

<p style="text-align: center;">European Communities (Revised Remedies Directive) Regulations 2009</p>	<p style="text-align: center;"><i>Corresponding Directive Article / Some comments.</i></p>
<p>I, BRIAN LENIHAN, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving effect to Council Directive 89/665/EEC⁽¹⁾, as amended by Directive 2007/66/EC⁽²⁾, hereby make the following regulations:</p> <p>Citation.</p> <p>1. These Regulations may be cited as the European Communities (Revised Remedies Directive) Regulations 2009.</p> <p>Commencement.</p> <p>2. These Regulations come into operation on _____ 2009.</p> <p>Interpretation—general.</p> <p>3.—(1) In these Regulations—</p> <p>“concluded”, in relation to a contract, has the same meaning as in the Public Authorities Contracts Directive;</p> <p>“court” means the High Court;</p> <p>“eligible person” has the meaning given by Regulation 6(2);</p> <p>“Official Journal” means the official Journal of the European Union;</p> <p>“PAC Regulations” means the European Communities (Award of Public Authorities’ Contracts) Regulations 2006 (S.I. No. 329 of 2006);</p> <p>“Public Authorities Contracts Directive” means Directive 2004/18/EC⁽³⁾ of the European Parliament and of</p>	

⁽¹⁾ O J No. L395, 20.12.1989, p. 33.

⁽²⁾ O J No. L335, 11.12.2007, p. 33.

the Council of 31 March 2004;

“reviewable public contract” means a contract to which the PAC Regulations apply;

“Revised Remedies Directive” means Council Directive 89/665/EEC of 21 December 1989, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007.

(2) A word or expression used in both these Regulations and the Revised Remedies Directive has, unless the contrary intention appears, the same meaning in these Regulations as in that Directive.

Interpretation—kinds of infringement.

4.—(1) In these Regulations—

(a) an Article 1(5) infringement is an infringement where—

- (i) a tenderer or candidate has applied to a contracting authority in accordance with Regulation 12 for review of a decision of the contracting authority in relation to a reviewable public contract, and
- (ii) the contracting authority has concluded the contract during the period during which, under Regulation 13, it is required to not do so,

(b) an Article 2(3) infringement is an infringement where—

- (i) a tenderer or candidate has applied to the court in accordance with Regulation 14 for review of a contract award decision in relation to a reviewable public contract,
- (ii) the contracting authority has concluded the contract before the court has made its decision, and

(c) an Article 2a(2) infringement is an infringement where—

- (i) the relevant contract is one to which a standstill period applies, and
- (ii) the contracting authority has concluded the contract during the standstill period, and

(d) an Article 2d(1)(a) infringement is an infringement where a contracting authority has awarded a contract without first publishing a contract notice in the Official Journal although the prior publication of such a notice was required by the Public Authorities Contracts Directive.

Application of these Regulations to contracts and decisions.

Article 2d and 2e

This draft Reg defines the types of serious infringements, as set out in Article 2d and 2e, that will result in a contract being declared ineffective or attract alternative “effective, proportionate and dissuasive” penalties.

Article 1(1)

³) O J No. L134, 30.4.2004, p. 114.

5.—(1) These Regulations apply in relation to reviewable public contracts.

(2) The decisions that are reviewable under these Regulations are decisions taken by a contracting authority that are required, under the third paragraph of Article 1(1) of the Revised Remedies Directive, to be reviewable.

Persons to whom review procedures are available.

6.—(1) The review procedures established by these Regulations are available to any person—

- (a) who has, or has had, an interest in obtaining a reviewable public contract, and
- (b) who alleges that he or she has been harmed, or is at risk of being harmed, by an infringement of Community law in the field of public procurement, or of a law of the State transposing that law.[Art 1(3)]

(2) For the purposes of these Regulations, a person is an eligible person in relation to a reviewable public contract if the review procedures established by these Regulations are available to the person in relation to the contract.

Standstill period.

7.—(1) A contracting authority shall not conclude a reviewable public contract (other than such a contract of a kind for which a standstill period is not required) within the standstill period for a contract of that kind.

