POLICY NOTE

THE PUBLIC PROCUREMENT ETC. (EU EXIT) (SCOTLAND) (AMENDMENT) REGULATIONS 2020

SSI 2020/XXX

The above instrument is made in exercise of the powers conferred in section 2(2) of the European Communities Act 1972 and paragraph 1(1) and (3) of Part 1 and paragraph 11G (1) and (3) of Part 1B of schedule 2 of the European Union (Withdrawal) Act 2018.
The instrument is subject to affirmative procedure.

Purpose of the instrument.
This instrument is being made to address deficiencies in retained EU law about public procurement which arise from the withdrawal of the United Kingdom (UK) from the European Union (EU). It also gives effect to Title 8 of Part 3 of the Withdrawal Agreement and Title 5 of Part 3 of the EEA EFTA Separation Agreement (together, 'the relevant withdrawal provisions'), to ensure that retained EU law in the field of public procurement operates effectively after the Implementation Period ends on 31 December 2020.

This instrument revokes and replaces the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 (2019/112), the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019 (2019/114); and the Public Procurement etc. (Scotland) (Amendment) (EU Exit) (Amendment) (No. 2) Regulations 2019 (2019/414) before these come into force. This is because those earlier amending Regulations (together, 'the 2019 EU Exit Regulations') were made before the UK and EU had entered into the Withdrawal Agreement or the EEA EFTA Separation Agreement and so did not take account of those.

Policy Objectives

1. This instrument maintains, as far as possible, the current legislative and policy framework for public procurement. It does so while recognising that the UK is no longer a member State of the EU and, after the end of the Implementation Period, will join the World Trade Organisation's Government Procurement Agreement, or GPA, in its own right.

2. The instrument also reflects the terms of Articles 75-78 of the Withdrawal Agreement and equivalent provisions of the EEA EFTA Separation Agreement and other changes to EU law since the 2019 EU Exit Regulations were made. These allow principally for transitional arrangements for procurements that have started before the end of the Implementation Period and have not yet concluded by that date.

3. It also fixes deficiencies using the power in schedule 2 of the European Union (Withdrawal) Act 2018. It addresses deficiencies in retained EU law that arise as a result of the withdrawal of the UK from the EU. It amends or removes provisions that are inoperable, inappropriate or would otherwise prevent the legislation from

functioning effectively after the end of the Implementation Period. For example, provisions that relate to the publication of notices in the Official Journal of the European Union ('OJEU') and to the submission of reports to the European Commission ('the Commission') would no longer be appropriate because they impose requirements and confer functions in respect of EU entities that no longer have such functions in relation to the UK after exit. These have been removed or replaced with provisions that relate to the functions of 'domestic' bodies and entities.

4. Without update the procurement rules would be deficient as these would not reflect that the UK would no longer be bound by EU public procurement rules. The territorial extent of this instrument is Scotland.

Explanation of the law being amended by the Regulations

5. The EU legal framework for the regulation of public procurement by public authorities and utilities consists of a package of directives (Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (utilities), Directive 2014/23/EU on the award of concession contracts and Directive 89/665/EEC and Directive 92/13/EEC, as amended, on remedies and review procedures for public procurement and on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors).

6. Those Directives currently govern the procedures for the award of public 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 GPA and is party to a number of international agreements with countries outside the EU that contain procurement provisions. The EU Procurement Directives reflect the obligations arising out of membership of these agreements as well as the EEA Agreement.

7. The main purpose of the instrument is to amend the Public Contracts (Scotland) Regulations 2015; the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016 which currently implement the EU Procurement Directives in domestic legislation.

8. The Public Contracts (Scotland) Regulations 2015 and the Utilities Contracts (Scotland) Regulations 2016 include saving provisions under which certain procurements remain governed by the revoked Public Contracts (Scotland) Regulations 2012 or the revoked Utilities Contracts (Scotland) Regulations 2012 which implement Directive 2004/18/EC on public procurement, and 2004/17/EC on the procurement procedures of entities operating in the water, energy, transport and postal services sectors, respectively, as well as the remedies Directives. This instrument makes amendments to deal with the deficiencies which arise from the UK's exit from the EU where those provisions continue to apply.

