Basic information

2006/0066(COD) COD - Ordinary legislative procedure (ex-codecision procedure) Directive	Procedure completed
Award of public contracts: improving the effectiveness of review procedures **Subject** 2.10.02 Public procurement	

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
IMCO Internal Market and Consumer Protection	FRUTEAU Jean-Claude (PSE)	04/09/2006

Committee for opinion	Rapporteur for opinion	Appointed
ECON Economic and Monetary Affairs	MITCHELL Gay (PPE-DE)	25/09/2006
EMPL Employment and Social Affairs	The committee decided not to give an opinion.	
ITRE Industry, Research and Energy	The committee decided not to give an opinion.	
JURI Legal Affairs (Associated committee)	MAYER Hans-Peter (PPE-DE)	02/10/2006

Council of the European Union

Council configuration	Meetings	Date
Education, Youth, Culture and Sport	2829	2007-11-15

European Commission

Commission DG	Commissioner
Financial Stability, Financial Services and Capital Markets Union	MCCREEVY Charlie

Key events

Date	Event	Reference	Summary

04/05/2006	Legislative proposal published	COM(2006)0195	Summary
04/07/2006	Committee referral announced in Parliament, 1st reading		
28/09/2006	Referral to associated committees announced in Parliament		
08/05/2007	Vote in committee, 1st reading		Summary
10/05/2007	Committee report tabled for plenary, 1st reading	A6-0172/2007	
21/06/2007	Decision by Parliament, 1st reading	T6-0278/2007	Summary
21/06/2007	Results of vote in Parliament		
21/06/2007	Debate in Parliament		
15/11/2007	Act adopted by Council after Parliament's 1st reading		
11/12/2007	Final act signed		
11/12/2007	End of procedure in Parliament		
20/12/2007	Final act published in Official Journal		

Technical information

Procedure reference	2006/0066(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
Stage reached in procedure	Procedure completed
Committee dossier	IMCO/6/36315

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Committee draft report		PE386.397	29/03/2007	
Amendments tabled in committee		PE388.410	20/04/2007	
Committee report tabled for plenary, 1st reading/single reading		A6-0172/2007	10/05/2007	
Text adopted by Parliament, 1st reading/single reading		T6-0278/2007	21/06/2007	Summary

Council of the EU

Document type	Reference	Date	Summary
Draft final act	03634/2007/LEX	11/12/2007	

European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2006)0195	04/05/2006	Summary
Document attached to the procedure	SEC(2006)0557	04/05/2006	
Follow-up document	COM(2017)0028	24/01/2017	Summary
Follow-up document	SWD(2017)0013	24/01/2017	

Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
EESC	Economic and Social Committee: opinion, report	CES0087/2007	18/01/2007	

Additional information

Source	Document	Date
National parliaments	IPEX	
European Commission	EUR-Lex	

Final act

Directive 2007/0066
OJ L 335 20.12.2007, p. 0031 Summary

Award of public contracts: improving the effectiveness of review procedures

2006/0066(COD) - 04/05/2006 - Legislative proposal

PURPOSE: to improve the effectiveness of review procedures concerning the award of public contracts.

PROPOSED ACT: Directive of the European Parliament and of the Council.

CONTENT: in presenting this proposal to amend the “Remedies Directives”, the European Commission is seeking to improve economic operators’ recourse to effective and harmonised procedures in cases of illegally awarded public procurement award contracts.

The Remedies Directives refer to Directive 89/665/EC, which applies to contracts for works, services and supplies and Directive 92/13/EC which applies to water, energy, transport and the postal services sectors. Procedures for the correction of infringements are foreseen in the Directives. Those that do exist, however, have varying time limits applicable to pre-contractual reviews, leading to a situation whereby most Member States retain national arrangements. These national arrangements result in contracts being signed irreversibly – even in cases where they have been awarded illegally. Indeed, the continuing lack of co-ordinated review procedures for the awarding of public contracts, has been described by the European Court of Justice as “the most serious breach of Community law in the field of public procurement on the part of an awarding authority”. Hence the need to remedy the current lack of effective procedures and introduce measures which allow for simple, though effective, review procedures.