(2) The contracts for which a standstill period is not required are the following—

- (a) a contract where the Public Authorities Contracts Directive does not require prior publication of a contract notice in the Official Journal;
- (b) a contract where the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned;
- (c) a contract based on a framework agreement;
- (d) a specific contract based on a dynamic purchasing system.

(3) The standstill period for a contract begins at the beginning of the day following the day on which each tenderer and candidate concerned is sent a notice, in accordance with paragraph (5), of the decision to award the contract.

(4) The duration of the standstill period is—

Article 1(3)

Articles 2a, 2b,

The Directive makes an explicit provision for a minimum 'standstill period' between the decision on a contract award and the formal signing of the contract. The minimum period set out in the Directive is 10 days if electronic means of communication are used or 15 days if other means of communication are used. Current regulations (SI 329 of 2006) require observance of a minimum 14 calendar day standstill period, reflecting the ECJ Judgment in the Alcatel Case. Draft regulation 7

<p>(a) if the notice is sent by fax or electronic means, 14 calendar days, or</p> <p>(b) if the notice is sent by any other means, 16 calendar days</p> <p>(5) The notice—</p> <p>(a) shall inform the candidates and tenderers of the decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system,</p> <p>(b) shall state the exact standstill period applicable to the contract, and</p> <p>(c) for each unsuccessful tenderer or candidate concerned, shall be accompanied by a statement of—</p> <p>(i) in the case of an unsuccessful candidate, the reasons for the rejection of his or her application,</p> <p>(ii) in the case of an unsuccessful tenderer, the reasons for the rejection of his or her tender, the reasons or a summary of the reasons for the rejection of his or her tender, and if the tenderer so requests in writing—</p> <p>(aa) the characteristics and relative advantages of the tender selected,</p> <p>(bb) the name of the successful tenderer, or, in the case of a framework agreement, the names of the parties to it, and</p> <p>(cc) in the cases referred to in Article 23, paragraphs 4 and 5 of the Public Authorities Contracts Directive, the reasons for the contracting authority’s decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements.</p> <p>In any event the notice shall provide sufficient information to enable an unsuccessful tenderer to decide whether there are grounds for seeking review of the contracting authority’s decision.</p> <p>(6) However, a contracting authority may decide to withhold any information referred to in paragraph (5) regarding the contract award, the conclusion of a framework agreement or admittance to a dynamic purchasing system if—</p> <p>(a) the release of such information would impede law enforcement,</p> <p>(b) would otherwise be contrary to the public interest,</p> <p>(c) would prejudice the legitimate commercial interests of economic operators, whether public or private, or</p>	<p><i>retains the 14 day calendar period but provides for an additional two days when non electronic means of communication are used.</i></p> <p><i>Contracting authorities are required to provide (i) sufficient reasons for their decisions to enable unsuccessful tenderers to determine if there are valid grounds for initiating a review procedure and (ii) the duration of the standstill period. Para (5) sets out the type of information to be supplied to candidates and tenderers, based on Art 2a.</i></p>
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(d) might prejudice fair competition between them.

(7) For the purposes of this Regulation—

(a) a tenderer is concerned if he or she has not been definitively excluded, and

(b) a candidate is concerned if the contracting authority has not made available information about the rejection of his or her application before the notification of the contract award decision to the tenderers concerned.

(8) For the purposes of paragraph (6)(a), the exclusion of a tenderer is definitive if it has been notified to the tenderer in accordance with paragraph (5) and—

(a) has been declared lawful by the court, or

(b) is not, or is no longer, subject to a review procedure.

Time limits for applying for review.

8. An application for the review of a contracting authority's decision that is reviewable under these Regulations, or a declaration that a contract is ineffective, shall be made within the review period for the decision or contract.

Article 2c

Review period for contract award decisions.

9.—(1) In the case of an application for the review of a decision of a contracting authority taken in the context of, or in relation to, a contract award procedure falling within the scope of the European Communities (Award of Public Authorities' Contracts) Regulations 2006, the review period begins at the beginning of the day following the day on which notice of the decision, including or accompanied by a summary of the relevant reasons, is sent to the applicant tenderer or candidate.

(2) The duration of the review period is—

(a) if the notice is sent by fax or electronic means, 14 calendar days, or

(b) the notice is sent by any other means, 16 calendar days.

Review period for certain other decisions.

