministers or, as the case may be, the relevant Northern Ireland Department.
- 7.10 Requirements to provide the Commission with reports have been either removed or converted into an obligation to provide reports to MCO. Where the power to request reports has been transferred, a similar power has been created for the Welsh Ministers and the relevant Northern Ireland Department in respect of devolved Welsh and Northern Ireland authorities.

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

- 7.11 The Regulations do not apply to contracts that fall within the scope of the Defence and Security Regulations 2011 (the 2011 Regulations). In addition, the Regulations are subject to the derogation set out in Article 346 of TFEU that has the effect of overriding the obligation to comply with the Regulations or particular requirements in them, where this would undermine EU member States' essential security interests.
- 7.12 To ensure that contracting authorities can continue to override particular requirements of the Regulations where necessary, this instrument inserts provisions (which are intended to correspond to provisions in the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019), which replace the cross-reference to Article 346 TFEU with the text of Article 346 (with some minor adjustments to make it operable).

- 7.13 It is arguable that Article 346 TFEU has direct effect through section 2(1) of the European Communities Act 1972, and so is retained through section 4 of the European Union (Withdrawal) Act 2018 in some circumstances. However, given the Regulations are made under the alternative implementing powers in section 2(2) of the European Communities Act 1972, inserting the text of Article 346 is considered to provide the most legal certainty in ensuring the continued effect of Article 346 after exit.
- 7.14 Consideration was also given to whether Article 346(1)(a) should be replicated in the instrument. Regulation 15(2)(b) of the Public Contracts Regulations 2015 and parallel provisions in the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 (the parallel provisions), (which permit procurements to be excluded from the application of the Regulations where they would oblige a contracting authority to supply information which would be contrary to the UK’s essential security interests), arguably already replicate its effect. However, the courts have not clarified the interaction between Article 346(1)(a) TFEU and regulation 15(2)(b) (or the parallel provisions) and a strict application of regulation 15(2)(b) (or the parallel provisions), disapplying the entirety of the Regulations in all circumstances could be considered disproportionate, so it was considered prudent to make the position entirely clear by replicating Article 346(1)(a) in the Regulations.
- 7.15 Article 346(1)(b) provides that a member State may take such measures as it considers necessary for the protection of the essential interests of its security that are connected with the production of, or trade in, arms, munitions and war material. The scope of products referred to is determined by a list that was drawn up by the Council of Ministers of the EEC (as it then was), in 1958 (the 1958 List). The amendments made by this instrument reproduce the significance of the 1958 List (for example, the new paragraphs (2) to (6) that this instrument substitutes for regulation 3(2) of the Public Contracts Regulations 2015). Article 346(2) empowers the Council to make changes to the 1958 List. This instrument confers an equivalent regulation-making power on the Secretary of State for the purposes of the Regulations (as the new paragraph (5) in the example quoted above). Given the nature of this power, and its potential to affect the scope of the Regulations, its exercise is made subject to the affirmative procedure (see, for example, the new regulation 84A(2) which this instrument inserts into the Public Contracts Regulations 2015).

Scope of duty owed by contracting authorities

- 7.16 Regulation 5(57) of the instrument includes amendments to Regulation 89 of the Public Contracts Regulations 2015 (and parallel provisions in the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016). It would no longer make sense to provide remedies for breaches of “enforceable EU obligations”, so the amendment refers instead to any retained EU obligation that is saved under section 4 of the European Union (Withdrawal) Act 2018. This would include directly effective rights and obligations that previously flowed through section 2(1) of the European Communities Act 1972 and which continue to be recognised in domestic law post exit.
- 7.17 It would also be inappropriate to retain the obligations under Part 2 and 3 of the Public Contracts Regulations 2015 in respect of economic operators from EEA States in circumstances where the UK is likely to be treated as a third country by contracting authorities in member States. After exit, and save in respect of procurements which

are on-going as of exit day, this duty is owed only to economic operators from the UK.

