

Summary: Intervention & Options

Department /Agency: Office of Government Commerce	Title: Impact Assessment of the transposition of the EU Remedies Directive into UK Regulations (excluding Scotland)	
Stage: Consultation	Version: Draft version 0.3	Date: 23 February 2009
Related Publications: Remedies 1st Consultation Document; the Remedies Directive		

Available to view or download at:

<http://www.ogc.gov.uk>

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What is the problem under consideration? Why is government intervention necessary?

On 20 December 2007, the EU published an amending directive that revises the rules on legal review procedures and remedies available for breaches of the EU public procurement rules. The main problem being addressed by the EU in formulating the Directive was to improve the review procedures and remedies available for breaches of the public procurement rules. In particular to provide an effective remedy for, and a deterrent to, illegal direct awards of public contracts. Government intervention is necessary to transpose the Directive by the EU's deadline of 20 December 2009.

What are the policy objectives and the intended effects?

- To transpose the above Directive and thereby adhere to EU Treaty obligations
- To maximise potential benefits and minimise potential negative impacts on UK stakeholders
- The main effect will be to increase the sanctions available for breaches of the public procurement rules, acting as both a deterrent to breaches and a remedy where breaches occur

What policy options have been considered? Please justify any preferred option.

The policy options are:

- implement
- not implement

The latter would breach UK obligations as members of the European Union, and would trigger infraction proceedings by the European Commission. There is no choice, and so the UK must implement. Consideration of the possible impacts of each of the policy choices on each article in the Directive are given in more detail in the attached evidence base.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The European Commission will review the implementation by 20 December 2012. This will inform the UK and other Member States of the success of the Directive.

Ministerial Sign-off For SELECT STAGE Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.....Date:

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' (Not monetisable, for the reasons explained in the evidence base)		
	One-off (Transition) Yrs			
	£			
	Average Annual Cost (excluding one-off)			
	£		Total Cost (PV)	£
Other key non-monetised costs by 'main affected groups' : i) Contracting Authorities: new rules could add costs for authorities that award contracts illegally. ii) Winning bidders, if their contract is overturned: could lose revenue in short-term, but counter-claim damages to restore lost revenues; iii) Aggrieved bidders: legal costs of making a claim, but recoupable if successful				

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' (Not monetisable, for the reasons explained in the evidence base)		
	One-off Yrs			
	£			
	Average Annual Benefit (excluding one-off)			
	£		Total Benefit (PV)	£
Other key non-monetised benefits by 'main affected groups' i) Contracting Authorities: the new rules should deter future breaches in the long-term, so further improving compliance; ii) All Bidders: the presence of enhanced review procedures and remedies incentivise fair treatment and competition, as well as providing better recourse when the rules are breached				

Key Assumptions/Sensitivities/Risks The European Commission's impact assessment (April 2006) concluded the new remedies directive would, in the short term, lead to an increase in the number of EU remedies cases and the associated process costs (though no forecast figures were available in the EU assessment), but that over time the benefits will outweigh the costs. The UK assumes the same.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	England, Wales & NI			
On what date will the policy be implemented?	20 December 2009			
Which organisation(s) will enforce the policy?	The High Court			
What is the total annual cost of enforcement for these organisations?	£			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ N/A			
What is the value of changes in greenhouse gas emissions?	£			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)
Increase of £	Decrease of £	Net Impact	£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

RIA PART 2 – Key Background Information

Purpose

1. This impact assessment supports the proposed draft regulations that will implement Council Directive 2007/66/EC (the Remedies Directive) in England, Wales and Northern Ireland.

Background

2. The EU public procurement rules seek to ensure that public sector bodies award contracts in an efficient and non-discriminatory manner; these rules were implemented by the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006. These rules include enforcement obligations and remedies that are available through the courts for breaches of the rules, such as the suspension of procurements and the award of damages.
3. Directive 2007/66/EC, which was adopted by the EU and published in December 2007, enhances the previous remedies rules by requiring or allowing Member States to implement specific changes. The intended effects are that the rules governing remedies on the award of public contracts are improved, to make the procurement process more transparent, to further dissuade contracting authorities from awarding contracts illegally, and to satisfactorily address situations where awards are made illegally.
4. Within the Directive, there are a number of different types of rules:
 - i) Mandatory new provisions for all Member States, where there is no choice over implementation;
 - ii) Mandatory new provisions but with optional elements on how the provision is implemented; and
 - iii) Permissive provisions, where Member States can choose whether to implement or not.
5. OGC's approach to implementation involves two consultation exercises. The first consultation, which ran during autumn 2008, consulted stakeholders on the approach to implementation. Largely, that involved describing to stakeholders the options available to the UK and seeking feedback on the preferred options. Comments were also sought on a draft Regulatory Impact Assessment (RIA). The consultation evoked a substantial response, with over 40 organisations responding in some detail. The analysis that followed during winter 2008/9 informed decisions on OGC's implementation policy.
6. The second consultation, which this more detailed RIA accompanies, summarise the outcomes of the first consultation, confirms the implementation policy, and seeks comments on draft implementing regulations.

