

Consultation on Remedies in Public Procurement

Fields marked with * are mandatory.

There are two Directives laying down remedies in relation to public procurement: Directive 89/665/EEC, which covers the public sector, and Directive 92/13/EEC, which covers the utilities sector. Both Directives were thoroughly amended by Directive 2007/66/EC.

The Remedies Directives require, as regards contracts falling within the scope of the Directives laying down substantive rules on public procurement (Directive 2004/17/EC and Directive 2004/18/EC, which are being replaced by Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU), that decisions taken by contracting authorities or contracting entities may be reviewed effectively and, in particular, as rapidly as possible, on the grounds that such decisions have infringed EU public procurement law. Member States must ensure that the review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

The Remedies Directives allow actions to be brought both before the contract is signed (pre-contractual remedies) and after (post-contractual remedies). Pre-contractual remedies are intended to correct the infringement of the public procurement rules in the course of the tendering procedure and in any event, before the contract becomes effective. These include the right of interim measures, a compulsory standstill period and the requirement to suspend the award procedure whilst the appeal is being investigated to prevent the award of the contract. On the other hand, post-contractual remedies aim to declare an existing contract ineffective and/or to provide compensation (mainly damages) to the affected parties after the contract in question has been awarded.

Directive 2007/66/EC obliges the Commission to report to the European Parliament and to the Council on the effectiveness of the Remedies Directives, in particular of the alternative penalties and time limits.

Furthermore, the Commission singled out Directive 2007/66/EC to undergo an evaluation under REFIT (Regulatory Fitness and Performance programme) in 2015. The objective of this evaluation is to assess the functioning of the provisions introduced by Directive 2007/66/EC.

This public consultation should be understood in the context of the above-mentioned report to the Parliament and the Council and evaluation under REFIT.

OBJECTIVE OF THE CONSULTATION

Evaluation of the effectiveness of the provisions of Directive 2007/66/EC on remedies in the field of public procurement

Identity of respondents

*Please indicate your Member State:

Denmark



*

Please identify yourself:

- ☐ (a) Citizen
- ☐ (b) Economic operator (e.g. a business)
- ☐ (c) Non-profit organisation
- ☐ (d) Academia
- ☐ (e) Lawyer
- ☐ (f) Other private entity (please specify)
- ☒ (g) Contracting authority
- ☐ (h) Contracting entity
- ☐ (i) First instance review body
- ☐ (j) Body of appeal against first instance remedy decision
- ☐ (k) Court conducting review if applicable in further instance
- ☐ (l) Other public authority (please specify)

Other private entity (please specify)

Other public authority (please specify)

Have you been involved in public procurement litigation over the last five years?

- ☒ Yes
- ☐ No

*

(i) First instance review body (please specify)

- ☒ (i.1) - administrative
- ☒ (i.2) - judicial

*

Please enter your name/organisation and contact details (address, e-mail, website, phone)

The Danish Regions (represented by Danske Regioner) and Amgros I/S (the joint purchasing entity for pharmaceutical products on behalf of the Danish Regions, owned by the Danish Regions).
Danske Regioner, Att.: Morten Rasmussen, Dampfærgevej 22, 2100 København Ø. Denmark. email: mrs@regioner.dk

Register ID number (if you/your organisation is registered in the EU Transparency register)

*

In the interests of transparency, your contribution will be published on the Commission's website. How do you want it to appear?

- ☒ Under the name supplied? (I consent to the publication of all the information in my contribution, and I declare that none of it is subject to copyright restrictions that would prevent publication.)
- ☐ Anonymously? (I consent to the publication of all the information in my contribution except my name/the name of my organisation, and I declare that none of it is subject to copyright restrictions that would prevent publication.)
- ☐ No publication - your answer will not be published and in principle will not be considered.

Questions

All questions are optional

1. Have the Remedies Directives as modified by Directive 2007/66/EC helped public procurement process to become:

	Yes	Partly	No
More transparent (i.e. more information is available to all companies about the details of public contracts, how they have been awarded, and how parties may challenge decisions)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Fairer (i.e. companies have the same opportunities to bid for public procurement contracts)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
More open and accessible (i.e. there are fewer barriers to companies participating in public procurement contracts, cross border procurement is easier)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
More compelling for contracting authorities / entities to comply with the requirements of substantive Public Procurement Directives.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

2. In your view, what are the most relevant provisions of the Remedies Directives as modified by Directive 2007/66/EC?

Please grade from 1 to 5, 1 being the least relevant:

	1	2	3	4	5
Automatic debrief to bidders at the time of the contract award decision notice	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
'Standstill period' to be at least 10 days	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Minimum time limits for applying for a review	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Suspension of the contract award procedure where review proceedings are initiated	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The ability of an independent review body to render a contract award ineffective	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Alternative penalties (the imposition of fines on the contracting authority or the shortening of the duration of the contract)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Voluntary <i>ex ante</i> transparency notice	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The possibility to award damages to persons harmed by an infringement	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

3. How long does a review procedure usually last for:

3.1 interim measures?

	Less than 1 month	Between 1 and three months	Between 3 and 6 months	Between 6 and 12 months	More than 1 year
In first instance?	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
In second instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
In third instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

3.2 the setting aside of decisions taken unlawfully?

