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THE RT HON THE EARL HOWE PC
DEPUTY LEADER OF THE HOUSE OF LORDS AND
MINISTER OF STATE FOR DEFENCE

MSU/4/8/2/3/ap

7th February 2019

Dear Dianne.

Thank you for your contribution to the debate in Grand Committee on 4 February 2019. At that debate a number of questions were raised on the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 on which I agreed to write to you.

In the context of a contracting authority being able to refuse to award a contract to the lowest bidder if that bidder 'does not comply with certain obligations in the field of social, environmental and labour laws', you asked if social law would include consumer law. Consumer law aims to protect the rights of consumers, usually in the context of private contracts (compared to commercial contracts), to address the often-unequal bargaining position between consumers and business, for example, by rules on product liability, unfair contract terms, health and safety standards and accurate information.

The term "social" is used in various ways in the procurement regulations but does not directly overlap with consumer law. In the context of environmental, social and labour law obligations, the regulations permit contracting authorities to reject bids that are economically the most advantageous where it is established that these obligations have been breached. The type of social obligations include those aimed at ensuring equal opportunities, social inclusion, fair working conditions and social security protection.

The ability of a contracting authority to reject the most economically advantageous tender where there is an established breach of national law or collective agreements relating to environmental, social and labour law remains unchanged. The instrument amends the alternative ground of rejection for breach of the international environmental, social and labour law provisions listed in the Annexes to the Procurement Directives. This has been replaced with a power on the MCO to make regulations reflecting international agreements the UK has ratified in these fields as if these agreements were listed in the Annexes. This means that if the UK enters into a new international agreement, or if the existing agreements are updated, MCO can make regulations to include the new obligations in the list to permit contracting authorities to reject bids where breaches of these new obligations have been established.

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The agreements currently listed in the Annex are as follows:

- ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise;
- ILO Convention 98 on the Right to Organise and Collective Bargaining;
- ILO Convention 29 on Forced Labour;
- ILO Convention 105 on the Abolition of Forced Labour;
- ILO Convention 138 on Minimum Age;
- ILO Convention 111 on Discrimination (Employment and Occupation);
- ILO Convention 100 on Equal Remuneration;
- ILO Convention 182 on Worst Forms of Child Labour;
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);
- Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols.

The UK is an independent signatory to all of these agreements and there is no intention to remove any of the agreements from the list.

A number of questions were raised on the topic of the Government Procurement Agreement (GPA) and I hope the following responses are helpful in answering those queries.

First a query was raised about the resistance of the US to the UK's accession to the GPA. Like other Parties, the US has been keen to understand what the position will be for the UK's participation in the GPA during any implementation period. However, the US has consistently supported the UK's continued participation in the GPA and has accepted our final market access offer.

Also on this topic, those present at the Grand Committee debate requested an update on the UK's accession to the GPA. GPA parties have agreed in principle to the UK's market access offer. Ministers and officials are in continuous conversation with the European Commission, other GPA parties and the WTO Secretariat to complete the necessary processes that will allow the UK to accede as an independent party to the GPA. This includes ensuring the UK can accede to the GPA as an independent party from exit day or as soon as possible thereafter in the event of a 'no deal'. Ministers and officials are aware

of the risk of a short gap in the UK's participation in the GPA in a 'no deal' as these necessary processes are completed. In the event that they will be needed, the Government is also exploring solutions to mitigate the impact of any short gap in the UK's GPA participation. This is the responsible thing to do and aims to minimise to the greatest extent any impact of a gap on businesses. The Government will inform businesses of any decisions relating to a gap in UK GPA participation that may affect them.

Connected to this topic was the question as to whether Irish firms would be in an intermediate position in any way in terms of access to government procurement. The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 guarantee continued access, rights and remedies for suppliers from GPA countries for a time limited period from EU exit and Ireland is a member of the GPA via its membership of the EU. As for reciprocal access for UK businesses, the Irish implementation of the EU procurement Directive obliges Irish contracting authorities to treat "economic operators equally and without discrimination and [act] in a transparent and proportionate manner"– no specific reference is made to an economic operator residing in the European Union. It is currently the Irish Government's policy that UK companies should not be treated differently from EU businesses. Consequently, UK businesses at present will still be entitled to participate in Irish public tenders.

Questions were also posed about the UK e-notification service. It was asked if no deal is reached with the EU, whether it would legally be possible for the UK public sector to advertise contracts in the Official Journal of the EU (OJEU). Provided they comply with the requirements of the Public Procurement (Amendment etc.) (EU Exit) Regulations, to publish on the UK e-notification service first, and the UK has access to OJEU, **then** public bodies could legally advertise in OJEU and/or any other way, such as in local newspapers or on their own websites. Of course, this relies on the Commission continuing to afford access to OJEU.

Finally, a related question was raised about the access of non-EU members to the advertising facilities provided by OJEU, in particular Norway and Switzerland, and whether, if it were possible to advertise in OJEU without being a member of the EU, the UK would continue to do so. Norway, as a member of the European Economic Area, is subject to the EU Procurement Directives and consequently has a duty to advertise regulated procurements in OJEU. Switzerland has its own national publication site but also publishes public procurement opportunities that are covered by the GPA, in OJEU.

I hope this is helpful. I am copying this letter to Lord Adonis and Lord Wallace and placing a copy in the Library of the House.

Yours sincerely,

Earl Howe

THE RT HON THE EARL HOWE PC