

<b>Transposition of the EU Defence and Security Directive 2009/81/EC into UK Regulations</b> <b>Lead department or agency:</b> Ministry Of Defence <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>
	<b>IA No:</b> MOD0001
	<b>Date:</b> 29 July 2011
	<b>Stage:</b> Final Proposal
	<b>Source of intervention:</b> EU
	<b>Type of measure:</b> Secondary legislation
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## Summary: Intervention and Options

### What is the problem under consideration? Why is government intervention necessary?

On 20 August 2009, the EU published a Directive (Council Directive 2009/81/EC – the “New Directive”) that creates public procurement rules specifically adapted to the defence and security sectors. The problem being addressed by the EU in formulating the New Directive was to provide a more effective set of rules for public procurement in those sectors, with the aim of enabling more efficient acquisition of military or security capability under the framework of EU procurement rules and opening up the European defence market. Government intervention is necessary to transpose the New Directive by the EU’s deadline of 21 August 2011.

### What are the policy objectives and the intended effects?

The policy objectives are to:

- transpose the New Directive and thereby adhere to the UK’s EU Treaty obligations;
- implement procurement rules specifically adapted to the defence and security sectors;
- open the majority of defence and security procurements to open competition in Europe;
- encourage some Member States away from inappropriate use of Article 346 Treaty of the Functioning of the European Union (TFEU) and the other derogations of the Treaty; and
- reduce reliance on exemptions.

### What policy options have been considered? Please justify preferred option (further details in Evidence Base)

The policy options are: 1) implement; 2) not implement; 3) implement late.

Not implementing or implementing late would breach UK obligations as members of the European Union, and would trigger the start of the European Commission’s infraction process and could also attract non transposition claims from aggrieved bidders. There is therefore very little real choice – the UK is obliged to implement the New Directive, otherwise it will be in breach of its treaty obligations.

The majority of the provisions in the New Directive are mandatory. Those provisions over which European Member States have discretion were explained in the First and Second Public Consultations, where MOD consulted stakeholders on the impact of its proposals. Consultation feedback was used to develop this IA. Consideration of the possible impacts of each of the policy choices on each article in the New Directive are given in more detail in the attached evidence base.

In implementing Option 1 we have looked specifically at each non-mandatory provision and those where we had discretion over the implementation, considering the impact to ensure that the least burdensome option is selected.

**When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?** It will be reviewed 08/2016

**Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?** Yes

**Ministerial Sign-off** For final proposal stage Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

**Signed by the responsible Minister:** Peter Luff **Date:** 28/07/2011

# Summary: Analysis and Evidence Policy Option 1

Description:

Price Base Year 2011	PV Base Year 2011	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	2.250	Yr0		2.250
High	3.375			3.375
Best Estimate	2.700			2.700

### Description and scale of key monetised costs by 'main affected groups'

It has only been possible to monetise the costs of industry becoming familiar with the New Regulations. Other costs are not monetisable for the reasons explained in the evidence base at paragraphs 32-41.

### Other key non-monetised costs by 'main affected groups'

Additional training and support costs for contracting authorities/entities; increased administration costs for contract competitions.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate				

### Description and scale of key monetised benefits by 'main affected groups'

Not monetisable, for the reasons explained in the evidence base at paragraphs 32-41.

### Other key non-monetised benefits by 'main affected groups'

"Defence and Security Public Contracts Regulations 2011(DSPCR 2011)" are better suited to defence and sensitive security procurement than existing PCR 2006, Public Contracts (Scotland) Regulations 2006, Utilities Contracts Regulations 2006 and Utilities Contracts (Scotland) Regulations 2006.

### Key assumptions/sensitivities/risks

Discount rate (%)

The key risks associated with the implementation are:

- a more complicated procurement process, as some acquisition teams will be required to use both the New & Classic Directives;
- additional training and support costs for contracting authorities/entities;
- increased administration costs for contract competitions.

