

NOTIFICATION TO THE SCOTTISH PARLIAMENT

EFTA and TCA international agreement procurement SI

Is the notification Type 1 or Type 2

Type 1

The affirmative SI aims to amend the following Scottish procurement legislation in addition to UK procurement legislation:

- the Public Contracts (Scotland) Regulations 2015,
- the Utilities Contracts (Scotland) Regulations 2016,
- the Concession Contracts (Scotland) Regulations 2016.

This is to:

- give legal effect to obligations from the procurement chapter of a new international agreement the UK has signed with European Economic Area (EEA) European Free Trade Association (EFTA) members (Iceland, Liechtenstein and Norway) – the ‘EFTA Agreement’ – on 8 July 2021,
- reduce the risk of non-compliance with procurement obligations from the UK-EU Trade and Cooperation Agreement (TCA) signed on 30 December 2020, which already have legal effect, by making them explicit in domestic procurement law.

EFTA Agreement

The UK Government proposes making amendments to UK and Scottish procurement legislation under section 2 of the Trade Act 2021. These insert obligations on UK public bodies with respect to EEA EFTA suppliers contained within the procurement chapter of the EFTA Agreement, which must be reflected in domestic procurement laws. The UK and the EEA EFTA members are all members of the World Trade Organisation Agreement on Government Procurement (GPA), and the relevant provisions of the GPA are incorporated into the EFTA Agreement.

The Agreement also includes some coverage not included in the GPA, and will be similar to coverage contained in the EU’s agreement with EEA EFTA members when the UK was an EU member state. A key difference, from the EU agreement with EEA EFTA members, is that the following services are not included in the EFTA agreement: human health services; administrative healthcare services; supply services of nursing personnel and supply services of medical personnel; transport services by railway; and water transport services.

EEA EFTA suppliers will not have access to remedies for these services but will retain their ability to view and compete in tenders. In the event that the proposed instrument is not implemented, EEA EFTA suppliers would have a further reduction in access to remedies, limited to procurement areas covered by the GPA. This situation would leave the UK at risk of breaching its international obligations once the EFTA Agreement is ratified.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot



Public bodies will not have to make any changes to their procurement processes and practices, given that they are in effect already compliant with the EFTA Agreement procurement chapter.

TCA

The UK Government proposes making amendments to UK and Scottish procurement legislation under section 31 of the EU (Future Relationship) Act 2020. This is to reduce the risk of non-compliance posed by the approach of the EU (Future Relationship) Act 2020, which states that existing law must be read as if it complies with the TCA, by making TCA obligations explicit in domestic procurement law.

The proposed changes would:

- implement / add coverage of the TCA into UK and Scottish procurement regulations;
- amend the Public Contracts (Scotland) Regulations 2015 and the Utilities Contracts (Scotland) Regulations 2016 (and corresponding UK legislation) so that a public body may ask a supplier if the price in a tender takes into account subsidies in cases where the tender has an abnormally low price; and
- amend the Public Contracts (Scotland) Regulations 2015 and the Utilities Contracts (Scotland) Regulations 2016 (and corresponding UK legislation) so that EU-owned businesses based in the UK are treated no less favourably than UK-owned businesses in the UK in respect of non-covered procurement as well as that covered.

The instrument is expected to be laid before the UK Parliament in November 2021, though Cabinet Office are not yet in a position to confirm an exact date.

Details of the provisions that Scottish Ministers are being asked to consent to.

Summary of the proposals

The EFTA and TCA international agreement procurement SI proposes a number of amendments to UK and Scottish procurement legislation by affirmative procedure. These are necessary to give legal effect to obligations contained within the procurement chapter of an international agreement the UK has signed with EEA EFTA members and to make explicit obligations, which already have legal effect, from the UK-EU TCA. The affected Scottish legislation is as follows:

- the Public Contracts (Scotland) Regulations 2015
- the Utilities Contracts (Scotland) Regulations 2016
- the Concession Contracts (Scotland) Regulations 2016

The amendments related to the EFTA agreement will ensure similar procurement coverage between the UK and EEA EFTA members to that which exists between the EU and EEA EFTA members when the UK was an EU member state. Public bodies will not have to make any changes to their procurement processes and practices. These amendments are being proposed by the UK Government under section 2 of the Trade Act 2021.

