

**Procurement Law Association comments on European Commission proposals for
modernisation of public procurement rules**

Article 84: Public Oversight

General comments

The PLA's working group on remedies has considered the proposals set out in Article 84 of the draft new "Classic Directive" and has some concerns. These relate primarily to the proposals in relation to a national oversight body ("OB"), and specifically to paragraphs (1) and (3) of that Article.

In general, the group was concerned that, practical difficulties aside, the new governance proposal may not deliver real benefits which are proportionate to its cost. There were also many concerns about the precise scope of authority and the precise activities to be carried out by the OB, and how these would fit in with existing powers and structures within the UK.

However, some aspects of the proposals are welcome. In essence, Article 84 requires member states to create a body whose functions closely mirror those of the European Commission in the field of public procurement. This proposal seems workable in many respects. Many of the functions entrusted to this entity are already performed in England and Wales by Cabinet Office. It may be that the enforcement role proposed will lead to a form of subsidiarity (or devolution) of enforcement from the Commission to member states, with the Commission only pursuing cases where the national oversight body does not. If this is the intention, it should be made clear in the text.

Comments on specific provisions

Article 84(1)

Article 84(1) provides that "Member States shall appoint an independent body responsible for the oversight and coordination of implementation activities". The use of the singular raises particular issues in the UK and unless this is amended to reflect the multi-jurisdictional nature of the UK this could be problematic.

Is what is envisaged a straight 'transplant' of the role of such bodies found in continental jurisdictions, exemplified in some respects by the Commission's own (legal, administrative, and interventionist) role in relation to the European Union as a whole? The Commission's answer to this would at least give some indication as to whether the OB would require any

innovative (and perhaps, radical) amendment to the existing court/tribunal structure; or simply require the (innovative) development of a new body with the requisite dovetailing into the existing court/tribunal structure.

Article 84(3)(b)

This provides that the OB shall provide "legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases". This is in addition to issuing opinions and guidance on questions of general interest (sub-paragraph (c)).

The members of the PLA's working group were generally not in favour of this proposal and considered that it raises a number of potential problems, as follows:

1. Who will be entitled to rely on that legal advice?
2. The proposal does not recognise the scale of advice which is required in major procurements. Even assuming that there was a budget and staff to provide unlimited high quality advice on procurement issues, how would that relate to all the transactional advice which has to be provided?
3. Is it envisaged that the oversight body would be the sole legal advisor to all existing contracting authorities i.e. would law firms only advise the private sector? If so, this would require huge resource on the part of the oversight body. Currently bodies such as the NI Central Procurement Directorate or Cabinet Office will give guidance to authorities but in the majority of cases will suggest that a contracting authority takes its own legal advice. These bodies have never allowed themselves to be held out as definitive legal advisors to those who come to them for guidance on the statutory and legal principles under which they operate, and are responsible for promoting.
4. It is possible that the lawyers at the OB could be faced with a professional conflict of interest if two authorities with diverging interests separately seek legal advice on the same project.
5. In light of the proposed obligation for the OB to take enforcement action in the courts, it is foreseeable that when authorities take legal advice from their usual lawyers (whether in-house or external) and the advice is that a particular course of action is the best way to comply with the rules, but that there are some (possibly theoretical or low) risks that the course of action might be seen as infringing the procurement rules, the authority concerned will systematically then seek a view from the OB. This would

be costly¹, inefficient and cause delay to procurements where the risk of infringement is low. For example, this might be the case if there are likely to be politically motivated complaints, as in planning or waste cases. It is important to recognise that very many decisions made during the procurement process involve an informed judgment call between two equally difficult options and that well-informed lawyers may have different views as to which of these options is more likely to infringe the procurement rules.

6. The sort of case specific advice envisaged in article 84(3)(b) goes far beyond anything that we would expect the Commission to do. It is not guidance or an indication of broad principles, but rather detailed case specific advice.

Article 84(3), final sub-paragraph (unnumbered)

This sub-paragraph provides that "Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity."

This proposal has raised a number of concerns. Our comments can be grouped together as follows:

1. What is the meaning of the provision, and in particular the words "seize the jurisdiction"? We are unsure if this means that the OB will itself assume a quasi-judicial role in order to consider alleged violations, or whether the OB will take such alleged violations to court (within the framework of the existing court structure) as a sort of public prosecutor of procurement law infringements.
2. The majority of the working group members believe that the intention is the former i.e. that the OB will assume a quasi-judicial role. This will create a vast potential conflict of interest, as the OB will act as both advisor/lawyer and judge and jury.
3. If the OB were giving legal advice (as above) and that advice were to be definitive, risk-based assessments would have to go as they would not be based on law. If on the other hand the advice was not definitive, and just advisory, no public body would approach the OB for advice, given that the OB would then be able to sit in judgment on that authority. But the existence of the OB and its role in providing advice would

¹ Though not necessarily costly to the authority seeking the advice - as the cost may be borne by the oversight body

mean that there would be no budget for any other legal advice, so public bodies would be conducting themselves without any legal advice at all.

4. Therefore the concern about conflicts of interest may be partly addressed if the OB were not also responsible for providing legal advice. Some issues may still arise where a contracting authority has followed erroneous OB-published guidance, but in practice that seems less likely. The degree of quality control on such guidance may be expected to be higher and, since it is not fact-specific, it is less likely that a breach of the procurement rules will result directly from following the guidance: it is more likely that any breach would be as a result of the incorrect interpretation by the contracting authority of the guidance.
5. We considered that if the European Commission wants a national procurement tribunal, this should be made explicit and should be separate from any OB.
6. If this were to be the case, then the OB should have the right to bring enforcement proceedings before the specialist tribunal, which would also be open to private parties.
7. If the OB is to have a judicial function, we consider that there should be a right of appeal rather than judicial review being the only option following a decision of the OB. We also consider that clarification would be required as to whether the OB would constitute a court or tribunal for the purposes of the preliminary reference procedure.