



Cabinet Office



Crown  
Commercial  
Service

## **Consultation Document**

# **UK Transposition of new EU Procurement Directives**

## **Utilities Contracts Regulations 2016**



## Executive Summary

1. This consultation document concerns the UK transposition of the revised Utilities Directive, one of the three EU Directives on Public Procurement, which came into force in April 2014 with Member States being allowed two years to transpose into national law. The Public Sector Directive has already been transposed by the Public Contracts Regulations 2015. The Government is now consulting on the draft Regulations transposing the Utilities Directive with the aim of bringing these into effect by April 2016. Consultation on the draft Regulations transposing the (new) Concessions Directive, which also covers bodies subject to the Utilities Directive, will be conducted in parallel.

2. Acting on behalf of the Minister for the Cabinet Office the Crown Commercial Service has UK policy responsibility for transposing the new procurement Directives.

3. This document focuses on the draft regulations for the new Utilities Directive. Many of the provisions in the Public Sector Directive are analogous to provisions in the Utilities and Concessions Directives. We have already consulted on generic matters that are applicable to all three Directives. The results of this previous consultation<sup>1</sup> have been carried through where applicable to these Regulations. The application in these Regulations of decisions on policy choices following the previous consultation is set out in Annex B.

4. Respondents to this consultation document are invited to consider the draft regulations, and respond to the particular consultation questions listed. Respondents are also welcome to comment more generally on any aspect.

5. This consultation document contains the following key sections:

- Part 1 sets out the background, scope and general instructions on how to respond;
- Part 2 introduces the draft regulations and seeks responses on various technical, drafting and other issues.

6. We welcome your input by 18 September 2015. Please direct any responses to: [transposition@crownccommercial.gov.uk](mailto:transposition@crownccommercial.gov.uk)

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<sup>1</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/356492/Consultation\\_Document\\_UK\\_Transposition\\_of\\_new\\_EU\\_Procurement\\_Directives\\_Public\\_Contracts\\_Regulations\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/356492/Consultation_Document_UK_Transposition_of_new_EU_Procurement_Directives_Public_Contracts_Regulations_2015.pdf)

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## Part 1: Background Information and Instructions for Responding

### Purpose

7. The purpose of this document is to consult on the draft Utilities regulations and to confirm whether they transpose the Utilities Directive (2014/25/EU) effectively and do so in the best way.

### Background

8. In December 2011, the European Commission brought forward proposals to replace the 2004 EU public procurement Directives to provide for a streamlined and more flexible set of procurement rules, so that Member States can obtain high quality goods and services while delivering value for money for the public purse.

9. Following 2 years of intensive scrutiny and debate, the European Parliament and the Council adopted three new Directives (Public Sector Contracts, Utilities Contracts, and Concessions Contracts) on 26 February 2014. The Directives were published in the Official Journal of the EU on 28 March 2014 and came into force on 17 April 2014. The UK and other EU Member States have until 18 April 2016 to transpose the new Directives in national legislation.

10. The new Directives are:

- a) Directive 2014/25/EU<sup>2</sup> on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for **Utilities** Contracts; and
- b) Directive 2014/24/EU<sup>3</sup> on public procurement, replacing the 2004 Directive for Public Sector Contracts; and
- c) Directive 2014/23/EU<sup>4</sup> on the award of concession contracts, which does not directly replace any previous directive.

11. The Directive on public procurement (2014/24/EU) has been transposed by the 2015 Public Contracts Regulations, which came into force on 26 February 2015. Many of the provisions in the Public Sector Directive, which the Government has already consulted upon, have analogous provisions in the Utilities Directive. The application in these Regulations of decisions on policy choices following the previous consultation is set out in Annex B.

### Scope of Consultation

12. This consultation applies principally to those jurisdictions to which the current Regulations apply, i.e. England, Wales and Northern Ireland. They will extend to

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<sup>2</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0243.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG)

<sup>3</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0065.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG)

<sup>4</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG)

and apply in Scotland in relation to the transposition which is for the UK Government. The drafting will be adjusted to give effect to that intention.

