

**EXPLANATORY MEMORANDUM TO
THE PUBLIC PROCUREMENT (MISCELLANEOUS AMENDMENTS)
REGULATIONS 2011**

2011 No. 2053

1. This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 This instrument amends 5 other instruments relating to public procurement. It does so for miscellaneous purposes, each of which affects two or more of the principal instruments in a similar way.

- 2.2 The instruments amended are as follows (with the abbreviations used, for convenience, to refer to them in this Memorandum):

- 2.2.1 The Public Contracts Regulations 2006 (SI 2006/5) (“the PCR”);
- 2.2.2 The Utilities Contracts Regulations 2006 (SI 2006/6) (“the UCR”);
- 2.2.3 The Defence and Security Public Contracts Regulations 2011 (SI 2011/1848) (“the DSPCR”);
- 2.2.4 The Public Contracts (Scotland) Regulations 2006 (SSI 2006/1) (“the Scottish PCR”);
- 2.2.5 The Utilities Contracts (Scotland) Regulations 2006 (SSI 2006/2) (“the Scottish UCR”).

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 It may be helpful to the Committee to know why regulation 10 was included in this instrument instead of relying wholly on section 17 of the Interpretation Act 1970.

- 3.1.1 The most important consideration here was the fact that some of the references to the Office of Government Commerce (“OGC”) that are replaced by this instrument refer to interaction between the OGC and the EU Commission under the provisions of the relevant Directive rather than under the implementing regulations in which the references occur (the purpose of the relevant domestic regulations being merely to give legal effect in domestic law to an exemption that arises in EU law once the Commission has, or in some cases has failed within a certain time, to do something in accordance with the relevant provisions of the Directive). This affects the references to the OGC in regulations 9(1)(a) and (c)(i) and 34(5)(e)(i) and (iii)(aa) of the UCR.

3.1.2 Secondly, it was thought best to eliminate scope for any possible argument that a change in the identity of the person who is to do something can be said to be a sufficiently material change in the provision to cast doubt about whether the relevant thing done by one person 'could have been ... done' (in terms of section 17(2)) under the amended provision which refers to it being done by a different person. This potentially concerns determinations made by the OGC under regulation 41(3) of the PCR and regulation 39(3) of the UCR and the provisions concerning the Treasury and civil financial penalties in regulation 47N of the PCR and regulation 45N of the UCR. In the latter respect, an additional provision has also been included in regulation 10 of this instrument to put beyond any doubt that the fact that the relevant Court order refers textually to the Treasury does not prevent enforcement proceedings being taken, if necessary, by the Minister for the Cabinet Office.

4. Legislative Context

4.1 Public procurement is regulated by the EU, primarily through a number of directives. Two of these were adopted in 2004, one applying to the public sector¹ and another applying to the utilities sector². These directives contain detailed procedural rules for the award of contracts. Provisions on legal review procedures and the remedies that are available when the rules are breached are contained in two separate directives, collectively known as the remedies directives³ (again one applying to the public sector and one to the utilities sector). The procedural procurement directives and the remedies directives are transposed into the law of England and Wales and Northern Ireland through one set of regulations for each of the two sectors: the PCR covering the public sector and the UCR covering the utilities sector. These two sets of Regulations have been amended on various occasions previously⁴. In Scotland, where responsibility is devolved, the directives are similarly implemented by two sets of regulations, one for each sector: the Scottish PCR and the Scottish UCR. This instrument amends all 4 of these sets of principal Regulations.

4.2 In 2009, a further sector-specific procurement directive was adopted, to cover the fields of Defence and Security⁵. This time, both procedural and remedies provisions were included in a single directive. This is implemented, for the whole of the UK, by the DSPCR, which were made on 28th July 2011 (in force 21st August 2011). Those Regulations are also amended by this instrument.

¹ Directive 2004/18/EC.

² Directive 2004/17/EC.

³ Directive 89/665/EC (public sector); and Directive 92/13/EEC (utilities sector), each of which was extensively amended by Directive 2007/66/EC.

⁴ Of particular relevance in the present context are the amendments made in 2009 to implement the amending remedies directive mentioned in footnote x. These amendments were made by the Public Contracts (Amendment) Regulations 2009 (SI 2009/2992) and the Utilities Contracts (Amendment) Regulations 2009 (SI 2009/3100), and amounted to a substantial expansion and recasting of the provisions about remedies,

⁵ Directive 2009/81/EC.

