



Consultation on the approach to implementation of the EU Remedies Directive

August 2008

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SCOTTISH GOVERNMENT CONSULTATION DOCUMENT ON THE APPROACH TO IMPLEMENTATION OF:

DIRECTIVE 2007/66/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 December 2007

amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

EXECUTIVE SUMMARY

This consultation document concerns the implementation of the new European Directive on Remedies in public procurement¹. This is the first of two consultations: this one focuses on the approach to implementation; a later consultation will seek feedback on the implementation itself including draft legislation.

The new Directive amends the previous two EU Directives on Remedies², which currently apply to the ‘classic’ public procurement sector and to the utilities sectors respectively. The main changes surround two key topics: the introduction of “ineffectiveness” as a remedy for illegal direct awards, and the operation of a harmonised standstill period between contract award decision and contract award, to allow the decision to be challenged.

This Directive has already been adopted at European level and cannot be substantively changed in the implementation process. However, some aspects are optional and the Scottish Government seeks stakeholder preferences on those options.

Respondents are urged to set out the rationale and evidence supporting their preferred options clearly. The Scottish Government will analyse the responses carefully and any decisions will take account of the evidence provided. Feedback is sought on all the topics highlighted in this document. However, the Scottish Government is particularly keen to receive stakeholder views on the subject of ineffectiveness and the practical issues surrounding it. Ineffectiveness is the most innovative provision and potentially the most challenging aspect of this transposition, so clear and reasoned feedback is essential.

Part 1 of this document sets out the background to the new Directive and proposed plans for its transposition into Scots law.

¹ http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm

² http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm

Part 2 of the document highlights the key issues for stakeholder consideration and feedback.

An initial Regulatory Impact Assessment and the text of the new Directive are attached at Annex A and B respectively.

Responding to the consultation

The Scottish Government welcomes input by **31 October 2008**. Comments can be submitted using the **online response form**. The online form includes a Respondent Information Form which should also be completed.

Alternatively, comments can be submitted by **e-mail** to:
procurementremedies@scotland.gsi.gov.uk

or by **post** to:

Jessie Laurie

Scottish Procurement Directorate
Scottish Government
1st Floor
Meridian Court
5 Cadogan Street
Glasgow
G2 6AT

If responding by post or e-mail, please quote the text box number to which your comments relate as this will aid our analysis of the responses received. To ensure that we treat your response appropriately, please also complete and return the Respondent Information Form at Annex C.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at www.scotland.gov.uk/Consultations/Current. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Government now has an email alert system for consultations (www.scotland.gov.uk/Consultations/seConsult). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult is designed to allow stakeholders to keep up to date with all Scottish Government consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would

therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, these will be made available to the public in the Scottish Government Library by 28 November 2008 and on the Scottish Government consultation web pages by 5 December 2008. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on our approach to implementation of the new Directive. We aim to issue a report on this consultation process by 23 January 2009.

We intend to implement the Directive by amending the existing Scottish Regulations. A second consultation exercise in 2009 will include a draft Scottish Statutory Instrument and will seek comments on the amending legislation.

Comments or complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

Jessie Laurie

Scottish Procurement Directorate
Scottish Government
1st Floor
Meridian Court
5 Cadogan Street
Glasgow
G2 6AT

or e-mail jessie.laurie@scotland.gsi.gov.uk.

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PART 1: BACKGROUND AND TRANSPOSITION PLANS

Purpose

1. This consultation document invites views from stakeholders on the Scottish Government's approach to transposition of Directive 2007/66/EC³ (the 'new Directive') of the European Parliament and of the Council, amending Council Directives 89/665/EEC⁴ and 92/13/EEC⁵ with regard to improving the effectiveness of review procedures concerning the award of public contracts.

Background

2. The new Directive was adopted by the EU Council of Ministers and the European Parliament on 11 December 2007. It was published in the Official Journal of the European Union (OJEU) on 20 December 2007 and must be implemented by EU Member States within two years of that date. The text of the new Directive is attached at Annex B.
3. The new Directive was adopted following a successful proposal by the European Commission to amend the existing Remedies Directives: Directive 89/665/EEC (for the public sector) and Directive 92/12/EEC (for the utilities sector).
4. It makes a number of amendments to the existing Remedies Directives. These provisions are intended to improve the effectiveness of review procedures concerning the award of public contracts, in particular to:
 - i) Harmonise the standstill arrangements following contract award; and
 - ii) Introduce ineffectiveness as a remedy for illegal direct awards.
5. The standstill period was implemented in Scotland in the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006 (the 'Scottish Regulations'). The standstill provisions in the new Directive are therefore relatively simple to implement, although we would welcome stakeholders' views on the points described below.
6. The introduction of "ineffectiveness" as a remedy for illegal direct awards is a more complex matter. The approach to implementation will depend, to a significant extent, upon the feedback and evidence provided by stakeholders.

³ The new Directive – <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0066:EN:NOT>

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0665:EN:NOT>

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0013:EN:NOT>

Scope

7. The Scottish Government has responsibility for the transposition of EU Directives on Public Procurement into Scots law, so this consultation exercise is primarily aimed at consultees in Scotland. The Office for Government Commerce (OGC) has responsibility for coordinating the transposition of these Directives into UK law and leads transposition for England, Wales and Northern Ireland. OGC is conducting a parallel consultation exercise:
www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_european_procurement_directives.asp.

Approach

8. Implementation of Directive 2007/66/EC is mandatory. However, there is some flexibility and some optional elements in the new Directive, therefore the outcomes can be influenced to some extent by stakeholders' views. The Scottish Government aims to capture stakeholder views while managing the transposition, using the following methodology.
9. Stakeholders will be consulted on two separate occasions. The first, commenced by this document, will introduce the approach to implementation and seek appropriate feedback. Specifically, this first consultation aims to:
 - i) Highlight the main new provisions.
 - ii) Seek feedback on the optional elements of the new Directive, to gauge preferences and inform decisions on the preferred options.

A second consultation will take place in 2009. It will include a draft Scottish Statutory Instrument (SSI), taking account of the results of the first consultation, and feedback will be sought on the proposed draft. The results of both consultation exercises will be published on the Scottish Government's website. Following the second consultation, the draft SSI will be finalised, made and laid before the Scottish Parliament in advance of the implementation deadline of 20 December 2009.