13. The consultation seeks comments on the draft regulations transposing the Utilities Directive, to ascertain whether the draft regulations effectively transpose the Directive, and whether they do so in the best way.

14. Comments are invited from relevant stakeholders. That primarily includes Utilities and other industry representatives, and may also be of interest to suppliers and advisors, and various others.

## Copy out

15. There is only very limited scope for the Government and other UK stakeholders to influence the substantive content of the UK's transposing regulations. Most of the provisions of the Directives are mandatory for Member States to transpose, so we cannot alter the substance in transposition. In addition, the Government's policies on "copy-out" of European Directives (where available) and avoidance of "gold-plating", further limit the extent to which we can deviate from the wording of the Directives when casting the national UK transposing regulations.

## Consultation Principles

16. This consultation complies with the Government's Consultation Principles<sup>5</sup>, and formally concludes a long-running period of continuous UK stakeholder engagement that commenced in 2011 when the Commission's own consultations began (see paragraphs 11 and 14 above). The history of UK stakeholder engagement is trailed in various Procurement Policy Notes, including PPN 05/13.<sup>6</sup> A 4 week consultation period is considered appropriate and proportionate given the limited scope and impact of the remaining issues on which to consult.

## Process

17. This consultation runs for 4 weeks from 21 August 2015 to 18 September 2015.

18. This consultation document is issued directly to a number of known stakeholders and is also made available publicly on the Cabinet Office Consultations page on the GOV.UK website [here](#).

19. This consultation has ten specific questions, which are summarised in paragraph 25. Please state clearly in your response which question or questions you are answering. Please direct responses, or any other questions on the consultation, to:

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<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255180/Consultation-Principles-Oct-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf)

<sup>6</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/225398/PPN - outcome of negotiations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225398/PPN_-_outcome_of_negotiations.pdf)

By email:

[transposition@crowncommercial.gov.uk](mailto:transposition@crowncommercial.gov.uk)

Or by post:

Crown Commercial Service Helpdesk  
Cabinet Office  
Rosebery Court  
Norwich  
NR7 0HS

Tel: 0345 410 2222

### **Handling of Information**

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

21. 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 Cabinet Office. Contributions to the consultation will be anonymised if they are quoted.

### **Contact for comments or complaints about the process**

22. Your opinions are valuable. 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 the:

Better Regulation Unit  
Cabinet Office  
Rosebery Court  
Norwich  
NR7 0HS

Email:

[bruenquiries@cabinetoffice.gov.uk](mailto:bruenquiries@cabinetoffice.gov.uk)

## Part 2 – Changes, other issues & questions

### Introduction

23. This section of the consultation document introduces a number of issues and sets out the questions on which feedback is specifically sought. Feedback will support the UK in making a clear and successful transposition. In particular, it introduces:

- a) The draft Regulations (Annex A) – general feedback is welcome on any aspect of the draft; and
- b) Other issues on which feedback is specifically requested.

24. We therefore invite stakeholders to consider the changes and questions raised and respond accordingly. Stakeholders are invited not only to offer their views, but also their reasons for coming to that view, as these viewpoints will be helpful to the preparation of the Regulations.

### Consultation Questions

25. A list of the consultation questions is set out below. Question 1 asks for general comments about the approach to drafting the Regulations, which generally follows the copy out approach, which was adopted for the Public Contracts Regulations 2015. The following 5 questions ask for any detailed comments on the drafting of particular sections of the Regulations. Apart from the questions concerning the drafting, there are four other questions which are introduced in more detail in paragraphs 26 to 37 below.

Question	Subject
1	<b>Draft Regulations</b> We seek general comments on the approach to the drafting of the draft Regulations, (in particular the copy out approach).
2	please provide comments on regulations 1 to 15 (general provisions and activities)
3	please provide comments on regulations 16 to 42
4	please provide comments on regulations 43 to 57
5	please provide comments on regulations 58 to 85
6	please provide comments on regulations 86 to 99
7	Would an explicit reference to the previous exemption applications in the Regulations be helpful?
8	Would an option for Utilities to apply for an exemption directly be helpful?
9	Do Utilities consider that the estimates of costs and benefits are reasonable?
10	Do Utilities consider it would be possible to monetise any of the other benefits, and, if so, would they provide estimates, where appropriate?



