Cabinet Office

Consultation document

2010

CONSULTATION DOCUMENT ON TAKING ACCOUNT OF THE UNIPLEX CASE (C-406/08)

Introduction

1. This consultation document covers the implications for the UK public procurement Regulations of the European Court of Justice (ECJ) ruling in the Uniplex case (C-406/08), concerning the time limits for bringing proceedings alleging a breach of the procurement rules. The first section sets out the background to the Uniplex case and the need to make consequential changes to the UK Regulations. The second section covers the consultation issues.

Purpose

2. This consultation document invites views from stakeholders on the approach by the Cabinet Office (CO), to amending the public procurement Regulations to take account of the European Court of Justice (ECJ) ruling in the Uniplex Case (C-406/08) concerning the time limits for challenges under those Regulations.

3. Implementation of the ECJ's decision in *Uniplex* is mandatory. As compliance with the *Uniplex* ruling could be achieved in a variety of different ways, the CO has therefore considered various options for amending the Regulations (set out below) and seeks the views of stakeholders and others by written response to this consultation paper.

Background

4. The judgment in Uniplex v NHS Business Services Authority has implications for the time limits for starting challenges brought under Part 9 of the Public Contracts Regulations 2006 ("PCR") and Utilities Contracts Regulations 2006 ("UCR")[1]. The Uniplex case concerned the compatibility with EU law of certain features of the time limits laid down in those Regulations.

5. Regulation 47(7) of the PCR and Regulation 45(5) of the UCR stated that such proceedings are to be brought "promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period."

6. In its ruling in the Uniplex case, the ECJ held that:

- In order to guarantee the effectiveness of the remedy, the limitation period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules, should not start to run until the time when the applicant

[1] SI 2006/5 and 2006/6.

knew, or ought to have known, of the alleged infringement;

- The requirement to bring proceedings promptly, which leaves the court discretion to dismiss an application even where the three month time limit has not yet expired, is also inconsistent with EU law, because it is not precise and so makes the rules uncertain.

As a consequence of the Uniplex decision, it is therefore necessary for CO to amend the UK procurement rules to achieve compliance with EU law. Two essential changes must be made:

- the time limit must run from when the applicant knew or ought to have known of the infringement, and

- The objectionable role played by the requirement to act "promptly" must be removed.

Scope

7. The CO has responsibility for coordinating the transposition of EU Directives on Public Procurement into law in England, Wales and Northern Ireland, so this consultation exercise is primarily aimed at consultees in those jurisdictions. CO also works closely with the devolved administration in Scotland; a similar consultation and implementation process is expected to happen in Scotland.

8. CO intends to seek views separately:

   - On changes to the linkage between when the time limits expire and when the claim form is deemed to be served by rules of court (regulations 47D(5), 47E(8) and regulation 47F(1) and (5) of the Public Contracts Regulations 2006 and equivalent provisions in the Utilities Contracts Regulations 2006); that exercise will also cover the similar linkage between the deemed service rules and the automatic suspension triggered by regulation 47G(1) and (3). These views will inform the preparation of the regulations that will amend the time limits

   - On transitional arrangements for the new rules; and

   - On implications for the standstill period.

Timing

9. This consultation runs for 8 weeks from 24 November 2010 to 19 January 2011. It includes: the relevant background; several policy options; and instructions on how to

respond. This consultation document is issued directly to a number of known stakeholders and is also made publicly available on OGC's website.

10. Subsequently, the CO will analyse the feedback, publish a summary of the results, and make and lay before Parliament the relevant amending regulations by statutory instrument. CO will also issue guidance on the rule-change.

Consultation

11. The consultation complies with the Better Regulation Executive's code of Practice on Consultation. As the issues set out in this consultation are not major policy changes and the issues, in general terms, had been addressed in the recent consultations on the implementation of the remedies directive, as shorter 8 week period was considered appropriate for this consultation rather than the usual 12 week period.

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Process

12. The CO welcomes input by **19 January 2011**. Please direct responses, or any questions on the consultation, to:

By email:

Ogcservicedesk@cabinet-office.gsi.gov.uk

By post:

OGC Servicedesk, Cabinet Office
Rosebery Court
St Andrews Business Park
Norwich
NR7 0HS

Handling of Information from Individuals

13. The information you send may need to be passed to colleagues within Cabinet Office or other Government departments, and may be published in full or in a summary of responses.

