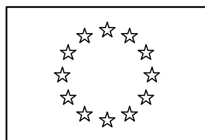

COMMISSION OF THE EUROPEAN COMMUNITIES

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Annex to the

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts

(presented by the Commission)

{COM(2006) 195}

IMPACT ASSESSMENT REPORT – REMEDIES IN THE FIELD OF PUBLIC PROCUREMENT

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT REPORT – REMEDIES IN THE FIELD OF PUBLIC PROCUREMENT

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1. EXECUTIVE SUMMARY

The Public Procurement Directives are intended to ensure that public contracts are awarded in an open, fair and transparent manner, allowing domestic and non-domestic companies throughout the Internal Market to compete for business on an equal basis, with the intention of improving the quality and/or lowering the price of purchases made by Awarding Authorities.

Remedies Directives 89/665/EEC and 92/13/EEC provide for tailor-made Remedies in this area. In particular, those Remedies apply to public contracts and to works concessions covered by the Public Procurement Directives on the procedures for the award of public works, supplies and services contracts above certain thresholds (for example, around €5.3 million for public works contracts or around €420,000 for public supply and service contracts in the Utilities).

The consultations carried out by the Commission, supplemented by case law have identified several areas where the existing Remedies Directives do not always achieve their objectives of: increasing the guarantees of transparency and non-discrimination; allowing effective and rapid action to be taken when there is an alleged breach of the Public Procurement Directives; and providing economic operators with the assurance that all tender applications will be treated equally.

The most important problems identified during the consultation process and in case law were (i) the lack of effective Remedies against the practice of illegal direct awards of public contracts (i.e. public contracts awarded in a non-transparent and non-competitive manner to a single tenderer) and (ii) the race to signature of public contracts by Awarding Authorities which actually deprives economic operators participating in formal tender procedures of the possibility to bring Remedies actions effectively, i.e. at a time when infringements can still be corrected.

This Impact Assessment Report describes the options identified by the Commission to address these problems, and their expected impacts on the operation of Remedies in the public procurement area.

Initially a wide range of solutions were considered, including: maintaining the status quo; conferring new powers to an independent authority; the introduction of a standstill period; changing post-contractual remedies and making greater use of auditors. These solutions could have been implemented in various ways – for example via Commission communications or amending Directives. After closer consideration, the Services of the Commission concluded that the solutions based on a standstill period and an independent authority (either via a communication or an amending directive) were most appropriate and required further impact analysis.

The final outcome is to propose as preferred options an amending Directive mainly based on the introduction of a standstill period, to tackle the most important problems identified above and one or more interpretative documents for other issues which result from a misinterpretation of the existing rules in some Member States.

2. INTRODUCTION

Public procurement accounts for a significant proportion of EU expenditure. In 2003, the EU15 Member States spent around €1500bn, or 16.3% of GDP on public procurement. The Public Procurement Directives[1] and the principles derived from the EC Treaty are intended to ensure that contracts are awarded in an open, fair and transparent manner, allowing domestic and non-domestic firms to compete for business on an equal basis, with the intention of improving the quality and/or lowering the price of purchases made by Awarding Authorities. In addition, in a market of this size it is clear that if the laws governing public procurement are not always being applied correctly, leading to some contracts being awarded to what is not the most economically advantageous or lowest bid, the financial consequences alone can be significant. When there are infringements of the Public Procurement Directives, the Remedies Directives[2] should guarantee that wronged parties have access to quick and effective means of redress. This Impact Assessment considers possible changes to make the Remedies Directives more efficient and effective.

The Remedies Directives provide for tailor-made Remedies in the area of public procurement. However, such specific Remedies only apply to public contracts and works concessions covered by the Public Procurement Directives, that is to say the largest contracts valued above the relevant thresholds (for example, around €5.3 million for public works contracts or around €420,000 for public supply and service contracts in the Utilities). Smaller contracts as well as contracts not covered by the Public Procurement Directives (such as service concessions) are subject to Remedies on the basis of the principle of judicial protection resulting from the EC Treaty.

Under both Remedies Directives[3], actions can be brought either before the contract awarding the procurement is signed (pre-contractual Remedies) or after signature (post-contractual Remedies, mainly applied as damages, although in some Member States it is possible in theory to have an unlawful decision set aside at this point). The Remedies process varies from Member State to Member State according to how the various options offered in the Directives have been transposed into national law. Some countries have also developed informal procedures for solving issues of this nature.

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1 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 (OJ L134/1 of 30.4.2004) and 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 (OJ L134/114 of 30.4.2004)

2 There are two Remedies Directives: Council Directive 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 (OJ L 395/33 of 30.12.1989) as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L209/1 of 24.07.1992 and 2) and Council Directive 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 (OJ L 76/14 of 23.3.1992)

3 *Alcatel* judgment, Case C-81/98, (paragraph 37). In case C-212/02 (paragraph 20), the Court found that the provisions of both Remedies Directives seek to reinforce existing arrangements for ensuring effective application of the Public Procurement Directives, "*in particular at the stage where infringements can still be rectified*" (expression used in the *Alcatel* judgement to justify the standstill period).

Pre-contractual Remedies are intended to be "quick" – they aim at preventing or correcting the infringement of public procurement rules before the contract is signed, thus allowing the contract to be awarded in line with the Public Procurement Directives. They consist primarily of interim measures where for example, an injunction is granted, suspending the award procedure whilst the complaint is investigated.

Actions for damages aim to provide compensation in the event of an infringement. In that case, wronged parties need to be able to prove that they had a real chance of winning the contract in question.

The consultations carried out by the Commission, supplemented by case law[4] have identified several areas where the existing Remedies Directives do not always achieve their stated objectives (see Section 4). This Impact Assessment Report presents the problems identified within the current Remedies process and the possible impacts of the main options available to the EU and its Member States to tackle the problems. It concludes by describing the Commission's preferred options and approach for improving the operation of the Remedies in the public procurement area, including suggestions for monitoring and evaluating their implementation.

3. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

3.1. Consultation and Expertise

The process of consultation on the operation of and possible improvements to the Remedies Directives[5] has been conducted since the beginning of 2003 by the services of DG Internal Market and Services. The standards of the Commission (COM (2002) 704) relating to public consultation have been followed. No external consultants have been involved.

It should be noted from the outset that a majority of European businesses[6] has hitherto never participated in public procurement procedures or never used national review procedures in this area. The questionnaire consultations have therefore only received replies from a limited number of stakeholders involved in this specific subject, including Member States' representatives, Awarding Authorities, economic operators, lawyers, non-governmental organisations and experts (such as academics and practitioners in the public procurement area, acting in the interests of tenderers or business associations).

A wide range of consultation instruments have been used (consultations of two Advisory committees (the Advisory Committee for Public Procurement composed of representatives of Member States and the Consultative Committee for the Opening-up of public contracts composed of experts in public procurement); direct consultation using the Commission's *Interactive Policy Making* tool (IPM); consultation of enterprises belonging to the *European Business Test Panel* (EBTP);

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4 Cases C-81/98 ("*Alcatel*"), C-212/02 ("*Commission v. Austria*") and C-26/03 ("*Stadt Halle*").

5 See Annex 1 for a more comprehensive description of the consultation procedure.

6 61 % of respondents on the European Business Test Panel have indicated they have never participated in a Public Procurement procedure in their Member States.

on-line questionnaires for Awarding Authorities). Spontaneously drafted contributions in the form of "*position papers*" have also been received from interested parties.

Tendencies observed in online consultations have been confirmed by the analysis of other sources of qualitative information (national reports by Member States[7] or experience gained by the Commission services in dealing with infringement cases in public procurement/Remedies) as well as the contributions submitted by experts and representative organisations either within the framework of Advisory Committees or in a spontaneous manner.

Whereas the positions of Member States and other stakeholders on the existence and the importance of most of the problems presented hereinafter are fairly equivalent, some differences of opinion still remain in relation to the solutions to certain problems, particularly concerning the practice of illegal direct awards of public contracts.

3.2. Main Results of the Consultations and How this Input has been Taken into Account

In general, consultations[8] of economic operators and their representatives (business associations and lawyers) have revealed that the operation of national review procedures under the existing Remedies Directives does not always make it possible to effectively correct failures to respect the EU public procurement rules. It has also become apparent that the effectiveness of Remedies in the public procurement area varies considerably from one Member State to another. Therefore, the enforcement of transparency and competitive tendering rules for the award of public contracts through national review procedures is not guaranteed in equivalent conditions in all Member States (i.e. there is no level playing field at present).

Two main problems and various possible solutions have been identified during the consultation process: (i) combating illegal direct awards of public contracts through different ways such as: administrative controls; penalties; conferring new powers on independent authorities; or a standstill period which could, in exceptional cases and subject to certain limitations, give rise to the unenforceability of the contract conclusion; and (ii) improving the effectiveness of pre-contractual Remedies through a regulated standstill period providing legal certainty. Although there is a consensus among stakeholders – including Member States except Spain - on the need to provide for detailed rules on the standstill period to improve the effectiveness of pre-contractual Remedies, there is no clear consensus between Member States on a single solution to tackle the problem of illegal direct awards which is the most serious breach of Public Procurement rules. Indeed, unlike formal award procedures which are already subject to detailed procedural rules and have been subject to a certain extent to a standstill obligation, at least for some types of public contracts in some Member States, there is a lack of specific and effective Remedies for direct awards. Therefore, these direct awards are perceived by Awarding Authorities to be extremely flexible and often left without sanction in the event they are unlawful. It

[7] These national reports are described in Section 4.1 below

[8] See Annex 1– Part 2 for a more comprehensive description of the results of the consultation.

appears that the suggestion to confer new powers on independent authorities or administrative controls is only supported by a minority of Member States because of the uncertain administrative costs which may result from the operation of such independent/administrative bodies in comparison with the benefits they may generate. With respect to fines/penalties to be financed by the public purse, they may not always have a deterrent effect on Awarding Authorities and may prove to be costly for taxpayers.

4. PROBLEM DEFINITION

The consultations carried out by the Commission, supplemented by case law have identified several areas for attention. It would seem that the existing Remedies Directives do not always achieve their objectives of: increasing the guarantees of transparency and non-discrimination; allowing effective and rapid action to be taken when there is an alleged breach of the Public Procurement Directives; and providing undertakings with the assurance that all tender applications will be treated equally. The main problems experienced by stakeholders are described in this section, including figures showing considerable differences in the levels of Remedies activity. Other specific problems which are either of less importance or affect few Member States, are then described.

4.1. Illegal Direct Awards

The most serious cause of a breach of public procurement law arises from the direct award of public contracts which should have been subject to a transparent and competitive award procedure. This has been confirmed by the *Stadt Halle* case[9] where the Court of Justice held that the contracting authority's decision not to initiate a formal award procedure (i.e. the decision to directly award a public contract) is "*the most serious breach of Community law in the field of public procurement on the part of a contracting authority*".

This complete disregard of the public procurement rules generally prevents the best value for money being obtained, working against the interests of both business and the general public. Reasons for such illegal direct awards are various and not systematic. Possible reasons include the Awarding Authority's willingness to favour a local or national player or a company in which it has an interest (for example, mixed entities in which the Awarding Authority has a stake) or, in the worst case scenario, they may be the result of corrupt practices[10]. In such cases, where an operator does have proof of an illegal direct award, he is often deterred from bringing an action due to the effort and risk involved given the uncertain results as a result of the current lack of specific and effective Remedies to combat this practice. This is confirmed in several national studies – for example, section 4.13 of the Wood Review[11] presents a summary of the reasons why operators are reluctant to bring such action; the responses of the United Kingdom, the Netherlands and Norway as

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9 Case C-26/03 (see in particular paragraphs 36, 37 and 39)

10 See the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a comprehensive EU policy against corruption, COM(2003)317 final

11 Wood Review – Investigating UK business experiences of competing for public contracts in other EU countries' - November 2004 accessible on the Website: http://www.woodreview.org

part of the "Report concerning the study of pre-contract problem solving systems"[12] as well as from the Commission's own IPM and EBTP surveys[13] all confirm the reluctance of economic operators to bring challenges.

In a Swedish study by the National Board for Public Procurement[14] analysing 600 Swedish cases over time (approximately half of which were court decisions) illegal direct procurement was by far the most commonly identified problem, finding that on several occasions suppliers and the general public were greatly disturbed by the lack of effective Remedies to address this issue. It concluded that there is a risk that some Awarding Authorities would consciously choose to carry out an illegal direct procurement rather than conducting a formal procurement procedure for which effective Remedies are available.

The relatively low overall transparency rate for the EU (16.2%)[15] and more importantly the considerable variation in this rate between Member States[16] (for the year 2002, the three lowest transparency rates being 7.5% for Germany, 8.9% for the Netherlands, 13.3% for Luxembourg and the three highest rates being 21.1% for the UK, 23.6% for Spain and 45.7% for Greece) may also be influenced by the fact that some public contracts continue to be directly awarded to a single tenderer in violation of the Public Procurement Directives; that this illegal practice is more or less widespread from one Member State to the other; and is not evenly subject to effective Remedies across all Member States.

In the public procurement related complaints and infringement cases dealt with by the Commission (under Article 226 of the EC Treaty), the most frequent legal issue involved is illegal direct award comprising a total of 95 registered "active" (i.e. not yet closed) complaints[17] (for 9 Member States) dealt with by the Commission services.

Member States and members of the Advisory Committee for the Opening-Up of Public Procurement generally agree on the fact that illegal direct award is an important issue which is difficult to combat under the existing Remedies Directives.

Lastly, illegal direct awards increase the risk of corruptive and/or illegal practices in procurement activities. In this regard, it should be noted that the United Nations Convention against Corruption, signed by the Commission on behalf of the Community on 15 September 2005 requires transparency, competition and objective

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12 Accessible on the Website: http://simap/ppn/pppp

13 See Annex 1, Part I

14 The National Board for Public Procurement (www.nou.se) is Sweden's public procurement watchdog. It has on behalf of a government Committee – the Procurement Committee (SOU 199:139) -, studied some problems in the field of illegal direct awards (report 1999-08-19 dnr 52/99-28)

15 The transparency rate estimates the value of public procurement published by each Member State in the Official Journal of the European Union (OJEU) compared to the estimated value of total public procurement for each Member State. See the rates per Member State in Annex 2

16 N.B. a high rate of transparency does not necessarily indicate that a Member State is consistently publishing at a high level. For example, this measure is highly influenced by large fluctuations in a country's government spending – large public works projects (e. g. bridges, motorways, airports) can significantly increase the transparency rate for the years affected, as can differences in public institutions' and governments' administrative and organisational characteristics. In any event, it appears from the figures available that there is currently a wide variation of transparency rates across Member States, even between Member States with similar GDP per capita.

17 Figures available up to September 2005.

criteria in procurement systems as well as an effective system of domestic reviews (see Article 9).

4.2. Race to Signature

The consultations have also highlighted specific problems within the area of pre-contractual Remedies. Of particular importance is the issue of the "race to signature". This can occur when a case for Remedies is brought, but the contract is signed anyhow (i.e. before the action is brought or resolved), thereby forcing any further complaint to be brought as damages – which are less efficient Remedies (see 4.3). In those Member States which permit an unlawful decision to be set aside once the contract has been signed, the balance of convenience test which the Court applies would, in practice, often lead to the claim being rejected, where an overriding interest is invoked by the Awarding Authority.

Three specific incidences where the "race to signature" causes **tangible** problems have been identified.

