NOTE SUPPLEMENTING THE 'CONSULTATION DOCUMENT ON TAKING ACCOUNT OF THE UNIPLEX CASE (C-406/08)' THAT WAS ISSUED BY THE CABINET OFFICE IN NOVEMBER 2010

Introduction

1. This note supplements the main consultation document ('the Condoc') and needs to be read in conjunction with it. Views expressed in response to this note will be handled in the same way as responses to the Condoc[1]. The Condoc was short and concentrated on bringing out the key features, the options and their pros and cons. This supplement is aimed primarily at procurement lawyers with a detailed and technical interest in the issues. The main purpose of this note is to seek informed views on-

    - the Cabinet Office's proposed approach to the transitional aspects of implementing whichever of the substantive options is adopted in the light of the response to the Condoc, and

    - Whether and, if so how, the existing linkage between the 'deemed service' rules and the time limits (and the trigger for the automatic suspension) under the PCR and UCR should be broken.

2. The first of these issues is complex and technical, and the second is highly technical and likely to be of particular interest to litigation lawyers concerned with procurement cases.

3. This note also-

    - flags up (at paragraphs 19 to 22) the Cabinet Office's intention to make a tweak to the technical definition of a 'tenderer' for the purposes of the standstill rules, which would seem appropriate whichever of the substantive options canvassed by the Condoc are adopted and

    - draws attention (at the end of the note) to the request, already raised by the recent Ministry of Defence consultation on the implementation of Directive 3009/81/EC, for views on whether the former obligation that was imposed by the PCR and UCR (but removed by the 2009 amendments) on prospective claimants to send a notice to the contracting authority ("CA") or utility before commencing proceedings, should be restored. This and the 'deemed service' issues are interlinked, as whether the notice obligation is restored may affect the merits of the possible solutions to the deemed service problem.

4. As the issues raised by this note require an understanding of how the 2009 regulation amendments have changed the position, it may be helpful briefly to recap on them here, as the Condoc itself did not do so.

[1] Please note in particular, paragraphs 13-15 of the Condoc.

5. The *Uniplex* judgment concerned the original time limits laid down in the 2006 Regulations. In 2009, the time limits were amended to implement the new EU Directive reforming the remedies regime for breaches of the public procurement rules[2]. The new time limits are more complex. The general time limits now laid down by regulation 47D of the PCR (45D of the UCR)-

- continue to enshrine the requirement to act 'promptly' (albeit that this is now partly curtailed by a new guarantee that it can never mean less than the 10/15 period described in paragraph (3) of the regulation) and

- continue to require the 3 month element of the time limit to be calculated from the date when grounds for starting the proceedings first arose, rather than from the date on which the claimant knew or ought to have known of those grounds.

6. These similarities are such that the reasoning of the ECJ clearly reads across to them.

7. In its judgment, the ECJ addressed how the High Court should act in relation to the time limits in the 2006 Regulations. In essence, the High Court must, if possible, interpret the time limits in such a way as to ensure that the period begins to run only from the date on which the claimant knew, or ought to have known, of the relevant infringement of the procurement rules. If the High Court cannot do so the ECJ says that the High Court must, in exercise of the discretion to extend which the Regulations confer on it, extend the limit in such manner as to achieve the same effect (i.e. as if the limit had run from the date on which the claimant knew, or ought to have known, of the infringement). The Cabinet Office understands that in practice the High Court has been interpreting the limits accordingly, and disregarding the 'promptly' requirement in the Regulations[3].

