

# Consultation Document

## The approach to implementation of the EU Remedies Directive

July 2008



**JULY 2008**

**OGC 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 procurement<sup>1</sup>. 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 Remedies<sup>2</sup>, 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 OGC seeks stakeholder preferences on those options.

Respondents are urged to set out the rationale and evidence supporting their preferred options clearly. OGC 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, OGC 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 UK legislation.

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<sup>1</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/remedies/remedies\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm)

<sup>2</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/remedies/remedies\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm)

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Remedies Directive  
Consultation on the Approach to Implementation

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

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

OGC welcomes input by **Friday 24 October 2008**. Please direct responses, or any questions on the consultation, to: [ServiceDesk@ogc.gsi.gov.uk](mailto:ServiceDesk@ogc.gsi.gov.uk).

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## **PART 1: BACKGROUND AND TRANSPOSITION PLANS**

### **Purpose**

1. This consultation document invites views from stakeholders on the OGC's approach to transposition of Directive 2007/66/EC<sup>3</sup> (the 'new Directive') of the European Parliament and of the Council, amending Council Directives 89/665/EEC<sup>4</sup> and 92/13/EEC<sup>5</sup> 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 UK implemented the standstill period in 2006 when the Public Procurement and Utilities Procurement Directives were transposed. The standstill provisions in the new Directive are therefore relatively simple for the UK and should not be onerous; OGC is largely clear on the approach to implementation, subject to 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, including the legal profession, public procurers and industry.

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

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

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

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## Scope

7. OGC has responsibility for coordinating the transposition of EU Directives on Public Procurement into UK law. OGC leads transposition for England, Wales and Northern Ireland, so this consultation exercise is primarily aimed at consultees in those regions. OGC also works closely with the devolved administration in Scotland to ensure alignment; a similar consultation process will take place in Scotland.

## 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. OGC 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 statutory instrument (SI), 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 OGC's website. Following the second consultation, the draft SI will be finalised, made and laid before Parliament in advance of the implementation deadline of 19 December 2009.

10. OGC plans to manage the transposition by amending existing Regulations, rather than creating entirely new ones. 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 'UK Regulations' in this consultation document to mean the Regulations that currently implement the Remedies Directives in England, Wales and Northern Ireland i.e. the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006.

### **Consultation Criteria**

14. This consultation complies with the Better Regulation Executive's *Code of Practice on Consultation*. The six consultation criteria, as outlined in the code of practice, are applicable to this consultation process. They are:
- i) Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
  - ii) Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
  - iii) Ensure that your consultation is clear, concise and widely accessible.
  - iv) Give feedback regarding the responses received and how the consultation process influenced the policy.
  - v) Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
  - vi) Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

## PART 2: CONSULTATION ISSUES

### Introduction

15. This part of the document introduces specific topics and information relating to the new remedies provisions on which OGC 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 (email, fax, letter etc).

#### **Box 1: Review Procedures**

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

#### **Box 2: Review Procedures - Means of Communication**

OGC 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 current 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. OGC therefore seeks the views of stakeholders on whether, and if so how, such a decision should affect the retention or reformulation of the Regulations' existing requirement to notify the authority.

**Box 3: Review Procedures - Notification**

OGC 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 court<sup>6</sup> 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 OGC 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 current UK Regulations on the standstill period. The main issues arising from the new Directive are:
- i) The UK Regulations need amending to allow for longer periods (15 days) where non-electronic means are used, although the current Regulations<sup>7</sup> do already require the most rapid means of communication practicable to be used.

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<sup>6</sup> The term used in the Directive is 'review body', but this document refers to 'the court' throughout, to reflect the fact that the UK has given this role to the High Court in relation to England, Wales and Northern Ireland.

<sup>7</sup> Regulation 32(1) - The Public Contracts Regulations 2006; Regulation 33(1) - The Utilities Contracts Regulations 2006

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**Box 5: Standstill - Means of Communication**

OGC 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. OGC seeks 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**

OGC 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 OGC 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**

OGC seeks feedback from stakeholders as to the extent to which the UK should implement i) and ii) above.

- iii) Under Dynamic Purchasing Systems (DPS) and framework agreements<sup>8</sup>, where call-off contracts are awarded following a further competition, 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

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<sup>8</sup> Please note that the optional derogation from standstill in respect of framework agreements is only for the public sector, not the utilities sector, as standstill is not applicable to call-off contracts in the Utilities Contracts Regulations 2006.

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ineffectiveness will then apply (as outlined in paras 25-26 below). The result is that contracting authorities have a choice between standstill and ineffectiveness for above threshold call-offs: one or the other will have to apply.

