

EXPLANATORY MEMORANDUM TO
THE PUBLIC PROCUREMENT (AMENDMENT ETC.) (EU EXIT) (NO. 2)
REGULATIONS 2019

2019 No. 623

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is being made in order to amend the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019¹ before they come into effect in such a way as to preserve in domestic law, for a time-limited period of 18 months, the duties which United Kingdom (UK) contracting authorities and other contracting entities currently owe towards economic operators from countries with which the European Union (EU) has, before exit day, concluded a trade agreement by which it is bound.
- 2.2 In doing so, the UK will be able to demonstrate that it is able to comply with the procurement obligations arising from those EU-third country trade agreements which the UK intends to ‘transition’ to apply to the UK as an independent party following EU Exit.

Explanations

What did any relevant EU law do before exit day?

- 2.3 The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 address deficiencies in retained EU law in relation to public procurement arising from the withdrawal of the UK from the EU, ensuring the legislation continues to operate effectively. They do so by, amongst other things, amending the Public Contracts Regulations 2015 (S.I. 2015/102), the Concession Contracts Regulations 2016 (S.I. 2016/273) and the Utilities Contracts Regulations (S.I. 2016/274) (“the principal public procurement Regulations”).
- 2.4 These Regulations amend Parts 1, 3 and 5 of, and the Schedule to, the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (‘the first SI’), before they come into force, so that, instead of removing from the principal public procurement Regulations the obligations owed by UK contracting authorities and other entities towards non-UK suppliers immediately on exit day, the first SI would remove those obligations 18 months after exit day. For a time-limited period, then, UK contracting authorities and entities will continue to owe duties towards suppliers from third country signatories to agreements with the EU. The effect is to afford those

¹ The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 were laid in draft before Parliament on 13th December 2018.

suppliers guaranteed access to UK procurement markets and a remedy in domestic law for breaches of the procurement regulations for a period of 18 months.

- 2.5 This would mirror similar provision already contained in the first SI in respect of economic operators established in territories and states which are party to the WTO Agreement on Government Procurement ('GPA'). As explained at paragraph 7.20 of the Explanatory Memorandum to the first SI, that instrument would modify the principal public procurement Regulations so that economic operators from territories and states which are party to the GPA at the point of the UK's withdrawal from the EU (including EEA states) continue to be afforded the same rights and remedies under domestic law for a period of eight months after exit day. This is on the basis of the EU's coverage schedules, pending the UK's independent accession to the GPA.
- 2.6 These Regulations also amend the relevant provisions of the first SI so that the extension of existing duties towards GPA economic operators would expire eighteen months from exit day, in line with the provision relating to the UK's transitioned international agreements.

Why is it being changed?

- 2.7 The UK has sought to replicate (or 'transition') a number of bilateral agreements in which the UK has, to date, been a participant via its EU membership.
- 2.8 Regulation-making powers in clause 2 of the Trade Bill currently before Parliament would enable the UK to give effect to these newly transitioned agreements in domestic law by reinstating, in the principal public procurement Regulations, the duties owed and remedies available to non-UK suppliers but re-framed to reflect the UK's own agreement with that third country.
- 2.9 In the absence of such regulation-making powers, it is appropriate to preserve in domestic law the *existing* obligations owed to those suppliers pursuant to *the EU's* agreements. Since the newly transitioned agreements seek to replicate, as closely as possible, the form and substance of the EU's agreements, this will enable the UK to demonstrate compliance with the procurement obligations arising from those agreements.
- 2.10 If the first SI is left unamended, at the point at which it comes into force, contracting authorities and other contracting entities will no longer be required to accord suppliers from the third countries in question the same favourable treatment they do now.

What will it now do?

- 2.11 For a period of 18 months the principal public procurement regulations will operate much as they do now; UK contracting authorities will be obliged to extend the same rights to economic operators from countries with which the EU has a relevant international trade agreement as they do to economic operators from the UK and GPA states.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

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

nature of the amendments described in section 2, and in particular the fact that this instrument would amend an SI which is subject to Parliament's prior approval, make it appropriate that the instrument is laid before and approved by a resolution of both Houses of Parliament before being made.

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

- 3.2 The territorial application of this instrument between provisions.
- 3.3 The amendments made by regulation 2 are of the same territorial application as the underlying provision of the first SI being amended so that, for example, paragraphs (3) to (8) of regulation 2 apply in respect of England, Wales and Northern Ireland only. Paragraph (9) of regulation 2 amends Part 5 of the first SI which applies throughout the United Kingdom. The amendment made by paragraph (9) therefore also applies in respect of Scotland as well as England, Wales and Northern Ireland.

