UK implementation of the decision of the European Court of Justice (ECJ) in *Uniplex*[1]

Cabinet Office response to the public consultation

Purpose

1. This document summarises the results of the public consultation[2] exercise on the UK's implementation, for England and Wales and Northern Ireland, of the Uniplex ruling in respect of public procurement time limits. It describes the overall results of the consultation, and summarises key points raised by stakeholders and conclusions reached by Cabinet Office.

Overview

2. Cabinet Office undertook the consultation for England and Wales and for Northern Ireland[3]. The consultation ran for 8 weeks beginning on 24 November 2010 and ending on 19 January 2011. We consulted both the public sector and the utilities sector simultaneously through a coordinated consultation process as the issues being addressed were largely identical.

3. The main objectives of the second consultation document, and therefore its main contents, were to:

    i) Explain to stakeholders why and in what respects the UK rules would have to be changed to implement the decision of the ECJ in Uniplex;

    ii) Outline the alternative approaches that the Cabinet Office could take, as the ECJ's decision left substantial flexibility on how the changes could be achieved;

    iii) Seek feedback on the alternative approaches, to gauge preferences and inform decisions on the optimum approach;

4. A supplementary note[4] that covered a number of technical issues[5] likely to be primarily of interest to procurement lawyers with a detailed and technical interest in the issues was also made available on the Cabinet Office website, but sent directly to a more limited number of recipients.

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[1] C-406/08, Uniplex (UK) Ltd vs NHS Business Services Authority, Judgement on 28 January 2010
[2] http://www.ogc.gov.uk/european_procurement_directives_consultation_on_the_uniplex_case.asp
[3] The Scottish Executive is responsible for implementation into Scots law and ran a separate, but similar, consultation in Scotland http://www.scotland.gov.uk/Publications/2010/12/03145348/4. For convenience, the rest of this response refers to 'the UK' but should be understood to relate only to England and Wales and Northern Ireland.
[4] http://www.ogc.gov.uk/european_procurement_directives_consultation_on_the_uniplex_case.asp
[5] Such as the role of the deemed service rules and transitional arrangements.

5. A total of 30 responses were received. 16 of these were from contracting authorities10 were from the legal and advisory sector[6] (including a detailed response from the Procurement Lawyers Association who represent around 350 public procurement lawyers), and 3 were from industry (including 2 utilities), and one from an academic.

6. Cabinet Office also liaised with the Ministry of Justice in relation to policy and practical issues regarding court procedures, and with Ministry of Defence colleagues, regarding the implications for the implementation of the Defence and Security Procurement Directive[7].

7. Cabinet Office is very grateful to all those stakeholders who participated in the consultation; the feedback was used extensively in making decisions on the policy choices and in making the amending regulations.

8. The analysis that follows below is a relatively brief summary of an intensive and detailed process, which took place over several months. It is not practicable to attempt to present such detail in a document of this nature, as to do so would be longwinded and key points would consequently become obscured. Rather, it explains the main themes that emerged, the key arguments for and against the main possible courses of action, and the resulting outcome. However, all points made were carefully considered.

9. This response does not normally attribute views to named respondents. However, as the response of the Procurement Lawyers Association ('the PLA') has been published by the Association on its own website[8], we have made reference to it where it seemed particularly relevant to do so.

Summary of the Analysis

10. To recap briefly, the 3 policy options offered in the consultation document were:

Option 1: 10/15 day period to challenge, running from the date of knowledge, as permitted by art. 2c of Directive 2007/66/EC

Option 2: Challenge period running from date of knowledge, but fixed at longer than 10/15 days

Option 3: 10/15 day period to challenge, but with discretion to extend to either a period shorter than three months or to three months

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[6] Apart from the Procurement Lawyers Association, these were all from individuals or firms in private practice, who would to varying extents act for claimant suppliers, defendant contracting authorities or both. Responses from contracting authorities' in-house legal departments have been classed as responses from contracting authorities.

[7] Directive 2009/81/EC, which imposes a regime of procurement rules on public authorities procuring in the fields of defence and security – see: http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/200981EcSecondConsultation.htm .

[8] http://www.procurementlawyers.org/Docs/Uniplex%20Paper.pdf. The response was by far the most detailed response received and was prepared by the Association's Uniplex Working Group on the basis explained on page 2 of the response.