- 4.3 The changes made by this instrument do not arise from a further EU directive. The amendments made by regulations 17 and 24 arise from the changes made by the Treaty of Lisbon, but otherwise the changes arise either from new case law, policy changes or the correction of errors in previous amendments, as explained more fully under heading 7 below.
- 4.4 A transposition note has not been prepared for this instrument. No new directive is being implemented, and the transposition notes prepared when the relevant directives were originally transposed remain accurate. This instrument makes changes which are largely technical, minor or peripheral to the core requirements of the relevant Directive. As a result, they do not impinge on the information given in earlier transposition notes.

5. Territorial Extent and Application

- 5.1 The amendments made by this instrument, and related transitional provisions, have the same extent as the Regulations that are amended. Accordingly-
- 5.1.1 those relating to the PCR and the UCR extend to England and Wales and Northern Ireland only;
 - 5.1.2 those relating to the DSPCR extend to the whole of the United Kingdom;
 - 5.1.3 those relating to the Scottish PCR and the Scottish UCR extend to Scotland only. These two sets of Regulations were made by the Scottish Ministers under devolved powers, and they are amended by this instrument at the request of the Scottish Ministers as the amendments arise out of UK machinery of Government changes.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

- 7.1 The instrument does various things which can be considered in several categories-
- 7.1.1 changes to the time limits within which proceedings can be brought by economic operators who wish to challenge procurement decisions made by contracting authorities⁶, and linked procedural changes;

⁶ Strictly speaking, 'utility' is the correct expression where the UCR is concerned but, for convenience, this Memorandum uses 'contracting authority' (the correct term where the PCR and DSPCR are concerned) to cover both categories.

- 7.1.2 a change to what triggers the ‘automatic suspension’ of a contracting authority’s ability to enter into a contract when the award of the contract is challenged by proceedings before the contract is actually entered into;
 - 7.1.3 updating the grounds upon which an economic operator can be rejected under regulation 23 of the PCR and regulation 26 of the UCR;
 - 7.1.4 machinery of Government changes;
 - 7.1.5 updating to reflect the Treaty of Lisbon;
 - 7.1.6 miscellaneous minor amendments;
 - 7.1.7 transitional provision.
- 7.2 The changes to the time limits arise from the judgment of the Court of Justice of the EU (“the ECJ”) in Case C-406/08 (the “Uniplex” case). The case directly concerned the UCR⁷, which required proceedings to be started ‘promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose’, subject to an open-ended discretion for the Court to extend time. The ECJ held that two features of these requirements were incompatible with EU law: the ‘promptly’ requirement, and the requirement for the 3 months to be calculated from, in effect, the time when the relevant breach of the procurement rules occurred (rather than from the date on which the claimant knew, or ought to have known, that the breach had occurred - the latter date is referred to, for simplicity, in the following paragraphs of this Memorandum as ‘the date of knowledge’).
- 7.3 It would have been straightforward to amend the PCR and UCR simply to remove the ‘promptly’ element, and to require the 3 months to be reckoned from the date of knowledge⁸, but the policy context was not as straightforward. The inability to impose a ‘promptly’ requirement which could be interpreted and applied flexibly by the High Court in the particular circumstances of each case, raised the question of what, if any, alternative means might, compatibly with EU law, best enable the urgency of particular circumstances to be recognised. Also, the policy rationale behind the original 3 month time limit and the open-ended discretion for the Court to extend it, rested largely on the need to avoid injustice in cases in which there was a significant delay between the date of breach and the date of knowledge – a policy rationale which would no longer exist if the limit were to run, as required by the ECJ, from the date of knowledge rather than the date of breach.
- 7.4 In the light of public consultation (see under heading 8 below), the Cabinet Office decided to introduce a limit of 30 days, running from the date of knowledge, capable of being extended in the Court’s discretion up to 3 months (but no longer) from the date of knowledge. This was considered to strike the best balance between the interests of claimants and defendants in a way which was compatible with the requirements of EU law laid down by the ECJ in Uniplex. The arguments for and against the various policy

⁷ The provisions of the PCR were identical in substance.

⁸ As the relevant provisions of the DSPCR (as originally made earlier this year) did, pending the outcome of the Cabinet Office-led review of what more fundamental changes should be made.

options, and the Cabinet Office's reasons for reaching its conclusions on the optimum policy, are summarised in its response. This change applies to the PCR, UCR and DSPCR.