Impact Assessment Requirements

7. RIAs are generally required for transposition of EU Directives. The Department for Business, Enterprise and Regulatory Reform (BERR) guidance on impact assessment clarifies that an assessment should be carried out for any government proposal that:
 - i) Imposes or reduces costs on businesses or the third sector;
 - ii) Similarly affects costs in the public sector, unless those costs fall below a threshold of £5M, in which case only a developmental/option stage assessment is required.

OGC's Approach to Impact Assessment

Overview

7. OGC acknowledges the helpful impact assessment guidance provided by the Department for Business, Enterprise and Regulatory Reform. This impact assessment adheres to the key principles within BERR's on-line toolkit, although it does not strictly follow every aspect of the reporting templates offered by BERR, for specific reasons as explained in more detail below.
8. Generally, the consultative approach taken by OGC is harmonious with the recommended approach to impact assessment. Specifically, OGC has:
 - consulted stakeholders about the various options available to them, including a draft RIA
 - considered and documented the possible impacts of those options in its analysis of the responses
 - used the impact assessment to aid decision-making in formulating the implementation policy
 - published the revised impact assessment to support the second consultation document

Analysis of comments on the draft RIA

9. OGC's initial view in the first consultation document was that there was unlikely to be a significant cost impact of the new Directive on either costs to businesses, the third sector or to the public sector. Any changes would affect public sector processes to some extent, but these were anticipated to be under the £5M threshold. However, OGC used the first consultation to test this thinking, and issued a draft developmental/option stage impact assessment for comments.
10. The responses on impact assessment were mixed. 12 respondents agreed with OGC's initial view that costs should not be substantial, as most of the provisions were clarifications of the existing rules. The only exception to this general rule related to only one of the mandatory provisions within the Directive (article 2d – ineffectiveness); however, even though there could potentially be an impact of this provision, stakeholders expected the likelihood of claims arising to be a rare occurrence, as court cases for procurement rules breaches have been historically very low in the UK.
11. 8 respondents called for a more detailed Regulatory Impact Assessment. Generally, these respondents also acknowledged that ineffectiveness claims would be rare. There was also a general acknowledgement that it would be impossible to forecast the number

of possible claims arising under the new rules, or the potential value of those claims, which rendered financial forecasting impossible also. Nevertheless, respondents explained clearly that the potential value of a single ineffectiveness claim could feasibly exceed, in complex high-value contracts, the £5M threshold that triggers the need for a full RIA.

12. The other respondents either did not comment or did not express a clear opinion either way.
13. The policy team found the differing views of respondents helpful in decision-making. Furthermore, the consultation exercise overall, ie not just the part on impact assessment but the feedback and analysis in its entirety, has provided a substantial evidence base on which to make better-informed policy decisions. In formulating its analysis, OGC has considered carefully the possible impacts arising from taking one or another course of action. Consequently, OGC has documented this more detailed, narrative RIA, discussing briefly the impact of each of the proposed Regulations but focussing on article 2d ineffectiveness as the main topic of concern, and how consultation has confirmed that these are the right choices.

Constraints

14. OGC points out one significant constraint in relation to the assessment: predictive data is not available on the potential frequency of cases arising purely because of the new rules, or the value of the remedies sought in those cases, or how the courts might rule when the facts of future cases are as yet unknown. Therefore, this impact assessment can only provide a narrative analysis rather than a financial forecast. The European Commission's impact assessment similarly could not estimate these figures.
15. Even though a common view is that the new rules may not increase substantially the historically low number of cases, it is possible that a single ineffectiveness claim on a sizeable contract could breach the BRE threshold of £5million, triggering the need for further impact assessment. Furthermore, contract values for ineffectiveness could, in theory, range from anywhere between £100K and £1BN or more, so it is impossible to estimate the likely cost of one or more claims at this point in time.
16. However, since implementing the ineffectiveness provision is mandatory, the impact assessment should primarily concern itself with implementing in such a way that minimises the possible negative aspects, rather than the do-nothing option, which would trigger infraction proceedings by the EU.

Options

17. Strategically, there are only two options available:

17.1 Option 1 – Do nothing

- 17.1.1 Non-implementation of the Directive would breach EU Treaty obligations, trigger infractions proceedings, resulting in the UK being liable for substantial penalties. This option is therefore not feasible; we intend to implement the Directive. Consequently, the do-nothing option is not considered within the detailed assessment of each article in Part 3 of this document, unless the Directive specifically permits an option for not implementing the article.