4.2.1. There is No Time Limit Between the Notification of an Award Decision and the Signature of a Contract

Whilst the *Alcatel* (case C-81/98) and *Commission vs. Austria* (case C-212/02) case law have gone some way to introduce a "reasonable" time period between notification of contract award and contract signature ("standstill period"), there are inconsistencies in the way the case law is applied. It is not taken into account in all Member States and where it is, most countries do not have provisions creating a fully effective standstill period for the award of all contracts falling within the scope of the Public Procurement Directives. Some examples of standstill provisions in national legislation which purport to apply the *Alcatel* case law without being fully effective include: the award decision is not notified by the fastest means of communication thereby reducing the duration of the standstill period for economic operators established outside of the country of origin; the application of the standstill period is exempted for contracts awarded in the Utilities sector and/or for contracts awarded under an accelerated procedure or following mini-competitions after a Framework agreement has been awarded; the reasoning of the award decision may be communicated to the unsuccessful tenderers too late preventing aggrieved tenderers from effectively challenging such a decision before contract signature; there is no obligation of an automatic suspension for a short period where a case has been brought before the Review body. These factors create loopholes in the law and such inconsistencies create uncertainty and lead to substantial differences in the effectiveness of pre-contractual Remedies from one country to the other, making it more difficult for a firm to bring a Remedies action, particularly if it is operating outside its country of origin.

From the IPM consultations of economic operators and their representatives (lawyers and business associations)[18], it would seem that a significant number[19] of economic

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[18] http://europa.eu.int/comm/internal_market/publicprocurement/Remedies/Remedies_en.htm#200310

[19] Between 50 and 57% of respondents in the three target groups of the IPM consultation said that they were deprived of such an effective Remedy because the contract was already signed. In the EBTP consultation, 12.2% of respondents said that they faced a similar situation but a large majority of them (approximately 75%) including

operators have been deprived of the possibility of an effective Remedy because the contract had already been signed.

4.2.2. *The Aggrieved Tenderer has to Inform the Awarding Authority Before Bringing Any Legal Challenge*

Experience has shown (in France until 2000 when this obligation was repealed) that providing preliminary information to the Awarding Authority sometimes has the unintended effect of encouraging the Awarding Authority to force the signature of the contract in order to make the consequences of the challenged award procedure irreversible (i.e. establishing a fait accompli for the judge, thus avoiding having to restart the whole award procedure, and retaining only the small risk of being made to pay damages). This is in particular the case when the obligation for the Awarding Authority to provide prior information causes the suspension, for an uncertain duration, of the right to bring a challenge to the Review body authorised to grant the provisional measures. From the IPM consultation, lawyers and businesses recognised only a few cases in Member States utilising this obligation where this has had the intended effect of providing for an amicable settlement of the dispute without resorting to legal measures.

4.2.3. *Preventing Contract Signature when the Review Body Responsible for the Remedies Action has not had Time to Issue an Injunction Suspending Contract Signature*

At present, except in a few Member States (e.g. Germany) issuing a Remedies action before an independent Review body does not automatically stop a contract from being signed. Therefore an Awarding Authority which has received notice of a Remedies action brought before an independent Review body can still sign the contract, thereby removing the effectiveness of pre-contractual Remedies.

Whilst the above discusses areas where concrete evidence of the problem is available, a fourth potential problem area has been identified in the context of screening legislation of acceding countries and a draft law to transpose the new Public Procurement Directives in one Member State, which could also be contributing to this problem.

4.2.4. *The Body Responsible for Review Procedures in the First Instance is the Awarding Authority Itself*

Where the Review body is not independent of the Awarding Authority, an automatic suspension of the award procedure is often imposed by national legislation (for example in some new Member States). If there is no automatic suspension, logically there is a risk of a race for signature of the contract when a challenge is brought before a Review body which is also the Awarding Authority.

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those who have not been faced with this situation, think that there should be a specific provision (in a Community Directive) which fixes a minimum period (standstill period) between the notification of an award decision and the signing of the contract.

4.3. Inherent Limits of Damages Action

An aggrieved supplier faced with a signed public contract, is often deterred from bringing a damages action for the following reasons:

- **actions in damages have no real corrective effect**. Even if the public contract already signed is held to have been awarded illegally, in the great majority of cases it remains in force when it has already been signed. Hence, even if the damages action is successful and some (limited) financial compensation is granted, the economic operator will ultimately not win the public contract and may also feel that he has compromised his future business with the Awarding Authority. This also limits the deterrent effect.

- **damages actions are hampered by practical difficulties**. Actions are rarely successful as a result of the practical difficulty of needing to prove that the economic operator was genuinely a tenderer who had a serious chance of winning the contract. If this is not proved, no compensation for lost business opportunities is awarded to the complainant and often, in practise, any financial award is limited to the reimbursement of costs incurred in bidding for the contract and may not even cover the legal costs of bringing the action. Such actions are even more difficult to bring for a potential tenderer who has not been able to participate in a public procurement procedure as a result of the lack of transparency.

- **the process is lengthy and costly.** In all Member States, damages is an action on the merits before ordinary Courts (and not by way of interlocutory procedures as in the case of interim measures) which may therefore last for years. Furthermore, given the requirements of proof, the process can be somewhat protracted, and may incur high litigation costs for both parties (economic operators and Awarding Authority).

There appears to be a particular problem with the use of damages as a Remedies action – the figures collected, supported by the feedback from stakeholders during the consultation process, are so low as to be almost non-existent (see Table 1 under 4.6. below). The consultation responses provide further evidence of problems in this area. Results from the EBTP survey showed that only 10% of businesses replying to the questions on damages had been involved in such action, and less than 10% of them had won their cases – an overall figure of less than 1% of respondents. The IPM survey conducted in 2003 found that 60% of businesses who had been involved in Remedies actions, and 35% of lawyers specialising in this area had never brought a damages case. Moreover, the majority of specialists and some Member States confirm that the probability of success in a case for damages is much lower than that for a pre-contractual Remedies action, with the added disincentive that in damages cases the amount of compensation awarded is often not sufficient to meet or to significantly exceed the costs incurred, which must be particularly discouraging to the smaller operators. Thus it would seem that damages, in the specific context of public procurement procedures, present a less attractive or efficient means of sanction than pre-contractual Remedies – the work and costs involved are often disproportionate to the outcome, deterring bidders from using damages.

4.4. Other Specific Problems Identified

Whilst the above presents the more significant problems directly affecting the effectiveness of Remedies in all or the majority of Member States, the consultations and the Commission's own experience have also highlighted other specific issues, which fall within two categories: (i) less important problems in the current EU legislation affecting all Member States; (ii) problems resulting from a misinterpretation of the current EU legislation and affecting few Member States.

4.4.1. Less Important Problems of the Current EU Legislation Affecting All Member States:

- The **Attestation mechanism** provided for in Articles 3 to 7 of Directive 92/13/EEC enables Awarding Authorities in the Utilities sector to have their contract award procedures and practices examined periodically and on a voluntary basis with a view to obtaining an attestation that, at that time, those procedures and practices conform with EU Public Procurement law. This mechanism has almost never been used, due to the lack of interest shown by Awarding Authorities. Furthermore, all stakeholders including economic operators, underline the fact that attestation granted at a certain point in time does not give any guarantee of compliance in future public procurement procedures and therefore do not prevent formal Remedies actions being brought by unsatisfied economic operators within the framework of subsequent award procedures.

- The **Corrective mechanism** provided for in Article 3 of Directive 89/665/EEC and Article 8 of Directive 92/13/EEC, which permits the Commission to notify both Member States and the Awarding Authority of breaches of EU public procurement law with a short and fixed deadline for reply, has not been used since the early 1990s. The process suffers from several weaknesses (for instance the need for the Commission to make its decision before the contract is signed; and to show that the alleged infringement was "clear and manifest"). In practice it has proved difficult to act swiftly before contract signature and gather convincing evidence of a "clear and manifest breach" quickly before contract signature and on the basis of just the documents and allegations provided by the complainant. Thus the discussions between the Commission and the Member State/Awarding Authority focused mainly on the issue of whether the breach was clear and manifest. This has undermined the effectiveness of this mechanism compared to both i) the "classical" infringement procedure provided for under Article 226 of the Treaty where the Commission is only required to prove a breach and ii) interim measures in interlocutory procedures which can be brought by economic operators before national Review bodies.

- The **Conciliation mechanism** provided for in Articles 9 to 11 of Directive 92/13/EEC permits an aggrieved tenderer to request from the Commission or national authorities a conciliation procedure for breach of EU public procurement law in the Utilities sector. This conciliation procedure can only take place on a voluntary basis and all parties must agree to it. Furthermore, conciliators can only be appointed from the list of conciliators drawn up by the Commission, following consultation with the Advisory Committee for Public Contracts comprising representatives of Member States. Conciliators must endeavour to reach an agreement between all parties as quickly as possible which is in accordance with Community law. If no agreement can be reached, no decision can be imposed by

conciliators upon any party. This mechanism has never been used, as the need to act swiftly within the framework of an award procedure is not always compatible with the Conciliation mechanism as provided for in Directive 92/13/EEC. Indeed the Conciliation procedure does not suspend the relevant award procedure and/or the time-limits to bring a Remedies action before national Review bodies. Furthermore, in general, Member States within the framework of the Advisory Committee have not been able to propose conciliators. Finally, for the above-mentioned reasons, economic operators have not shown an interest in this Conciliation mechanism.

As a result of the above-mentioned weaknesses, the Attestation and Conciliation mechanisms provided in Directive 92/13/EEC have almost never been used. The Corrective mechanism provided in both Remedies Directives has not been used since the early 1990s.

4.4.2. Problems Resulting from a Misinterpretation of the Current EU Legislation and Affecting a Few Member States

- **The application of additional and restrictive conditions to grant interim measures in certain Member States.** Under the current Remedies Directives, such interim measures have to be granted at the earliest opportunity via interlocutory procedures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned (including the suspension of award procedures). In a few Member States, the economic operator considering applying for such interim measures must prove that other restrictive conditions are met (such as providing proof of an irreparable harm if the interim measure is not granted by the national Review body). Such additional conditions may affect the effectiveness of Pre-contractual remedies.

- **The improper application of the effective judicial protection principle to the award of contracts not covered by the Public Procurement Directives** (for example, public contracts below the thresholds of these Directives). In many Member States, these problems do not exist, since national review procedures are governed by identical rules both for public contracts fully or partially subject to the Public Procurement Directives and for public contracts not covered by the Directives, even though this is not required by the Remedies Directives. However in the few Member States where this problem exists, the absence of effective judicial protection against the illegal award of public contracts not covered by the Public Procurement Directives (which does not necessarily have to be identical to the system provided in the Remedies Directives) does not deter Awarding Authorities from breaching general principles of Community law such as the principles of non-discrimination, transparency and equal treatment. This problem affects Awarding Authorities in a minority of Member States.

- **The non-application of the Remedies Directives to the award of contracts partially covered by the Public Procurement Directives** (for example, public service contracts covered by Annex II B of Directive 2004/18/EC or Annex XVII B of Directive 2004/17/EC and therefore subject to fewer detailed procedural rules).

In a minority of Member States, national review procedures applicable to public contracts partially covered by the Public Procurement Directives – for example, hotel and restaurant services, rail or water transport services or certain investigation and security services[20] - are ineffective. This generally results from an improper application or interpretation of the Remedies Directives and general principles of the EC Treaty for service contracts whose amounts are above thresholds. This problem affects Awarding Authorities tendering for such particular service contracts in a minority of Member States.

- The **misuse of the "balance of public interests clause"** - in a few Member States Review bodies interpret the concept of public interest too widely when they compare the negative consequences of a measure for all interests likely to be harmed (including public interest) with the benefits (particularly for the aggrieved tenderer). This results in a low rate of success for pre-contractual Remedies even in cases where the infringement is clearly established and recognised by the Review body. Economic operators in such Member States may have no difficulty in accessing the review procedures but often have their claims rejected even though the Awarding Authority has seriously infringed EU Public Procurement law. The consequences for transparency and best value for money in public procurement procedures can be serious but they only affect a Remedies cases in a limited number of Member States.

- **Problems encountered by aggrieved tenderers in accessing relevant information/documents held by Awarding Authorities.** Challenges to an allegedly unlawful decision require substantiation. The legal and practical difficulties aggrieved tenderers sometimes face in gathering relevant information or accessing the relevant documents, which can be used as supporting evidence, can constitute an obstacle to effective Remedies. The seriousness of the problem varies from one legal system to another and results either from national legislation on access to documents or from national practices in this area. In some legal systems, Courts are empowered to instruct Awarding Authorities to provide such documents for the exclusive use of the Court. In other legal systems, such documents have to be disclosed to all interested parties. In all cases the key issue remains the protection of what could be commercially sensitive information. The problem originates in the fact that in many Member States the Awarding Authority can notify unsuccessful tenderers of the contract award decision but does not, at that point, give them the reasons (at least summarised) for the rejection of their offer.

- **Problems in how quickly bodies responsible for review procedures in certain Member States are able to take decisions on interim measures**. These problems affect very few Member States and result from an insufficient allocation of human resources to allow the proper functioning of their judicial systems.

Unlike the main problems mentioned in Sections 4.1 and 4.2 above (i.e. illegal direct awards and race to signature) which seriously affect all or the majority of Member States and constitute real obstacles to a well-functioning and competitive public

[20] See the list of services in Annex IIB of Directive 2004/18/EC or Annex XVIIB of Directive 2004/17/EC.

procurement market, these specific problems are caused not by a lack of Community rules but rather from a misinterpretation of existing rules and/or lack of relevant national rules. Generally, these less important problems affect economic operators bidding in those few Member States where one or more of these problems have not been resolved. Therefore they are probably best addressed on a case by case basis.

4.5. Effects on Stakeholders

The problems identified affect Awarding Authorities, businesses operating in the public procurement sector and the Review body (judiciary or administrative authority) acting in this area. The effect on each group varies depending on the role that they play. An Awarding Authority which does not follow the rules is not necessarily spending its budget in the manner best suited to the public interest; most affected here are the businesses that through no fault of their own are cheated out of contracts which they would have won in a fair, open and transparent competition. The Review body provides the resource to judge any complaints brought; however, if the existing legislation is somehow deterring cases from being brought, the available resources may not be as high and experienced as they could be. To the extent that there may be an inappropriate contract award, leading to a sub-optimal use of public funds, the general public is also adversely affected, as is the State (who provides the funding).

4.6. Available Remedies Figures

The figures relating to the number of Remedies actions obtained by the Commission[21] for the EU15[22] between 2000 and 2002 show considerable differences in the levels of Remedies activity (see Table 1). One striking difference is between the usage of pre-contractual Remedies and actions for damages: available damages figures are very low while pre-contractual Remedies figures are higher, but quite variable from one Member State to the other. Looking at the number of pre-contractual Remedies cases brought as a percentage of the number of Invitations to Tender (ITTs) gives some measure of Remedies as a percentage of contract activity: the figures range from just 0.02% in the UK to around 10% in Finland. The EU figure is approximately 2.5%. Possible reasons behind this variation include cultural and social factors, for example: different propensities to take litigious action; different positions taken by individual bidders in relation to the financial cost of such an action; and fear of possible retaliation, such as the loss of future contracts. In addition, it seems likely that the perceived accessibility and effectiveness of the different Remedies systems contribute to the utilisation of the schemes.

[21] Member States were asked to supply the number of Remedies cases brought relating to procurements above threshold. Whilst there may be some discrepancy between the timing of when an Invitation to Tender (ITT) is issued and when a Remedies action is brought, this should equally affect all countries. The ITT figures are taken from the OJEU, and relate generally to contracts above the thresholds.