10. The Scottish Government plans to manage the transposition by amending the existing Scottish Regulations, rather than creating entirely new ones. Consultees are invited to express if alternative approaches would be preferred. We are consulting both the 'classic' public sector and the utilities sector simultaneously through a coordinated consultation process as the issues being addressed are broadly similar. Where there are sectoral differences, these will be made explicit.

References

11. In this consultation document we use the term 'the new Directive' to refer to Directive 2007/66/EC, and we use 'the Classic Remedies Directive' and 'the Utilities Remedies Directive' to refer to Directives 89/665/EC and 92/13/EEC respectively.

12. The new Directive simply amends the existing Classic and Utilities Remedies Directives, usually by substituting new articles for existing ones, or by inserting additional articles. For convenience, this consultation document will usually identify new provisions by reference to the number of the relevant article in the Classic or Utilities Remedies Directive as substituted, inserted or amended by the new Directive. Unless otherwise stated, it can be assumed that any article reference given in this document is the same in both the Classic and Utilities Remedies Directives. When looking at the new Directive (set out at Annex B to this document), you can navigate your way around it and find the relevant new provisions by bearing in mind that:
- i) Article 1 of the new Directive contains all the changes to the Classic Remedies Directive; and
 - ii) Article 2 of the new Directive contains all the changes to the Utilities Remedies Directive.
13. For convenience, we use the term 'Scottish Regulations' in this consultation document to mean the Regulations that currently implement the existing Remedies Directives in Scotland i.e. the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006.

Consultation period

14. Consultation is an essential and important aspect of Scottish Government working methods. In accordance with the Scottish Government's guidance on consultation and public engagement, this consultation will run for a period of 12 weeks.

PART 2: CONSULTATION ISSUES

Introduction

15. This part of the document introduces specific topics and information relating to the new remedies provisions on which the Scottish Government is inviting feedback. This feedback is important, as it will help to shape the approach to implementation. The topics include:
- i) How some of the new provisions will work in practice; and
 - ii) The preferred choice of stakeholders where there are optional elements in the new Directive.
16. Stakeholders are reminded that implementation of Directive 2007/66/EC is mandatory. However, we welcome feedback that will help to shape the approach on specific issues where there is scope to influence transposition, as detailed below.
17. From here on, this consultation document introduces each of the discussion topics in turn, by stating the article being addressed and describing the key issues to be considered. The yellow text boxes (shaded, if printed in black and white) contain our specific requests for stakeholder feedback, and clarify mandatory provisions where appropriate.

Article 1: Scope and Applicability of Review Procedures

18. The amendments to Article 1 include these optional elements for Member States.
- i) Article 1(5): Member States may require applicants to seek review with the contracting authority first. This is a new feature and would mean that, once such a review was sought, the award of the contract would be suspended until 10 or 15 days (depending on the means of communication used) after the contracting authority's reply, to preserve the applicant's opportunity to bring court proceedings if it remained dissatisfied with the outcome of the review. Were this provision to be implemented, then a further decision will be required on the appropriate means of communication (e-mail, fax, letter etc).

Box 1: Review Procedures

The Scottish Government seeks views on whether to implement the above provision, including any perceived arguments for or against implementation.

Box 2: Review Procedures – Means of Communications

The Scottish Government anticipates that electronic means may be preferable to most stakeholders, but we seek confirmation of this and any related views.

- ii) Article 1(4): Member States may require that persons wishing to use review procedures notify the authority of the alleged infringement and their intention to seek review. This is not new, and the Scottish Regulations already impose such a requirement. However, the context and significance of this requirement may be different if a decision is taken to implement option i) above. The Scottish Government therefore seeks the views of stakeholders on whether, and if so how, such a decision should affect the retention or reformulation of the existing requirement in the Scottish Regulations to notify the authority.

Box 3: Review Procedures - Notification

The Scottish Government invites feedback on the relevance of article 1(4) if the option conferred by article 1(5) is exercised.

Article 2: Requirements for Review Procedures

19. The new provisions in article 2 are broadly similar to the current position, including the availability of: interim remedies; setting aside unlawful decisions; awards of damages; and the option for review bodies to decide not to grant interim measures where negative consequences outweigh benefits.
20. The substantive new provision, at article 2(3), is that no contract award can be made before the court⁶ has made a decision either on the outcome of the review itself or on interim measures, or before the end of the standstill period (see below).

Box 4: Review Procedures - Suspension of Procurement

The above is mandatory for transposition and the Scottish Government draws stakeholders' attention to it for information only. Feedback is not necessary.

Article 2a: Standstill Period

21. The provisions in the new Directive are similar to existing provisions in the Scottish Regulations on the standstill period. The main issues arising from the new Directive are:
- i) The Scottish Regulations need amending to allow for longer periods (15 days) where non-electronic means are used, although the current Regulations⁷ do already require the most rapid means of communication practicable to be used.

⁶ The term used in the Directive is 'review body', but this document refers to 'the court' throughout, to reflect the fact that this role is given to the Sheriff Court and the Court of Session in Scotland.

⁷ Regulation 32(1) - The Public Contracts (Scotland) Regulations 2006; Regulation 33(1) - The Utilities Contracts (Scotland) Regulations 2006

Box 5: Standstill - Means of Communication

The Scottish Government anticipates that it will be rare that fax or electronic communication will not be practicable where the bidders are serious contenders for an 'over the threshold' contract, so for practical purposes the shorter period is expected as the norm. We are seeking stakeholder confirmation of this view.

- ii) The Directive states that the timescales (10 days electronic, 15 days for other means) are minima.

Box 6: Standstill - Minimum timescales

The Scottish Government invites comments on whether these minima are satisfactory, or alternatively whether a longer minimum period is preferable.

- iii) The amendments also include a new requirement for contracting authorities to provide each candidate with a precise statement of the exact standstill period.

Box 7: Standstill - Precise Statement

The above is mandatory for transposition and the Scottish Government draws stakeholders' attention to it for information only. Feedback is not necessary.

Article 2b: Derogations from the Standstill Period

22. The following are optional derogations from the standstill period:

- i) Where an OJEU contract notice is not required (e.g. Part B Services).
- ii) Where there is only one tenderer – no other candidates are concerned.

Box 8: Standstill Derogations

The Scottish Government seeks feedback from stakeholders as to the extent to which i) and ii) above should be implemented.