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

The GPA and other international agreements

- 7.20 It is the intention of the UK to join the GPA in its own right (the UK currently participates in its capacity as an EU member State). If the UK does not accede to the GPA by exit, as a matter of international law economic operators established in territories and states which are GPA parties would no longer have the guaranteed access (and associated remedies) that they currently have in relation to UK public procurements. It has been decided that for procurements within the scope of the Regulations, economic operators established in territories and states which are party to the GPA (including EEA states) as at the point of the UK's withdrawal from the EU should continue to be afforded the same rights and remedies as the UK currently gives to economic operators established in territories and states which are party the GPA, on the basis of the EU's coverage schedules and for a period of eight months after exit. This is in anticipation of the UK's accession to the GPA on or shortly after exit. The eight-month timeline is in step with the meeting schedule of the GPA Committee. This instrument therefore modifies the relevant provisions of the Regulations from exit day so that they continue to accord guaranteed access and remedies to economic operators established in states which are GPA parties, including member States, despite the UK not being a member State or, until accession, a GPA party. Regulations 6, 8 and 10 of this instrument remove these provisions eight months from exit day.
- 7.21 Part 5 of the instrument disapplies the rights, powers, liabilities, obligations, restrictions, remedies and procedures in the field of public procurement which are derived from international agreements between the EU and third countries where those obligations could otherwise form part of retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018. Part 3 of the instrument also removes from the Regulations the provision that extends the application of the duties on contracting authorities and remedies to suppliers from third countries that have such an agreement with the EU.

Exclusion grounds

- 7.22 In respect of procurement procedures commenced after exit day, contracting authorities will not be bound by the mandatory requirement to exclude an economic operator established as having a conviction where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities. To avoid 'moving the goalposts' in ways that could produce unfairness in the context of procurements that are already underway, this ground of exclusion will, under the transitional provisions in the Schedule to this instrument, continue to apply to on-going procurement procedures commenced before exit.

Retained direct EU legislation

- 7.23 Section 3 of the European Union (Withdrawal) Act 2018 provides that "so far as operative immediately before exit day", direct EU legislation, with certain exemptions, forms part of domestic law on and after exit day. It incorporates legislation into domestic law that had legal effect prior to exit through s. 2(1) of the European Communities Act 1972.
- 7.24 This instrument modifies and in one case, revokes, for the whole of the UK, direct EU legislation in respect of which the Cabinet Office is the lead department.
- 7.25 The instrument modifies Regulation 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV), to transfer the powers of the Commission to amend the annexes to the Regulation to MCO.
- 7.26 The instrument also modifies Commission Decision 2006/211/EC (electricity generation in England, Scotland and Wales), Commission Decision 2007/141/EC (supply of electricity and gas in England, Scotland and Wales), and Commission Decision 2010/192/EC (exploration for and exploitation of oil and gas in England, Scotland and Wales). It replaces references to the application of Directive 2004/17/EC with references to the relevant provisions of domestic law and omits redundant Articles.
- 7.27 The instrument revokes Commission Implementing Regulation (EU) No 2015/1986 establishing standard forms for the publication of notices in the field of public procurement. That Regulation sets out the forms required for the publication of notices in OJEU. The forms will not be required for the purposes of the new UK e-notification service. The service itself will be designed to elicit the information in the form and manner in which it is to be submitted.

Consequential amendments to primary and secondary legislation

- 7.28 The instrument makes a number of amendments to primary and secondary legislation that arise as a consequence of the amendments to the Regulations.
- 7.29 The Greater London Authority Act 1999 is amended to replace references to the sending of notices to the Publications Office of the EU with references to the submission of notices to the new UK e-notification service. Section 355(8) now provides that where the Mayor revises the provisions of the London Environment Strategy dealing with municipal waste management after an authority has submitted a contract notice relating to the award of that contract to the UK e-notification service, then, in discharging their obligations under section 355, authorities are to disregard the amendments made to the London Environment Strategy. However, under the

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

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

Specific amendments

- 7.35 The definition of affiliated undertaking in both the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 by reference to the requirements in Directive 2013/34/EU has been replaced with a reference to the domestic legislation which implements the Directive, namely, Part 15 of the Companies Act 2006.
- 7.36 Regulation 85 of the Utilities Contracts Regulations 2016 applies to tenders relating to products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries. Utilities are entitled to reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries exceed 50% of the total value of the products constituting the tender. The origin of the products is determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code as amended from time to time. The instrument replaces the reference to the Community Customs Code with a suitable

reference that attracts the country of origin rules in the Taxation (Cross-Border Trade) Act 2018.

The 2006 Regulations

- 7.37 The effect of the original transitional provisions in the Regulations means that the Public Contract Regulations 2006 and Utilities Contract Regulations 2006 (the 2006 Regulations) continue to apply to contract award procedures commenced in accordance with the Public Contracts Regulations 2006 before 26th February 2015; to contract award procedures or design procedures commenced in accordance with the Utilities Contracts Regulations 2006 before 18 April 2016; and to concession contract award procedures commenced in accordance with the Public Contract Regulations 2006 before 18 April 2016.
- 7.38 Since the 2006 Regulations will only ever apply in respect of procedures commenced before exit day, the instrument modifies them to the extent that they continue to apply to subsequent stages of the procurement that have not been completed by exit day. Consistent with the transitional and savings provisions we are making in respect of amendments to the Regulations, references to a member State will be deemed to continue to include the UK whereas all requirements to send notices to OJEU are replaced with a requirement to submit a notice to the UK e-notification service.