Impact on admin burden (AB) (£m):		Impact on policy cost savings (£m):		In scope
New AB:	AB savings:	Net:	Policy cost savings:	No

## Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			United Kingdom		
From what date will the policy be implemented?			21/08/2011		
Which organisation(s) will enforce the policy?			The High Court & equivalent Scottish Court		
What is the annual change in enforcement cost (£m)?			Not known		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			No		
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			Traded: N/A	Non-traded: N/A	
Does the proposal have an impact on competition?			Yes		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			Costs: N/A	Benefits: N/A	
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro N/K	< 20 N/K	Small N/K	Medium N/K	Large N/K
Are any of these organisations exempt?	No	No	No	No	No

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with. Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
<b>Statutory equality duties</b> <sup>1</sup> <a href="#">Statutory Equality Duties Impact Test guidance</a>	Yes	20
<b>Economic impacts</b>		
Competition <a href="#">Competition Assessment Impact Test guidance</a>	Yes	18
Small firms <a href="#">Small Firms Impact Test guidance</a>	Yes	19
<b>Environmental impacts</b>		
Greenhouse gas assessment <a href="#">Greenhouse Gas Assessment Impact Test guidance</a>	No	19
Wider environmental issues <a href="#">Wider Environmental Issues Impact Test guidance</a>	No	19
<b>Social impacts</b>		
Health and well-being <a href="#">Health and Well-being Impact Test guidance</a>	No	19
Human rights <a href="#">Human Rights Impact Test guidance</a>	No	20
Justice system <a href="#">Justice Impact Test guidance</a>	No	19
Rural proofing <a href="#">Rural Proofing Impact Test guidance</a>	No	20
<b>Sustainable development</b> <a href="#">Sustainable Development Impact Test guidance</a>	No	19

<sup>1</sup> Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

# Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

## References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

**No. Legislation or publication**

Directive 2009/81/EC First Public Consultation

<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/200981EcFirstConsultation.htm>

Directive 2009/81/EC Second Public Consultation

<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/200981EcSecondConsultation.htm>

## Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

### Annual profile of monetised costs and benefits\* - (£m) constant prices

	Y <sub>0</sub>	Y <sub>1</sub>	Y <sub>2</sub>	Y <sub>3</sub>	Y <sub>4</sub>	Y <sub>5</sub>	Y <sub>6</sub>	Y <sub>7</sub>	Y <sub>8</sub>	Y <sub>9</sub>
Transition costs	2.7									
Annual recurring cost	0									
Total annual costs	2.7									
Transition benefits										
Annual recurring benefits										
Total annual benefits										

\* For non-monetised benefits please see summary pages and main evidence base section

# Evidence Base (for summary sheets)

## Part 2 - Key Background Information

1. This Impact Assessment (IA) supports the proposed draft regulations that will implement the New Directive) in the UK.
2. Part 2 sets out the approach taken by MOD in the transposition of New Directive including: MOD's approach to the two public consultations; its approach to drafting the New Regulations; the analysis of transposition options; and monetisation of the impacts of the New Regulations. The impact of the Key Articles is discussed in Part 3.

## Background

3. Directive 2009/81/EC (New Directive) was adopted by the European Parliament in July 2009 and published in the Official Journal of the European Union in August 2009. It sets out procurement rules for contracting authorities/entities that are more suitable for procurements involving military equipment, sensitive equipment, and related goods, works or services. The New Directive also includes remedies rules that are substantially the same as those set out in Council Directive 2007/66/EC (the Remedies Directive), which was implemented by amendments to the existing UK Regulations.

## Options Analysis

4. Strategically, there are only three options available:
  - a. Option 1 Implement Directive into UK law by the imposed deadline  
This is the only feasible option – the UK is obliged to implement the New Directive by 21 August 2011. This option is discussed further in the section below - “General Transposition Approach”. This section explains MOD's decision to mirror PCR 2006 wherever appropriate and describes the decisions it has made when the UK had an element of choice as to how provisions were to be implemented.
  - b. Option 2– Do nothing  
Non-implementation of the New Directive would breach EU Treaty obligations, trigger infraction proceedings, resulting in the UK being liable for substantial penalties and risk claims for damages for non-implementation from aggrieved parties. This option is therefore not feasible; we intend to implement the New Directive. Consequently, the “do nothing” option is not considered within the detailed assessment of each article in Part 3 of this document, unless the New Directive specifically permits an option for not implementing the article.
  - c. Option 3 – Implement Late  
As for Option 2, late implementation of the New Directive would breach EU Treaty obligations, trigger the start of the European Commission's infraction process and could also attract non transposition damages claims from aggrieved parties. Following the introduction of the Lisbon Treaty, the EU Commission implemented a new computer system that is capable of triggering an infraction the day after the transposition deadline is missed, so this option is no more feasible than Option 2.

