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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2019 No.**

**EXITING THE EUROPEAN UNION**

**PUBLIC PROCUREMENT**

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

*Made* - - - - - *2019*

*Coming into force in accordance with regulation 1*

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### SCHEDULE — TRANSITIONAL AND SAVINGS PROVISIONS

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a) and paragraph 1(1) and (3) of Part 1 of schedule 2 of the European Union (Withdrawal) Act 2018 (the Act)(b).

## PART 1

### GENERAL

#### **Citation, commencement, extent and transitional and saving provision**

1.—(1) These Regulations may be cited as the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019.

(2) Except for regulations 4, 6 and 8 these Regulations come into force on exit day.

(3) Regulations 4, 6 and 8 come into force eight months after exit day.

(4) The amendments and modifications made by these Regulations are subject to the transitional and savings provisions made by the schedule.

## PART 2

### AMENDMENT OF PRIMARY LEGISLATION

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

2. The Procurement Reform (Scotland) Act 2014 is amended as follows—

(a) 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.”,

(b) 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 reasons to unsuccessful participants), 33(1) (request for further information),

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(a) 1972 c.68. 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. Paragraph 1A of schedule 2 was inserted by the 2006 Act, section 28, and was amended by the 2008 Act, schedule, Part 1.

(b) 2018 c.16.

- 37(1) (actionable duties), and 41(1)(c)(a) (the directive, public contracts regulations and EU-regulated procurements) for “an EU-regulated procurement” substitute “a higher value regulated procurement”,
- (c) in section 30(1) (technical specifications), for “EU-regulated procurements” substitute “higher value regulated procurements”,
- (d) 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.”,
- (e) in section 41 (the directive, public contracts regulations and EU-regulated procurements)—  
(i) for the heading substitute “Public Contracts Regulations and Higher Value Regulated Procurements”,  
(ii) omit subsections (1)(a) and (2)(a),
- (f) in section 42 (general interpretation)—  
(i) for the meaning of “public contract” substitute “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”,  
(ii) for the meaning of “public works contract” substitute—  
“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, of 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),”,  
(iii) at the end of sub-section (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 exit day**

**3.—**(1) The Public Contracts (Scotland) Regulations 2015**(b)** are amended as follows.

(2) In regulation 2 (interpretation), in paragraph (1)—

- (a) omit the definition of the “Commission”,

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(a) Section 41(1)(c) was amended by S.S.I. 2015/446, regulation 1(2) and schedule 6, paragraph 2(4)(c).  
(b) S.S.I. 2015/446, amended by S.S.I. 2016/47.

- (b) 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.”
  - (c) omit the definition of “ESPD”,
  - (d) in the definition of “GPA”, after “amended” insert “before exit day”,
  - (e) in the definition of “innovation”, omit “the Europe 2020 strategy for smart”,
  - (f) 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(a) because of the effect which the Treaty on European Union or TFEU had immediately before exit day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section.”
  - (g) after the definition of “selection criteria” insert—
    - “SPD” means the Single Procurement Document referred to in regulation 60(1),”
  - (h) 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),”.
- (3) In regulation 2, omit paragraphs (2) and (3).
- (4) In regulation 3, (subject-matter and application of these regulations), for paragraph (2) substitute the following—
- “(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 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 exit 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(b).”.
- (5) In regulation 4 (mixed procurement)—
- (a) in paragraph (1), for “Article 346 of the TFEU” substitute “regulation 3(2)”,

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(a) 2018 c.16.

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

- (b) in paragraph (2)—
  - (i) for “Utilities Directive” substitute “Utilities Contracts (Scotland) Regulations 2016(a)”,
  - (ii) for “Art 5 and 6 of the Utilities Directive” substitute “regulations 5 and 6 of those Regulations”.
- (6) 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 “£4,551,413”,
    - (ii) in sub-paragraph (b), for “the amount specified in Article 4(b) of the Directive” substitute “£118,133”,
    - (iii) in sub-paragraph (c), for “the amount specified in Article 4(c) of the Directive” substitute “£181,302”,
    - (iv) in sub-paragraph (d), for “the amount specified in Article 4(d) of the Directive” substitute “£615,278”,
  - (b) in paragraph (3)(a)(i) for “80,000 euros” substitute “£65,630”,
  - (c) in paragraph (3)(a)(ii) “1 million euros” substitute “£820,370”,
  - (d) omit paragraph (5).
- (7) 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 31st 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 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 2019.”.