9. This instrument also amends the Procurement Reform (Scotland) Act 2014, and the Procurement (Scotland) Regulations 2016 made under that Act. These impose

additional requirements beyond those imposed by the EU Procurement Directives, but rely on references to the EU Procurement Directives in order to do so.

10. Scottish Ministers have already made 2019 EU Exit Regulations about procurement. Without change, these would substantially come into force at the end of the Implementation Period with some provisions coming into force later. These were made before, and so did not give effect to, the Withdrawal Agreement or the EEA EFTA Separation Agreement. Part 3 of the Withdrawal Agreement and equivalent provisions of the EEA EFTA Separation Agreement provide for the continued application, in particular, of EU law to some procurements which cross over the end of the Implementation Period – i.e. to provide for transitional arrangements for procurements which start before 31 December 2020 and have not yet concluded by that date.

11. These transitional arrangements are necessary to ensure, for example, that procurement notices for procurements still ongoing at the end of the transition period can still be sent in those cases to the OJEU rather than to the new UK equivalent, publication service, if appropriate.

12. Rather than making more amendments to the 2019 EU Exit Regulations, this instrument revokes and replaces them. Much of the content of the 2019 EU Exit Regulations remain unchanged as a result but, where there are changes, these are limited to those appropriate to reflect the UK's new status outside of the EU and to give effect to the Withdrawal Agreement. What is being changed and why is summarised immediately below and is described in more detail in this Policy Note.

What is being changed

13. This instrument corrects deficiencies arising as a result of the UK's withdrawal from the EU. Changes have been made where they are appropriate and within the scope of the European Union (Withdrawal) Act 2018. The aim is for the Regulations to reflect the UK's status as a non-Member State at the same time as ensuring these comply with the requirements of the GPA, which the UK intends to join in its own right. Where possible, amendments support a level playing field between economic operators (potential bidders for contracts) established outside the UK.

<u>'Steady state' amendments and the relevant withdrawal provisions</u>

14. The 'steady state' amendments apply to new procurement procedures commenced after the end of the Implementation Period to ensure the Regulations operate effectively. For example, provisions that relate to the publication of notices in the OJEU, and to the submission of reports to the Commission have been removed or replaced with provisions that relate to the functions of 'domestic' bodies and entities; retained direct EU legislation that contains deficiencies arising out of the UK's withdrawal is amended; in respect of procurement procedures commenced under these which concluded before the end of the Implementation Period, the steady state amendments remove any ongoing obligations on contracting authorities and entities to report to the Commission.

15. The relevant withdrawal provisions (described at paragraphs 63 to 66 below) provide for the continued application of the general principles of Union law applicable to the award of public contracts, the EU Procurement Directives and certain direct EU legislation governing public procurement procedures. These procedures are those which, before the end of the Implementation Period, were launched but not yet finalised (normally when a contract has been awarded and the fact published or notified to those involved), and, in respect of live framework agreements (and the award of contracts based on such agreements), those concluded before the end of the Implementation Period.

16. The Schedule to this instrument provides certain savings and modifications to the Regulations to ensure that the Regulations are applied in accordance with the relevant withdrawal provisions.

Summary of how the present instrument differs from the 2019 EU Exit Regulations

17. The relevant withdrawal provisions require major changes to some transitional handling arrangements. This means that the Schedule to this instrument is very different from the Schedule to the 2019 EU Exit Regulations. For the same reason, the amendments made to the Public Contracts (Scotland) Regulations 2012 and the Utilities Contracts (Scotland) Regulations 2012 ('the 2012 Regulations'), most of the provisions of which apply only to transitional cases, are different from those made by the 2019 EU Exit Regulations (see paragraphs 56 to 58 below).

18. Additional, or altered, fixes are made to various provisions of the Regulations concerning exemptions for the procurement of legal services (see paragraph 45 below), the sterling amounts of various thresholds (see paragraph 47 below), common technical specifications (see paragraph 52 below), advanced electronic signatures (see paragraph 53 below), exemptions relating to the award of concession contracts, on the basis of special or exclusive rights, or for air transport services (see paragraph 54 below) and tenders comprising products originating in third countries (see paragraph 55 below).