4. Extent and Territorial Application

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

5. European Convention on Human Rights

- 5.1 The Minister for Implementation has made the following statement regarding Human Rights:

"In my view the provisions of the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

- 6.1 The principal public procurement Regulations implement a legal framework set out in EU Procurement Directives for procurement by contracting authorities and other contracting entities (Directive 2014/24/EU on public procurement; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (utilities); Directive 2014/23/EU on the award of concession contracts; and Directives 89/665/EEC and 92/13/EEC, as amended, on remedies and review procedures for public procurement and on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors).
- 6.2 The EU Procurement Directives govern the procedures for the award of contracts over specified financial thresholds, subject to certain exclusions from their scope. The legal framework is based on the principles of transparency, non-discrimination, equal treatment and proportionality. Its intention is to create an open public procurement market that supports the free movement of supplies, services and works within the EU. The EU is a member of the WTO Agreement on Government Procurement (GPA), and is party to a number of international agreements with countries outside the EU that contain procurement provisions. The EU procurement regime reflects the obligations arising out of membership of these agreements as well as the EEA Agreement.

- 6.3 The first SI amends the principal public procurement Regulations. It also amends (and in one case revokes) retained direct EU legislation that contains deficiencies arising from the UK's withdrawal. Further, amendments are made to primary and secondary legislation, in some cases because that legislation contains references to the EU procurement regime that are no longer appropriate in light of EU withdrawal and in other cases because it envisages a continued role for the EU Publications Office in publishing procurement notices submitted by UK authorities. Finally, the first SI makes amendments to the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006 (in so far as they are saved and continue to apply to ongoing procurements) to deal with the deficiencies that arise from EU exit.
- 6.4 The first SI primarily applies in respect of England, Wales and Northern Ireland (though certain of its provisions, for example the amendments to retained direct EU legislation, are of UK-wide application). The Scottish Government has laid a separate statutory instrument before the Scottish Parliament under the EU (Withdrawal) Act 2018 to amend its own corresponding procurement legislation. In most respects that instrument follows the approach taken by the UK Government in the first SI.
- 6.5 This instrument would amend the first SI after it is made but before it comes into force.
- 6.6 Part 3 of the first SI would have amended the principal public procurement Regulations to remove from them, on exit day, certain provisions which gave effect to, or referred to, international agreements by which the EU is bound. More specifically, the first SI would have removed the requirement on UK contracting authorities and entities to treat suppliers from third countries which are signatories to those international agreements in the same way as economic operators from the EU.
- 6.7 Part 5 of the first SI would also have disapplied, from exit day, any rights, powers, liabilities, obligations, restrictions, remedies and procedures in the field of public procurement which are derived from international agreements between the EU and third countries where those obligations would otherwise form part of retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018.
- 6.8 These Regulations amend the first SI, before the relevant provisions described above come into force, so that, instead of removing the obligations towards non-UK suppliers immediately on exit day, the first SI would remove them 18 months after exit day. For a time-limited period, then, UK contracting authorities and entities will continue to owe duties towards suppliers from third country signatories to agreements with the EU. The effect is to afford those suppliers guaranteed access to UK procurement markets and a remedy in domestic law for breaches of the procurement regulations for a period of 18 months.

7. Policy background

What is being done and why?

- 7.1 As a member state of the EU, the UK is currently party to a number of international trade agreements with non-EU countries containing provision relating to public procurement. After the UK's exit from the EU, these agreements will cease to apply to the UK. The Government's intention is that the UK should continue to reap the economic benefits of these agreements. The UK has, therefore, sought to replicate, or 'transition', these bilateral trade agreements so that they will apply to the UK in its own right post-EU withdrawal.