10. In the case of an application for review concerning a decision referred to in Article 2(1)(b) of the Revised Remedies Directive that is not subject to a specific notification, the review period is 14 days beginning at the

Article 2c (last sentence): relates to direct award of contracts

beginning of the day following the day of publication of the decision.

Review period in relation to declaration that contract is ineffective.

11.—(1) The review period for application for a declaration that a contract is ineffective is as set out in the Table to this paragraph.

TABLE

<i>Case</i>	<i>Duration of period</i>	<i>Beginning of period</i>
Where the contracting authority published a notice in accordance with Regulation 17(6)(b) that included a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union	14 calendar days	at the beginning of the day following the day on which the authority published the notice
Where the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of the Public Authorities' Contracts Directive	30 calendar days	at the beginning of the day following the day on which the authority published the notice
Where the contracting authority notified the tenderers and candidates concerned of the conclusion of the contract, and that notice contained a summary of the relevant reasons that complied with Regulation 7(5)(c)	30 calendar days	at the beginning of the day following the day on which the authority gave the notice
The case of a contract based on a framework agreement, where the contracting authority has given notice in accordance with Regulation 7(5).	30 calendar days	at the beginning of the day following the day on which the purchasing authority gave the notice
The case of a specific contract based on a dynamic purchasing system, where the contracting authority has given notice in accordance with Regulation 7(5).	30 calendar days	at the beginning of the day following the day on which the contracting authority gave the notice

Article 2f:

Sets out the time limits within which ineffectiveness may be declared in various instances where an authority has not notified and allowed a standstill period in accordance with Reg 7.

Any other case	6 months	at the beginning of the day following the day on which the contracting authority had concluded the contract	
<p>(2) For the purposes of this Regulation—</p> <p>(a) a tenderer is concerned if he or she has not been definitively excluded, and</p> <p>(b) a candidate is concerned if the contracting authority has not made available information about the rejection of his or her application before the notification of the contract award decision to the tenderers concerned.</p> <p>(3) For the purposes of paragraph (2)(a), the exclusion of a tenderer is definitive if it has been notified to the tenderer and—</p> <p>(a) has been declared lawful by the court, or</p> <p>(b) is not, or is no longer, subject to a review procedure.</p>			
<p>Application to contracting authority for reconsideration.</p>			
<p>12.—(1) Subject to paragraph (2), an eligible person may apply to a contracting authority for reconsideration of a decision that is reviewable under these Regulations on the grounds that—</p> <p>(a) the decision allegedly infringes Community law, or a law of the State that transposes that law,</p> <p>(b) the person has or had an interest in obtaining the relevant contract, and</p> <p>(c) the person alleges that he or she has been harmed by the alleged infringement.</p> <p>(2) Paragraph (1) does not apply—</p> <p>(a) if the contract has been concluded, or</p> <p>(b) in relation to a decision to award the contract to a particular tenderer or candidate.</p> <p>(3) The application shall be in writing and must set out details of—</p> <p>(a) the decision,</p> <p>(b) the alleged infringement of Community law, or law of the State transposing that law,</p>			<p>Article 1(5) <i>Directive allows the option of requiring that a review must first be sought with the contracting authority. Draft Reg leaves this optional rather than mandatory – Is there a case for making it mandatory?</i></p>

- (c) the person's interest, and
 - (d) the alleged harm that was suffered by the person or of which the person is at risk.
- (4) The application shall be made within the review period for the decision.
- (5) Within 30 days (beginning at the beginning of the day following the day on which it receives an application that complies with paragraphs (3) and (4)), the contracting authority—
- (a) shall reconsider the decision in accordance with the applicable law, and
 - (b) shall notify the applicant in writing of its reconsideration decision.
- (6) The notice of the authority's reconsideration decision—
- (a) shall inform the applicant of the decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system,
 - (b) shall be accompanied by a statement of—
 - (i) in the case of an unsuccessful candidate, the reasons for the rejection of his or her application,
 - (ii) in the case of an unsuccessful tenderer, the reasons for the rejection of his or her tender, including, in the cases referred to in Article 23, paragraphs 4 and 5 of the Public Authorities Contracts Directive, the reasons for the contracting authority's decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
 - (iii) in the case of a tenderer who has made an admissible tender, the characteristics and relative advantages of the tender selected and the name of the successful tenderer or the names of the parties to the framework agreement.
- (7) However, a contracting authority may decide to withhold information referred to in paragraph (7) regarding the contract award, the conclusion of a framework agreement or admittance to a dynamic purchasing system if—
- (a) the release of such information would impede law enforcement,
 - (b) would otherwise be contrary to the public interest,
 - (c) would prejudice the legitimate commercial interests of economic operators, whether public or private, or
 - (d) might prejudice fair competition between them.

