

## SCHEDULE 2

### Amendments to statutory instruments

## PART 2

### Other statutory instruments

#### **Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975**

25. The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975(1) is amended as follows.

26.—(1) Article 2(1) is amended as follows.

(2) For the definition of “contracting authority” substitute—

““contracting authority” has the meaning given by regulation 2(1) of the Public Contracts Regulations 2015, regulation 4(1) of the Utilities Contracts Regulations 2016 or regulation 4 of the Concession Contracts Regulations 2016, as appropriate;”.

(3) Omit the definitions of “contracting entity”, “[Directive 2004/17/EC](#)” and “[Directive 2004/18/EC](#)”.

(4) After the definition of “trustee” insert—

““utility” has the meaning given by regulation 5(1) of the Utilities Contracts Regulations 2016 or regulation 5 of the Concession Contracts Regulations 2016, as appropriate;”.

27. For article 3(1)(j) substitute—

“(j) any question asked by or on behalf of a contracting authority or utility in relation to a conviction for an offence listed in regulation 57(1) of the Public Contracts Regulations 2015 or regulation 38(8) of the Concession Contracts Regulations 2016 which is a spent conviction (or any circumstances ancillary to such a conviction) for the purpose of determining whether or not a person is excluded—

(i) for the purposes of regulation 57 of the Public Contracts Regulations 2015,

(ii) from participation in a design contest for the purposes of regulation 80 of the Public Contracts Regulations 2015,

(iii) for the purposes of regulation 80 of the Utilities Contracts Regulations 2016,

(iv) from participation in a design contest for the purposes of regulation 96 of the Utilities Contracts Regulations 2016, or

(v) for the purposes of regulation 38 of the Concession Contracts Regulations 2016,

where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions for such offences are to be disclosed;”.

28. Omit article 3(1)(ja).

#### **Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979**

29. The Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979(2) is amended as follows.

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(1) S.I. 1975/1023, amended by S.I. 2006/2143 and 2015/102; there are other amending instruments but none is relevant.

(2) S.R.(NI) 1979 No 195, amended by S.R. NI 2009 No 173; there are other amending instruments but none is relevant.

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**30.**—(1) Article 1(2) (citation, commencement and interpretation) is amended as follows.

(2) For the definition of “contracting authority” substitute—

““contracting authority” has the meaning given by regulation 2(1) of the Public Contracts Regulations 2015, regulation 4(1) of the Utilities Contracts Regulations 2016 or regulation 4 of the Concession Contracts Regulations, as appropriate;”.

(3) Omit the definitions of “contracting entity”, “[Directive 2004/17/EC](#)” and “[Directive 2004/18/EC](#)”.

(4) At the appropriate place insert—

““utility” has the meaning given by regulation 5(1) of the Utilities Contracts Regulations 2016 or regulation 5 of the Concession Contracts Regulations 2016, as appropriate;”.

**31.** For article 2(g) (exclusion of article 5(2) of the Order in relation to certain questions) substitute—

“(g) any question asked by or on behalf of a contracting authority or utility in relation to a conviction for an offence listed in regulation 57(1) of the Public Contracts Regulations 2015 or regulation 38(8) of the Concession Contracts Regulations 2016 which is a spent conviction (or any circumstances ancillary to such a conviction) for the purpose of determining whether or not a person is excluded—

- (i) for the purposes of regulation 57 of the Public Contracts Regulations 2015,
- (ii) from participation in a design contest for the purposes of regulation 80 of the Public Contracts Regulations 2015,
- (iii) for the purposes of regulation 80 of the Utilities Contracts Regulations 2016,
- (iv) from participation in a design contest for the purposes of regulation 96 of the Utilities Contracts Regulations 2016, or
- (v) for the purposes of regulation 38 of the Concession Contracts Regulations 2016,

where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions for such offences are to be disclosed.”.

### **Heavy Goods Vehicles (Charging for the Use of Certain Infrastructure on the Trans-European Road Network) Regulations 2009**

**32.** In regulation 18(2) of the Heavy Goods Vehicles (Charging for the Use of Certain Infrastructure on the Trans-European Road Network) Regulations 2009<sup>(3)</sup> (information requirements where a concession toll is involved) for sub-paragraph (b) substitute—

“(b) the base case on which the grantor under the concession contract has founded the concession notice within the meaning of regulation 6 of the Concession Contracts Regulations 2016.”.

