EXPLANATORY MEMORANDUM TO

THE PUBLIC PROCUREMENT (ELECTRONIC INVOICES ETC.) REGULATIONS 2019

[2019] No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by Cabinet Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument, in a Brexit "deal" scenario, implements Directive 2014/55/EU of the European Parliament and of the Council of 16th April 2014 on electronic invoicing in public procurement ("the Directive"). It also makes minor amendments to those provisions of the Public Contracts Regulations 2015 and the Concession Contracts Regulations 2016 that deal with mandatory grounds for exclusion from a contract award procedure.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

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

3.2 The territorial application of this instrument varies between provisions.

3.3 Regulations 2 to 5 make amendments to existing secondary legislation. Those amendments are generally of the same territorial application as the underlying instrument, or Part of that instrument, being amended. The amendments to the Defence and Security Public Contracts Regulations 2011 made by regulation 2 therefore apply throughout the United Kingdom. The amendments to the Concession Contracts Regulations 2016 made by regulation 4 and the amendments to the Utilities Contracts Regulations 2016 made by regulation 5 apply in respect of England, Wales and Northern Ireland only. Regulation 3 inserts new provisions (new regulations 113A and 113B) into Part 4 of the Public Contracts Regulations 2015. Part 4 of the Public Contracts Regulations 2015 extends throughout the UK but its provisions do not generally apply in respect of contracting authorities whose functions are wholly or mainly devolved to Wales, Northern Ireland or Scotland. We have amended the 'Extent and application' provisions of the Public Contracts Regulations 2015 (regulation 1(7) to (9)) to make clear that these newly inserted provisions (regulations 113A and 113B) are an exception; those provisions will apply to a contracting authority where its functions are wholly or mainly Northern Ireland or Welsh devolved functions.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

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

5. European Convention on Human Rights

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

"In my view the provisions of the Public Procurement (Electronic Invoices etc.) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 The Directive requires Member States to adopt the necessary provisions to ensure that contracting authorities and other contracting entities are precluded from refusing electronic invoices issued as a result of the performance of contracts which fall within the scope of Directive 2009/81/EC, Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU, where those electronic invoices comply with the European Standard on electronic invoicing.

6.2 The European Standard was published in Commission Implementing Decision 2017/1870.

6.3 In accordance with the third sub-paragraph of Article 11(2) of the Directive, the final date for bringing into force the necessary measures ("the transposition deadline") was published in Commission Implementing Decision 2017/1870. The transposition deadline is 18th April 2019. The second sub-paragraph of Article 11(2) of the Directive confers on Member States the discretion to postpone the application of implementing provisions to sub-central contracting authorities and contracting entities (utilities) until 18th April 2020.

6.4 These Regulations are intended to implement the Directive for England, Wales and Northern Ireland. In respect of the amendments to the Defence and Security Public Contracts Regulations 2011 made by regulation 2, these Regulations also partially implement the Directive for Scotland. The Scottish Government has brought forward its own amendments to procurement legislation that applies in Scotland for the purposes of implementing the Directive.

7. Policy background

What is being done and why?

7.1 These Regulations amend the Defence and Security Public Contracts Regulations 2011, the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 and the Utilities Contracts 2016 (collectively, "the Procurement Regulations") by inserting new provisions which oblige contracting authorities and entities (utilities) to include within their contracts

an express term requiring them to accept and process electronic invoices that comply with the European Standard (where the invoice is undisputed). In the absence of an express term, a term to that effect is to be implied.

7.2 The Regulations will come into force on 18th April 2019. We have, however, taken advantage of the derogation described at paragraph 6.3 above in respect of sub-central contracting authorities and utilities. The amendments made to the Procurement Regulations do not, therefore, take effect in relation to contracts awarded by those procuring entities until 18th April 2020.

7.3 The Regulations also amend references to offences under the Modern Slavery Act 2015 in both the Public Contracts Regulations 2015 and the Concession Contracts Regulations 2016. In the case of the amendment to the Public Contracts Regulations 2015 that is to omit a duplicate reference which appears to have been included erroneously in 2016 and, in the case of the Concession Contracts Regulations 2016, that is to ensure that offences under section 1 of the Modern Slavery Act 2015 are included within the mandatory grounds for exclusion from participation in a concession contract award procedure (the grounds for exclusion in the Public Contracts Regulations 2015 and Concession Contracts Regulations 2016 ought to be consistent).

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

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

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

10. Consultation outcome

10.1 A consultation on transposition of the Directive was issued by way of a Procurement Policy Note 03/18 on "Electronic Invoicing in Public Procurement", made available on the gov.uk website. In light of the limited freedom afforded to Member States under the Directive as to how to give effect to its obligations, a short, four-week, consultation was considered appropriate for the purposes of meeting the requirement set out in section 39(6) of the Small Business, Enterprise and Employment Act 2015. The consultation closed on 21 December 2018. Ten responses were received in total, from both the public and private sectors. Those who responded were supportive of the overall intent. In some cases they asked for further detailed of the technical standard – this is now free to access on the British Standards Institution website.

11. Guidance

11.1 We intend to provide further guidance to practitioners by means of a Procurement Policy Note in late February/early March 2019.

12. Impact

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

12.2 The impact on the public sector is not deemed as significant.

12.3 A full Impact Assessment has not been prepared for this instrument. The submission of electronic invoices that comply with the European Standard is voluntary for the supplier community. Accordingly, no additional costs to the supplier community will arise as a result of this instrument.

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 EU Commission is required by the Directive to review its effects on the internal market and on the uptake of electronic invoicing in public procurement. The Commission has to submit a report to the European Parliament and to the Council by April 2023. We are working to identify the most appropriate monitoring mechanism for the UK that may include use of an existing government payments forum.

14.2 The regulations do not include a statutory review clause. Section 28 of the Small Business, Enterprise and Employment Act 2015 does not apply where powers to make secondary legislation are exercised so as to make or amend provision in connection with procurement or to make or amend provision that is already subject to review by virtue of existing provision. In this case, the amendments we are making to the various sets of existing procurement regulations will already be caught by the review provisions in those regulations.

15. Contact

15.1 Andrew Timms at the Cabinet Office Telephone: 07585 401874 or email: andrew.timms@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Edward Green, Deputy Director for EU and International Procurement Policy, at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Oliver Dowden, Minister for Implementation at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.