## General Transposition Approach

5. Public procurement is currently regulated in the UK through the Public Contracts Regulations (PCR) 2006 which is the transposition of the Classic Directive and the Remedies Directive. (Amendments introduced to the PCR in 2009 pursuant to amendments to the Remedies Directive were the subject of extensive consultation). The new Defence and Security Directive is specifically tailored to Defence and Security procurements by public bodies, but largely replicates provisions in the Classic Directive and the Remedies Directive. The Classic Directive and the Remedies Directive will remain in force and in broad terms will apply to those procurements not classed as defence or security related. The two sets of implementing regulations (the PCR and the new DSPCR) must operate side by side as contractors and contracting authorities are likely to be involved in contract award procedures under both sets of regulations and will already be well used to the PCR regime. Because of this, the two sets of regulations need to be aligned as closely as possible to avoid confusion, to create legal certainty (so that the interpretation of the two sets of regulations are consistent with each other and developing case law), ease of use for contracting authorities and contractors who are used to operating the current regime and

to minimise the costs to both sides.

6. Where the underlying Directives are substantively the same an approach has been adopted of the DSPCR closely following the language and structure of the PCR adapted, as necessary, to take into account differences between the two Directives. For example, some of the award procedures (open and dynamic purchasing systems) are not appropriate to or available under the new Directive. This approach has been tested through two rounds of public and cross-government consultation and passed scrutiny by the NSC and RRC in November 2010 with no adverse comments as to the approach.

### **Gold Plating and One In One Out Policy**

7. The new Directive is largely expressed in mandatory terms but there are some areas where Member States have an element of choice as to how they implement and how the domestic regulatory regime is structured. The choices are not about whether or not to regulate but about the mechanics of how the regime will operate. In exercising those choices the MOD has selected the least burdensome option or the option that requires the minimum change from the current regime, taking into account the specialised nature of the defence and security markets. In so doing, it is our view that implementation has not gone beyond the minimum necessary to comply with the new Directive, that there has been no extension of its scope or addition to its substantive requirements and, therefore, that there is no 'gold-plating'. Because of this, the 'one-in, one-out' policy does not apply. In any case, none of the choices exercised, as described below, are such as to place UK businesses at a competitive disadvantage compared with their European counterparts and, therefore, the choices made would not constitute a net regulatory 'in'. A new net regulatory burden has not been imposed on UK business.

8. The provisions where Member States have an element of choice are described below and can be split into the categories of 'transposed provisions' and 'non-transposed provisions'.

### **Transposed provisions**

9. In the instances detailed in this paragraph, equivalent provisions exist in the Classic Directive and the Remedies Directive and choice has been exercised in the same way as it was exercised in the implementation of those Directives, with the provision being transposed in the DSPCR. This is in line with our general approach, and as these provisions are already regulated through the PCR, this does not represent an additional regulatory burden on Industry.

a. **Article 10** provides that Member States may stipulate that contracting authorities may make purchases through a central purchasing body. The ability to purchase through central purchasing bodies (such as OGC Buying Solutions) has been long recognised as a useful tool to cut administrative burdens and to deliver value for money across Government. Failure to provide for this would hinder our ability to carry out our co-operative procurement with Other Government Departments and, in the case of defence and security procurement, the ability to use European public bodies such as the EDA. There would be consequential cost implications with agencies and departments having to contract separately for the same or similar items, losing any economies of scale or joint purchasing power and ancillary savings. UK industry, in their response to the first consultation, supported the transposition of this provision.

b. **Article 14** provides that Member States may reserve the right to participate in contract award procedures to sheltered workshops etc. This provision allows the UK to "reserve" the contract for "supported factories or businesses" where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market. MOD has recently used the similar provision in the PCR to procure NBC suits from Remploy. This provides a benefit to industry with protection for a niche section of industry. Supported businesses would otherwise be adversely impacted as they would have to compete on normal terms for defence and security contracts, potentially impacting on disabled workers.

c. **Article 27** provides that Member States may provide that the competitive dialogue procedure may be used. The restricted procedure and negotiated procedures are the default procedures in the new Directive and it is envisaged that the majority of procurements will be undertaken using one of these two procedures. However, there may be occasions where the competitive dialogue procedure is necessary such as in the case of a particularly complex contract. There is no perceived disadvantage to contracting authorities or industry in providing for this and they have considerable experience in operating it.

