

**THE TRANSPOSITION OF THE PUBLIC PROCUREMENT
REMEDIES DIRECTIVE 2007/66/EC IN THE UNITED KINGDOM**

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The United Kingdom Public Contracts (Amendment) Regulations 2009 SI 2009/2992¹ and the Utilities Contracts (Amendment) Regulations 2009 SI 2009/3100² represent the transposition of Directive 2007/66/EC amending the Procurement Remedies Directives 89/665/EEC and 92/13/EC. These Amendment Regulations entered into force on 20 December 2009. The new Regulations apply in England, Wales, and Northern Ireland. Scotland has implemented separately and the new Scottish Regulations also entered into

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² http://www.opsi.gov.uk/si/si2009/uksi_20093100_en_1 (accessed in late July 2010). On both instruments see: Henty, "Remedies Directive Implemented into UK Law" (2010) 19 *Public Procurement Law Review* NA115-124.

force on 20 December 2009.³ While this transposition occurred 11 days before the start of 2010, the transposition was of course only ‘felt’ after the holiday period and therefore belongs to the major changes in the public law of the United Kingdom for 2010. The following pages will summarise the most important innovations of the new Public Contracts Regulations, including time limits, the automatic suspensive effect including reverse suspensive effect, the standstill-period, and the new remedy of ineffectiveness.

Remedies are now regulated in Part 9 of the United Kingdom Public Contracts Regulations as amended in 2009. Should the High Court find in favour of the applicant, it may grant an order to set aside or to amend a relevant decision by the contracting authority, suspend the implementation of its decisions and of the procedure itself, or to amend a document (for example regarding the specifications). Before the 2009 amendments damages were the only available remedy after the conclusion or making of the contract,⁴ with the exception of rare cases of fraud or bad faith. The SI 2009/2992 United Kingdom Public Contracts (Amendment) Regulations 2009 and the SI 2009/3100 United Kingdom Utilities Contracts (Amendment) Regulations 2009 introduced the new remedy of ineffectiveness discussed below.

According to Regulation 47D (2) United Kingdom Public Contracts (Amendment) Regulations procurement decisions must be challenged promptly and in any event within three months from when the grounds for review first arose. Hence the time limit starts to run from the time the grounds for review first arose and not “from the time they became

³ Public Contracts and Utilities Contracts (Scotland) Amendment Regulations SSI 2009/428: http://www.opsi.gov.uk/legislation/scotland/ssi2009/ssi_20090428_en_1 (accessed in late July 2010).

⁴ Even SI 2006/05 United Kingdom Public Contracts Regulation 47 (9) read:

“In proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into.”

known to those concerned.” This arrangement is not in compliance with the requirements of EU law, an assessment already clear from *Universale Bau*⁵ and recently confirmed by the Court of Justice in the *Uniplex* case⁶ which directly concerned the relevant United Kingdom time limits. According to EU law limitation periods have to run from the time when the applicant “knew or ought to have known” that an infringement of public procurement rules occurred.⁷ This will make it necessary to amend Regulations 47D (2) and 45D (2), for public contracts and utilities contracts respectively, as an implementation of the *Uniplex* case is required to comply with EU law.⁸

With a time limit that is triggered by the knowledge of the prospective applicant, proceedings might be initiated much later than three months after the breach of procurement law occurred. On the one hand this compromises the objectives of the time limits, to protect the smooth flow of the procurement process and promote legal certainty. On the other hand it is largely within the control of the contracting entity to avoid this effect through transparency. They can avoid this effect by communicating their decisions to the bidders.⁹

⁵ Case C-470/99, [2002] ECR I-11617

⁶ Case C-406/08, *Uniplex*, nyr.

⁷ McGovern, “Two important decisions of the European Court of Justice on time-limits in proceedings for review procedures in public procurement: the *Uniplex* case (C-406/08) and *Commission v. Ireland* (C-456/08)” (2010) 19 *Public Procurement Law Review* 101.

⁸ Henty, “Remedies Directive Implemented into UK Law”, supra note 2, at NA122, whereas Taylor, “Bridging the remedies gap” (2010) 21 *Practical Law Company* 29, at 31 suggests interpreting Regulation 47D (4) in the light of the *Uniplex* judgment.