8. The status quo following the Uniplex judgment is therefore that the time limits as originally laid down by the 2006 Regulations have effect in a way that is more generous to claimants than had been intended when the Regulations were made, in that

[2] The Public Contracts (Amendment) Regulations 2009 (SI 2009/2992) replaced the previous regulation 47 of the PCR with, among other new regulations, new regulations 47D and 47E laying down new time limits. The Utilities Contracts (Amendment) Regulations 2009 (SI 2009/3100) replaced regulation 45 of the UCR with similar new regulations 45D and 45E. The new Directive (2007/66/EC) amended the two principal Directives (89/665/EEC and 92/13/EEC) which apply, respectively, to remedies in the public and utilities sectors. In each case, the new Directive inserted new articles 2c and 2f to address time limits. Generally, this consultation document uses the phrase 'the new Remedies Directive' to refer to the new substantive provisions inserted by the 2009 Directive.

[3] See generally paragraphs 36-50 of the ECJ's judgment. The ECJ did not answer the 'second question' referred by the High Court quite as explicitly in relation to whether the 'promptly' requirement in the Regulations must be disregarded prior to its formal revocation by regulation amendment, but the Cabinet Office takes the view that this is implicit in the tenor of the ECJ's answer to the second question as a whole.

- the former ability to recognise that the particular urgency of some situations and the adverse impact on the defendant if a claim is not brought particularly quickly in those circumstances, may require proceedings to be started sooner than the usual 3 month period has disappeared, and

- the 3 month period itself now only begins to run from the date on which the claimant knew, or ought to have known, of the relevant procurement breach, which may in practice be considerably later.

9. Another complexity introduced by the 2009 amendments is the new time limit in regulation 47E of the PCR (45E of the UCR) for bringing proceedings for the new remedy of ineffectiveness, so implementing article 2f of the new Remedies Directive. This new time limit was not questioned either by the Uniplex judgment[4] or following the informal scrutiny of the 2009 Regulations by the European Commission. As a result, the Cabinet Office does not consider that there is any need for changes to the ineffectiveness time limit.

Transitional aspects

10. The Condoc canvassed various options for changing the time limits to make them Uniplex-compliant. Whichever option is implemented, it will need to be clear what the transitional effect of the change is to be. This aspect of the change gives rise to some complexity, particularly as new proceedings could still be brought under the original remedies regulations ("the pre-2009 Regulations") that were replaced by the 2009 Regulations. This is because the transitional provisions included in the 2009 Regulations preserve the effect of the pre-2009 Regulations in relation to procurement processes which had already started by 20 December 2009.

11. The rest of this section of this note sets out the Cabinet Office's analysis of the issues. We would be grateful for your views on whether our conclusions and analysis are correct, or whether a different policy should in any respect be adopted.

[4] The ECJ's judgment is silent on the question, and the issue did not need to be decided as the case was governed by the law in force prior to the Directive. However, the judgment does mention article 2c of the Directive (see paragraph 34) as supporting the Court's conclusion. As article 2f had also been drawn to its attention, the Court would presumably have said so if it had wanted that article, unlike article 2c, to be viewed as incompatible with the Court's conclusions. The Advocate-General's Opinion in the case suggests a distinction between primary and secondary legal protection. In her view, where the proceedings seek to have a concluded contract declared void (primary legal protection) it is reasonable to lay down an absolute limitation period of comparatively short duration (which article 2f does), regardless of the applicant's date of knowledge. By contrast, where proceedings are aimed merely at obtaining a declaration that there has been an infringement, possibly accompanied by damages, the balance tips in favour of a date of knowledge test. See in particular paragraphs 31-39 of her opinion. The Court in its judgment, did not feel it necessary to comment on this aspect of the Opinion. It often happens that the Court's judgment is more tightly focussed than the Advocate-General's Opinion, as the Court is usually keener to avoid addressing issues that do not strictly arise on the facts of the case. As it has not been criticised by the Court, this aspect of the Advocate General's Opinion, though not binding, has persuasive authority.

12. In principle, the Cabinet Office is inclined to think that the changes should be introduced so that

    a. they apply to all proceedings (including those governed by the pre-2009 Regulations) started after the date on which the changes come into force (which will probably be 21 days, or slightly longer, after the amending regulations are made and laid before Parliament)

    b. they do not apply to proceedings which had been started, but not concluded, before the date on which the changes come into force.