- 7.5 The instrument also refocuses the time limits so that what the claimant needs to do within the time limit is simply to issue the proceedings rather than to serve them (after issue) on the defendant. This change (which restores the approach that applied before changes to the regulations in 2009) sidesteps problems with how the 'deemed service' rules (applicable under rules of court) had affected the time limits introduced in 2009. This technical issue is explained at greater length in the Cabinet Office's supplemental consultation note (see under heading 8 below). This is coupled with a new requirement for the claimant to serve the claim form within 7 days of issuing it, which brings these proceedings into line, in this respect, with judicial review proceedings. These changes, which were suggested by the Procurement Lawyers' Association in their response to the public consultation, apply to the PCR, UCR and DSPCR.
- 7.6 The instrument also modifies the obligation on a contracting authority to send a 'standstill notice' prior to awarding a contract. Such a notice serves the purpose of alerting unsuccessful candidates or tenderers of the contracting authority's decision to award the contract to one of their competitors, to give them an opportunity to start proceedings challenging the decision before the contract is actually signed. The modification is that it will no longer be necessary to send a notice to a tenderer who has already been excluded from consideration, if the time limit for challenging that exclusion has elapsed. This had always been permitted in principle by the relevant Directives, but the existence of open-ended Court discretion to extend the time limit under the implementing regulations meant that, at the stage at which a standstill notice had to be sent, it would never be possible to take the view that a claimant who has not challenged the limit would not be granted an extension were he to attempt to do so, however late. Now that there will not be open-ended discretion to extend time, this opportunity has been taken to amend the PCR, UCR and DSPCR to enable contracting authorities to refrain from sending a standstill notice to tenderers who have been excluded where 3 months (which will now be the maximum possible extension of time) has expired, or if the legality of the exclusion has already been upheld by the Court.
- 7.7 The instrument also modifies the requirement on contracting authorities to refrain from entering into a contract the award of which is challenged by proceedings under the Regulations. The requirement will now arise when the authority has become aware that a claim form has been issued instead of when the claim form is deemed by rules of court to be served. The reason for this change is that the 'deemed service' provisions in rules of court do not produce a satisfactory effect when applied for this purpose (as explained in greater technical detail in the Cabinet Office's supplemental consultation note - see under heading 8 below). These changes apply to the PCR, UCR and DSPCR.

- 7.8 The instrument also updates the grounds upon which an economic operator can be rejected under regulation 23 of the PCR and regulation 26 of the UCR⁹. The most significant changes are: -
- 7.8.1 The lists of criminal offences in Regulation 23(1) and 26(1) have been updated to include relevant offences created or consolidated since the Regulations were made.
 - 7.8.2 The original statutory references within Regulations 23(1) and 26(1), including those that have since been repealed, have been retained in order to capture historical convictions, with the following exceptions: -
 - 7.8.2.1 The relevant Directives define ‘participation in a criminal organisation’ by reference to Article 2(1) of Council Joint Action 98/733/JHA, which has since been repealed and replaced by Council Framework Decision 2008/841/JHA. Accordingly we have referenced the current definition and deleted the reference to the repealed provision.
 - 7.8.2.2 The offence of corruption has been limited to active corruption in order to bring the provisions more closely into line with the Directives, which distinguish between active (in effect giving a bribe) and passive (in effect receiving a bribe) corruption. The Directives only require mandatory exclusion in the event of active corruption. We have followed the terms of the Directives by defining ‘active corruption’ by reference to the Council Act of 26 May 1997 and Council Joint Act 98/742/JHA. Council Joint Action 98/742/JHA has since been repealed by Council Framework Decision 2003/568/JHA; however, as the same does not contain a deeming provision, the Regulations continue to refer to the original definition.
 - 7.8.2.3 The references to the Money Laundering Regulations 2007 have been substituted by section 340(11) of the Proceeds of Crime Act 2002, as ‘money laundering’ is defined within those regulations by reference to the 2002 Act.
 - 7.8.3 The relevant Northern Ireland offences have been inserted with a view to providing greater transparency and legal certainty.
 - 7.8.4 In accordance with the wording of the Directives, the conspiracy offences have been extended to include conspiracy to commit offences outside England and Wales (or the United Kingdom in the case of Northern Ireland).
 - 7.8.5 The principal money laundering offences have been inserted to capture convictions pursued under the Criminal Justice Act 1988, the Proceeds

⁹ The DSPCR, as originally made, incorporated comparable changes.

of Crime (Northern Ireland) Order 1996 and the Drug Trafficking Act 1994 via transitional provisions.