⁹ In the recent case of *Sita UK Ltd v Greater Manchester Waste Disposal Authority* (Rev 1) [2010] EWHC 680 the High Court decided against a bidder who had initiated proceedings after the contract award when the time limit had elapsed. The bidder had known about the breach in question well before the limitation period had elapsed. According to Skilbeck, “Developments in Public Procurement Law” (2010) 20 *Computers & the Law* 16, at 18

Before the Public Contracts (Amendment) Regulations 2009, the lodging of an application for review had normally no automatic suspensive effect on the ongoing tendering procedure.¹⁰ The new Regulation 47G of the United Kingdom Public Contracts (Amendment) Regulations 2009 SI2009/2992 contains a provision entitled: “Contract making suspended by challenge to award decision”. Where proceedings are started with respect to a contracting authority’s decision to award the contract, and the contract has not been entered into, the starting of the proceedings requires the contracting authority to refrain from entering into the contract. The requirement continues until the court brings the requirement to an end by interim order under Regulation 47H (1) (a), or the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement, for example in connection with an appeal or the possibility of an appeal. Hence the recently amended Regulations introduced an automatic suspensive effect on the making of the contract until the court decided on the case. An automatic suspensive effect ensures that the *status quo* is maintained until a review body decides on the lawfulness of the challenged act.¹¹

Moreover, the possibility of ‘reverse suspensive effect’ by interim order was introduced in Regulation 47H. This will allow the High Court to remove the now automatic suspensive effect, normally on the application of the respective contracting entity. In deciding on such an application the Court will apply the same test formerly – under the previous 2006 Regulations – used for deciding on the granting of interim relief in the form of a suspension of the procurement procedure outlined above. However, this turns the tables: the contracting entity rather than the aggrieved bidder has to invest time and effort,

this will make breaches of procurement law which occur earlier in the procedure more often becoming the subject of review proceedings.

¹⁰ Henty, “Remedies Directive Implemented into UK Law”, *supra* note 2, at 117.

¹¹ Arrowsmith, Linarelli, and Wallace; *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International: London, 2000), at 773.

and has the difficult burden to establish the requirements of the test.¹² Moreover, the new rules give the aggrieved bidder more time.¹³

With regards to contracts covered by the Regulations, the United Kingdom has introduced a ten-day standstill period between the notification of the results of the tendering procedure to the bidders and the formal conclusion or making of the contract in United Kingdom Public Contracts Regulation 32 (3). Aggrieved bidders thus have the opportunity to mount a challenge to an award decision they believe to be legally flawed.

This standstill period was introduced in 2006 following the *Alcatel* judgment of the European Court of Justice¹⁴ and was amended to a 10 or 15 day period by SI 2009/2992 implementing Directive 2009/66/EC. The Amendment Regulations of 2009 have altered the structure of the standstill period.¹⁵ Under the old 2006 Regulations the standstill period was a two-stage process. First, in a standstill letter to the unsuccessful bidders the contracting entity would provide only the basic information about their bids. Second, the recipient of this letter, in other words the unsuccessful bidder, would then have the opportunity to request a debriefing with additional information including the strengths of the successful tender. As there was only a standstill period of ten days, it was very difficult in practice for an aggrieved bidder to collect the necessary information, gather the evidence, instruct lawyers, and apply for an injunction before the conclusion or making of the contract.¹⁶ In contrast, under the 2009 Amendment Regulations 32A, unsuccessful bidders have to be informed about the reasons for the award decisions in the standstill letter already.

¹² Henty, "Remedies Directive Implemented into UK Law", *supra* note 2, at 117.

¹³ Taylor, *supra* note 7, at 31.

¹⁴ Case C-81/98, *Alcatel Austria AG v. Bundesministerium für Wirtschaft und Verkehr* [1999] ECR I-7671.

¹⁵ Henty, "Remedies Directive Implemented into UK Law", *supra* note 2, at 116.

¹⁶ Taylor, *supra* note 7, at 30.

Moreover, the standstill period will only begin once that information has been provided. This gives bidders enough time to collect the relevant information, gather the evidence, mandate the lawyers, and to initiate proceedings as envisaged in Recital 6 of Directive 2007/66/EC. Respect for the standstill period is also enforced by the new remedy of ineffectiveness outlined below, since the conclusion or making of a contract before the standstill period has expired is one of the only three violations for which ineffectiveness can be granted.