- iii) Under Dynamic Purchasing Systems (DPS) and framework agreements⁸, where call-off contracts are awarded, the following rules would apply:
- Above threshold call-offs: the standstill can be waived. However, if authorities choose to waive the standstill period, then the trade-off is that ineffectiveness will apply where there has been a breach of the existing mini-competition rules (see paragraphs 25-26 below).

⁸ Please note that the optional derogation from standstill in respect of framework agreements is only for the Classic Remedies Directive and not the Utilities Remedies Directive.

- Below threshold call-offs: the standstill can be waived without ineffectiveness being made available.

Box 9: Standstill Derogations - DPS/Frameworks

The points above on derogations relating to DPS and frameworks are optional, though the Scottish Government anticipates that stakeholders will prefer the derogations to be transposed. We therefore highlight these issues primarily for information, though specific feedback is also welcome.

Article 2c: Time limits for Applying for Review

23. Article 2c imposes minimum time limits within which proceedings must be brought. These are 15 days from the day after the contracting authority's decision (with a summary of its reasons) is sent, or 10 days if it is sent by fax or electronic means.
24. Member States may establish longer limits. The Scottish Regulations currently require the review to be brought 'promptly' and in any event within 3 months unless the court considers that there is good reason for extending the period. This is similar to the time limit that applies to Judicial Review proceedings in England and Wales. The meaning of 'promptly' varies with the circumstances of the case. A minimalist approach to article 2c would be simply to amend the Regulations to make it clear that 'promptly' can never mean less than 10/15 days (according to which method of communication is used).

Box 10: Time Limits for Applying for Review

The Scottish Government seeks feedback on the appropriate length of time limits and, related to this, on whether further clarification or amendment on the subject of 'prompt review' is required.

Article 2d: Ineffectiveness

Introduction

25. The principle of ineffectiveness has been introduced to act as both a deterrent to, and a remedy for, illegal direct awards, which are perceived by the Commission to be the most serious breach of the procurement rules. The implementation issues around ineffectiveness are more complex than those surrounding the standstill period, however, because ineffectiveness is a new concept in the procurement context and therefore requires significant consideration about how it will work in practice. Recitals 13 to 26 of the new Directive provide the rationale and the intention of ineffectiveness, and should provide the relevant context for stakeholders.

26. To summarise, under the new Directive, contracts must be considered ineffective in any of the following cases:
- i) There is failure to publish a contract notice in the OJEU where this is required by the relevant Public Procurement Directive;
 - ii) There is failure to comply with the rules on review procedures i.e:
 - The suspension of the contract awarding process required by article 1(5) when a review is sought with the contracting authority (if such a requirement is imposed – see paragraph 18 above);
 - The requirement that the contract cannot be concluded before a court has made its decision on interim measures or on review – see paragraph 20 above; or
 - The standstill requirement – see paragraph 21 above.

But only where:

- The infringement has deprived the tenderer of the opportunity to pursue pre-contractual remedies;
 - Such an infringement is combined with a breach of the relevant Procurement Directive, where that breach has affected the chances of the tenderer obtaining the contract.
- iii) For contracts based on a DPS or framework agreement, ineffectiveness will apply where:
- The contracting authority has chosen not to observe the standstill period (assuming that the derogation as outlined in paragraph 22 above is exercised); and
 - There is an infringement of the rules on mini-competitions as laid down in the Procurement Directives for above threshold call-offs (below-thresholds call-offs are exempt from ineffectiveness).

Issues for consideration

27. The main consultation issues on article 2d are:
- i) The choice between retrospective and prospective cancellation; and
 - ii) Whether the court should have the ability not to apply ineffectiveness where there are good reasons to maintain the contract.

Each of these topics is introduced separately below.

Retrospective vs Prospective Cancellation

28. Recital 21 and article 2d(2) provide that national law must determine the consequences resulting from a contract being considered ineffective. They go on to introduce two possibilities: retrospective cancellation of all contractual obligations

(sometimes, as in the recital, called *ex tunc*); or prospective cancellation, meaning cancellation of only those obligations that have yet to be performed (*ex nunc*). The option for national law is which method to choose.

29. Whilst stakeholder feedback will be essential in determining the final policy stance on these options, the Scottish Government is mindful that the existing common law recognises retrospective and prospective cancellation of contractual obligations.
30. Retrospective cancellation would seek to 'undo' what had already been done under the contract prior to the declaration of ineffectiveness. Scots common law already has effect that subsisting and apparently valid contracts may in certain circumstances be annulled by the courts – these are voidable contracts. The effect of a voidable contract being annulled by the courts is that the contract is rendered retrospectively void. Voidable contracts are distinct from void contracts, which are null from the outset, for example *ultra vires* contracts entered into by public authorities.
31. Prospective cancellation, by contrast, would release the parties from any obligations under the contract after it had been declared ineffective, but would not seek to 'undo' what had already been done prior to the declaration of ineffectiveness. It should be pointed out that, if prospective cancellation is the option provided for in the Scottish Regulations, this would need to be coupled with additional penalties (as discussed in paragraphs 37-41 below). Scots common law already has effect that subsisting and valid contracts can be “frustrated” by certain supervening events. The effect of frustration is that the parties are released from future performance of their obligations. But frustration does not invalidate the contract i.e. the contract is not rendered retrospectively void.
32. The effect of retrospective or prospective cancellation of contractual obligations will often be that one party is enriched at the expense of the other party. The law of unjustified enrichment at Scots common law already allows a party suffering loss in such circumstances to seek a remedy against the enriched party for recompense.

Box 11: Ineffectiveness - Retrospective or Prospective Cancellation

The Scottish Government seeks views on whether implementing regulations should provide for retrospective cancellation or prospective cancellation of contractual obligations. In particular, views are sought on whether existing common law principles are sufficient to address potential unfairness that might arise when contractual obligations are cancelled by the courts.

