

## **TECHNICAL NOTE ON DRAFTING**

*Accompanying the draft Public Contracts Regulations 2015 issued for public consultation on 19 September 2014.*

### **Purpose of this Note**

1. This note is intended to be helpful to those consultees who wish to engage with technical legal and drafting aspects of the draft Regulations. It should be read in conjunction with the Consultation Document of the same date.
2. This note is not intended to be a comprehensive technical explanation of the draft Regulations or the drafting approach taken generally or in relation to each individual regulation. Such a note would need to be much longer than the Regulations themselves.
3. Rather, this note is intended to explain in very general terms the most significant aspects of the general approach taken to the drafting, and to flag up some particular technical or drafting matters. The latter tend to be things where we either think that it would be particularly helpful to provide a technical explanation, or where we wish to flag up a particularly difficult point which consultees may wish to consider offering views on in their responses to the consultation. We hope our selection of points to bring out in this note will be helpful to consultees, but consultees should not feel restricted by them and are invited to consider and comment on the whole of the draft Regulations and to address any other technical or drafting issues that they may wish to raise in their responses.

### **Expressions used in this note.**

4. In this note-
  - “The Directive” (unless otherwise stated) means the new Directive 2014/24/EU on public procurement (referred to in the Consultation Document as the Public Sector Directive)
  - all references to articles are to articles of that Directive (unless otherwise stated).
  - “PCR 2006” means the Public Contracts Regulations 2006 (as amended).

### **Use of square brackets in the draft Regulations**

5. In the draft Regulations, the occasional use of square brackets indicates a particular element of uncertainty on our part. Often, they identify a phrase which we have copied out from the Directive but are not sure that it is precise enough, or sufficiently in tune with UK drafting norms, to be the best phrase to use.
6. In other cases, they may identify a passage which we have copied from the Directive but which may arguably be inconsistent, or at least not perfectly aligned with, another passage, giving rise to an issue about whether it would be better to adopt a more consistent approach in the Regulations.

7. In some other cases, the issue may be whether the passage concerned is superfluous in the Regulations even though it appears in the Directive.
8. Square brackets have been used sparingly. They often relate to comparatively minor matters, as many of the more important issues do not neatly focus themselves on a particular word or phrase that can be neatly square bracketed. On balance, we have kept these square brackets in the consultation draft on the assumption that they might be helpful to consultees without being unduly distracting.

### **Footnotes in the Regulations**

9. When they are made, the Regulations will have extensive footnotes, which take considerable time to research and finalise. To avoid delaying the consultation, these are often absent, incomplete or in marker form in the draft Regulations that have been published for consultation. Work will continue on the footnotes, and it is not necessary for consultees to comment on their present state.

### **OUR GENERAL APPROACH TO THE DRAFTING**

10. Paragraph 32 of the Consultation Document explains the division of the draft Regulations into various Parts.
11. Part 2 is by far the biggest part of the draft Regulations (accounting for more than 80% of the consultation draft). This Part transposes the substantive provisions of the Directive (the 'definitions' in Article 2 have been included in the overarching Part 1 of the Regulations because many of them are also relevant to the interpretation of Parts 3 to 6 as well as to Part 2).
12. Part 2 has been drafted in accordance with the Government's policy of using the 'copy-out' method where it is available, to avoid 'gold-plating'.
13. The structure of Part 2 adheres very closely to the structure of the Directive. Generally speaking, each individual article of the Directive is transposed by a corresponding regulation. From regulations 7 to 82 (inclusive) the numbering of each regulation is identical to that of the article of the Directive which it transposes. We hope this will be thought a useful feature. We have also respected the high-level grouping of articles within the Directive: thus, each 'title' within the Directive becomes a separate 'chapter' within the Regulations, and each 'chapter' within the Directive becomes a separate 'section' within the Regulations. We have also preserved each 'section' within the Directive as a separate element called a 'sub-section' within the Regulations, though the template used to generate the table of contents on pages 1 to 5 of the draft Regulations does not descend below the level of section (we will look into what can be done about that). The few places in which the Directive descends even further, to what it calls 'subsections' (e.g. the way Articles 13 and 14 are grouped together), cannot really be reproduced in the Regulations (as only 4 levels are catered for in the substantive drafting software), but this does not seem to produce any particular problem with the clarity or user-friendliness of the Regulations.