- 7.8.6 Regulation 23(4) and regulation 26(5) have been updated to take account of Debt Relief Orders and Debt Relief Restrictions Orders.
- 7.8.7 The provisions relating to discretionary exclusion on the grounds of misrepresentation have been brought closer into line with the wording of the applicable Directive. The revised provision now enables a contracting authority to exclude an economic operator which is guilty of serious misrepresentation in providing any information related to the selection process or where it fails to provide such information when requested to do so.
- 7.9 The instrument also replaces references to the Treasury and the OGC with references to the Minister for the Cabinet Office and the Cabinet Office. This reflects the transfer of responsibility for the OGC from the Treasury to the Cabinet Office (announced by the Prime Minister on 15 June 2010¹⁰), and ensuing administrative re-arrangements. These changes apply to the PCR, the UCR and, at the request of the Scottish Ministers, the Scottish PCR and the Scottish UCR¹¹. The instrument also takes the opportunity to refine slightly the logistics relating to the payment of civil financial penalties where the person or department to whom the penalty is normally paid is actually ordered to pay such a penalty (the refinement will avoid the absurdity of requiring a body to pay money to itself, but makes no substantive change to the requirement that the penalty is ultimately to be paid into the relevant Consolidated Fund). This refinement applies only to the PCR¹².
- 7.10 The instrument also substitutes appropriate references to the Treaty on the Functioning of the European Union, where relevant, for references that have been superseded as a result of the Treaty of Lisbon. These are matters which were outside the scope of the Treaty of Lisbon (Changes in Terminology) Order 2011 (S.I 2011/1043) that was made by the Foreign and Commonwealth Secretary in March. These changes apply to the PCR and UCR.¹³
- 7.11 The instrument also makes miscellaneous minor amendments to the PCR and UCR.
- 7.11.1 The text of regulation 47D(3)(b)(i) of the PCR and regulation 45D(3)(b)(i) of the UCR is simplified. In effect, the former subparagraph (bb) is removed. This is because the period specified in it can never end before that specified in paragraph (ii)(bb)). Therefore, paragraph (i)(bb) could never produce any substantive effect, because the opening words of paragraph (b) make it clear that significance attaches only to “whichever of the following periods ends first”.

¹⁰ Hansard vol 511, part 15, col 48WS.

¹¹ The DSPCR, as originally made, incorporated comparable changes.

¹² The issue would not arise under the UCR.

¹³ The DSPCR, as originally made, incorporated comparable changes.

7.11.2 A phrase in regulation 47E(2)(b) of the PCR and regulation 45E(2)(b) of the PCR is modified slightly for greater clarity .

7.11.3 A few words are added to regulation 47K(6)(c) of the PCR and regulation 45K(6)(c) of the UCR to ensure, as required by the Public Sector Remedies Directive and the Utilities Remedies Directive, that the third ground of ineffectiveness can apply to a contract where the estimated value of the contract is equal to the relevant threshold as well as when it exceeds that threshold. This corrects a simple slip by which the previous wording, read literally, achieved the wrong result where the estimated value of the contract was exactly equal to the threshold.

7.12 The instrument contains transitional provisions.

7.12.1 In relation to the time limit changes, the principle adopted is quite simple:

7.12.1.1 where the date of knowledge occurs on or after 1st October 2011 (the commencement date of this instrument), the new limits will apply (i.e. 30 days from the date of knowledge, with discretion for the Court to extend this up to 3 months from the date of knowledge);

7.12.1.2 where the date of knowledge has occurred before 1st October 2011, the time limit will be 3 months from the date of knowledge, with open-ended discretion for the Court to extend the limit.

The transitional provisions (in regulations 3 to 8 of the instrument) which achieve this simple effect look quite complex because of the need to modify the text of two successive previous versions of the PCR and UCR under which proceedings may still arise. For transparency, the 'old' version of these provisions has not simply been preserved in relation to cases in which the date of knowledge occurred before 1st October 2011, because that would create a misleading impression of what they mean and how they have in fact been applied by the High Court since the Uniplex judgment. This is because in Uniplex, the ECJ said that the High Court should, if possible, not enforce the 'promptly' requirement laid down by the regulations, and should interpret the 3 month element of the limit as running from the date of knowledge rather than from the date specified in the Regulations. In practice, the Courts have taken the view that it is possible to interpret the 'old' regulations in such a way (see in particular the judgment of the Court of Appeal in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156). The transitional provisions make explicit these modifications.

7.12.2 In relation to the machinery of Government changes, specific transitional provisions have been included in regulation 10 to ensure

7.12.3 In relation to the change to the requirement to send a standstill notice, a transitional provision disapplies the change where the new time limits do not apply, as the change makes sense only in the context of the new limits.