17.2 Option 2 – Implement Directive into UK Law

17.2.1 The options for implementation are constrained by the requirements of the Directive, which has already been adopted by the European Parliament and Council. Within these constraints there are a number of Articles in the Directive where Member States have choices as to how, and in some cases whether (or not), to implement particular provisions. Following responses to our 2008 consultation, we have drafted implementing regulations for all the Articles below.

Article 1	Scope and Applicability of Review Procedures
Article 2	Requirements for Review Procedures
Article 2a	Standstill Period
Article 2b	Derogations from the standstill period
Article 2c	Time limits for applying for review
Article 2d	Ineffectiveness
Article 2e	Infringements of this Directive and alternative penalties
Article 2f	Time limits
Article 3a	Content of a notice for voluntary ex ante transparency

17.2.2 Against each Article, we believe we have selected the best possible policy option to limit the possible negative consequences including, where it is permitted by the Directive, not implementing provisions that are entirely optional for Member States. A brief assessment considers the potential impact of each Article in turn

RIA PART 3 – POTENTIAL IMPACT OF ARTICLES

18. This section of the RIA considers the potential impact of each of the articles within the Directive. It does not attempt to repeat the detailed justification for OGC's policy decisions contained within the consultation document and which have been endorsed by the Exchequer Secretary to the Treasury. Where helpful it recaps on the policy decision, whilst majoring on the possible impacts of each option.

Article 1 – Scope and Applicability of Review Procedures

19. Article 1(5) is entirely permissive: it allows Member States to introduce a mandatory first review by the contracting authority as a pre-cursor to court proceedings. The options available are either to implement or not. OGC's analysis led to the policy decision not to implement article 1(5), so there is no impact.
20. There were also some other choices contained in Article 1, but these only apply to Member States that opt to implement article 1(5) which the UK has chosen not to do, so again there is no impact.

Article 2 – Requirements for Review Procedures

21. The substantive new provision at article 2 is that contract procedures must be automatically suspended following a challenge of the award decision (ie during the standstill period). The article is mandatory; there are no optional elements, and the matter has already been impact-assessed at EU level.
22. The main impact for the UK is that regulations and procurement procedures will need to be adapted to ensure that contracts are suspended when the award decision is challenged. However, these changes are not expected to increase or decrease costs significantly; they are fairly straight-forward process-changes for the public sector to accommodate.

Article 2a – Standstill Period

23. The standstill period is already in the UK Regulations; there is no major change resulting from article 2a. The only minor amendments that will be needed are:
- i) Adjustments to allow the normal standstill period of 10 days to be extended (up to 15 days) where the commencement of the period is notified by non-electronic means, so that tenderers have time to receive the information through the postal or courier systems used. Feedback confirmed that electronic means of communication would be the normal method, so the normal standstill period will therefore remain as 10 days. This small amendment to the rules is not expected to trigger any substantial impact on any stakeholders. It merely allows a few extra days notice to compensate for the added time taken for the delivery of non-electronic communications.
 - ii) For contracting authorities to make a clear statement of the exact standstill period. This is a minor administrative requirement on contracting authorities and should be easily absorbed into procedures without cost impacts.

Article 2b – Derogations from the standstill period

24. The derogations are optional for Member States. If transposed into UK regulations they would give additional flexibility so that the full remedies rules would not apply in certain circumstances. Conversely, a decision not to transpose the derogations would increase the scope of the remedies rules and make the regime more onerous. The consultation confirmed that stakeholders preferred the derogations to be transposed, and this is in line with the Government's general aim to identify proposals that best achieve its objective whilst minimising cost burdens. The derogations should help to limit any additional costs of the new rules, rather than significantly impose any costs in themselves.

Article 2c: Time limits for applying for a review

25. Under article 2c, Member States must allow a certain period of time available for reviews to be brought (the absolute minimum being 10 days where electronic means are used and 15 days otherwise). UK regulations currently require reviews to be brought 'promptly, and in any event within 3 months', which is in line with judicial review timescales. The consultation confirmed that stakeholders were content with OGC's minimalist approach of maintaining the principle of the existing regulations but ensuring that the directive is complied with by clarifying that 'promptly' can never mean less than 10 or 15 days (depending on the method of communication used). There are no direct costs expected from this minor clarification.