13. The following paragraphs explain further, and flag up aspects which might be debatable. The Cabinet Office would be grateful for your views on whether its analysis and conclusions are correct, or whether a different policy should in any respect be adopted.

14. In the Cabinet Office's view, it would not be appropriate to make the changes subject to the same transitional approach that was used when the new Remedies Directive was implemented by the 2009 Regulations. The latter approach was to say that the changes do not affect any contract award *procedure* started before the changes came into force. If applied in this context, such an approach would mean that, for a long time after the changes were brought into force, new *proceedings* could be started without being subject to the new time limits. This would not be appropriate here, as the context is wholly different from the prospective transition from one remedies regime to another that was implemented in 2009. In the present context, the existing provisions about time limits in the Regulations are already in a form that breaches EU law. Although the ECJ has given clear directions to the Court as to how it should interpret or apply those provisions so that they are compatible with EU law, it is unsatisfactory not to regularise the position as soon as reasonably possible for all proceedings that may be started after the change comes into force, so that the regulations mean what they say and can be relied on as accurately laying down the limits concerned Also, because the default guidance given by the ECJ produces an effect that is more generous to claimants than any of the three options which the Cabinet Office believes to be tenable, the resulting injustice to defendants should not be perpetuated longer than is necessary.[5]

[5] This is not to criticise the ECJ, but merely to note that the superficial editing out of the requirement to act 'promptly' and to apply the 3 month limit from date of knowledge rather than the date on which the grounds arise, produces the result that the time limits, as they are required to be interpreted post-Uniplex, are more generous to claimants than they has been intended to be when they were laid down. It would not have been appropriate for the ECJ to usurp the role of the UK Government by engaging in a more substantial exercise of reformulating the limits more radically to counterbalance the pro-claimant effect of those two changes that were necessary to bring the existing 3 month limit into compliance with EU law. That editing by the ECJ was merely a 'holding job' and does not prevent the UK from recasting the limits to rebalance the limits taking account of the need to avoid undue reliance on 'promptly' and the need for the limits to run from the date of knowledge.

15. Secondly, the Cabinet Office does not think that the changes should be made retrospective, in the sense of enabling defendants in proceedings which had been started, but not yet concluded, before the changes come into force to argue at the hearing that the claim should be rejected as out of time, even though the proceedings had been started at a time at which the more generous time limits applied by virtue of the 'holding instruction' given by the ECJ in Uniplex.

16. It seems less clear whether any particular transitional period would be appropriate to enable those who might hitherto have been working towards starting proceedings within the Uniplex holding time limits to adjust to the need to start proceedings sooner under the changed rules. The arguments on this may be affected by which of the substantive options is implemented. In accordance with general practice, the amending regulations which make the changes will not come into force until at least 21 days after they are made and laid before Parliament. As the regulations will enter the public domain (and will be publicised by the Cabinet Office) very soon after they are laid, there would seem to be no need for a further transitional period if option 1 is adopted, as more than the new '10/15 day' time limit would elapse in any event before the regulations come into force.

17. However, if option 2 is implemented, with a period of 30 days as the limit, it might arguably be fair for a transitional provision to provide that the changes do not prevent the starting of proceedings by a certain date (chosen to be 30 days after the expected date of publication of the regulations), if the claim would not otherwise have been out of time (i.e. under the ECJ's holding instructions). On the other hand, it can be argued that claimants who are aware of, and relying on, the extended ECJ holding instructions, should also be aware from the very nature of the ECJ's holding that the Cabinet Office will need to reconsider and regularise how the regulation addresses the time limits. The Condoc issued in November 2010 also flags up publicly that all the options being considered will rebalance the time limits in ways that are more or less disadvantageous to prospective claimants (compared with the holding instructions) and that it would therefore be unsafe to rely on the generous holding limits continuing. Also, the holding instructions can be considered a 'windfall' for claimants, giving them generous leeway that had never been intended, and there would therefore be less injustice in depriving prospective claimants of the full generosity of those limits.