19. Certain amendments to the Regulations that would otherwise have come into force 18 months after the end of the Implementation Period will now do so 12 months after its end (see paragraphs 38 to 44 below).

20. Amendments are made to retained direct EU legislation concerning the European Single Procurement Document.

Reasons for and effect of the proposed change or changes on retained EU law

<u>The UK e-notification service</u>

21. This instrument replaces the requirement to send notices to the EU Publications Office (for publication in OJEU via Tenders Electronic Daily (TED)), with a requirement to submit notices to the new UK e-notification service. This is intended to reflect the publication requirements in the GPA. Contract opportunities that would have been published on OJEU/TED will be published on the new UK e-notification service instead. Publication will take place electronically and the service will be free

for all users. Transitional provisions have been made in respect of procurement procedures which cross over the end of the Implementation Period and in relation to which earlier notices have been published on OJEU/TED.

22. The instrument makes no change to the requirement arising from the Procurement Reform (Scotland) Act 2014 for notices to also be published on Public Contracts Scotland. Notices must not be published on the national portal before they are published on the UK e-notification service.

Transfer of functions

23. The EU Procurement Directives provide the Commission with a number of functions to fulfil its supervisory role over EU public procurement that are reflected in retained EU law and that it would not be appropriate to retain after the end of the Implementation Period. There are also a number of delegated powers to make legislation whose effects it is appropriate to recreate in the Regulations by conferring those powers on Scottish Ministers.

24. This instrument transfers to the Scottish Ministers the Commission's function to revalue the main financial thresholds. The EU Procurement Directives require the Commission to review these thresholds every two years to establish whether they continue to correspond to the relevant thresholds laid down by the GPA. If these do not correspond, the Commission, by delegated act, makes the necessary amendment to the euro figures set out in the EU Directive to bring them back into line. At the same time, the Commission also determines the sterling value of the thresholds. The Regulations currently make ambulatory reference to the thresholds laid down in the relevant EU Directive (as determined in sterling by the Commission). This instrument replaces those ambulatory cross-references with the actual sterling figures (see paragraph 47 below) and confers on the Scottish Ministers the power to make Regulations following a biennial review. The Scottish Ministers will be required to conduct the reviews on the same basis as the Commission, but rather than adopting the Commission's two-stage process, the Scottish Ministers must value the GPA thresholds, which are expressed in special drawing rights, directly into the equivalent sterling values. The conversion rates to be used for this purpose are those published in the monthly International Financial Statistics published by the International Monetary Fund, which is the methodology applicable under the GPA.

25. The Commission has the power to update the exceptions to the circumstances in which contracting authorities are obliged to require the use of electronic means of communication in light of technological developments. It can also update the technical requirements relating to tools and devices for the electronic receipt of tenders and requests to participate to take account of technological developments. The instrument transfers these powers to the Scottish Ministers. The scope of the Scottish Ministers' powers to amend the Regulations has been based on the scope of the Commission's existing powers to amend the corresponding passages of the EU Procurement Directives (for example, new regulation 23A, which this instrument inserts into the Public Contracts (Scotland) Regulations 2015, is based on the powers conferred by Article 22(7) of Directive 2014/24/EU).

26. Provision has been made to confer on the Scottish Ministers the power to treat the list of international agreements in the field of environmental, social and labour law set out in the annexes to the EU Procurement Directives as though certain international agreements were removed and others that are not covered were listed. An equivalent, delegated power to amend the list of international agreements in these annexes currently rests with the Commission.

27. This is relevant to the ability of a contracting authority to refuse to award a contract to the bidder submitting the most economically advantageous tender where the contracting authority has established that the bidder does not comply with certain applicable obligations in the field of social, environmental and labour law.

28. Requirements to provide the Commission with reports have been either removed or converted into an obligation to provide reports to the Scottish Ministers.