Article 2d: Ineffectiveness

The need for further impact assessment on ineffectiveness

26. The ineffectiveness provisions were intended, by the EU and the Member States that designed them, both as a deterrent to, and a sanction for, significant breaches of the rules, especially illegal direct contract awards. The principle is straightforward: contract awards that are found to be illegally awarded can be rendered ineffective. Implementation, however, is a more complex matter.
27. Stakeholders in the first consultation perceived the impact of ineffectiveness had the greatest potential for impact of all the new provisions, and some respondents sought further analysis of the possible impacts. OGC considered the potential impacts from the limited data available in determining the optimum policy model, and these considerations are described below.
28. A common view is that the new rules may not increase substantially the historically very low number of cases for procurement remedies that reach court. However, this is quite speculative, and the counter-view that the availability of additional and potentially more attractive penalties might lead to an increase in remedies sought is also arguable.
29. Speculation aside, it is possible that a single ineffectiveness claim on a sizeable contract could breach the Better Regulation Executive's recommended threshold of £5million, triggering the need for further impact assessment. Since that remains a possibility, OGC concluded the need for this more detailed impact assessment.

Constraints

30. BERR guidance¹ on impact assessment urges for impacts to be monetised wherever possible. However, OGC highlights to stakeholders a clear and unavoidable constraint in relation to the assessment: predictive data is not possible on the potential frequency of cases arising purely because of the new rules, or the value of the remedies sought in those cases, or how the courts might rule when the future facts are impossible to predict. Furthermore, contract values for ineffectiveness could, in theory, range from anywhere between £100K and upwards of £1BN. So it is impossible to estimate the likely cost of one or more claims at this point in time. Consequently, the impact assessment can only be a narrative analysis of pros and cons rather than a financial forecast.
31. This impact assessment discusses these points amongst others in further detail, but it is not possible at this time to offer forecast figures. Rather, the assessment evaluates the various pros and cons of the options available in terms of their respective possible impacts, as a guide to the matters that have been considered in making the right choice.

Risk Assessment

32. In terms of risk, the impacts of a successful ineffectiveness claim are clearly very high, irrespective of which method of ineffectiveness is chosen: Either it would involve the prospective cancellation of contractual obligations coupled with the added threat of a civil financial penalty², or the retrospective unravelling of all contractual obligations including those that had already been delivered. Either outcome has potentially serious consequences for an upheld ineffectiveness claim. A key concern for impact assessment is which of these methods is likely to have the least problematic impact on stakeholders.
33. However, generally, stakeholders and OGC anticipate that the likelihood of successful ineffectiveness claims will likely be low, even more likely be very rare indeed, and possibly may never occur at all. Partly, this view is attributable to the historically low incidence of UK court cases³ on procurement rules breaches. Partly it is attributable to the dissuasively high consequences of the threat of ineffectiveness itself. And partly it is attributable to the fairly simple best-practice steps that can be taken by both procurers and bidders to avoid ineffectiveness arising.
34. In other words, the threat of ineffectiveness is substantial, but also so easily avoidable that parties to a contract should, in all but exceptional circumstances, have protected themselves in such a way that the sanction can not be invoked. Non-utilisation of the sanction could also be indicative as its success as a deterrent to rule breaches, in the same way that utilisation could be indicative of its failure as a deterrent.
35. This consideration of possibly-high-impact against very-low-likelihood is important in considering whether there is really a substantial concern here: on the one hand, stakeholders are anxious about the possibility of expensive court proceedings and their outcomes, but on the other hand the presence of the possibility of ineffectiveness could

¹ <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html>

² The directive refers to these as fines, but in the UK we are using the term civil financial penalty to avoid any inference or misapprehension that these are criminal penalties.

³ Conclusive data is not available on the definitive number of UK court judgements on procurement cases, as cases are not classified as such. However, tentative conclusions can be drawn from the known number of published cases, which have always been in single figures each year (eg in 2008 we know of 5 published UK judgements, a similar number in 2007 and even fewer in previous years).

actually help to reduce substantial breaches of the procurement rules, which in turn marginalises the chance of ending up in court. The more people worry about ineffectiveness, the less likely they are of falling foul of it.

36. The alternative view as raised by respondents means that it could only take one successful ineffectiveness claim on a substantial contract to trigger major additional costs to the public and private sectors; a single ineffectiveness claim on a sizeable contract could breach the £5M threshold for detailed impact assessment.

The impact of implement / not implement

37. Article 2d on ineffectiveness is mandatory. Despite there being optional elements within the mandatory requirement, a decision to do-nothing would breach the UK's obligations under the EU Treaty, triggering infraction proceedings by the European Commission, and lead ultimately to an ECJ court case and a substantial civil financial penalty as well as political embarrassment with our EU neighbours. Consequently the do-nothing option has been discarded. Furthermore, it should be borne in mind that, even if the consequences of implementing the article are felt to be of significant impact, there is still no option of not implementing. The law has been agreed at European level and the UK must now comply. Rather, OGC has concerned itself primarily with selecting the best policy option from the alternatives available, which will maximise the positive effects and minimise the negative ones.