14. As some of the Annexes to the Directive are very short, we have transposed them by building them into the body of the regulation which transposes the relevant article, where this seemed the most sensible and user-friendly approach. We have sometimes made an ambulatory cross-reference to the Directive (for example, in providing for the value of the thresholds), where the Commission have the power to amend the Directive, so that the effect of any amendment feeds through automatically to the Regulations without the need for us to make amending Regulations. For example, the thresholds are regularly adjusted by the Commission, so regulation 5 (like its predecessor in the PCR 2006) does not copy out the actual values currently set out in the Directive, but makes an ambulatory reference to the figures specified in the relevant passages of the Directive.
15. The most obvious deviation from copy-out has been in the paragraphing. The EU tradition of including separate unnumbered paragraphs within a numbered paragraph, including bullet points, and including more than one sentence within a paragraph, are all unacceptable in UK regulations. And, where the directive has included a particularly long and complex sentence which is not user-friendly but can be broken up without any deviation from the words used and without altering any nuance to be derived from the structure, we have ventured to do so.
16. Where a particular regulation is lengthy, we have also supplied italic subheadings, where the structure of the regulation made that possible.

## **SOME GENERAL DRAFTING POINTS**

### **'Shall' or 'must'**

17. The new Directive usually imposes obligations by using the word 'shall' (e.g. the opening words of Article 57(1): "contracting authorities shall exclude an economic operator from...."). Throughout Part 2 we have followed suit where the word is used in this sense of imposing an obligation on somebody (notably contracting authorities or economic operators). We have done so for maximum fidelity to the wording of the Directive, and also because it is also the word that is generally used in the PCR 2006, so it preserves a certain continuity for those who are already used to the word in that context.
18. However, it is now more usual to avoid the word in UK legislative drafting style, in order to avoid ambiguity. Such ambiguity can sometimes arise because the word can also be used in the different sense of describing a legal effect that is meant to arise automatically. The Directive sometimes uses 'shall' in this sense (e.g. Article 3, which begins "Paragraph 2 shall apply to mixed contracts which..."). In the draft Regulations, we have generally turned such references into statements of fact in the present tense (thus regulation 4 begins "Paragraphs (2) and (3) apply to mixed contracts which...").
19. For consistency, we have used the same approach in Parts 4 and 5, by using 'shall' to articulate obligations on real people to actually do (or refrain from doing) things in the real world, but avoiding the word in other contexts.
20. Part 3 has largely been copied from the PCR 2006, as we are not (generally) revisiting how we transposed the Remedies Directive. Nearly all of Part 6 (certainly regulations 87 to 104)

comprises provisions that were inserted into the PCR 2006 by amending regulations in 2009 (and further revised in 2011). In these provisions, 'shall' was avoided in favour of using the word 'must'. This was not a big issue at the time, as there is greater flexibility when inserting a large block of text like the remedies provisions into a pre-existing instrument.

21. However, now that we are making the whole of the Regulations afresh, this contrast in approach between Part 3 and the rest of the Regulations may be thought less satisfactory. Comments are welcome on whether a more consistent approach would be desirable, and if so whether consistency should be achieved by using "shall" or "must" (in some passages where "shall" is currently used, "must" might jar, and another technique, such as "is to be" might be better, and these would all need to be considered on a case by case basis if we were to go down that path).

### **Quantities**

22. In UK legislative drafting style, it is usual to express propositions in the singular, where possible, to avoid literal ambiguities of distribution which may arise from using plural nouns, particularly in complex sentences. In its use of nouns (such as in referring to contracting authority/authorities) or economic operators(s)), the Directive often uses the singular (sometimes preceded by 'a' and sometimes by 'any'). But often it uses the plural. Sometimes a single sentence will contain a mixture of plural and singular nouns.
23. On the whole, we have followed the Directive in our use of the singular in some places and the plural in others, except where the result seemed particularly unsatisfactory, in which case we have either changed it or square bracketed the relevant word. It would be a major undertaking to rewrite the Regulations systematically using a more consistent approach to quantity, in the UK legislative drafting tradition. Comments are welcome on whether we have got the balance right in this regard, or whether the quantities in particular passages should be adjusted and, if so, in what respects.

