

ECONOMIC ACTIVITY OF PUBLIC BODIES (OVERSEAS MATTERS) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Economic Activity of Public Bodies (Overseas Matters) Bill as introduced in the House of Commons on 19 June 2023 [Bill 325].

- These Explanatory Notes have been provided by the Department for Levelling Up, Housing and Communities in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.

- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The legislation will prevent public bodies when making decisions about procurement and investment from considering a country or territory of origin or other territorial considerations in a way that indicates political or moral disapproval of a foreign state. The legislation will not prevent public bodies from complying with formal UK Government legal sanctions, embargoes and restrictions.
- 2 The Bill contains 17 clauses and one schedule, addressing a range of issues relating to boycotts, divestments and sanctions imposed by public bodies.
- 3 The Bill makes changes to existing legislation, including the Local Government Act 1988, the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 (S.I. 1992/810 (N.I.6)), Pensions (Northern Ireland) Order 2005 (S.I. 2005/255 (N.I. 1)), the Public Service Pensions Act 2013, the Public Service Pensions Act (Northern Ireland) 2014 (c. 2 (N.I.)), and the Pensions Act 2004.

Policy background

- 4 Campaigning groups sometimes seek to persuade institutions in the UK, including public authorities, not to buy goods or services associated with particular foreign countries. The most prominent example in recent years is the 'Boycott, Divestment and Sanctions' campaign, focused on Israel. That campaign argues that boycotts and divestments are an appropriate response to the Israeli occupation of the Palestinian Territories¹. Opponents have argued that the campaign undermines community cohesion and may offer a pretext for antisemitism².
- 5 The Government has set out its view that it is not appropriate for public bodies to accede to such campaigns except where to do so is positively consistent with the UK's foreign policy as determined by the Government³. The Conservative Party manifesto for the 2019 Election included a

¹ The BDS Movement states on its website that it is a Palestinian-led movement targeting Israel. <https://bdsmovement.net/what-is-bds>

² Conservative MP, Priti Patel has argued that the BDS movement is antisemitism. <https://www.jpost.com/bds-threat/article-707088>

³ The Government's view that it is not appropriate for public bodies to use their procurement and investment decisions to pursue their own foreign policy agenda was set out in the Queen's Speech 2022. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074113/Lobby_Pack_10_May_2022.pdf

commitment to “ban public bodies from imposing their own direct or indirect boycotts, disinvestment or sanctions campaigns against foreign countries.” This Bill is intended to fulfil that commitment.

Legal background

6 The Bill will apply to public authorities as defined in section 6 of the Human Rights Act 1998 (“HRA”), except where a public authority has been expressly excluded from the Bill. This therefore includes hybrid public authorities to the extent they are exercising a public function.

7 The UK is a signatory of the World Trade Organisation’s (“WTO”) Government Procurement Agreement (“GPA”). This restricts the ability of UK contracting authorities to boycott economic operators from GPA parties or countries with which the UK has an international agreement with procurement provisions. This Bill will not conflict with the UK’s obligations under the GPA.

8 There is some existing legislation restricting considerations to which local authorities are permitted to have regard to when making procurement decisions. Section 17 of the Local Government Act 1988 prohibits local authorities in England, Scotland and Wales from considering non-commercial matters in relation to decisions about public supply or works contracts, including, *“the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractor”*. Article 19 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 provides a near identical restriction as respects councils in Northern Ireland. Both provisions will be superseded by commencement of the Bill.

9 Section 17 of the Local Government Act 1988 has been disapplied by the Local Government (Exclusion of Non-commercial Considerations) (England) Order 2022 (S.I. 2022/741) in relation to any of an authority’s proposed or subsisting public supply or works contracts where the country or territory of origin of supplies to the contractor is the Russian

Federation or the Republic of Belarus, or where the location of the business activities or interests of a contractor is the Russian Federation or the Republic of Belarus.

10 The Procurement Bill has already been introduced into this Parliament (Third Session). The Bill will not conflict with the provisions of the Procurement Bill.