A further impetus behind presenting harmonised and uniform review procedures is the logic that such a move would encourage economic operators to pursue public award contracts in other EU Member States, confident that where a contract has been awarded illegally, they can have recourse to simple and effective procedures. Thus, this proposal is fully in line with the EU’s commitment to opening up the internal market as well as being fully in line with the EU’s overall policy on targeting corruption.

Prior to presenting this proposal, the European Commission held a public consultation exercise, which was open to economic operators, professional associations and lawyers, European and national professional associations as well as non-governmental experts and the awarding authorities themselves. The Commission also prepared an impact assessment (see below) in which a number of options for future actions were considered. Based on the results of the impact assessment and taking account of views expressed during the public consultation exercise, the European Commission decided to present a “standstill” procedure.

Put concretely, this measure states that:

- awarding authorities, upon completion of a formal procedure for awarding a contract, must suspend the conclusion of the contract until the end of a minimum period of ten calendar days from the date on which the economic operators involved in the award procedure are given a reasoned notification of the award decision.

- When an awarding authority considers that it has the right to directly award a contract with a value above the thresholds fixed by the Directives on public procurement it must (except in cases of extreme urgency) suspend the conclusion of the contract for a minimum period of ten calendar days, following sufficient publicity in the form of a simplified award notice.

- If a contract is concluded illegally during the standstill period, such an action is considered invalid. A competent review body will be responsible for stating what the consequences of an illegal action should be. Economic operators must refer the matter to the body within six months with effect from the date of conclusion.

- The unused attestation and conciliation mechanisms are repealed.

The proposal is fully in line with the both the subsidiarity and proportionality principle. Significant disparities among the Member States, in terms of the public procurement review procedures, has resulted in ineffective remedies as well as discouraging Community enterprises from tendering outside their country of origin. Experience shows that this legal uncertainty can not be removed by isolated and separate Member State action. In this respect, the EU is well positioned to propose uniform reviews procedures. Further, most Member States accept the seriousness of the problem – such as the race to sign contracts in the case of formal award procedures. Member States retain their power to appoint the bodies responsible for the review procedures and to maintain the national procedural rules applicable to such reviews. As regards the proportionality principle, the proposal is limited to providing some improvement to existing provisions where the amounts are higher than the thresholds fixed by Directives 2004/18/EC and 2004/17/EC. It does not demand any changes to existing administrative or judicial systems.

Lastly, the proposal will be extended to the European Economic Area. It has no implications for the Community budget.

Award of public contracts: improving the effectiveness of review procedures

2006/0066(COD) - 11/12/2007 - Final act

PURPOSE: to improve the effectiveness of review procedures concerning the award of public contracts.

LEGISLATIVE ACT : Directive 2007/66/EC of the European Parliament and of the Council 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.

CONTENT: the Council adopted at first reading, further to agreement reached with the European Parliament, a Directive amending Council Directives 89/665/EEC and 92/13/EEC (the “Remedies Directives”) with regard to improving the effectiveness of review procedures concerning the award of public contracts. Directives 89/665/EEC and 92/13/EEC are intended to ensure the effective application of Directives 2004/18/EC and 2004/17/EC. As a result of weaknesses revealed by the case law of the Court of Justice, the mechanisms established by Directives 89/665/EEC and 92/13/EEC did not always make it possible to ensure compliance with Community law, especially at a time when infringements could still be corrected. Consequently, the provisions of this Directive are intended to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. The weaknesses noted included in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes resulted in contracting authorities which wished to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for tenderers who had not been definitively excluded, the Directive provides for a minimum standstill period.

The main points are as follows:

-**Minimum standstill periods:** the Directive provides a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not. The standstill period will give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. A contract may not be concluded following the decision to award a contract before the expiry of a period of at least 10 calendar days with effect from the day after the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of at least 15 calendar days with effect from the day after the date on which the contract award decision is sent to the tenderers and candidates concerned. In the latter case, Member States may also provide that a contract shall not be concluded before the expiry of at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision. If this standstill period has not been respected, the Directive requires national courts under certain conditions to set aside a signed contract, by rendering the contract 'ineffective'.