Effect of application to contracting authority for reconsideration.

13.—(1) If an eligible person applies to the contracting authority for reconsideration of a decision in relation to a reviewable public contract, the contracting authority shall not conclude the contract until the end of the relevant period.

(2) For paragraph (1), the relevant period begins at the beginning of the day after the authority sends the eligible person a notice of its reconsideration decision in accordance with paragraphs (5) and (6) of Regulation 12 and ends at the end of—

- (a) if the notice is sent by fax or electronic means, 14 calendar days, or
- (b) if the notice is sent by any other means, 16 calendar days.

Application to court.

14.—(1) If a person who is an eligible person in relation to a reviewable public contract that has not been concluded has applied to the contracting authority concerned for reconsideration of a decision in relation to the contract, and—

- (a) if the authority has sent the person a notice of its reconsideration decision in accordance with paragraphs (5) and (6) of Regulation 12, the person is aggrieved by the contracting authority’s reconsideration decision, or
- (b) if the authority has not sent the person such a notice, 45 days has expired since the person applied for that reconsideration,

the person may apply to the court for review of the authority’s reconsideration decision or failure to make such a decision, as the case requires.

(2) A person who is an eligible person in relation to a reviewable public contract that has not been concluded may apply to the court—

- (a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority, or
- (b) for review of a decision of the contracting authority to award the contract to a particular tenderer or candidate.

Article 1(5) and 2(3)

Provides for suspension of contract award pending reconsideration by contracting authority.

(3) If a person applies to the court under paragraph (1) or (2), the contracting authority shall not conclude the contract until the court so orders.

(4) A person who is an eligible person in relation to a reviewable public contract that has been concluded may apply to the court for a declaration that the contract is ineffective.

(5) An application under paragraph (1), (2) or (4) may include a claim for damages or other relief.

(6) A person who has applied to the court under paragraph (1), (2) or (4) shall give the authority notice of the application by serving a sealed copy of the originating motion on the authority as soon as reasonably practicable.

(7) Nothing in this Regulation prevents an eligible person from applying to the court for any other remedy that may be available in the particular circumstances.

Powers of the court.

15.—(1) The court may—

(a) by order—

(i) set aside, vary or affirm a reconsideration decision of a contracting authority (that is, a decision of the authority made on reconsideration of a decision), or remit such a decision to the contracting authority with appropriate directions,

(ii) set aside, vary or affirm a decision of a contracting authority in relation to a reviewable public contract,

(iii) declare a reviewable public contract ineffective,

(iv) impose alternative penalties on a contracting authority, or

(b) make such other order as it considers just and equitable in the circumstances,

and may make any necessary consequential order.

(2) The court may make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority.

(3) In particular, the court may set aside any discriminatory technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure.

Article 2 requirements

(4) When considering whether to make an interim order, the court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.

(5) The court may by order suspend the operation of a decision or a contract.

(6) The court may award damages as compensation for loss resulting from a decision that is an infringement of Community law, or of a law of the State transposing Community law. [Art2(1)(c), (6)]

Rules of court.

16.—(1) The rules of court may provide for a preliminary procedure to decide whether an applicant under Regulation 14 is an eligible person in relation to a particular reviewable public contract.

(2) The rules of court may provide for the court to grant leave, in exceptional circumstances, to make an application under Regulation 14 out of time.

Declaration by court that contract ineffective.