### **Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009**

**33.** In regulation 9 of the Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009<sup>(4)</sup> for “the Utilities Contracts Regulations 2006” substitute “the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016,”.

<sup>(3)</sup> S.I. 2009/1914, amended by S.I. 2014/2437; there are other amending instruments but none is relevant.

<sup>(4)</sup> S.I. 2009/3244, amended by S.I. 2015/102.

## **Cleaner Road Transport Vehicles Regulations 2011**

**34.** The Cleaner Road Transport Vehicles Regulations 2011(5) are amended as follows.

**35.—**(1) Regulation 2(1) (interpretation) is amended as follows.

(2) Before the definition of “contract documents” insert—

““concession notice” has the same meaning as in regulation 6 of the Concession Contracts Regulations 2016;”.

(3) In the definition of “contract notice” for “Utilities Contracts Regulations 2006” substitute “Utilities Contracts Regulations 2016”.

(4) At the end of the definition of “contracting authority” add “, regulation 4 of the Utilities Contracts Regulations or regulation 4 of the Concession Contracts Regulations 2016 (as applicable)”.

(5) At the end of the definition of “declaration of ineffectiveness” add “, regulation 103(1) of the Utilities Contracts Regulations 2016 or regulation 49(1) of the Concession Contracts Regulations 2016 (as applicable)”.

(6) In paragraph (a) of the definition of “economic operator” for “or the Utilities Contracts Regulations 2006” substitute “, the Utilities Contracts Regulations 2016 or the Concession Contracts Regulations 2016 (as applicable)”.

(7) In the definition of “procurement procedure”, for paragraph (b) substitute—

“(b) the open procedure, the restricted procedure, the negotiated procedure with prior call for competition, the negotiated procedure without prior call for competition, competitive dialogue or an innovation partnership within the meaning of the Utilities Contracts Regulations 2016;”.

(8) In the definition of “utility” for “regulation 2(1) of the Utilities Contracts Regulations 2006” substitute “regulation 5 of the Utilities Contracts Regulations 2016 or regulation 5 of the Concession Contracts Regulations 2016 (as applicable)”.

**36.—**(1) Regulation 3 (scope of the Regulations) is amended as follows.

(2) In paragraph (3) for sub-paragraphs (b) and (c) substitute—

“(b) the Utilities Contracts Regulations 2016 apply in respect of that contract;

(c) the Concession Contracts Regulations 2016 apply in respect of that contract; or

(d) that contract is to be entered into by an operator and the condition specified in paragraph (4) is satisfied.”.

(3) For paragraph (4)(b) substitute—

“(b) if that operator were a contracting authority or a utility, that contract would not be excluded from the application of the Utilities Contracts Regulations 2016 by regulation 16 (thresholds) of those regulations (whether or not it would also be so excluded for any other reason);

(c) if that operator were a contracting authority or a utility, that contract would not be excluded from the application of the Concession Contracts Regulations 2016 by regulation 9 (threshold amounts) of those Regulations (whether or not it would also be so excluded for any other reason).”.

**37.** For regulation 6(3) and (4) (enforcement of duties) substitute—

“(3) Subject to paragraph (4), Part 5 of the Utilities Contracts Regulations 2016 has effect as if any reference in that Part to—

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(5) [S.I. 2011/1631](#), amended by [S.I. 2015/102](#).

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- (a) the duty owed in accordance with regulation 104 of those Regulations included reference to the duty owed in accordance with paragraph (1);
  - (b) a utility included a reference to an operator;
  - (c) an economic operator included any person who is an economic operator for the purpose of these Regulations.
- (3A) Subject to paragraph (4), Part 5 of the Concession Contracts Regulations 2016 has effect as if any reference in that Part to—
- (a) the duty owed in accordance with regulation 50 of those Regulations included reference to that duty owed in accordance with paragraph (1);
  - (b) a contracting authority or a utility included a reference to an operator;
  - (c) an economic operator included any person who is an economic operator for the purpose of these Regulations.
- (4) Where Part 3 of the Public Contracts Regulations 2015 or Parts 5 of the Utilities Contracts Regulations 2016 or the Concessions Contracts Regulations 2016 have effect in relation to an economic operator by virtue of paragraph (2)(b), (3)(b) or (3A)(b)—
- (a) the operator does not owe any duty under that Part to a person who is not a national of or established in an EEA State;
  - (b) in proceedings against an operator under that Part the Court may not make a declaration of ineffectiveness, an order imposing a civil financial penalty or an order shortening the duration of the contract;
  - (c) the operator is not required to refrain from entering into any contract by reason of any proceedings having been started under that Part.”.

