Council of the European Union

Brussels, 27 January 2017
(OR. en)

5635/17

MAP 3
JUR 41
COMPET 44
MI 70
ECOFIN 38
TELECOM 17
EF 11

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	24 January 2017
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2017) 28 final
Subject:	Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement

Delegations will find attached document COM(2017) 28 final.

Encl.: COM(2017) 28 final

EUROPEAN
COMMISSION

Brussels, 24.1.2017
COM(2017) 28 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

ON THE EFFECTIVENESS OF DIRECTIVE 89/665/EEC AND DIRECTIVE 92/13/EEC, AS MODIFIED BY DIRECTIVE 2007/66/EC, CONCERNING REVIEW PROCEDURES IN THE AREA OF PUBLIC PROCUREMENT

{SWD(2017) 13 final}

1. General context

The Procurement Directives[1] regulate award procedures and limited aspects of the execution of public contracts and concession contracts above certain thresholds. The estimated value of tenders published in 'Tenders Electronic Daily' (TED)[2] in 2014 amounted to 421.31 billion euros, which is 3.32% of the EU GDP.[3] Open and well regulated procurement markets contribute to a more efficient use of public resources and to the improvement in the quality of public purchases.

The experience acquired with the Procurement Directives showed that to fully meet their objectives, economic operators had to be able to enforce the rights conferred by these Directives everywhere in the EU. Consequently, the Remedies Directives (Directives 89/665/EEC and 92/13/EEC, as amended through Directive 2007/66/EC[4]) were adopted as flanking measures[5]. These Directives aimed at ensuring that, based on minimum EU review standards, economic operators everywhere in the EU would have access to rapid and effective procedures for seeking redress in cases where they considered that contracts had been awarded in breach of the Procurement Directives. The Remedies Directives are therefore an essential piece in the public procurement landscape and a unique example in EU law of giving full effect to EU rights at national level.

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 include the right of interim measures, a compulsory standstill period between the award decision and the conclusion of the contract and the requirement to suspend the award procedure whilst the appeal is being investigated to prevent the award of the contract. Post-contractual remedies aim to declare

[1] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Both Directives were replaced by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. Directive 2014/23/EU introduced further amendments to Directive 89/665/EEC and Directive 92/13/EEC, mainly to extend their scope of application with regard to concessions. Since its deadline for transposition elapsed on 18 April 2016, its impact is not addressed in this evaluation.

[2] TED is the online version of the 'Supplement to the Official Journal' of the EU, dedicated to public procurement (http://ted.europa.eu).

[3] European Commission, 2016. "2014 Public procurement indicators", http://ec.europa.eu/growth/single-market/public-procurement/studies-networks/index_en.htm

[4] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; and 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.

[5] In particular, Directive 2007/66/EC aimed at making it possible for cases to be brought where corrective action is still possible and at providing an effective remedy for illegal direct awards.

an existing contract ineffective and/or to provide compensation (in particular damages) to the affected parties after the contract in question has been signed. Additionally, other key elements of the Remedies Directives are the automatic debrief to tenderers as to why they were unsuccessful, the regime of time limits for bringing proceedings and the alternative penalties (namely the shortening of the duration of the contract or the imposition of fines) when ineffectiveness is not appropriate.

The Remedies Directives provide that the Commission reviews their implementation and reports to the European Parliament and the Council on their effectiveness, in particular as regards the alternative penalties and time limits introduced by Directive 2007/66/EC. In addition, in 2013 it was decided to carry out an evaluation under the Commission Programme on Regulatory Fitness and Performance (REFIT) of these Directives. The present report is submitted to Parliament and the Council with a view to fulfil the legal obligation to report to Parliament and Council and to communicate the results of the REFIT evaluation. The Staff Working Document accompanying this report provides additional detail on the evaluation carried out.

In order to prepare the present report, the following sources of information were used:

- the study '*Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*'[6];
- an open online public consultation that aimed to collect evidence on the functioning and added value of the Remedies Directives[7];
- consultations with Member States;
- a number of targeted consultations with experts and practitioners in public procurement litigation; and
- a review of national legislation and case law.

In addition to evaluating the policy performance of the Directives, the evaluation under REFIT has a specific focus on whether the Remedies Directives are fit for purpose, minimise associated costs and burdens and maximise the simplification potential.