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

29. The Regulations amended by this instrument do not apply to contracts that fall within the scope of the Defence and Security Regulations 2011 ('the 2011 Regulations'). The Regulations amended by this instrument are also subject to the derogation set out in Article 346 of TFEU that has the effect of overriding the obligation to comply with those Regulations or particular requirements in them, where this would undermine EU member States' essential security interests.

30. To ensure that contracting authorities can continue to override particular requirements of those Regulations where necessary, this instrument inserts provisions (which are intended to correspond to amendments made to the 2011 Regulations by the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019), which replace the cross-reference to Article 346 TFEU with the text of Article 346 (with some minor adjustments to make it operable).

31. It is arguable that Article 346 TFEU has direct effect through section 2(1) of the European Communities Act 1972, and so is retained through section 4 of the European Union (Withdrawal) Act 2018 in some circumstances. However, given the Regulations amended by this instrument are made under the alternative implementing powers in section 2(2) of the European Communities Act 1972, inserting the text of Article 346 is considered to provide the most legal certainty in ensuring the continued effect of Article 346 after exit.

32. Consideration was also given to whether Article 346(1)(a) should be replicated in the instrument. Regulation 16(2)(b) of the Public Contracts (Scotland) Regulations 2015 and parallel provisions in the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016 ('the parallel provisions'), (which permit procurements to be excluded from the application of the Regulations where they would oblige a contracting authority to supply information which would be contrary to the UK's essential security interests) arguably already replicate its effect. However, the courts have not clarified the interaction between Article 346(1)(a) TFEU and regulation 16(2)(b) (or the parallel provisions) and a strict application of regulation 16(2)(b) (or the parallel provisions), disapplying the entirety of the Regulations in all circumstances could be considered disproportionate, so it was

considered prudent to make the position entirely clear by replicating Article 346(1)(a) in the Regulations.

33. Article 346(1)(b) provides that a contracting authority can take such measures as it considers necessary for the protection of the essential interests of the security of the UK and which are connected with the production of, or trade in, arms, munitions and war material. The scope of products referred to is determined by a list that was drawn up by the Council of Ministers of the EEC (as it then was), in 1958 ('the 1958 List'). The amendments made by this instrument reproduce the significance of the 1958 List (for example, new provisions inserted by regulation 4(4) that this instrument substitutes for regulation 3(2) of the Public Contracts (Scotland) Regulations 2015).

Scope of duty owed to economic operators

34. Regulation 4(58) of this instrument includes amendments to regulation 87 (*Duty owed to economic operators*) of the Public Contracts (Scotland) Regulations 2015. The instrument also amends parallel provisions in the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016. It would no longer make sense to provide remedies for breaches of 'enforceable EU obligations', so the amendment refers instead to any retained EU obligation that is saved under section 4 of the European Union (Withdrawal) Act 2018. This would include directly effective rights and obligations that previously flowed through section 2(1) of the European Communities Act 1972 and which continue to be recognised in domestic law after the end of the Implementation Period.

35. It would also be inappropriate to retain the obligations under relevant Parts of the Procurement Regulations in respect of economic operators from EEA States in circumstances where the UK is likely to be treated as a third country by contracting authorities in member States. After the end of the Implementation Period, and save in respect of procurements within the scope of the relevant withdrawal provisions and subject to the extension of existing duties towards economic operators from GPA parties and parties from states which have relevant international agreements (see paragraphs 38 to 44 below), the duty is owed only to economic operators from the UK.

36. Similarly, it would be inappropriate to continue to retain the obligations set out in the Procurement Reform (Scotland) Act 2014 in respect of economic operators from a member State or the EEA. The instrument amends the scope of these obligations so that, after the end of the Implementation Period, they will extend only to economic operators from the UK.

37. For the avoidance of doubt, Gibraltar is added as an express reference to make clear that the duty owed to economic operators in the UK extends to those in Gibraltar. As the UK is responsible for Gibraltar's external relations, the UK and Gibraltar are effectively treated as one member State under EU law. Contracting authorities in other member States owe the same duties to economic operators from Gibraltar as economic operators from the UK. After the end of the Implementation Period, Gibraltar will no longer come within the scope of the EU Treaties. It may therefore, be treated by member States as having the same third country status as the UK.