17.—(1) Subject to paragraphs (2), (6) and (7), the court shall declare a reviewable public contract ineffective in the following cases—

- (a) the case where the contracting authority has awarded the contract without first publishing a contract notice in the Official Journal and concluding the contract without publishing such a notice is not permitted by the Public Authorities Contracts Directive,
- (b) the cases of an Article 1(5) infringement, an Article 2(3) infringement or an Article 2a(2) infringement, where the infringement—
 - (i) has deprived the tenderer applying for review of the possibility of pursuing pre-contractual remedies, and
 - (ii) was combined with an infringement of the Public Authorities Contracts Directive that has affected the chances of the tenderer's applying for a review to obtain the contract,
- (c) the cases referred to in paragraphs (a), (c) and (d) of Regulation 7(2).

(2) Despite paragraph (1), the court may decline to declare a contract ineffective if it finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

Article 2d.

Directive requires that contracts awarded unlawfully must be declared "ineffective" by the court. The kinds of (serious) infringement that must result in ineffectiveness are those set out in draft Reg 4. This is a new concept which gives rise to some difficulties - legal and practical.

If there are overriding reasons relating to a general interest, the review body may decide not to declare ineffectiveness but instead apply an alternative "effective, proportionate and dissuasive" penalty. The Directive explicitly provides (i) that additional costs such as costs of retendering, cost of changing a contractor, costs arising

- (3) Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.
- (4) Economic interests directly linked to the contract are not overriding reasons relating to a general interest.
- (5) In paragraph (4), “economic interests directly linked to the contract” include (but are not limited to)—
- (a) the costs resulting from the delay in the execution of the contract,
 - (b) the costs resulting from the launching of a new procurement procedure,
 - (c) the costs resulting from the change of the economic operator performing the contract, and
 - (d) the costs of legal obligations resulting from the ineffectiveness.
- (6) Paragraph (1)(a) does not apply where—
- (a) the contracting authority considered that the award of a contract without prior publication of a contract notice in the Official Journal was permitted by Regulation 32 of the PAC Regulations,
 - (b) the contracting authority published, in the Official Journal, a notice complying with paragraph (9) stating that it intended to conclude the contract, and
 - (c) the contract was not concluded before the end of the period of 14 days beginning at the beginning of the day following the day of publication of that notice.
- (7) Paragraph (1)(c) does not apply where—
- (a) the contracting authority considered that the award of the contract was in accordance with Regulation 35, or paragraphs (9) to (12) of Regulation 36, of the PAC Regulations,
 - (b) the contracting authority sent a notice of the contract award decision, together with a summary of reasons complying with regulation 7(5)(c), to the tenderers concerned, and
 - (c) the contract was not concluded before the end of a period of—
 - (i) 14 days beginning at the beginning of the day following the day on which notice of the contract award decision is sent to the tenderers concerned if fax or electronic means are used, or
 - (ii) 16 days beginning at the beginning of the day following the day on which notice of the contract award decision is sent to the tenderers concerned if another means of communication is used.
- (8) In the case of an Article 1(5) infringement, an Article 2(3) infringement or an Article 2a(2) infringement (being, in each case, an infringement not covered by paragraph (1)(b)), the court may, after having assessed all relevant aspects, declare the relevant contract ineffective.

from delay in completion of a project or additional legal costs are not sufficient to avoid ineffectiveness and (ii) compensation for loss or damages to aggrieved parties is not an alternative effective, proportionate and dissuasive penalty.

(9) A notice referred to in paragraph (6)(b)—

- (a) shall be in the format most recently adopted by the Commission under Article 3a of the Revised Remedies Directive before the commencement of this Regulation,
- (b) shall include—
 - (i) the name and contact details of the contracting authority,
 - (ii) a description of the object of the contract,
 - (iii) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, and
 - (iv) the name and contact details of the economic operator in favour of whom a contract award decision has been taken, and
- (c) may include any other information that the contracting authority considers useful.

(10) The court may make any order necessary in the interests of justice to ensure that proper payment is made for any work done, or goods or services provided, in good faith in reliance on a contract that has been declared ineffective.

Effect of declaration that a contract is ineffective.

18.—(1) If the court declares a contract ineffective—

- (a) any contractual obligations already performed are retroactively cancelled,
- (b) any contractual obligations not already performed are cancelled,
- (c) goods provided under the contract shall be returned (or in a case where goods provided under the contract have been consumed, an equivalent quantity of similar goods shall be returned to the party that provided the consumed goods), and
- (d) all money paid shall be refunded.