The impact of the 3 different options (prospective, retrospective, or court discretion)

38. Stakeholders were asked for opinions based upon 3 possible alternatives permitted by the Directive:
- i) Prospective cancellation. This would mean that all future (ie as yet unperformed) obligations were rendered ineffective, and would also require the courts to impose a civil financial penalty on the contracting authority, so that the overall penalty is comparable with the alternative of retrospective cancellation. Most stakeholders preferred this option: the penalty was still felt to be dissuasively high, but it eliminated some of the additional uncertainties and their corresponding risks and costs of the other alternatives.
 - ii) Retrospective cancellation. This would involve cancellation of all contractual obligations, including those that had already been performed. Stakeholders were unanimously opposed to this option, mainly because of the practical difficulties in undoing delivered obligations (eg unbuilding a building) and the substantial uncertainties that came alongside it. Uncertainty was a major risk factor for all parties and could generate further costs in the procurement process.
 - iii) Court discretion between prospective and retrospective cancellation. The benefits of additional flexibility were outweighed by the same problems of uncertainty as with the previous option.
39. OGC concluded from the consultation exercise that prospective cancellation represented the option with the least negative impacts, which OGC equated with the 'do-minimum' option suggested in the impact assessment guidance.

Possible costs/benefits of pre-agreeing ineffectiveness terms

40. Stakeholder feedback identified that in many cases, parties to a contract would be keen to pre-agree specific contract terms before signing the contract, which would pin down clearly the effects of an ineffectiveness ruling and the various obligations of the various parties in unwinding the contract. OGC perceives that such a practice will not only be helpful in being clear about what would happen in the event of an ineffectiveness claim, but will also be significant in reducing even further the possibility of claims ever arising.
41. In other words, the process of agreeing ineffectiveness terms will place the possibility of ineffectiveness clearly in the minds of parties to the contract, thereby encouraging them further to apply the necessary and straightforward remedies rules before awarding the contract and in doing so avoid the highly problematic possibility of ineffectiveness.
42. OGC expects that particular stakeholder groups will formulate their own standard ineffectiveness clauses, whereas others may create their own clauses from scratch. However, there is no evidence to suggest that the formulation of such terms should involve significant additional costs; the action is purely a precautionary measure and akin to one which happens in many contracts already (eg exit clauses).

The possible costs/benefits of best practice

43. As mentioned earlier, because there are only a few rules breaches that can trigger an ineffectiveness claim, it should be possible to marginalise the likelihood of claims occurring by issuing clear guidance on how to prevent an ineffectiveness claim.
44. Clearly, for contracting authorities, the overarching message is that compliance with the rules will ensure that they are protected from ineffectiveness claims. However, OGC guidance will more clearly spell out the specific rules which can trigger ineffectiveness, which can be summarised as:
 - i) Illegal direct contract awards (ie Failure to publish an OJEU contract notice, where one is required);
 - ii) Breach of the procedural rules for awarding above-threshold call-off contracts (from framework agreements and dynamic purchasing systems) where the contracting authority has not applied a standstill period;
 - iii) Where coupled with a substantive breach of the main procurement rules:
 - a. When the contract is awarded pending a court review of the award decision; or
 - b. When the contract is awarded in breach of the standstill period.
45. Successful tenderers also have a key interest in ensuring that their fairly-won contract is not at risk from ineffectiveness. By making some simple checks before signing the contract, the winner can protect itself at virtually no cost.
46. OGC guidance was always intended to complement the remedies implementation, so there is no anticipated cost to these best practice measures, though it could be very beneficial in terms of marginalising the number of possible ineffectiveness claims.