Ability for Courts Not to Apply Ineffectiveness (Article 2d(3))

33. There is an option for national law to allow the court to decide not to render a contract ineffective, if the court finds that there are good reasons for the effects of the contract to be maintained. What constitutes a good reason is addressed in the new Directive in recitals 22-25 and the amended article 2d(3). Some of the key principles can be summarised as:

- i) The circumstances should be exceptional, requiring certain overriding reasons relating to a general interest to be respected;
- ii) In such cases, alternative penalties should be applied instead;
- iii) The court should examine all relevant aspects in making its decision;
- iv) Economic interests may only be considered as overriding reasons if ineffectiveness would lead to disproportionate consequences;
- v) Economic interests directly linked to the contract concerned shall not constitute overriding reasons, for example: costs of a new procurement procedure; costs of changing to a new supplier; costs of legal obligations resulting from ineffectiveness.

Box 12: Ability for Courts Not to Apply Ineffectiveness

The Scottish Government expects to implement this option, as it will allow the court flexibility in the application of this provision. Feedback is welcome either to confirm the Scottish Government's view or to flag up any substantial reasons not to implement it.

Ineffectiveness – Exemptions (Article 2d(4))

34. The following provides an exemption from ineffectiveness where a contracting authority considers that the publication of a contract notice in the OJEU is unnecessary, e.g. Part B services:
- i) Publication of a contract notice in OJEU is not required by the relevant Procurement Directive;
 - ii) The contracting authority has published a voluntary ex ante transparency notice in the OJEU, expressing its intention to conclude the contract; and
 - iii) At least 10 days has elapsed from the publication of that notice before the contract is awarded.

Box 13: Ineffectiveness Exemptions - Advertising Obligations

The above is mandatory for transposition and the Scottish Government draws stakeholders' attention to it for information only. Feedback is not necessary.

35. The Scottish Government also draws stakeholders' attention to the exemption from ineffectiveness, if the related standstill derogation (article 2b(c)) is exercised⁹, where call-off contracts have been awarded under DPS or framework agreements. This exemption only applies to the public sector, not the utilities sector. Ineffectiveness will not apply where:

⁹ If it is not exercised, then ineffectiveness will not be required and no need to rely on this specific exemption will arise.

- i) The contracting authority has sent a contract award decision, with a summary of reasons for that decision, to the tenderers concerned; and
 - ii) At least 10 days (electronic)/15 days (other means) has elapsed from the date the decision is sent to tenderers;
 - iii) There has been compliance with the detailed rules on mini-competitions.
36. Stakeholders are reminded about the resulting trade-off between standstill and ineffectiveness for contracts awarded through framework agreements and DPS, which is first described in paragraph 22. Contracting authorities have a choice: either apply the standstill period to the call-off contract, in which case ineffectiveness will not apply; or alternatively, do not apply the standstill period, in which case the ineffectiveness rules will apply where there has been a breach of the mini-competition rules. As previously stated, this choice only applies in the public sector, not the utilities sector.

Box 14: Ineffectiveness Exemptions - Frameworks and DPS

The Scottish Government describes the above provisions for purposes of clarity; specific comments are not sought.

Article 2e: Infringements of this Directive and Alternative or Additional Penalties

37. Article 2e requires the remedies of fines and shortening the duration of the contract to be available in certain circumstances: sometimes instead of a declaration of ineffectiveness, and sometimes as an additional remedy (if the ineffectiveness is only to be 'prospective' – see paragraph 31 above).
38. There are two different situations in which alternative/additional penalties issues arise under the new Directive:
- i) For breaches of the requirement to:
 - Suspend procurement following application for review [article 1(5)];
 - Suspend procurement before the court has made a decision [article 2(3)];
 - Apply the standstill period [article 2a(2)]where the mandatory ineffectiveness criteria in article 2d(1)(b) cases do not apply (see paragraph 41 below); and
 - ii) As an addition to prospective ineffectiveness (article 2d(2) cases). In other words, if the outcome of this consultation is that prospective but not retrospective ineffectiveness is implemented, then the court would also impose alternative penalties.
39. The new Directive (Article 2e(2)) leaves no choice about what the alternative/additional penalties must be. Article 2e(2) provides that the award of

damages does not constitute an alternative/additional penalty. The only possibilities are:

- i) The imposition of fines on the contracting authority; or
- ii) The shortening of the duration of the contract.

40. The new Directive requires that the penalties be 'effective, proportionate and dissuasive'. One approach would be to specify these factors in the Regulations and leave the court to apply them in each case when exercising judgment about:

- i) Which penalty to apply (or whether to apply both);
- ii) The appropriate size of any fine and, where relevant, the length of time by which a contract should be shortened.

Box 15: Alternative Penalties to be Effective, Proportionate and Dissuasive
The Scottish Government seeks comments on how best to achieve this, and how much discretion the court should have.

41. The Scottish Government also has the option under article 2e, to decide whether, in situations of a kind identified in 2e, ineffectiveness or only alternative remedies should apply, or whether the court should be free to choose between ineffectiveness and alternative penalties at its discretion. These situations may be summarised as follows:

Where there has been an infringement of either:

- i) The suspension of the contract awarding process required by article 1(5) when a review is sought with the contracting authority (if such a requirement is imposed – see paragraph 18 above);
- ii) The requirement that the contract cannot be concluded before the court has made its decision on interim measures or on review – see paragraph 20 above;
- iii) The standstill requirement – see paragraph 21 above.

But only where these infringements are not covered by the ineffectiveness rules at article 2d(1)(b) (i.e. because the claimant cannot show that):

- i) He has been deprived of the chance to pursue pre-contractual remedies;
- ii) The infringement is combined with a breach of the relevant Procurement Directive¹⁰, where that breach has affected his chances of obtaining the contract.

¹⁰ Whichever of Directive 2004/18 or 2004/17 is applicable

Box 16: Ineffectiveness or Alternative Penalties: should the court have discretion

The Scottish Government seeks comments on whether the courts should be able to choose between ineffectiveness and alternative penalties, in cases identified in article 2e (i.e. where there has been a relevant remedy-oriented procedural breach but not a breach of the relevant Procurement Directive).

Article 2f: Time Limits

42. This article covers provisions for the time limits for seeking a review in Court. Paragraph 1 allows Member States to require that any application for such a review must be made within certain time limits, where ineffectiveness is sought in the circumstances covered by article 2d(1) (see paragraph 26 above). In such cases, Member States may require the application to be brought:
- i) Within a certain time period (which must not be less than 30 days) from the day after the date on which either:
 - The contract award notice is published, for contracts that are justified as not needing prior publication in the OJEU; or
 - The authority informs the candidates of the conclusion of the contract with the reasons required by the existing procurement rules.
 - ii) And in any event, within a period of at least 6 months from the day after that on which the contract was awarded.