- d. **Article 29** provides that Member States may provide that contracting authorities may conclude framework agreements. The ability to use framework agreements is a well-established and useful tool for public procurement allowing considerable flexibility and delivering value for money. Failure to transpose this provision would mean that the requirements met under framework agreements would have to be met by a multitude of smaller contracts procured using a separate procurement procedure on each occasion. This would result in considerably more effort for contracting authorities and industry without delivering any benefit.
- e. **Article 36(5)(b)** provides that Member States may require electronic tenders to be accompanied by an advanced electronic signature. This is a useful tool which reflects the reality of modern procurement techniques.
- f. **Article 39(1)** provides that Member States may provide for a derogation from the requirement to exclude contractors convicted of certain offences relating to corruption, fraud and terrorist offences for overriding requirements in the general interest. Without such a derogation, certain convicted suppliers would be automatically debarred from all public contracts covered by the regulations even where they are the only provider or when for urgent operational reasons a contract may be awarded directly to that supplier. The derogation allows the contracting authority to take into account factors such as the seriousness of the offence, the length of time that has elapsed since the conviction, and action taken to prevent reoccurrence when deciding whether or not to exclude a supplier.
- g. **Article 48** provides that Member States may provide that contracting authorities may use electronic auctions. The ability to use electronic auctions is a well-established and useful tool for public procurement allowing considerable flexibility and delivering value for money. The UK has past experience of using such e-tools to deliver value for money. The use of e-tools rather than conventional paper based systems also reduces cost to both industry and contracting authorities.
- h. **Article 56(4)** provides that except where provided for in Article 56(3) and 55(6), review procedures need not necessarily have an automatic suspensive effect on the contract award procedure to which they relate.
- i. **Article 56(7)** provides that Member States may provide that remedies shall be limited to damages where a contract has been entered into save where ineffectiveness applies. The remedies regime was recently consulted on and there are no particular defence and security implications reasons for taking a different approach.
- j. **Article 58** provides circumstances in which Member States can provide that the standstill period in Article 57(2) does not apply. It ensures that the contract award procedure is not delayed in circumstances where a standstill period would be inappropriate.
- k. **Article 60(2)** provides that national law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which have still to be performed. In the PCR the prospective cancellation was provided for.
- l. **Article 60(3)** provides that Member States may provide that the review body may not consider a contract ineffective if overriding reasons relating to the general interest, first and foremost in connection with defence and/or security interests, require that it be maintained. **Article 61(1)** provides that Member States may provide that the review body shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.
- m. **Article 61(2)** provides that Member States may confer on the review body broad discretion to take into account all the relevant factors.
- n. **Article 62** provides that Member States may provide that the application for review in accordance with Article 60(1) must be made within special time limits.

10. In the case of **Article 52(6) – Thresholds and rules on advertising** - there is no equivalent provision in the Classic Directive or Remedies Directive. Article 52(6) allows Member States to provide for the use of framework agreements by successful tenderers to meet subcontracting requirements. Framework agreements are a well-established and useful tool for public procurement allowing considerable flexibility, reducing the administrative burden and delivering value for money to the benefit of both contracting authorities and industry. The ability to use such a tool at prime contract level will have similar benefits. This is an optional tool for industry which will allow prime contractors to meet multiple requirements by using a pre-existing framework agreement under certain conditions. Otherwise, the prime contractor would have to run a competition under the regulations for each individual requirement. The benefit to industry is that it reduces the administrative burden of implementing Article 21, should deliver better value for money than individual competitions, and allows it to set up a supply chain that can deliver the product over a period of time.

11. In the following instances, choice has been exercised in a different way to the way it was exercised in the implementation of the Classic Directive and the Remedies Directive with the provision being transposed in the DPSCR despite equivalent provision not being transposed in the PCR:

a. **Article 55(5) – Scope and availability of procedures.** The general effect of this provision is that it allows Member States to require that anyone wishing to use a review procedure for an alleged infringement of the regulations has notified the contracting authority of this and their intention to seek review before seeking it. We consulted specifically on this point and the consensus was that this provision provides a useful tool for contracting authorities and suppliers alike as it could prevent proceedings being commenced and costs being incurred unnecessarily. Most importantly, this could also prevent sensitive defence and security issues from being aired in a public forum.

b. **Article 56(5) – Requirements for review procedures.** The general effect of this provision is that it allows Member States to require a review body to take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, in particular defence and/or security interests. The language of the new Directive, which differs from that of the Remedies Directive, gives particular prominence to defence and/or security interests and given the nature and sensitivity of many defence and security issues was appropriate to transpose. Industry and other interested government departments involved in defence and security work supported the approach. Although this changes the mechanics of the test, it is not felt that there would be an additional financial burden as a result.