## Changes in the 2014 Utilities Directive and particular questions about the draft Regulations

### Removal of the indicative list of Utilities

26. There is a significant change to the structure of 2014/25/EU in comparison with the previous Utilities Directive (2004/17/EC), in that there are no longer any annexes providing an indicative list of Utilities (by sector) covered by the Directive. In the 2006 Utilities Regulations, the list of UK utilities was replicated from the Directive. As, however, there is no longer such a list, the draft Regulations do not, therefore, contain a list of UK utilities. This is in line with copy out policy. It will be important for utilities to consider carefully whether they are covered by the definitions in the draft Regulations, particularly in light of the change to the definition of special or exclusive rights as set out below.

### Change to definition of special or exclusive rights (Article 4(3) and Regulation 5(3))

27. Following privatisation in various sectors covered by the Utilities Directive, there are many private sector utilities in the UK. Private sector utilities would only be covered if, for an activity covered by the Utilities Directive they operated under special or exclusive rights as defined in Article 4(3). This, however, makes clear that where a utility's activities are exercised pursuant to rights which have been granted following a procedure in which adequate publicity has been ensured and where the granting of these rights was based on objective criteria, these do not constitute special or exclusive rights. In these circumstances, such activities would be out of scope. In the 2004 Utilities Directive, this part of the definition had only been included in the recitals. Utilities will need to consider whether they are covered by the definition of special or exclusive rights or not.

### Exemption mechanism: Articles 34 & 35 & Regulations 34 & 35

28. The mechanism whereby Utilities can apply for an exemption from the rules, where they operate under competitive conditions and where access to the market is not restricted, has been maintained in 2014/25/EU. There have been some minor changes to improve the decision making process following an application, but the essentials remain the same.

29. The UK made three successful applications using the exemption mechanism set out in Article 30 of the previous Utilities Directive (2004/17/EC). These were:

- a) **Electricity generation in England, Scotland and Wales**  
Exemption decision [2006/211/EC](#) (8 March 2006);
- b) **Supply of electricity and gas in England, Scotland and Wales**  
Exemption decision [2007/141/EC](#) (26 February 2007);
- c) **Exploration for and exploitation of oil and gas in England, Scotland & Wales**

Exemption decision [2010/192/EU](#) (29 March 2010).

30. Recital 43 of the new Utilities Directive confirms that these decisions will stay in place after the entry into force of the new Directive. As a result, the new Regulations will not apply to the activities covered by these decisions. Although this is not repeated in the substantive articles of the Utilities Directive, the decisions have been explicitly included in draft regulation 34, to make clear that these activities continue to be exempted.

**Question 7.** Would an explicit reference to the previous exemption decisions be helpful?

31. Article 35 of the new directive allows Member states to provide in their legislation that utilities can submit a request for exemption from the rules. The 2006 Utilities Contracts Regulations provided for this possibility and this possibility has been included in Regulation 35(1) a.

**Question 8.** do Utilities want to have an option to apply for an exemption directly

## Remedies and standstill

32. Part 5 of the Regulations derives from the Remedies Directive transposed by the UK in 2009. These Regulations are not part of the transposition of the Utilities Directive and the policy on remedies is not being reopened. The standstill and remedies regulations have simply been moved from the existing Utilities regulations into the draft 2016 regulations, with adjustments that are necessary or appropriate to mesh with the changed main regulations/Directive, together with some minor drafting or technical improvements.

## Impact assessment confirmation

33. In preparing for transposition, the Cabinet Office produced an impact assessment (IA) estimating the costs, benefits and impacts on business of the new Directive. This analysis covered private utilities only. In producing the IA, we used information provided by utilities about costs and benefits (for which we were very grateful). From this information, the IA estimated that the net annual benefit of the proposal was £2,700.