14. All information in responses, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be acceded to only if it is appropriate in the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on

the Department. Contributions to the consultation will be anonymised if they are quoted.

15. Individual contributions will not be acknowledged unless specifically requested.

Contact for comments or complaints about the process

16. Your opinions are valuable to us. Thank you for taking the time to read this document and respond. If you have comments or complaints about the consultation process itself, please contact:

By email:

vanessa.barron@cabinet-office.x.gsi.gov.uk

By post:

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Consultation issues

Introduction

17. This section of the consultation document:

    i. Recaps on the closely linked issues covered during the implementation of the new Remedies Directive, so as to provide additional context in particular on the subject of time limits for bringing legal proceedings, which featured strongly in the Remedies Directive consultations and is at the root of the ECJ's decision in Uniplex;

    ii. Introduces three main policy options that CO perceives to be feasible, and solicits feedback on those options. It also mentions two other options which CO has considered and rejected as being unsuitable, for completeness.

    iii. Seeks feedback on the possible impacts of the various options and so that CO can ensure that impacts are effectively considered in the policy-making process.

18. In the text that follows, each relevant implementation option is introduced, followed where relevant by one or more text boxes that encapsulates our specific question or request for feedback relating to that issue. Please ensure that your response addresses all of the text boxes.

Recap on linked technical issues considered during the implementation of the Remedies Directive

19. During the 2009 implementation of the new Remedies Directive, the Office of Government Commerce conducted two consultation exercises. The time limits for applying for reviews were addressed in these consultations and the results were published[2] on the OGC web site.

20. In the consultations, OGC sought feedback on the appropriate length of time limits and the new Directive's implications for the requirement to start proceedings 'promptly'. At the time, most respondents were keen to preserve the long-established three-month backstop for review applications, and agreed with OGC's minimalist approach of amending the definition of "promptly", so that it could never mean less than 10/15

[2] http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_european_procurement_directives.asp

days. This meant that the time period would be compliant with article 2c of 2007/66/EC, which sets out that there should be a minimum time period of 10 or 15 days for applying for review, depending on the method of communication. Some respondents suggested that the three month period for review should be shortened, but it was decided to keep the three month period, to keep it consistent with the time limit for judicial review proceedings. As it was not an issue raised explicitly by the Directive, OGC did not raise the possibility of refocusing the 3 month limit to run from date of knowledge rather than the traditional focus on date of breach, and no respondents suggested such a change.

21. The 2009 amending regulations came into force on the EU-imposed deadline of 20 December 2009. Shortly afterwards on 28 January 2010, the ECJ gave its judgment in the Uniplex case. That ruling therefore came too late to be taken account of in the amending regulations, and OGC's response to the second remedies consultation,[3] noted that further amendments would be necessary following the decision in Uniplex; this consultation engages stakeholders in the process.

[3] http://www.ogc.gov.uk/documents/OGC_response_to_the_2nd_remedies_consultation.pdf

Options for changing the Public Procurement Regulations

22. The following three options would provide a definite time period within which to make a challenge, with one of the three options providing discretion to extend, but in all cases the term "promptly" would be removed from the Regulations. **In particular, feedback is welcomed not only on stakeholders' preferred option, but also the specific reasons for any preference, and also the reasons why any of the options are considered less favourable.**

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

23. A clear and comparatively simple option for taking account of the ruling would be to say that any challenge should be brought within 10/15 days of the date of knowledge, which is compatible with the minimum time limit required in article 2c of the Remedies Directive (2007/66/EC) (see below for how the concept of date of knowledge would be expressed for this purpose). The Court would have no discretion to extend this limit.

24. The main arguments in favour of this option are that:

    a) Because the time limit will run from the date of knowledge rather than the date of breach, it is unnecessary for the limit to be as long as the current three month limit

    b) For the same reason, it is unnecessary for there to be discretion for the Court to extend the time period beyond the limit, because the main purpose of this discretion in the existing Regulations was to prevent injustice where there had been a long gap between the breach and the date on which the claimant knew, or could have known, of the breach. Because the time limit will now only start to run on the latter date, such injustice is avoided. Removing the discretion will therefore provide greater certainty for contracting authorities and utilities about when the risk of challenge has passed, without risking the sort of injustice to claimants that was possible when the time limit ran from the date of breach regardless of the claimant's knowledge.

    c) It conforms to the minimum requirements laid down by article 2c of the Directive (though it would also apply to cases falling outside the scope of article 2c, as explained below) and the ECJ has not criticised that[4].

    d) Although the limit would be short, it is no shorter than the 10/15 day standstill period which already means that economic operators who wish to challenge a contract award decision must start proceedings within 10/15 days if they wish to be sure of being eligible for a pre-contractual remedy rather than damages. Claimants have been able to operate within this tight 10/15 day limit in those circumstances, and this option would simply make that period universal for all proceedings (other than ineffectiveness claims) under the Regulations.