(2) However, nothing in these Regulations prevents action taken in good faith in reliance on an ineffective contract having legal consequences.

Article 2d(2)

Draft Reg sets out consequences of a contract being declared ineffective.

Alternative penalties.

19.—(1) The court shall impose an alternative penalty if—

- (a) under Regulation 17(2), it declines to declare a contract ineffective, or
- (b) in the case of an alleged infringement referred to in Regulation 17(8), it finds that the infringement occurred but declines to declare the contract ineffective.

(2) The alternative penalty shall be either or both of the following:

- (a) the imposition on the contracting authority of a fine of up to the lesser of 20% of the value of the contract or €1,000,000;
- (b) the termination, or shortening of the duration, of the contract.

(3) The court may take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and any extent to which the contract remains in force.

(4) The award of damages is not an appropriate alternative penalty for the purposes of this Regulation.

Non-exclusion of other remedies.

20. Nothing in these Regulations affects any power of the court to grant any other remedy in relation to a contract.

Revocation.

21. The European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations 1994 (S. I. No. 309 of 1994) are revoked.

Article 2e

This Article provides that where a contract awarded unlawfully is not declared ineffective (for overriding reasons relating to a general interest), alternative “effective, dissuasive and proportionate” penalties must be applied. The Article cites fines or shortening duration of ongoing contracts as alternatives.

No problem with shortening duration, but there may be issues on the imposition of fines on grounds of effectiveness and compatibility with legal system. However to date, we have not identified an alternative to fines that might meet the Directive requirement.

GIVEN under my Official Seal,

_____ 2009.

Minister for Finance.

The section of Directive 2007/66/EC amending public sector Remedies Directive 89/665/EEC (to which the above draft regulations relate) is reproduced below. A PDF version of Directive 2007/66/EC can be accessed at the following web address:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0046:EN:PDF>

**Directive 2007/66/EC of the European Parliament and of the Council
of 11 December 2007**

**amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning
the award of public contracts
(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) Council Directives 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [4] and 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [5] concern the review procedures with regard to contracts awarded by contracting authorities as referred to in Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [6] and contracting entities as referred to in Article 2 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [7]. Directives 89/665/EEC and 92/13/EEC are intended to ensure the effective application of Directives 2004/18/EC and 2004/17/EC.

(2) Directives 89/665/EEC and 92/13/EEC therefore apply only to contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC as interpreted by the Court of Justice of the European Communities, whatever competitive procedure or means of calling for competition is used, including

design contests, qualification systems and dynamic purchasing systems. According to the case law of the Court of Justice, the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of Directives 2004/18/EC and 2004/17/EC.

(3) Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

(5) The duration of the minimum standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used. This Directive only provides for minimum standstill periods. Member States are free to introduce or to maintain periods which exceed those minimum periods. Member States are also free to decide which period should apply, if different means of communication are used cumulatively.

(6) The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. When the award decision is notified to them, the tenderers concerned should be given the relevant information which is essential for them to seek effective review. The same applies accordingly to candidates to the extent that the contracting authority or contracting entity has not made available in due time information about the rejection of their application.

(7) Such relevant information includes, in particular, a summary of the relevant reasons as set out in Article 41 of Directive 2004/18/EC and Article 49 of Directive 2004/17/EC. As the duration of the standstill period varies from one Member State to another, it is also important that the tenderers and candidates concerned should be informed of the effective period available to them to bring review proceedings.

(8) This type of minimum standstill period is not intended to apply if Directive 2004/18/EC or Directive 2004/17/EC does not require prior publication of a contract notice in the Official Journal of the European Union, in particular in cases of extreme urgency as provided for in Article 31(1)(c) of Directive 2004/18/EC or Article 40(3)(d) of Directive 2004/17/EC. In those cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no

candidates concerned. In this case there is no other person remaining in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow for effective review.

(9) Finally, in cases of contracts based on a framework agreement or a dynamic purchasing system, a mandatory standstill period could have an impact on the efficiency gains intended by those tendering procedures. Member States should be able therefore, instead of introducing a mandatory standstill period, to provide for ineffectiveness as an effective sanction in accordance with Article 2d of both Directives 89/665/EEC and 92/13/EEC for infringements of the second indent of the second subparagraph of Article 32(4) and of Article 33(5) and (6) of Directive 2004/18/EC, and of Article 15(5) and (6) of Directive 2004/17/EC.