### **Use of the definite or indefinite article**

24. Similarly, where the singular is used in the Directive, there is sometimes inconsistency or inappropriateness (or debatably so in UK legislative drafting style) over the use of the definite or indefinite article, such as when to refer to 'the contracting authority' (implying a particular contracting authority that had already been mentioned explicitly, or implied by a contextual inference that a particular paradigm case is being addressed) rather than 'a contracting authority' (implying any contracting authority) or 'any contracting authority'. Similar considerations to those in paragraph 23 apply.

### **Tenses**

25. The Directive contains some inconsistencies of tense. For example, time limits are sometimes expressed to run from when something "is sent", and sometimes from when it "was sent". We will review these systematically, so that a consistent approach is taken.

## **SOME POINTS ON PARTICULAR REGULATIONS**

### **Regulation 1 (citation, commencement and extent)**

26. Paragraph (6) is a marker. As noted in the Consultation Document, aspects of the policy on extent and application beyond England are to be determined.

### **Regulation 2 (Definitions): Transposing Article 2**

27. It seemed to us that it would be more helpful to group the definitions in alphabetical order (as in the PCR 2006) rather than to preserve the sometimes random order in which they appear in Article 2 (or elsewhere) in the Directive. There are a lot of them, and this would make it easier for the reader to quickly check whether a particular term is defined.
28. With some exceptions (such as ‘economic operator’), the Directive generally defines terms using plural language (such as the definition of ‘public contracts’). This technique is usually avoided in UK legislative drafting practice, to avoid ambiguity, but the draft Regulations generally respect the Directive’s decisions on when to define things in the singular and plural respectively. It would be helpful to know if consultees see any problems with that approach.
29. The definition of ‘GPA’ is taken from recital 17 of the Directive.
30. We need to define certain terms which do not need definition in the Directive, such as ‘the Commission’, ‘Official Journal’ and ‘Public Contracts Directive’. We think it would also be helpful to the reader to include various definitions for user-friendliness. We have not yet done this in a systematic way, but it would be helpful to hear whether consultees think it would be useful to include, for example, entries in regulation 2(1) for such terms as “contract notice”, “contract award notice”, “dynamic purchasing system” etc, which simply defined them by reference to the relevant substantive regulation which describes or requires them.
31. In relation to the definition of “economic operator”, a few technical issues arise. In the UK, “person” would mean any natural or legal person, so the words in the first square brackets would appear unnecessary. It would also seem unnecessary to copy out the square bracketed reference to ‘public entity’, as there would not seem to be any in the UK that would not be a legal or natural person (or body of persons, bearing in mind that the singular includes the plural in accordance with section 6(c) of the Interpretation Act 1978). The views of consultees on any of these issues are welcome.
32. In the definition of “central government authorities”, the words in brackets may end up appearing in the Schedule (when it has been drafted), as its predecessor did in the PCR 2006.
33. For the time being paragraph (2) reproduces regulation 2(4) of PCR 2006. Although these propositions are not stated explicitly in either the old or the new Directive, they derived from Regulation (EEC, EURATOM) No. 1182/71 of the Council of 3 June 1971, laying down how references to periods, dates and time limits in Directives are to be interpreted. We will do further work to check whether this paragraph needs adjusting to reflect the range of references to time limits that occur in the new Directive and feed through into Part 2 of the Regulations.

#### **Regulation 4 (mixed procurement): Transposing Article 3**

34. The regulation does not transpose Article 3(5), or the final subparagraph of Article 3(4), because it is envisaged that when these Regulations first come into force, the separate Utilities and Concessions Directives will not yet have been transposed.

#### **Regulation 5 (thresholds): Transposing Articles 4 and 6**

35. Paragraph (4) of this regulation is the only part of it that transposes Article 6 (most of which bites on the Commission rather than Member States). The rest of this regulation transposes Article 5.
36. The approach taken follows PCR 2006 (regulation 8(5A)) in making ambulatory reference to the figures in the Directive, so that any amendment of the thresholds in the Directive which the Commission make from time to time in exercise of the powers conferred on them by Article 6 will feed through automatically to the Regulations without the need for us to make amending regulations.

