



## EUROPEAN COMMISSION

DIRECTORATE-GENERAL INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP AND  
SMES  
DIRECTORATE-GENERAL TRADE  
DIRECTORATE-GENERAL DEFENCE INDUSTRY AND SPACE

Brussels, 25 January 2021  
REV1 – replaces the notice dated  
18 January 2018

### NOTICE TO STAKEHOLDERS

#### **WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF PUBLIC PROCUREMENT**

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a “third country”.<sup>1</sup> The Withdrawal Agreement<sup>2</sup> provided for a transition period which ended on 31 December 2020. The Withdrawal Agreement provided also, in some cases, for separation provisions at the end of the transition period.

During the transition period, the European Union and the United Kingdom negotiated a Trade and Cooperation Agreement, which was signed on 30 December 2020<sup>3</sup> and applies provisionally since 1 January 2021.<sup>4</sup>

All interested parties, and especially economic operators, are reminded of the legal situation applicable since the end of the transition period, taking account of the Trade and Cooperation Agreement (Part A below). This notice also explains certain relevant separation provisions of the Withdrawal Agreement (Part B below).

Please note;

This notice does not address EU rules on:

- procurement by EU institutions and bodies;
- VAT on goods and services.

For these aspects, other notices are in preparation or have been published.

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<sup>1</sup> A third country is a country not member of the European Union.

<sup>2</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7 (“Withdrawal Agreement”).

<sup>3</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444, 31.12.2020, p.14.

<sup>4</sup> OJ L 1, 1.1.2021, p.1.

## **A. LEGAL SITUATION SINCE THE END OF THE TRANSITION PERIOD**

Since 1 January 2021, EU rules in the field of public procurement<sup>5</sup> no longer apply to and in the United Kingdom, without prejudice to section B of this notice.

Economic operators from the United Kingdom interested or participating in public procurement procedures in the European Union will have the status of economic operators based in a third country regarding their access to the EU's public procurement market.

However, the United Kingdom has joined the WTO Agreement on Government Procurement on 1 January 2021. Under this agreement, the European Union and the United Kingdom have taken mutual commitments to give access to each other's operators, goods and services to certain public procurement opportunities. Moreover, Title VI of Heading One of Part Two of the Trade and Cooperation Agreement provides for additional mutual commitments on access to public procurement opportunities.

### **1. PROCUREMENT COVERED BY THE EU'S COMMITMENTS UNDER THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT AND UNDER THE TRADE AND COOPERATION AGREEMENT**

Economic operators, goods and services of the United Kingdom will enjoy fair and non-discriminatory access to the market opportunities covered by the European Union's commitments under the WTO Agreement on Government Procurement and under the Trade and Cooperation Agreement.<sup>6</sup>

These EU commitments cover the procurement of goods and of certain services, including construction services, for an economic value equal to or above thresholds<sup>7</sup> set by the European Union, by the following entities:

- all central and sub-central entities;
- bodies government by public law; and
- public entities, public undertakings and private undertakings with exclusive or special rights operating in the following utilities sectors: water, electricity, gas and heat, ports, airports, urban transport and rail sectors.

Such access is based on the rules of the WTO Agreement on Government Procurement and the Trade and Cooperation Agreement, which provides for UK goods, services and suppliers covered under the Agreement treatment no less

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<sup>5</sup> Please see [https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation\\_en](https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en) for more information on public procurement rules in the European Union.

<sup>6</sup> EU economic operators, goods and services will have fair and non-discriminatory access to public procurement opportunities in the United Kingdom in accordance with the United Kingdom's commitments under the WTO Agreement on Government Procurement and under the Trade and Cooperation Agreement.

<sup>7</sup> These thresholds are the same as those applied under the EU Directives in the field of public procurement.

favourable than the European Union accords to its own goods, services and suppliers.