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

- (8) 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 regulation 17 (exclusion: contracts awarded for the purpose of resale of lease to third parties), 22 (exclusion: contracts awarded 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 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”.
- (9) 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(a),”,
    - (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.”.
- (10) In regulation 10 (exclusions: public contracts awarded, and design contests organised, pursuant to international rules), in paragraph (1)(a)—
- (a) before “Treaties” insert “Retained”,
  - (b) for “one or more third” substitute “one or more other”.
- (11) In regulation 11 (exclusions: specific service contracts), in paragraph (1)(e)—
- (a) in paragraph (i)—
    - (i) in sub-paragraph (aa), for “a member State, a third” substitute “the United Kingdom, another”,
    - (ii) in sub-paragraph (bb), for “a member State or a third” substitute “the United Kingdom or another”,
  - (b) in both paragraphs (iv) and (v), for “member State concerned” substitute “United Kingdom”.
- (12) 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

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(a) S.S.I. 2016/65.

before exit day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section”.

(13) In regulation 13 (exclusions: public contracts between entities within the public sector), in paragraphs (2)(c) and (5)(c), before “Treaties” insert “Retained”.

(14) In regulation 14 (specific situations: contracts subsidised by a contracting authority)—

(a) in paragraph (1)—

- (i) in sub-paragraph (a), for “Article 13(a) of the Directive” substitute “regulation 5(1)(a)”,
- (ii) in sub-paragraph (b), for “Article 13(b) of the Directive” substitute “regulation 5(1)(b)”.

(15) In regulation 16 (specific situations: defence and security), in paragraph (2)(a), omit “or another member State”.

(16) 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)”.

(17) In regulation 18 (public contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules), in paragraph (1)—

(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”.

(18) 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 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.”.

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

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

(21) 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 (23), for the word “member” substitute “other”.

(22) After regulation 23 insert—

**“Powers to amend regulation 23**

**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 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.”.

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

- (a) In the heading for “relation” substitute “relating”,
- (b) in the heading, omit “and other international agreements”,
- (c) in the body of the regulation, the text of the existing regulation becomes paragraph (1) and is amended as follows—
  - (i) omit “and by the other international agreements by which the EU is bound”,
  - (ii) for “those agreements” substitute “the GPA”,
  - (iii) for “EU” substitute “United Kingdom”,
- (d) after that paragraph (1) insert—

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

- (a) each country that was a member State immediately before exit 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.”.

(24) 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”.

- (25) 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”,
- (26) 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”.
- (27) In regulation 33 (use of the negotiated procedure without prior publication), in paragraph (1)(a), for “to the Commission where it so requests” substitute “to the Scottish Ministers if they so request”.
- (28) 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), 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).”
- (29) Omit regulation 40 (procurement involving contracting authorities from different member States).
- (30) 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), omit “to the extent that they are compatible with EU law,”.
- (31) 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” 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”.
- (32) For regulation 50 (contract notices) substitute—

**“Contract notices**

**50. Contract notices—**

- (a) must contain the information set out in part C of Annex V to the Public Contracts 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) must be submitted for publication in accordance with regulation 52 (publication on the UK e-notification service).”.
- (33) In regulation 51 (contract award notices)—
- (a) in paragraph (1), for “send” substitute “submit”,
  - (b) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,

- (c) for paragraph (2) substitute—
    - “(2) Such notices—
      - (a) must contain the information set out in part D of Annex V to the Public Contracts Directive, but as if—
        - (i) in paragraph 9, “Article 67” were a reference to regulation 67 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 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) must be submitted for publication in accordance with regulation 52 (publication on the UK e-notification service),”,
    - (d) in paragraphs (5)(a) and (b), for “send” substitute “submit”.
- (34) 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.”.
- (35) 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”.

(36) 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”.

(37) In regulation 55 (invitations to candidates), in sub-paragraph (5)(d)—

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

(38) 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.”.