- 7.2 In order to ratify, and give full effect to, these transitioned agreements, the UK needs to ensure that its domestic legislation, in particular the principal public procurement Regulations, reflects the obligations by which the UK will be bound.
- 7.3 The Trade Bill which is currently before Parliament, once enacted, will provide the necessary powers to enable UK Ministers and devolved authorities to implement transitioned trade agreements. Specifically, clause 2 of the Bill will allow for appropriate changes to be made to domestic legislation in order to fully implement the obligations arising from these agreements. Due to delays to the Bill's passage through Parliament, secondary legislation under these powers is highly unlikely to have completed its parliamentary passage and have been made in time to come into force for exit day.
- 7.4 If the first SI is made to come into force in its current form it would remove from the principal public procurement Regulations, from exit day, all the duties owed by UK contracting authorities to economic operators from third countries with which the EU has an international agreement containing provisions relating to public procurement. Without appropriate primary powers, the Government will be unable to make the necessary changes to the principal public procurement Regulations to re-establish these duties in respect of those countries with which the UK has transitioned a trade agreement.
- 7.5 The Minister therefore considers it appropriate, via this instrument, to preserve in the principal public procurement Regulations the duties owed, and remedies currently afforded, to economic operators from countries with which the EU has entered into an international trade agreement containing provisions relating to public procurement and by which the EU is, before exit day, bound. This preservation of existing obligations, for a period of 18 months, will enable the UK to demonstrate compliance with the procurement provisions contained within the newly transitioned agreements, pending appropriate secondary legislation being brought forward to implement them. That is because the Government has sought to replicate these agreements in a form that is as close to the form of the EU's agreements as possible.
- 7.6 This measure mirrors a similar provision already contained within the first SI which would preserve those rights and remedies accorded to economic operators established in territories and states which are party to the GPA at the point of the UK's exit for a period of eight months (on the basis of the EU's coverage schedules). Clause 1 of the Trade Bill provides bespoke powers to implement the UK's obligations under the GPA. These obligations are sufficiently similar to the UK's obligations under the EU's current GPA membership that retaining, in domestic law, obligations arising from the EU's GPA membership for a limited period allows the Government to demonstrate compliance with the UK's independent GPA obligations.
- 7.7 These Regulations amend the relevant provisions of the first SI so that the extension of existing duties towards GPA economic operators expires eighteen months from exit day, in line with the provision relating to the UK's transitioned trade agreements.
- 8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**
- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the EU.

In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

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

10. Consultation outcome

10.1 There has been no consultation on how to rectify the deficiencies in the principal public procurement Regulations arising from withdrawal. The changes now proposed are intended to maintain the current legislative and policy framework in so far as this is possible after exit.

10.2 Discussions on the content of this instrument have been held with the devolved administrations during the drafting process in accordance with the Intergovernmental Agreement. In so far as this instrument makes provision that could be made by the Welsh Ministers or a Northern Ireland Department, there has been engagement with the Welsh Government and Northern Ireland Civil Service during the drafting process and in accordance with the terms of the Intergovernmental Agreement on the EU (Withdrawal) Act².

11. Guidance

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

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the framework and principles underlying the principal public procurement Regulations have not been substantially amended. Contracting authorities and other contracting entities as well as private sector businesses will have to familiarise themselves with the amended provisions. These impacts are, however, expected to be negligible and are below the threshold required to carry out a full impact assessment.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 We propose no specific action to minimise regulatory burdens on small businesses. The impact on small businesses arising from this instrument is expected to be low.

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

2

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

15. Contact

- 15.1 Alex Fletcher at the Cabinet Office Telephone: 07566 293233 or email: alex.fletcher@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Edward Green, Deputy Director for Public Procurement Policy, at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Oliver Dowden, the Minister for Implementation at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

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

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

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|---|--------------------------|---|--|
| | | 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence | |
| Sub-delegation | Paragraph 30, Schedule 7 | Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument. | State why it is appropriate to create such a sub-delegated power. |
| Urgency | Paragraph 34, Schedule 7 | Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7. | Statement of the reasons for the Minister's opinion that the SI is urgent. |
| Explanations where amending regulations under 2(2) ECA 1972 | Paragraph 13, Schedule 8 | Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA | Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law. |
| Scrutiny statement where amending regulations under 2(2) ECA 1972 | Paragraph 16, Schedule 8 | Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA | Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid. |

Part 2

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

1. Appropriateness statement

1.1 Oliver Dowden, the Minister for Implementation, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the amendments made by the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 do no more than is appropriate in light of the UK's withdrawal from the EU.

1.2 This is because preserving the existing rights and remedies of economic operators from countries with which the EU currently has an international agreement containing procurement obligations, for a period of 18 months, will facilitate the UK's own accession to, and demonstrate our compliance with, those agreements and preserve as much continuity as possible in the meantime.”

2. Good reasons

2.1 Oliver Dowden, the Minister for Implementation, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view, there are good reasons for the provisions in this draft instrument, and I have concluded they are a reasonable course of action. These reasons are set out in paragraphs 7.1 to 7.7 of this explanatory memorandum”.

3. Equalities

3.1 Oliver Dowden, the Minister for Implementation, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

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

4. Explanations

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