Territorial extent and application

- 11 Clause 17(1) and (2) set out the territorial extent and application of provisions of the Bill. The provisions in this Bill extend to England and Wales, Scotland and Northern Ireland, subject to clause 17(2).
- 12 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Part 1: Main Provision

Clause 1: Disapproval of foreign state conduct prohibited

13 Clause 1 prohibits relevant public authorities from having regard to a territorial consideration in a way that indicates moral or political disapproval of a country or territory's foreign state conduct, when making decisions about procurement or investments. This clause is designed to catch both open participation in boycotts or divestment campaigns, and more subtle ways of singling out countries or territories that could produce similar results.

14 Clause 1(8) provides that the prohibition is subject to exceptions set out in clause 3.

15 Clause 1(3) defines "territorial consideration" as a consideration that relates specifically or mainly to a particular foreign territory.

16 Clause 1(4) defines "foreign state conduct" as meaning policies or conduct of foreign governments and public authorities, as well as

conduct openly encouraged or facilitated by them.

17 Clause 1(5) defines “foreign territory” to mean a country or territory outside the United Kingdom and clause 1(6) defines “foreign state authority” to mean the government of, or any other public authority in, a foreign territory.

18 Clause 1(7) sets out that, when making procurement or investment decisions, public authorities must not have regard to a third-party’s moral or political disapproval of a country or territory’s foreign state conduct if that third party is trying to persuade the decision maker to act. This applies even when the decision maker is not influenced by its own political or moral disapproval of foreign state conduct.

19 The ban in clause 1 is not intended to prohibit a higher education institution from deciding to terminate a collaboration with a foreign university on the grounds of academic freedom, if they deem it necessary in line with their statutory duties in Part A1 of the Higher Education and Research Act 2017 or other legislation.

Clause 2: Application to procurement and investment decisions

- 20 Clause 2(1) sets out that this Bill applies to procurement and investment decisions made by any public authority as defined in section 6 of the Human Rights Act 1998. Any ‘hybrid’ public authorities (private bodies which are public authorities by virtue of the fact they are performing a public function) will not be in scope of the Bill in relation to their private functions and acts.
- 21 Clause 2(5) provides that clause 2 is subject to exceptions set out in clause 3.
- 22 Clause 2(2) and clause 2(3) define “procurement decision” and “investment decision” respectively.
- 23 “Procurement decision” is a decision about a contract for the supply of goods, services or works to the decision maker. This does not include the sale of services by the decision maker. “Investment decision” is a decision about the acquisition, management, retention or disposal of an asset

held wholly or principally for investment purposes. This does not include an asset held as operational assets, such as an office utilised by the body for operational purposes.

Clause 3: Exceptions

24 Clause 3 makes a number of exceptions to the ban, set out in the Schedule.

25 Clause 3(2) provides the Secretary of State or Minister for the Cabinet Office with the power to amend the Schedule to add a description of decision or consideration, or amend or remove considerations added under previous regulations. Such regulations are to be made using the affirmative procedure.

26 Clause 3(3) sets out that regulations made under clause 3(2)(a) must not relate to the decisions of the following authorities: Ministers of the Crown, Scottish Ministers, Welsh Ministers, a Northern Ireland department, a district council in Northern Ireland, a scheme manager of a funded local government scheme, or an authority listed in Schedule 2 of the Local Government Act 1988. This

includes local authorities.

27 Clause 3(5) gives the Secretary of State or the Minister for the Cabinet Office the power to make regulations to disapply the provisions in this Bill in respect of a particular country or territory. Clause 3(6) provides that this means that clause 1 should be read as if the country or territory is not a “foreign territory”, and therefore should this power be exercised, this would allow a relevant public authority to conduct boycotts or divestment campaigns against a particular country or territory.

28 Regulations made under clause 3 are to be made using the draft affirmative procedure, unless accompanied by a statement that the person making the instrument believes it is urgent – in which case it can be done with the made affirmative procedure.