25. The main arguments against such an approach are that:

    a) This would provide only a short period for challenge;

    b) It is arguably too radical a shortening of the traditional time limits. The apparent reduction from 3 months to 10/15 days is in reality less draconian when it is remembered that the 3 month limit ran from date of breach, but the 10/15 day limit would only start running from the date of

[4] See further, footnote 6.

knowledge. Nevertheless, the reduction to 10/15 days is arguably disproportionate, and will worsen the position of claimants in all cases in which the date of knowledge occurs less than 2½ months or so after the date of breach.

c) It is a 'one size fits all' approach that (unlike option 3) lacks any ability to strike a balance between the legitimate interests of the claimant and the defendant in the circumstances of a particular case or class of case.

d) In particular, while there seems a good case for imposing a short time limit for starting claims which could, if successful, affect an ongoing procurement process, there seems less of a case for doing so where the claimant is only seeking damages (in practice, this would be where the contract has been awarded and the claimant accepts that the grounds for ineffectiveness do not exist). In cases of the latter kind, the proceedings will have no potential to have a disruptive effect on a live procurement procedure or on the process of putting an awarded contract into execution, and so there is less legitimate need to require the claim to be brought as urgently as within 10/15 days. It would be particularly anomalous that, where a contract award notice was published justifying a decision to proceed without prior publication of a contract notice, regulation 47E would allow a claimant up to 30 days to start proceedings seeking the very intrusive remedy of ineffectiveness, but only a shorter period of 10/15 days to start proceedings for the less intrusive remedy of damages. One way of mitigating this might be to draw a distinction between damages and other remedies, and allow more time (perhaps following one of options 2 or 3) for seeking damages, and confine option 1 to other remedies, though this would complicate the time limits.

26. For the purpose of this option, CO would propose that the 'date of knowledge' should, for those cases covered by article 2a2 of the Directive, be defined in the terms used by that article. This would mean 10/15 days from the date of sending the decision to which the intended legal challenge relates, depending on the method used (10 days for electronic means, 15 days for other means), 10 days from date of receipt, or 10 days from date of publication[5].

[5] Although the ECJ, in its judgment in Uniplex, referred in generic terms to the need for the time limits to run from the date on which the claimant knew or ought to have known of the infringement

27. However, article 2a2 is not comprehensive, and does not address situations in which the decision concerned is not sent (by any means) or published, but which nevertheless comes to the attention of the claimant by other means (for example a leak). Paragraph 2 of article 2f of the Directive would appear to allow the UK to determine the time limit that should apply in such cases. By analogy with the limits laid down by article 2c, the appropriate limit would seem to be 10 days from the date on which the claimant first knew, or ought to have known, of the grounds for bringing the proceedings. CO would like to know whether consultees agree that article 2c is not comprehensive, and that there is scope for the regulations to lay down a general longstop limit running from the date on which the claimant actually knew, or ought to have known, of the grounds, even if none of the methods mentioned in article 2c are used to being it to their attention.

28. A further related issue is whether, even in cases where a notice is sent, or the decision is published, the 10/15 days should start to run earlier if in fact the claimant knew or ought to have known of the decision prior to the publication etc. CO would be interested to hear the views of consultees on whether this would be compatible with article 2c.

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

Please respond with your assessment of option 1. If you do not consider this option appropriate generally, it would be helpful if you could also say whether it would be appropriate to apply this option to some types of case but another option to other types of case (eg damages claims).

concerned, the ECJ referred explicitly to the detailed rules laid down by article 2c of the new Directive without suggesting that these were incompatible with such an approach. Indeed the ECJ indicated (at paragraph 34 of its judgment) that article 2c supported and illustrated such an approach. The ECJ did not comment on the possibility that a notice that is sent, thereby triggering the 10/15 time limit under article 2c, might not in fact be received. Clearly, it will only be from the date of receipt that the recipient will in fact know, or ought to know, of the contents. Article 2c already allows Member States to lay down time limits running from the date of receipt, so the only point of article 2c in authorising Member states to lay down time limits running from the date of sending seems to be to obviate the need for defendants to prove that the notice was actually received on any particular date (or at all). It is perhaps unfortunate that the ECJ did not comment on this possibility, and how it measured up to its general conclusions on the importance of limits running from the date on which the claimant knew or ought to have known of the relevant infringement. Nevertheless, CO considers it justified in relying on article 2c, as endorsed generally by the ECJ's judgment, in the absence of any indication from the ECJ that article 2c might in some respects be incompatible with fundamental requirements of EU law.