Abnormally low tenders and State aid

- 7.39 In respect of abnormally low tenders submitted by bidders who may have been in receipt of state subsidies, the intention is to treat non-UK economic operators on a level playing field. Further, although a new UK State aid regime is envisaged in which the function for enforcement is to be conferred on the Competition and Markets Authority, in the area of public procurement it would be inappropriate for economic operators established in the UK to be required to demonstrate that aid provided by the UK Government was compatible with the UK's State aid regime in contrast to economic operators not established in the UK. Accordingly, the provisions in the Regulations relating to State aid have been removed (for example, regulation 69(2)(f), (6) and (7) of the Public Contracts Regulations 2015).

E-Certis

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

Joint procurement

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

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

Transitional provisions

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

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

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the EU. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

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

10. Consultation outcome

- 10.1 There has been no consultation on how to rectify the deficiencies arising from withdrawal. The changes made are intended to maintain the current legislative and policy framework in so far as this is possible after exit and are within the extent permitted by the European Union (Withdrawal) Act 2018 to correct deficiencies.
- 10.2 Regular discussions on the content of this instrument have been held with the devolved administrations throughout the drafting process in accordance with the Intergovernmental Agreement. In so far as this instrument makes provision that could be made by the Welsh Ministers, Scottish Ministers and a Northern Ireland Department, there has been regular engagement with the Welsh Government, Scottish

Government and Northern Ireland Civil Service throughout the drafting process and in accordance with the terms of the Intergovernmental Agreement on the EUWA¹.

11. Guidance

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

12. Impact

- 12.1 There is no, 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 framework and principles underlying the Regulations have not been substantially amended. Modifications contained in this instrument have been made to ensure the Regulations function effectively, once the UK withdraws from the EU. Contracting authorities and other contracting entities as well as private sector businesses will have to familiarise themselves with the amended provisions and the new UK e-notification service. UK economic operators will have to monitor opportunities on the new UK e-notification service on which UK procurement opportunities will be advertised. These impacts are, however, expected to be low and are below the threshold required to carry out a full impact assessment. It will be open to UK economic operators to continue to respond to contract notices published on OJEU by member States but in a no deal scenario where the UK is not participating in the GPA, it may be that economic operators would no longer have guaranteed access to the procurement markets of GPA parties (including the EU) or the remedies provided for by them. However, that is not an impact that arises from this statutory instrument. The most significant cost to the public sector that arises directly from this instrument relates to the development of the IT system for the UK e-notification service.

13. Regulating small business

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

14. Monitoring & review

- 14.1 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Lois Devey at the Cabinet Office Telephone: 07834172021 or email: lois.devey@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf

- 15.2 Edward Green at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Oliver Dowden, the Minister for Implementation, at the Cabinet Office 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 clauses 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/ESIC
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising clauses 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 clauses 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 clauses 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 clauses 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 clauses 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 clauses 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, Sch 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 13, 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 16, 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 Oliver Dowden, the Minister for Implementation, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 1.2 “In my view the [draft] Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 does no more than is appropriate.
- 1.3 This is the case because it does no more than prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU, examples of which are mentioned in paragraph 7.1 in the main body of this explanatory memorandum”.

2. Good reasons

- 2.1 Oliver Dowden, the Minister for Implementation, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 2.2 “In my view there are good reasons for the provisions in this [draft] instrument, and I have concluded they are a reasonable course of action. These reasons are set out in paragraph 7.1 to 7.42 of this explanatory memorandum”.

3. Equalities

- 3.1 Oliver Dowden, the Minister for Implementation, has made the following statements:
- 3.2 “The draft instrument does 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. Equality Act 2010 Section 155 subsection 2 and 3 (power to impose specific duties in relation to public procurement: supplementary) will be amended to refer to provisions in the Public Contracts Regulations 2015 and Public Contracts (Scotland) Regulations instead of the Public Sector Directive 2014/24/EU. These amendments have no wider policy impact. We have engaged with the devolved authorities to discuss appropriate amendments to their parallel procurement regulations”.
- 3.3 Oliver Dowden, the Minister for Implementation, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 3.4 “In relation to the draft instrument, I, Oliver Dowden, the Minister for Implementation, 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 paragraph 2 of the main body of this explanatory memorandum.