11. The clear preference was for option 2: Of the responses which expressed a preference, 4 preferred option 1, 21 preferred option 2, and 2 preferred option 3[9],.

12. Those supporting option 1 tended to advocate the benefits of legal certainty for the contracting authority against whom proceedings might be brought (and suppliers who may be adversely affected if such proceedings were successful). However, option 1 gained very little support from respondents in the legal sector, with common arguments against it seeming persuasive, including:

- That it worsened drastically the current position of would-be claimants
- It placed an overly burdensome obligation on both the claimant and the claimants' lawyers to commence proceedings, potentially involving complex and detailed analysis, decisions and paperwork, in an unnecessarily tight timescale.
- The likelihood of its absolute shortness encouraging "protective" claims
- Its tendency to trigger unnecessary 'automatic suspensions' (under regulation 47G PCR/45G UCR[10]) when only damages were really wanted
- the anomaly that the limit would be shorter than the separate time limit for seeking the more draconian remedy of ineffectiveness.

13. Option 3 was fairly easily dismissed. It was supported by only 2 respondents[11], because of the attractiveness of the flexibility of court discretion (an issue which many respondents picked up on and argued should be introduced in option 2).

14. Option 2 was favoured by the vast majority of respondents. Though many reasons were given, the overriding theme was that it struck the fairest balance between the interests of procurers (and some suppliers) on the one hand and aggrieved suppliers on the other hand. This approach would provide a reasonable amount of time within which proceedings could, where needed, be started, without providing a perverse incentive to move over-hastily into an adversarial litigation mode where there was scope for the parties to engage in discussions that could lead to the resolution of the contentious issue without resorting to legal proceedings (something which it is long standing policy to encourage). At the same time, this

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[9] These figures are approximate, given the subtleties with which some respondents commented. Two respondents each expressed a preference for option 1 in some types of case and option 2 in other types of case. For the purpose of compiling the stated figures, those two responses have each been counted as 0.5 in favour of each of those two options. As noted below, a lot of those who stated a preference for option 2 added that it should (contrary to how the option had been formulated) include discretion to extend. Logically, this could just as easily have been expressed as support for option 3 (the only option which included discretion) but adding that the guaranteed period should be longer than 10/15 days – indeed, one respondent did just that and we counted it as one of the responses that preferred option 3. Although we have, for simplicity, stated the numbers that appeared to support each of the three options presented by the consultation paper we have, of course, taken full account of the extent to which respondents expressed a preference for a modified form of an option. Indeed, this largely accounts for why our final policy decision, as explained below, does not accord exactly with any of the 3 options as originally presented. The length of responses and the quality of the arguments and evidence advanced by them varied considerably, and Cabinet Office has been influenced primarily by arguments and evidence presented rather than a simple head count.

[10] In referring to particular provisions of the 2006 Regulations (as amended in 2009), the abbreviations PCR and UCR are used to refer to the Public Contracts Regulations and the Utilities Contracts Regulations respectively.

[11] One of whom advocated a longer period than 10/15 days.

approach would not expose prospective defendants to an unnecessarily protracted or even open-ended period of uncertainty.

15. There was a wide consensus that more than 10/15 days would be necessary. However, many of the respondents who supported option 2 in principle had detailed and useful arguments about exactly how option 2 should be implemented, the key issues being;

    i) How much longer than 10/15 days should be allowed?

    ii) Should there be discretion for the Court to extend beyond the prescribed time period?

    iii) Should the answer be different for particular types of case (e.g. damages)?

    These issues are considered further below in turn.

How much longer than 10/15 days should be allowed?

16. There was most support for a 30 day period[12], for reasons including:

    - It was considered a fair compromise between the rights of the complainant and the need for procurements to proceed without uncertainty about potential challenges
    - It would bring the general limit into line with the ineffectiveness limit.

17. Those who supported a longer period felt that 30 days would be too short, particularly in complex cases or where there was scope for complex negotiations aimed at settling matters amicably. 3 months was also the traditional focus of the procurement time limits, with which practitioners were familiar

18. Although Cabinet Office accepted that, in some circumstances, 30 days might prove too short, it felt that, overall, 30 days struck the right balance. Cabinet Office considered that the minority of cases in which this might prove unduly short could be addressed adequately by giving the Court discretion to extend up to 3 months, where the Court accepted that the particular circumstances justified any delay over and above 30 days (see further below).