(39) 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”.
- (40) In regulation 59 (selection criteria), omit paragraph (5).
- (41) 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”.
- (42) In regulation 61 (means of proof)—
  - (a) in paragraph (4)(a) and (b), omit “member State or”,
  - (b) in paragraph (5)—
    - (i) omit “member State or” in each place it occurs,
- (43) Omit regulation 62 (recourse to e-certis).
- (44) 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).
- (45) Omit regulation 65 (recognition of official lists of approved economic operators and certification by certification bodies).
- (46) In regulation 68 (life-cycle costing)—
  - (a) in paragraph (3)(c)—
    - (i) omit ‘third’,
    - (ii) omit the words from “or other” to the end.
  - (b) omit paragraphs (5) and (6).
- (47) In regulation 69 (abnormally low tenders)—
  - (a) in paragraph (2), omit sub-paragraph (f),
  - (b) omit paragraphs (6) and (7).
- (48) 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)”.
- (49) 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”.
- (50) In regulation 73 (termination of contracts), in paragraph (1)—
  - (a) after paragraph (a), insert “or”,
  - (b) after paragraph (b), omit “or”,
  - (c) omit paragraph (c).
- (51) 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”.
- (52) In regulation 78 (notices)—
  - (a) in paragraph (1) after “Directive” insert—
    - “, 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) 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), 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 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”.
- (53) In regulation 79 (rules on the organisation of design contests and the selection of participants), omit paragraph (2).
- (54) In regulation 82 (retention of contract copies)—
  - (a) in paragraph (1)—
    - (i) in sub-paragraph (a), for “1,000,000 EUR” substitute “£820,370”,
    - (ii) in sub-paragraph (b), for “10,000,000 EUR” substitute “£8,203,700”,
  - (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 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).

(56) 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 statutory instrument, subject to annulment in pursuance of a resolution of the Scottish Parliament.

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

(57) 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 or Condition 2 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 exit 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 exit 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 exit day the EU had agreed with a GPA state that the GPA shall apply to a contract of that description.”.

(d) omit paragraph (4),

(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 exit day was”,

(ii) in the definition of “relevant time”—

(aa) for “sent” substitute “submitted”,

(bb) for “EU Publications Office” substitute “UK e-notification service”.

(58) In regulation 88 (enforcement of duties through the courts) in paragraph (5)(a)—

(a) for “sent” substitute “submitted”,

(b) for “Official Journal” 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”.

- (59) 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”.
- (60) 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 exit day”.
- (61) Omit schedule 5 (professional and trade registers etc.).

#### **Amendments commenced eight months after exit day**

- 4.**—(1) The Public Contracts (Scotland) Regulations 2015 (as amended by regulation 3) are further amended as follows.
- (2) Omit regulation 26 (conditions relating to the GPA).
  - (3) In regulation 68 (life-cycle costing), in paragraph (3)(c), 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 exit day**

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

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

- (iii) in the definition of “contract” for “supplies or services” substitute “supply or service”,
- (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 exit 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 because of the effect which the Treaty on European Union or TFEU had immediately before exit 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) in paragraph (1), for “to the organisation” substitute “for the organisation”,
  - (b) 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 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.
- (2B) Any measures which, if they had been taken immediately before exit 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(a).”.

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(a) S.I. 2016/274, amended by S.I. 2016/696.

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

(5) In regulation 6 (procurement covering several activities), in paragraph (1), 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 “£363,424”,

(b) in paragraph (1)(b), for “the amount specified in Article 15(b) of the Utilities Contracts Directive” substitute “£4,551,413”,

(c) in paragraph (1)(c), for “the amount specified in Article 15(c) of the Utilities Contracts Directive” substitute “£820,370”,

(d) in paragraph (2)(a)—

(i) in paragraph (i), for “80,000 Euros” substitute “£65,630”,

(ii) in paragraph (ii), for “1 million Euros” substitute “£820,370”.

(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 2019.”.

(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 (exclusion: contracts awarded and design contests organised pursuant to international rules), in paragraph (1)(a)—

- (a) before “Treaties” insert “Retained”,
- (b) for “third” substitute “other”.

(11) In regulation 20 (exclusion: specific exclusions for service contracts), in paragraph (1)(d)—

- (a) in paragraph (i)—
  - (i) in sub-paragraph (aa), for “a member State, a third” substitute “the United Kingdom, another”,
  - (ii) in sub-paragraph (bb), for “a member State or a third” substitute “the United Kingdom or another”,
- (b) in both paragraphs (iv) and (v), for “member State concerned” substitute “United Kingdom”.

(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 exit day in giving rise to any of the powers, rights etc mentioned in that section”.

(13) In regulation 23 (defence and security), in paragraph (2)(a), 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 (contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules), in paragraph (1)—

- (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 (exclusions: contracts awarded to an affiliated undertaking), in paragraph (5)—

- (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”,
- (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 (activities directly exposed to competition), in paragraph (2), 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 (principles of procurement), in paragraph (4) omit from “or international law measures” to the end.

(23) In regulation 35 (economic operators)—

- (a) omit paragraph (1),
- (b) in paragraph (3)(c), for “services” substitute “service”.