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

29. This option would be similar to the first option, but would provide for a significantly longer period than 10/15 days, for example 30 days from the date of knowledge. This would provide a balance in relation to the time period: it would be longer than 10/15 days, but not as long as 3 months.

30. This option addresses the argument that a 10/15 day period would be unreasonably short, while still giving some weight to the argument that the change to a limit running from the date of knowledge makes some reduction in the old 3 month time limit appropriate. It does not provide for the discretion to extend and so provides for clarity and certainty on timescales. If the time limit were to be set at 30 days, it would have the added advantage of aligning with the 30 day time limit set out for ineffectiveness claims in regulation 47E(2) of the PCR, thus avoiding the counter-intuitive anomaly mentioned at paragraph 24(d) above. A fixed period would not, however, allow the circumstances of a particular case to be taken into account. In not allowing for any discretion, it has the drawbacks of a 'one size fits all' approach.

31. When you express a view on this option, it would be helpful if you would state how long the challenge period should be.

32. It would also be helpful if you would comment on how the concept of 'date of knowledge' should be defined for the purpose of this option. In relation to option 1, as explained above, we would propose making use of the concepts of sending, receiving and publication mentioned in article 2c, applied also by analogy to those cases falling outside article 2c. However, if a period as long as 30 days were selected, it is unclear how far any useful purpose would be served in laying down different limits according to whether electronic or other means were used to send the notice (for example, 25/30 days, or 30/35 days), as 30 days for all means of communication would, in any event, comply with the minimum requirements of article 2c.Therefore the case, as a matter of policy, of continuing to draw such a distinction may be doubtful (particularly as, for example, the delay in using the post would not tend to amount to the 5 day discrepancy suggested by article 2c).

Box 2: Policy Option 2 (a challenge period running from date of knowledge, but fixed at longer than 10/15 days)

Please respond with your assessment of option 2. When you express your views on this option, it would be helpful if you would state clearly:

i) How long you think the challenge period should be;

ii) How you think the concept of 'date of knowledge' should best be defined

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

33. This option would allow for a longer time period than option 1, where the circumstances made this appropriate. The discretionary period would be either three months, which would align with the time limit for judicial review, or a shorter period, such as one month.

34. This provides a compromise approach, mitigating the harshness of the short 10/15 days to challenge, by allowing for the discretion to extend that limit up to a specified maximum period. If the maximum were to be set at three months, it would arguably be longer than necessary, as the starting point would be the date of knowledge rather than the cause of action. Therefore, a shorter period, such as one month, might be more appropriate. Allowing discretion, however, would reduce the clarity and predictability of any court ruling on the limitation point and this would create more uncertainty for contracting authorities than option 1 (and possibly more uncertainty than option 2, depending on whether the option 2 time limit was shorter than the maximum extension permitted under option 3).[6]

[6] CO does not consider that the existence of this kind of limited role for Court discretion would be incompatible with the reasoning in the Uniplex judgment. Claimants would be guaranteed a 10/15 day period which fully meets the minimum requirements laid down by the Directive, and the existence of some discretion to extend the limit beyond that, but only up to a fixed minimum set by the regulations, where that would serve the interests of justice in the particular circumstances, would not, in CO's view, create the sort of objectionable uncertainty that would infringe the principles upheld by the ECJ in Uniplex.

Box 3: Policy Option 3 (a 10/15 days period to challenge, but with discretion to extend to either a period shorter than three months or to three months)

Please respond with your assessment of option 3. When you express your views on this option, it would be helpful if you would state clearly how long you think the period of discretion should be

Discarded Options

35. Two other possible options have been set out below. These have been considered and judged unsuitable for the reasons set out below.