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The amendments related to the TCA will make existing obligations from the EU (Future Relationship) Act 2020 explicit in procurement law, reducing the risk of non-compliance. These amendments are being proposed by the UK Government under section 31 of the EU (Future Relationship) Act 2020.

Procurement is a devolved matter and the Scottish Ministers have the power to make a Scottish Statutory Instrument to make the necessary amendments. This, though, would result in Scottish Ministers duplicating UK Ministers given there is no scope to do anything differently to what is proposed by the UK Government.

This means that it is sensible to agree to the UK Government's proposed approach.

Does the SI relate to a common framework or other scheme?

No, although there is a Common Framework on public procurement which has been provisionally agreed and is operational, covering international agreements and applicable to the following legislation in Scotland:

- Public Contracts (Scotland) Regulations 2015
- the Utilities Contracts (Scotland) Regulations 2016
- the Concession Contracts (Scotland) Regulations 2016.

Summary of stakeholder engagement/consultation

None due to the technical amendments proposed, and also in recognition that the TCA is already law and the SI will simply place that law into procurement regulations.

A note of other impact assessments, (if available)

Not applicable.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

The amendments are required to ensure that the UK and Scotland fulfil obligations that have arisen due to international trade agreements. There is no scope for Scottish Ministers to take a distinct approach, and to legislate separately would simply be to replicate the SI.

The Scottish Parliament consented to a similar approach for the Public Procurement (Government Procurement Agreement) Regulations and the Public Procurement (International Agreements) Regulations on 2 December 2020. This is in addition to the Public Procurement Regulations (Agreement on Government Procurement) (Amendment) (No. 2) Regulations that Scottish Ministers consented to on 24 March 2021 (during the Scottish Parliament election period) and which the Scottish Parliament were notified of on 22 June 2021.

Intended laying date (if known) of instruments likely to arise

Cabinet Office are currently unable to give a definitive laying date but have indicated that they intend to lay the SI as a draft affirmative by the end of November 2021.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

Not applicable.

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Information about any time dependency associated with the proposal

Not applicable.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

No, the SI is proposing technical amendments.

Any significant financial implications?

No financial implications are anticipated due to public bodies already being compliant with the obligations of the EFTA Agreement at a practical level and already legally bound by the obligations of the TCA.

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SI NOTIFICATION: SUMMARY

Title of Instrument
EFTA and TCA international agreement procurement SI
Proposed laying date at Westminster
Cabinet Office are currently unable to give a definitive laying date but have indicated that they intend to lay the SI as a draft affirmative by the end of November 2021.
Date by which Committee has been asked to respond
22 November 2021 (if notification issued on 25 October 2021)
Power(s) under which SI is to be made
Section 2 of the Trade Act 2021; Section 31 of the EU (Future Relationship) Act 2
Categorisation under SI Protocol
Type 1
Purpose
<p>The affirmative SI aims to amend the following Scottish procurement legislation in addition to UK procurement legislation:</p> <ul style="list-style-type: none"> • the Public Contracts (Scotland) Regulations 2015 ; • the Utilities Contracts (Scotland) Regulations 2016; and • the Concession Contracts (Scotland) Regulations 2016. <p>This is to:</p> <ul style="list-style-type: none"> • give legal effect to obligations from the procurement chapter of a new international agreement the UK has signed with the European Economic Area (EEA) European Free Trade Association (EFTA) members (Iceland, Liechtenstein and Norway) – the ‘EFTA Agreement’ – on 8 July 2021, and • make explicit in procurement legislation, legal obligations which are already in effect as part of the Trade and Cooperation Agreement (TCA) signed between the UK and EU on 30 December 2020.
Other information
Not applicable
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