(24) In regulation 36 (reserved contracts), in paragraph (2), 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 (23), in the words after sub-paragraph (b), for the words from “ the Utilities” to the end substitute “these Regulations”.
- (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 heading, omit “and other international agreements”,
  - (b) in the body of the regulation, the text of the existing regulation becomes paragraph (1) and is amended as follows—
    - (i) omit “and by the other international agreements by which the EU is bound”,
    - (ii) for “those agreements” substitute “the GPA”,
    - (iii) for “of the EU” substitute “of the 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 exit 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 (restricted procedure), in paragraph (3)(a), for “sent” substitute “submitted”.
- (30) In regulation 45 (negotiated procedure with prior call for competition), in paragraph (3)(a), for “sent” substitute “submitted”.
- (31) In regulation 46 (competitive dialogue), in paragraph (3)(a), for “sent” substitute “submitted”.
- (32) In regulation 47 (innovation partnership), in paragraph (11)(a), 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), omit “to the extent that they are compatible with EU law,”.
- (36) In regulation 61 (communication of technical specifications) in paragraph (1)(a), for “services” substitute “service”.
- (37) 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), for “send” substitute “submit”,
  - (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 references 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 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”,
    - (ii) in sub-paragraph (d)—
      - (aa) for “sent” 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”.
- (38) 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 10 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) in the words 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”.
- (39) 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).”.
- (40) 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 sent 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”.

- (41) 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 the words from “, provided” to the end,
  - (f) at the end 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.”.
- (42) 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), for “by the EU Publications Office” substitute “on the UK e-notification service”,
  - (c) in paragraph (3), 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”.

(43) In regulation 71 (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”.

(44) In regulation 74 (general principles), in paragraph (6)—

- (a) omit “EU law,”,
- (b) after “agreements or” insert “, subject to paragraphs (6A) and (6B)”,
- (c) 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.”.

(45) In regulation 77 (reliance on the capacities of other entities), in paragraph (10), for “services” substitute “service”.

(46) 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).

(47) In regulation 81 (life-cycle costing)—

- (a) in paragraph (3)(c)—
  - (i) omit ‘third’,
  - (ii) omit the words from “or other” to the end.
- (b) omit paragraphs (5) and (6).

(48) In regulation 82 (abnormally low tenders)—

- (a) in paragraph (2), omit sub-paragraph (f),
- (b) omit paragraphs (6) and (7).

(49) In regulation 83 (tenders comprising products originating in third countries) in paragraph (2)(a), for the words 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(a) if the products were chargeable goods within the meaning of that Part”.

(50) In regulation 85 (subcontracting)—

- (a) in paragraph (4)(b) for “services” substitute “service”,
- (b) in paragraph (7), for “ESPDs” substitute “SPDs”,

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

- (c) in paragraph (8)(a) and (b) for “services contracts” substitute “service contracts”.
- (51) 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”.
- (52) In regulation 87 (termination of contracts), in paragraph (1)—
- (a) at the end of sub-paragraph (a) insert “or”,
  - (b) omit sub-paragraph (c) and the immediately preceding “or”.
- (53) 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”.
- (54) 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)—
    - (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”.
- (55) In regulation 93 (rules on the organisation of design contests and the selection of participants and the jury), omit paragraph (2).
- (56) In regulation 95 (retention of contract copies)—
- (a) in paragraph (1)—
    - (i) in sub-paragraph (a), for “1,000,000 Euros” substitute “£820,370”,
    - (ii) in sub-paragraph (b), for “10,000,000 Euros” substitute “£8,203,700”,
  - (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”.
- (57) 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).
- (58) 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 or Condition 2”,
    - (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 exit 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 exit 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 exit day the EU had agreed with a GPA state that the GPA shall apply to a contract of that description.”,
  - (d) omit paragraph (4),
  - (e) 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 exit day was”,
    - (iii) in the definition of “relevant time”—
      - (aa) for “sent” substitute “submitted”,
      - (bb) for “EU Publications Office” substitute “UK e-notification service”.
- (59) In regulation 101 (enforcement of duties through the courts)—
- (a) in paragraph (5)(a)—
    - (i) for “sent” substitute “submitted”,
    - (ii) for “the Official Journal” where it first occurs substitute “the UK e-notification service”,
    - (iii) for “form and manner of sending notices for publication at EU level” substitute “publication on the UK e-notification service”,
    - (iv) for “in the Official Journal” substitute “on the UK e-notification service”.
- (60) 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”.
- (61) 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 statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

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

(62) 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 exit day”.

#### Amendments commenced eight months after exit day

**6.**—(1) The Utilities Contracts (Scotland) Regulations 2016 (as amended by regulation 5) are further amended as follows.

