

EXPLANATORY MEMORANDUM TO
THE DEFENCE AND SECURITY PUBLIC CONTRACTS (AMENDMENT) (EU
EXIT) REGULATIONS 2019

2019 No. 697

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Defence (MOD) and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 This instrument is being made in order to address deficiencies in retained EU law in relation to public procurement in the field of defence and security arising from the withdrawal of the United Kingdom (UK) from the European Union (EU). These changes will ensure the legislation continues to operate effectively after the UK leaves the EU, providing certainty to people and businesses.
- 2.2 The instrument also corrects or removes some outdated references in legislation and an omission arising from an amendment to the European Economic Area (EEA) agreement. These changes are not connected to withdrawal.

Explanations

What did any relevant EU law do before exit day?

- 2.3 The Defence and Security Public Contracts Regulations 2011 (the 2011 Regulations) implement Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (the Defence and Security Directive). They govern public contracts in the fields of defence and security above a set financial threshold and require such procurements to be competed transparently and for economic operators to be treated equally and in a non-discriminatory manner.
- 2.4 The 2011 Regulations include references to primary legislation and secondary legislation and to numerous EU regulations, directives and other instruments, for example, EU Implementing Regulation 2195/2002 which sets out classification codes (Common Procurement Vocabulary (CPV)) to be used in public procurement procedures within member States.

Why is it being changed?

- 2.5 This instrument addresses deficiencies in retained EU law which arise as a result of the withdrawal of the UK from the EU. It amends provisions that are redundant, inappropriate or otherwise deficient within the meaning of section 8 of the European Union (Withdrawal) Act 2018. For example, provisions which relate to the publication of notices in the Official Journal of the EU will no longer be possible as the UK will lose access to EU systems.

What will it now do?

- 2.6 Changes have been limited to those which are appropriate to reflect the UK's new status outside the EU. Apart from Gibraltar, there will be little or no distinction between the treatment of economic operators from the EU and other places outside the UK. The framework and principles underlying the procurement regime remain unchanged.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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

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

4. Extent and Territorial Application

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

5. European Convention on Human Rights

- 5.1 The Rt Hon Earl Howe PC has made the following statement regarding Human Rights:

“In my view the provisions of the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The 2011 Regulations implement the legal framework set out in the Defence and Security Directive for procurement by contracting authorities of certain work contracts, supply contracts and services contracts in the field of defence and security. The 2011 Regulations apply to the whole of the UK.
- 6.2 The main legal framework for government procurement is the Public Contracts Regulations 2015 which implement Directive 2014/24/EU in the UK. The Defence and Security Directive supplements that, creating a tailored regime for procurement of defence and security requirements. A separate instrument, to be made by the Minister for the Cabinet Office, making amendments to the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016, is being laid on the same day as this instrument. It is desirable for the changes that are being made to the 2011 Regulations to be consistent as far as possible with those being made in that instrument (see for example para 7.30 below).

- 6.3 The Defence and Security Directive sets out procedures that must be followed before awarding a contract to an economic operator when its value exceeds set thresholds, unless it qualifies for a specific exclusion. The legal framework is based on the Treaty principles of transparency, non-discrimination, equal treatment and proportionality with the intention of creating an open procurement market in the field of defence and security, which supports the free movement of supplies, services and works within the EU.
- 6.4 Regulation 2 of this instrument makes some changes to the 2011 Regulations which are not connected to the UK's withdrawal from the EU. It updates outdated references to the Common Military List (which forms part of the definition of "military equipment" covered by the 2011 Regulations); includes economic operators from Norway and Iceland, in order to correct an omission arising from the EEA agreement's adoption of the Defence and Security Directive in 2013; and removes references to prescribed forms which are no longer in force.
- 6.5 Under the European Union (Withdrawal) Act 2018, EU-derived domestic legislation forms part of retained EU law. In order to ensure that such legislation operates effectively after exit, regulation 3 of this instrument makes amendments to fix deficiencies which arise from the UK's withdrawal, for example, references which are based on the UK's status as a member State, and transfers certain powers that are exercised by the European Commission to the Secretary of State.