Box 17: Ineffectiveness - Time Limits

The Scottish Government assumes that limits of the kind described above at i) and ii) should be imposed (but welcomes comments on this), in which case we also seek comments on whether they should be the minimum periods of 30 days and 6 months respectively allowed by the Directive, or longer periods (and if so, what those longer periods should be).

43. Article 2f(2) provides that in all other cases, including claims under 2e(1) for discretionary ineffectiveness (see paragraph 41 above), Member States are free to set any time limit, subject only to article 2c (i.e. not less than 10/15 days). The same issue was covered earlier in this document at paragraph 24, so feedback is welcome as indicated by the text box there.

Other Articles

44. The following articles are listed for completeness. They may be of less interest to stakeholders, so they have not been discussed in this document. These matters are largely irrelevant to the implementation exercise, so feedback on them is not sought:

Amendments to the Classic Remedies Directive 89/665/EEC:

- Article 3: Corrective Mechanism
- Article 3a: Content of a notice for voluntary ex ante transparency
- Article 3b: Committee Procedure
- Article 4: Implementation
- Article 4a: Review

Amendments to the Utilities Remedies Directive 92/13/EEC:

- Article 3: Corrective Mechanism
- Article 3a: Content of a notice for voluntary ex ante transparency
- Article 3b: Committee Procedure
- Article 8: Corrective Mechanism
- Article 12: Implementation
- Article 12a: Review
- Recitals 29 and 30 also abolish the voluntary attestation and conciliation system due to lack of usage.

Additional question: review procedures

45. Directives 89/665/EEC and 92/13/EEC require Member States to ensure that decisions taken by contracting authorities may be reviewed effectively. In Scotland, suppliers may access both formal and informal review procedures:
- i) The Scottish Regulations allow suppliers to bring proceedings in the Sheriff Court or the Court of Session against contracting authorities which have infringed their obligations to comply with the Regulations, or any other enforceable Community obligation which may be relevant to awarding a contract. Very few cases are brought to court.
 - ii) In addition, the Scottish Government has introduced a Single Point of Enquiry (www.scotland.gov.uk/Topics/Government/Procurement/Selling/supplier-enquiries) where suppliers can seek advice on public procurement legislation and raise issues and concerns about public procurement practices in Scotland. In its current format, the Single Point of Enquiry is not a point of appeal on procurement decisions and its recommendations do not have legal effect. The Single Point of Enquiry has handled approximately 12 cases since its introduction in January 2008.
46. Consultees are invited to note the recent Court of Session decision in *Lightways (Contractors) Ltd v North Ayrshire Council*¹¹. That case involved interim proceedings for the suspension of a contract award decision. Despite the pursuer satisfying the court that they had an arguable case on three out of four grounds of challenge, the court held that the balance of convenience was not with the pursuer and as such no order for suspension of the contract award decision was made.

¹¹ 20 June 2008, 2008 S.L.T. 690

Box 18: Review Procedures

The Scottish Government seeks comments on the effectiveness of the review procedures currently available to suppliers. In particular, we would welcome feedback on potential barriers to use of the above procedures and any ways in which the formal and/or informal review procedures could be improved.

Impact Assessment

47. An initial Regulatory Impact Assessments (RIA) is attached at Annex A. Our initial view is that the new Directive will not have a significant impact on costs to businesses, the third sector or to the public sector. However, we would welcome comments on the initial RIA attached to this document on which comments are welcome.

Box 19: Regulatory Impact Assessment

The Scottish Government seeks comments on the initial RIA at Annex A.

Conclusion

48. Directive 2007/66/EC covers a number of amendments to the existing Remedies Directives. These provisions are intended to improve the effectiveness of review procedures concerning the award of public contracts, in particular to harmonise the standstill arrangements following contract award and to introduce ineffectiveness as a remedy for illegal direct awards.
49. This consultation document aims to provide a breakdown of the main implications and the optional elements of the new Directive, and seeks stakeholder feedback on those options.
50. The Scottish Government acknowledges that many of the issues described in this document are not straightforward. However, we urge stakeholders to give careful consideration to these matters and provide feedback where requested, as that will ensure a more effective and relevant transposition.
51. We would like to thank you for your interest and look forward to receiving your feedback.

Scottish Procurement Directorate
Procurement Policy and Development
August 2008

CONSULTATION ON THE APPROACH TO IMPLEMENTATION OF THE EU REMEDIES DIRECTIVE

INITIAL REGULATORY IMPACT ASSESSMENT

1. Title of proposal

Transposition of EU Directive 2007/66/EC¹ (The Remedies Directive) in Scots law.

2. Purpose and intended effect

Objectives

The Remedies Directive introduces changes to the legal remedies available to suppliers for breaches of EU procurement law. The Directive addresses two main problems: the difficulty of challenging a direct award on the basis that there has been no prior advertising and no competition; and the difficulty of ensuring that a contract award decision can be set aside before the contract comes into effect.

The Directive provides that contracts which should have been advertised in the Official Journal of the European Union but which are instead awarded directly should be deemed ineffective. It also provides for a harmonised standstill period between the contract award decision and the conclusion of the contract, to allow for challenges to the contract award decision. In addition, where a contract award decision is challenged in court, the contracting authority cannot conclude the contract before the court has taken a decision on the application.

The Remedies Directive seeks to improve the rules governing the remedies available to aggrieved bidders, to make the procurement process more transparent, to further deter contracting authorities from awarding contracts in breach of EU procurement law and to satisfactorily address situations where such awards are made.

EU Member States must implement the Remedies Directive in national legislation by 20 December 2009.

Background

Member States have a responsibility to ensure that effective and rapid remedies are available against decisions taken by public sector contracting authorities. The European Commission has examined the review mechanisms in place in Member States and has identified a number of weaknesses. The purpose of the Remedies Directive is to improve the effectiveness of Member States' procedures for reviewing the award of public contracts.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0066:EN:NOT>

At present, the Scottish Regulations² allow suppliers to bring proceedings in the Sheriff Court or the Court of Session against contracting authorities which have infringed their obligations to comply with the Regulations, or any other enforceable Community obligation which may be relevant to awarding a public contract.

