

## Client Alert

## UK Public Procurement Law Digest: Limitation Period and the Need for Promptness

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## ECJ gives guidance on the time limit for the bringing of procurement challenges

The new procurement remedies regulations which came into effect in the UK in December 2009 accelerated a trend for the rules on procurement challenge becoming more bidder-friendly. That trend has been confirmed by a new European Court decision.

Currently, if a bidder wishes to bring legal proceedings in the UK to challenge a contracting authority's award decision, the rule has been that it has to do so "*promptly and in any event within 3 months*". The ECJ has stated that the rule requiring legal challenges to be brought "*promptly*" is incompatible with the provisions of EU law. This decision requires contracting authorities to disregard the equivalent provision in the new remedies regime.

## What is the case?

The case is *Case C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority ("Uniplex")*, a decision made by the European Court of Justice ("ECJ") in respect of a claim brought against the National Health Service by a distributor of surgical instruments. The ECJ has provided a number of important guidelines regarding the interpretation of the Public Contracts Regulations 2006 ("PCR"), which implements the EU procurement rules in the UK.

## Why is this case important?

This judgment provides a set of important guidelines on the interpretation of a key provision of the PCR relating to the time period for bringing procurement challenges. Specifically, this case sends out a clear signal that:

- the 3-month limitation period prescribed by the PCR only starts when the unsuccessful bidders are notified of the contracting authorities' reasons for not selecting the unsuccessful bidders;
- the requirement of the PCR that legal challenges must be brought "*promptly*" is incompatible with EU procurement rules; and
- the discretion granted to the Courts by the PCR to extend the 3-month limitation period must be exercised in such a way to ensure that as much effective remedy as possible is made available to bidders who are affected by an unlawful decision.

To contracting authorities, this case serves as an important reminder that, in order to trigger and rely on the 3-month limitation period, contracting authorities must disclose the reasons for their decisions to the bidders, rather than relying on delaying tactics.

To bidders, this case at long last clarifies that "*3 months*" means just that and *not* a shorter period for the purposes of the limitation period. This will spell a welcome relief for all bidders, particularly in light of the approach taken by the Courts in the UK indicating that an aggrieved bidder who brings a claim within the 3-month limitation period could nevertheless be barred for failing to bring the claim "*promptly*".

Bidders should also take additional comfort from this case, which also confirms that as long as there is a good reason for the delay, a claim made out-of-time is not necessarily a lost cause.

## What happened in this case?

In March 2007, the NHS published a contract notice in the Official Journal of the European Union, inviting expressions of interest to tender for a framework agreement for the supply of certain surgical instruments. Uniplex, a UK-based company which acted as a distributor of haemostats manufactured by a Dutch manufacturer, was one of the bidders to express an interest and participate in the procurement.

However, Uniplex was unsuccessful and was not admitted to the framework agreement. The NHS notified Uniplex of this on 22 November 2007 by sending a letter, and Uniplex in return requested a debrief by sending an e-mail to the NHS on 23 November 2007. On 13 December 2007, the NHS reverted to Uniplex and provided the reasons as to why Uniplex was unsuccessful.

Subsequently, Uniplex sent a letter before action to the NHS on 28 January 2007, alleging various breaches of the PCR. The NHS replied to this on 13 February 2008 by stating, amongst other things, that for the purposes of the limitation period prescribed in the PCR, the clock started ticking on 22 November 2007, when Uniplex was notified of the fact that it was excluded from the framework.

At that time, Regulation 47(7)(b) of the PCR provided that proceedings under the PCR must be brought “*promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought*”. [1]

Uniplex eventually brought proceedings before the High Court on 12 March 2008. Uncertain as to whether or not Uniplex brought proceedings within time in accordance with the provisions of what was then Regulation 47(7)(b) of the PCR, the High Court referred the matter to the ECJ, seeking clarification as to how Regulation 47(7)(b) of the PCR ought to be interpreted in light of the provisions of Directive 89/665/EEC, which sets outlines, amongst other things, the remedies that must be made available in respect of breaches of EU public procurement rules. The questions posed by the High Court were as follows:

1. Should Regulation 47(7)(b) of the PCR 2006 be interpreted, such that the 3-month limitation period started on: (a) the date when the aggrieved bidder knew or ought to have known that the contract award was made in breach of EU public procurement rules; or (b) the date on which the breach of a relevant EU public procurement rule took place?
2. How should the requirement of Regulation 47(7)(b) to bring proceedings “*promptly*” be applied in practice?
3. In practice, how should the Court apply its discretion contained in Regulation 47(7)(b) to extend the limitation period if there is a “*good reason*” to do so?