34. This was based on an estimate that the benefits to business would be £6,000 per year, as a result of not having to submit detailed annual statistics to the European Commission covering procurement conducted under the rules, and that the costs to business would be £3,300 per year as a result of competing some service contracts, caused by changes to the previous Part B services regime.

35. How these figures were estimated is set out in Annex C.

36. The IA also set out some additional benefits for which estimates were not available at that time. These were:

- a) There will be a reduction in the statutory minimum time limits that suppliers will have to respond to advertised procurements and submit tender documents. This should ease the regulatory burden of utility company procurement processes;
- b) The use of electronic catalogues will be expressly permitted;
- c) The current rules on Dynamic Purchasing Systems (DPS) will be greatly simplified; and
- d) The new rules will encourage and allow preliminary market consultations.

37. The Regulatory Policy Committee requested that at the public consultation stage estimates for the benefits should be checked and also whether it would be possible to monetise the other benefits. (The figures for the net present value and the business net present value are the same).

**Question 9.** Do Utilities consider that the estimates of costs and benefits are reasonable?

**Question 10.** Do Utilities consider it would be possible to monetise any of the other benefits, and, if so, would they provide estimates, where appropriate?

## **Annex A: Revised Utilities Regulations**

A1. Please follow the link below to the Cabinet Office Consultations page to access the Draft Utilities Contracts Regulations 2016.

A2. [Transposing the 2014 EU Procurement Directives](#)

## **Annex B: How policy choices have been incorporated following the consultation on the Public Contracts Regulations 2015**

### **Introduction**

B1. The Directives permit a limited number of choices to be made on whether or how to transpose particular provisions. The consultation on the 2015 PCR covered the policy options for all **three** Directives, including the Utilities Directive.

B2. The decisions on the policy choices are set out below and the relevant regulation number has been added where appropriate.

### **Outcome of consultation on policy choices**

#### ***Policy choice: Social, Environmental and Labour Law***

B3. What “appropriate measures” should the UK take to ensure suppliers comply with social/environmental/labour laws (Article 36(2) of the Utilities Directive).

B4. The policy decision was to transpose by administrative measures, using guidance to make it policy to mirror these obligations in contract clauses, backed up by a standard contract condition.

#### ***Policy choice: Group participation of economic operators***

B5. Whether, and if so how, the UK should establish standard terms for how groups of economic operators meet requirements for financial standing and technical capacity (Article 37(2) of the Utilities Directive).

B6. The policy decision was not to transpose.

#### ***Policy choice: Procedures***

B7. Whether the Regulations should require that contract award notices for call-offs should be sent on a quarterly basis (Article 70 of the Utilities Directive).

B8. The policy decision was not to require this.

#### ***Policy choice: Reserved Contracts for Sheltered Workshops***

B9. Whether to allow contracts to be reserved for sheltered workshops (Article 38 of the Utilities Directive).

B10. The policy decision was to transpose: see Regulation 38.

#### ***Policy choices: Electronic (“e”) communication and e-procurement choices***

B11. Whether the Regulations should:

- a) Centrally set the level of security in e-communications, or leave this to each contracting authority within a centrally-set “framework” (Article 40(6) (b) of the Utilities Directive);
- b) Centrally specify the level of risk requiring the use of advanced electronic signatures (Article 40(6) (c) of the Utilities Directive);
- c) Postpone requirements for electronic communication to the extent permissible (Article 106(2) of the Utilities Directive);
- d) Mandate the use of electronic catalogues in some procurements (Article 54(1) of the Utilities Directive); and
- e) Mandate the use of “building information electronic modelling” (BIM) for works contracts (Article 40(4) of the Utilities Directive).

B12. The policy decisions were:

- a) Not to specify centrally the levels of security;
- b) Nor to specify centrally the level of risk requiring the use of advanced e-signatures;
- c) To postpone the requirements for the use of e-communication (Regulation 1(3));
- d) Not to mandate the use of e-catalogues for some procurements;
- e) Not to mandate the use of BIM.