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[12] 14 respondents preferred 30 days (though 4 of them also supported Court discretion to extend the period where appropriate). In addition, the 5 respondents who preferred option 1 would presumably prefer 30 days to a longer period (and one of them made this explicit), as would the sole respondent to express a preference for 20/25 days. One respondent preferred 3 months, and 3 other respondents indicated that they had no strong preference as between 30 days and 3 months. The PLA (not counted in the above figures) reported that some of its Working Group members preferred 30 days and others preferred 3 months.

Should there be discretion for the courts to extend beyond the prescribed time period?

19. Responses were divided on this issue. The PLA (whose Working Group was unanimous on this point) and 2 other respondents (both of which were firms of solicitors) supported discretion. Far more responses were against discretion[13] .

20. Those who opposed discretion tended to view certainty for contracting authorities (and for suppliers who benefitted from their decisions) as very important, and feared that the Court's attitude to an application to extend time could be unpredictable, and lead to resources being wasted on arguing the issue of whether discretion should be exercised. A firm limit would help to focus minds.

21. Those who favoured discretion tended to regard avoiding injustice to claimants in unusual situations as more important than absolute certainty, and were sceptical of the merits of a 'one size fits all' solution which did not enable the widely differing circumstances of real cases to be acknowledged. Some pointed out that the Court would act on well-understood principles, and suggested that even the theoretically open-ended discretion to extend time which the Court has possessed hitherto has not in practice caused real problems for defendants.

22. Although a majority of respondents preferred the absence of discretion, a significant minority advocated discretion and put forward persuasive arguments. The Cabinet Office has concluded that some element of discretion to extend the limit would be desirable, particularly as this would enable the normal limit to be set at 30 days without risking injustice in a minority of cases where an extension would be appropriate.

23. Now that time will only start to run once the claimant knows, or ought to have known, that grounds for starting the proceedings had arisen, Cabinet Office sees no need to preserve the *open-ended* discretion to extend which had previously been appropriate to address cases in which such knowledge occurred only a long time after the limit had expired. Under the new scheme, the reasons for, and length of, of an extension would in practice be more constrained (tending largely to relate to the complexity of the issues involved, also having regard to any pre-litigation negotiations). Cabinet Office has therefore concluded that a power to extend the limit from 30 days up to 3 months (still running from the date on which the claimant knew or ought to have known of the grounds) would adequately address the legitimate interests of claimants, without exposing defendants to an unnecessarily protracted period of uncertainty.

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[13] It is difficult to give a precise figure, as not all respondents addressed the question explicitly. The figure would be more than 9 at the very least, and as high as 20 if one includes all those who preferred option 1 and all those who preferred option 2 without explicitly commending the absence of discretion in the consultation document's description of that option.

24. Cabinet Office considered whether to lay down specific criteria that the Court would have to apply in deciding whether to exercise discretion to extend the 30 day limit, but concluded that it would be undesirable to tie the Court's hands by reference to such a test. The regulations will, therefore, continue to use the traditional general wording "where the Court considers that there is a good reason for" extending the limit.

Should the answer be different for particular types of case?

25. The Consultation Paper raised the possibility of differential limits (for example a longer time limit where only damages were sought, as opposed to relief which could derail or hold up an ongoing procurement process).

26. There was little support for such an approach from respondents. A couple of respondents supported drawing (different) distinctions, one of them acknowledging that it was not ideal, and a couple of other responses might be read as vaguely lending some support to such an approach. Others considered that drawing such distinctions would be undesirable and would cause confusion and lead to a rush to keep all relief options open. The PLA response reported that the Working Group did not favour a split solution, advancing four reasons in particular.

27. Cabinet Office concluded that the benefits of a split solution were speculative at best, that such a solution would be difficult to craft and apply, and would introduce unnecessary complexity into the system. Cabinet Office believes that a single general limit of 30 days, extendable by the Court to 3 months, offers a better solution. To the extent that different kinds of relief sought would prejudice the defendant in different ways, such considerations could, where appropriate, be relevant to the Court's decision whether to exercise discretion.