There is currently no EU-wide monitoring and evaluation system of remedies in Member States. Data for remedies actions on public contracts above thresholds brought in each Member State are not collected in a structured, coherent and systemic manner that would allow analysing the results obtained in an automated and easily comparable way. For this reason, the proper measurement or estimation of the effects of the Remedies Directives is difficult and requires additional actions (e.g. one-off data collection and manual analysis, as it was the case in the current evaluation).

[6] Study by Europe Economics and Milieu, April 2015: http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/evaluation/index_en.htm.

[7] This consultation was open from 24 April to 20 July 2015 and yielded 170 responses coming from all Member States. The consultation involved contracting authorities and entities, economic operators, academics, lawyers, review bodies and citizens.

2. Implementation by Member States

The Remedies Directives were fully transposed by all Member States. Nevertheless, significant and wide-spread delays in transposition were identified for the amending Directive 2007/66/EC (for details, see Annex 5 to the Staff Working Document). Given the minimum harmonisation brought about by the Remedies Directives, Member States adopted national rules of varying scope and nature, having regard to their respective legal traditions.

As a consequence, a variety of review bodies have been established in each Member State. In 14 Member States[8] there is an administrative public procurement review body, whether specialised or not. In the remaining Member States, an existing judicial review body is responsible for the review of procurement procedures.

All Member States require the review procedure to be available to anyone having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In addition, some Member States also provide that associations or bodies that do not act as economic operators are eligible to start a review procedure. This may include professional associations or the competition authority.

In all Member States, provisions also exist for the three compulsory types of remedies (interim measures, set-aside decisions and damages), but their approach varies considerably depending on their legal traditions.

For other key elements of the Remedies Directives, the situation is as follows:

- All Member States provide for an automatic debrief to tenderers, at the time of the contract award decision, as to why they were unsuccessful.
- All Member States apply the minimum standstill period as required by the Remedies Directives. In a number of cases, a longer standstill period has been specified than the minimum standstill period provided for under these Directives.
- All Member States provide for ineffectiveness where a contracting authority/entity awards a contract without prior publication of a contract notice in TED when this is not permitted under the Procurement Directives. The majority of Member States have transposed provisions on voluntary *ex ante* transparency (VEAT) notices, which allows the contracting authorities/entities to avoid the sanction of ineffectiveness. Based on the information available in TED, the use of this notice has remained relatively stable since 2010 with around 10 000 notices published every year.
- In most Member States, the time limits for bringing proceedings for pre-contractual remedies follow the structure of the Remedies Directives and thus lay down time limits that mirror the minimum standstill period. In some cases, a longer period is set.
- Several Member States follow exactly the structure of the Remedies Directives in relation to time limits for ineffectiveness claims. Others do not provide that both the publication and the notification of the award decision trigger the start of the 30-day time limit. In any event,

[8] Bulgaria, Cyprus, the Czech Republic, Germany, Denmark, Estonia, Spain, Croatia, Hungary, Malta, Poland, Romania, Slovenia, Slovakia.

in the absence of any publication or notification, all Member States lay down a six-month time limit with effect from the day following the date of the conclusion of the contract.

- In some Member States, the period of suspension of the procurement procedure can apply until a decision on appeal against the first instance decision is taken, or even longer. In the vast majority of Member States, the court or the review body can bring suspension to an end at an earlier stage.
- For alternative penalties, the majority of Member States transposed both fines and/or the shortening of the duration of the contracts. Nevertheless, these penalties are used only sporadically as they are perceived to be the least effective remedy. In particular, Member States consider that fines constitute a mere relocation of funds.

3. The Remedies Directives' effectiveness, efficiency, relevance, coherence with other policies and EU added value

The Commission carried out an evaluation of the performance of the Remedies Directives. To this end, it used specific evaluation criteria, including: (i) effectiveness; (ii) efficiency; (iii) relevance; (iv) coherence with other policies and (v) EU added value. Detailed evidence for the relevant findings can be found in the Staff Working Document accompanying this Report.

On that basis, the following conclusions were reached.