***Policy choices: central purchasing bodies***

B13. Whether to provide that utilities may use central purchasing bodies to procure their requirements (Article 55(1) of the Utilities Directive).

B14. Policy decision: to provide this flexibility. See regulation 55(1).

B15. Whether to mandate that certain procurements must be made by using specific central purchasing bodies (Article 55(1) of the Utilities Directive).

B16. Policy decision: this has not been included in the draft regulations.

B17. Whether to limit contracting authorities when using central purchasing bodies in other Member States for centralised purchasing activities (Article 57(2) of the Utilities Directive).

B18. Policy decision: this has not been included in the draft regulations.

### ***Policy choices: division of contracts into lots/SME access***

B19. The main policy choices are how the UK should transpose the provisions concerning the division of contracts into “lots”. The choices are whether:

- a) Utilities should be obliged to divide contracts into lots, or should this decision be left to each utility per procurement (Article 65(4) of the Utilities Directive); and
- b) Utilities should be allowed to accept bids for combined lots (provided that the permissible combinations are advised to bidders in the procurement documents) (Article 65(3) of the Utilities Directive).

B20. The policy decisions are set out in Regulation 65. The decision as to whether to split into lots is left to the discretion of utilities, as are decisions on the number and types of lots.

### ***Policy choices: conflicts of interest, exclusion and related matters***

B21. The choices are how the UK should transpose the options on exclusion of economic operators from public procurement for various offences, failures and misdeeds. It should be noted that the provisions concerning mandatory exclusions and conflicts of interest are only obligatory for those utilities that are also contracting authorities. (There are four policy choices below, b), c) d) and f), which have been given effect by reference to the corresponding Regulation in the Public Contracts Regulations (PCR) 2015). The choices are whether to:

- a) Mandate the discretionary exclusion for certain offences failure or misdeeds, or leave to the discretion of authorities (Article 80(1) of the Utilities Directive);
- b) Allow possible derogation from mandatory exclusion for overriding reasons in the public interest or where, in respect of the exclusion for non-payment of taxes and social security contributions, exclusion would be disproportionate;
- c) Prohibit exclusion of economic operators in certain cases, or leave to discretion of utilities;
- d) Elaborate the grounds for (mandatory) exclusion;
- e) Elaborate the requirement to avoid conflict of interest (Article 42 of the Utilities Directive); and
- f) To decide the duration of both mandatory and discretionary exclusions.

B22. The policy decisions are:

- a) This is left to the discretion of the utility;
- b) To allow a discretion for overriding reasons in the public interest or where exclusion would be disproportionate;

- c) This is left to the discretion of utilities;
- d) This is elaborated by reference to the offences listed in the Public Contracts Regulations 2015 (see Regulation 57(1) of the PCR 2015);
- e) This requirement is not elaborated;
- f) The durations are set out by reference to Regulation 57(11) and (12) of the PCR 2015.

***Policy choices: Tender Assessment***

B23. The policy choices covered were whether the Regulations should:

- a) Prevent utilities, when using the open procedure, from examining tenders before looking at whether the selection criteria were met or whether there were grounds for exclusion (Article 76(7) of the Utilities Directive);
- b) Allow utilities to ask for incomplete or erroneous information to be supplemented (Article 76(4) of the Utilities Directive); and
- c) Restrict the use of price only or cost only as the sole award criterion (Article 82(2) of the Utilities Directive).

B24. The policy decisions were:

- a) To allow utilities to examine tenders before verifying the suitability of tenderers, see regulation 76(7);
- b) To allow utilities to ask for information to be supplemented, see regulation 76(4);
- c) Not to provide for this restriction.