#### **Regulation 7 (utilities exclusion):**

37. As we are proposing to bring these Regulations into force before we transpose the new Utilities Directive, we cannot transpose Article 7 exactly as stated in the Directive. Instead, pending the transposition of the new Utilities Directive, this draft reproduces regulation 6(1) of the PCR 2006 so that its interface with the Utilities Contracts Regulations 2006 ('the UCR 2006') remains the same as the PCR 2006's interface with the UCR 2006. When the new Utilities Directive is transposed, regulation 7 of the new PCR will be amended so that it meshes with the new UCR in the way envisaged by Article 7.

#### **Regulation 8 (electronic exclusions): Transposes Article 8**

38. Article 8 of the Directive establishes these definitions by cross-referring to Directive 2002/21/EC. This was a last minute change in the text of the Article shortly before the Directive was adopted, prior to which Article 8 of the draft Directive reproduced the actual definitions copied from the 2002 Directive, as shown in paragraph (2) of the consultation draft of the regulations. It would be helpful to know if consultees think it would be useful to include these definitions in full in regulation 8, or better to follow the Directive in making a cross-reference to Directive 2002/21/EC. We gather the last minute insertion of cross-references into Article 8 was intended to ensure that any amendments to those definitions in the 2002 Directive would automatically feed through to the procurement Directive. If this is the effect, we could frame regulation 8(2) as an 'ambulatory' cross-reference to the definitions in the 2002 Directive to achieve the same effect. This would minimise the scope for the definitions going out of alignment, but would mean that users of the Regulations in the future would need to check what the latest text of the 2002 Directive says. Incidentally, if we do reproduce the full definitions in regulation 8, we may need to include also the definition of 'subscriber' from the 2002 Directive, as the word is used within the definition of network termination point.

#### **Regulation 10 (service exemptions): Transposing Article 10**

39. We have applied the copyout method to the concepts used in Article 10 of the Directive. To avoid the risk of gold-plating, we have not attempted to list UK-specific concepts, such as by naming in regulation 10(1)(d) the various categories of lawyer that we think would fall within the definition of lawyer in Directive 77/249/EEC, but comments are welcome. Even if we did name the various relevant domestic categories, we would need to transpose the generic EU-wide definitions as a residual test to cover the various categories of lawyer that exist abroad (because, for example an English contracting authority might need to instruct lawyers in another member State).
40. Where the Directive cross-refers to another directive, do consultees think it would be more helpful to reproduce the relevant wording in these Regulations rather than simply cross-refer (this affects the definitions of lawyer, certain financial services and certain broadcasting-related terms). If cross-reference is used, should they be ‘ambulatory’? (See the technical note on regulation 8 for how ‘ambulatory’ references work).
41. We intend to consider whether it is necessary to define the Facility and Mechanism mentioned at the end of regulation 10(1)(e).

**Regulation 12 (contracts between entities within the public sector): Transposing Article 12**

42. Article 12 refers throughout to the concept of a ‘legal person’. We have square bracketed ‘legal’ in the regulation: we think the adjective is probably unnecessary in our law and can be deleted, but comments are welcome.
43. In regulation 12(1)(c), (3) and (4)(c) we have copied references in the Directive to national legislation that is compatible with the EU Treaties. Comments are welcome on:
- whether, in relation to a domestic contracting authority, the relevant national legislative provisions could ever be those of another State (e.g. if the separate controlled person were an overseas company incorporated under another law)
  - whether the regulations should identify and name the relevant legislation (if any), in the UK, in the interests of legal certainty, and if so whether the regulations could or should dispense with implying that such particular legislation might not be in conformity with the treaties.

**Regulation 21 (Confidentiality): Transposing Article 21**

44. Article 21(2) contains both a general reference to ‘unless otherwise provided in this Directive’ as well as a particular subsection to certain obligations in Articles 50 and 55. Comments are welcome on whether we could or should transpose the former as a similarly general proposition about ‘any other provisions of this Part’ rather than seeking to identify what other provisions are relevant and name them specifically here, in the same way we cross-refer to regulations 50 and 55.

**Regulation 22 (Rules applicable to communication): Transposing Article 22 and Annex IV**

45. As Annex IV of the Directive (which is referred to in Article 22(6)) is quite short, we have transposed it as paragraph (16) of this regulation rather than as a separate Schedule to the Regulations.
46. Paragraphs (18) and (19) are not copied from the Directive. They are what we propose as the “framework established by the member State concerned” that is referred to in Article 22(6)(b). Comments on the proposed framework are particularly welcome.