36. The simplest change would be to insert a provision after Regulation 47D(3)(c), to say that in all other cases (i.e. those not falling within (a) to (c)), 'promptly' can never mean less than 10 days from the date of knowledge. The effect would be to provide for a three-stop approach, with claimants being always guaranteed 10/15 days from a relevant trigger sanctioned by article 2c of the Directive or (by analogy) 10 days from the date of knowledge in other cases. This approach would retain the three month limit (still focussed on the date of the breach rather than the date of knowledge) which could still be eaten into by the concept of 'promptly' (depending on the circumstances of the particular case), provided it did not reduce it beyond the 10 or 10/15 guarantee already mentioned. This approach would also retain the Court's existing ability to extend the limit, even beyond three months.

37. The merit of this approach is that it preserves as much as possible of the 'traditional;' time limit, qualifying it only to the minimum extent that can be argued to be required by the judgment. This 'minimalist approach' would represent the smallest tweak to the existing structure of regulation 47D that can be argued to be necessary to comply with the Directive.

38. However, this appears to be outweighed by the disadvantages of such an approach. The solution would be complex in its effects, with different elements of the limit focussing on date of knowledge and date of breach respectively, and with the retention of certain features which were only really needed in the first place to cater for some categories of case that did not fall within the 10/15 day guarantee. Now that Uniplex requires all the time limits to reflect a date of knowledge trigger, it seems more desirable to approach the issue afresh in one of the ways addressed by options 1 to 3 above, which would also avoid any problems associated with the retention of the concept of

'promptly' as an integral ingredient of the time limit (though the discretion to extend that as a feature of option 3 above would, in substance, do a similar job in enabling the Court to reflect the circumstances of the particular case in deciding whether a case should be allowed to proceed despite failure to comply with the 'first stop' element of the limit).

Another possible option would be to allow for a three-month time limit running from the date of knowledge, with or without the discretion to extend. The use of the three-month period would be the same as the time limit for judicial review. The move to a "date of knowledge test", however, would remove the need for a standard time limit anything like as long as three months, so CO has rejected this option as being unduly favourable to claimants and insufficient to reflect the legitimate need of contracting authorities and utilities for certainty in many circumstances.

Impact Assessment

39. Impact Assessments (RIA) are generally required for transposition of EU Directives. The UK guidance on impact assessment[7] clarifies that an assessment should be carried out for any government proposal that:

    i. Imposes or reduces costs on businesses or the third sector;

    ii. Similarly affects costs in the public sector, unless those costs fall below a threshold of £5M, in which case only a developmental/option stage assessment is required.

40. An impact assessment was carried out during the transposition of the remedies directive, and is available from CO's website[8]. Paragraph 28 of that impact assessment, as reproduced below, addressed time limits. In the light of the policy options presented above to implement Uniplex, we intend to update paragraph 28 of that impact assessment and we are seeking views on how this could be done.

41. The relevant extract from the remedies directive impact assessment on article 2c was:

Article 2c: Time limits for applying for a review

Under article 2c, Member States must ensure that a certain period of time is available for reviews to be brought (the absolute minimum being 10 days where electronic means are used and 15 days otherwise). UK Regulations currently require reviews to be

[7] http://www.berr.gov.uk/files/file44544.pdf

[8] http://www.ogc.gov.uk/documents/Remedies_Impact_Assessment.pdf f

brought 'promptly, and in any event within 3 months', which is in line with judicial review timescales. The consultation confirmed that stakeholders were content with OGC's minimalist approach of maintaining the principle of the existing Regulations but ensuring that the Remedies Directive is complied with by clarifying that 'promptly' can never mean less than 10 or 15 days (depending on the method of communication used). There are no direct costs expected from this minor clarification.

42. CO's current view is that the direct costs or financial benefits of either of the three new policy options to implement the Uniplex decision will be either difficult or impossible to predict, though we welcome stakeholder's feedback to test this assumption and invite suggestions on how the possible impacts could be forecast. This could include, for example, financial predictions based on the costs of progressing legal proceedings more quickly or slowly, or the more practical benefits and drawbacks of each of the policy options, in terms of their impact on the public sector, businesses or the third sector.

Box 4: Impact Assessment (IA)

CO seeks comments on:

i) Whether the costs and benefits of the policy options could be reflected in the amendment to paragraph 28 of the IA; and, if so

ii) Specifically what those costs or benefits might be.

Conclusion

43. We would be grateful for your views on which of the three options would be preferable and why, and for any comments on the updating of paragraph 28 of the Impact Assessment on the implementation of the Remedies Directive. Details on the consultation process are given on pages 4 and 5 of this document.

Procurement Policy
Efficiency & Reform Group
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