***Policy choices: Subcontracting***

B25. The policy choices were:

- a) Whether it should be compulsory for utilities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and the details of any proposed subcontractors (Article 88(2) of the Utilities Directive);
- b) Whether the main contractor should be directly obliged to provide information about its subcontractors (Article 88(5) of the Utilities Directive);
- c) Whether the basic requirement (being the requirement for the main contractors on works contracts or contracts for services to be provided at a facility under direct oversight of the contracting authorities to provide contact



information of subcontractors to the contracting authority) should be extended to a wider scope of contract or a wider scope of subcontractors (i.e. further down the supply chain) (Article 88(5) of the Utilities Directive);

- d) Whether utilities should be required to verify whether there are mandatory or discretionary grounds for exclusion of any subcontractors and, if such verification is undertaken and the response shows that there are discretionary grounds for exclusion, whether utilities should be obliged to require that the main contractor find a replacement subcontractor (Article 88(6) of the Utilities Directive);
- e) Whether or not to provide for direct payment of subcontractors; and whether subcontractors should receive direct payments without it being necessary for them to request such direct payment (Article 88(3) of the Utilities Directive).

B26. The policy decisions were:

- a) Not to mandate this;
- b) To leave this for utilities to decide according to the circumstances of the procurement;
- c) To allow utilities to decide whether or not to include clauses in the contract with the main contractor to give effect to the basic requirement;
- d) Not to mandate this;
- e) Not to mandate this.

### ***Policy choices: Termination of contracts***

B27. Policy choice. How to ensure that utilities are able to terminate contracts in certain circumstances (Article 90 of the Utilities Directive).

B28. The policy decision was to set out in regulation 89 that utilities should ensure that they include provisions in all contracts to enable termination in the circumstances listed.

### ***Light touch regime (LTR)***

B29. The former distinction between Part A and Part B service contracts has been abolished, and a new rules regime, the “light touch regime”, has been introduced for certain health, social and other services.

B30. The new light-touch regime (LTR) is a specific set of rules for certain service contracts that tend to be of lower interest to cross-border competition. Those service contracts include certain social, health and education services, defined by Common Procurement Vocabulary (CPV) codes. These are listed in Schedule 7 of the draft Utilities Regulations.

B31. Following consultation on the approach to be taken in the public sector Regulations, a minimalist approach was adopted. A similar approach has been adopted in Regulations 90 to 93 of the draft Utilities Regulations.

## **Annex C: estimates of costs & benefits for the Impact Assessment**

C1. As set in paras 33 to 37 above, we would like to test estimates concerning the benefits and costs of the new Directive and to see whether certain other benefits can be monetised. The estimates were based on the following assumptions.

### **Assumptions on which the estimates are based**

C2. Analysis of the annual statistics returns submitted by utilities for 2011 and 2012 shows the proportion of private sector utilities was 60% in 2011 and 57% in 2012. This minor variation between the two years reflects a small decrease in the number of contracts awarded by private sector utilities. It is assumed this proportion will remain unchanged for 2013 and subsequent years. The higher figure of 60% has been applied as the best estimate.

C3. The number of contracts placed by utilities in a year is relatively small compared with the number let under the Public Contracts Regulations. Tenders Electronic Daily (TED), the on-line version of the Official Journal of the EU (OJEU) in which contract opportunities are advertised, shows that in the year ended 31 May 2013 there were 621 above-threshold contracts advertised by utilities. In the year ended 31 May 2014, there were 572.

C4. Consultation with the sector suggests it takes, on average, 3 hours to complete a contract notice form for advertising a light-touch regime contract opportunity in OJEU. The average hourly rate for the procurement staff involved in completing, approving and sending the form to OJEU is £50 including non-wage costs, based on the compliance cost reports from utilities for 2012. The cost is therefore estimated to be £150 (3 hours @ £50 per hour).

### **Monetised benefits**

C5. Utilities will no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from an on-line system, freeing up time and resources for utilities. Analysis of the compliance cost reports from all 50 utilities who submitted statistics returns for 2012 shows the total cost incurred in collecting and submitting this information was £10K. Assuming 60% of those utilities are private sector, the benefits to utilities are estimated to be £6K per year (£10Kx0.6).