#### *Limitation Period and the requirement for “effective review”*

In respect of the first question, the ECJ noted that Directive 89/665/EEC required Member States to ensure that contracting authorities’ decisions could be subjected an effective review,[2] and concluded that this requirement for an effective review could be secured only if the limitation period in Regulation 47(7)(b) started to run from the date on which the aggrieved bidder knew or ought to have known that the contract award was made in breach.

In so concluding, the ECJ had little difficulty in holding that an aggrieved bidder could be imparted with such knowledge only once the aggrieved bidder is informed of the reasons as to why it has been eliminated from the procurement, because the mere fact that a bidder is unsuccessful does not, without more, “*enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings*.”

The ECJ also noted that the provisions of the PCR relating to limitation period had to be interpreted “*in such a way as to ensure that that period begins to run only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question*”, and concluded that the Courts were obliged, by virtue of the very discretion granted to them, “*to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rule*”.

#### *The requirement to bring proceedings “promptly” and the requirement for “effective review”*

The answer given by the ECJ to the first question is not particularly surprising, given that it was a ground which was already visited by the ECJ in the past.[3] Likewise, the answer given by the ECJ to the third question accords with the current practice of the High Courts.[4]

What makes the ECJ’s decision in *Uniplex* unique is the answer given by the ECJ to the second question that the requirement of Regulation 47(7)(b) of the PCR where by aggrieved bidders have to bring proceedings “*promptly*” was incompatible with EU procurement rules, and must be disregarded by the Courts.

The ECJ’s rationale behind this conclusion is that the wording of Regulation 47(7)(b) of the PCR not only gives rise to uncertainty, but also because “*The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made ‘promptly’ within the terms of that provision*”. Indeed, the ECJ’s criticism of Regulation 47(7)(b) of the PCR is, in essence, an indirect criticism of the approach taken in the past by the Courts in the UK, whereby Regulation 47(7)(b) of the PCR is construed as imposing two independent requirements, namely a requirement to bring proceedings “*promptly*”, and a requirement to bring proceedings “*within 3 months*”. [5]

As stated by the ECJ, “*If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply Community law fully...*” [6] Thus, until Parliament enacts an amendment to the PCR, the Courts will now have to disregard the requirement to bring proceedings “*promptly*” imposed under Regulation 47(7)(b) in respect of legal challenges that fall under the old remedies regime, and under Regulation 47D(2) in respect of legal challenges that fall under the new remedies regime. [7]

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[1] Note that Regulation 47(7)(b) is now replaced by Regulations 47D(2) and 47D(4) due to amendments made to the PCR in order to implement Directive 2007/66/EC. See foot note 7 below.

[2] See Article 1(1) of Directive 89/665/EEC, as amended; also see para 26 of the ECJ judgment in *Uniplex*.

[3] See Case C-470/99 *Universale-Bau AG, Bietergemeinschaft: 1. Hinteregger & Söhne Bauges.mbH Salzburg, 2. ÖSTU-STETTIN Hoch- v Tiefbau GmbH*, which was referred to frequently within this ECJ judgment. Contrast this with the Northern Irish High Court's decision in *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 2)* [2008] NIQB 105, where it was held that the 3-month limitation period prescribed by PCR started to run only once a flawed decision made by the contracting authority is actually implemented in an irreversible way, e.g. flawed evaluation criteria actually being applied to select the winning bidder (for further discussion on *Henry Bros*, see [UK Public Procurement Law Digest: Framework Agreements, 4 February 2009](#)

[4] See paragraphs 36 et. seq. in Northern Irish High Court's decision in *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 2)* [2008] NIQB 105; also see UK Public Procurement Law Digest: Framework Agreements, 4 February 2009

[5] *Amaryllis Limited v HM Treasury (sued as OGCBuyingsolutions)* [2009] EWHC 962 (TCC) – see UK Public Procurement Law Digest: Limitation Periods and Delays, 17 June 2009 . This case, and other similar cases must now be treated with caution in light of the ECJ's judgment in *Uniplex*.

[6] See paragraph 49 of the ECJ's judgment in *Uniplex*.

[7] For an overview of the new remedies regime brought about by Directive 2007/66/EC and implemented in the UK through amendments to PCR, see UK Public Procurement Law Digest: New Remedies Regime, 11 January 2010. Generally speaking, where legal challenges are brought in respect of procurements which were commenced before 20 December 2009, such legal challenges will fall under the remit of the old remedies regime, but on the other hand, where legal challenges are brought in respect of procurements which were commenced on or after 20 December 2009, such legal challenges will fall under the remit of the new remedies regime.