[22] The only available figures for the 15 Member States were those relating to the years before the accession of the 10 new Member States on 1 May 2004. In addition the old EU 15 - unlike the EU 10 - have applied the Remedies Directives for several years. In light of the above, the analysis and comparison of the statistical information regarding the operation of Remedies in this impact assessment have focused on the old EU 15.

Member State	Pre-contractual Remedies Actions in 2002	Damages Remedies Actions in 2002	Invitations to Tender (ITT)	Pre-contractual Remedies/ITT
AU	232	Not available	2.854	8,13%
BE	36	1	2.384	1,51%
DE	1.092	Not available	17.185	6,35%
DK	22	5	1.495	1,47%
EL	214	2	2.614	8,19%
ES	174	Not available	5.548	3,14%
FI	132	Not available	1.368	9,65%
FR	253	Not available	44.627	0,57%
IE	4	3	972	0,41%
IT	301	12	8.343	3,61%
LU	4	Not available	310	1,29%
NL	34	*1	1.993	1,71%
PT	89	Not available	1.303	6,83%
SE	+69	*3	3.364	2,05%
UK	2	1	11.986	0,02%
EU	2.658	28	106.346	2,50%

Table 1: Remedies Cases in the EU15

Source: DG Markt and Member States

* Cases brought between 2000 and 2002 + As only the total figures were available, 20% (69 cases) are assumed to be above threshold

It should be noted that there are difficulties in interpreting the meaning of the level of Remedies action within a country. Low Remedies activity may reflect a fairly compliant procurement market where the system is operating fairly well and hence there are few grounds for complaint; equally, low Remedies activity could reflect a system which is inaccessible – both from a legal and practical standpoint - and ineffective, where the low usage simply reflects suppliers' lack of confidence in the system or high litigation costs. However, if there is a “level playing field” in EU public procurement, and if the Remedies Directives are functioning in a similar manner across all Member States, it would be reasonable to assume that there would not be such a great discrepancy in the amount of Remedies activity in each country i.e. a similar number of Remedies actions would be brought in each country, as a proportion of the number ITTs issued. For 2002 this would mean that in each Member State, around 2.5% of all ITTs resulted in a Remedies action[23]. As can be seen from Figure 1, the percentages of pre-contractual Remedies brought are quite variable. In five Member States the percentage is more than twice the EU figure (meaning that considerably more cases are brought in these countries). In three

[23] Based on pre-contractual Remedies figures only.

countries the percentage is less than half the EU figure (meaning that considerably fewer cases are brought in these countries).

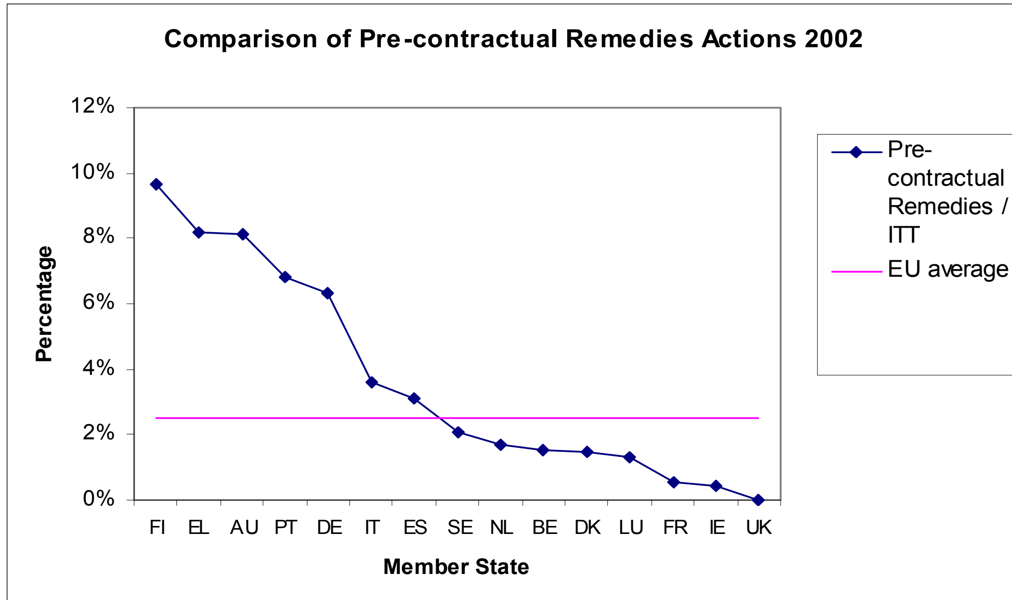

Figure 1 Above-threshold Pre-contractual Remedies Actions 2002

Source: DG Markt

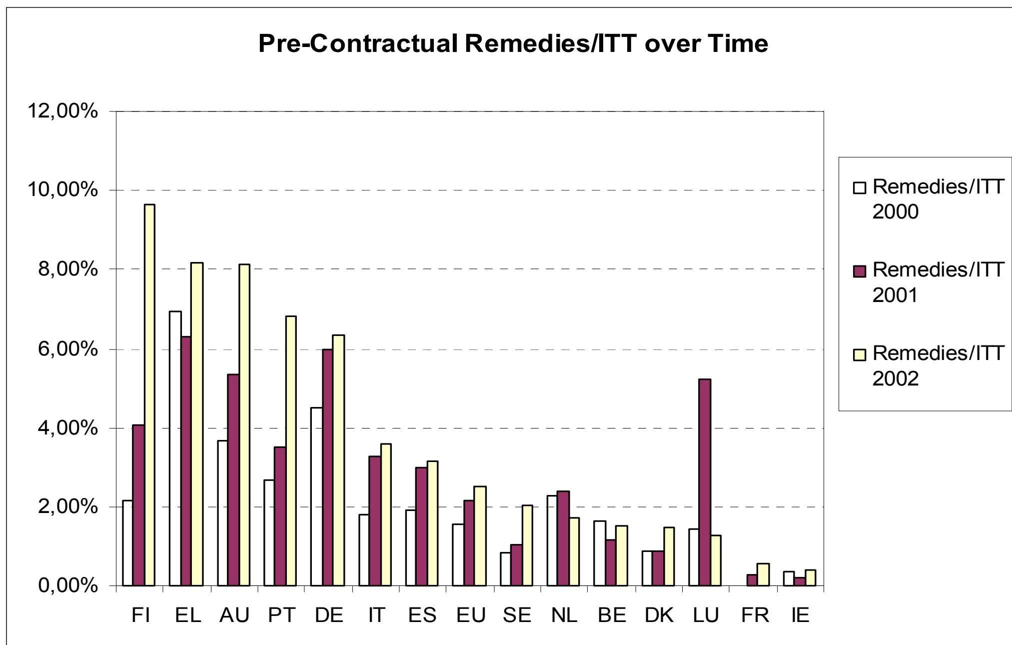

Figure 2 Pre-contractual Remedies Figures over Time

Source: DG Markt

NOTE: 20% of total Swedish figures assumed above threshold; No data is available for France in 2000, and the 2001 figure is an estimate

As mentioned before, the reasons for the differences in Remedies activity are likely to differ from country to country. In some countries e.g. the UK, litigation costs can be very high, and this may partially explain why the number of pre-contractual

Remedies cases actually brought is so low. In countries where more cases are brought than might be expected, the higher number of Remedies actions might be explained by lower litigation costs; simpler procedures or because Remedies are more accessible and there is a better chance of success. Whilst there may be other reasons affecting the accuracy of this estimate – for example problems with the number of ITTs published for certain countries, this analysis shows that there are discrepancies in the figures for Remedies actions being brought which go beyond differences which could reasonably be expected due to random differences in the country markets.

Some data are available relating to the amount of Remedies action occurring in the new Member States (but with no distinction between above and below threshold contracts). In general, the number of Remedies actions being brought is much higher than in the EU15. However, careful interpretation of these figures for the new Member States is required. Firstly, the Remedies Directives were only fully applicable in these countries from 1 May 2004. Secondly, most of the Remedies actions recorded in the figures below relate to contracts below thresholds. Finally, in these countries, the EU public procurement processes are newer and less familiar for the parties involved.

Member State	**Number of Remedies Actions above and below thresholds)**		
	2002	**2003**	**2004**
Hungary	791	693	866
Lithuania	97		
Estonia	230	260	
Slovenia	323	363	378
Poland	1.936	2.292	2.421

Table 2: Remedies Actions in New Member States

Source: DG Markt

4.7. Problem Summary

Consideration of the existing use of Remedies actions, and consultation with stakeholders has shown that there are significant problems in relation to the current Remedies legislation. Some of these problems relate to the Remedies process in general, others are specific to the pre- or post-contractual process. The main drivers behind the problems can be summarised as follows:

- weaknesses and uncertainties in the current Remedies legislation act against the public interest and prevent the development of a level playing field. Where it is known that contracts have been awarded in a manner contrary to EU law the existing legislation does not always act to support the complainant.

- the current Remedies legislation does not deter the illegal direct award of contracts, which is a significant threat to a transparent and competitive internal

market. The Court of Justice recognises that the Awarding Authority's decision not to initiate a formal award procedure when required is "the most serious breach of Community law in the field of public procurement on the part of an Awarding Authority[24]."

- whilst pre-contractual Remedies actions are easier to bring and offer some possibility of a satisfactory result, weaknesses in the existing system handicap the wronged party especially by their inability to prevent a contract being signed before a complaint has been lodged or examined. In practise, this forces the wronged party to either bring a damages action or to simply accept the result. The "race to signature" further exploits the weaknesses inherent in the damages system, as it is harder to bring post-contractual Remedies actions and the chances of having an award decision altered are quite low.

- in the field of public procurement, bringing damages action is less efficient than using pre-contractual Remedies. It subjects the wronged party to a possible lengthy and costly process with little likelihood of a satisfactory outcome and therefore it deters potential complainants from bringing justified Remedies actions.

- finally there are sections in the existing legislation (i.e. attestation, conciliation and corrective mechanisms) which do not function satisfactorily in their current form.

Figure 3 summarises the problems identified in terms of their relative importance.

4.8. How Would the Problem Evolve, All Things Being Equal?

If no action is taken at EU level, the unsatisfactory situation in terms of the lack of transparency in the award of public contracts and the ineffectiveness of certain Remedies would probably remain the same so that the new legislative package on public procurement would remain unevenly enforced in Member States and hence would not achieve its potential. As a result of the *Alcatel* ruling, Member States are introducing standstill periods, but their scope, application and duration can differ quite significantly between countries providing unsatisfactory solutions in most cases. Few Member States are working at national level on proposals to tackle the major issue of illegal direct awards and the solutions under consideration vary significantly. Other Member States have no proposals or effective Remedies in force. The general trend is thus towards a range of different national laws, with little consistency at an EU level. Overall the deterrent effect necessary for the Remedies legislation to function properly will continue to be lacking, to the detriment of an efficient public procurement market.

[24] Case C-26/03 paragraph 37

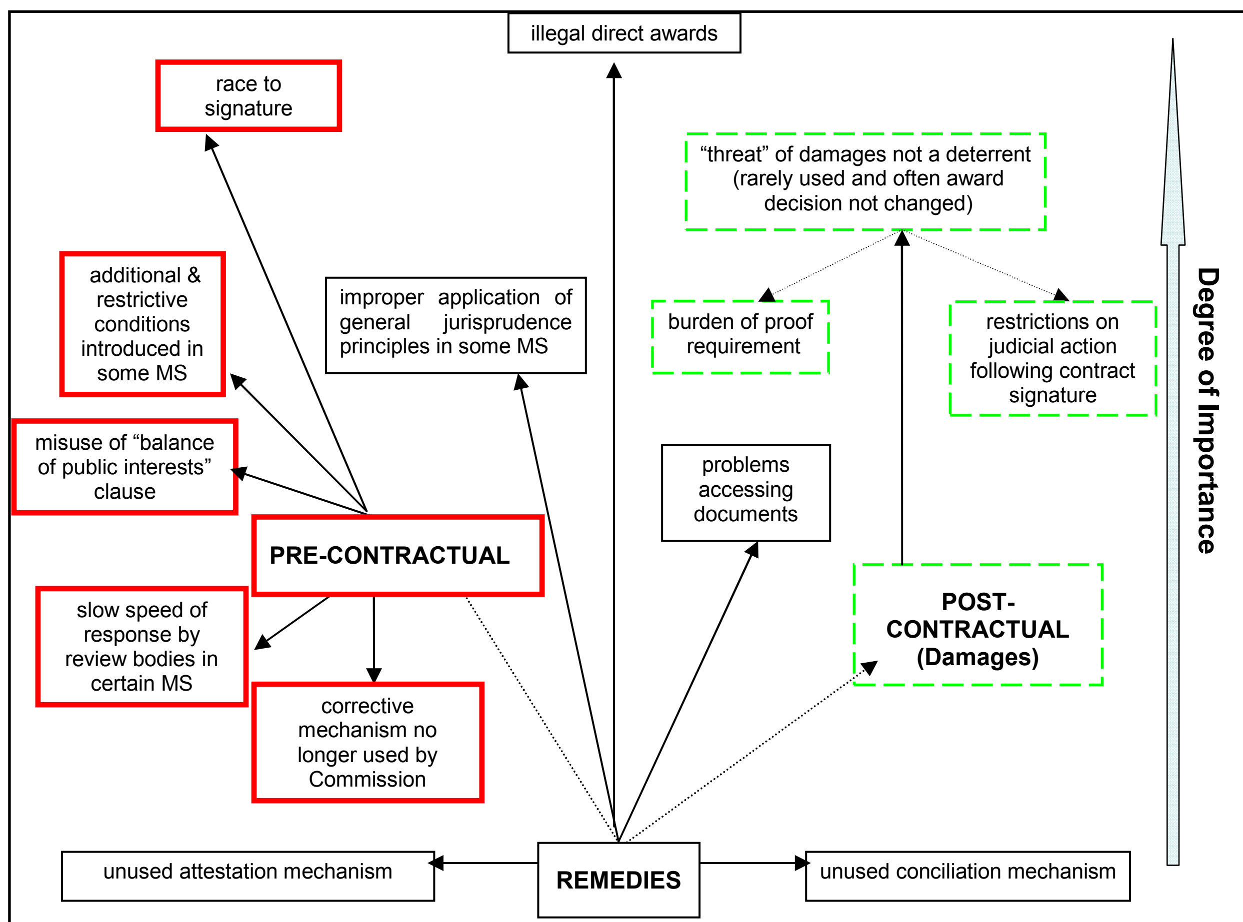

Figure 3: Summary of Remedies Problem Strands

Source: DG Markt

4.9. Is the EU Best Suited to Act?

The problems result from the weaknesses in certain areas of the two existing Remedies Directives. The legal basis for Directives 89/665/EEC and 92/13/EEC, is Article 95 of the Treaty which also provides the basis for any corrective action. Whatever the solution may be, the principle of the procedural autonomy of Member States will be maintained since Member States would not be required to change their administrative/judicial system..

In relation to the insufficient effectiveness of Remedies in the area of public procurement, the EU is in a better position to act than Member States individually. The degree of mobilization of Member States on the issue of enforcing public procurement rules through effective Remedies varies from one country to the other and the current situation where no level playing field exists in this area will remain the same if no initiative at the EU level is taken.

Regarding illegal direct awards, whilst most Member States recognise it is an existing and actual problem which is qualified by the Court of Justice as the most serious breach of public procurement rules, no effective solutions have yet been adopted by the majority of Member States. Only a minority of Member States have explored various ways to deal with this issue, and action at the EU level is therefore necessary.