18. Addressing new cases under the pre-2009 Regulations will need to be achieved in a particular way. Because the pre-2009 Regulations on time limits have already been revoked (by the 2009 Regulations), they cannot as such be amended, So, technically, the substantive effect we have proposed would be achieved by modifying the transitional saving of those provisions so that, as from the date on which the 2010 regulations come into force, the pre-2009 regulations continue to apply, but with modifications, to challenges brought (on or after that date) in respect of procurement procedures which had themselves been commenced before 20 December 2009. Those modifications would be specified in the transitional provisions of the 2010 regulations in terms which mirror, so far as relevant, the substantive effect of

the prospective amendments being made to the regulation 47D of the PCR (45E of the UCR) which apply to wholly new cases. In terms of user-friendliness, it is unfortunate that the effect has to be produced in quite such a technical way, but this seems inescapable given the legislative history.

Implications for the standstill period

19. The new Remedies Directive (article 2a) requires a standstill notice to be sent to the 'tenderers and candidates concerned'. For this purpose the Directive deems tenderers to be concerned "if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body *or can no longer be subject to a review procedure*" (paragraph 2 of article 2a, with emphasis added).

20. When regulation 32 of the PCR (regulation 33 of the UCR) was amended to implement the new Directive's requirements relating to the standstill period, the relevant provisions were recast to refer to candidates and tenderers, and these terms were defined by a new regulation 32(17) (33(14) in the UCR) in terms which do not exclude (from the definition) tenderers whose prior exclusion (from the procurement process) can no longer be subject to a review procedure. This was because the existence of the Court's open-ended discretion to extend the 3 month time limit means that it can never be said definitively that an exclusion from the process can no longer be subject to challenge.

21. All the viable options put forward by the Condoc will remove the Court's open-ended discretion to extend the time limit. Even option 3, which allows some discretion to extend, would cap the discretion at 3 months (or less). It would therefore become possible and meaningful for the definition of 'tenderer' in regulation 32(17) (and in 33(14) UCR) to be amended to exclude (from the definition) tenderers who have been excluded (from the process) and who have not brought proceedings to challenge their exclusion and whose time for bringing such a challenge has expired. The Cabinet Office therefore intends to do so (together, for completeness, with spelling out that a tenderer is also outside the definition if a challenge has in fact been brought but the exclusion was upheld by the Court).

22. This intention is explained for information rather than as something on which the Cabinet Office seeks comments, but if anyone does wish to comment on this aspect of the proposals they are, of course, welcome to do so.

Deemed date of service: when the automatic suspension is triggered and when the time limits bite

<u>Introduction: the background and what the problem is</u>

23. PCR regulation 47G[6] provides for the starting of proceedings to require the CA to refrain from entering into the contract. This is often referred to compendiously as the 'automatic suspension'.

24. The automatic suspension is triggered by the service of the claim form in accordance with reg 47F(1) (see reg 47G(1) and (3)).

25. Similarly, in applying the time limits, it is the date of service in compliance with reg 47F(1) that needs to occur within the limit (see reg 47D(5) and 47E(8)).

26. Reg 47F(1) imposes the obligation on the contracting authority to serve the claim form (effectively removing the option of opting for service through the Court which is normally available under the Civil Procedure Rules). Reg 47F(5) defines 'serve' to mean, for this purpose, serve in accordance with rules and court, and makes it clear that a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

27. When these provisions were inserted in 2009, the OGC was aware that, where postal service is used, the deemed date of service is 2 days after posting. But we were not fully aware that the same 2 day gap also occurs with other, instantaneous, methods of service, such as fax, e-mail or even personal service. If the claim form is personally delivered to the contracting authority's HQ, or successfully faxed or e-mailed, it is still not deemed to have been served until 2 days later. A summary of the deemed service rules in the Civil Procedure Rules (CPR) is set out in Annex A to this note.