(2) Omit regulation 41 (conditions relating to the GPA).

(3) In regulation 81 (life-cycle costing), in paragraph (3)(c), omit the words from “, including” to the end.

(4) Omit regulation 100(2) to (5) (duty owed to economic operators).

## CHAPTER 3

### THE CONCESSION CONTRACTS (SCOTLAND) REGULATIONS 2016

#### Amendments commenced on exit day

**7.**—(1) The Concession Contracts (Scotland) Regulations 2016(a) are amended as follows.

(2) In regulation 2 (interpretation), in paragraph (1)—

(a) omit the definition of “Commission”,

(b) after the definition of “contracting entity”(b) insert—

““covered by regulation 7(2)”, in relation to an activity, an element, a part of a 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”, delete “of a member State”; and before “Treaties” insert “Retained”,

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

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

- (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 exit day(a),”
- (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 because of the effect which the Treaty on European Union or TFEU had immediately before exit 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),”.
- (3) In regulation 5 (meaning of “utility”), in paragraph (4)(b)—
  - (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 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 exit 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(b).”.
- (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 “£4,551,413”,
  - (b) omit paragraph (2),
  - (c) in paragraph (4), for “sent” substitute “submitted”.

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(a) 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).

(b) S.I. 2016/273.

(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 2019.”.

(7) In regulation 9 (exclusions: concession contracts awarded on the basis of an exclusive right)—

- (a) in paragraph (1)(b), omit the words from “granted in accordance with” to the end,
- (b) omit paragraph (2).

(8) In regulation 10 (exclusions: concession contracts awarded pursuant to international rules)—

- (a) in sub-paragraph (1)(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 paragraph (i)(aa), for “a member State, a third” substitute “the United Kingdom, another”,
    - (ii) in paragraph (i)(bb), for “a member State or a third” substitute “the United Kingdom or another”,
    - (iii) in both paragraphs (iv) and (v), for “member State concerned” substitute “United Kingdom”,
  - (b) in paragraph (1)(o)—
    - (i) for “third country” substitute “country other than the United Kingdom”,
    - (ii) for “European Union” substitute “United Kingdom”.
- (11) In regulation 15 (exclusions: concession contracts awarded to an affiliated undertaking), in paragraph (5)—
- (a) in sub-paragraph (a), for the words from “Directive” to “Council” substitute “Part 15 of the Companies Act 2006(a)”,
  - (b) in sub-paragraph (b), in the words before paragraph (i), for “Directive” substitute “Part”.
- (12) Omit regulation 17 (notification of information by utilities).
- (13) In regulation 19 (concession contracts between entities within the public sector), in paragraphs (2)(c) and (5)(c), before “Treaties” insert “Retained”.
- (14) In regulation (22) (mixed procurement), in paragraph (5), for “Article 346 of 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 (contracts covering both activities listed in schedule 2 and activities involving defence or security aspects), in paragraph (1), for “Article 346 of the TFEU” substitute “regulation 7(2)”.
- (17) In regulation 26 (reserved concession contracts), in paragraph (3), 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 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)—
- (a) in paragraphs (1) and (2), for “send” substitute “submit”,

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(a) 2006 c.46.

- (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 (electronic availability of concession documents), in paragraph (1), 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 (time limits for receipt of applications and tenders for the concession contract), in paragraph (3), for “sent” substitute “submitted”.

(25) In regulation 44 (concession contract award criteria), in paragraph (9), 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 (termination of concession contract), in paragraph (1)—

(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 “another 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 or Condition 2 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 exit 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 exit 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 exit day the EU had agreed with a GPA state that the GPA shall apply to a contract of that description.”.
  - (d) omit paragraph (4),
  - (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 exit day was”,
    - (ii) 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 (enforcement of duties through the courts), in paragraph (5)(a)—
- (a) for “sent” substitute “submitted”,
  - (b) for “to the Official Journal” substitute “to the UK e-notification service”,
  - (c) for “form and matter of publication of notices” substitute “form and manner of publication of notices”,
  - (d) 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 statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

(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 exit day”.

**Amendment commenced eight months after exit day**

**8.**—(1) The Concession Contracts Regulations 2016 (as amended by regulation 7) 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**

**9.**—(1) The Procurement (Scotland) Regulations 2016(a) are amended as follows—

(a) in regulation 7 (publication of contract notices, prior information notices and award notices on the Public Contracts website)—

(i) in paragraph (1) for “an EU regulated procurement” substitute “a higher value regulated procurement”,

(ii) 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”,

(iii) 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”,

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(a) S.S.I. 2016/145.