7.12.4 In relation to the updating of treaty references to reflect the Treaty of Lisbon, the old references are saved in relation to their application to anything done before 1st December 2009, the date on which the Treaty of Lisbon entered into force. This is based, so far as relevant, on the approach taken in article 3(3) of the Treaty of Lisbon (Changes in Terminology) Order 2011 (S.I 2011/1043).

7.12.5 Transitional provisions were not considered necessary in relation to other amendments made by the instrument.

7.13 The policy is not expected to attract interest from the general public, although the policy is of interest to those people working in the field of public procurement, as evidenced in relation to the time limit policy by the responses to the consultation, details of which are given below. Although it is not expected that the changes to the time limit, and related procedural changes, will result in a change to the number of public procurement proceedings, the changes should provide greater clarity and fairness in the operation of the time limits. It is also envisaged that the updates to, and improved drafting of, the grounds for exclusion of bidders will also provide greater certainty and transparency. The machinery of Government changes, and updating of the treaty references, are routine and wholly uncontroversial.

- *Consolidation*

7.14 There are currently no plans to consolidate the PCR or the UCR, but the Cabinet Office will keep this under review. These are the first amendments to the DSPCR, which came into force on 21st August 2011, and there are no plans to consolidate them. Decisions about consolidation of the Scottish PCR and the Scottish UCR are matters for the Scottish Ministers.

8. *Consultation outcome*

8.1 The Cabinet Office has undertaken public consultation to involve stakeholders in the decision making process in relation to the changes to the time limits and

- 8.2 The main consultation ran for 8 weeks between November 2010 and January 2011. The consultation document¹⁴ concentrated on the key policy issues.
- 8.3 In December 2010, the Cabinet Office issued a note supplementing the main consultation document. This note addressed peripheral or technical issues likely to be of interest primarily to procurement lawyers with a detailed and technical interest in the issues. This was published on the department's website but sent directly to a smaller number of recipients than the main paper, but including the Procurement Lawyers Association.
- 8.4 A total of 30 responses were received (sometimes representing the views of more than one respondent) some in substantial detail. 16 of the respondents were contracting authorities or contracting entities, 10 were from the legal advisory sector (including a detailed response from the Procurement Lawyers Association who represent around 350 public procurement lawyers), 3 from industry (including 2 utility companies) and one academic.
- 8.5 On the main issue, the consultation document identified 3 main options. The vast majority of respondents supported option 2, which was a time limit running from the date of knowledge and fixed at a period longer than 10/15 days. Most respondents supported a 30 day period. However, a significant minority also advocated that option 2 should be modified to allow the Court discretion to extend the period. Taking account of all the arguments advanced, which were complex, the Cabinet Office accepted that a 30 day limit would strike the best balance between the legitimate interests of challengers and contracting authorities, but also accepted that, in a minority of cases, 30 days would not be enough and that the best way to address this would be to allow the Court discretion to extend this limit, but only up to a maximum of 3 months.
- 8.6 The responses to the consultation also influenced greatly the Cabinet Office's conclusions on the related procedural and transitional issues raised by the note.
- 8.7 More detail will be contained in the Cabinet Office response to the consultation, which will be published in the resource library of its website (<http://www.cabinetoffice.gov.uk/resource-library>) shortly. The Clerk to the Committee will be notified when this has been done.

9. Guidance

- 9.1 Information on the practical implications of these amendments will be provided to supplement existing guidance.

¹⁴ The consultation document, and the supplemental note mentioned in paragraph 8.3 of this Memorandum, can be seen at http://www.ogc.gov.uk/european_procurement_directives_consultation_on_the_uniplex_case.asp

10. Impact

10.1 An impact assessment has not been produced for this instrument as no significant impact on the private or voluntary sectors is foreseen.

11. Regulating small business

11.1 No significant impact on the private sector, including small firms, is envisaged, though it is expected that the greater clarity on timescales will be helpful to small forms and other economic operators alike.

12. Monitoring & review

12.1 The European Commission (EC) is undertaking a review of the public procurement Directives (2004/17/EC & 32004/18/EC), with the intention of bringing forward proposals to amend the Directives at the end of 2011. The Remedies Directive (2007/66/EC) will be reviewed separately. The EC is required to review the implementation and report on the effectiveness of 2007/66/EC by 20 December 2012.

13. Contact

Peter Bennett at the Efficiency and Reform Group in the Cabinet Office (Tel 020 7271 1337 email peter.bennett@cabinet-office.gsi.gov.uk) can answer any queries regarding the instrument.