7. Policy background

What is being done and why?

- 7.1 This instrument makes some changes which are necessary in any event, but its primary purpose is to correct deficiencies arising as a result of the UK's withdrawal from the EU. The aim is to reflect the UK's status as a non-member State at the same time as ensuring that the 2011 Regulations continue to facilitate a functioning UK internal market and maintaining as much continuity as possible for ongoing procedures. This means that, where possible, amendments support a level playing field between economic operators established in third countries, whether or not they are member States.

Exclusions from the DSPCR and the 1958 list

- 7.2 Certain defence and security procurements can be excluded from the application of the 2011 Regulations, either through reliance on derogations contained within the EU Treaties themselves (Article 4(2) of the Treaty Establishing the European Union or Articles 36, 52, 62 and 346 of the Treaty on the Functioning of the European Union ("TFEU")) or through exclusions set out in regulation 7 of the 2011 Regulations.
- 7.3 Article 346 TFEU provides a derogation for cases where compliance with EU law would undermine EU member States' essential security interests. In the context of defence procurement, it permits the UK to derogate from the application of the 2011 Regulations to the extent necessary to protect its essential security interests. It is necessary to ensure that contracting authorities can continue to disapply the 2011 Regulations where required. Accordingly, this instrument inserts the text of Article 346 TFEU (with some minor adjustments to make it operable) into regulation 6 of the 2011 Regulations to ensure the 2011 Regulations can still be disapplied to protect the UK's essential security interests.

- 7.4 It is arguable that Article 346 TFEU has direct effect through section 2(1) of the European Communities Act 1972, and so is retained through section 4 of the European Union (Withdrawal) Act 2018 in some circumstances. However, given it is referred to in regulation 6(1) of the Regulations, which are made under section 2(2) of the European Communities Act 1972, it is considered that the insertion of Regulations 6(3A) to (3C) provides the most legal certainty in ensuring the continued effect of Article 346 TFEU. Consideration was also given to whether Article 346(1)(a) should be replicated in the instrument. Regulation 7(1)(a) of the Regulations (which permits procurements to be excluded from the application of the Regulations where they would oblige the contracting authority to supply information which would be contrary to its essential security interests) arguably already replicates its effect. However, the courts have not clarified the interaction between Article 346(1)(a) TFEU and regulation 7(1)(a), and a strict application of regulation 7(1)(a) disapplying the entirety of the Regulations in all circumstances could be considered disproportionate, so it was considered prudent to make the position entirely clear by replicating Article 346(1)(a) in the Regulations.
- 7.5 The scope of Article 346 TFEU is partly determined by a list of arms, munitions and war material that was drawn up by the Council of Ministers of the European Economic Community (as it then was) in 1958 (“the 1958 List”). The amendments made by this instrument (see regulation 3(3)) reproduce the significance of the 1958 List.

Powers to make regulations

- 7.6 Article 346(2) TFEU empowers the Council to make changes to the 1958 List. This instrument (at regulation 3(31)) confers an equivalent regulation-making power on the Secretary of State for the purposes of the 2011 Regulations. Given the nature of this power, and its potential to affect the scope of the 2011 Regulations, its exercise is made subject to affirmative procedure.
- 7.7 The power to make regulations amending any or all the technical details and characteristics of the equipment for electronic receipt set out in sub-paragraphs (a), (e) and (f) of regulation 49(6) of the 2011 Regulations has been transferred from the Commission (set out in Article 69 of the Defence and Security Directive) to the Secretary of State (see regulation 3(31) of this instrument). The powers in this paragraph and 7.6 will be exercised by the Secretary of State via Statutory Instrument.