## **2. PROCUREMENT NOT COVERED BY THE EU'S COMMITMENTS UNDER THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT AND UNDER THE TRADE AND COOPERATION AGREEMENT**

### **2.1. General rules**

In respect of procurement not covered by the European Union's commitments under the WTO Agreement on Government Procurement and under the Trade and Cooperation Agreement<sup>8</sup>, economic operators from the United Kingdom will have the same status as all other economic operators based in a third country with which the European Union does not have any agreement providing for the opening of the EU procurement market. They are therefore to be subject to the same rules as any third country tenderer. In particular, as stated in the "Guidance on the participation of third-country bidders and goods in the EU procurement market"<sup>9</sup>, *"economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded"*.

Additionally, pursuant to Article 85 of Directive 2014/25/EU regulating procurement procedures for the purchase of supplies by entities operating in the water, energy, transport and postal services sectors<sup>10</sup> tenders submitted in the European Union for such procurements may be rejected if the proportion of the products originating in third countries with which the European Union has not concluded an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries, exceeds 50% of the total value of the products constituting the tender. Even where such offers are not rejected, they shall not lead to the award of a contract if there are equivalent offers with less than 50% of the products originating in third countries. Therefore, tenders in this type of EU procurements, i.e. procurements not covered by the European Union's commitments under the WTO Agreement on Government Procurement and under the Trade and Cooperation Agreement, offering more than 50% of products originating from the United Kingdom and from other third countries with which the European Union has not concluded an agreement may be rejected or may not be awarded a contract.

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<sup>8</sup> The commitments of the European Union under the WTO Agreement on Government Procurement and the Trade and Cooperation Agreement do not cover *inter alia* the following: procurement below the thresholds; procurement of all services which are not included in the commitments under those agreements (such as research and development services), service concessions, procurement by public entities, public undertakings and private undertakings with special and exclusive rights in certain utilities sectors (postal services, extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels), defence procurement and procurement by most EU institutions and bodies (except the European Commission, the Council and the European External Action Service).

<sup>9</sup> <https://ec.europa.eu/docsroom/documents/36601>.

<sup>10</sup> OJ L 94, 28.3.2014, p. 243.

## **2.2. Specific rules in the field of defence and security**

As clarified by Recital 18 of Directive 2009/81/EC regulating procurement procedures by contracting authorities or entities in the field of defence and security<sup>11</sup>, EU Member States will retain the power to decide whether or not their contracting authorities/entities may allow economic operators from third countries to participate in their defence and security procurement procedures. Economic operators from the United Kingdom may therefore be excluded from bidding for defence and security contracts in the European Union.

Furthermore, Article 22 of Directive 2009/81/EC provides that EU Member States shall recognise the security clearances which they consider equivalent to those issued in accordance with their national law. As of the end of the transition period, EU Member States will no longer be under the obligation to recognise security clearances obtained by an economic operator in the United Kingdom, even where they could consider them as equivalent to their national security clearances. This may lead to the exclusion of operators relying on a United Kingdom security clearance in EU defence and security public procurement procedures.

### **B. RELEVANT SEPARATION PROVISIONS OF THE WITHDRAWAL AGREEMENT**

Title VIII of Part Three of the Withdrawal Agreement regulates public procurement procedures ongoing on 31 December 2020. Articles 76 of the Withdrawal Agreement sets out that public procurement procedures launched by contracting authorities or contracting entities in the United Kingdom or in the European Union, and which are not yet finalised on 31 December 2020, continue to be carried out, until their finalisation, in accordance with EU law governing public procurement procedures. As a result, economic operators from the United Kingdom continue to benefit from the principle of non-discrimination in respect of those ongoing procedures in the European Union – and vice versa.

Additionally, United Kingdom contracting authorities or contracting entities from the United Kingdom have to continue to request the publication of notices, in respect of those procedures ongoing on 31 December 2020, by the Publication Office of the European Union on TED (Tenders Electronic Daily), the online version of the “Supplement to the Official Journal” of the European Union, dedicated to European public procurement.

Article 77 of the Withdrawal Agreement sets out that the review procedures provided for by EU rules in the field of public procurement continue to apply to those public procurement procedures ongoing on 31 December 2020.

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<sup>11</sup> OJ L 216, 20.8.2009, p. 76.