Under the Scottish Regulations, the Sheriff Court or the Court of Session may: make an interim order suspending the procedure leading to the award of the contract; order the contracting authority to amend any document forming part of the procurement process or to set aside any decision, including its decision to award a contract; award damages.

It will be necessary to amend the Scottish Regulations to implement the provisions in the Remedies Directive.

Rationale for Government intervention

Government intervention is necessary to transpose the Directive by the European Commission's deadline of 20 December 2009.

3. Consultation

Within government

The following government agencies and departments have been consulted in the preparation of this initial RIA:

Constitution, Law and Courts Directorate, Scottish Government
Office of Government Commerce
Scottish Government Legal Directorate

Public consultation

Public consultation will be in two parts:

- A consultation on implementation of the Remedies Directive in Scotland and this initial RIA will take place from August to November 2008. Where authorised to do so, we will publish the responses to the consultation; we will also publish a summary of the responses.
- We will publish draft amendments to the Scottish Regulations and a revised RIA for consultation in Spring 2009.

4. Options

Option 1 – do nothing

Non-implementation of the Directive would trigger infraction proceedings and the UK could be liable for substantial penalties. The Scottish Ministers are obliged by the terms of the Scotland Act to fulfil their obligations under EU law. We therefore intend

² Regulation 47, The Public Contracts (Scotland) Regulations 2006; Regulation 45, The Utilities Contracts (Scotland) Regulations 2006.

to implement the Directive in line with our EC Treaty obligations and the Scotland Act.

Option 2 – implement the Directive into national law

It will be necessary to amend the Scottish Regulations to implement the provisions in the Directive relating to review procedures, the standstill period, ineffectiveness and other sanctions.

The options for implementation are constrained by the requirements of the Directive, which has already been adopted at the European level. The majority of the provisions in the Directive are mandatory. However, Member States have a choice as to how certain provisions in the Directive are implemented. For example, in relation to ineffectiveness, Member States may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. The first stage of the public consultation highlights all new provisions in the Directive, as well as explaining those provisions which have not changed. In particular, the consultation seeks feedback on implementation of the optional elements in the Directive.

The preferred options for implementation will emerge from analysis of the consultation responses.

5. Costs and benefits

Sectors and groups affected

The following are likely to be affected by changes to the legal remedies available to suppliers for breaches of EU procurement law: public sector procurement organisations must ensure that they comply with the rules governing remedies; suppliers and service providers will have greater opportunity to challenge in court the procedures adopted by public sector procurement organisations and the decisions they make. We anticipate that there may be an increase in the number of legal challenges in the Sheriff Court and Court of Session.

Benefits

Implementation of the Directive in Scotland will ensure that effective legal remedies are available to suppliers and service providers for breaches of EU procurement law. It will further deter contracting authorities from awarding contracts in breach of EU procurement law. Greater compliance with EU procurement law will result in savings to the public purse.

Costs

In our view, the implementation of the Directive will not make a significant impact on costs to business, the third sector or the public sector. We would welcome feedback on the potential costs to these groups, which will, of course, depend on the preferred options for implementation. We will undertake a more detailed cost analysis once the preferred options have been identified.

6. Small/Micro Firms Impact Test

It is not anticipated that implementation of the Directive will have any impact on small or micro businesses. However, we would welcome feedback on possible impacts.

7. Legal Aid Impact Test

The majority of those seeking remedies for breach of EU procurement law will be doing so on behalf of businesses, in which case legal aid will not be available. There will therefore not be a significant impact on the legal aid fund.

8. “Test Run” of business forms

Implementation of the Directive will not introduce any statutory business forms.

9. Competition assessment

EU procurement legislation is intended to facilitate greater competition by opening up markets. The Remedies Directive binds only the public sector but beneficial effects are shared with private sector suppliers and service providers.

10. Enforcement, sanctions and monitoring

The European Commission will review Member States' implementation of the Remedies Directive and report to the European Parliament and the Council of Europe before 20 December 2012.

11. Declaration and publication

Consultation

This initial RIA and the proposals contained in the accompanying consultation paper are now produced for comment. It has been distributed to a range of key stakeholders with an interest in public procurement.

It is also available on the Scottish Government website consultation page.

Contact

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DIRECTIVES

DIRECTIVE 2007/66/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 11 December 2007****amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts****(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

(1) Council Directives 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts ⁽⁴⁾ and 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of

entities operating in the water, energy, transport and telecommunications sectors ⁽⁵⁾ concern the review procedures with regard to contracts awarded by contracting authorities as referred to in Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ⁽⁶⁾ and contracting entities as referred to in Article 2 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ⁽⁷⁾. Directives 89/665/EEC and 92/13/EEC are intended to ensure the effective application of Directives 2004/18/EC and 2004/17/EC.

(2) Directives 89/665/EEC and 92/13/EEC therefore apply only to contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC as interpreted by the Court of Justice of the European Communities, whatever competitive procedure or means of calling for competition is used, including design contests, qualification systems and dynamic purchasing systems. According to the case law of the Court of Justice, the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of Directives 2004/18/EC and 2004/17/EC.

(3) Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms

⁽¹⁾ OJ C 93, 27.4.2007, p. 16.

⁽²⁾ OJ C 146, 30.6.2007, p. 69.

⁽³⁾ Opinion of the European Parliament of 21 June 2007 (not yet published in the Official Journal) and Council Decision of 15 November 2007.

⁽⁴⁾ OJ L 395, 30.12.1989, p. 33. Directive as amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).

⁽⁵⁾ OJ L 76, 23.3.1992, p. 14. Directive as last amended by Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).

⁽⁶⁾ OJ L 134, 30.4.2004, p. 114. Directive as last amended by Directive 2006/97/EC.

⁽⁷⁾ OJ L 134, 30.4.2004, p. 1. Directive as last amended by Directive 2006/97/EC.

established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

- (4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.
- (5) The duration of the minimum standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used. This Directive only provides for minimum standstill periods. Member States are free to introduce or to maintain periods which exceed those minimum periods. Member States are also free to decide which period should apply, if different means of communication are used cumulatively.
- (6) The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. When the award decision is notified to them, the tenderers concerned should be given the relevant information which is essential for them to seek effective review. The same applies accordingly to candidates to the extent that the contracting authority or contracting entity has not made available in due time information about the rejection of their application.
- (7) Such relevant information includes, in particular, a summary of the relevant reasons as set out in Article 41 of Directive 2004/18/EC and Article 49 of Directive

2004/17/EC. As the duration of the standstill period varies from one Member State to another, it is also important that the tenderers and candidates concerned should be informed of the effective period available to them to bring review proceedings.