### **Defence and Security Public Contracts Regulations 2011**

**38.** The Defence and Security Public Contracts Regulations 2011(6) are amended as follows.

**39.** In regulation 3(1) (interpretation) at the end of the definition of “contract” add “but does not include a concession contract within the meaning of the Concession Contracts Regulations 2016”.

**40.**—(1) Regulation 4 (contracting authorities) is amended as follows.

(2) At the end of paragraph (a) add “or regulation 4(1) of the Utilities Contracts Regulations 2016”.

(3) In paragraph (c) for “regulation 3 of the Utilities Contracts Regulations 2016” substitute “regulation 5 of the Utilities Contracts Regulations 2016”.

**41.** In regulation 6(4) to (6) (application)—

- (a) for “Utilities Contracts Regulations 2006” in each place it occurs substitute “Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016,”;
- (b) after “Utilities Contracts (Scotland) Regulations 2012” in each place it occurs insert “(or, as a result of regulation 118 of the Public Contracts Regulations 2015 or regulation 123 of the Utilities Contracts Regulations 2016, the Public Contracts Regulations 2006 or the Utilities Contracts Regulations 2006, as the case may be)”.

**42.** In regulation 17(5) after “contract” insert “notice”.

**43.** In Schedule 4 (consequential amendments, repeals and revocations), omit paragraphs 1 and 3.

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(6) [S.I. 2011/1848](#), amended by [S.I. 2015/102](#); there are other amending instruments but none is relevant.

## **The Railways (Interoperability) Regulations 2011**

**44.** In regulation 2(1) of the Railways (Interoperability) Regulations 2011(7)(interpretation) for the definition of “European specification” substitute—

““European specification” means a common technical specification, a technical specification formulated by reference to a European Technical Assessment or a national standard transposing a European standard, the terms used in this definition having the meaning given in Annex VIII to [Directive 2014/25/EU](#) of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing [Directive 2004/17/EC](#)(8);”.

## **National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013**

**45.** The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(9) are amended as follows.

**46.** In regulation 13(3) (powers of Monitor to investigate) after “2015” insert “or the Concession Contracts Regulations 2016”.

**47.**—(1) In regulation 17 (actions brought under the Public Contracts Regulations 2006) after “2015” insert “or the Concession Contracts Regulations 2016”.

(2) In the heading to regulation 17, for “Public Contracts Regulations 2006” substitute “Public Contracts Regulations 2015 or the Concession Contracts Regulations 2016”.

## **Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013**

**48.** The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013(10) are amended as follows.

**49.**—(1) Regulation 6 (tender requirements and procedure) is amended as follows.

(2) In paragraph (2)(a) for “Utilities Contracts Regulations 2006” substitute “Utilities Contracts Regulations 2016 nor the Concession Contracts Regulations 2016”.

(3) In paragraph (2)(b) for “Utilities Contracts Regulations 2006” substitute “Utilities Contracts Regulations 2016”.

(4) For paragraph (2)(c) substitute—

“(c) the incumbent undertaker seeks offers without a call for competition pursuant to regulation 50(1)(b) to (j) of the Utilities Contracts Regulations 2016, or”.

(5) In the final words of paragraph (2) for “Utilities Contracts Regulations 2006”, in each place, substitute “Utilities Contracts Regulations 2016”.

(6) In paragraph (3) for “Utilities Contracts Regulations 2006” in the first place it occurs substitute “Utilities Contracts Regulations 2016”.

(7) For paragraph (3)(b)(ii) substitute—

“(ii) for Chapter 2 of Part 5 of the Utilities Contracts Regulations 2016 (applications to the Court), there were substituted the Chapter 2 of Part 5 set out in Part 2 of Schedule 2.”.