As regards the insufficient effectiveness of pre-contractual Remedies resulting from the lack of an appropriate standstill period preventing the race to signature (*Alcatel* case law), a consensus between representatives of Member States has emerged[25] on the need to provide for a common and clearly defined standstill period in a new Directive.

Some action at EU level is therefore considered necessary to deal with these breaches of EU procurement law. Furthermore, as the most recent case law of the European Court of Justice has confirmed, the provision at EU level of effective, proportionate and deterrent sanctions is within the competence of the EU where this proves to be necessary[26]. This impact assessment focuses mainly on the solutions considered for the two main problems identified above: illegal direct awards and the race to signature.

For completeness, the other specific problems mentioned in section 4.4 are addressed in section 8.2.

5. OBJECTIVES

The general objective of this Review process is to ensure that the Remedies legislation is effective, providing legal certainty and a deterrent to non-compliant behaviour, and thereby leading Awarding Authorities to comply better with the Public Procurement Directives. This should increase enforcement by private tenderers, allowing businesses and the general public to take full advantage of the positive effects of transparency and competitive tendering in public procurement procedures.

Furthermore, improving the effectiveness of Remedies can contribute to achieving the objective to prevent or avoid corruption in tendering procedures, as required notably under Article 9 paragraph 1 point (d) of the United Nations Convention against Corruption signed by the Commission on behalf of the Community on 15 September 2005.

The more specific objective is to improve the effectiveness of pre-contractual Remedies, without seriously affecting the operation of public procurement procedures. Pre-contractual Remedies are the most effective Remedies available in public procurement procedures – they have the potential to prevent or quickly correct infringements of the Public Procurement Directives, before it is too late (i.e. before the signature of the contract). This could also encourage European businesses to tender in any Member State of the European Union, by providing them with the guarantee that they could use pre-contractual Remedies where their interests have been affected in public procurement procedures.

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[25] Some Member States have gone further by specifically calling the Commission for an EU legislative initiative in this area (e.g. the UK, Ireland and the Netherlands).

[26] See *Case* C-68/88 *Commission v. Greece* and more recently *Case C-176/03 Commission v. Council* as well as the Commission Communication of 3 May 1995 (COM(95) 162), Council resolution of 29 June 1995 (OJ C188 of 22.7.95) and Commission Communication of 23.11.2005 (COM(2005)583 final on this issue

The <u>operational objectives</u> are (i) preventing the conclusion of public contracts which have been subject to illegal direct awards and (ii) preventing the race to signature of public contracts in formal public procurement procedures.

6. POLICY OPTIONS

Over the course of this impact assessment various solutions have been proposed and discussed with Member States and other stakeholders to tackle the key problems of illegal direct awards and the race to signature. As explained in section 4 above, among the two types of Remedies, pre-contractual Remedies are the more effective Remedies in the context of public procurement. The various policy options which have been considered are presented below.

Remedial action which is taken before contract signature can still permit the final award to be compliant with the objectives of the public procurement directives. By its nature, EU action at this level would therefore be more pro-active and efficient. To improve the efficiency of pre-contractual Remedies it is necessary to make them fully available at a pre-contractual stage and to make it clear to all parties that the rules will be enforced. The practical advantages of this are clear - in cases where an unlawful decision has been taken, measures can be ordered to correct the situation and prevent further damage to the interests concerned. In addition, this approach reduces the risks and costs of damages actions. Whilst it is necessary to maintain the existing rules on damages for economic operators, they alone cannot provide a sufficient deterrent to ensure that Awarding Authorities comply with the Public Procurement Directives. Hence, although the Services of the Commission did initially consider policy options which would introduce changes to post-contractual Remedies, these solutions were discarded at an early stage (see section 6.2 below). The Commission Services believe that the most appropriate way forward is to concentrate on solutions in the area of pre-contractual Remedies, and this is the starting point for the solutions presented below. The other, less important problems presented in section 4.4 could be tackled by clarification or simplification provisions in an amending Directive or through interpretative documents (see section 6.3 below).

6.1. Policy Options for Further Consideration

Three main policy options *Do Nothing; Standstill Period; and Independent Authority* have been considered in detail to address the two main problems identified for further analysis. These options are presented below.

6.1.1. Option 1 - Do Nothing

In short, this action would consist of maintaining the status quo – the Commission would continue to launch infringement cases when clear incidences of problems were brought to its attention and Member States would continue to introduce/amend national policy as and when required. The *Alcatel*[27] ruling is already having some effect on some national legislations and procurement systems, but the degree of implementation varies considerably between Member States; the duration and more

[27] Case C-81/98

importantly the scope of application of the standstill period as well as its consequences on the award and challenge procedure vary from country to country. This means that the potential benefits of this ruling are not being realised and the problems of race to signature and illegal direct awards would continue. Whilst some Member States are looking at various solutions to the problem of illegal direct awards (including imposing penalties, non effectiveness of contract, public auditing mechanisms and prior consultation with administrative bodies), the lack of effective Remedies in the majority of countries, coupled with the mix of different approaches creates uncertainty, creates loopholes in the legal system and cannot provide the expected level-playing field.

6.1.2. Option 2 – Introduction of Standstill Period

The concept of a standstill period between contract award and contract signature results from the *Alcatel* ruling issued in the context of the existing Remedies Directives. Although there is practically a consensus between Member States (except Spain) on the need to draw the consequences from this ruling, different approaches remain as to its concrete implications. In order to allow the standstill concept to achieve its full potential, further clarification could be provided addressing issues such as the scope, duration, possible adjustments and sanctions applicable if the standstill period is not respected. The introduction of a standstill period during which the signature of the contract is suspended is proposed as a possible solution to the problems of both the illegal direct awards and race to signature[28].

- **Standstill Period for Direct Awards:** where an Awarding Authority considers that it is entitled to award directly a contract without following a formal award procedure, it would have to suspend the contract signature until a **minimum** standstill period has elapsed, starting from the date of adequate advertising through a simplified award notice. This would thus implement the required transparency (limited to publication of limited information justifying the direct award before contract signature). Furthermore, the duration of the standstill period under different circumstances would be clearly defined; the means and contents of the notification of the award decision to tenderers would be clearly specified; necessary adjustments (such as the shortening the minimum standstill period in well defined cases) and limited exceptions to the standstill would be introduced. Finally, this minimum standstill period would be automatically extended by a short period of time in the event that a Remedies action was brought before the Review body in order to give the latter enough time to provide an initial assessment

[28] Summary of the proposed standstill obligation in formal award procedures and direct award cases (for more details see the legislative proposal):1. Where an Awarding Authority follows a formal award procedure, it will normally have to suspend the contract conclusion until a standstill period of minimum 10 calendar days has elapsed from the date of the notification of the award decision by email or fax to economic operators having participated in the award procedure. 2. Where an Awarding Authority considers that it is entitled to directly award a contract without following a formal award procedure, it will have to suspend the contract conclusion until a standstill period of minimum 10 calendar days has elapsed from the date of adequate advertising of a simplified award notice, except in cases of extreme urgency. 3. This minimum 10 calendar-day standstill period is automatically extended by 5 working days in the event that a Remedies action is brought before the review body by an economic operator 4. If the contract is illegally signed by the Awarding Authority during the standstill period, such a conclusion is considered to be ineffective. This may then give rise to a decision by the review body to declare the illegal contract ineffective, unless there are overriding reasons based on the general interest

- **Standstill Period for Race to Signature**: where an Awarding Authority follows a formal award procedure, it would normally have to suspend the contract signature until a **minimum** standstill period has elapsed from the date of the notification of the award decision by email or fax to economic operators having participated in the award procedure. Again, the minimum standstill period would be automatically extended by a short period in the event that a Remedies action was brought before the Review body. This solution would address all the details and consequences of the case law (*Alcatel, Commission v. Austria* and *Stadt Halle*[29] mentioned in sections 4.1 and 4.2 above) thereby improving legal certainty in the Internal Market and making the Remedies legislation more effective, by allowing tenderers to bring a pre-contractual Remedy in cases where they think there has been a breach of the Public Procurement Directives. Again, the duration of the standstill period under different circumstances would be clearly defined, the means and contents of the notification of the award decision to tenderers would be clearly specified, necessary adjustments and limited exceptions to the standstill would be introduced.

Two main variants have been considered in relation to the possible consequences of not respecting the standstill period. They are as follows:

- sanctions would be recommended/introduced, but the actual definition would be left to the discretion of Member States (the "discretionary sanction" option); or

- for all Member States, if the contract is illegally concluded by the Awarding Authority during the standstill period, such a conclusion would be deemed to be ineffective. This could then give rise to a decision by the Review body to declare the contract unenforceable, unless there were overriding reasons based on the general interest that would command maintaining certain effects of the contract over time or in a case of extreme urgency (the "unenforceable contract" option).

The introduction of such standstill rules at national level could be envisaged as a result of a Commission communication (Option 2a) interpreting current case law and urging Member States to follow such an interpretation. This Option 2a would necessarily be associated with the first variant in relation to the possible consequences of not respecting the standstill period (the "discretionary sanction" option). Alternatively, the introduction of such standstill rules at national level could be guaranteed via an amending directive providing for compulsory and clear rules to be followed by all Member States for all types of public contracts associated with clearly defined sanctions (the "unenforceable contract" option) (Option 2b).

6.1.3. Independent Authority

The starting point for this solution is the suggested designation in all Member States of independent authorities (or unit within any existing suitable body) to which any interested party could easily file a complaint, at no cost to themselves. This type of authority already exists in some Member States but with different powers from one Member State to the other (for example, the Competition Authority in Denmark or

[29] *Alcatel* is ECJ, Case C-81/98; *Commission v. Austria* ECJ, Case C-212/02 and *Stadt Halle* ECJ, Case C-26/03 (paragraph 39)

the Swedish central government Agency for Public Procurement ("NOU"[30]) or the Office of Public Procurement in Poland). As a first step, the independent authority would quickly notify the Awarding Authority of the alleged breach, with the intention of creating an immediate correction, thus preventing, or at least limiting, the negative effects and restricting the number of cases requiring more formal legal intervention. If this notification process did not cause the required changes, the independent authority would then be able to bring a case via the national arrangements.

This process would give the party bringing the complaint anonymity, thereby protecting it from any possible repercussions, and also removing the financial constraints that may sometimes prevent Remedies actions being brought. This solution addresses some of the problems inherent in the process of bringing Remedies actions (cost of bringing an action, fear of retaliation[31]) and would thereby assist wronged parties to bring cases more easily when illegal direct awards are made, or there has been a race to signature. The existence of a specific authority or unit, tasked with dealing with such complaints would also deter Awarding Authorities from taking such non-compliant action in the first place.

The introduction of such powers could be suggested through a communication which may be followed by some Member States only (Option 3a) or imposed through an amending directive which if adopted, will have to be implemented by all Member States (Option 3b).

6.2. Discarded Options

The following options were discarded at an early stage:

- Changes to post-contractual Remedies which would imply changes to the underlying philosophy of the Remedies Directives requiring a completely new set of Directives to be introduced: various solutions more specific to post-contractual Remedies were considered. The key issue here is to strengthen the deterrent effect induced by the "threat" of bringing a damages action. One possible way to do this would be to amend the Remedies Directives, removing or relaxing the conditions requiring an unsuccessful bidder to provide proof that he had a serious chance of winning the contract. However, this would directly touch upon the basic national principles governing contractual liability (i.e. the rules on compensation where loss of a chance has to be proved by the plaintiff) with few benefits (i.e. no corrective effects on the award procedure and the contract signed). Initially at least, cases would be brought to "test" the willingness of the Review bodies to award such damages, which would increase costs for the taxpayer, as Awarding Authorities which have signed a public contract without achieving best value for money would have to pay damages more frequently and in a higher amount. Balancing these potential increased costs, coupled with the significant changes required in the national laws of contractual liability, lead the Commission services

[30] Nämnden för offentlig upphandling, see their website: www.nou.se

[31] Although retaliation against complaints is prohibited under European law, the consultations clearly showed that some economic operators have incurred or fear such action.

to discard this solution at an early stage[32]. Such burdensome measures would produce little benefit in light of the above-mentioned inadequacy of damages in the specific area of public procurement.

- Greater use of Auditors: the auditing of Awarding Authorities, which already exists in most Member States, may be an occasion for public auditors to discover breaches of the public procurement rules and bring them to the attention of the competent Courts or administrative bodies. However, such audits are not systematic and their timing is in general not compatible with the objective of corrective and preventive Remedies which should be brought before the contract is signed. When an audit takes place before the contract is signed, the administrative burden is high as it significantly delays the award of public contracts during the time necessary for the auditing and requires a high level of resources. Therefore, this option could only be used as a complementary means of enforcement of the public procurement rules but not as a general solution to the problems under consideration.

6.3. Summary

The five policy options to be considered further consist of combinations of the actions and instruments to implement them, as described above. They are:

- Option 1 - Do Nothing;

- Option 2a - presentation of a Communication interpreting current case law based on standstill periods for formal and direct awards and suggesting solutions;

- Option 2b - introduction of an Amending Directive, introducing standstill periods for formal and direct awards ;

- Option 3a - presentation of a Communication through which the Commission would suggest conferring new powers to independent authorities ; and

- Option 3b - introduction of an Amending Directive, conferring new powers to independent authorities.

Under the options proposed, the problems of illegal direct awards and race to signature could be addressed by conferring new powers to independent bodies, or via the introduction of a standstill period. Both of these solutions – which are not equivalent in terms of efficiency and implementation guarantees – could be promoted via an amending directive, or a communication. The impacts of these policy options will be discussed in the next section.

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[32] These arguments are not necessarily valid in other areas of Community law (e.g. for the application of Articles 81 and 82 of the Treaty) where damages can be adequate Remedies to deter and sanction anticompetitive behaviour by undertakings. For example, damages paid from one firm to another which has suffered as result of anti-competitive behaviour does not affect the public budget, would consist in a transfer of private resources in the interest of competitiveness and would thus have a corrective effect, unlike damages paid by Awarding Authorities after a public contract is signed and/or performed.

7. ANALYSIS OF IMPACTS

This chapter considers the likely impacts of the options referred to under section 6.3 which have been selected for further analysis. The impacts are discussed in relation to the general objectives of improved effectiveness (defined here as a reduced number of wrongly awarded contracts), legal certainty and deterrence to non-compliant behaviour.

As a matter of fact, increased levels of enforcement of the law should increase the incentives of Awarding Authorities to comply with the law (deterrent effect)[33], thus helping to ensure that markets remain open and competitive[34]. Increased enforcement of the EC Public Procurement Directives should encourage economic operators to participate in public procurement procedures across the Community and should therefore increase their business opportunities.

Private enforcement is important also in the wider context of enhancing Europe's competitiveness. Competition in the public procurement market (which represents 16.3% of GDP) should encourage tenderers to innovate and operate efficiently, in order to submit bids offering best value for money. It should thus contribute to a more efficient use of resources, and hence improved growth in productivity. Open and competitive markets are the main driver behind competitiveness and ultimately the standard of living of citizens. This is stated in the Commission's Action Plans for the renewed Lisbon Strategy forming a Partnership with the Member States[35]. The objective is to enhance Europe's delivery of economic growth and jobs. Ensuring an open and competitive public procurement market is one key area where stronger action is needed both at EU and national level.

Moreover, the need for clarity and legal certainty of the rules applicable to Remedies in the field of public procurement is crucial in order to achieve private enforcement of substantive public procurement rules. If the rules on Remedies are uncertain and unlikely to lead to successful action before the national Review bodies (court or administrative body) potential claimants will be deterred from enforcing their rights.