28. This has two unintended consequences.

29. First, it means that, in cases of instantaneous service (such as personal service or service by fax or e-mail) there will be a 2 day window after receiving the claim form during which the CA can sign the contract without, on a literal interpretation of the Regulations, infringing the automatic suspension. This was not intended. It can be argued that well-established general principles (developed in the context of deliberate destruction of the subject matter of litigation which the prospective defendant knows is about to be commenced) would allow some sort of remedy where the CA acts deliberately to pre-empt the impending automatic suspension, after the claim form has in fact come to its attention. It can even be argued that a broader, more purposive, interpretation of the Regulations would allow ineffectiveness to be applied in such a case. But it is not satisfactory for there to be a lack of clarity or precision in relation to this.

30. Secondly, it means that 2 days have been unintentionally shaved off the time limits – which is particularly significant given the very short time limits set under reg 47D(3) (and would, of course, be even more significant if Option 1 raised by the Condoc were to be implemented). 10/15 days is short enough anyway, but in reality, the deemed service provisions make it 8 days where

[6] The corresponding provisions of the UCR are similar, but for convenience this section refers only to the PCR provisions.

fax or e-mail are used, and 13 days where personal service is used, because the deemed service provisions do not recognise any way in which a claimant can effect service with immediate effect (or with an effect quicker than 2 days later).

31. Many new proceedings will still be governed by the pre-2009 version of the Regulations by virtue of the transitionals in the 2009 Regulations (which preserved the old rules for cases challenging anything which occurred in the context of a procurement process which had itself been commenced before 20 Dec 2009), but new regime cases (i.e. relating to procurements started on or after 20 Dec 2009) will increasingly occur as time goes on.

32. When the time limits in regulation 47D are modified to address the implications of the Uniplex case, it will be convenient also to address this issue (including its ramifications for the ineffectiveness time limits in 47F and for automatic suspension). It seems wrong to re-incorporate the existing regulation 47D(5) in the new Uniplex-compliant reg 47D when it seems to be flawed in the respects identified above.

Possible solutions

33. Stating the problem with the existing linkage between time limits, and the triggering of the automatic suspension, on the one hand and the deemed service rules in the CPR on the other, is easier than identifying the best solution.

34. The Cabinet Office has no preconceived preference, and would greatly appreciate the insights of the specialist community of lawyers who are concerned with procurement litigation.

35. In a very tentative way, three possible approaches are identified below, in the hope of stimulating debate, but we would be very interested to hear of other approaches that might be possible, as well as comments on the merits of the approaches that are identified below. In supporting any particular approach, please do not feel shy of suggesting how the regulations should best be drafted to give effect to it.

36. It may be that different solutions are appropriate for time limits and the automatic suspension respectively, or it may be that a common solution may be best in both contexts. Again, your views will be very helpful.

Approach A: keeping the deemed service rules as a 'backstop' but providing for actual knowledge to suffice, if acquired earlier

37. One approach would be to keep the CPR's deemed service rules as a backstop, so that-

- the automatic suspension would, at the latest, always arise when the claim form was deemed by the CPR to be served, and

- proceedings would always be 'within time' if the claim form was deemed by the CPR to have been served before the time limit expired.

38. The difference from the existing regulations would be that there would be explicit provisions to produce the effect that

    - the automatic suspension would also arise if
        - the claim form had actually been issued, **and**
        - a copy of it has in fact come into the defendant's possession (a variation might be to require merely that the defendant has acquired actual knowledge that it has been issued)
    - proceedings would be commenced within time if-
        - the claimant has issued the claim form within the time limit **and**
        - a copy of it had in fact come into the defendant's possession within the time limit (here also, a variation might be to require merely that the defendant has acquired actual knowledge that it had been issued)

39. Potential problems with this might be how precisely the rule could be framed to produce certainty. As the defendant will usually be an organisation rather than an individual, the question would arise as to whose possession or knowledge was to be imputed to the organisation as a whole. We welcome views about how far the provisions could sensibly be clear on this point, the extent to which the fulfilment of such criteria would tend in practice to be disputed, and how far the resolution of such disputes would be likely to be predictable, difficult, or unfair to one of the parties (for example, because of the difficulty of proving or disproving assertions about actual knowledge or its lack).