- (iv) 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”,
- (b) in regulation 8(1) (selection of tenderers: exclusion of economic operators on grounds of criminal activity)—
  - (i) omit sub-paragraph (e),
  - (ii) in sub-paragraph (k), for “Article 57(1)” substitute “Article 57(1)(a), (b), (d), (e) or (f)”,
- (c) in regulation 10 (selection of tenderers: selection criteria), omit paragraph (5),
- (d) in regulation 11 (technical specifications)—
  - (i) in paragraph (8), for “adopted by a legal act of the EU” substitute “imposed by retained EU law”,
  - (ii) in paragraph (10), in the words 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**

**10.—**(1) To the extent that the Public Contracts (Scotland) Regulations 2012(a) (“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 paragraph (i), sub-paragraph (aa) were omitted, and

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(a) 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.

- (ii) in paragraph (ii), the words “EU law or” and “European or” were omitted,
  - (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—
- (a) immediately before exit day, a procurement has been commenced,
  - (b) on or after exit 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 exit 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 exit 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 exit day.
- (5) Paragraph 1 of the schedule applies for the purposes of paragraph (4) as it applies for the purposes of the schedule.

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

**11.—**(1) To the extent that the Utilities Contracts (Scotland) Regulations 2012(a) (“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 paragraph (xiii) read “£4,101,850, 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”,

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(a) 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.

- (ii) in sub-paragraph (b)—
    - (aa) “400,000 euro” read “£328,150”,
    - (bb) “5,000,000 euro” read “£4,101,850”,
    - (cc) 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)—
    - (i) in paragraph (i), sub-paragraph (aa) were omitted, and
    - (ii) in paragraph (ii), the words “EU law or” and “European standard or” were omitted,
  - (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 exit day, a procurement has been commenced,
  - (b) on or after exit 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 exit 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 exit 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 exit day.

(5) Paragraph 1 of the schedule applies for the purposes of paragraph (4) as it applies for the purposes of the schedule.

*Name*  
A member of the Scottish Government

St Andrew’s House,  
Edinburgh  
Date

## SCHEDULE

Regulation 1(4)

### TRANSITIONAL AND SAVINGS PROVISIONS

#### Interpretation

1.—(1) In this schedule—

“amended”, in relation to a provision, means that provision as amended or substituted by these Regulations,

“amendments” (and cognate expressions) include the modifications made by regulations 10 and 11,

“Official Journal” means the Official Journal of the European Union,

“the Procurement Regulations” means—

- (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,

“unamended”, in relation to a provision, means that provision in the form in which it existed immediately before it was amended or substituted by these Regulations.

(2) In this schedule, the following have the same meaning as in whichever of the Procurement Regulations the context requires—

- (a) contracting authority,
- (b) design contest,
- (c) dynamic purchasing system,
- (d) framework agreement,
- (e) utility.

(3) For the purposes of this schedule, a procurement has been commenced before a particular date if, before that date—

- (a) a notice has been sent to the Official Journal in accordance with the 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.

(4) For the purposes of this schedule, a procurement covers the whole of the procedures which stem from that commencement.

(5) Accordingly, for example, if a contract notice in relation to a proposed framework agreement under the Public Contracts (Scotland) Regulations 2015 has, before exit day, been sent as described in sub-paragraph (3)(a), paragraph 3(1) 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 exit day.

(6) Procedures taken for the purpose of modifying a contract or framework agreement are not to be regarded, for the purposes of sub-paragraph (4), as stemming from the commencement of the procurement from which the award of that contract or framework agreement had itself stemmed.

(7) A procedure commenced as described in sub-paragraph (3)(a)(i), (b) or (c) is not to be regarded, for the purposes of sub-paragraph (4), as stemming from the commencement of any design contest that had previously been held in relation to the subject-matter of the procurement.

## **General principles**

2.—(1) Subject to the other provisions of this schedule, the amendments made by these Regulations apply prospectively even in relation to procurements which had commenced before the amendments came into force.

(2) But, subject to the following provisions of this schedule, an amendment made by these Regulations does not apply to the extent that the provision amended refers or relates (directly or indirectly) to something which in fact occurred before the amendments came into force.