7.1. Option 1: Do Nothing

As can be seen from section 4, the current use of the Remedies system varies from one Member State to another. The *Alcatel* ruling[36] is already having an effect on some national legislations and procurement systems, but the degree of implementation varies considerably between Member States. By 1 May 2004, all new Member States that acceded to the EU on that date had introduced some *Alcatel* provisions. In the EU15 the situation is more mixed: in Spain and Italy which have cases before the European Court of Justice, there are no such provisions; in countries including Denmark, the UK and Ireland implementation is under consideration; other countries have already made some provisions – these include Germany (the first to

[33] See the same conclusions in the Green Paper on damages actions for breach of the EC antitrust rules, COM(2005)672.

[34] See the judgment of the ECJ in *Courage v. Crehan*, para. 27

[35] Lisbon Action Plan incorporating EU Lisbon Programme and Recommendations for Actions to Member States for Inclusion in their National Lisbon Programmes of 2.2.2005, SEC(2005) 192, Companion document to the Communication to the Spring European Council 2005 (COM(2005)24final).

[36] Case C-81/98 confirmed by Case C-212/02 decided by the European Court of Justice

introduce such measures in February 2001), Luxembourg, Belgium, France, Finland; Sweden and the Netherlands. In general, the countries which do have a standstill period have seen increases in the number of actions being brought, with similar rates of success to previously.

In those countries where implementation has occurred the standstill periods and the conditions under which they apply can be quite different and cannot always permit the standstill period to be fully effective. If it continues to develop along present lines suppliers would continue to operate in a market where the rules governing Remedies action would differ from country to country, significantly affecting the way in which pro-active, pre-contractual Remedies could be brought. Whilst the Commission would continue to bring infringement cases as and when appropriate, which should ultimately lead to the adoption within the EU of the principle of a standstill period, the inconsistencies and differences in the application of the standstill period – including derogations to its application – would be likely to remain.

Illegal direct awards have been cited as currently being the most serious problem occurring in the public procurement market. Very few member States (Ireland and the UK) believe this is a rare problem. Although it is virtually impossible to gauge the number and value of contracts that are being awarded in this way, it is thought to be significant. Under the status quo, such awards are being made and Remedies action is rarely brought, as the situation is not visible to other parties. This is reducing transparency and openness in the public procurement market and is unlikely to be delivering best value for money to society in general, and not even to the Awarding Authorities involved. The lack of effective Remedies against illegal direct awards in most Member States and different approaches in some Member States to combat this practice create uncertainty and loopholes in the legal system

In relation to the objectives pursued it is clear that the Do Nothing option is not satisfactory. Whilst individual Member State legislation may create some legal certainty within a country, the differences in legislation and implementation between countries cannot provide the expected level playing field within the Internal Market. Although more award decisions are being judged incorrect (a result of the increased volume of Remedies cases being brought in countries which have introduced the standstill period), showing that the introduction of a standstill period does have a positive impact on effectiveness, these benefits are limited. The impacts on deterrence are also small, resulting from the outcomes to individual cases, as most countries are not specifying the circumstances that will apply if the existing rules are breached.

7.2. Option 2: Introduction of Standstill Period

The following text discusses the various possible impacts due to the introduction of a standstill period, which would affect some or all of the stakeholders, depending on how this action is taken and on the degree of enforcement. For simplicity, the discussion first focuses on the impacts resulting from the introduction of a standstill period; it then discusses the two variants relating to the sanctions prescribed (the "discretionary sanction" and "unenforceable contract" options). Finally the differences due to the choice of the instrument, i.e. via a communication or an amending directive are presented.

7.2.1. *Impacts due to the Introduction of a Standstill period*

Changes to the number of Remedies cases being brought: Remedies actions have already increased as a result of the introduction in some Member States of standstill periods. Figures for Sweden provided by the Swedish delegation within the framework of the Advisory Committee for Public Procurement[37] indicate that the number of Remedies cases (for contracts above threshold) has risen from a low level, around 1% of Invitations to Tender in 2001 and 2% in 2002, to 5.3% in 2003 and 6.9% in 2004, following the introduction of a standstill period on 1 July 2002. In Germany, where a standstill was introduced on 1 February 2001, the increases are much lower at around one third more cases in 2001, and 15% more in 2002[38]. In both cases, the ratio of Remedies to ITT is between 6 and 7% two years after the changes were made (which may be coincidence). It seems certain that the introduction of a standstill period would cause an initial increase in the number of Remedies actions being brought, which would then be expected to reduce over time, as the deterrent impact was felt, and parties overall become more compliant. In particular, it would be possible to bring more actions in relation to direct awards – the publication obligation would allow more suppliers to obtain information on previously unknown contracts, giving them the possibility to raise objections.

The possibility of more "nuisance actions" being brought must also be considered – some suppliers could use the standstill period to deliberately bring actions which were not justified, simply to waste other parties' time and delay contract signature; however this risk is limited, since economic operators generally fear being "blacklisted" in future procurement procedures and for this reason would generally be reluctant to bring vexatious complaints which might also be expensive (in terms of litigation costs).

This increase in caseload would obviously affect the workload of the Review bodies, and might require Member States to reallocate staff in this area. Awarding authorities and suppliers would also be affected as they would need to defend their actions.

One working assumption would be to assume on the basis of the available figures (i.e. Germany and Sweden) that the Remedies rate in the EU would rise to around 7% of ITTs if a standstill period is introduced in all Member States (increase of around 4,800 Remedies cases p.a. in EU15 with around 106,000 ITTs). However, it is likely that this estimated increase will not affect all Member States in the same way and the number of "real" and "nuisance" challenges cannot be estimated separately. Indeed various factors such as the propensity for litigation, the jurisdictional and administrative organisation and litigation costs in Member States, would exert some influence on the impacts of the introduction of a standstill. However, if the number of cases were to increase in this way, even if the success rate remained unchanged (currently between 20 and 33%), then changes to the award decisions of around 1000 to 1600 contracts could be expected. If all these cases were previously "wrongly awarded", this would have a significant impact on the effectiveness and deterrent effect of the Remedies legislation – currently there are around 2600 Remedies actions brought in the EU15, with approximately 650 cases

[37] Source: NOU (Sweden's independent authority).

[38] The Remedies/ITT percentages for Germany were 4.5% in 2000, 5.97% in 2001 and 6.35% in 2002.

being upheld by the Review body. Note: these calculations are very crude and implicitly assume that challenges are only made to wrongly awarded contracts: in practice some correctly awarded contracts may be challenged. The intention behind the standstill period is to provide tenderers with the opportunity to challenge and ultimately change wrong award decisions – to be effective this should maximise the number of wrong awards that are corrected.

Delivery delay: by preventing the signature of the contract, the standstill period causes a delay to the start of the contract and hence to the delivery of the work, supply or service being procured.

Various suggestions have been made as to the duration of the standstill period. In countries which currently have such a delay it ranges between seven and twenty one days; in countries where no such period exists the award and signature may be simultaneous i.e. no standstill period at all. The majority of economic operators and their lawyers[39] favoured a period between 10 and 14 days. Through its consultations the Services of the Commission have discussed the duration of the standstill period with Member States and a practical and workable solution which balances the need for a reasonable period of time to bring a Remedies action and the rapidity of the award procedure, has been reached. The proposal is to allow **a minimum of 10 calendar days** between the notification of the award decision by the fastest means of communication (or advertisement of a simplified award notice for direct awards) and the signature of the contract; this period can be extended by a further **five working days** in the event that a Remedies action is brought before the Review body, to provide time for an initial review of the case. Again, other sensitivities relating to the amount of time to be given to the Review body were discussed and five days was seen as sufficient to permit an initial verdict as to whether the case had sufficient merit to continue or be stopped.

In total this means that the introduction of a standstill period would generally introduce a minimum delivery delay of between 10 and 17 calendar days (10 calendar days plus 5 working days).

In the vast majority of cases (90% plus), no Remedies action is likely to be brought, so this delay would simply be the minimum 10 calendar days. Where a breach of the public procurement rules is alleged, the length of the delay would depend on the decision of the Review body and when it is taken. If the case is rejected within the timetable proposed, the minimum delay would range between 10 and 17 calendar days; if the Review body decides that there are questions to be answered it may order further delays whilst the matter is investigated; and if the contract is signed (which may occur because the Review body has not reached a decision in the five-working day period, or has not suspended the signature pending further investigation), this would again limit the minimum delay to 17 calendar days, but would also forces any Remedies action to take place within post-contractual Remedies.

The delay to the provision of the supply/work/service would cause a generally small cost to the state, the general public and the Awarding Authority. The winning bidder

[39] See the EBTP and IPM results on http://europa.eu.int/comm/internal_market/publicprocurement/remedies/remedies_en.htm

would also incur costs as a result of this delay – his profit from the contract would not be realised at the original time planned, and he might incur additional costs as a result of needing to keep the required resources available. Equally, losing bidders and other interested parties would benefit from the standstill – it would improve their access to the Remedies system, giving them the time to consider and if necessary bring a complaint.

The proposed changes would only affect contracts which are above the thresholds fixed by the Public Procurement Directives. A minimum standstill period of 10 days (the delay likely to apply to over 90% of cases) would thus apply to the larger and more complex contracts, which in any case take quite a long time to complete. The Commission services' analysis of above threshold contracts following a formal award process between 2000 and 2004 shows that in the EU, the median[40] value for the time taken between the publication of an invitation to tender and publication of its associated contract award date was 23 weeks (i.e. 161 days). Whilst this calculation does not take into account certain related factors e.g. the time taken to prepare an invitation, it does show that the actual time taken to award such a contract is quite long. Thus the delivery delay impact of introducing a standstill period on the time taken to close above threshold contracts would actually be quite limited (in the context of the average 161 days, the standstill period would be just 1/16 of the length of the award procedure). The delay would also affect all direct awards which comply with the publication provision – its impact in relation to the time taken to make the award is more difficult to judge, as no data is available, but it would be likely to represent a larger proportion of the overall time taken, although this must be set in the context of whether the direct award is justified or not.

In addition, there are limits when comparing the average length of award procedures with the minimum standstill period necessary to guarantee the effectiveness of Remedies.

<u>*Process changes (administrative/legal)*</u>: Any changes or clarification of the current situation would cause some (initial at least) administrative cost, although this would generally be of a "one-off" nature and should be relatively low. These changes would impact on parties who would have to introduce new, or change existing, procedures e.g. the state, the Review body and the Awarding Authority. However, the existence of *Alcatel* is already provoking some of these changes – Member States are introducing new legislation to comply with the need to separate the contract award from the contract signature, and Review bodies are having to deal with more Remedies cases. For direct award procedures, normally the Awarding Authority could fulfil the publication requirement by publishing before contract conclusion a full award notice in the manner currently provided in the Public Procurement Directives i.e. only publishing one notice. The relevant provisions of the Public Procurement Directives[41] currently require Awarding Authorities to send an award notice for publication in the Official Journal, no later than 48 days (or 2 months in the Utilities sector) after the award of the contract/framework agreement. Alternatively, if the publication requirement is fulfilled in a certain way (voluntarily

[40] The median is a measure of central tendency. When ordered according to duration, 50% of the values for the time taken between publication of the invitation to tender and the contract award notice were below the median value, and half were above.

[41] Article 43 of Directive 2004/17/EC and Article 35, paragraph 4 of Directive 2004/18/EC.

chosen by Awarding Authorities) consisting of publishing a simplified award notice before contract conclusion and a full award notice in the Official Journal after contract conclusion, some small costs could be introduced – but no new staff should be required. Therefore such small administrative costs could be introduced only in the latter case of double publication on a voluntary basis – i.e. as it would not be required to do so under new legislation - at different points in time and on different publication supports. For example, an Awarding Authority may choose to advertise its intention to directly award a contract in a simplified award notice published in the relevant press before contract signature and then later on to publish the full award notice in the Official Journal after contract signature but no later than 48 days or 2 months after the award.

Therefore, apart from the case of voluntary "double publication", this new requirement would affect Awarding Authorities on the timing of publication (before contract conclusion in the proposal instead of a maximum period of 48 days or 2 months under the current rules). This should have little if any impact on administrative costs since publication in the Official Journal is free of charge for Awarding Authorities.

Other financial impacts: there are a range of financial impacts resulting from the introduction of a standstill period. The delay to the start of the contract could have a financial cost to an Awarding Authority (discussed above), although this could be partially offset if the authority benefits from interest earned as a result of the money not being spent until a later point. Several parties could face litigation costs as a result of a Remedies action being brought – this would not necessarily be limited to the bidder bringing an action, and the Awarding Authority – the party that won the contract might also find it necessary to take legal advice and representation. Also, a party bringing a Remedies action could at some point risk "retaliation" costs (which may themselves act as a deterrent to bringing action, particularly with respect to "nuisance" cases). A winning bidder whose contract is delayed could also incur costs due to delayed profits and also in relation to resources which are being kept on hold. As a result of the increased number of Remedies actions being brought, Review bodies might need to reallocate staff in this area (or cases may take longer to settle). In total, the above-mentioned financial impacts/costs would vary from country to country depending on the legal systems in place, but in certain cases could be quite high (e.g. €000s where litigation costs are high). However the overall expected cost should be lower, as the likelihood of bringing a Remedies action remains low (around 7%).

Effectiveness, Clarity and Legal Certainty: Any action taken to better define when certain conditions apply or what legal arrangements should be followed should lead to improved clarity and greater effectiveness of the standstill period whose scope will no longer be limited by national restrictions. An EU wide set of guidelines or rules could also increase the confidence of firms to bid in other countries of the Union, thereby improving cross-border procurement. Awarding Authorities and Review bodies would also benefit over time.

Open and transparent Public Procurement leading to increased competition: Better definition and enforcement of the Remedies legislation should lead to Awarding Authorities and bidders operating on a “level playing field”, resulting in interested parties knowing the system in place to bring a pre-contractual Remedies action and

having a guarantee that it is effective. The deterrent effect should encourage greater compliance with the public procurement legislation, thus leading to increased publication rates and hence a more open and transparent procurement market. With proper application of the public procurement rules and open and transparent procedures, competition should ultimately increase and firms become more effective. At the same time, Awarding Authorities should receive more offers and therefore have more, and better, choice in their procurement decisions, making actual purchases closer to their needs and thus society as a whole should benefit. Firms from any country should be able to tender in any Member State, safe in the knowledge that if they need to bring a complaint they know the basic principles of the Remedies system. All parties would benefit if this can be achieved, but isolating and quantifying the impacts due to this action would be very difficult.

By ensuring that there is one clear process to be followed, starting with the decision to make a direct award and ending with signature after a defined period, the process would be clear and easy to follow. The publication of more contract information (particularly in relation to direct awards) would have a direct and immediate positive impact on transparency. At present the Commission estimates that in 2003 16% of EU public procurement was published, valued at around €240 billion. If this publication rate could be improved by just 1% this would increase the amount published by approximately €15 billion of contracts. EU studies have shown that following the public procurement rules can, in some cases, reduce the price paid by the Awarding Authority by up to 30%[42] . If the need to publish a notice showing the intention to make a direct award were to change Awarding Authority behaviour, either making them follow a more open procedure at an earlier stage, or by Remedies actions leading to a more efficient award, this could have a significant impact on the potential value for money obtained. On contracts totalling €15 billion, a very conservative 5% reduction in the prices paid would represent a saving of nearly €790 million. These figures indicate the magnitude of the potential benefits that such a process could introduce. It is highly unlikely that the associated costs would be of this order in total, although the positive and negative impacts on individual authorities could be more diverse.