29 Clause 3(7) sets out that regulations made under subsection (5) and subsection (2) cannot be used to make exceptions to the ban that relate specifically, or mainly to, Israel, the Occupied Palestinian Territories, or the Occupied Golan

Heights.

Clause 4: Related Prohibition on Statements

30 Clause 4 prohibits public bodies who are subject to clause 1 from publishing a statement indicating that they intend to have regard to territorial considerations in a way that indicates moral or political disapproval of foreign state conduct, when making decisions about procurement or investments. This clause also prohibits such bodies from publishing statements indicating that they would participate in such activity if it were lawful to do so. . This stops public bodies from expressing support for themselves engaging in boycotts and divestment campaigns.

31 This clause does not apply to a statement by a Minister of the Crown in connection with a proposed exercise of the powers to add or amend exceptions in clause 3. This will allow a Minister of the Crown to justify their intention to use the power in clause 3(5) to disapply the ban in respect of a certain country or territory.

Part 2: Enforcement

Clause 5: Legal Proceedings

32 Clause 5 enables the ban to be enforced by the courts. This will apply to all public bodies to which this Bill applies.

33 In clause 5(1) and (2), the clause provides that the specific enforcement regime provided by the Bill in clauses 5 to 11 does not prevent the restrictions imposed by the Bill from being enforced in judicial review, provided that the decision or statement in question is otherwise subject to public law.

34 As not all decisions, statements or subject-matter of statements by public bodies are amenable to judicial review, clause 5(3) to (9) also provides for the restrictions to be enforced in such cases by application to the High Court (or the Court of Session in Scotland) in a manner analogous to judicial review.

35 Applications will only be accepted if the court considers that the applicant has sufficient interest in the subject matter of the application - for example, if they were affected by the decision in

question.

Clause 6: Enforcement authorities

36 Clause 6 establishes who the “enforcement authorities” are in respect of the Bill.

37 Subsection (2) sets out that the enforcement authority is the Secretary of State or the Treasury, unless otherwise stated in this clause.

38 There is no enforcement authority in relation to a decision made by a Minister of the Crown.

39 In relation to a decision made by a registered English higher education provider, the enforcement authority is the Office for Students.

40 This clause also gives the Secretary of State or the Minister for the Cabinet Office the power to change the enforcement authority in relation to a particular decision (including decisions of particular public bodies), via regulations. Such regulations are to be made using the affirmative procedure.

Clause 7: Information notices

41 This clause provides a power for enforcement

authorities to prepare and issue a written information notice, requesting information from a relevant public authority relating to a decision in respect of this Bill.

42 An enforcement authority can request, by information notice, any information likely to be useful to allow the enforcement authority to assess whether the person has contravened, or is likely to contravene, the provisions in this Bill. It may also issue an information notice if the enforcement authority is satisfied that a public body subject to this Bill has published, or is about to publish, a statement prohibited by clause 4. An information notice must state the time by which, and the form and manner in which the information must be provided.

43 The duty to comply with information notices is enforceable by judicial review or, if the recipient of the notice is not amenable to judicial review, enforceable by the High Court or Court of Session in Scotland.

44 Personal data may be required by an

information notice if the enforcement authority is satisfied that it is necessary for its investigation. Personal data is not required to be shared if its sharing would contravene data protection legislation.

Clause 8: Compliance Notices

45 Clause 8 provides powers for the issuing of compliance notices. Compliance notices may only be issued if the enforcement authority is satisfied a relevant public authority has contravened, or is likely to contravene, clauses 1 or 4.

46 Subsections (2) and (3) set out the information which must be contained within the compliance notice. The enforcement authority must include in the compliance notice that any failure to comply with the notice may lead to a monetary penalty under Clause 9.

47 Subsection (4) sets out that once an enforcement authority has decided to issue a compliance notice, it must communicate this decision to the public authority before issuing a compliance notice. This gives public authorities an

option to make representations in advance of the proposed notice being issued.