**Regulation 26 (Choice of procedures): Transposing Article 26**

47. In paragraph (10) we have reproduced Article 26(6) almost verbatim, but are not sure what the paragraph adds to the effect of the ‘without prejudice to regulation 32’ wording in regulation 26(1) (which itself copies wording in Article 26(1)). It is not normally regarded as acceptable in UK legislative drafting to say the same thing twice. In the Directive, the main reason Article 26(6) is there seems to be to make the point that Member States have the choice. As the Cabinet Office is proposing that the choice be exercised, might it suffice just to leave the wording in paragraph (1) to achieve it?

**Regulation 31 (Innovation partnership): Transposing Article 31**

48. The draft regulation shows what it would look like if it respected the order in which propositions are set out in the course of Article 31. However, this structure of Article 31 is idiosyncratic. Unlike the regulations setting out the other procedures, it does not follow a logical order from the start of the procedure to its finish, but jumps about, with propositions about a similar topic (such as the structure of the partnership) separated from each other by unrelated material.
49. One consequence of the odd structure of the Article, is that it seems impossible to provide italic sub-headings of the kind we have used in the immediately preceding regulations, even though the existence of no fewer than 26 paragraphs in this regulation rather cries out for the regulation to be set out in a more digestible way under a number of sub-headings. As almost each paragraph jumps to something completely different from the paragraph which precedes it, often returning to a theme previously touched on, one would need to have a separate sub-heading for almost every paragraph, which might defeat the point of such sub-headings.
50. We considered if there was a case for departing from copy-out to inject more sensible reordering of the material, without losing important nuances implicit in existing juxtapositioning, but no obvious way forward emerged. Comments and suggestions are particularly welcome.

**Regulation 34 (Dynamic purchasing systems ): Transposing Article 34**

51. Paragraphs (8) to (13) are basically copied from the Directive (albeit in a modified structure to comply with UK legislative drafting norms), but the effect seems user-unfriendly. Instead of this ‘bittiness’ of saying some parts of regulation 28 about time limits apply, others don't, and here are some supplemental things, is there a case for making the time limits provisions of regulation 34 comprehensive? This would involve reproducing within



them the parts of regulation 28 that are meant to read-across, and simply not reproducing the parts that are not meant to read-across, and weaving this seamlessly with the bespoke time limit rules in regulation 34

**Regulation 35 (Electronic auctions): Transposing Article 35 and Annex VI**

52. As Annex VI of the Directive (which is referred to in Article 35(4)) is quite short, we have transposed it as paragraph (8) of this regulation rather than as a separate Schedule to the Regulations. In that paragraph, we have taken the list verbatim from that Annex VI. Are the concepts in the list clear enough for this, or do consultees think any require elaboration for legal certainty?

**Regulation 39 (Procurement involving contracting authorities from different Member States): Transposing Article 39**

53. The basic focus of most of the propositions in this regulation follow those in Article 39 quite closely, even though the Regulations, unlike the Directive, only bite in one Member State. This approach relies on the limited territorial extent of the Regulations, as domestic UK legislation, to achieve the overall impression that this regulation is not purporting to authorise contracting authorities in other member States to do things, or to cover them under their own law for what they do when they participate in joint activities with contracting authorities which *are* bound by these Regulations. Do consultees think this is satisfactory, or should we be more rigorous in drafting these provisions so as to focus only on contracting authorities to which these Regulations apply directly? Although that might be quite easy to do for paragraph (1) (which could perhaps say “Without prejudice to regulation 12, contracting authorities located in any of the jurisdictions to which these Regulations extend, may act jointly with one or more contracting authorities from a Member State other than the United Kingdom in the award of public contracts by using one of the means provided for in this Article”), it seems more difficult to do so consistently and rigorously throughout the regulation, which would tend to produce a rather cumbersome effect. Views would be welcome.

**Regulation 42 (Technical specifications): Transposing Article 42**

54. Article 42(1) refers to the technical specifications “as defined in point 1 of Annex VII”. We have not transposed Annex VII as a separate Schedule to the Regulations, but have included (in their appropriate alphabetical place) in regulation 2(1) the definitions set out in that Annex (except for the Annex’s definition of ‘technical specification’, which does not seem to add anything material to what regulation/Article 42 itself says).