7.2.2. Sanctions and Deterrence

By its very existence, the Remedies legislation should act as a deterrent to potential non-compliance. The introduction of a standstill period should prevent contract signature too close to contract award, but it is the conditions that would apply if the standstill period were not respected, coupled with their proper enforcement, that would act as a deterrent. In this instance, it is perhaps more useful to talk about the **expected** costs and benefits – bringing together the probability that an action is required (e.g. the sanction is enforced) with its likely impacts. Two different proposals have been considered, relating to different possible sanctions applicable to cases where the standstill period has not been respected. These options are "discretionary sanctions" and "unenforceable contract" (see section 6.1.2).

[42] A Report on the Functioning of Public Procurement Markets in the EU: benefits from the application of EU Directives and Challenges for the Future .

The starting point for this debate is the general principle of Community law - that effective, proportionate and deterrent sanctions should exist. By not specifying any such sanctions and leaving them to the choice of Member States, the discretionary sanctions variant simply reflects the current situation and thus does not properly address the current problems. At present the likelihood of any sanctions being imposed is very low especially where bringing actions in damages is the only available Remedy when the contract has already been signed. Even if the Commission brings more infringement cases, it cannot call for any specific sanctions. Therefore, the desired deterrent effect would vary from country to country depending on the sanctions adopted and enforced, but the overall benefits in terms of legal certainty and improving the effectiveness of the legislation would probably be low. It is also difficult to estimate the associated costs. Introducing the specific "unenforceable contract" option[43] for any contracts unlawfully concluded within the standstill period would increase the likelihood of the sanction being applied. For Awarding Authorities and tenderers, this would mean that the potential negative impacts of ignoring the standstill would be significantly increased which should lead to improved compliance and the state, general public and Awarding Authority should all benefit from improved value for money: the procurement would be closer to their needs. Ultimately, improved deterrence should reduce the number of Remedies actions, as more effective legislation results in more contracts being awarded correctly in the first place. Over the long term, this should reduce some of the costs related to the increased volume of actions identified earlier.

There are clearly some quite significant potential costs associated with the use of the "unenforceable contract" option. However, once suppliers and Awarding Authorities understand that this is a sanction which applies to a wilful breach of the clear and straightforward obligations arising from a standstill period and that such sanctions will be applied, its actual use should be very low, thus lowering the associated expected costs. In addition, prescription of action would limit the risk to be brought to court to the first six months after contract signature. If this "unenforceable contract" remedy is applied, the winning bidder would lose the profit unduly expected from the project and the costs that have been incurred to secure the contract – but according to national legislation it could be compensated by the Awarding Authority for costs relating to the performance of the contract (see for example, rules on unjust enrichment). In return the Awarding Authority would receive whatever supply/service/work has been delivered, but they would also incur costs relating to the delay of the service, and the costs of re-launching the tender process. Society in general would suffer perhaps the largest loss, due to the delay in the procurement, although there might be some benefits from the improved procurement process to offset against this. In the case of direct awards, the winning bidder would have no bid costs and although the Awarding Authority would now incur some costs relating to the call for tender process, these would be costs that it should have occurred initially.

[43] Ineffectiveness of contract conclusion (unenforceable contract) is conceived as an exceptional consequence to a serious breach of the Public Procurement Directives. Furthermore, the Court or any other competent review body would still have some margin of appreciation before applying the sanction. The standstill and transparency obligations are therefore conceived as means to ensure legal certainty for both Awarding Authorities and successful bidders. In extreme cases where such obligations are not respected by the Awarding Authority acting in bad faith and the Court then decides to render the contract unenforceable, the consequences of such unenforceability may be mitigated: for example, restitution in value (avoiding the destruction of what has been performed) is possible. Furthermore, the unenforceability of contract could be avoided if the review body considers that there are overriding reasons based on the general interest.

Overall it could be expected that over time the benefits of this variant will outweigh the costs.

After some reflection and discussion with stakeholders, the Services of the Commission propose to include the "unenforceable contract" variant within option 2 (Introduction of Standstill Period), as it is effective and proportionate. The "discretionary sanction" option reflects the current situation, which is neither efficient nor effective.

7.2.3. Summary of the Impacts Resulting from the Introduction of a Standstill Period

As can be seen from the above, there are a range of impacts resulting from the introduction of a standstill period between the decision to award a contract, and the conclusion of that contract. The general impacts and their magnitude differ according to the stakeholders involved (summarised in Table 3 below), but overall it is concluded that the introduction of such a standstill period would have a positive impact. Although a standstill period would slightly increase the time taken to get a contract signed, the increase would not be disproportionate, given the current time the whole process usually takes. A standstill period would be expected to improve the effectiveness of the legislation, providing quick corrections of breaches before it is too late or by preventing breaches occurring in the first place. This is illustrated by data from Sweden which has had a standstill period since mid-2002; figures provided to the Commission Services imply that a significant proportion of cases are withdrawn because the Awarding Authority accepts the fact that certain aspects of the award process require change[44] This indicates that in Sweden, the standstill period is having a positive effect on behaviour, leading to greater compliance with the procurement rules.

The standstill period would not be expected to significantly change the actual success rate of cases going through the Remedies system (i.e. cases where the complaint is upheld by the Review body) because usually economic operators bring Remedies actions when they have a reasonable chance of success.

What a standstill period would do is improve the accessibility of the Remedies system, making it possible for cases to be brought in the period where corrective and/or preventive action is still possible, and at less cost than if they are brought after signature, with some associated improvement in future compliance behaviour. This is not to say that the costs of bringing a Remedies case are necessarily reduced; each case brought would have associated litigation costs and the complainants would also run the risk of retaliation costs.

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44 For the year 2004 in Sweden, it should be noted that among the 35% of cases held inadmissible, a large number of these cases gave rise to a withdrawal of the claim by the tenderer because the contracting authority accepted to correct the breach

Action and % of Cases Affected	Costs	Benefits
Introduction of Standstill period: approx. 93% of cases would only experience the 10 calendar day delay	**AA** – delay of service (-) **Winning Bidder** – Delay of profit (-) Risk of loosing contract (--) **Bidders** – decreased prices over time (-) **AA/State** – costs of introducing legislation and new processes (-)	**AA** – interest accrued on non-payment of contract value (+) **Losing Bidder(s)** – Increased choice and ability to make challenge (++) Chance to still win contract (+) **Bidders** – increased opportunities over time (+) **General over time** – More open and transparent system, with improved behaviour of parties (+++) Increased competition leading to decreased prices (+++)
NET POSITION = POSITIVE IMPACT		
Challenge brought – initially approx 7% of cases (increased from 2.5% at present)	**AA, Winning Bidder and Bidders bringing Remedies action** - legal costs (- to ---) **Bidder(s) bringing action** – Risk of retaliation costs (- to ---) **Review body/State** – increased resource costs (--)	**General** – increase in transparency (mainly realised above)
CUMULATIVE NET POSITION = Depends on legal costs and use of retaliation– still likely to be lower than overall gains to public procurement market, so **POSITIVE**		
Challenge dismissed	**Bidder(s) bringing action** – retaliation costs incurred(- to ---)	**AA** – improved reputation as shown to have made fair decision **Winning bidder** – possible improved reputation as made compliant bid
CUMULATIVE NET POSITION = Depends on retaliation costs - still likely to be lower than overall market gains, so **POSITIVE**		
Challenge upheld – **impacts depend on change in volume of cases**	**AA, Winning Bidder and Bidders bringing Remedies action** - legal costs (- to ---) **AA** – negative impact on reputation **Winning Bidder** – if loses contract loses profit; impact on reputation if it's bid is at fault	**General** when contract re-awarded, may see reduced cost and or improved quality (++) improved behaviour of parties (leading to greater compliance with procurement rules) (++)
CUMULATIVE NET POSITION = Depends on legal costs and changed volume of Remedies cases – still likely to be lower than overall market gains so **POSITIVE**		

Table 3: Impacts by Stakeholder of Introducing a Standstill Period

Note: AA = Awarding Authority

Source: DG Markt

The total level of these costs would depend on the number of Remedies actions brought, and it is expected that initially at least, the number of actions would rise

(assumption: EU15 average might initially rise to around 7% of ITTs, from its current level of 2.5%). This may require reallocated resources in the various national Review bodies, but these costs should be more than offset by the improvements to public procurement as a whole, and the creation of a more level playing field. Hence in terms of the decision whether to introduce a standstill period or not, the decision should definitely be in favour of its introduction.

7.2.4. Communication or Directive

Two options have been proposed as a means to introduce the standstill period. In Option 2a, the introduction of standstill rules at national level could be envisaged as a result of a Commission communication interpreting current case law and urging Member States to follow such an interpretation. This Option 2a would leave to Member States the choice as to the scope of the standstill obligation and to the possible consequences to be drawn in case where the standstill period has not been respected. However, experience on the monitoring of the application of the *Alcatel* case law since 1999, has shown that Member States tend to have different views on the exact scope of the standstill obligation and in most cases draw no consequences in the case where such an obligation is not respected.

Option 2b would guarantee the introduction of standstill rules at national level via an amending directive providing for compulsory and clear rules to be followed by all Member States for all types of public contracts associated with clearly defined sanctions providing for legal certainty and effectiveness (the "unenforceable contract" option).

In general, the impacts resulting from the use of a directive would be stronger since they should ensure a level-playing field across the EU and improve the effectiveness of Remedies for economic operators and ultimately result in better transparency and value for money in public contracts; those impacts resulting from a communication would be more difficult to measure as they would depend on the degree of support and follow-up given by Member States to the communication produced. However a Directive would have several distinct advantages over a Communication:

- It would make it compulsory for all EU Member States to include a standardised standstill provision, and would clearly define the fields of application. This would greatly improve the effectiveness of the Internal Market legislation, creating greater legal certainty and at relatively low additional cost (some administrative and process costs would be generated). There would be more equal access to Remedies in all Member States for all economic operators. This cannot be achieved using a Communication, although it could act as an EU reference point, with some associated improvements to effectiveness, clarity and certainty.

- The inclusion of provisions for "unenforceability of contract" would strengthen the deterrent effect, as there would be a clear and defined sanction to be applied in the event of a breach of the standstill period. The positive benefits associated with a defined sanction would be strengthened by being adopted into law – a communication can only suggest what may occur if the standstill period is not respected, hence limiting the possible benefits. This should mean that the standstill period is respected, hence allowing Remedies actions to be brought in the most efficient and effective period (prior to contract conclusion). In turn, this

knowledge that such remedial action can, and will, be taken should ensure a greater degree of overall compliance with the public procurement rules.

7.2.5. Summary

The following table summarises the key positive and negative impacts of the two options based on the introduction of a standstill period.

Option	Key Strengths	Key Weaknesses
2a - Standstill Communication	• Quickly available • EU reference point	• Limited impact depending on acceptance by Member States of the Commission's interpretation of the way case law has to be applied in order to make Remedies fully effective
2b - Standstill Directive	• Greater effectiveness of Remedies, consistency, clarity and certainty • Defined deterrent, easier to apply • Level playing field	• Delay to implementation • Largest increases to the number of Remedies brought, with associated costs

Table 4: Strengths and Weaknesses of the Standstill Period Options

Source: DG Markt

7.3. Option 3: Independent Authority

This section presents the main impacts of the two options based around conferring new powers to one or more independent authorities in each Member State.

7.3.1. Scope of the Independent Authority:

Initially the scope of this authority covered any (pre-defined) serious breach of the Public Procurement Directives, but after discussions with Member States it was proposed to limit the scope, to prevent the independent authority from being overwhelmed by cases which were perhaps unjustified. The latest proposal discussed with Member States would give an independent authority (or unit within an existing suitable organisation) the relevant powers to deal only with issues related to illegal direct awards. This obviously reduces the potential benefits from this option and means that one of the main problems identified (race to signature) is not addressed.

7.3.2. Impacts Resulting from Conferring New Powers to an Independent Authority

<u>*Changes to the number of Remedies cases being brought*</u>: Illegal direct awards have no public or open process, and are by definition more secretive, and therefore more difficult to discover. Although there appears to be consensus that this is a serious and significant problem, no data are available on the number of illegal direct awards being made and there is a certain "random nature" to the number of related Remedies actions as they can only be brought when an interested party finds that such a contract has been awarded. This limits the positive impact on the effectiveness of the

legislation. However, the fact that there are no costs to bring Remedies actions before the Independent Authority could result in more actions brought by tenderers– but this could also encourage more nuisance cases. Overall it is expected that conferring new powers to independent authorities would substantially increase the number of Remedies cases brought, but the increase is difficult to estimate. Increases in the number of cases brought would impact mainly on the state which would have to bear the set up and operational costs; the Review body might see a decrease in the number of cases appearing before it. Also, individual Awarding Authorities and suppliers would be involved in more Remedies cases.

Depending on the standstill position, the actions brought may be both pre- and post-contractual. The amount of costs borne by the independent authority, and the resultant benefits from bringing the Remedies cases would depend on the distribution of these two types of action.

Delivery delay: For the options around the designation of an Independent Authority the delivery delay would be limited to those cases where a Remedies action was brought (hence the impact would be driven by the increase in the number of actions).

Process changes (administrative/legal): The granting of certain powers to an independent authority (or unit within an existing body) may create some new layers within the Remedies system; the legal position of the entity would need to be defined and also its' operational processes. The additional process costs could be relatively high.

Other financial impacts: There are a whole range of costs related to setting up an independent authority (or unit within an existing body), which would probably be borne by the state. The main costs would relate to the costs of staff, and their associated costs (which include among others accommodation, IT, pensions, personnel and training). Anonymity and simplicity of the complaint process would probably lead to a substantial increase in the number of complaints brought and would therefore significantly increase the above-mentioned costs. The costs would be higher in Federal States where several independent authorities or units within existing independent authorities might have to be set up. However, given the uncertainty around the number of actions which could be brought, it is difficult to estimate the number of staff which may be required. It is possible that some of these costs could be off-set by any reduction in the number of cases going before the more formal Review bodies.

As some anonymity would be given to tenderers bringing a Remedies action, the risk of retaliation costs would be significantly reduced under these options and the costs of bringing the action would be transferred from the tenderer to the independent authority (and ultimately to the state). Also, these options should provide solutions earlier in the Remedies process, and due to the less formal nature of the processes proposed, this should be achieved at a lower cost.

Effectiveness, Clarity and Legal Certainty: since the Authority would contain staff specialising in the field of public procurement, the use of the Remedies process itself should become more efficient and effective. This solution introduces another layer to the Remedies process and could cause a further increase in the number of complaints lodged, but as mentioned above could result in fewer cases going before the official

Review bodies – this would provide benefits both in terms of improved effectiveness and reduced litigation and court costs. The solutions would have to be careful to clearly define the roles and restrictions of the independent authorities if they are to ensure consistency across the EU.

Deterrence: the existence of an independent authority specifically tasked with dealing with problems relating to illegal direct awards should have some deterrent effect. This would be increased if it were coupled with the possibility to apply effective, proportionate and deterrent sanctions (including fines) in cases where an Awarding Authority ignores a justified notification by the said authority represents another possible way of correcting non-compliant behaviour. However if these sanctions are not defined, they would suffer from the same weaknesses as the discretionary sanction variant of the standstill options (see 7.2.2).

Open and transparent Public Procurement leading to increased competition: an independent authority could make it easier for certain suppliers to bring Remedies actions which should ultimately lead to more successful Remedies actions, causing the parties involved to become more compliant.