(7) [S.I. 2011/3066](#), to which there are amendments not relevant to these Regulations.

(8) OJ No L 94, 28.3.2014, p243.

(9) [S.I. 2013/500](#), amended by [S.I. 2015/102](#).

(10) [S.I. 2013/1582](#), amended by [S.I. 2015/102](#).

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(8) In paragraph (8)(b) after “occurs” insert “other than in relation to the modifications made to regulations 42 and 98 of the Utilities Contracts Regulations 2016 specified in the second column of the table in Part 1 of Schedule 2”.

50. For Schedule 2 (application of the Utilities Contracts Regulations 2006) substitute—

“SCHEDULE 2

Regulation 6

Application of the Utilities Contracts Regulations 2016

PART 1

<i>Provision applied</i>	<i>Modification</i>
regulation 2 (definitions) and Schedule 1 (activities constituting works), regulation 4 (contracting authorities), regulation 36 (principles of procurement), regulation 37 (economic operators)	These provisions apply only to the extent that they are relevant to the provisions referred to in this Schedule.
regulation 39 (confidentiality)	In paragraph (2)(a), for “such as the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in regulations 70 and 75 respectively”, there were substituted “such as the obligations relating to the information to candidates and tenderers set out in regulation 75”.
regulation 40 (rules applicable to communication)	Paragraph (15)(a)(ii) does not apply.
regulation 41 (nomenclatures)	
regulation 42 (conflicts of interest)	The incumbent undertaker is bound by paragraph (1) as if it were a contracting authority.
regulation 44 (choice of procedures)	Paragraphs (4)(a) and (5) do not apply.
regulation 45 (open procedure)	Paragraph (4) does not apply.
regulation 46 (restricted procedure)	Paragraph (2)(b) does not apply.
regulation 47 (negotiated procedure with prior call for competition)	Paragraph (2)(b) does not apply.
regulation 48 (competitive dialogue)	Paragraph (2)(b) does not apply.
regulation 49 (innovation partnership)	
regulation 50 (use of the negotiated procedure without prior call for competition)	Only paragraphs (1)(a) and (2) apply.
regulation 51 (framework agreements)	
regulation 54 (electronic catalogues)	Paragraphs (11) to (13) do not apply.

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<i>Provision applied</i>	<i>Modification</i>
regulation 55 (centralised purchasing activities and central purchasing bodies)	Paragraph (11) applies as if the words from “Procurement”, where it first appears, to the end of that paragraph were substituted by “For the purposes of this regulation, “dynamic purchasing system” has the same meaning as the system referred to in regulation 52 of the Utilities Contracts Regulations 2016.”.
regulation 56 (occasional joint procurement)	
regulation 58 (preliminary market consultations)	
regulation 59 (prior involvement of candidates or tenderers)	
regulation 60 (technical specifications)	
regulation 61 (labels)	
regulation 62 (test reports, certification and other means of proof)	
regulation 63 (communication of technical specifications)	Paragraph (1)(b) does not apply.
regulation 64 (variants)	
regulation 65 (division of contracts into lots)	
regulation 66 (setting time limits)	
regulation 68 (notices on the existence of a qualification system)	
regulation 69 (contract notices)	
regulation 71(form and manner of sending notices for publication at EU level)	Paragraph (1) applies as if “regulations 67 to 70” were substituted by “regulations 68, 69”.
regulation 72 (publication at national level)	Paragraph (1) and (3) apply as if “regulations 67 to 70” were substituted by “regulations 68, 69”.  Paragraph (2) applies as if the words “(in addition to the periodic indicative notices referred to in regulation 67(3)(b))” were omitted.  Paragraph (6) does not apply.
regulation 73 (electronic availability of procurement documents)	
regulation 74 (invitations to candidates)	Paragraphs (2) and (6) do not apply.
regulation 75 (informing applicants for qualification, candidates and tenderers)	Paragraph (1) applies as if “framework agreement, the award of a contract, or admittance to a dynamic purchasing system”