Clause 9: Monetary penalties: power

48 Clause 9 details the conditions that must be met before the enforcement authorities can issue a monetary penalty. An enforcement authority may issue a monetary penalty if they are satisfied that a public authority has breached clauses 1 or 4 and has been issued a compliance notice which they failed to comply with, where that breach would have been avoided if the public authority had complied with that notice.

49 Subsection (2) provides that a monetary penalty may also be imposed if a relevant public authority fails to comply with an information notice.

50 Subsection (3) sets out that the enforcement authority may issue a written notice of its intention to issue a penalty.

51 Subsection (4) outlines the information that must be included in the monetary penalty notice, such as the amount of the proposed penalty; the

reasons for imposing a penalty and the amount; and how the person can make representations.

52 Subsection (5) defines the period in which the person may make representations about the proposed penalty (28 days beginning with the day on which the notice is received).

53 Subsection (6) outlines the requirements that must be met for an enforcement authority to issue a monetary penalty.

54 Subsection (7) provides enforcement authorities with the power to impose a monetary penalty, which must be by written notice.

55 Subsection (8) outlines the information that will be included in the monetary penalty notice outlined in subsection (7). This includes a statement that the enforcement authority is satisfied that the person committed a relevant offence; the amount; when payment may be made; and how.

Clause 10: Monetary penalties: further provision

56 Subsection (1) states the Secretary of State must by regulations determine the maximum

penalty imposed by an enforcement authority.

57 Subsection (2) states the Secretary of State may make regulations in relation to matters to which the enforcement authority must, or must not, have regard in exercising monetary penalties under clause 9.

58 Subsection (3) makes provision for interest to be due on the penalty (or unpaid part) if it is not paid on time or in the required manner, and for both penalty and interest to be recoverable as a civil debt.

59 Subsection (4) explains that an enforcement authority other than the Secretary of State or the Treasury must pay any monetary penalties they receive to the Secretary of State.

Clause 11: Variation and revocation of enforcement notices

60 Clause 11 explains that enforcement notices may be varied or revoked by the enforcement authority.

Part 3: Local government pension schemes

Clause 12: Application of prohibitions

61 Clause 12 makes corresponding provisions to apply the restriction on procurement and investment decisions set out in clauses 1 and 4 to local government pension schemes, as defined in section 1 of the Public Service Pensions Act 2013, or section 1 of the Public Service Pensions Act (Northern Ireland) 2014. The exemptions and exclusions provided for in clause 3 are also applied to the restrictions for local government pension schemes by relying on the Schedule to this Bill.

Clause 13: Enforcement powers

62 Clause 13 amends the Pensions Act 2004 to provide the Pensions Regulator with the power to enforce the ban as set out in clauses 1 to 4 against local government pensions schemes. It also amends the Pensions (Northern Ireland) Order 2005 to provide the Pensions Regulator with the power to enforce the ban against local government pension schemes in Northern Ireland.

63 This means that the Pensions Regulator will be the enforcer for decisions to which this Bill applies

made by scheme managers of local government pension schemes. The Pensions Regulator will use existing enforcement powers in pensions legislation rather than the powers conferred by clauses 5 to 11 of this Bill.

Part 4: Supplemental and general provision

Clause 14: Relationship with procurement legislation

64 Clause 14(1) provides that the ban will apply to decisions to disregard suppliers that are not United Kingdom treaty state suppliers, as set out in section 19(3)(b) and section 20(5)(c) and (d) of the Procurement Act 2023.

65 Clause 14(2) sets out that powers conferred by the Procurement Act 2023 in relation to excludable suppliers are subject to clause 1 of this Act in a case where the exclusion ground relied on is “professional misconduct”.

66 Clause 14(3) sets out that the ban will apply to decisions of a Minister of the Crown to add or remove a supplier from the debarment list on the basis of professional misconduct – as set out in

paragraph 11 of Schedule 7 of the Procurement Act 2023. The debarment list is a list of suppliers where a Minister of the Crown has made a determination to exclude a supplier from public procurements.