7.3.3. Communication or Directive

Two options have been proposed as a means to introduce the Independent Authority. Option 3a would involve the presentation of a Communication including the suggestion that new powers be granted to an independent authority (or unit within an existing organisation); by introducing similar measures via an amending directive, Option 3b would require such independent authorities or units to be set up in all Member States. Again, the differences in the impacts of these two options result from the degree to which Member States would respect the guidelines presented in a Communication.

Depending on the number of designated authorities introduced, a Communication on this issue is likely to increase the actions brought, as other potential bidders would not have to bear the cost of any action, and should remain anonymous. This would also increase the likelihood of more "nuisance actions". This increase would be even greater under the Directive option.

The additional financial costs would depend on how many Member States follow the Communication and how many staff they recruit. The costs for a Directive are likely to be higher (measured in the €000s). Also, because the Independent Authority would have to deal with cases on behalf of the complainant, it (and ultimately the State or funding authority) would incur these costs too.

Although a communication has been presented here as an option, it would probably be implemented in few Member States in light of the strong opposition presented by some countries during the consultations. Conversely, nothing prevents those Member States which do not have one from setting up such authorities if they wish so.

7.3.4. Summary

The following table summarises the key positive and negative impacts of the options relating to the Independent Authority. The strengths and weaknesses attributed to the general option apply to both options 3a and 3b.

Option	Key Strengths	Key Weaknesses
3 – General Independent Authority Option	• Some of the costs of bringing a Remedies action are alleviated for the complainant • Some Remedies cases will be resolved without needing to refer to Review bodies	• Does not address the problem of the race to signature • Uncertainties about the demand make it difficult to estimate the staff required, and hence the set-up costs • Longer time until operational
3a - Independent Authority Communication	• Voluntary	• Not supported by all Member States, so lower overall impact likely
3b - Independent Authority Directive	• Consistent and clear solution in all Member States • Deterrent sanctions easier to enforce	

Table 5: Strengths and Weaknesses of Independent Authority Options

Source: DG Markt

8. COMPARING THE OPTIONS AVAILABLE

This section summarises and compares the impacts of the various options identified as solutions to the problems inherent in the current Remedies system.

8.1. Comparison of Options

As can be seen from Table 6 the Do Nothing option is incurring a cost over time. The absence of open and transparent procedures is causing contracts to be awarded in a non-optimal manner and no level playing field is being generated within the Internal Market. Whilst the Independent Authority solutions (which could have included a standstill and transparency obligation for Awarding Authorities and the provision of sanctions to be imposed by competent bodies or courts at the initiative of the Independent Authority) could lead to some benefits overall, they would be hampered by problems in predicting what the workload and therefore the administrative costs for the designated authorities would be. Although the existence of the designated authorities and their ability to promote solutions before a formal Remedies action is brought should produce some benefits (making the Remedies legislation more effective and accessible; improving compliance with the Public Procurement Directives), these might not be enough to outweigh the uncertain administrative costs. Also, an independent authority (or units within existing organisations) would take time to set up and become operational. By definition the cases being brought before the independent authority could be both pre- and post-contractual, with all the problems already identified for damages actions. Finally, these options would not, at present, have majority support within Member States.

In contrast, the proposed Standstill solutions would build on existing case law rather than introducing completely new mechanisms. The options are significantly strengthened by the possibility to impose a well defined, effective, and proportionate sanction. The standstill period solutions would be anchored in pre-contractual Remedies which are more pro-active and introduce corrections before the contract is concluded and operated. They should make it easier for Remedies actions to be brought and should improve the efficiency and clarity of the legislation.

8.2. Proposed Action for the Less Important Problems

In section 4.4, some specific problems which have come to light during the course of the consultations were briefly outlined. As these problems were either of a minor legislative nature, or did not affect all the EU countries, it was not considered necessary to include them in the full impact assessment. However it would not be appropriate for the Services of the Commission to take no action on these issues. The following measures are suggested as appropriate and proportional solutions.

8.2.1. Less Important Problems of the Current EU Legislation Affecting All Member States:

In the context of Better Regulation, if an amending Directive is adopted by the co-legislators, the provisions relating to the voluntary Conciliation and Attestation mechanisms in the Utilities sector could be repealed, making the existing legislation more focused on effective provisions. Since these mechanisms only indirectly affect the operation of Remedies and have almost never been used, maintaining the *status quo* or conversely repealing these mechanisms has almost no impact on the effectiveness of Remedies.

With respect to the Corrective mechanism provided in the current Remedies Directives, it should be noted that the current process suffers from several weaknesses, resulting from the requirements of the current text (for instance the need for the Commission to decide before the contract is signed and to show that the alleged infringement was 'clear and manifest'). If an amending Directive is adopted by the co-legislators, it would be possible at the same time to refocus this mechanism on the presumed "serious violations" detected by the Commission. This would remove problems relating to the requirement to prove a "clear and manifest" infringement. The requirement for the Commission to act swiftly before contract signature could also be removed and the fixed, inflexible deadlines (21 days in the classical sectors and 30 days in the utilities) could be replaced by reasonable deadlines to be adapted on a case by case basis. The removal of these three requirements and the refocus on the presumed "serious violations", would produce a positive impact. It would make this mechanism more operational and could highlight the importance of some infringements committed by one or several Awarding Authorities, thereby triggering a particularly swift and strong reaction (both from Member States and Awarding Authorities).

Finally, since the notification sent by the Commission in the framework of this Corrective mechanism is equivalent to a letter of formal notice sent on the basis of Article 226 of the Treaty (infringement procedure launched by the Commission against Member States), the impact of the proposed change is rather of a qualitative nature than of a quantitative nature.

8.2.2. Problems Resulting from a Misinterpretation of the Current EU Legislation and Affecting a Few Member States

To address some of the other problems discussed in section 4.4.2 which result from a misinterpretation of current provisions of the Remedies Directives by some Member States, the Services of the Commission could also produce at a later stage, after the legislative proposal is adopted, one or more interpretative documents, providing a thorough explanation of the current rules and their implications. This proportionate response would be available to all parties, and could act as a reference point if further disputes arise. It would improve the clarity and legal certainty of the situation, and should improve the way in which the current legislation is applied. By clarifying what is required for a supplier to bring a case, more complainants may feel able to bring a Remedies action, which may introduce some costs but if their complaints are upheld, the legislation will be seen to be more effective: there will be benefits due to improved compliance, and hence more open and transparent public procurement.

To help address the problems encountered by unsuccessful tenderers in relation to the access of relevant information/documents relating to a given tender procedure (providing them with the reasons why their offers were rejected), it could be possible to insert a provision in the proposed amending Directive– assuming the standstill proposal is adopted by the co-legislators – whereby the Awarding Authority would have to provide at least a summary of the reasons for rejecting their bid at the same time as it notifies them of the award decision and therefore at the start of the standstill period. It would indeed seem to be proportionate for the co-legislators to provide in a Directive that the relevant information on the reasons for rejection which must be currently provided by Awarding Authorities to unsuccessful tenderers no later than 15 days from receipt of a written request[45] should henceforth be provided earlier, i.e. at the beginning of the standstill period, to allow for an effective Remedies action.

In order to limit the burden on Awarding Authorities and avoid any delay in the tender procedure, the reasons for rejection could be notified to unsuccessful tenderers in a summarised manner. This should be straightforward if the bidders' selection process has been properly carried out. In this case, the relevant information should be readily available to Awarding Authorities (e.g. minutes of the Selection Committee of the Awarding Authority and/or the executive summary of the Bids Assessment Report) and could easily be reproduced by Awarding Authorities in the document notifying tenderers of the award decision. If just a summary of the reasons is given at the time of notification of the award decision, the full reasoning would then still have to be given by Awarding Authorities at a later stage if requested by unsuccessful tenderers, as currently provided in the Public Procurement Directives.This limited obligation on Awarding Authorities consisting in earlier and more systematic communication of reasons for rejection of bids would have the following impacts.

<u>*Changes to the number of Remedies cases being brought*</u>: It could slightly increase this number, by allowing unsuccessful tenderers to react immediately to any possible mistakes made by an Awarding Authority in assessing the different bids, at a time when effective Remedies are available.

[45] Article 41, paragraph 2 of Directive 2004/18/EC and Article 49, paragraph 2 of Directive 2004/17/EC.

Delivery delay: any impact on the delivery delay should normally be extremely limited because the reasons for rejection should be readily available and therefore a minimum effort is required by the Awarding Authority to set them out clearly in the award decision.

Process changes (administrative/legal): these changes would be limited to summarising or extracting reasons from existing documents available internally within the Awarding Authorities' organisation.

Other financial impacts: the main costs would relate to the costs of staff and their work in drafting or reproducing the summary of the reasons for rejection in the award decision notifications.

Effectiveness, Clarity and Legal Certainty: such action would avoid misunderstandings between unsuccessful economic operators and Awarding Authorities on the results of the award procedure. It could therefore provide for more clarity, transparency and legal certainty on the selection process. Remedies actions could then be brought in a more useful and effective manner, i.e. when known reasons for rejection do not appear to be lawful for economic operators. It would therefore limit the number of unfounded complaints lodged on the basis of a misunderstanding of the reasons for rejection.

Deterrence and Open and transparent Public Procurement leading to increased competition: being required to provide their reasoning to unsuccessful tenderers at the time of notification of the award decision would be a strong incentive for Awarding Authorities to follow a transparent selection process based on best value for money.

8.3. Conclusions

After considering the possible impacts of the different options, the Services of the Commission consider that the most appropriate course of action would be a proposal for an amending Directive based on standstill obligations - including their consequences on the effectiveness of the contract where they have not been respected by Awarding Authorities - to tackle the most important problems of ineffective Remedies – i.e. illegal direct awards and race to signature in formal award procedures. The reasons for rejection of bids would be provided systematically by Awarding Authorities at the start of the standstill period, thereby allowing for effective Pre-Contractual Remedies to be brought by economic operators on the basis of clear facts and legal grounds. This approach which is supported by the majority of stakeholders, should achieve the objective to ensure that the Remedies legislation is effective, providing legal certainty and a deterrent to non-compliant behaviour, and leading Awarding Authorities to comply better with the Public Procurement Directives. This objective should be attained for the least cost and on the basis of existing European Court of Justice case law which has been thus far unevenly applied in Member States.

In the spirit of Better Regulation, the Services of the Commission would also propose that as complementary measures, the corrective mechanism should be refocused on the most serious infringements of the Public Procurement rules and that the existing mechanisms of conciliation and attestation which are currently unused,

should be repealed. For other problems resulting from a misinterpretation of the current rules by some Member States, interpretative documents would be proposed by the Services of the Commission at a later stage.

Policy Option / Impact	Option 1 - Do Nothing	Option 2a - Standstill Period Communication	Option 2b - Standstill Period Directive	Option 3a - Independent Authority Communication	Option 3b - Independent Authority Directive
Change to Number of Remedies Cases	No real change expected	Increase related to number of authorities publishing √ to √√	Increase related to number of authorities publishing √ to √√√	Increase depending on number of authorities designated √ to √√	Large increase, as costs borne by AA; some anonymity √√√
Delivery Delay	None	Related to number of publications of direct awards, and increases to Remedies actions √	Related to number of publications of direct awards, and increases to Remedies actions √√ to √√√	Related to increased number of Remedies actions √ to √√	Related to increased number of Remedies actions √ to √√
Process Changes	None	Costs of publication and standstill -	Costs of publication and standstill - to --	Set up costs of designated authorities and associated processes - to --	Set up costs of designated authorities and associated processes --
Other Financial Impacts	Continued opportunity cost of contracts not obtaining VFM -- to ---	Costs related to additional staff in Review bodies -	Costs related to additional staff in Review bodies --	Staff costs in designated authorities and additional staff needed in Review bodies - to ---	Staff costs in designated authorities and additional staff needed in Review bodies -- to ---
Effectiveness of Legislation; Legal Certainty	Continued ineffective use of legislation	Clear and simple processes; more accessible Remedies process	Clear and simple processes more accessible Remedies process++ to +++	Some improvement due to guidelines and greater use of Remedies legislation	Greater and better use of Remedies through experts in designated authority

Policy Option / Impact	Option 1 - Do Nothing	Option 2a - Standstill Period Communication	Option 2b - Standstill Period Directive	Option 3a - Independent Authority Communication	Option 3b - Independent Authority Directive
	-- to ---	+ to ++		+	++
Deterrence	Reduced deterrence --	Related to Member State's voluntary use of "unenforceable contract" option +	Related to use of "unenforceable contract" option, but enforceable by Commission + to ++	Authority seen to act to prevent or correct breaches +	Authority seen to act to prevent or correct breaches ++
Open and Transparent Public Procurement	Contracts continue to be awarded in non-open, non-transparent manner --	Related to rates of publication and use of standstill + to ++	Related to rates of publication and use of standstill ++ to +++	Related to increased number of Remedies actions +	Related to increased number of Remedies actions + to ++
Timeliness	None	Effective from publication	Effective from publication of draft directive	Effective from publication	Effective from publication of draft directive
Problems Addressed	None?	Illegal Direct Awards Race to Signature	Illegal Direct Awards Race to Signature	Illegal Direct Awards (Race to signature)	Illegal Direct Awards (Race to signature)
Other Issues		Uncertainty around increased number of Remedies actions	Uncertainty around increased number of Remedies actions	Uncertainty of workload in designated authority; issue of "nuisance actions"	Uncertainty of workload in designated authority; issue of "nuisance actions"
NET Position	**Negative**	**Small Positive**	**Positive**	**Negligible**	**Small positive**

Table 6: Comparison of Impacts Note: √ indicates there is an impact; - indicates cost; + indicates benefit

9. MONITORING AND EVALUATION

If the preferred option outlined above is adopted by the co-legislators, the following actions should occur:

(1) The Remedies Directives would be amended to include standstill provisions intended to prevent/deter illegal direct awards and the race to signature of public contracts in formal public procurement procedures;

(2) Some specific mechanisms within the current Remedies directives would be repealed or amended; and

(3) The Services of the Commission would issue one or more interpretative documents to address other specific problems affecting individual, or groups of Member States.

To monitor and assess the success of these measures, several indicators and mechanisms could be introduced. However, it should be noted that there is currently no real measurement of Remedies action, and obtaining Member State support for the above proposals would be critical in ensuring their further support in collecting and analysing the appropriate data. It is obvious that some monitoring and evaluation of the impacts of these actions would be required, and any problems in collecting the data would need to be addressed with the help of Member States.

The following measures would be proposed by the Services of the Commission in agreement with the Advisory Committee for Public Contracts:

- Annual collection of data for all Remedies actions on public contracts above thresholds brought in each Member State; this would be critical to the proper measurement or estimation of the implementation of the proposals. The data collected should be able to distinguish particulars such as: pre-contractual Remedies ; actions in damages; direct award cases giving rise to Remedies actions distinguishing between cases where the Awarding Authority complied with the Transparency and Standstill obligation and those where it did not; the country (ies) involved; the results of the case (and reasons given) etc.

- It could be assumed that there would be an initial increase in the number of cases, as rejected bidders would find it easier to bring actions, and would be encouraged by the positive outcomes of other cases. However, in the longer term, it is expected that the knowledge of these successful outcomes would act as a deterrent in the first place, encouraging Awarding Authorities and bidders to comply with the public procurement rules.

- Continuing the current monitoring of the transparency rate (estimate of each Member State's total public procurement published in the OJEU / estimate of each Member State's total public procurement) (relates to actions 1 and 2). The transparency rate should increase if there is greater compliance with the public procurement rules, and particularly if awards that were previously being awarded illegally and directly are now being published (and tendered).