In order to preserve continuity it is appropriate to continue to include Gibraltarian economic operators in the duties owed by contracting authorities.

The GPA and other international agreements

38. It is the intention of the UK to join the GPA in its own right rather than in the capacity as an EU member State. If the UK does not accede to the GPA by the end of the Implementation Period, as a matter of international law economic operators established in territories and states which are GPA parties would no longer have the guaranteed access (and associated remedies) that they currently have in relation to UK public procurements. The UK Government, in amending the procurement Regulations applying to England, Wales and Northern Ireland, has decided that for procurements within the scope of the Regulations, economic operators established in territories and states which are party to the GPA (including EEA states), as at the end of the Implementation Period, should continue to be afforded the same rights and remedies as the UK currently gives to economic operators established in territories and states which are party to the GPA, on the basis of the EU's coverage schedules.

39. The Scottish Regulations also replicate this provision to support the UK's swift accession to the GPA. This instrument therefore modifies the relevant provisions of the Regulations from the end of the Implementation Period so that they continue to accord guaranteed access and remedies to economic operators established in states which are party to the GPA, including member States until the UK accedes to the GPA. Regulations 5, 7 and 9 of this instrument remove these provisions twelve months after the end of the Implementation Period.

40. In addition, as a member State, the UK was party to a number of international agreements with non-EU countries containing provisions relating to public procurement. After the end of the Implementation Period, these agreements will cease to apply to the UK. The UK has sought to replicate, or 'transition', these bilateral trade agreements so that they will apply to the UK after the end of the Implementation Period.

41. In order to ratify, and give full effect to, these transitioned international agreements, the procurement Regulations will need to reflect the obligations by which the UK will be bound.

42. The Trade Bill is currently before the UK Parliament and, it is anticipated that once it comes into force it will provide the necessary powers (specifically, clauses 1 and 2 respectively) to enable UK Ministers and the devolved administrations to implement the obligations in the GPA and the transitioned international agreements throughout the UK as an independent party.

43. In the meantime, this instrument preserves in Regulations, the duties owed, and remedies currently afforded, to economic operators from GPA parties and countries with which the EU has entered into an international agreement which contain provisions relating to public procurement and by which the EU is, before the end of the Implementation Period, bound. This preservation of existing obligations, for a period of twelve months, will enable the UK to demonstrate compliance with the GPA and the procurement provisions contained in the newly transitioned international

agreements, pending appropriate secondary legislation being brought forward to implement them. The UK Government has sought to replicate the EU's coverage schedules under the GPA and its international agreements in a form that is as close to the form of the EU's agreements as possible.

44. Once the powers under the Trade Bill are available, it is likely that the extension of existing duties towards economic operators from GPA parties and parties from states which have relevant international agreements will be revoked and replaced. In the meantime, these contingency provisions will expire twelve months from the end of the Implementation Period (but will continue to apply to procurements commenced before the expiry, by virtue of Part 4 of the Schedule to the instrument).

Specific exclusions for service contracts

45. The Regulations exclude certain legal services by a 'lawyer' within the meaning of the Lawyers' Services Directive. To maintain the exclusion of lawyers from member States practising under their domestic designation would be to provide preferential treatment to EU lawyers compared to lawyers from third countries. Accordingly, the instrument amends the definition of 'lawyer' to mean a person practising as an advocate, barrister or solicitor in any part of the United Kingdom or in Gibraltar.

Exclusion grounds

46. In respect of procurement procedures commenced after the end of the Implementation Period, contracting authorities and other entities will not be bound by the mandatory requirement to exclude an economic operator established as having a conviction where the offence relates to fraud affecting the European Communities' financial interests, as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities.

Thresholds

47. The financial thresholds which govern the award of public contracts in the Regulations were updated in October 2019 and came into effect in the UK on 1 January 2020. In amending the Regulations to substitute sterling figures (see paragraph 24 above) this instrument takes account of the new figures.