Following the requirements of the new Remedies Directive 2007/66/EC,¹⁷ ‘ineffectiveness’ was introduced in the United Kingdom procurement Regulations in December 2009. According to Regulation 47K of the United Kingdom Public Contracts (Amendment) Regulations 2009 the respective courts may declare a public or utility contract ineffective if there are extreme violations of the Public Contracts Regulations. These are the three grounds also provided in the Directive: direct illegal awards, violation of the standstill obligation and of the suspension of the tender procedure, and call-offs above the threshold values of the Directives in the context of framework agreements or dynamic purchasing systems. This will enable legal action by third parties against concluded or made contracts possibly leading to the court nullifying at least parts of the obligations of a concluded or made contract.

According to Regulation 47E of the Public Contracts (Amendment) Regulations 2009 an action for ineffectiveness has to be brought within a time limit of six months after the conclusion or making of the contract. The exception to this rule is when a contract award notice was published or where the contracting authority has informed the economic operator of the conclusion of the contract and provided a summary of the relevant reasons. In these two cases the time limit is 30 days from the date of the publication of the notice.

¹⁷ Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L-134/114.

There is no time limit for the court to issue a decision on an action for ineffectiveness. There are generally no limits for English courts to issue decisions. The time for a court to reach a decision will depend on “the complexity of the issue under consideration and will vary widely.”¹⁸

The approach of ‘prospective ineffectiveness’¹⁹ in Regulation 47M (5) will limit the contractual obligations that can be nullified to those which have yet to be performed at the time of the legal action. This means that “[o]bligations that have been performed by any contractor will not therefore have to be undone.”²⁰ According to the Office of Government Commerce’s *Explanatory Memorandum to the Public Contracts (Amendment) Regulations 2009 No. 2992*, “UK stakeholders strongly favoured the prospective method, even though that would need to be coupled with an additional method, [...]”.²¹ The Directive left the choice between prospective and retrospective ineffectiveness to the Member States. Moreover, consultation of the stakeholders is good legislative practice. However, this citation from the OGC document could be interpreted as suggesting that the choice was mainly made by the stakeholders or at least that their opinion was a decisive factor. Ineffectiveness and public procurement law in general aims to regulate the behaviour of contracting authorities and bidders. Ineffectiveness aims to deal with the most extreme

¹⁸ Trybus, Blomberg, and Gorecki, *Public Procurement Review and Remedies Systems in the European Union* (SIGMA Paper 41, Paris, 2007), http://www.oecd-ilibrary.org/governance/public-procurement-review-and-remedies-systems-in-the-european-union_5kml60q9vklt-en (accessed in February 2011), at 109

¹⁹ Henty, “OGC Consultation on Implementation of the New Remedies Directive” (2009) 18 *Public Procurement Law Review* NA48, at NA50 citing (United Kingdom) Office of Government Commerce, Consultation on the Approach to Implementation, at paragraphs 28-32

²⁰ *Explanatory Memorandum to the Public Contracts (Amendment) Regulations 2009 No. 2992*, (Office of Government Commerce, 2009) http://www.ogc.gov.uk/documents/Remedies_EXPL_MEMO.pdf (accessed in December 2010), at 7.3.1.

²¹ *Ibid.*

violations. While, again, consultation is good legislative practice, it is doubtful whether the details of an instrument devised to punish extreme violations of the law should be decided by stakeholders the new instrument is directed against, if they violate the law in such an extreme way. Prospective ineffectiveness is ‘ineffectiveness light’ and potentially less effective as it is less of a deterrent against the extreme violations it is directed against. Moreover, the distinction between the two forms of ineffectiveness can be difficult to establish.²²

Regulation 47L of the Public Contracts (Amendment) Regulations 2009 contains an exception to ineffectiveness when overriding reasons relating to the general interest can justify that the contract is continued.