- (8) This type of minimum standstill period is not intended to apply if Directive 2004/18/EC or Directive 2004/17/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*, in particular in cases of extreme urgency as provided for in Article 31(1)(c) of Directive 2004/18/EC or Article 40(3)(d) of Directive 2004/17/EC. In those cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. In this case there is no other person remaining in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow for effective review.
- (9) Finally, in cases of contracts based on a framework agreement or a dynamic purchasing system, a mandatory standstill period could have an impact on the efficiency gains intended by those tendering procedures. Member States should be able therefore, instead of introducing a mandatory standstill period, to provide for ineffectiveness as an effective sanction in accordance with Article 2d of both Directives 89/665/EEC and 92/13/EEC for infringements of the second indent of the second subparagraph of Article 32(4) and of Article 33(5) and (6) of Directive 2004/18/EC, and of Article 15(5) and (6) of Directive 2004/17/EC.
- (10) In the cases referred to in Article 40(3)(i) of Directive 2004/17/EC, contracts based on a framework agreement do not require prior publication of a contract notice in the *Official Journal of the European Union*. In those cases a standstill period should not be mandatory.
- (11) When a Member State requires a person intending to use a review procedure to inform the contracting authority or contracting entity of that intention, it is necessary to make it clear that this should not affect the standstill period or any other period to apply for review. Furthermore, when a Member State requires that the person concerned has first sought a review with the contracting authority or contracting entity, it is necessary that this person should have a reasonable minimum period within which to refer to the competent review body before the conclusion of the contract, in the event that that person should wish to challenge the reply or lack of reply from the contracting authority or contracting entity.

- (12) Seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract. It is thus necessary to provide for an independent minimum standstill period that should not end before the review body has taken a decision on the application. This should not prevent the review body from making a prior assessment of whether the review as such is admissible. Member States may provide that this period shall end either when the review body has taken a decision on the application for interim measures, including on a further suspension of the conclusion of the contract, or when the review body has taken a decision on the merits of the case, in particular on the application for the setting aside of an unlawful decision.
- (13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.
- (14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive 2004/18/EC. This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC.
- (15) Possible justifications for a direct award within the meaning of this Directive may include the exemptions in Articles 10 to 18 of Directive 2004/18/EC, the application of Article 31, Article 61 or Article 68 of Directive 2004/18/EC, the award of a service contract in accordance with Article 21 of Directive 2004/18/EC or a lawful 'in-house' contract award following the interpretation of the Court of Justice.
- (16) The same applies to contracts which meet the conditions for an exclusion or special arrangements in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of Directive 2004/17/EC, to cases involving the application of Article 40(3) of Directive 2004/17/EC or to the award of a service contract in accordance with Article 32 of Directive 2004/17/EC.
- (17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
- (18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract.
- (19) In the case of other infringements of formal requirements, Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for alternative penalties. Alternative penalties should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application.
- (20) This Directive should not exclude the application of stricter sanctions in accordance with national law.
- (21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.

- (22) However, in order to ensure the proportionality of the sanctions applied, Member States may grant the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In those cases alternative penalties should be applied instead. The review body independent of the contracting authority or contracting entity should examine all relevant aspects in order to establish whether overriding reasons relating to a general interest require that the effects of the contract should be maintained.
- (23) In exceptional cases the use of the negotiated procedure without publication of a contract notice within the meaning of Article 31 of Directive 2004/18/EC or Article 40(3) of Directive 2004/17/EC is permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified.
- (24) Economic interests in the effectiveness of a contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons.
- (25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.
- (26) In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directives 2004/18/EC and 2004/17/EC and has applied a minimum standstill period allowing for effective remedies. The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive 2004/18/EC or Directive 2004/17/EC.
- (27) As this Directive strengthens national review procedures, especially in cases of an illegal direct award, economic operators should be encouraged to make use of these new mechanisms. For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected.
- (28) Strengthening the effectiveness of national review procedures should encourage those concerned to make greater use of the possibilities for review by way of interlocutory procedure before the conclusion of a contract. In those circumstances, the corrective mechanism should be refocused on serious infringements of Community law on public procurement.
- (29) The voluntary attestation system provided for by Directive 92/13/EEC, whereby contracting entities have the possibility of having the conformity of their award procedures established through periodic examinations, has been virtually unused. It cannot thus achieve its objective of preventing a significant number of infringements of Community law on public procurement. On the other hand, the requirement imposed on Member States by Directive 92/13/EEC to ensure the permanent availability of bodies accredited for this purpose can represent an administrative maintenance cost which is no longer justified in the light of the lack of real demand by contracting entities. For these reasons, the attestation system should be abolished.
- (30) Similarly, the conciliation mechanism provided for by Directive 92/13/EEC has not elicited any real interest from economic operators. This is due both to the fact that it does not of itself make it possible to obtain binding interim measures likely to prevent in time the illegal conclusion of a contract, and also to its nature, which is not readily compatible with observance of the particularly short deadlines applicable to reviews seeking interim measures and the setting aside of decisions taken unlawfully. In addition, the potential effectiveness of the conciliation mechanism has been weakened further by the difficulties encountered in establishing a complete and sufficiently wide list of independent conciliators in each Member State, available at any time and capable of dealing with conciliation requests at very short notice. For these reasons, the conciliation mechanism should be abolished.
- (31) The Commission should be entitled to request Member States to provide it with information on the operation of national review procedures proportionate to the objective pursued by involving the Advisory Committee for Public Contracts in determining the extent and nature of such information. Indeed, only by making such information available will it be possible to assess correctly the effects of the changes introduced by this Directive at the end of a significant period of implementation.

(32) The Commission should review progress made in the Member States and report to the European Parliament and to the Council on the effectiveness of this Directive no later than three years after its deadline for implementation.

(33) The measures necessary for the implementation of Directives 89/665/EEC and 92/13/EEC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽¹⁾.

(34) Since, for the reasons stated above, the objective of this Directive, namely improving the effectiveness of review procedures concerning the award of contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective, while respecting the principle of the procedural autonomy of the Member States.