### **Non-monetised benefits**

C6. Utilities agree the other changes that remove or reduce regulatory requirements deliver benefits but are unable, currently, to monetise them. The benefits are likely to be relatively low because of the small number of contracts placed by utilities in a year. The non-monetised benefits are as follows:

- a) Reduced red tape on suppliers' response times. The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third. This will help

utilities to speed up procurements for simpler or off-the-shelf requirements, easing the regulatory burden on their procurement processes;

- b) Use of electronic catalogues will be expressly permitted. Such catalogues are an electronic list of goods or services for purchase complete with their prices and delivery times, of a type commonly provided by on-line retailers. The 2004 directive is silent on whether such procurement techniques can be used, which causes uncertainty and can in some cases result in a procurement being delayed while legal advice is obtained. By making express provision for the use of electronic catalogues, the new Directive creates certainty for utilities because there is no longer any doubt as to their legality. This will enable utilities to procure goods or services more quickly in cases where electronic catalogues are to be used;
- c) The current rules on DPS have been greatly simplified. A DPS is a completely electronic system which may be established by a utility to purchase commonly used goods or services. A DPS is an agreement with suppliers that sets out the terms and conditions under which specific purchases (call-off contracts) can be made by competition throughout the period of the DPS. The 2004 directive requires every call-off contract opportunity to be advertised in OJEU. The new Directive removes that requirement, easing the regulatory burden on utilities. In future, only the DPS itself will have to be advertised; and
- d) The new rules encourage and allow preliminary market consultation between utilities and suppliers, which should ease the burden on utilities by facilitating shorter procurement times.

## **Monetised costs**

C7. The 2004 directive applies the rules to service contracts in two discrete ways. Part A services (such as maintenance and repair of vehicles, advertising services, and building cleaning services) are subject to the full rules where the value of the contract is equal to or greater than €414K. Part B services (such as health, social services and education services) are only subject to the rules on technical specifications and contract award notices but are subject to the same €414K threshold. The new Directive removes that distinction and introduces a new light-touch regime for social and health and some other services to which a much higher threshold of €1M applies. The main change from the rules for Part B service contracts, in terms of procurement processes, is the requirement to advertise above threshold contract opportunities in OJEU for services that fall under the light-touch regime. Services outside the scope of the light-touch regime will either be subject to the full rules or fall outside the rules altogether on the grounds of an exclusion or exemption.

C8. Some former Part B service contracts will now be subject to the new light-touch regime. Following consultation with the sector, it is estimated that 11% of all utilities that are subject to these procurement rules will be affected by this change. The latest available compliance cost reports, for 2012, show that 50 utilities advertised contracts in OJEU in that year and were thus complying with the

procurement rules. It is therefore estimated that 6 utilities ( $50 \times 0.11 = 5.5$ , rounded to 6) will procure former Part B service contracts under the light-touch regime.

C9. One utility has estimated that 6 of its former Part B service contracts per year will now go through the light-touch regime. No other utility was able to provide such an estimate. Assuming that number applies in each of the 6 utilities estimated to be impacted in this way, and that 60% of utilities are private sector, the number of contracts affected by this change is 22 per year ( $6 \times 6 \times 0.6$ ).

C10. The average cost to utilities of completing a contract notice form for advertising each opportunity in OJEU is estimated to be £150. The additional burden created by this change is therefore estimated to be £3.3K per year ( $22 \times £150$ ).

C11. Consultation with the sector also suggests that there are no former Part B service contracts which will now be procured under the full rules as a result of this change. This potential consequence of the new Directive is therefore not expected to create additional burdens. Some utilities have said they have a policy of treating Part B contracts in the same way as Part A, which means they are already bearing the cost of complying with the full rules and this change will have no impact. Some have said all their Part B contracts are below threshold and so are out of scope, while others have said all of their service contracts are Part A.

C12. The net annual benefit is therefore estimated at £2.7K (£6K minus £3.3K).

**C13. As set out in questions 9 & 10 on page 11, we invite comments on whether the estimates of costs and benefits, and the assumptions on which they are based, are reasonable. If you have alternative costs and benefits estimates to offer, or estimates for the non-monetised benefits, please show your calculations and the assumptions you have used.**