12. In the following instances, Member States could either provide for a discretion to do something or mandate something. Choice has been exercised to provide for a discretion, thereby adopting the least burdensome approach:

a. **Article 21(2) – Subcontracting** - provides that Member States may require tenderers to provide certain information in relation to sub-contracting or can provide contracting authorities with a discretion to require the information. Our approach (transposing as an option rather than mandating) was supported by UK industry. There is no equivalent provision in the Classic Directive or Remedies Directive.

b. **Article 21(3) – Subcontracting** - provides that Member States may require tenderers to award proposed sub-contracts to unconnected third parties or can provide contracting authorities with a discretion to require it. Our approach to allow contracting authorities the discretion to do so (rather than the authorities being mandated to do so) was supported by UK industry. Mandating this could have had an adverse impact on SMEs in particular as they would be required to sub-contract work that would previously have been done in-house. There is no equivalent provision in the Classic Directive or Remedies Directive.

c. **Article 24 – Obligations relating to taxes, environmental protection, employment protection provisions and working conditions** - provides that Member States may require contracting authorities to provide where information relating to taxes, environmental protection, employment protection and working conditions can be obtained from or can provide a discretion to provide it. The equivalent provision in the Classic Directive was transposed in the PCR as a discretion.

## **Non-transposed provisions**

13. In the following instances, choice has been exercised in the same way as it was exercised in the implementation of the Classic Directive and the Remedies Directive and the equivalent provision has not been transposed in the DSPCR:

- a. **Article 36(5)(c)** provides that Member States may introduce or maintain voluntary arrangements for accreditation intended to improve the level of certification service provided for electronic tendering devices. There is no perceived benefit of such a provision.
- b. **Article 46(1)** provides that Member States may introduce official lists of approved suppliers. There is no need for such a provision in the UK because the UK does not have approved lists of suppliers.
- c. **Article 55(6)** provides that Member States may require that the person wishing to use a review procedure first seeks a review with the contracting authority. Implementation would result in greater delays, risks and costs of review period and process. Mandatory review will not justify this or make significant reduction in court proceedings.
- d. **Article 56(2)** provides that the powers specified in Article 56(1) (review procedures) and Articles 60 and 61 (ineffectiveness) may be conferred on separate bodies responsible for different aspects of the review procedure. All proceedings are heard in the High Court or the Scottish equivalent so the option of providing jurisdiction on separate bodies for reviews is unnecessary.
- e. **Article 56(6)** provides that Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

14. In the following instances, there is no equivalent provision in the Classic Directive or Remedies Directive and the provisions have not been transposed:

- a. **Article 21(4)** provides that Member State may require tenderers to subcontract to third parties a share of the contract or can provide contracting authorities with a discretion to do so. This provision has not been transposed as it would likely add cost and delay to procurement through added bureaucracy without compensating benefits. This approach was supported by UK industry.
- b. **Article 56(10)** provides that Member States may decide that a specific body has sole jurisdiction for the review of contracts in the fields of defence and security and provide for cleared members and specific security measures. Following extensive consultation, implementation of this provision was considered unnecessary as current court rules already provide for adequate protection.

15. For each Article, we believe we have selected the best policy option to limit the possible negative consequences including, where it is permitted by the New Directive, not implementing provisions that are entirely optional for Member States.

## **Approach to Consultation**

16. MOD's approach to consultation involved two public consultation exercises. The first public consultation, which ran from December 2009 to March 2010, consulted stakeholders on MOD's approach to implementation. The First Consultation Document described the main provisions of the New Directive and sought feedback from stakeholders on the optional elements. The analysis that followed during spring 2010 informed decisions on MOD's implementation policy.

17. Comments were also sought on an initial draft Impact Assessment (IA). Though many stakeholders anticipated an increase in time, cost, risk and administrative burden, none were able to provide a financial quantification of the impact of the New Directive.