Retained direct EU legislation

48. Section 3 of the European Union (Withdrawal) Act 2018 provides that, so far as it is operative immediately before the end of the Implementation Period, direct EU legislation, with certain exemptions, forms part of domestic law on and after the end of the Implementation Period. It incorporates legislation into domestic law that had legal effect through section 2(1) of the European Communities Act 1972.

49. This instrument amends Commission Implementing Regulation (EU) No 2016/7 establishing the standard form for the European Single Procurement Document to replace this reference with the domestic Single Procurement Document. Article 1 is also amended so that rather than reference to Article 59 of Directive 2014/24/EU, it refers to regulation 60 of the Public Contracts (Scotland) Regulations 2015. The

amendment of (EU) No 2016/7 extends to Scotland only. The UK Government is making its own amendments of (EU) No 2016/7 in a separate instrument.

Consequential amendments to primary and secondary legislation

50. The application of some provisions of the Procurement Reform (Scotland) Act 2014, and of the Procurement (Scotland) Regulations 2016, made under that Act, is currently determined by reference to "EU-regulated procurement". This concept remains unaltered, but is amended to read "higher value regulated procurement". A number of interpretative provisions which refer to the European Directives are also updated.

Specific amendments

51. The definition of affiliated undertaking in both the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016 by reference to the requirements in Directive 2013/34/EU has been replaced with a reference to the domestic legislation which implements the Directive, Part 15 of the Companies Act 2006.

52. In respect of procurements with an information and communication technology (ICT) component, the Public Contracts (Scotland) Regulations 2015 and the Utilities Contracts (Scotland) Regulations 2016 permit contracting authorities and utilities to define their technical specifications by reference to common technical specifications. These are defined as technical specifications in the field of ICT laid down in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 on European standardisation. The instrument makes clear by express reference that this is a reference to the EU law version of Regulation (EU) No 1025/2012. Common technical specifications recognised by the Commission via Commission Implementing Decisions after the end of the Implementation Period may be referred to by contracting authorities and utilities.

53. The instrument amends the Public Contracts (Scotland) Regulations 2015 and the Utilities Contracts (Scotland) Regulations 2016 in respect of advanced electronic signatures. This is to reflect the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019, in particular in respect of amendments to Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the eIDAS Regulation), in connection with the use of advanced electronic signatures. Where contracting authorities or utilities consider that the security risks associated with electronic communications may make it appropriate to use advanced electronic signatures, they are to continue to be required to accept advanced electronic signatures supported by a qualified certificate for electronic signature (including a certificate which would have qualified status for the purpose of EU law); and are required to establish the required advanced electronic signature format on the basis of the formats referred to in Commission Implementing Decision 2015/1506 (which is to be retained as direct EU legislation). In case a different format of electronic signature is used, it must be a signature which complies with Commission Implementing Decision 2015/1506.

54. Regulation 9 of the Concession Contracts (Scotland) Regulations 2016 is amended to exclude references to TFEU and EU legal acts laying down common rules on access to the market. Services concession contracts awarded to an economic operator on the basis of an exclusive right are excluded in relation to an activity listed in Schedule 2. Regulation 12(1)(k) is amended so that the exclusion for air transport services will now be based on the economic operator's status as a qualifying air carrier. This is within the meaning of Regulation (EC) No 1008/2008 (as amended, as retained direct EU legislation, by the Operation of Air Services (Amendment etc.) (EU Exit) Regulations 2018).

55. Regulation 83 of the Utilities Contracts (Scotland) Regulations 2016 applies to tenders relating to products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries. Utilities are entitled to reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender. The instrument retains this provision for a time-limited period. This is to reflect the obligations owed by UK contracting authorities and other entities towards economic operators established in territories and states which are party to the GPA and non-UK suppliers under international agreements signed by the EU immediately before the end of the Implementation Period. However, the instrument replaces the applicable rules for determining the origin of the products. Rather than in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992, these are amended to be in accordance with Part 1 of the Taxation (Cross-border Trade) Act 2018.