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<i>Provision applied</i>	<i>Modification</i>
	were substituted by “framework agreement or the award of a contract”.  Paragraph (1)(d) does not apply.
regulation 76 (general principles)	
regulation 77 (qualification systems)	
regulation 78 (criteria for qualitative selection)	
regulation 79 (reliance on the capacity of other entities)	
regulation 80 (use of exclusion grounds and selection criteria provided for under the Public Contracts Regulations)	The incumbent undertaker is bound by paragraph (2) as if it were a contracting authority.
regulation 81 (quality assurance standards and environmental management standards)	
regulation 82 (contract award criteria)	
regulation 83 (life-cycle costing)	
regulation 84 (abnormally low tenders)	Paragraph (7) applies as if the reference to “the Commission” were a reference to “the Secretary of State and the Water Services Regulation Authority”.
regulation 86 (conditions for performance of contracts)	
regulation 87 (subcontracting)	The incumbent undertaker is bound by paragraphs (5), (8), (9), (10) and (11) as if it were a contracting authority.
regulation 88 (modifications of contracts during their term)	
regulation 89 (termination of contracts)	
regulation 98 (retention of contract copies)	The incumbent undertaker is bound by this regulation as if it were a contracting authority.
regulation 99 (information and documentation requirements)	Paragraph (1) applies as if the words “and each time a dynamic purchasing system is established” were omitted.  Paragraph (7) applies as if the reference to “the Commission”, in the first place it occurs, were a reference to “the Secretary of State or the Water Services Regulation Authority” and, in the second place it occurs, were a reference to “the Secretary of State or the Water Services Authority (as the case may be)”.



<i>Provision applied</i>	<i>Modification</i>
	Paragraphs (2)(c), (3), (8) and (9) do not apply.
regulation 100 (scope of Chapter 1)	
regulation 101 (notices of decisions to award a contract or conclude a framework agreement)	Paragraph (5)(a) does not apply.  Paragraph (5)(c) applies as if “or a dynamic purchasing system” were omitted.  Paragraph (8) applies as if the words after “expired” in sub-paragraph (b) were omitted.
regulation 102 (standstill period)	
Chapter 2 of Part 5 (applications to the Court)	

## PART 2

### “CHAPTER 2

#### Applications to the court

#### **Enforcement of obligations**

**103.**—(1) The obligation on an incumbent undertaker to comply with the provisions of these Regulations, other than regulations 84(7) and 99(7), is a duty owed to an economic operator.

(2) A breach of the duty owed in accordance with paragraph (1) is actionable by any economic operator which in consequence suffers, or risks suffering, loss or damage and those proceedings shall be in the High Court.

(3) Subject to paragraphs (4) to (6), such proceedings must be started within 30 days beginning with the date on which the economic operator first knew or ought to have known that grounds for starting proceedings had arisen.

(4) Paragraph (3) does not require proceedings to be started before the end of any of the following periods—

- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
  - (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision, or
  - (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—
  - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision, or
  - (ii) 10 days beginning with—

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- (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
  - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons; and
  - (c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with day on which the decision is published.
- (5) Subject to paragraph (6), the Court may extend the time limit imposed by paragraph (3) where the Court considers that there is good reason for doing so.
- (6) The Court must not exercise its power under paragraph (5) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
- (7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.
- (8) Subject to paragraph (9), but otherwise without prejudice to any other powers of the Court in proceedings brought under this regulation, the Court may—
- (a) by interim order—
    - (i) suspend the procedure leading to the award of the contract or the procedure leading to the determination of a design contest in relation to the award of a contract of which the breach of duty owed in accordance with paragraph (1) is alleged; or
    - (ii) suspend the implementation of any decision or action taken by the incumbent undertaker in the course of following such a procedure; and
  - (b) if satisfied that a decision or action taken by an incumbent undertaker was a breach of the duty owed in accordance with paragraph (1)—
    - (i) order the setting aside of that decision or action, or order the incumbent undertaker to amend any document;
    - (ii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach; or
    - (iii) do both of those things.
- (9) In proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) if the contract in relation to which the breach occurred has been entered into.
- (10) Where, in proceedings under this regulation, the Court is satisfied that an economic operator would have had a real chance of being awarded a contract or winning a design contest if that chance had not been adversely affected by a breach of the duty owed to it by the incumbent undertaker in accordance with paragraph (1), the economic operator shall be entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract or its costs of participating in the procedure leading to the determination of the design contest.
- (11) Paragraph (10) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages, and is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any other such claim.””

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