(i) In terms of **effectiveness**, the Remedies Directives have generally met their objectives of increasing the guarantees of transparency and non-discrimination; allowing effective and rapid action to be taken when there is an alleged breach of the Procurement Directives; and providing economic operators with the assurance that all tender applications will be treated equally. The available data on the actual usage of the provisions added further evidence on the effectiveness of the Directives. In general, the remedies that they lay down were frequently used in most of Member States. There were around 50 000 first instance decisions across Member States during 2009-2012. The most frequently type of remedy sought was set aside decision, followed at distance by interim measures and the removal of discriminatory specifications. As far as the opinions of the stakeholders were concerned, a clear majority of respondents to the Commission departments' public consultation considered that the Remedies Directives have had a positive effect on the public procurement process. It is considered to be more transparent (80.59 %), fairer (79.42 %), and more open and accessible (77.65 %) and it provides greater incentive to comply with substantive public procurement rules (81.77 %). As confirmed among all the interested parties, Directive 2007/66/EC substantially increased the effectiveness of pre-contractual remedies by introducing a minimum standstill period between the notification of an award decision and the signing of the contract.

Some national systems require that legal protection in public procurement procedures is provided at first instance by administrative review bodies rather than ordinary courts. As a general trend, these tend to be more effective. This is confirmed by a large majority of respondents to the public consultation (74.7 %) who considered that procedures before ordinary courts take generally longer and result in lower standards of adjudication than the procedures before specialised administrative review bodies.

In most cases, the costs of review procedures, albeit very divergent across Member States, do not seem to have a decisive dissuasive effect on access to remedies. Moreover, the Remedies Directives are also well balanced in addressing the interests of all parties concerned. In particular, 57.06 % of respondents to the public consultation considered that the Directives evenly balance the interest of economic operators in ensuring the effectiveness of public procurement law and the interest of contracting authorities in limiting frivolous litigation. As a final point, the Remedies Directives are also effective as a deterrent to non-compliant behaviour in the area of public procurement.

The Remedies Directives require the Commission to pay particular attention to the effectiveness of alternative penalties and time limits. The evaluation revealed that alternative penalties are sporadically used in Member States and were considered by respondents to the online public consultation (carried out by the Commission departments) and by some Member States to be the least relevant remedy. Nonetheless, views were expressed that all remedies provided for in the Remedies Directives contribute to their deterrent effect and provide for a comprehensive and effective system for sanctioning irregularities in public procurement. Concerning time limits, no specific evidence was gathered in the context of the evaluation that would demonstrate that time limits that follow the structure of the Remedies Directives are either too long and cause undue delays in the public procurement process or too short and thereby do not allow economic operators to enforce their rights.

The evaluation revealed that certain aspects of the Remedies Directives could be made clearer. This is confirmed by the contributions received. This applies, for example, to matters such as the interplay between the Remedies Directives and the new legislative package on public procurement, and the development of criteria to be applied to lift the automatic suspension of the conclusion of the contract following the lodging of a legal action.

The evaluation also made it possible to identify problems that persist at national level. In particular, various stakeholders confirmed in the context of the public consultation that problems identified are rooted either in national legislation beyond the Remedies Directives or in national practices, and not in the Remedies Directives themselves.

Finally, the Commission also recognises that, in most Member States, the information on national remedies systems is not collected in a structured manner, making the analysis of the performance of the Directives extremely difficult. In addition, it is rarely used for policy-making purposes (for example, identification of resources needed or abusive complaints; consistency of decisions based on effective searching tools; identification of contracting authorities/entities against which successful complaints are lodged most often; and identification of the aspects of procurement procedures that are appealed successfully).

(ii) In terms of **efficiency**, the Remedies Directives provide overall benefits in line with the intended impacts, both direct and indirect. There are clear indications that the benefits achieved through the Directives outweigh their costs. The costs to contracting authorities and suppliers of bringing forward or defending a review case (including direct and indirect costs) vary widely across the EU, typically accounting for 0.4 %-0.6 % of the contract value. However, the costs would not reduce to zero if the Remedies Directives were repealed. On the contrary, they could be even

higher because of national differences in the review and remedies rules and a lack of harmonisation at EU level leading to a more cumbersome context for tenderers and others.