The 2012 Regulations

56. The effect of the original transitional provisions in the Regulations means that the Public Contract (Scotland) Regulations 2012 and the Utilities Contract (Scotland) Regulations 2012 ('the 2012 Regulations') continue to apply to contract award procedures commenced in accordance with those Regulations before 18 April 2016. In practical terms, we expect that very few ongoing procedures will fall into this category.

57. The Schedule to the instrument provides that the steady state amendments do not affect those procurement procedures launched and finalised before the end of the Implementation Period, including under the 2012 Regulations. In respect of such procurements, effectively concluded contracts, the instrument amends the 2012 Regulations to remove ongoing reporting obligations to the Commission. Technical provision is also made to preserve the effect of existing exemptions from the 2012 Regulations.

58. In respect of procurement procedures which launched before the end of the Implementation Period but are not yet finalised, these come within the scope of the relevant withdrawal provisions and so are subject to the transitional provisions in the Schedule to the instrument. Notably these are the modifications made by paragraph 5 of the Schedule.

Abnormally low tenders and State aid

59. In respect of abnormally low tenders submitted by bidders who may have been in receipt of State aid, the intention is to treat non-UK economic operators on a level playing field. Under regulation 69 of the Public Contracts (Scotland) Regulations 2015, and regulation 82 of the Utilities Contracts (Scotland) Regulations, a contracting authority or utility can investigate an abnormally low tender and ask further questions of the economic operator. Where the contracting authority or utility establishes that the tender is abnormally low because the economic operator has obtained State aid, it may, following consultation with the tenderer and only if the tenderer is unable to prove that the aid is compatible with Article 107 TFEU, reject the tender on that ground alone. Any such rejections have to be reported to the Commission. From the end of the Implementation Period there is no policy justification to either continue to effectively use the procurement Regulations to treat EU economic operators differently to those from other third countries, or 'police' state aid given by other member States. Accordingly, the provisions in the Regulations relating to State aid have been removed (for example, regulation 69(2)(f), (6) and (7) of the Public Contracts (Scotland) Regulations 2015).

E-Certis

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

Joint procurement

61. The provisions in the Regulations about procurement involving contracting authorities or other contracting entities from other member States (for example, regulation 40 of the Public Contracts (Scotland) Regulations 2015) reflect rules introduced by the Commission to encourage cross-border joint procurements between member States. The omission of these provisions is not intended to imply that joint procedures should not be undertaken or that there should be any disruption to existing arrangements.

62. However, these provisions are premised on recognition by all the member States of the contracting authorities concerned that the contracting authorities' mutual rights and obligations will be as laid down by, or in accordance with, the arrangements referred to in these provisions. For example, that all the member States will respect the choice of national law made by contracting authorities who procure jointly under these provisions. After the end of the Implementation Period, this common recognition will not necessarily apply. The corresponding provisions of the Directives (for example, Article 39 of Directive 2014/24/EU), which will continue to apply to member States, refer only to "contracting authorities from member States", a category that will no longer include contracting authorities from the UK. It is therefore appropriate to omit these provisions. Cross-border joint procedures may

continue to be undertaken (as, in practice, they were to some extent before the Regulations were made, as the previous Procurement Directives and their transposing Regulations did not contain such provisions), but on the same basis as cross-border joint procedures with contracting authorities from non-member States, without the legal clarity provided by these provisions which would be impossible to enforce after the end of the Implementation Period.

The relevant withdrawal provisions

63. The relevant withdrawal provisions seek to ensure a level of continuity for procurement procedures which began before the end of the Implementation Period. The Schedule to this instrument contains transitional and saving provisions to ensure that the steady state amendments made to the Regulations by this instrument do not affect any ongoing procedure which straddles the end of the Implementation Period launched by a contracting authority or a utility under the Regulations or under the 2012 Regulations. In addition, framework agreements launched before the end of the Implementation Period which have not expired or been terminated, and call-off procedures under these, are not affected by the steady state amendments. So, for example, notices must continue to be sent to the EU Publications Office and such procedures will continue to be subject to the obligations to provide the Commission with reports. At a practical level there should be no changes in the way that public bodies submit notices as these will still go to Public Contracts Scotland.