(35) In accordance with point 34 of the Interinstitutional Agreement on better law-making ⁽²⁾, Member States should draw up, for themselves and in the interests of the Community, their own tables illustrating the correlation between this Directive and the transposition measures, and make them public.

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.

(37) Directives 89/665/EEC and 92/13/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 89/665/EEC

Directive 89/665/EEC is hereby amended as follows:

1. Articles 1 and 2 shall be replaced by the following:

'Article 1

Scope and availability of review procedures

1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (*), unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

⁽¹⁾ OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

⁽²⁾ OJ C 321, 31.12.2003, p. 1.

4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

Article 2

Requirements for review procedures

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

(*) OJ L 134, 30.4.2004, p. 114. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).;

2. the following articles shall be inserted:

'Article 2a

Standstill period

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with

effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b

Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

- (a) if Directive 2004/18/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*;
- (b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;
- (c) in the case of a contract based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 33 of that Directive.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

- there is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC, and,
- the contract value is estimated to be equal to or to exceed the thresholds set out in Article 7 of Directive 2004/18/EC.

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

- (a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

- (b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

- (c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

- the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18/EC,
- the contracting authority has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

- the contracting authority considers that the award of a contract is in accordance with the second indent of the second subparagraph of Article 32(4) or with Article 33(5) and (6) of Directive 2004/18/EC,
- the contracting authority has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e

Infringements of this Directive and alternative penalties

1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after

having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

- the imposition of fines on the contracting authority; or,
- the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

Article 2f

Time limits

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

- (a) before the expiry of at least 30 calendar days with effect from the day following the date on which:
 - the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*, or
 - the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive. This option also applies to the cases referred to in Article 2b(c) of this Directive;
- (b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.;

3. Article 3 shall be replaced by the following:

‘Article 3

Corrective mechanism

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/18/EC.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall

confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.;

4. the following articles shall be inserted:

‘Article 3a

Content of a notice for voluntary ex ante transparency

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

(a) the name and contact details of the contracting authority;

(b) a description of the object of the contract;

(c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the contracting authority.

Article 3b

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (*) (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (**) shall apply, having regard to the provisions of Article 8 thereof.

(*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

(**) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).;

5. Article 4 shall be replaced by the following:

'Article 4

Implementation

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).';

6. the following article shall be inserted:

'Article 4a

Review

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.'

Article 2

Amendments to Directive 92/13/EEC

Directive 92/13/EEC is hereby amended as follows:

1. Article 1 shall be replaced by the following:

'Article 1

Scope and availability of review procedures

1. This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*), unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive

2004/17/EC, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4. Member States may require that the person wishing to use a review procedure has notified the contracting entity of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting entity. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting entity has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contracting entity has sent a reply or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

(*) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).';

2. Article 2 shall be amended as follows:

(a) the title 'Requirements for review procedures' shall be inserted;

(b) paragraphs 2 to 4 shall be replaced by the following:

'2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

3a. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

4. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.;

(c) paragraph 6 shall be replaced by the following:

'6. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may

provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.;

(d) in the first subparagraph of paragraph 9, the words 'court or tribunal within the meaning of Article 177 of the Treaty' shall be replaced by the words 'court or tribunal within the meaning of Article 234 of the Treaty';

3. the following articles shall be inserted:

'Article 2a

Standstill period

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/17/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC, and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b

Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

- (a) if Directive 2004/17/EC does not require prior publication of a notice in the *Official Journal of the European Union*;
- (b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;
- (c) in the case of specific contracts based on a dynamic purchasing system as provided for in Article 15 of Directive 2004/17/EC.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

- there is an infringement of Article 15(5) or (6) of Directive 2004/17/EC, and,
- the contract value is estimated to be equal to or to exceed the thresholds set out in Article 16 of Directive 2004/17/EC.

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/17/EC must be made before the expiry of a specified period, this period shall

be at least 10 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

- (a) if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/17/EC;
- (b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;
- (c) in cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting entity may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

— the contracting entity considers that the award of a contract without prior publication of a notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/17/EC,

— the contracting entity has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

— the contracting entity considers that the award of a contract is in accordance with Article 15(5) and (6) of Directive 2004/17/EC,

— the contracting entity has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e

Infringements of this Directive and alternative penalties

1. In case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting entity shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

— the imposition of fines on the contracting entity; or,

— the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting entity and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

*Article 2f***Time limits**

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

— the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*, or

— the contracting entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC. This option also applies to the cases referred to in Article 2b(c) of this Directive;

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.;

4. Articles 3 to 7 shall be replaced by the following:

*'Article 3a***Content of a notice for voluntary ex ante transparency**

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

(a) the name and contact details of the contracting entity;

(b) a description of the object of the contract;

(c) a justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the contracting entity.

*Article 3b***Committee procedure**

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (*) (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (**) shall apply, having regard to the provisions of Article 8 thereof.

(*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

(**) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).;

5. Article 8 shall be replaced by the following:

*'Article 8***Corrective mechanism**

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC, or in relation to Article 27(a) of that Directive in the case of contracting entities to which that provision applies.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.;

6. Articles 9 to 12 shall be replaced by the following:

Article 12

Implementation

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).

Article 12a

Review

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to

the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.;

7. the Annex shall be deleted.

Article 3

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 December 2009. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 11 December 2007.

For the *European Parliament*

The President

H.-G. PÖTTERING

For the *Council*

The President

M. LOBO ANTUNES

CONSULTATION ON THE APPROACH TO IMPLEMENTATION OF THE EU REMEDIES DIRECTIVE

RESPONDENT INFORMATION FORM

Please complete the details below and return it with your response. This will help to ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)

(a) as an individual go to Q2a/b and then Q4

(b) **on behalf of** a group/organisation go to Q3 and then Q4

INDIVIDUALS

2a. Do you agree to your response being made available to the public (in the Scottish Government library and/or on the Scottish Government website)?

Yes (go to 2b below)

No, not at all We will treat your response as confidential.

2b. **Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

ON BEHALF OF GROUPS OR ORGANISATIONS

3. The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your **response** to be made available?

Yes

No We will treat your response as confidential.

SHARING RESPONSES/FUTURE ENGAGEMENT

4. We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes

No