(3) Accordingly, for example—

(a) where, before exit day, a contract notice was published in the Official Journal after being sent for such publication in accordance with unamended regulations 50 and 52 of the Public Contracts (Scotland) Regulations 2015, but exit day occurred before the sending of a contract award notice to the EU Publications Office in accordance with unamended regulations 51 and 52 of those Regulations in relation to that procurement—

(i) the contract award notice is, on or after exit day, to be submitted for publication on the UK e-notification service in accordance with amended regulations 51 and 52 of those Regulations, but

(ii) the information to be included in that notice by virtue of amended regulation 51(2) of those Regulations includes the date and reference of the publication of the contract notice in the Official Journal because that publication occurred before exit day and, accordingly, amended regulation 51(2)(a)(iv) of those Regulations is to be disregarded in relation to that publication,

(b) even in relation to a procurement that is commenced on or after exit day, the amendment made by regulation 3(11) of these Regulations to regulation 10(1)(a) of the Public Contracts (Scotland) Regulations 2015 does not apply if the legal instrument referred to in that regulation 10(1)(a) was concluded before exit day (and, in such circumstances, the test laid down by that regulation accordingly continues to be whether the instrument had been concluded in accordance with “the Treaties” as defined in the unamended regulation 2(1) of those Regulations rather than whether the instrument had been concluded in accordance with “the Retained Treaties” as defined by the amended regulation 2(1) of those Regulations).

## **Transitional provision in for the Public Contracts (Scotland) Regulations 2015**

3. Where, in accordance with regulation 35 of the Public Contracts (Scotland) Regulations 2015, a contracting authority has established a dynamic purchasing system before exit day, paragraph (24) of that regulation shall be read in relation to that system as if the reference to “a renewed SPD” were a reference to “an SPD or a renewed SPD”.

## **Transitional provision in for the Utilities Contracts (Scotland) Regulations 2016**

4. Where, in accordance with regulation 50 of the Utilities Contracts (Scotland) Regulations 2016, a contracting authority has established a dynamic purchasing system before exit day, paragraph (23) of that regulation shall be read in relation to that system as if the reference to “a renewed SPD” were a reference to “an SPD or a renewed SPD”.

## **Savings in relation to procurements commenced before exit day**

5.—(1) The amendments made by these Regulations described in sub-paragraph (2) do not affect any procurement commenced before exit day.

(2) The amendments are—

- (a) the amendments to the following provisions of the Public Contracts (Scotland) Regulations 2015—
  - (i) the definition of “ESPD” in regulation 2(1) (interpretation),
  - (ii) regulation 26 (conditions relating to the GPA and other international agreements),
  - (iii) regulation 35(24) (which, as unamended, refers to a renewed ESPD as a means of proof in relation to dynamic purchasing systems),
  - (iv) regulation 43(8) (which, as unamended, refers to a legal act of the EU in relation to mandatory accessibility requirements in technical specifications),
  - (v) regulation 58 (exclusion grounds),
  - (vi) regulation 59 (selection criteria) and the related omission of schedule 5 (professional and trade registers etc),
  - (vii) regulation 60 (European Single Procurement Document),
  - (viii) in regulation 63 (quality assurance standards and environmental management standards), paragraph (2) and the words after paragraph (4)(c),
  - (ix) regulation 71(7) (which, as unamended, refers to ESPDs in respect of subcontractors),
- (b) the amendments made to regulation 40 (exclusion grounds) of the Concession Contracts (Scotland) Regulations 2016,
- (c) the amendments made to the following provisions of the Utilities Contracts (Scotland) Regulations 2016—
  - (i) regulation 41 (conditions relating to the GPA and other international agreements),
  - (ii) regulation 58(8) (which, as unamended, refers to a legal act of the EU in relation to mandatory accessibility requirements in technical specifications),
  - (iii) in regulation 79 (quality assurance standards and environmental management standards), paragraph (2) and the words after paragraph (4)(c),
  - (iv) regulation 85(7) (which, as unamended, refers to ESPDs within the meaning of regulation 60 of the Public Contracts (Scotland) Regulations 2015).

(3) To the extent that it is saved by paragraphs (1) and (2)(a)(vii), regulation 60(11)(a) of the Public Contracts Regulations (Scotland) 2015 has effect as if the reference in it to “any member State” continued to include the United Kingdom.

## **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 other member States),
- (b) regulation 55 of the Utilities Contracts (Scotland) Regulations 2016 (procurement involving utilities from other 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 with modification of certain references to compatibility with EU law**

7.—(1) The omission by these Regulations of the words “to the extent that they are compatible with EU law” from—

- (a) regulation 43(10) of the Public Contracts (Scotland) Regulations 2015 (technical specifications), and
- (b) regulation 58(10) of the Utilities Contracts (Scotland) Regulations 2016 (technical specifications),

does not affect any procurement commenced before exit day.