	Less than 1 month	Between 1 and three months	Between 3 and 6 months	Between 6 and 12 months	More than 1 year
In first instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
In second instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
In third instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

3.3 damages?

	Less than 1 month	Between 1 and three months	Between 3 and 6 months	Between 6 and 12 months	More than 1 year
In first instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
In second instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
In third instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

3.4 ineffectiveness?

	Less than 1 month	Between 1 and three months	Between 3 and 6 months	Between 6 and 12 months	More than 1 year
In first instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
In second instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
In third instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

4. What is/should be the standard for review in public procurement cases in your jurisdiction?

- ☒ Exclusively legal matter
- ☐ Legal and technical matters

5. Is there any impact on time and/or standard for review depending on whether the case is dealt by a specialised review body or an ordinary court?

- ☐ Yes
- ☒ Partly
- ☐ No

Please give examples

6. To what extent are the Remedies Directives as modified by Directive 2007/66/EC sufficiently clear and precise?

- ☐ Significantly
- ☒ Moderately
- ☐ Not at all

Please give examples of provisions/notions which are not clear or precise.

7. To what extent do the Remedies Directives as modified by Directive 2007/66/EC balance the interest of economic operators in ensuring the effectiveness of public procurement law and the interest of contracting authorities / entities in limiting frivolous litigation?

- ☒ The balance is too much on the interest of economic operators
- ☐ The balance is on the middle
- ☐ The balance is too much on the interest of contracting authorities / entities

Please justify your views.

As implemented and interpreted in Denmark the balance is too much on the interest of economic operators.

8. To your knowledge, has the remedy system in your Member State caused delays in the award of public contracts?

- ☒ Yes, frequently
- ☐ Only occasionally
- ☐ No

What was in your view the main reason for the delay (other than the use of the remedy itself):

- ☐ national procedural rules not laid down in the Remedies Directives
- ☒ conduct of parties
- ☐ ineffectiveness of the national judicial system
- ☐ other (please specify)

Other (please specify)

9. Should interim measures be considered an effective remedy?

- ☒ Yes
- ☐ Yes, but only exceptionally
- ☐ No

10. Should a standstill period be considered an effective remedy?

- ☒ Yes
- ☐ Yes, but only exceptionally
- ☐ No

11. Should ineffectiveness be considered an effective remedy, in particular helping to tackle direct awards?

- ☒ Yes
- ☐ Yes, but only exceptionally
- ☐ No

12. Should alternative penalties be considered an effective remedy?

- ☒ Yes
- ☐ Yes, but only exceptionally
- ☐ No

13. Should damages be considered an effective remedy?

- ☒ Yes
- ☐ Yes, but only exceptionally
- ☐ No

14. Do remedies exist for contract below the EU thresholds in your jurisdiction?

- ☐ Yes, they are the same as for contracts above the EU thresholds
- ☒ Yes, but they are different from those intended for contracts above the EU thresholds (please specify the differences)
- ☐ No

please specify the differences

Not all remedies are the same, for instance ineffectiveness does not apply under the current law.

15. Would alternative dispute resolution (ADR) /mediation prove operational in the context of public procurement disputes?

- ☒ Yes
☐ No

16. Do court fees apply to public procurement cases in your jurisdiction?

- ☒ Yes
☐ No

17. Do administrative fees apply to public procurement cases in your jurisdiction?

- ☒ Yes
☐ No

18. If the answer to questions 16 or 17 is affirmative, would you define the level of fees as dissuasive for users of the review and justice system?

- ☐ Yes (if possible, please specify)
☒ No

if possible, please specify

19. Are there any other costs (such as the cost of legal advice and representation) that may have an impact in access to justice in your jurisdiction?

- ☒ Yes (if possible, please specify)
☐ No

if possible, please specify

Cost of legal advice for parties is by far a larger expense than administrative fees and court fees.

20. Do you think there are still problems in addressing breaches in EU public procurement law?

- ☒ Yes (please briefly describe such problems)
☐ No

please briefly describe such problems

EU rules and EU-court practise is often not entirely clear which causes doubt when interpreted in national law.

Additional comments (please specify to which question/questions they relate)

The rules on ineffectiveness in the remedies directives are interpreted in an unbalanced and disproportionate manner in Denmark as they are also applied in many other instances than those set out in the remedies directives. The Danish government has in spring 2015 introduced a draft new public procurement law. According to the draft law a decision by the national complaints board whereby an award decision is annulled (apart from exceptional cases identical to those applying to contracts directly awarded) will now oblige the contracting authority to annul the contract in force.

The purpose of the remedies directives is to ensure that effective and proportionate remedies are available in national law. The new Danish law effectively means that contracts in force must be annulled if the award decision was unlawful despite the fact that the conditions for imposing the sanction ineffectiveness are not present and ex ante transparency notices are not available to safeguard the interests of contracting authorities and their contract parties.

The new requirement in Danish law is effectively the same as declaring any contract ineffective provided the award decision has been annulled and not only in those cases where the rules on ineffectiveness should be used according to the remedies directives. This is not in line with the principle of proportionality.