67 Clause 14(4) also sets out that clause 1 of this Act will not prevent giving effect to the provisions of the Procurement Act 2023 about excluded and excludable suppliers, and clause 14(5) cross-references section 57 of that Act for the meaning of excluded and excludable supplier.

68 Clause 14(6) gives the Secretary of State the power to make regulations about the relationship of this Act with any of the legislation repealed, revoked or modified by the Procurement Act 2023 in the period before the coming into force of that Act, or the Procurement Reform (Scotland) Act 2014 or any regulations under that Act. Such regulations are to be made using the affirmative procedure.

Clause 15: Related changes to local government contracting restrictions

69 Clause 15 makes changes to section 17(5) of the Local Government Act 1988 and Article 19(4) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992.

70 Clause 15(1) and (2) repeal the restrictions on local authorities taking account of territory of origin in procurement, which the ban in section 1 of this Act replaces.

71 Clause 15(3) gives the Secretary of State power to make regulations to disapply section 17(5)(f) of the Local Government Act 1988 or Article 19(4)(f) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 for the purpose of securing that decision-making validated by regulations made under clause 3 is not unlawful under these provisions.

Clause 16: Regulations

72 Clause 16 sets out the procedure that applies where regulations are made under this legislation.

73 Regulations made under any clause of this Act, with the exception of clause 17, must be approved

by each House of Parliament. In cases of urgency, regulations made under clause 3 do not need to be laid before and approved by each House of Parliament before coming into force. The instrument must contain a statement that the person making the instrument is of the opinion that this is justifiable on the basis of urgency. If, however, such regulations are then not approved by each House of Parliament within 28 days, they cease to have effect.

74 Subsection (7) provides that the regulation making powers under this legislation (except clause 17), include the power to make consequential, incidental, supplementary, transitional, transitory or saving provision.

75 Subsection (8) provides that in the case of regulations made under clause 6(6), consequential, incidental or supplementary amendments can be made to any Act of Parliament, Act of the Scottish Parliament, Act or Measure of Senedd Cymru or Northern Ireland legislation. Subsection (8) may be needed where a body is given enforcement

authority functions, but there are provisions in other legislation about how the body exercises its functions that need to be applied or modified.

Clause 17: General provision

76 Subsection (1) explains that this Bill extends to England and Wales, Scotland and Northern Ireland. Subsection (2) clarifies that amendments to other enactments made under any provision of this Bill, except by clause 17 have the same extent as the provisions amended.

77 Subsection (3) to (6) explain when the provisions of this Bill will come into force. Subsection (3) commences the regulation making powers of the Bill on the day it is passed. Subsection (4) and (5) include the Secretary of State's power to commence regulations or make transitional or saving provision in connection with the commencement of provisions of the Act.

Schedules

Schedule: Excepted considerations

78 Part 1 of the Schedule lists excepted bodies

and functions. This means that clause 1 and clause 4 will not apply to a decision made by a body or a function of a body in this Schedule. The Schedule disapplies clause 1 from pension schemes but corresponding restrictions for local government pension schemes are made in clause 12 and enforcement provisions in clause 13.

79 Part 2 of the Schedule lists excepted considerations. This means that clause 1 will not apply to a decision made by a body or a function of a body on the basis of a consideration in this schedule. A consideration falls within this schedule if it relates to financial and practical matters, national security, international law, bribery, labour-related misconduct, competition law infringements, or environmental misconduct.

80 This Schedule ensures that public bodies are able to conduct due diligence in regard to modern slavery when making investment or procurement decisions, in alignment with the Modern Slavery Act 2015.

81 Clause 3(2) and (3) provides the Secretary of

State or Minister of the Cabinet Office with the power to add a description of consideration or decision to this Schedule or to remove or amend a description of consideration or decision previously added by regulations.