64. As an exception, regulation 62 of the Public Contracts (Scotland) Regulations 2015 relating to e-Certis (which is revoked for new procedures launched after the end of the Implementation Period) will cease to apply 9 months after the end of the Implementation Period, even in relation to procedures that are not finalised at that point. This 9-month cut-off for e-Certis is specifically provided for in the relevant withdrawal provisions.

65. The Schedule provides certain modifications to the Regulations and savings to ensure that, in respect of such procedures, the Regulations operate effectively. For example modifications are made to the Regulations so that any reference to member State or EEA state is to be read to include the UK and any reference to a citizen of the EU or EEA includes a UK national.

66. The definition of 'steady state amendments' in paragraph 2 of the Schedule has been designed to minimise the risk that any future amendments that may be made to the Regulations do not inadvertently bite on transitional procurements in a way that would infringe relevant withdrawal provisions.

Statements required by the European Union (Withdrawal) Act 2018 and Additional Information required by the Protocol between the Scottish Government and the Scottish Parliament

The instrument is made in exercise of powers in the 2018 Act both to deal with deficiencies in retained EU law and to implement Part 3 of the withdrawal agreement (Part III Articles 75 to 78). All of the amendments in the instrument (with two exceptions) and Parts 1 and 2 of the Schedule are made in exercise of the deficiencies powers in the 2018 Act.

The two exceptions are regulation 4(8)(a) and (22)(a) which are made under powers conferred by section 2(2) of the European Communities Act 1972.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the Regulations do no more than is appropriate

The Cabinet Secretary for Finance has made the following statement "In my view the Public Procurement etc. (EU-Exit) (Scotland) (Amendment) Regulations 2020 do no more than is appropriate. This is because these do no more than prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU and which are described in this policy note".

Statement as to why the Scottish Ministers consider that there are good reasons for the Regulations and that this is a reasonable course of action

The Cabinet Secretary for Finance has made the following statement "In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These reasons are set out in this policy note".

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Cabinet Secretary for Finance has made the following statement "In my view the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 do 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".

Statement that Scottish Ministers have, in preparing the Regulations, 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

The Cabinet Secretary for Finance has made the following statement "In my view the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 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".

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This heading is not applicable.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable.

An indication of how the Regulations should be categorised in relation to the significance of the change proposed

High – this instrument is largely concerned with technical detail, and does not seek to change the effect of the underlying legislation. It does, however, transfer a number of functions, including limited EU legislative powers to the Scottish Ministers.

Statement setting out the Scottish Ministers' reasons for their choice of procedure

This SSI is subject to mandatory affirmative procedure under section 22 and paragraph 1(6) of Schedule 7 of the European Union (Withdrawal) Act 2018. Specifically, Schedule 7 paragraph 1(2)(b) of the 2018 Act as the instrument includes a power to legislate. Therefore, the sifting procedure in the SSI protocol is not relevant to this SSI.

Further information

Consultation
There has been no public consultation as the changes made are intended to maintain the current legislative and policy framework as far as possible after the end of the Implementation Period and are within the extent permitted by the European Union (Withdrawal) Act 2018 to correct deficiencies. Regular discussions on the content of this instrument have been held with the UK Government and the other devolved administrations. Where appropriate, the amendments to legislation set out in this instrument are consistent with amendments which the UK Government is making to its equivalent legislation.

As regulation 2 paragraph (2) of the instrument will come into force immediately before IP completion day, under paragraph 4(a) of schedule 2 of the EU (Withdrawal) Act 2018, we consulted with the Secretary of State before making the amendment. All that provision will do is revoke the 2019 EU Exit Regulations already made by Scottish Ministers about procurement before these come into force. Also, as some of the provisions remove reciprocal arrangements, we have also consulted the Secretary of State under paragraph 4(b) of Schedule 2 of the 2018 Act.

Impact Assessments

Impact assessments have not been prepared for this instrument because the framework and principles underlying the Regulations have not been substantially amended. Modifications contained in this instrument have been made to ensure the Regulations function effectively after the end of the Implementation Period.

Financial Effects

The Cabinet Secretary for Finance confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government - Scottish Procurement and Property Directorate

November 2020