**Regulations 50(7), 55(3) and 79(4)**

55. These all list the same grounds for withholding or not publishing information, but in a slightly different way, reflecting differences in the wording of the corresponding provisions of the Directive. Views are welcome on the merits of introducing consistency and, if so, using which wording and why.

**Regulation 54 (Invitations to candidates): Transposing Article 54 and Annex IX**

56. Paragraphs (4) and (6) transpose Annex IX. It seemed more helpful to integrate these requirements into the body of this regulation than to reproduce the Annex as a separate Schedule to the Regulations.

#### **Regulation 57 (Exclusion grounds): Transposing Article 57**

57. The Consultation Document explains why we have decided to depart from copy-out in specifying the relevant domestic offences for the purposes of the mandatory exclusions in paragraph (1).
58. In other provisions, we have used 'copy-out' where possible, but comments are welcome on whether the principle of legal certainty requires us to be more specific here. Context is often important in determining whether the copy-out approach provides the requisite clarity. For example, in paragraph (7)(a), it does not seem necessary to define 'minor' because the concept is used merely to illustrate the inherently judgmental concept of disproportionality, rather than as a hard-edged legal criterion. In paragraph (3), where the terms used *are* hard edged criteria triggering mandatory exclusion, it is less satisfactory that there is no precise definition of what is a tax or social security contribution. But even if we defined what we thought it meant in the UK, the ECJ may disagree. And it would not be feasible to address specifically in the regulations the tax and social security structures in other countries, so the generic test will inevitably be needed to some extent.
59. We have not transposed the final paragraph of Article 57(4) because it seems to us that the subject-matter of that provisions is relevant only where a member State exercises the option (permitted by the opening words of Article 57(4)) to make these exclusions mandatory rather than discretionary (which we do not propose to do).
60. In paragraph (8), we have made an ambulatory reference to the Directive itself, as the Commission has power to amend the list of conventions in Annex X. In this respect, we are treating it like the thresholds (see under regulation 5). The same point arises in regulation 69.

#### **Regulation 60 (Means of proof): Transposing Article 60 and Annex XII**

61. Paragraphs (6) and (9) transpose Annex XII.

#### **Regulation 61 (e-Certis): Transposing Article 61**

62. Comments are welcome on whether the first half of Article 61(1) actually needs to be transposed. In the second half of the paragraph, we have copied out 'primarily', and comments are welcome on whether its significance is clear enough and, if thought not, what should be said instead.

#### **Regulation 64 (Official Lists of Approved Operators etc): Transposing Article 64**

63. No official lists or certification arrangements are to be maintained for the purpose of Article 64 in England and Wales or Northern Ireland. Therefore, much of Article 64 does not need to be transposed. Regulation 64 therefore focuses on transposing those elements of Article 64 which require recognition to be accorded, in procurements falling within these

Regulations, to official lists or certification arrangements maintained in other Member States.

#### **Regulation 68 (Life-cycle costing): Transposing Article 68**

64. Paragraphs (5) and (6) copy out, respectively, the first and second sentences of Article 68(3). However, their interrelationship seems obscure and, by copying them both out, we have not clarified which is the dominant provision. What would the position be if the criterion in the first sentence is met but not the second (for example, because a relevant new legislative act has been adopted but the Commission have not yet exercised the powers conferred upon them by Article 68(3) to amend the list in the Annex?) Conversely, what would the legal position be if the Annex is amended wrongly where the criteria in the first sentence are not actually met? Comments are welcome on whether we should plump for one test or the other (or, if both are needed, whether the relationship between them can and should be clarified – such as by making it clear that the first sentence is potentially open-ended but that the second sentence at least deems the list in the Annex to meet the criteria laid down in the first sentence). But if both interpretations are viable, the rationale of the copy-out approach would seem to support reproducing the ambiguity in the Directive so that any judicial decision on the meaning of the Directive will read across.
65. To the extent that the second sentence of Article 68(3) is to be transposed, we think it appropriate to make an ambulatory cross-reference to the Annex, rather than copy out the Annex, so that as and when the Commission exercise their powers to modify the list, the effect will feed through automatically to this regulation without the need for us to amend the Regulations.

#### **REMEDIES PROVISIONS**

66. As explained in the consultation document, our transposition of the Remedies Directive is not being revisited more than is necessary.