(10) In the cases referred to in Article 40(3)(i) of Directive 2004/17/EC, contracts based on a framework agreement do not require prior publication of a contract notice in the Official Journal of the European Union. In those cases a standstill period should not be mandatory.

(11) When a Member State requires a person intending to use a review procedure to inform the contracting authority or contracting entity of that intention, it is necessary to make it clear that this should not affect the standstill period or any other period to apply for review. Furthermore, when a Member State requires that the person concerned has first sought a review with the contracting authority or contracting entity, it is necessary that this person should have a reasonable minimum period within which to refer to the competent review body before the conclusion of the contract, in the event that that person should wish to challenge the reply or lack of reply from the contracting authority or contracting entity.

(12) Seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract. It is thus necessary to provide for an independent minimum standstill period that should not end before the review body has taken a decision on the application. This should not prevent the review body from making a prior assessment of whether the review as such is admissible. Member States may provide that this period shall end either when the review body has taken a decision on the application for interim measures, including on a further suspension of the conclusion of the contract, or when the review body has taken a decision on the merits of the case, in particular on the application for the setting aside of an unlawful decision.

(13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the Official Journal of the European Union within the meaning of Directive 2004/18/EC. This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC.

(15) Possible justifications for a direct award within the meaning of this Directive may include the exemptions in Articles 10 to 18 of Directive 2004/18/EC, the application of Article 31, Article 61 or Article 68 of Directive 2004/18/EC, the award of a service contract in accordance with Article 21 of Directive 2004/18/EC or a lawful "in-house" contract award following the interpretation of the Court of Justice.

(16) The same applies to contracts which meet the conditions for an exclusion or special arrangements in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of Directive 2004/17/EC, to cases involving the application of Article 40(3) of Directive 2004/17/EC or to the award of a service contract in accordance with Article 32 of Directive 2004/17/EC.

(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

(18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract.

(19) In the case of other infringements of formal requirements, Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for alternative penalties. Alternative penalties should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application.

(20) This Directive should not exclude the application of stricter sanctions in accordance with national law.

(21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.

(22) However, in order to ensure the proportionality of the sanctions applied, Member States may grant the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In those cases alternative penalties should be applied instead. The review body independent of the contracting authority or contracting entity should examine all relevant aspects in order to establish whether overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(23) In exceptional cases the use of the negotiated procedure without publication of a contract notice within the meaning of Article 31 of Directive 2004/18/EC or Article 40(3) of Directive 2004/17/EC is permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified.

(24) Economic interests in the effectiveness of a contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons.

(25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.

(26) In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the Official Journal of the European Union is permissible in accordance with Directives 2004/18/EC and 2004/17/EC and has applied a minimum standstill period allowing for effective remedies. The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive 2004/18/EC or Directive 2004/17/EC.

(27) As this Directive strengthens national review procedures, especially in cases of an illegal direct award, economic operators should be encouraged to make use of these new mechanisms. For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected.

(28) Strengthening the effectiveness of national review procedures should encourage those concerned to make greater use of the possibilities for review by way of interlocutory procedure before the conclusion of a contract. In those circumstances, the corrective mechanism should be refocused on serious infringements of Community law on public procurement.

(29) The voluntary attestation system provided for by Directive 92/13/EEC, whereby contracting entities have the possibility of having the conformity of their award procedures established through periodic examinations, has been virtually unused. It cannot thus achieve its objective of preventing a significant number of infringements of Community law on public procurement. On the other hand, the requirement imposed on Member States by Directive 92/13/EEC to ensure the permanent availability of bodies accredited for this purpose can represent an administrative maintenance cost which is no longer justified in the light of the lack of real demand by contracting entities. For these reasons, the attestation system should be abolished.