-**Illegal direct awards of public contracts**: this has been called the most serious infringement of EU procurement law. National courts will also be able to render these public contracts ineffective if they have been illegally awarded without transparency and prior to competitive tendering. In these cases the contract will need to be tendered again, this time according to the appropriate rules.

National courts may decide that these contracts remain in force only if required by overriding reasons relating to a general interest. In those cases, alternative penalties must be applied instead. These alternative penalties must be effective, proportionate and dissuasive, and may entail the shortening of the duration of the contract or the imposition of fines on the contracting authority.

Derogations: the standstill period is not intended to apply if Directive 2004/17/EC or Directive 2004/18/EC do not require prior publication of a contract notice in the OJ, in particular in all cases of extreme urgency. In those cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no other candidates. In cases of contracts based on a framework agreement or a dynamic purchasing system, Member States may, instead of introducing a mandatory standstill period, provide for ineffectiveness as an effective sanction in accordance with certain provisions of the legislation. In certain cases, contracts based on a framework agreement do not require prior publication of a contract notice in the OJ, and in those cases a standstill period is not mandatory.

Ineffectiveness: in order to prevent the serious infringements of the standstill obligation and the automatic suspension, which are prerequisites for effective review, effective sanctions must apply. Contracts that are concluded in breach of the standstill period or the automatic suspension will therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that these infringements have affected the chances of the tenderer applying for a review to obtain the contract. In the case of other infringements of formal requirements Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States will have the flexibility to provide for alternative penalties. The latter will be the imposition of fines which should be paid to a body independent of the contracting authority or a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application. The Directive does not exclude the application of stricter sanctions according to national law.

Sanctions: in order to ensure the proportionality of the sanctions applied, Member States may give the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In those cases alternative penalties should be applied instead. In exceptional cases the use of the negotiated procedure without publication of a contract notice within the meaning of Directive 2004/18/EC or Directive 2004/17/EC would be permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified. Economic interests in the effectiveness of a contract may only be considered as overriding reasons if, in exceptional circumstances, ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons.

Review: no later than 20 December 2012, the Commission shall review the implementation of the Directive and report in particular on the effectiveness of the alternative penalties and time limits.

TRANSPOSITION: 20 December 2009.

ENTRY INTO FORCE: 09/01/2008.

Award of public contracts: improving the effectiveness of review procedures

2006/0066(COD) - 21/06/2007 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted the resolution drafted by Jean-Claude **FRUTEAU** (PES, FR), and made some amendments to the proposal 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. Parliament reached agreement with the Council before the first-reading vote in plenary.

The main points are as follows:

Standstill period: the Commission had proposed that, under the "standstill" clause, authorities must suspend the conclusion of an awarded public contract for at least 10 days from the date when the contract award decision is sent to relevant tenderers. MEPs voted to retain this minimum period in cases where such notification is made by fax or electronic means. In instances where notification is made by other means, however, it extended it to 15 days. Accordingly, the text now states that a contract may not be concluded following the decision to award a contract before the expiry of a period of at least 10 calendar days with effect from the day after the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of at least 15 calendar days with effect from the day after the date on which the contract award decision is sent to the tenderers and candidates concerned. In the latter case, Member States may also provide that a contract shall not be concluded before the expiry of at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Derogations: the standstill period is not intended to apply if Directive 2004/17/EC or Directive 2004/18/EC do not require prior publication of a contract notice in the OJ, in particular in all cases of extreme urgenc. In those cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. Finally, in cases of contracts based on a framework agreement or a dynamic purchasing system, Member States may, instead of introducing a mandatory standstill period, provide for ineffectiveness as an effective sanction in accordance with certain provisions of the legislation. In certain cases, contracts based on a framework agreement do not require prior publication of a contract notice in the OJ, and in those cases a standstill period is not mandatory.

Ineffectiveness: in order to prevent the serious infringements of the standstill obligation and the automatic suspension, which are prerequisites for effective review, effective sanctions must apply. Contracts that are concluded in breach of the standstill period or the automatic suspension will therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent

that these infringements have affected the chances of the tenderer applying for a review to obtain the contract. In the case of other infringements of formal requirements Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States will have the flexibility to provide for alternative penalties. The latter will be the imposition of fines which should be paid to a body independent of the contracting authority or a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application. The Directive does not exclude the application of stricter sanctions according to national law.