- 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 OGC 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. Current Regulations 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. 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**

OGC 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 are to be considered ineffective where:
- i) There is failure to publish a contract notice in the OJEU where 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 the court has made its decision on at least interim measures;
    - The standstill requirement.

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 UK has exercised the derogation as outlined in paragraph 22 above); 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 2(d) 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) clarify that national law should 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 is essential in determining the final policy stance on these options, OGC's current view is described below to give some guidance to stakeholders in their consideration of these issues.
30. Retrospective cancellation would seek to 'undo' what had already been done under the contract prior to the declaration of ineffectiveness. There would be many circumstances in which it would be difficult to do this. Sometimes it would not be possible or sensible to attempt this, and sometimes it might not be clear what such an approach would entail. Examples of such situations include where a building or other infrastructure asset is already under construction, or where services had already been performed. It might be possible in some cases to undo what had been done to some extent but not completely. It is therefore difficult to set out how retrospective cancellation might function in precise terms.
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 Regulations, this would need to be coupled with additional penalties (as discussed in paras 37-41 below).
32. In either case, it is likely that the court would need to be able to address consequential matters, such as the restitution of benefits conferred by one party on another or the prevention of the unjust enrichment of one party by the other. An example might be where ineffectiveness was declared at a point in the contract's life when one party had performed more of its side of the contract than the other. Powers to make compensatory adjustments to prevent unfairness, while respecting the minimum requirement to cancel the parties prospective obligations to perform the contract, might provide a way of addressing the cases where it is not physically possible, or sensible, to undo the contract altogether.

**Box 11: Ineffectiveness - Retrospective or Prospective Cancellation**

OGC seeks views on whether national law should provide for retrospective cancellation, prospective cancellation, or whether the courts should have discretion.

### **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 from resulting from ineffectiveness.

**Box 12: Ability for Courts Not to Apply Ineffectiveness**

OGC expects to implement this option, as it will allow the court flexibility in the application of this provision. Feedback is welcome either to confirm OGC'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 OGC draws stakeholders' attention to it for information only. Feedback is not necessary.

35. OGC also draws stakeholders' attention to the exemption from ineffectiveness, if the related standstill derogation (article 2b(c)) is exercised<sup>9</sup>, 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:
- 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. In other words, contracting authorities have a choice: either apply the standstill period to the call-off contract at the end of the further competition, in which case ineffectiveness will not apply; or alternatively, do not apply the standstill period following further competition, in which case the ineffectiveness rules will apply. As previously stated, this choice only applies in the public sector, not the utilities sector.

**Box 14: Ineffectiveness Exemptions - Frameworks and DPS**

OGC 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 below).
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)]

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

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where the mandatory ineffectiveness criteria in article 2d(1)(b) cases do not apply; 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. 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**  
OGC seeks comments on how best to achieve this, and how much discretion the court should have.

41. The UK 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 at least interim measures;
- iii) The standstill requirement.

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 Directive<sup>10</sup>, where that breach has affected his chances of obtaining the contract.

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

OGC 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; or
  - The authority informs the candidates of the conclusion of the contract with the reasons required by the existing procurement rules.
- ii) 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**

OGC 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), the UK is 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.

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<sup>10</sup> Whichever of Directive 2004/18 or 2004/17 is applicable

## 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.

## Impact Assessment

45. Regulatory Impact Assessments (RIA) are generally required for transposition of EU Directives. The Department for Business, Enterprise and Regulatory Reform (BERR) guidance on impact assessment<sup>11</sup> 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.
46. OGC's current view is that there is 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 will affect public sector processes to some extent, but these are anticipated to be under the £5M threshold. However, OGC is using this first consultation to test this thinking and requests feedback from stakeholders. An early draft developmental/option stage impact assessment is attached to this document on which comments are welcome.

### **Box 18: Regulatory Impact Assessment**

OGC seeks comments on the need for impact assessment and the draft RIA

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<sup>11</sup> <http://www.berr.gov.uk/files/file44544.pdf>

## Conclusion

47. 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.
48. This consultation document aims to provide a UK-tailored breakdown of the main implications and the optional elements of the new Directive, and seeks stakeholder feedback on those options.
49. OGC acknowledges that many of the issues described in this document are not straightforward. However, OGC urges stakeholders to give careful consideration to these matters and provide feedback where requested, as that will ensure a more effective and relevant transposition.
50. OGC will publish a summary of the responses later in 2008 when the consultation has closed and the feedback has been analysed. Thank you for your interest and in anticipation of your feedback.

OGC Policy and Standards Division  
International Team  
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