

Report on the Statutory Instrument Consent Memorandum for The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020

November 2020

Background

- 1.** Standing Order 30A states that a member of the government must lay a Statutory Instrument Consent Memorandum in relation to any relevant statutory instrument (e.g. regulations) laid before the UK Parliament by UK Ministers, if a UK statutory instrument makes provision in relation to Wales to amend primary legislation within the legislative competence of the Senedd.
- 2.** The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020¹ (the Regulations) were laid before the UK Parliament on 7 October 2020. The Regulations contain amendments to section 155(2) and (3) of the Equality Act 2010.
- 3.** On 21 October 2020, Jane Hutt MS, the Deputy Minister and Chief Whip (the Deputy Minister), laid before the Senedd a Statutory Instrument Consent

¹ [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020](#)



Memorandum² (the Memorandum) for the Regulations, in accordance with Standing Order 30A.

4. On 6 November, the Deputy Minister wrote to notify us of the Memorandum.³

Committee consideration

5. We considered the Memorandum at our meeting on 2 November 2020,⁴ and considered the Deputy Minister's letter at our meeting on 9 November.⁵

6. The Annex provides a commentary of our analysis of the Memorandum.

7. We note that the Deputy Minister has indicated that a statutory instrument consent motion will be tabled and a debate on the motion will be scheduled.

² Statutory Instrument Consent Memorandum – The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 which contain amendments to section 155 (2) and (3) of the Equality Act 2010, October 2020

³ Letter from the Deputy Minister and Chief Whip, 6 November 2020

⁴ Legislation, Justice and Constitution Committee, 2 November 2020

⁵ Legislation, Justice and Constitution Committee, 9 November 2020

Annex

UK MINISTERS ACTING IN DEVOLVED AREAS	
173 - The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020	
<i>Laid in the UK Parliament: 7 October 2020</i>	
Sifting	
Subject to sifting in UK Parliament?	No
Procedure:	Draft affirmative
Date of consideration by the House of Commons European Statutory Instruments Committee	NA
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	NA
Date sifting period ends in UK Parliament	NA
Written statement under SO 30C:	Paper 57
SICM under SO 30A (because amends primary legislation)	SICM(5)33
Scrutiny procedure	
Outcome of sifting	NA
Procedure	Draft affirmative
Date of consideration by the Joint Committee on Statutory Instruments	21 October 2020
Date of consideration by the House of Commons Statutory Instruments Committee	Not known
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	20 October 2020

Background

These Regulations are proposed to be made by the UK Government pursuant to sections 8 and 8B(1) of, paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

Summary

This instrument is being made in order to address deficiencies in retained EU law in relation to public procurement, arising from the withdrawal of the United Kingdom (UK) from the European Union (EU), and to give effect to Title 8 of Part 3 of the Withdrawal Agreement and Title 5 of Part 3 of the EEA EFTA Separation Agreement, 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 the following legislation, before the instruments come into force:

- The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (2019/560); and
- The Public Procurement (Amendment) EU Exit) (No 2) Regulations 2019 (2019//623).

Both of those Regulations were made before the UK and the EU had entered into the Withdrawal Agreement or the EEA EFTA Separation Agreement.

Regulation 4 of the Regulations also amends section 155(2) and (3) of the Equality Act 2010. The amendment provides for the defining of a term by reference to the Public Contracts Regulations 2015, rather than by reference to the Public Sector Directive (2014/24/EU). This amendment is required in order for this provision to operate effectively after the end of the transition period.

Statement by Welsh Government

Legal Advisers agree with the statement laid by the Welsh Government dated 12 October 2020 regarding the effect of these Regulations.

In particular, we agree that the Regulations contain provisions that enable functions to be exercised by either the Cabinet Office or the Minister for the Cabinet Office, and the Welsh Ministers concurrently in relation to Devolved Welsh Authorities. These functions would constitute functions of either a Minister of the Crown or public authority (Cabinet Office) for the purposes Schedule 7B to the Government of Wales 2006, and that this would be a relevant consideration in the context of the Senedd's competence to legislate in these areas in future.

The effect of the concurrent functions contained in these Regulations have the potential to engage the consent requirements in Schedule 7B, and therefore represent a potential restriction on the Senedd's future competence.

The Welsh Government's statement notes that negotiations are ongoing with the OSSfW in relation to a s.109 Order to amend Schedule 7B so as to negate the potential restriction on the future competence of the Senedd.

Intergovernmental Agreement on the European Union (Withdrawal) Bill

The above summary and the content of the Explanatory Memorandum to these Regulations confirm their effect.

Legal Advisers do not consider that any significant issues arise under paragraph 8 of the Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks in relation to these Regulations.

Consent motion under Standing Order 30A.10

The Welsh Government laid a Statutory Instrument Consent Memorandum in respect of these Regulations on 21 October 2020.