18. The second public consultation, which ran from December 2010 to March 2011 summarised the outcomes of the first consultation, confirmed the implementation policy, and sought comments on the draft implementing regulations. This second consultation also sought comments on a more detailed IA and specifically asked stakeholders to comment on MOD's inability to monetise the IA.

## **Approach to Impact Assessment**

### **Overview**

19. Generally, the consultative approach taken by MOD is consistent with the recommended approach to impact assessment. Specifically, MOD has:

- a. Consulted stakeholders about our overall approach and key provisions;
- b. Considered and documented the possible impacts of the overall approach and provisions its analysis of the responses;
- c. Used the IA to aid decision-making in formulating the implementation policy;
- d. Published the revised IA to support the second consultation document; and
- e. Published a final IA to accompany the Explanatory Memorandum.

### **Analysis of comments on the initial draft IA**

20. MOD's initial view in the First Consultation Document was that there was unlikely to be a significant cost impact of the New Directive on either cost to businesses, the third sector or to the public sector. Any changes would affect public sector processes to some extent, but these were anticipated to be under the £5M threshold. However, MOD used the first consultation to test this thinking, and issued a draft developmental/option stage IA for comments.

21. The responses on the initial IA were mixed. One respondent suggested that if a significant proportion of procurements that had previously been subject to the current EU public procurement rules, or were exempt from those rules, were now to be subject to the New Directive, then significant costs would be likely to arise and that these could feasibly exceed the £5M threshold. The creation of new procedures, particularly those for sub-contracting, training and training time in both the contracting authority/entity and supplier communities, plus the constraint placed on some procurements in terms of time and scope leading to a greater number of procurement actions than may have been necessary in the past, were identified as cost drivers. Another respondent suggested that the contracting authority/entity and supplier sides of the security market were fragmented and immature, thus inhibiting its ability to absorb a complete set of procurement rules without significant extra cost. Despite comments about likely overall cost impact, Industry was unable to quantify these costs. However, they did provide an estimate of the costs of Industry becoming familiar with the new Regulations which are discussed in paragraph 39 below.

22. A further respondent focussed on the remedies rules and recalled the conclusion reached by the Office of Government Commerce (OGC), in the IA for the Remedies Directive, that no-one can feasibly predict the volume by which the courts' caseload may increase as a consequence of those new rules. However, it is clear that one of the stated aims of that Directive is to encourage greater use of review procedures and the respondent suggested it would be appropriate for MOD to test, in the light of experience, whether the new remedies rules were having an effect in cost terms which exceed the £5M threshold.

23. The other respondents either did not comment or did not express a clear opinion either way.

24. Although MOD found the differing views of respondents helpful in decision-making, it is important to note that the New Directive is not materially different from the Classic Directive. Rather, the New Directive brings more procurements into a regulated regime. The key Articles in this respect are:

- a. **Scope** – This covers military and security requirements, some of which are currently met under the Classic Directive, some of which are currently exempt from the Classic Directive. In the future, in general, the vast majority of military and security requirements met under the Classic Directive will fall under the New Directive. Some will remain under the Classic, particularly for works.

Many of the requirements that are currently exempt will now be met by the New Directive. Contracting authorities/entities will therefore have to consider when to use both Directives in addition to having procurement procedures for exempt and below threshold requirements.

b. **Thresholds** – The threshold has increased from £101,323 in the Classic Directive to £313,694 in the Defence Directive. In FY 09/10, contracts valued between £101,323 and £313,694 roughly equated to 10% of all MOD contracts. Many of these types of requirements will continue to be placed under the Classic Directive and many more will be exempt from either Directive.

c. **Exclusions** – Roughly 55% of MOD contracts are exempt from the Classic Directive. The New Directive will reduce the number of exempt contracts in two ways. First, its provisions on security of supply and security of information may provide adequate protection for requirements, meaning that there will be less reliance on Article 346 TFEU. Second, the general exclusions in the New Directive at Articles 12 and 13 are more tightly drawn. This means it will be harder to justify using these exemptions. Although it is difficult to quantify the effect, there is likely to be a significant reduction in the number of exempt contracts.

d. **Sub-contracting** – The extent to which these provisions will be used is uncertain. Many defence procurements are too complex for these provisions to be used without undue risk. Their use may be limited to straightforward service and works contracts.

e. **Review Procedures** – The review procedures are very similar to the provisions of the existing Remedies Directives. However, because requirements that would previously have been exempt from the UK Regulations will fall under the implementing regulations and its remedies regime, it is likely that there will be a greater number of legal challenges.