Treatment of non-UK economic operators

- 7.8 It is inappropriate to retain the obligations in respect of economic operators from the EU, Norway and Iceland (as relevant EEA states) in circumstances where the UK is likely to be treated as a third country by contracting authorities in member States or relevant EEA states. Regulations 3(2)(d), (f), (h) and (i) collectively amend provisions which affect the scope of the definition of “economic operator” in regulation 5(1) of the 2011 Regulations. The definition currently covers contractors, suppliers and services providers from member States, but will (from exit day) cover only those from the UK or Gibraltar. Many of the provisions in the 2011 Regulations are expressed by reference to economic operators, and remedies under Part 9 of the 2011 Regulations are available only to economic operators. Other amendments have also been made to the 2011 Regulations as a result of the removal of rights and obligations in respect of economic operators established in member States and the relevant EEA states. For example, regulation 25(2)(f) in assessing whether an economic operator meets any

minimum standards as regards technical capacity, study and research facilities or quality control measures, the contracting authority will only be obligated to accept evidence based on the results of a check carried out by the contracting authority itself or on its behalf by a competent official body in the United Kingdom or Gibraltar.

- 7.9 Prior to exit, Gibraltar came within the territorial scope of the EU Treaties in accordance with Article 355(3) TFEU that applies the treaties to European territories for whose external relations a member State was responsible, subject to some exceptions that are material to public procurement (such as in relation to the Channel Islands) set out elsewhere in Article 355 but which are not relevant to Gibraltar. Since the UK is responsible for Gibraltar's external relations, the UK and Gibraltar are effectively treated as one member State under EU law. Further, Gibraltar is included within the definition of the UK by virtue of the UK's declaration to the Council on the definition of British nationals of 28 January 1983 which includes under 'nationals of Member States', British Dependent Territory citizens who acquire their citizenship from a connection with Gibraltar. Contracting authorities in other member States currently owe the same duties to economic operators from Gibraltar as economic operators from the UK.
- 7.10 After the UK's exit, Gibraltar will no longer come within the scope of the EU Treaties and a reference to the UK will not include Gibraltar. In order to preserve continuity and to reflect the UK's special relationship with Gibraltar, it is appropriate to ensure that the duty owed to economic operators in the UK extends to those in Gibraltar.
- 7.11 Amendments to, for example, regulation 23(4), (5) and (6) of the 2011 Regulations have been made to reflect the practical consequences in maintaining the duty owed to Gibraltarian economic operators.
- 7.12 Amendments have been made to regulation 7 of the 2011 Regulations to ensure that the exclusions operate effectively after exit as they are currently drafted on the basis that the UK is a member State.
- 7.13 Regulation 7(1)(d) has been amended to reflect the fact that prior to exit, the reference to 'member State' and to the 'territory of the EU' included Gibraltar.
- 7.14 It is not considered necessary to amend regulations 7(1)(c), (e) or (f), 16 (1)(e) or 43(1)(e) to make reference to Gibraltar as those regulations refer to the activities of the contracting authority, not the economic operator.

Thresholds

- 7.15 Currently, the thresholds for defence and security procurements in the 2011 Regulations make ambulatory reference to the thresholds set in the Defence and Security Directive. This is because the Directive requires the Commission to amend these thresholds every two years where necessary to keep them aligned with corresponding thresholds in respect of procurements under the Utilities Directive¹. This instrument amends regulations 9(2)(a) and (b) of the 2011 Regulations so that they cross-refer instead to the sums in regulations 16(1)(a) and 16(1)(b) of the Utilities Contracts Regulations 2016. The latter provisions currently make ambulatory reference to thresholds set in the Utilities Directive, but the separate instrument referred to in paragraph 6.2 above will amend them to refer to sterling sums and require the Minister for the Cabinet Office to review them and, where necessary,

¹ Directive 2014/25 of the European Parliament and the Council of 26th February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors.

amend them, on the same basis that the Commission currently does to the corresponding thresholds in the Utilities Directive. Such amendments will automatically feed through to the thresholds in regulation 9 of the 2011 Regulations by virtue of the new cross-reference inserted by this instrument.