The consequences resulting from a contract being considered ineffective will be determined by national law.

In order to ensure the proportionality of the sanctions applied, Member States may give the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In those cases alternative penalties should be applied instead. The independent review body should examine all relevant aspects in order to establish whether overriding reasons relating to a general interest require that the effects of the contract should be maintained. In exceptional cases the use of the negotiated procedure without publication of a contract notice within the meaning of Directive 2004/18/EC or Directive 2004/17/EC would be permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified. Economic interests in the effectiveness of a contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons. Furthermore, the need to ensure over time the legal certainty of the decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective and to ensure that consequences follow from that.

Illegal direct awards of public contracts: this is the most serious infringement of EU procurement law. Therefore a contract resulting from an illegal direct award should be considered ineffective in principle. The ineffectiveness should not be automatic but should be ascertained by a decision by an independent review body. Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunities to compete.

Implementation of the Directive: The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of the national review procedures. The Member States shall communicate to the Commission on a yearly basis the text of all decisions, together with their reasoning, taken by their review bodies

Review: No later than three years after implementation of this Directive the Commission shall review its implementation and report to the European Parliament and to the Council on its effectiveness, in particular on the effectiveness of the alternative penalties and the time limits.

Award of public contracts: improving the effectiveness of review procedures

2006/0066(COD) - 24/01/2017 - Follow-up document

The Commission has presented a report on the effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as amended through Directive 2007/66 /EC (known as the Remedies Directives) concerning review procedures.

The objective of the Remedies Directives is to ensure that economic operators have access to rapid and effective redress procedures throughout the Union if they believe that contracts have been awarded in breach of the EU's public procurement directives. They allow for legal actions to be taken both before the signature of a contract (pre-contractual remedies) and after its signature (post-contractual remedies).

Main conclusions: on the basis of the evaluation, the Commission concludes that the Remedies Directives, in particular the amendments introduced by Directive 2007/66/EC, **largely meet their objectives** both effectively and efficiently even if it has not been able to quantify their costs and benefits in concrete terms.

The remaining difficulties stem from national legislation and not in the remedies directives themselves. From a qualitative point of view, **the benefits of the Remedies Directives outweigh their costs**. They remain relevant and continue to present EU added value.

The Commission **does not see the need to amend the remedies directives** at this stage and therefore proposes to maintain them in their present form.

Weaknesses identified: despite the positive findings of the evaluation, some weaknesses were observed. The Commission thus recognises that:

- **certain provisions of the Remedies Directives are not clear.** For example, (i) the references to 'contract notices' in these directives do not reflect the fact that the new Directive 2014/24/EU authorises the use of a pre-information notice, instead of a contract notice, to call for competition in certain circumstances; (ii) clarification should be provided as regards the application of the Directives to changes in public procurement and concession contracts, the termination of such contracts and to the light procurement regime;
- **information on national remedies systems** has not been collected in a structured manner and has been rarely used for policy making purposes. This makes the assessment of the performance of the Directives more difficult;
- **specialised first instance administrative appeals bodies** are generally more effective than first instance judicial courts in terms of the length of proceedings and the standards of review.

Action to be taken: the Commission intends to ensure **greater convergence between the remedies systems** applied in the Member States by making use of the following additional measures:

- **increasing transparency in the performance of national recourse systems** by defining, together with the Member States, a limited number of objective indicators (number of complaints, number of substantiated complaints, costs, length of proceedings, etc.). These indicators would be published in the Single Market Scoreboard;

- **promoting cooperation between primary appeal bodies** by encouraging them to network to improve the exchange of information and good practices in regard to certain aspects of the application of the Remedies Directives and by paying particular attention to the strengthening of first instance administrative appeals bodies;
- **disseminating guidance** on some important aspects of the Remedies Directives in order to allow a better understanding of some of their provisions. These include: (i) the interaction between the Remedies Directives and the new legislative package on public procurement, and (ii) the definition of the criteria to be applied to lift the automatic suspension of the conclusion of the contract as a result of the introduction of legal action;
- taking the necessary measures to bring national practices into line with EU rules if **breaches** of the Remedies Directives are found.