#### **Regulations 85 to 87**

67. These provisions retranspose the requirements relating to the sending of standstill notices and the observance of a standstill period. The provisions were formerly in regulation 32 and 32A of the PCR 2006.
68. Not all of regulation 32 of PCR 2006 has found its way into regulation 86, because a lot of regulation 32 was there to transpose provisions about giving information to candidates and tenderers that were contained in the Directive's predecessor ('the 2004 Directive'). In the new Directive, the equivalent is Article 55 which we have transposed as regulation 55. We considered integrating the transposition of these aspects of the two Directives, but decided that it was better to preserve the integrity of the principle that Part 2 transposes the main Directive and Part 3 transposes the Remedies Directive. We think this will assist practitioners in being able to construe the relevant provisions in the context of the different directives (including the different recitals) which they respectively transpose.

69. It may be helpful to note why the definitions of candidate and tenderer in regulation 86(7) and (8) do not mirror their predecessors (in regulation 32(17) and (18) of PCR 2006) exactly. The PCR 2006 contained no definition of ‘candidate’ or ‘tenderer’ in the general definitions in regulation 2. However in the new Regulations, regulation 2(1) does contain definitions of both terms, copying out the definitions in Article 2(1)(13) and (14) of the new Directive, in accordance with the copyout policy we are following in transposing the new Directive. As the Remedies Directive does not contain a bespoke definition of ‘candidate’ or ‘tenderer’, there seems no reason not to allow that element of the work done by regulation 32(17) of PCR 2006 to be done now by the two definitions in regulation 2 of the new Regulations. Thus, the only element needed to be covered by regulation 86(9) and (10) is the ‘concerned’ element from Article 2a(2) of the Remedies Directive.

### **Regulations 88 to 104**

70. These transpose the main provisions of the Remedies Directive, and are the equivalents of regulations 47 to 47P of the PCR 2006. On the whole, there has been little adjustment of the wording. In particular, regulations 91 to 98 and 100 to 104 are very similar to their predecessors.
71. In other provisions, some changes have been made, usually in order to ensure that the drafting meshes with the different content of the new Directive as transposed in Part 2, to improve clarity, or for some technical reason.
72. It may be helpful to mention a few things specifically.
73. Regulations 89 and 90 differ in some respects from regulations 47A and 47B of PCR 2006 to improve clarity, remove unnecessary exceptions, and also recognise the existence of relevant bilateral agreements between the EU and third countries outside the scope of the GPA. Regulation 90(4) is currently a marker and will need to be expanded. The provisions in regulation 47A(1)(b) and (3) of PCR 2006 that were relevant only to concessions have not been reproduced because the new Directive, and hence Part 2 of these Regulations, do not apply to concessions.
74. Regulation 89 refers to economic operators from “EEA states”. The definitions do not define this expression, because it is defined (in a fully ambulatory way) by the Schedule to the Interpretation Act 1978 (as amended), which will apply to these Regulations. The expression includes the UK, as well as other EU member States and other parties to the EEA Agreement. The ambulatory definition of EEA state was only inserted into the Interpretation Act by the Legislative and Regulatory Reform Act 2006 and applies only to the interpretation of statutory instruments made after 8 January 2007. That is why the PCR 2006 was unable to rely on this easy approach to referring to EEA states in an ambulatory way and contained instead the cumbersome approach in regulation 4(4) and the (non-ambulatory) list of countries in Schedule 4.
75. Regulation 99(4) (and the failure to reproduce the ‘forms’ requirement of regulation 47K(4)(b) of the PCR 2006) reflect the approach taken in Part 2. Whether the final version of these Regulations mandate the use of forms will depend on whether the Commission

have, prior to the making of these Regulations, adopted regulations (to which our Regulations can refer) prescribing the various forms to be used.

## **FINAL PROVISIONS**

### **Regulation 115 (revocations and consequential amendments)**

76. Work is being done on consequential amendments to other pieces of primary and secondary legislation (for example, those which cross refer to the PCR 2006 or to the concepts used in them), in liaison with other Government Departments with responsibility for the provisions concerned.

### **Regulation 116 (saving for concessions)**

77. Because the new Concessions Directive will not be transposed before these Regulations come into force, the PCR 2006 will continue to apply to the kinds of concessions that are already within the scope of the new Public Contracts Directive's predecessor and hence the PCR 2006. When the Concessions Directive is transposed, this saving will be revoked.

The Cabinet Office  
19 September 2014