(30) Similarly, the conciliation mechanism provided for by Directive 92/13/EEC has not elicited any real interest from economic operators. This is due both to the fact that it does not of itself make it possible to obtain binding interim measures likely to prevent in time the illegal conclusion of a contract, and also to its nature, which is not readily compatible with observance of the particularly short deadlines applicable to reviews seeking interim measures and the setting aside of decisions taken unlawfully. In addition, the potential effectiveness of the conciliation mechanism has been weakened further by the difficulties encountered in establishing a complete and sufficiently wide list of independent conciliators in each Member State, available at any time and capable of dealing with conciliation requests at very short notice. For these reasons, the conciliation mechanism should be abolished.

(31) The Commission should be entitled to request Member States to provide it with information on the operation of national review procedures proportionate to the objective pursued by involving the Advisory Committee for Public Contracts in determining the extent and nature of such information. Indeed, only by making such information available will it be possible to assess correctly the effects of the changes introduced by this Directive at the end of a significant period of implementation.

(32) The Commission should review progress made in the Member States and report to the European Parliament and to the Council on the effectiveness of this Directive no later than three years after its deadline for implementation.

(33) The measures necessary for the implementation of Directives 89/665/EEC and 92/13/EEC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [8].

(34) Since, for the reasons stated above, the objective of this Directive, namely improving the effectiveness of review procedures concerning the award of contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective, while respecting the principle of the procedural autonomy of the Member States.

(35) In accordance with point 34 of the Interinstitutional Agreement on better law-making [9], Member States should draw up, for themselves and in the interests of the Community, their own tables illustrating the correlation between this Directive and the transposition measures, and make them public.

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.

(37) Directives 89/665/EEC and 92/13/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 89/665/EEC

Directive 89/665/EEC is hereby amended as follows:

1. Articles 1 and 2 shall be replaced by the following:

"Article 1

Scope and availability of review procedures

1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

Article 2

Requirements for review procedures

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

2. the following articles shall be inserted:

"Article 2a

Standstill period

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed 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.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b

Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

- (a) if Directive 2004/18/EC does not require prior publication of a contract notice in the Official Journal of the European Union;
- (b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;
- (c) in the case of a contract based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 33 of that Directive.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

- there is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC, and,
- the contract value is estimated to be equal to or to exceed the thresholds set out in Article 7 of Directive 2004/18/EC.

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC;

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

- the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal of the European Union is permissible in accordance with Directive 2004/18/EC,
- the contracting authority has published in the Official Journal of the European Union a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

- the contracting authority considers that the award of a contract is in accordance with the second indent of the second subparagraph of Article 32(4) or with Article 33(5) and (6) of Directive 2004/18/EC,
- the contracting authority has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e

Infringements of this Directive and alternative penalties

1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.
2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

- the imposition of fines on the contracting authority; or,
- the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

Article 2f

Time limits

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

- the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, or

- the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive. This option also applies to the cases referred to in Article 2b(c) of this Directive;

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.";

3. Article 3 shall be replaced by the following:

Article 3

Corrective mechanism

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/18/EC.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.";

4. the following articles shall be inserted:

"Article 3a

Content of a notice for voluntary ex ante transparency

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

(a) the name and contact details of the contracting authority;

(b) a description of the object of the contract;

(c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the contracting authority.

Article 3b

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 [] (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [] shall apply, having regard to the provisions of Article 8 thereof.

5. Article 4 shall be replaced by the following:

"Article 4

Implementation

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.
2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefore, taken by their review bodies in accordance with Article 2d(3).";

6. the following article shall be inserted:

"Article 4a

Review

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits."

[1] OJ C 93, 27.4.2007, p. 16.

[2] OJ C 146, 30.6.2007, p. 69.

[3] Opinion of the European Parliament of 21 June 2007 (not yet published in the Official Journal) and Council Decision of 15 November 2007.

[4] OJ L 395, 30.12.1989, p. 33. Directive as amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).

[5] OJ L 76, 23.3.1992, p. 14. Directive as last amended by Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).

[6] OJ L 134, 30.4.2004, p. 114. Directive as last amended by Directive 2006/97/EC.

[7] OJ L 134, 30.4.2004, p. 1. Directive as last amended by Directive 2006/97/EC.

[8] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

[9] OJ C 321, 31.12.2003, p. 1.

- [] OJ L 134, 30.4.2004, p. 114. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).";
- [] OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).
- [] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).";
- [] OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).";
- [] OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).
- [] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).";