Technical specifications

- 7.16 The deletion of regulation 12(14) of the 2011 Regulations coupled with the amendment of the definition of recognised bodies has been made on the basis that the current reference to recognised bodies established in ‘other member States’ in regulation 12(14), limits the definition of recognised bodies in 12(1) to those established in the UK or in Gibraltar.

Reporting to the European Commission

- 7.17 Requirements to send reports to the Commission, including at its request, are abolished, as it would no longer be appropriate (see amendments to regulations 16(2), 33(14) and 46(2) of the 2011 Regulations).

Inappropriate EU or member State references

- 7.18 Regulation 23 of the 2011 Regulations has been amended to remove inappropriate references to the EU within the offences for which economic operators can be disqualified. For example, the deletion of regulation 23(1)(g) which covers fraud but only where it affects the financial interests of the European Communities within the meaning of Article 1 of the Convention on the protection of the financial interests of the European Communities.
- 7.19 Regulation 27 of the 2011 Regulations has been deleted because it refers to lists of approved or certified economic operators. Such lists do not exist in respect of UK or Gibraltar economic operators, so this regulation is no longer necessary.
- 7.20 Regulation 29 of the 2011 Regulations has been deleted because it relates to recognition of service providers authorised under the laws of the member State in which they are established to provide services. This is no longer appropriate after exit.
- 7.21 In respect of abnormally low tenders and State aid, the intention is to treat non-UK economic operators on a level playing field. Although a new UK State aid regime is envisaged in which the function for enforcement is to be conferred on the Competition and Markets Authority, in the area of public procurement it would be inappropriate for economic operators established in the UK to be required to demonstrate that aid provided by the UK Government was compatible with the UK's State aid regime in contrast to economic operators not established in the UK. Accordingly, the provisions in the Regulations relating to State aid in regulation 31 of the Regulations have been removed.
- 7.22 Regulation 39(3) of the 2011 Regulations has been deleted because it will not be necessary to protect the integrity of the remaining member States’ export, transfer or transit licensing criteria.
- 7.23 Regulation 42(9) has been deleted because it makes reference to TFEU general principles which will not be retained EU law after exit.

Replacement of Official Journal of the European Union

- 7.24 Amendments have been made to regulation 48 (and in other relevant regulations) of the 2011 Regulations to provide for the replacement of the requirement to send notices to the EU Publications Office for publishing in the Official Journal of the European Union (OJEU) via Tenders Electronic Daily (TED), with a requirement to publish on a single UK e-notification service. The separate instrument, to be made by the Minister for the Cabinet Office making amendments to the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 revokes, for the whole of the UK, Commission Implementing Regulation (EU) no 2015/1986 establishing standard forms for the publication of notices in the field of public procurement.
- 7.25 Contract opportunities that would have been published on OJEU/TED will now be published on the new UK e-notification service. Publication will take place electronically and the service will be free for all users. Transitional provisions have been made to provide for ongoing procurement procedures that straddle exit day.
- 7.26 As the new UK e-notification service will be electronic, amendments have been made to remove references to paper submission, see for example the amendments made to regulations 17(6), 18(5) and 19(9) of the 2011 Regulations.

Retained EU obligations and retained EU law

- 7.27 Regulation 3(28) of the instrument amends regulation 51 of the 2011 Regulations. It will no longer be appropriate to provide economic operators with remedies for breaches by contracting authorities of “enforceable EU obligations”, so the amendment refers instead to any retained EU obligation that is saved under section 4 of the European Union (Withdrawal) Act 2018. This would include directly effective rights and obligations that previously flowed through section 2(1) of the European Communities Act 1972. Amendments have been made to regulations 12(4) and 36(1) of the 2011 Regulations to refer to “retained EU obligations” and “retained EU law” respectively to similarly reflect the fact that EU obligations and EU law will no longer be relevant after the UK has left the EU.