Despite all the criticism expressed above, the introduction of ineffectiveness significantly changes the traditional approach to concluded public contracts in England and Wales (and Northern Ireland and Scotland). At least in theory, which is no small feat, the principle of *pacta sunt servanda* is overcome by the amended Regulations. Again, it is not clear yet how ineffectiveness will operate in practice. However, even with the current lack of clarity it is assumed that it is a major deterrent due to the possible costs, delay to the project, the hassle of re-commencing the procurement procedure, the impact on the budget if fines are imposed,²³ as well as the risk of bad publicity and political pressure.²⁴

Traditionally, there were no provisions in relation to periodic penalty payments and no financial or other alternative penalties available in the United Kingdom. However, this changed with the implementation of Directive 2007/66/EC in the United Kingdom (and

²² Skilbeck, *supra* note 8, at 17.

²³ Clifton, “Ineffectiveness – the new deterrent: will the new Remedies Directive ensure greater compliance with the substantive procurement rules in the classical sectors?” (2009) 19 *Public Procurement Law Review* 165

²⁴ Henty, “Remedies Directive Implemented into UK Law”, *supra* note 2, at 116.

Scotland).²⁵ According to Regulations 47N "civil financial penalties" may and in some cases have to be imposed by the court. Moreover, the same provisions allow "contract shortening" as a possible remedy in certain circumstances. Both of these 'alternative penalties' can be imposed in addition to or instead of an order of ineffectiveness. In the context of the latter case, they can be imposed if the court is satisfied that any of the grounds for ineffectiveness apply but does not make such a declaration because of overriding reasons in the public interest (see above). Finally, they can be imposed where the standstill period, the automatic suspension of the procurement procedure, or an interim order has not been respected and the court does not make an order of ineffectiveness, "because none was sought or because the court is not satisfied that any of the grounds for ineffectiveness applies." When the court is considering what 'alternative penalty' to impose, "the overriding consideration is that the penalties must be effective, proportionate and dissuasive." In that context the court will account of all the relevant factors, including the seriousness of the relevant breach of the duty, the behavior of the contracting authority, and in certain contexts the extent to which the contract remains in force.

Compared to the case loads in Germany and France, there are relatively few public procurement cases each year. While this is partly due to the effort and costs²⁶ involved in having to bring proceedings in the High Court and possibly beyond and the unavailability of cheaper lower level procurement review bodies, the small number of public contracts cases in England and Wales (and Scotland and Northern Ireland) is also a result of the general attitude of tenderers towards review proceedings. The Wood Review found that British tenderers are reluctant to challenge mainly due to the negative consequences of their

²⁵ As foreseen by Henty, "OGC Consultation on Implementation of the New Remedies Directive", *supra* note 19, at NA51-52.

²⁶ The costs identified as a deterrent to litigation already by Pachnou, "Bidder remedies to enforce the EC procurement rules in England and Wales" (2003) 12 *Public Procurement Law Review* 35

business relationships and the difficulties of proving a wrongdoing.²⁷ This changed recently. For the last few years there have been about 20+ public procurement cases each year, amounting to an overall body of case law since the beginnings of public procurement litigation of about 200 cases with about 60 in Northern Ireland alone.²⁸ While there has been no research into the reasons for this change of attitude regarding litigation, it appears that the findings of the Wood Review are now at least to an extent outdated. An increased awareness of the available public procurement remedies amongst tenderers is likely to be one factor leading to their increased readiness to seek them. Moreover, there is anecdotal evidence that the introduction of the standstill period following the Alcatel judgment in the 2006 regulations made a considerable difference.

The small number of cases, high litigation costs, and the absence of lower level procurement review bodies below the High Court (and Sheriff Court) led to criticism questioning whether the United Kingdom and Scotland public procurement review and remedies systems were sufficiently effective. The number of cases is increasing and might increase even further in the future. While this is partly due to innovations in the review and remedies systems initiated by the implementation of EU law, there also appears to be a shift from the attitude of many tenderers ‘not to bite the hand that feeds’. This shift might become more dramatic in the future since the new Coalition Government is unlikely to feed as much as its predecessor did.

²⁷ Wood Review: *Investigating UK business experiences of competing for public contracts in other EU countries* (November 2004) www.ogc.gov.uk/documents/woodreview.pdf (accessed in January 2011).

²⁸ This estimate figure emerges from the increased number of United Kingdom and Scotland judgments published in the law reports and discussed in the *Public Procurement Law Review*, other law journals, and the websites of law firms and barristers’ chambers.