Consideration of scenario-based assessments

47. The range of possible scenarios in which ineffectiveness could apply is virtually unlimited: there are literally thousands of possible combinations of different but relevant aspects, such as contract value, duration, type, scope, risk etc. Of these, contract value seems likely to be the most relative factor to the potential value of any ineffectiveness claim which could feasibly equate to or exceed the entire contract value.
48. However, the contract in question could be virtually any size imaginable, and therefore the ineffectiveness claim could be any size too. The contract could be amongst the biggest let by the public sector eg above £1 billion spanning a 25-year period, or it could be a mid-range multi-million pound deal, or it could be at the lower end of the range where ineffectiveness can be applied ie above the relevant OJEU threshold, which in many cases is around £90,000.
49. Consequently there seems little to be gained in pondering specific scenarios, as a conclusion based on one scenario may have no practical relevance to the factors at play in a real ineffectiveness claim should it arise. For example, a model based on a hypothetical example involving a £15 million contract might generate an ineffectiveness claim that caused the defending contracting authority to lose the full contract value of £15 million, but how is that hypothetical knowledge helpful if, following implementation, an actual ineffectiveness claim relates to a contract with a value of £100,000, or £1 billion?
50. What is perhaps more helpful is to consider the general bands of contract value and consider the risk to each of these. For example, feedback from stakeholders in the PPP/PFI markets has confirmed that there are substantial concerns about how ineffectiveness could work in those markets. The stakeholders explained clearly how the effects of ineffectiveness, or at least the threat of it, could destabilise those markets for example by inadvertently discouraging funders from being involved because of the perceived high risks. Clearly, the stakeholders in those markets are concerned that the impact could be very high indeed. Furthermore, the very presence of the bidders' concerns suggests there is an even greater likelihood that the bidders will make the relevant checks during legal due diligence to ensure that the contracting authority has not breached an ineffectiveness-inducing rule before signing the contract. Whilst it is therefore understandable that there is much concern about the possible impact in these markets, the likelihood of ineffectiveness actually arising seems to be even further mitigated by the managed approach to risk-taking required by those markets and the capability of the contracting authority's commercial assurance and governance regime.
51. On the other hand, in procurement with a lower value or profile, there might be less general concern on both the buyer and seller sides about the possible impact of ineffectiveness. This could be the case for contracts which are only just above threshold, or for above-threshold call-offs from a framework agreement. So, whilst the impact of ineffectiveness is clearly lower on lower-value contracts, it may be possible that the likelihood of an ineffectiveness rule breach is higher than in higher-value contracts, whilst still being low likelihood overall.
52. However, the above considerations are still extremely speculative, whilst drawing where possible on stakeholders views. The only relevant conclusions that can be drawn from the above considerations are:
- The impact on any procurement could be as much as the entire contract value.
 - The greater risk of ineffectiveness claims occurring could be within the larger number of lower-value contracts as opposed to the smaller number of higher-value contracts.

Possible impacts on the contracting authority

53. Contracting authorities are in the driving seat for public procurement and the onus is clearly on them to know and apply the rules. The possible impacts of ineffectiveness on contracting authorities could be substantial for a single ineffectiveness claim, as has been discussed above. However, the ineffectiveness rule was developed by the EU precisely for this reason – the intention in creating the rule was to dissuade authorities from acting illegally. Contracting authorities have a simple choice: adhere to the procurement rules, in which case there is no impact; or act illegally, in which case the impact is potentially significant.
54. OGC expects that contracting authorities, as has generally been the case in the past, will respect the procurement rules and therefore the impact will be minimal, though OGC can not rule out the possibility that isolated rule breaches might trigger one or more future ineffectiveness claims with an unpredictable cost impact. That risk lies entirely within the control of contracting authorities and is not removable by the method of ineffectiveness that the UK implements.
55. The choice of prospective cancellation is required to be coupled with a civil financial penalty – this is the trade-off for not having performed obligations ‘undone’ as would be the case with retrospective cancellation. Clearly this impacts on contracting authorities only, which might have led to an expectation that contracting authorities would argue against prospective cancellation – but instead they preferred it, largely for the additional benefits of certainty and practicability. Since it would be for the court to determine the level of the civil financial penalty, there is no way of estimating the possible cost of a single civil financial penalty as the matter is for case-by-case consideration. Civil financial penalties should be effective, proportionate and dissuasive.
56. There may also be some risk of contracting authorities being pursued vigorously by claimants without real grounds for a complaint. Although these circumstances are likely to be rare (within the already rare context of ineffectiveness claims), it could still be possible that there might be costs to some contracting authorities in defending a legitimate course of action from a resolute review applicant.

Possible impacts on the successful tenderer

57. The possible impact on successful tenderers is also substantial – they could see themselves stripped of a contract that they had believed that they had won legitimately. Ineffectiveness seems odd when viewed from this perspective, as it would appear to penalise an apparently innocent party.
58. However, OGC has no choice over implementing ineffectiveness, and can only influence the method of ineffectiveness. OGC considers that the chosen method, prospective cancellation, limits the negative impacts on successful tenderers insofar as is possible within the mandate laid down by the Directive. The evidence for this conclusion is that the alternative, retrospective cancellation, would require the undoing of delivered obligations in addition to being stripped of the contract, which could cause the additional and substantial problems for the winning contractor in terms of working through the actions required to undo the delivery of those delivered obligations. For example, a retrospectively ineffective construction contract might require the disassembly of a part-constructed building, which would presumably result in additional costs for personnel, demolition, waste management and transit of materials. Or a retrospectively cancelled consultancy services contract could involve the difficult undoing of advice, influence and intellectual property.