Amendments made under section 2(2) of the European Communities Act 1972

- 7.28 Amendments to the 2011 Regulations under the powers set out in section 2(2) European Communities Act 1972 will take effect the day after the day on which this instrument is made.
- 7.29 Regulation 3(1) of the 2011 Regulations is amended to include a definition of the Common Military List as the ambulatory reference in the 2011 Regulations is ineffective because the list was revoked and replaced rather than amended.
- 7.30 All references to Commission Regulation (EC) No. 1564/2005 will be deleted as they are out of date because the Regulation was repealed in 2011. That Regulation and its current replacement (Commission Implementing Regulation (EU) No 2015/1986) set out standard forms for the presentation of information. The information itself (as opposed to the form in which it must be presented) is identified in the 2011 Regulations, largely by direct references to Annexes to the Defence and Security Directive. These references are modified, where appropriate, by this instrument so that they continue to work in a suitable way after exit day: see for example, the amended definition of ‘contract notice’ in regulation 3(1) of the 2011 Regulations read in conjunction with the new Schedule A1 which this instrument inserts into the

2011 Regulations. From exit day, the information will be submitted into the new UK e-notification service, which will be an electronic portal which will operate in such a way as to make the use of physical forms redundant. In the short period before exit day, the current Commission Regulation will be directly applicable and it was not thought necessary to insert references to that Regulation in one part of this instrument only to remove them from exit day in another part.

- 7.31 An amendment to regulation 3(1) of the 2011 Regulations to add a definition of ‘member State’ will be made to correct an omission arising from the EEA agreement’s adoption of the Defence and Security Directive in 2013. The amendment adds Norway and Iceland to the definition of economic operator to ensure economic operators from those two EEA states are covered.

Transitional arrangements

- 7.32 The amendments in this instrument will generally apply prospectively, even in relation to procurements that are already underway on exit day. However, there will be some exceptions to this, mainly in cases in which applying the amended provision to such procurements would, or could, produce unfairness. For example, the ground of exclusion in regulation 23(1)(g) of the 2011 Regulations will, under the transitional provisions in regulation 4 of this instrument, continue to apply to on-going procurement procedures commenced before exit.

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 United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.
- 8.2 Alongside the EU (Withdrawal) Act 2018 powers the instrument is also being made under section 2(2) of the European Communities Act 1972 to correct out of date references and address other matters as detailed in paragraphs 7.28 to 7.31 above.

9. Consolidation

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

10. Consultation outcome

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

11. Guidance

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

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the 2011 Regulations do not fall within the Better Regulation framework processes, and they do not regulate or deregulate business. The impact of changes proposed are to maintain the operability of the 2011 Regulations to avoid disruption to procurers and suppliers. Moreover, the changes to the 2011 Regulations do not involve policy changes. The regulatory burdens will not be beyond those that currently exist under the current regime.

13. Regulating small business

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

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that a 5-year review will be undertaken in accordance with regulation 2 of the 2011 Regulations.

15. Contact

- 15.1 Richard Marwood at the Ministry of Defence, Telephone: 030679 34073 or email: Richard.Marwood998@mod.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 Richard Marwood, Head of MOD Commercial Policy, Process and Procedures (P3) at the Ministry of Defence, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Earl Howe PC, Minister of State in the House of Lords at the Ministry of Defence, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

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

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

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 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 The Minister of State in the House of Lords, the Rt Hon Earl Howe PC, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate”.

- 1.2 This is the case because: the instrument corrects the deficiencies arising out of the UK leaving the EU.

2. Good reasons

- 2.1 The Minister of State in the House of Lords, the Rt Hon Earl Howe PC, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 2.2 These are: to maintain a workable set of defence procurement rules that do not discriminate against UK suppliers.

3. Equalities

- 3.1 The Minister of State in the House of Lords, the Rt Hon Earl Howe PC, has made the following statement(s):

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

- 3.2 The Minister of State in the House of Lords, the Rt Hon Earl Howe PC, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, the Rt Hon Earl Howe PC, 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.