40. To the extent that actual knowledge should suffice, a further question would be how much knowledge would be necessary. In principle, the information should presumably at least be sufficient to enable the defendant to identify which procurement exercise or award decision was the subject matter of the claim. We gather that sometimes even the claim form itself does not give adequate information to enable the defendant to identify it without recourse to the claimant for further particulars. Presumably in the context of automatic suspension, it is in the claimant's own best interests to ensure that the defendant is aware of what the claim relates to, as the claimant would presumably far rather than the defendant was in fact able to identify and stop the signing of the contract in question, than have to bring an ineffectiveness claim and argue about whether all the requirements of the second ground of ineffectiveness had been met. In the context of time limits, the defendant's need to be able, *immediately* on receipt of the claim form, to know what precisely it relates to is presumably less important.

41. The restoration of the requirement for claimants to send a pre-litigation notice might affect the nature and weight of these arguments, and also some of the

arguments advanced below in relation to approaches B and C. The issue of whether to restore that requirement is dealt with at the end of this note.

Approach B: moving entirely to an 'actual knowledge' approach

42. This would be similar to approach B, expect that the 'backstop' role played by the deemed service rules would disappear, so that the issue of when the automatic suspension had been triggered, or the time limit complied with, would always depend on when a copy of the claim form in fact came into the defendant's possession (or when the defendant became aware of its issue).

43. So, for example, this approach would remove the apparent unfairness that a defendant might inadvertently breach the automatic suspension (and thus be exposed to potential ineffectiveness) as a result of a claim form being delayed for more than 2 days in the post but still being deemed to have even served after 2 days. In practice, we assume that this is highly unlikely to arise, as it will clearly be in a claimant's best interests, where it wishes to pursue a pre-contractual remedy, to use a more reliable and expeditious form of service, or at least to have notified the defendant or its lawyers (for example by phone) that the claim form had been posted on such and such a date and would therefore be deemed to be served on the second day. So, it seems highly unlikely that plausible circumstances would in practice arise in which a defendant remained genuinely in ignorant of the issue of proceedings.

Approach C: refocus the time limits on date of issue rather than date of service or knowledge

44. This approach would require merely that the claim form be issued within the time limits. This would restore the position to what it was before the 2009 regulation amendments.

45. The main problem with this approach would be that, depending on which Part of the CPR the proceedings were issued under, the claimant could effectively sit on the claim form for up to 5 months without serving it on the defendant. Paragraph 66.1 of OGC's second consultation paper of April 2009 set out the thinking behind the move to a focus on date of service rather than date of filing. This paragraph is reproduced in Annex B to this note.

46. One way of eliminating that possibility would be to include, in the PCR reg 47F (UCR reg 45F) an explicit requirement for the claimant to serve the claim form 'forthwith' (or some such expression). However, it might not be clear what, or how effective, the sanction would, or should be, for a breach of that obligation. In principle, it would seem more desirable for it to be clear that compliance with the time limit was conditional on the defendant being made aware of the issue of the claim form within the time limit, which might in principle suggest that Approach A or B would be more satisfactory.

47. It would not seem appropriate to use Approach C to deal with the automatic suspension, as it would be wrong in principle for defendants to be bound by an obligation (backed up by the considerable sanction of ineffectiveness) of the existence of which they were not aware. Where a claim form had been issued, it would seem appropriate for the defendant to be at least aware of that fact before he could be treated as under the obligation (i.e. Approaches A or B).