The benefits are important in terms of sound financial management, the best price/quality ratio and deterrence, especially when considering the value of invitations to tender published on TED. The 2011 evaluation of EU public procurement legislation[9] in general estimated that savings of 5 % realised for the EUR 420 billion of public contracts that were published at EU level would translate into savings or higher public investment of over EUR 20 billion a year. The effective implementation of the Remedies Directives can therefore make such estimated savings from the Procurement Directives more likely to happen. Finally, the evaluation did not identify any administrative burden considered to be unnecessary for the operation of the Remedies Directives.

(iii) Concerning **relevance**, the objectives of the Remedies Directives are still relevant. The evaluation revealed that many provisions of the Directives are perceived as relevant across suppliers, contracting authorities and legal practitioners. Based on replies to the public consultation, the most relevant provision appears to be the standstill period (65 % of respondents), followed by the suspension of the contract award procedure where review proceedings are initiated (62 %) and the automatic debrief to tenderers (58 %). Even if certain provisions are perceived to be of less practical value, they still contribute to the deterrent effect of the Remedies Directives. Another indicator of the relevance of the Remedies Directives is the actual use of the procedures they provide. In general, the remedies provided are frequently used in most Member States. There were around 50 000 first instance decisions across Member States during 2009-2012.[10] The most frequent type of remedy sought is a set-aside decision, followed at some distance by interim measures and the removal of discriminatory specifications.

(iv) The Remedies Directives are **coherent with other EU policies**. As confirmed by the Court of Justice of the EU, the right to an effective remedy is a general principle of EU law[11]. The Remedies Directives are in line with the rights and general principles laid down in EU primary law concerning fundamental rights. They lie at the core of public procurement legislation as they allow bidders to enforce their substantive rights. They were found to be generally aligned with the new 2014 legislative package on public procurement, in particular to cover the concessions subject to Directive 2014/23/EU. Nonetheless, as already mentioned, the interplay between these Directives and the new legislative package on public procurement could be further clarified. Finally, by improving the effectiveness of national review procedures, especially those dealing with illegal direct awards of contracts, the Remedies Directives also play an important role in effectively tackling breaches of Procurement Directives that could also entail irregularities with criminal implications. The evaluation has not found any possible conflicts with other policy fields.

[9] The Evaluation Report on Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final.
[10] This figure came from the Study '*Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*'.
[11] Order of 23 April 2015 of the Vice-President of the Court of Justice in case C-35/15 P(R), *Vanbreda*, paragraph 28.

(v) In the Commission's view, the Remedies Directives present a clear **EU added value**. It was generally confirmed by all sources of information used for the purposes of the evaluation that it is of the utmost importance to have EU law requirements for remedies in public procurement. Ordinary courts under ordinary procedural codes cannot guarantee a rapid and effective review as required by EU case law. For instance, before a mandatory standstill period was introduced by Directive 2007/66/EC, no interim measure before ordinary courts was rapid enough to suspend the conclusion of the awarded contract.

Compared with other fields of EU law, public procurement rules have certain specificities. Firstly, as long as the contract is above EU thresholds, the substantive public procurement rules are applicable, irrespective of their actual cross-border interest. Secondly, in each tendering procedure conducted by any contracting authority/entity there is a significant potential for numerous infringements (e.g. unlawful exclusion of tenderers, unlawful tender specifications, unlawful contract award criteria, use of the wrong procedures, accepting abnormally low tenders, conflict of interest, etc.). The role of the Commission, when dealing with individual complaints and potential infringements of EU law, is directed to ensuring future respect of EU law, rather than obtaining remedies for individual parties to public tendering procedures particularly given the large volume of contracting authorities, tenderers and procedures in the EU, and also the technicalities involved in each individual process.

Suitable rights of direct recourse for bidders are therefore indispensable for the correct functioning of substantive public procurement rule and for the proper operation of the single market in the public sector. As confirmed by numerous stakeholders, the minimum level of harmonisation ensured by the Remedies Directives is absolutely essential in this respect.

4. Conclusions

Based on the evaluation, the Commission concludes that the Remedies Directives, in particular the amendments introduced by Directive 2007/66/EC, largely meet their objectives in an effective and efficient way although it has not been possible to quantify the concrete extent of their cost/benefits. Even if specific concerns are reported in some Member States, they usually stem from national measures and not from the Remedies Directives themselves. In general qualitative terms, the benefits of the Remedies Directives outweigh their costs. They remain relevant and continue to bring EU added value.