Financial implications of the Bill

82 There will be associated costs to the Government to deliver the enforcement regime for the Bill. The enforcement regime will ensure compliance with the legislation by providing a power for Ministers and regulators to investigate, issue compliance notices and impose monetary fines. It is expected that the presence of an enforcement regime will act as a strong deterrent and therefore enforcement action will be relatively rare and costs will be low. Based on similar enforcement regimes on those bodies in scope, it has been estimated that the cost of running an enforcement case which goes to a determination panel will be between £120,000 to £200,000. It is expected that the enforcement costs will be offset by the fines which will be returned to the

Exchequer. Further detail is available in the Impact Assessment that has been published.

Commencement

83 Clause 17(3) sets out that clauses 3, 6(6), 10(1) and (2), 14(6), 15(3) to (5), 16 and 17 come into force on the day on which the Bill is passed.

84 Clause 17(4) and (5) sets out that the remaining provisions in the Bill come into force on such day or days to be set by the Secretary of State in commencement regulations, and that the Secretary of State may make transitional or saving provision in connection with them. Clause 17(6) confirms that different days may be appointed under regulations in clause 17(4).

Parliamentary approval for financial costs or for charges imposed

85 A money resolution will be required to cover expenditure incurred in discharging the enforcement functions conferred by the Bill.

Compatibility with the European Convention on Human Rights

86 The Secretary of State in the Department for Levelling Up, Housing and Communities, Michael Gove MP, has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

87 As the Bill's provisions only apply to decisions and statements of public authorities under section 6 of the Human Rights Act 1998, which do not have Convention rights, the Bill is compatible with the Convention.

No statement under the Environment Act 2021

88 The Secretary of State in the Department for Levelling Up, Housing and Communities, Michael Gove MP, is of the view that the Bill as introduced into the House of Commons does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

Related documents

89 None.

Annex A - Territorial extent and application in the United Kingdom

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland ?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Main Provision							
Clause 1	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 2	Yes	Yes	No	Yes	No	Yes	No
Clause 3	Yes	Yes	No	Yes	No	Yes	No
Clause 4	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Enforcement							
Clause 5	Yes	Yes	No	Yes	No	Yes	No
Clause 6	Yes	Yes	No	Yes	No	Yes	No
Clause 7	Yes	Yes	No	Yes	No	Yes	No
Clause 8	Yes	Yes	No	Yes	No	Yes	No
Clause 9	Yes	Yes	No	Yes	No	Yes	No
Clause 10	Yes	Yes	No	Yes	No	Yes	No
Clause 11	Yes	Yes	No	Yes	No	Yes	No
Local government pension schemes							
Clause 12	Yes	Yes	No	Yes	No	Yes	No
Clause 13	Yes	Yes	No	Yes	No	Yes	No

Supplementary and general provision

Clause 14	Yes	Yes	No	Yes	No	Yes	No
Clause 15	Yes	Yes	No	Yes	No	Yes	No
Clause 16	Yes	Yes	No	Yes	No	Yes	No
Clause 17	Yes	Yes	No	Yes	No	Yes	No
Schedule	Yes	Yes	No	Yes	No	Yes	No

Subject matter and legislative competence of devolved legislatures

The core provisions of the Bill extend and apply across England and Wales, Scotland and Northern Ireland.

The Sewel Convention means that the UK Parliament “will not normally legislate with regard to devolved matters without the consent” of the devolved legislatures, and the UK Government will not normally support such legislation. However, the Bill’s provisions fall within the international relations / foreign policy reservation.

As addressed in the Devolution Guidance Notes, the UK Parliament will not normally alter the legislative or executive competence of the devolved legislatures or

administrations without seeking equivalent legislative consent (and similarly the UK Government will not normally support such legislation). As the Bill applies to the decision making of the Devolved Administrations, the Bill can be said to modify executive competence. This would trigger the Legislative Consent Mechanism. The Government will seek legislative consent motions from all three devolved legislatures to apply the Bill to the devolved administrations to the extent the Bill modifies executive competence of the devolved ministers.

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