Possible restoration of the obligation on claimants to send a pre-litigation notice.

48. As originally made, regulation 47(7)(a) of the PCR provided that proceedings must not be brought unless the economic operator had informed the contracting authority of the breach, or apprehended breach, of duty and of its intention to bring proceedings in respect of it.

49. That requirement was not reproduced in the corresponding provisions in the new Part 9 of the PCR that was substituted in 2009. The thinking behind the removal of this obligation was set out in the OGC's second consultation document of April 2009 and the subsequent response to the Consultation. The relevant paragraphs are, for convenience, set out in Annex B to this note.

50. The MOD Second Consultation on the Approach to the Implementation of Directive 2009/81/EC ("the MOD Condoc"), issued on 13 December 2010 can be seen at http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/200981EcSecondConsultation.htm

51. That Directive, and the regulations that will be made to implement it, will apply to procurements in the fields of defence and security, in place of the classic and utilities substantive and remedies directives, and instead of the PCR and UCR.

52. The MOD Condoc includes the following text:

> 42.15. MOD intends to implement Article 55(5). This provides that the UK may require a claimant to notify the contracting authority/entity of the alleged breach and of his intention to commence proceedings provided this does not affect the standstill period or any other time limits for commencing proceedings. This approach does not coincide with the approach taken by those transposing the Remedies Directives. MOD considers that such a provision may prove useful in certain circumstances. Notification of an intention to issue proceedings before the expense of court proceedings and necessary preparation are committed to may result in such costs being avoided for both parties if the potential issues in dispute can be dealt with swiftly prior to issue of proceedings. This may be the case for examples where proceedings have to be issued to obtain an automatic stay under New Regulation 55 but could have been avoided through simple dialogue between the

parties. It is proposed that transposition will revert to similar wording in the unamended version of the PCR 2006 and simply state that any proceedings which may be commenced in accordance with the implementing regulations for breach of duty owed under the implementing regulations must not be brought unless the economic operator bringing the proceedings has informed the contracting authority/entity of the breach or apprehended breach of the duty owed and of its intention to bring proceedings in respect of it.

42.16. By way of background, we understand that the OGC took the view, based on responses to their open consultation on this specific point, that the related change in the PCR 2006 to an approach under which proceedings are only deemed to be started (in particular, for limitation purposes) when they are served (rather than, as formerly, when issued) deprived the pre-litigation notice of its practical utility as a safeguard against claimants issuing a claim form shortly before the limitation period expired and sitting on it for months without telling the defendant or serving it. Since the implementation of the relevant amendments to the PCR 2006 in 2009, the OGC has become aware that there is a case for reconsidering this decision, particularly given the extent to which it seems that claim forms (even when served) often contain much less specific information about the alleged breach than the former obligation to send a pre-litigation notice had been interpreted to require.

.....

52. The MOD intends to transpose Article 55(5) as new regulation 51(3) as the provisions of Article 55(5) may prove useful to contracting authorities/entities and suppliers alike in preventing proceedings being commenced and costs being incurred, especially in light of the automatic stay provisions under Article 56(3). MOD is aware that this approach differs from that taken in the transposition of the most recent Remedies Directive. Consultees are urged to comment on the practical usefulness of the requirement, not only in the context of the attached draft regulations, but in the wider context of procurement proceedings, as this will assist the Cabinet Office in considering whether to restore the requirement in the PCR 2006 and UCR 2006.

[There follows Box 5, which states “The MOD would welcome stakeholders’ views on the decision to transpose Article 55(5) and proposed approach in draft regulation 51(3) (and whether a similar approach should be taken in the PCR 2006 and UCR 2006)]

53. The MOD Condoc seeks views by 7 March 2011 and MOD will share the responses, so far as relevant to the restoration of the pre-litigation notice requirement in the PCR and UCR, with us. It would, however, be useful if you would let us know your views, even preliminary views, on whether the obligation to send a pre-litigation notice should be restored in the PCR/UCR,

when you respond to us on the issues relating to the deemed service problem, as the topics are to some extent interrelated.