59. On the other hand, the UK's chosen method of ineffectiveness, prospective cancellation, limits the cancellation to those obligations that have yet to be performed. Whilst this still might mean the loss of a valuable income stream, there would be no requirement to undo anything that had already been done, which we expect would be preferable to tenderers in most foreseeable circumstances. The contractor would also normally have the right to seek damages for any incurred loss, had such eventualities not been pre-defined already before the contract was awarded. In the construction example above, prospective cancellation would simply mean that work stops, and payment is made for all work up until that point. The same would apply to the consultancy example. Clearly more complex projects such as PFIs would involve more complex arrangements than simply stopping work, but those arrangements would be considered during the pre-agreement of the ineffectiveness terms as discussed above.
60. In conclusion, the impact of prospective cancellation on the originally successful tenderer could, if not considered beforehand, initially trigger some unforeseeable costs. However, those costs should be largely or wholly avoidable by the agreement of relevant terms pre-award, and may even be recoupable after contract award through the legal system where, for example, the contractor whose contract is deemed ineffective can prove consequential loss arising from the contract being taken from him. Feedback has also confirmed that stakeholders on the supply-side prefer prospective cancellation.

Possible impacts on the unsuccessful tenderer (ie the claimant)

62. The impact on the unsuccessful tenderer(s) is expected to be mainly beneficial, as the ineffectiveness remedy adds to the previous suite of remedies available and enables the aggrieved bidder to bid again, if successful in pursuing the claim. Whilst there is undoubtedly a cost element in using the UK legal system, this cost is not new or specific to the ineffectiveness remedy – it has always been there and as such is not considered to be a new impact resulting from the new Directive. Furthermore, claimants would normally claim the costs of legal proceedings in addition to their other claim, which mitigates any cost impacts to the claimant further.

Conclusions on Ineffectiveness

63. Prospective cancellation represents the preferred position regarding the three alternatives to the majority of stakeholders. It offers the most benefits and the least potential negative impacts on the stakeholder network.

Article 2e – Infringements of this Directive and Alternative Penalties

64. Article 2e is mandatory but with an optional element, requiring a choice to be made by Member States.
65. Where there has been a remedies rule breach (ie breach of standstill period or contract award whilst a court is reviewing an award decision), but no substantive breach of the main procurement rules, Member States are required to provide for either ineffectiveness, alternative penalties (contract shortening or fines), or court discretion between ineffectiveness and alternative penalties.
66. As the article is mandatory, there is no choice other than to implement it. The main considerations are therefore how best to minimise the potential negative consequences.

Stakeholder feedback was mixed: a larger number of stakeholders preferred court discretion, but the arguments complementing that feedback were generally limited to the general benefits of flexibility that is associated with court discretion. On the other hand, a smaller number of stakeholders made more convincing arguments for limiting the effects of article 2e to alternative penalties, not ineffectiveness. OGC concurs with the latter, as ineffectiveness appears to be too severe a penalty for inconsequential breaches that have not affected the chances of any party in winning the contract. This also represents the minimum action, in terms of the possible impact on stakeholders, which is required by the Directive, although as with previous discussion on ineffectiveness, it is impossible to quantify the number or cost of successful claims.

Article 2f – Time Limits (for ineffectiveness claims)

67. Article 2f is mandatory. The effect is that, where Member States require reviews to be brought within a specific period of time, that period is at least 30 days where tenderers have been notified of the award, or at least 6 months where tenderers have not been notified.
68. The main choice for the UK is whether to implement the minimum limits given by the Directive, or to allow for longer periods. Stakeholders understood the choice and were clear in their responses that the minimum periods were satisfactory and UK Regulations should not attempt to extend them (extension would also be tantamount to ‘gold-plating’ without any clear justification).
69. Since the time limits for ineffectiveness are entirely new, they do not change the position of the old time limits, as those time limits for other claims remain intact (ie 3 months in most circumstances). The limiting of the ineffectiveness period is also helpful, given the uniquely sweeping and profound impact that a successful ineffectiveness claim could have on the parties to a contract. Consequently the UK has opted to make the time limits absolute – ie there will be no court powers to extend the availability of ineffectiveness beyond the time limits, as is the case with other types of claim. This should further minimise any negative impact and facilitate greater contractual certainty.

Article 3a – Contents of a notice for voluntary ex ante transparency

70. Article 3a is mandatory with no optional elements. It requires Member States wishing to use the voluntary transparency mechanism to do so in a prescribed format.
71. OGC does not expect that contracting authorities will often need to use the voluntary transparency mechanism, but even in the event that they do, the details required are simple, brief administrative information about the contract and should not present any substantial costs to authorities.

Conclusion

72. The mandatory nature of the new Directive imposes some significant additions and amendments to be made to UK Regulations. In some cases, there are choices in implementing, and OGC’s role has been to identify, consult and then decided on those choices which represents the best policy options for the UK.
73. BRE guidance encourages systematic assessment of impacts over a suggested £5M threshold, avoidance of ‘gold-plating’ and taking a minimalist approach to implementation. OGC has adhered to BRE guidance insofar as is possible within the

context of this implementation. The preceding impact assessment has examined, article by article, the choices available for the UK and identified a range of options. The options that represent the least cost and greatest benefit within the confines of the mandate laid down in the Directive have invariably been selected by OGC. However, specific monetising of the possible impacts has not been possible given the unavailability of relevant predictive data, and the unpredictability of the facts surrounding future potential court cases.