Overall Conclusions of Cabinet Office on the best mix of length and discretion

28. Cabinet Office concludes from the consultation exercise and the subsequent analysis that the time limit for bringing legal proceedings under the procurement regulations should be: **30 days running from the date of knowledge, with Court discretion to extend the period up to an absolute maximum of 3 months from the date of knowledge**.

29. We believe that this strikes the optimum balance between several important factors by:

    i) allowing enough time for a claimant to realistically assess the position, and for alternatives to litigation to be explored (e.g. through constructive dialogue) without the need to issue 'protective' proceedings and prematurely enter a litigious phase which then develops a life and impetus of its own;

ii) not being so long that proceedings that could easily have been started sooner are delayed simply to keep the aggrieved supplier's options open or simply because minds are only focussed to take a decision when the deadline approaches, with resulting unnecessary extra uncertainty for the CA (and , where relevant, the successful supplier);

iii) avoiding anomaly with the ineffectiveness time limits;

iv) being reasonably certain and predictable, whilst including some flexibility to avoid injustice;

v) being reasonably simple and easy to understand, though not at the price of sophistication which is necessary to avoid injustice;

vi) taking account of the need to avoid discrimination and to comply with other relevant principles of EU Law, notably the principle of effectiveness.

Should the 'date of knowledge' be defined?

30. Although the subtleties of the responses on this point make it difficult to tally numbers precisely, it is fair to say that opinion was roughly evenly split (with about 7 responses on each side) about whether the regulations should address in some detail when a claimant should be treated as having the requisite degree of knowledge. One school of thought was that this would serve the interests of certainty, though there was little agreement among respondents who favoured such an approach about what such a definition might say. Among the interesting issues canvassed in the responses were-

- whether the knowledge should relate to the breach of the procurement rules or the occurrence of resulting loss or damage
- the problem of 'incremental' or 'creeping' knowledge
- how far recognition should be given to knowledge arising by means other than those required by the substantive regulations
- whether recognition should be given to a formal notice procedure.

31. The other school of thought suggested that it would be wrong to go beyond the general concept articulated by the ECJ in the Uniplex judgment: that of when the claimant knew or ought to have known of the cause of action. The general test should be left to be applied by the High Court as a matter of fact in the circumstances of each case. As the PLA response pointed out, this would have the added merit that the Court can adapt to any changes in the case law of the ECJ. Some of the responses supporting this approach explicitly accepted that, as required by the Remedies Directive, the 10/15 day period running from the specific triggers specified in article 2c of the Directive, should be retained as a qualification

of such a general approach, but that nothing further should be done to elaborate the general concept.

32. In the light of the responses, Cabinet Office considered that-

i) attempting to define the date of knowledge would be problematic;

ii) there is no consensus about how such a definition might be framed;

iii) The more specific the regulations attempted to be on this point, the greater the likelihood that they might not produce an optimal result for all cases (the facts of which could vary enormously);

iv) It is possible that the ECJ will in future cases give further guidance on how the general concept laid down in Uniplex should be applied in practice, and it is desirable that the terms of the UK regulations should be generic enough to be not explicitly inconsistent with any such further refinements;

v) any certainty given by detailed wording in the regulations defining the date of knowledge would be illusory as the wording might be required by the ECJ to be read in a different way or indeed ignored (as indeed, happened in the Uniplex case in relation to the old wording of the time limit provision in the Regulations);

vi) it would nevertheless be wrong to lay down a general principle which might, albeit in rare circumstances, fail to guarantee to claimants the 10 or 15 days guaranteed by the specific wording of article 2c of the Directive.

33. Cabinet Office therefore concluded that-

i) the general rule laid down in the Regulations should be that the new general time limit of 30 days will run from that date on which the economic operator "first knew or ought to have known" that grounds for starting the proceedings had arisen, leaving the Court to apply this in the circumstances of each case and in the light of any further guidance from the ECJ;

ii) to ensure strict compliance with the Directive, paragraph (3) of PCR regulation 47D (UCR regulation 45D) should be retained, so that it qualifies the new general limit in the same way that it qualified the old general limit, to ensure that claimants always have at least the 10 or 15 days from the triggers stipulated by art 2c of the Directive.