Despite the overall positive conclusion of the evaluation, certain shortcomings were identified.

First, the Commission acknowledges that certain provisions of the Remedies Directives are not entirely clear.[12] In particular, despite the update introduced by the new legislative package on public procurement, some additional needs for clarification have been identified. For instance, references to 'contract notice' in the Remedies Directives do not reflect the fact that new Directive 2014/24/EU permits the use of a prior information notice, instead of a contract notice, to call for competition in certain circumstances. It could also be clarified how the Remedies Directives apply to modifications

[12] For details of the consultation launched by the Commission departments, see Annex 3 to the Staff Working Document (replies to questions 6 and 20).

of public procurement contracts and concessions, to the termination of such contracts and to the light procurement regime.

Furthermore, the Commission concludes that in most Member States, 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.

Finally, the Commission has concluded that, in general terms, first instance administrative review bodies are more effective than first instance judicial instances in terms of the duration of procedures and standards of review.

5. Way forward

(i) General

Given that the evaluation identified neither major nor urgent needs to amend the Remedies Directives, it is decided to maintain them in their current form, without any further modification at this stage.

Notwithstanding this, the Commission intends to tackle the weaknesses identified in the operation of the Remedies Directives and to seek greater convergence of remedies systems in Member States. While respecting Member States' procedural autonomy and their respective legal traditions at the same time, the Commission will use a consistent combination of the following additional actions.

(ii) Promotion of transparency

The evaluation demonstrates that information on national remedies systems have not been collected in a structured manner and have rarely been used for policymaking purposes. To tackle this, the Commission intends to propose increasing transparency regarding the performance of national remedy systems. To begin with, data needs to be collected in an automated fashion without imposing additional administrative burden. In that context, the Commission, as announced in the Single Market Strategy[13], and consistently with the new Interinstitutional Agreement on Better Lawmaking[14], will develop — together with Member States — a limited number of objective indicators (number of complaints, number of successful complaints, costs, length of procedures, etc.). These indicators will be published under the Single Market Scoreboard. This will allow the business community to compare the efficiency of remedies systems in different Member States and help Member States to identify opportunities for improvement of their national remedies systems.

(iii) Promotion of cooperation between first instance review bodies

The evaluation demonstrates that the systems by which legal protection in public procurement procedures is provided in the first instance by administrative review bodies rather than ordinary courts tend to be more effective in terms of both the duration of proceedings and adjudication

[13] Communication *Upgrading the Single Market: more opportunities for people and business*, COM(2015)550 and Staff working document *A Single Market Strategy for Europe — Analysis and Evidence*, SWD(2015) 202

[14] European Parliament decision of 9 March 2016 on the conclusion of an Interinstitutional Agreement on Better Lawmaking between the European Parliament, the Council of the European Union and the European Commission (2016/2005(ACI)).

standards. For this reason, as announced in the Single Market Strategy, the Commission will encourage first instance review bodies to cooperate and network to improve the exchange of information and best practices related to specific aspects of the operation of the Remedies Directives and, more generally, to ensure the efficient functioning of national review procedures. The relevant good practices will be disseminated throughout the network. Good practices can be a source of inspiration and leverage for Member States to improve their national remedies systems. In that context, particular attention will be paid to strengthening first instance administrative review bodies.

(iv) Guidance

The Commission will disseminate guidance on some outstanding aspects of the Remedies Directives in order to increase the understanding of some provisions and to guarantee their effectiveness. Aspects that could be covered include the interplay between the Remedies Directives and the new legislative package on public procurement and the development of criteria to be applied to lift the automatic suspension of the conclusion of the contract following the lodging of a legal action. Based on evidence gathered so far, the Commission will engage in a dialogue with Member States and stakeholders to identify other specific areas that require clarification.

(v) Consistent enforcement activities and monitoring

In cases where breaches of the Remedies Directives are identified, the Commission will take appropriate measures to bring the relevant national practices into line with EU rules. In that context, the Commission will focus on the most significant and systematic breaches that undermine the effective functioning of the remedies systems in Member States.