These annual data collection programmes could be supplemented by periodical surveys in order to cross-check the related data. It should result in an annual consultation with the national authorities, and other affected parties to discuss how and to what degree they were able to evaluate any (positive and negative) impacts resulting from the proposed changes.

These instruments would allow the Services of the Commission to evaluate whether the objectives of this action were being met. If over time, the number of Remedies actions could be seen to decline, as a percentage of the number of invitations to tender being issued for public procurement activity, and other indicators, such as the transparency rate were improving, it would probably be fair to conclude that the deterrent effect of the Remedies legislation had improved.

ANNEX 1: STAKEHOLDER CONSULTATIONS

PART 1 – CONSULTATION AND EXPERTISE

1.1 Consultation of Member States

All 25 Member States have been consulted and have been given the opportunity to contribute to debates on the project of revising the Remedies Directives on several occasions in the framework of the Advisory Committee for public procurement (« CCMP »). EFTA States, parties to the EEA attended these CCMP meeting; Norway has contributed to the reflections within this framework. It should be noted that the analysis by the Commission services of the actual operation of the Remedies Directives (both from a statistical and qualitative point of view) has been focused on the EU-15 and EFTA States.

A first detailed questionnaire has been presented to them at the CCMP of 11 March 2003. The questionnaire asked for information regarding the application of the two Remedies Directives in each of the Member States and for opinions on how to improve Remedy and control mechanisms. All Member States, except Malta and Slovenia have responded to this first questionnaire.

A second questionnaire asking for information of statistical nature on the operation of national review procedures for the years 2000, 2001 and 2002 has been submitted to Member States in 2004.[46] Italy, the Netherlands and the UK have not responded to this inquiry. Portugal, Austria and Spain have provided partial information.

The Commission services have been looking to complete statistical information by their own means. Two summarising tables submitted to Member States in the course of the CCMP of March 10, 2005, have met no objections concerning the figures reflected therein.

A detailed discussion has taken place within the framework of several CCMP meetings in 2005, on the proposed main points of the revision of the Remedies Directives. On this occasion, 15 delegations representing EU Member States and EFTA States have provided written contributions.

1.2 Consultation of Awarding Authorities (such as local authorities and bodies governed by public law)

In addition to the consultation of Member States in the course of the CCMP, a consultation of Awarding Authorities has been launched in the internet from mid-April to mid-June 2004. Only 16 responses have been received: 12 from German communes, 1 from the *Deutscher Staedtetag* in the name of the German communes and 1 response from the UK, France and Sweden each.

Participation in this on-line enquiry was low and the predominance of responses from German local authorities does not allow drawing conclusions for all Awarding Authorities across the EU.

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[46] This information inquiry results from Article 4(2) of Directive 89/665 and Article 12(2) of Directive 92/13

This consultation suggests that for most German communities the automatic suspension mechanism, which is currently only applied in this Member State normally for a period of 5 weeks, is generally accepted except for one German community who claims that it can create difficulties for significant projects. Generally speaking, introducing a "standstill" period of between 10 to 14 days harmonized at the European level (Alcatel case law) is welcomed, except by one contracting authority from the United Kingdom. Certain German communities recognise that tenderers have difficulties in succeeding in actions for damages because of the proof requirement. Independent authorities at local level are not supported by German communities who think that the interests of tenderers are sufficiently protected in the existing review procedures. One German city regrets the absence of rules concerning the consequences of direct awards of public contracts. One French local authority criticises the fact that in France Remedies actions can be brought only on formal aspects (for example, a missing mention in a contract notice published in the Official Journal) even though the formal error has no impact on the competitive tendering procedure and therefore on the complainant.

1.3 Consultations through *Interactive Policy Making* (« IPM ») of Lawyers, Business Associations and Non-governmental Organisations and Enterprises

The Commission launched a consultation on the internet through the IPM accessible via "Your Voice in Europe" between October 2003 and April 2004. The consultation, the results of which are available under:

http://europa.eu.int/comm/internal_market/publicprocurement/Remedies/Remedies_en.htm, cover the legal and practical problems, that the enterprises and the lawyers may encounter when they apply the national Remedy procedures in order to contest the decision taken by the public authorities within the framework of awarding public contracts. The consultation has used three distinct on-line questionnaires which were addressed to different target groups (lawyers, business associations and non-governmental organisations, enterprises). These questionnaires were largely inspired by the questionnaire given to Member States at the CCMP in March 2003.

It should be noted from the outset that a majority of European businesses[47] has hitherto never participated in public procurement procedures or never used national review procedures in this area. The questionnaires have therefore been replied only by a limited number of stakeholders to the specific subject such as European or national business associations or specialised lawyers representing the interests of several tenderers as well as a few individual economic operators having experienced Remedies in the field of public procurement and wishing to give their feed-back.

57 national or international lawyers/law-firms, 37 EU-wide or national business associations or non-governmental organisations and 44 individual economic operators have replied to the numerous questions on the operation of Remedies through the IPM. The replies originated from the following countries: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[47] 61 % of respondents on the European Business Test Panel have indicated they have never participated in a public procurement procedure in their Member States.

1.4 Consultation of the *European Business Test Panel* (“EBTP”)

The EBTP – using online consultation instruments – is a means to solicit the views of panel members whenever important legislative proposals and/or political initiatives of the Commission are envisaged.

The EBTP is a complementary instrument of consultation and relies on a relevant panel of enterprises coming from a great variety of sectors and representing all business sizes.

The EBTP consultation « public contracts/Remedies » which opened on March 19, 2004, and closed on May 7, 2004, was addressed to 2300 European enterprises. 543 responses have been received:

Netherlands	18,5%	Portugal	5 %	France	1,6 %
Denmark	15%	Austria	5 %	Spain	1,5 %
Germany	13 %	Sweden	4 %	Iceland	0,5 %
UK	12 %	Ireland	4 %	Greece	0,3%
Norway	6 %	Italy	4 %	Luxembourg	0 %
Finland	6 %	Belgium	2 %		

The results of this consultation are available under:
http://europa.eu.int/comm/internal_market/publicprocurement/Remedies/Remedies_en.htm

1.5 Consultation of the Consultative Committee for the Opening-up of public contracts (“CCO”)

The Committee, set up by the Commission in 1987 is composed of independent experts whose business and industrial experience and whose competence regarding public procurement at Community level are widely recognized.

The CCO was consulted several times on the revision of the Remedies Directives (identical questionnaire to that presented at the CCMP. The majority of its members have made a contribution to the line of consideration by the services of the Commission (Alcatel case law, suspension of conclusion procedures, mechanisms to prevent and to combat the illegal direct award of contracts, sanctions, Remedies introduced by independent authorities or by tenderers.)

1.6 Spontaneous Contributions by Interested Parties.

Eurochambers is an association which aggregates the Chambers of Commerce and the European industry. On October 24, 2003, this professional organisation proposed that Member States should be obliged to establish control and sanction mechanisms that would be applied by independent national authorities modelled on national competition authorities.

The Union of European Industry and Employers Associations (UNICE) has submitted a position paper on April 29, 2005. The points mentioned are *inter alia*: obligation to provide for a standstill period including information to unsuccessful bidders viewed as a very effective

method, the need to provide for specific Remedies against the illegal direct award of contracts which should consist in declaring the illegal direct procurement invalid, reserved position on the issue of national independent authorities in the field of public contracts which should be left to Member States to decide whether or not to establish them, need for the suspension of the award of the contract in the case of Remedies, improvement of the mechanism of damages but consideration should focus on strengthening the legal protection of the bidder against violations prior to the award of contract rather than after, imposing fines on Awarding Authorities being perceived as not a realistic option, and cross-border Remedies.

European Competition Lawyers Forum (« ECLF ») also submitted a « position paper » on January 31, 2004, suggesting in particular rapid Remedy mechanisms (short time limits of foreclosure and time limits for decisions/judgements by the bodies responsible for review procedures), a better access to the files of the Awarding Authorities and compliance with the Alcatel jurisprudence in all Member States.

The *Bundesverband der Deutschen Industrie* (« BDI) submitted a „position paper“ in January 14, 2004, responding to each of the questions presented to the members of the CCMP the CCO. This paper expresses the following views: the prior information requirement is considered valuable to prevent breaches; there is a need for comprehensive information (reasoning) to be given by Awarding Authorities so as to allow tenderers to assess the correctness of the award decision; a new Directive should include a provision on its applicability to illegal direct awards; the creation of new independent authorities would increase bureaucracy, lead to delays and Remedies should only be accessible for parties having a legitimate interest; the intervention of conciliatory authorities seldom leads to a solution; the German system of procurement chambers within the authorities with the right of appeal to the courts has been successful; the minimum standstill period has turned out as a very effective means to ensure the correct application of public procurement law in Germany. A period of 14 calendar days should be incorporated into the Directives. The automatic suspensive effect when applying for Remedies has turned out to be very effective in Germany and its incorporation into the Directives is recommended. Damages Remedies have only lower priority since the requirement of proof that the tenderer would have had good chances to win the contract would cause problems. There is no alternative to the obligation to inform unsuccessful tenderers before the award and therefore improving Remedies after conclusion of the contract is not really an alternative; imposing a penalty on the Awarding Authority who is the customer is really abstruse; the attestation and conciliation mechanisms in the Utilities are superfluous.

The *Bundesverband der Deutschen Entsorgungswirtschaft* (« BDE ») submitted a „position paper“ on July 27, 2004, on the Commission’s Green Paper on PPPs and the Community law of public contracts and of concessions. In this “position paper” reference is made to the problem of illegal direct awarding of contracts.

PART 2 – RESULTS OF THE CONSULTATIONS AND HOW THIS INPUT HAS BEEN TAKEN INTO ACCOUNT

There is a consensus among all stakeholders (economic operators and their representatives as well as Member States) that pre-contractual Remedies consisting primarily in interim measures (for example, a rapid injunction by a national Court or any other Review body, to suspend the award procedure) and cancellation of illegal decisions made during the tender procedure, are the most adequate types of Remedies in the context of public procurement

procedures. Indeed it is generally accepted by stakeholders that alternative Remedies such as actions in damages after the public contract is signed, are time-consuming, costly and rarely successful. The result of the consultations shows that there is a need for improving at EU level the effectiveness of pre-contractual Remedies.

In order to achieve this objective, a consensus with Member States has emerged on the need for a legislative instrument inserting a clear standstill period (in terms of duration and scope) and regulating its consequences on both the tender procedure and the challenge procedure. An overwhelming majority of economic operators and their representatives have also supported such a proposal.

In addition, specific problems in the way pre-contractual Remedies are operated in certain Member States have been pointed out by stakeholders. It has appeared that such specific problems, could be tackled through a clarification of the current rules in EU guidelines and a close monitoring of their application in those Member States.

The second major problem identified during the consultation process by stakeholders and described by the Court of Justice as the most serious infringement of EU public procurement law is the need for effective Remedies aimed at combating the practice of illegal direct award of public contracts. This practice occurs when a contract is signed between a public authority and an economic operator in a non-transparent (no publication of a prior notice in the Official Journal) and non-competitive manner.

During the consultation process, various solutions have been suggested and discussed with stakeholders. The first solution which has been discussed was to provide an obligation for Member States to set up a mechanism whereby any person could complain with an independent authority in case of a serious breach of public procurement rules (for example in case of direct award). This independent authority would then be empowered either to bring a legal action in the "general interest" before the competent national Review body against the Awarding Authority found to be in breach of the rules or to notify the breach to the Awarding Authority. It was further suggested that sanctions could then be imposed upon the Awarding Authority if the breach was later confirmed.

Whilst a large majority of economic operators and their representatives (approximately 70 % of them as a result of on-line questionnaires) and Eurochambers supported this idea, only a minority of Member States in the Advisory Committee has endorsed the proposal. The majority of Member States, Awarding Authorities and German business associations have opposed the idea, even in its minimalist form (i.e. a non-binding notification mechanism by an independent authority), alleging administrative costs which are difficult to estimate particularly in Federal States and uncertainties as to the effectiveness of the mechanism. Penalties to be paid by Awarding Authorities who directly award public contracts have been suggested by some Member States who already apply this system or intend to apply it in the future (Sweden for example), but it has been opposed by the majority of Member States. Economic operators were divided on this issue and some of them have contended that penalties would increase public spending and would not necessarily have a deterrent effect on Awarding Authorities. Therefore no consensus could emerge on this proposal.

The alternative proposed to this mechanism would consist in providing an obligation of transparency and a standstill period before the signature of a contract which is intended to be directly awarded. In case of an illegal signature during the standstill period, the contract could be declared to be ineffective, subject to certain limitations in time and scope. The idea of

ineffectiveness of contracts which have been illegally signed in the most serious cases of infringement (i.e. illegal direct awarding), is supported by economic operators and their representatives. It is also currently in force in some Member States but rarely applied and it is proposed to be adopted in two national legislations. Some Member States have expressed reservations on the principle or on the scope of the nullity/unenforceability. Despite clear case law[48], two delegations in the Advisory Committee initially did not see sufficient grounds of competence for the introduction of such a provision by the Community. Few Member States favour the introduction of the imposition of an administrative fee or fine, instead of nullity/unenforceability, in cases of illegal direct award.

An alternative has also been suggested by a minority of Member States consisting in making compulsory for Awarding Authorities to consult administrative bodies before directly awarding public contracts. Due to high administrative burdens on the effectiveness of this mechanism, the majority of Member States has not endorsed such a proposal.

Finally, it has appeared that specific mechanisms provided for in Directive 92/13/EEC (Remedies in the Utilities sector) has proved not to be used or to be ineffective. Therefore, a consensus has emerged among all stakeholders that the attestation and conciliation mechanisms have not been effective and should be repealed in an amending Directive.

48 See e.g. Case C-176/03 *Commission v. Council*, 13 September 2005

ANNEX 2: TRANSPARENCY RATES (%) BY MEMBER STATE (EU15)

	1995	1996	1997	1998	1999	2000	2001	2002
Belgium	6,9	7,6	10,9	13,8	15,6	15,6	18,6	15,8
Denmark	16,4	13,4	13,4	13,5	14,3	20,9	15,8	14,5
Germany	5,1	5,6	6,3	6,5	5,2	5,6	5,7	7,5
Greece	34,1	37,7	42,9	45,1	39,9	31,9	35,3	45,7
Spain	8,5	11,0	11,5	11,5	16,8	25,4	23,4	23,6
France	5,5	6,8	8,4	11,0	11,7	14,6	16,8	17,7
Ireland	11,4	16,3	19,3	16,1	16,8	21,4	19,3	18,0
Italy	9,8	9,9	11,3	10,7	13,2	17,5	15,3	20,3
Luxembourg	5,2	7,0	9,2	14,3	12,9	12,3	10,7	13,3
Netherlands	4,8	5,1	5,5	5,2	5,9	10,8	12,5	8,9
Austria	4,5	7,5	7,5	8,3	7,0	13,5	14,6	15,5
Portugal	15,5	17,7	15,1	15,5	14,6	15,0	17,7	19,4
Finland	8,0	9,2	8,2	9,2	9,8	13,2	15,1	13,9
Sweden	10,5	10,6	11,5	11,6	12,5	17,9	23,4	19,3
UK	15,0	15,6	17,9	16,9	15,1	21,5	21,5	21,1
EU 15	**8,4**	**9,2**	**10,7**	**11,1**	**11,2**	**14,9**	**15,4**	**16,2**

Source: DG Markt