(2) To the extent that those words are saved by paragraph (1), the reference to EU law is to be construed as referring to EU law as it had effect immediately before exit day.

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

8.—(1) This paragraph applies where—

- (a) a contract was awarded before exit day, and
- (b) immediately before exit 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 exit day, that power continues despite the omission, by these Regulations, of that regulation 73(1)(c), 47(1)(c) or 87(1)(c).

#### **Saving with modification of certain references to design contests in relation to procurements commenced before exit day**

9.—(1) The omission by these Regulations of—

- (a) paragraph (2) of regulation 79 of the Public Contracts (Scotland) Regulations 2015 (rules on the organisation of design contests and the selection of participants), and
- (b) paragraph (2) of regulation 93 of the Utilities Contracts (Scotland) Regulations 2015 (rules on the organisation of design contests and the selection of participants and the jury),

does not affect any procurement commenced before exit day.

(2) To the extent that they are saved by sub-paragraph (1), the omitted paragraphs have effect on and after exit day as if each reference in them to a ‘member State’ continued to include the United Kingdom.

**Saving, in relation to procurements commenced before exit day, of duty owed to economic operators from EEA states**

**10.**—(1) The amendments made by these Regulations to—

- (a) paragraph (1) of regulation 87 of the Public Contracts (Scotland) Regulations 2015 (duty owed to economic operators),
- (b) paragraph (1) of regulation 51 of the Concession Contracts (Scotland) Regulations 2016 (duty owed to economic operators),
- (c) paragraph (1) of regulation 100 of the Utilities Contracts Regulations 2016 (duty owed to economic operators),

do not affect any procurement commenced before exit day.

(2) To the extent that they are saved by sub-paragraph (1), the unamended paragraphs (2) have effect on and after exit day as if the word “another” read “an”.

**Saving, in relation to procurements commenced before exit day, of duty owed to economic operators from states party to certain bilateral agreements**

**11.**—(1) The omission by these Regulations of—

- (a) paragraphs (2)(b) and (4) of regulation 87 of the Public Contracts (Scotland) Regulations 2015 (duty owed to economic operators),
- (b) paragraphs (2)(b) and (4) of regulation 51 of the Concession Contracts (Scotland) Regulations 2016 (duty owed to economic operators),
- (c) paragraphs (2)(b) and (4) of regulation 100 of the Utilities Contracts (Scotland) Regulations 2016 (duty owed to economic operators),

do not affect any procurement commenced before exit day.

(2) To the extent that they are saved by sub-paragraph (1), the unamended provisions referred to in sub-paragraph (1) have effect on and after exit day—

- (a) as if the United Kingdom were still an EEA state, and
- (b) as if, in each unamended paragraph (4)(a)—
  - (i) the words “there is” read “immediately before exit day there was”, and
  - (ii) the words “is bound” read “was bound”.

**Saving in relation to procurements commenced before regulations 4, 6 and 8 come into force**

**12.** The amendments made by regulations 4, 6 and 8 do not affect any procurement commenced before those regulations come into force.

**Saving in relation to affiliated undertakings**

**13.** Where—

- (a) a procurement was commenced before exit day, and
- (b) immediately before exit day, an undertaking fell within the definition of “affiliated undertaking” in regulation 15(5) of the Concessions Contracts (Scotland) Regulations 2016 or regulation 28(5) of the Utilities Contracts (Scotland) Regulations 2016,

the amendments made by these Regulations to those regulations do not prevent that undertaking from continuing, on and after exit day, to fall within that definition in relation to that procurement.

## EXPLANATORY NOTE

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

These Regulations are made in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2 of the European Union (Withdrawal) Act 2018 (c.16) in order to address failures of retained EU law to operate effectively arising from the withdrawal of the UK from the European Union.

The opportunity is also taken to amend (under powers conferred by section 2(2) of the European Communities Act 1972 (c.68)) a small number of other matters which would otherwise have required separate regulations to have been brought forward by the Scottish Government.

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 (S.S.I. 2016/65), the Procurement (Scotland) Regulations 2016, the Public Contracts (Scotland) Regulations 2012 (S.S.I. 2012/88) and the Utilities Contract (Scotland) Regulations 2012 (S.S.I. 2012/89) respectively. The schedule makes transitional and savings provisions.

The power contained in section 2(2) of the European Communities Act 1972 has been relied upon for amendments made by regulation 5(2)(a)(iii), (3)(a), (23)(b), (36), (50)(a) and (c) and regulation 7(28)(c) of these regulations.

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