74. It seems that the greatest potential area of concern regarding the impact of the new rules is with the ineffectiveness provisions. However, the impact may be substantially reduced by adherence to the rules and best practice. So on the one hand it is possible that there may be no impact whatsoever if no ineffectiveness claims arise. Whilst on the other hand it is also possible that the triggering of a single ineffectiveness claim could result in substantial costs and inconvenience to the contracting authority and supplier(s) concerned. What is clear is that all parties to a contract have a major stakeholding in avoiding ineffectiveness, and since there are simple things that can be done to ensure that it is avoided, then it is in their best possible commercial interests to do those things and always to ensure that they are done before signing the contract.

RIA PART 4 – Checklist of Specific Impact Tests

ECONOMIC TESTS

1. Competition Assessment

This Directive, as with other procurement Directives, is intended to facilitate greater competition by opening markets and specifically by providing deterrents and sanctions to anti-competitive behaviours.

2. Small Firms Impact Test

The new Remedies rules will affect the way in which public contracts can be challenged, but it will not affect the normal day-to-day business environment of small firms or anyone else.

In some ways, the new rules are to the benefit of small businesses, as with larger firms, as they will have additional remedies available should they wish to challenge a public procurement made in breach of the procurement rules. Furthermore, the new rules will further encourage contracting authorities to respect the public procurement rules, which means that contracts are more likely to be competed fairly, to the benefit of all firms regardless of size.

There is also the possibility that a contract won by a small business could later be deemed ineffective, or shortened. This could potentially affect small businesses to a greater extent than the same set of circumstances might affect a larger firm. In such cases, the small firm would have both opportunities to reduce or eliminate its risk before being awarded the contract, and may also be able to claim damages for incurred losses having been awarded the contract, and the legal fees for making the claim. These impacts were discussed in part 3 as part of the discussion on ineffectiveness.

However, these instances are expected to be very rare, as has generally been the case with procurement cases in the UK, and there are significant disincentives as discussed in Part 3 of this RIA which further limit the likelihood of claims occurring. Furthermore these situations are largely avoidable by making some basic checks before the contract is signed.

In any event, the ineffectiveness provision is mandated by the Directive, so there is no choice other than to implement it. OGC has selected the option, of the two options permitted in the Directive, which has the least negative consequences for all firms, including those that are small.

OGC has reviewed BERR's guidance on the Small Firms Impact Test. That guidance recommends that particular studies are done with small firms so that various policy alternatives can be identified if the cost implications for small firms are high. As is discussed in Part 3 of this RIA, the possible cost implications can not be monetised, and there are no alternative policy options as this aspect of the Directive is mandatory. Consequently, OGC concludes that there is no further helpful value to be added by the SFIT in this context.

3. Legal Aid Impact Test

The Remedies Directive only affects companies, not individuals, so there is no impact on Legal Aid.

OGC is working closely with the Ministry of Justice to identify any possible impacts on court procedures and handling of civil financial penalties. That work is progressing to a different

timescale than the draft regulations which this impact assessment accompanies. If there are any effects on the workload of the courts, then these will be documented and published with the final impact assessment that accompanies the new regulations.

4. Other Economic Issues

There is a possibility that the new rules could generate receipts for Government, as a result of civil financial penalties on contracting authorities. In one sense, this is not new money, but rather public money changing hands from one public body to another. However, the number of civil financial penalties and the corresponding number of receipts is expected to be very low (ie isolated instances and possibly few or none). The value of receipts is entirely unpredictable.

SUSTAINABILITY TESTS

5. Sustainable Development

The impacts of this Directive can not be monetised, as discussed in the RIA, due to the unpredictability of facts and data on potential future court cases. The impacts, if any, are more likely to be economic than social or environmental. However, the policy complies with the 5 Sustainable Development principles:

- Living within environmental limits;
- Ensuring a strong, healthy and just society;
- Achieving a sustainable economy;
- Promoting good governance; and
- Using sound science responsibly

6. Carbon Assessment / Other Environment

There are no environmental characteristics to this policy proposal and therefore these tests are not relevant.

SOCIAL TESTS

7. Health Impact Assessment

The proposal should have no impact on health, well-being or health inequalities.

8. Race Equality, Disability Equality, Gender Equality, Human Rights

The policy is derived from EU law, via the European Commission, and so is compliant with other EU laws on race, disability, equality and human rights. An extensive public consultation has not produced any evidence that suggests the proposed policy has any bearing on race equality, disability equality, gender equality or human rights. The policy improves the rights of *all* businesses in tendering for public contracts, and is not skewed in favour of or against any particular group.

9. Rural Proofing

The proposal should have no impact in different rural areas.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

none