Cabinet Office
23 December 2010.

ANNEX A

SUMMARY OF THE DEEMED SERVICE RULES UNDER THE CPR

Rule 6.14: A claim form served in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1).

CPR 7.5(1):

Method of service	Step required
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider
Delivery of the document to or leaving it at the relevant place	Delivering to or leaving the document at the relevant place
Personal service under rule 6.5	Completing the relevant step required by rule 6.5(3)
Fax	Completing the transmission of the fax
Other electronic method	Sending the e-mail or other electronic transmission

See also the notes at 6.14.2 which explain that "where service is effected by personal service the claim form is deemed to be served, not on the day which is [sic] has been left with the appropriate person, but on the second business day after that day".

ANNEX B

PRE LITIGATION NOTICES: THE 2009 CONSULTATION AND RESPONSE

Relevant passages from the second OGC Consultation Document (April 2009) on implementation of the new Remedies Directive

66.1 One feature of the CPR is the length of time normally allowed for service of the claim form after it has been issued by the Court. This varies according to which Part of the CPR is used but can be as long as 4 months, although a defendant who is aware that a claim form has been issued can require expedited service. We consider that the importance of avoiding delay in procurement proceedings makes it appropriate to require the claimant to have both filed and served the claim form within the relevant time limit (this is achieved by draft regulation 47F(3)). Although delay will clearly be more undesirable in some kinds of case (such as where infectiveness is being sought) than others, we see no reason for complicating the Regulations with exceptions to this new requirement. As the defendant will be a public body or utility, we consider that there will not in practice be any difficulty in achieving prompt service, for example by fax or e-mail, and where ineffectiveness is not an issue the presumptive 3 month time limit will be long enough to make the effect of the service requirement negligible. It will be service therefore that will trigger the automatic suspension of the defendant's ability to make the contract where the award decision is challenged (regulations 47F(3) and 47F(G)(1)), and it will therefore be in the claimant's own interests to serve the claim form as soon as possible if the standstill period is about to, or has just, expired.

66.2 In the existing Regulations, regulation 47(7)(a) requires the economic operator to have notified the contracting authority of its intention to bring proceedings. Regulation 47F(1) of the accompanying draft reproduces that requirement, and continues to focus it on the filing of the claim form rather than its subsequent service on the defendant. Focussing it on the service of the claim form would be meaningless as it may result in notification immediately prior to service. We are undecided how far even retaining it with its current focus on *filing* the claim form would serve any useful purpose in a context in which it is now the service of the claim form that has to be accomplished within the time limit. (When the requirement was merely to file the claim form within the time limit, a claimant could do so just before the end of the time limit and refrain from serving it on the defendant for a number of months. He would have, however, had to have alerted the defendant under the existing regulation 47(7)(a) of his intention to issue a claim form before the end of the time limit. We suspect that in practice even this function would have added little, if anything, to the effect of the relevant pre-litigation protocols and practice direction, though breaches of the latter do not automatically have the claim-barring effect of the existing regulation 47(7)(a)). We would therefore be interested to hear from consultees whether draft

regulation 47F(1) serves a useful purpose, whether it can be discarded altogether, or whether it can and should be refocused to serve a useful purpose.

Relevant paragraph from the OGC response (2010) to the second Consultation on implementation of the new Remedies Directive

Regulation 47F(1) – should the requirement to give notice of the intention to start proceedings be retained

43 The consultation document (paragraph 66.5) asked for comments on whether this obligation would continue to serve any useful purpose in the changed context of the time limit focussing on service, rather than filing, of the claim form. Of the 5 respondents who expressed a clear preference, a bare majority supported abolishing it. OGC agrees that it has become superfluous and the obligation has been removed from the final version of the Regulations.