Other Issues

34. Cabinet Office's supplementary consultation note raised a number of further issues:-

i) What action should the claimant have completed within the time limits, and what should trigger the 'automatic suspension' under regulation 47G PCR (45G UCR), given the unintended effect of the 'deemed service' rules identified in the note?

ii) Should the obligation to send a pre-litigation notice (which had been abolished in 2009) be restored?

iii) What transitional policy should be adopted in relation to the new time limits?

35. These issues did not attract the same interest as the key issues raised by the main consultation paper. Only three responses addressed these issues: the PLA's response and the responses of two contracting authorities.

36. In relation to the 'deemed service' problem, Cabinet Office accepted the essence of the PLA Working Group's proposal[14] and concluded that the best way to resolve the problem would be to-

i) refocus the time limits so that the claim form need only be issued (rather than served) within the time limit (i.e. restoring the approach taken before the 2009 reforms);

ii) introduce a new requirement that service be effected within 7 days of issue (mirroring the obligation in judicial review proceedings);

iii) provide for the automatic suspension to apply where the contracting authority becomes aware that the proceedings have been issued, leaving it for the Court to determine this as a factual question.

37. On the subject of pre-litigation notices, the PLA Working group 'strongly' opposed its restoration. It was also opposed by one of the contracting authorities which commented, but supported by the other contracting authority which commented. The Cabinet Office agrees that the obligation to send such a notice should not be restored, broadly for the reasons given in paragraph 7.11 of the PLA's response.

38. In relation to the transitional policy, the Cabinet Office had indicated its preferred approach in paragraph 12 of its supplementary consultation note. Of the three responses received on this topic, two contracting authorities supported this preferred approach. The PLA addressed transitional policy in section 8 of its response, expressing serious concern about the Cabinet Office's preferred

[14] Paragraphs 7.1 to 7.9 of the PLA's response. The Cabinet Office considered a less radical alternative approach whereby a 'deemed service' approach would be retained, but be linked to the different rules applicable, under Rules of Courts, to documents other than claim forms. This was rejected as not entirely satisfactory, unduly complex, and less attractive than the approach suggested by the PLA. One of the contracting authorities which commented on this issue was broadly in favour of an 'actual knowledge' approach, and the other was noncommittal.

approach that new shorter limits may apply where the grounds have already come to the complainant's attention before the new rules are adopted.

39. After careful consideration of the PLA's observations, and the complex issues that arise in relation to transitional matters in this context, Cabinet Office decided to adopt a transitional approach significantly different from the preferred approach set out in its consultation note

40. Cabinet Office does not share the view of the PLA's Working Group that it would be appropriate to adopt a similar transitional approach to that which was adopted when the new remedies were introduced in 2009, by not applying the new limits in the context of any procurement process that had already been commenced, even where no cause of action had yet arisen in those proceedings. For the reasons given in paragraph 14 of the consultation note, Cabinet Office considers that the present situation is materially different. Indeed, it seems difficult to identify any substantive reason for preserving the old limits where the cause of action had not even arisen by the time the new limits are introduced.

41. However, Cabinet Office does accept that the new limits should not apply where the date on which the claimant first knew or ought to have known of the relevant cause of action occurred *before* the date on which the regulation amendments introducing the new limits come into force. It seems to the Cabinet Office that this approach will-

    i) fully address any legitimate objections to the preferred approach suggested in the consultation note;

    ii) in particular, avoid applying a shorter limit after the claimant has become aware of the cause of action (and so might already have begun planning its way forward in a way which conformed to the existing time limit);

    iii) be a reasonably simple and clear rule to apply;

    iv) be in line with precedent[15] .

42. As indicated in the consultation note, Cabinet Office will apply the transitional approach across the board, to cases governed by the original time limits provisions of the 2006 Regulations as well as to those governed by the time limits as amended in 2009.

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[15] For example, when the limitation period for defamation claims was reduced from 6 years to 3 years, the new limit was not applied to any cause of action which had already accrued: see paragraph 14 of Schedule 9 to the Administration of Justice Act 1985. In the present context, the fact that the limit will run from the date of knowledge rather than the accrual of the cause of action makes it appropriate to focus the transitional cut-off on the former rather than the latter, but the principle is fundamentally the same.