

Case Id: b34fff26-cd71-4b22-95b2-c0a7c38a00be

## 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:

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Spain
- Sweden
- The Netherlands
- United Kingdom
- Other country

\*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)

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

- Yes
- No

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

CEEP - European Center of Employers and Enterprises providing Public Services  
 Rue des Deux Eglises, 26  
 BE - 1000 Brussels  
 T: +32 (0) 2219 27 98  
 Email: ceep@ceep.eu  
 www.ceep.eu

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

59513031434-92

\*

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 checked="" type="radio"/>	<input 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 checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Suspension of the contract award procedure where review proceedings are initiated	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" 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 checked="" type="radio"/>	<input 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 checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The possibility to award damages to persons harmed by an infringement	<input type="radio"/>	<input checked="" type="radio"/>	<input 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 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 type="radio"/>
In third instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>	<input type="radio"/>
In second instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
In third instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>	<input type="radio"/>
In second instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
In third instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>	<input type="radio"/>
In second instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

In third instance?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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

The situation differs from one member state to another:

- In Belgium, the fact that the case is dealt with by ordinary courts is mentioned as a major cause of delay by contracting entities. This seems to be also the case in Austria where since 2014 the cases are dealt with by ordinary courts, and no longer by a specialised administrative body. The reason of this reform was motivated by concerns of conflicts of interest.
- On the contrary, in Germany, there are also complaints on delayed procedures, but the cases are dealt with by a special institutional body (so-called Vergabekammer). The delay seems rather due to insufficient capacities of contracting authorities.

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.

The modalities of declaring a contract ineffective are not sufficiently detailed in the Directive (article 2d):

- Regarding §3: First of all, it is challenging that member states are not obliged to transpose the possibility to apply alternative penalties for "overriding reasons relating to a general interest". As a consequence, some member states have not or insufficiently clearly transposed this provision, which creates legal uncertainty for public services providers (e.g. Germany).
- Regarding § 2: Furthermore, the Directive does not detail the consequences of the situation where a contract is considered as ineffective and in particular does not determine the scope of retroactive effects.

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.

see "additional comments"

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

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

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

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

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

- Yes (please briefly describe such problems)
- No

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

Please find below a short opinion of CEEP on the effectiveness of the Remedies Directive



Preliminary remarks:

- The Remedies Directive of 2007 aims at providing the economic operators with more effective national review procedures in order to ensure the effective application of the EU public procurement law. In particular, the Directive introduced a mandatory standstill period between the awarding and the conclusion of the contract, as well as the possibility to render a contract ineffective in case of illegal direct allocation.
- CEEP represents employers and enterprises providing services of general interests and thus represents both economic operators and contracting authorities. Therefore it is crucial for CEEP that there is a balance between guaranteeing certain rights to economic operators and legal certainty for contracting authorities.
- An effective Remedies Directive is of crucial importance for CEEP: in order to maintain the presumption of legality of the performance of the contracting authorities in public procurement (and avoid immediate economic responsibilities on public authorities), it is important that the rights of bidders are guaranteed by a judicial system which gives them adequate protection. At the same time, the burden on contracting authorities in terms of delayed procedures and legal insecurity has to be reduced as much as possible. This is important in order not to challenge the obligation of contracting authorities in terms of provision of public services.
- It is important to remind that an effective implementation of the new public procurement package will help to avoid remedies procedures. The very essence of the new rules has been to provide a clearer legal framework to avoid remedies. In this context, the detailed codification of the possibility of "in-house" procedure and public-public cooperation in the new public procurement package is particularly important.

On the Effectiveness of the Remedies Directive:

- (Question 1 and 2) Overall CEEP believes that the Remedies Directive has provided better review procedures for economic operators. In particular, it has enabled to make the public procurement process more open and accessible. In the light of the public service obligations of CEEP members, one of the most relevant provisions are the suspension of the award procedure, the possibility of ineffectiveness and the possibility of alternative penalties to ineffectiveness. However, regarding the latter point, it is problematic for public services providers when the possibility of applying alternative penalties instead of ineffectiveness for "overriding reasons relating to a general interest" is not transposed or clarified in national legislation.
- (Related to Question 5 to 7) There is no doubt that the existence of the Remedies Directive has led to a multiplication of judicial procedures and therefore a delay in allocation procedures. Contracting authorities suffer from a lack of capacities compared to the increasing number of complaints. Furthermore, they are suffering from a lack of legal certainty and frivolous procedures. As a consequence, they can be reluctant to close a procedure because

e of the fear of being sued. In respect with the principle of procedural autonomy, Member States should organise review procedures in such a way to minimize the burden for contracting authorities. It appears that the procedures are particularly burdensome when it is dealt with at the level of ordinary courts rather than by a specialised review body. Alternative resolution mechanism might be adequate in some Member states where ordinary court procedures take long. Furthermore, intermediate mediation mechanisms might be helpful to avoid heavy delays in allocation procedures. Such mechanisms already exist in some member states (e.g. UK) and could be particularly useful when contracting authorities have to allocate tenders for projects of general interest.

## Contact

[GROW-CONSULTATION-PP-REMEDIES@ec.europa.eu](mailto:GROW-CONSULTATION-PP-REMEDIES@ec.europa.eu)

---