25. The net effect is likely to be an increase in the amount of procurements carried out under the auspices of either the Classic Directive or the New Directive.

### **Analysis of comments on the revised draft IA**

26. The IA that accompanied the Second Public Consultation documents was produced taking cognisance of the outcome of the first public consultation. MOD stated that the business impacts were uncertain for a number of reasons, and the outcomes could not therefore be estimated, quantified or monetised. MOD explained further that Contracting authorities/entities should benefit overall and there should be net positive effects on the UK economy as a whole. The reasons for this assessment were brief: a regime which is tailored to procurement in the defence and security sectors; greater competition which should benefit UK contracting authorities/entities through more competitive and innovative tenders; and competitive and innovative UK economic operators should benefit through increased opportunities in wider EU markets.

27. In all these instances there is a great range of variables which results in a lack of precision and makes quantifying the impact impractical as any figures produced would be subject to unacceptable levels of uncertainty.

28. The majority of stakeholders did not raise any objections to MOD's approach. One stakeholder suggested that the impact assessment against Article 21(3) would "bring in focus some of the sub-contracting issues". However, they suggested the IA may benefit from the inclusion of an impact grading and that "monetisation will substantially benefit the argument which could be achieved through scenario analysis. The same stakeholder commented that with respect to Article 12 it is not clear if the implementation of the New Directive will cause any material change and therefore the impact for that element should be summarised as neutral. MOD has agreed and amended the IA accordingly.

29. The IA provided as part of the document set for the second public consultation contained a section on Article 21(3). Article 21(3) is a mandatory provision and must be transposed. However, there are no preconditions in its use. MOD will transpose this Article as an option to be used by contracting authorities/entities. In doing so procurers will assess each procurement on a case-by-case basis and make their decision as to whether or not to use Article 21(3) (Regulation 37(3) in the New Regulations) in accordance with the published sub-contracting guidance. It is impractical to monetise the effect of Article 21(3) as it is unknown to what extent and in what circumstance the provision will be used.

30. The IA explains the factors that will have an impact on overall cost. The extent to which these factors will affect cost (both positive and negative) will vary depending on the individual procurement. It is therefore impractical to implement an impact grading system.

31. The MOD had considered running a series of scenarios to analyse the impact. However, defence and security contracts vary hugely in terms of contract value and complexity and therefore for a study to be truly representative it would have to analyse a large number of individual examples. It was decided that the cost associated with running such an analysis would be disproportionate to the value of the findings.

## **Monetisation**

32. The New Directive is intended to enable the more efficient acquisition of defence or security requirements. This will be achieved through subjecting a greater range of requirements to competition in open EU markets, drawing on a wider supply base for procurement solutions and by extending the application of the remedies regime should a Member State fail to meet its obligations.

33. The business impacts are uncertain for a number of reasons, and the outcomes cannot therefore be estimated, quantified or monetised. Contracting authorities/entities should benefit overall and there should be net positive effects on the UK economy as a whole. The reasons for this assessment are detailed below:

34. The New Directive introduces a regime which is tailored to procurement in the defence and security sectors. Additional regulated competition across the EU should benefit contracting authorities/entities in terms of them being offered more competitive prices, better availability of superior products and greater innovation (whether in terms of production processes or product capabilities). Due to the number of variables (including equipment scope and volume procurements) it is not possible, with any certainty, to forecast the precise benefits.

35. Greater competition will benefit the more competitive and innovative economic operators, as they will be able to seek opportunities in wider EU markets. These achievements will enable them to expand their sales and market shares, thereby increasing their output, which will reduce their costs and/or improve their products and those of efficient members of their supply chain increasing their overall profitability. For economic operators who are less agile or more accustomed to operating under less competitive market conditions the New Directive will present more of a challenge which could result in a negative cost impact. Again, due to the range of variables, it is not possible to accurately quantify the consequences of increased competition.

36. The nature of competition is that outcomes are dynamic and unpredictable in terms of specific beneficiaries. We can say that the best-suited firms are most likely to gain, but we cannot necessarily identify them in advance.

37. Predictive data is not available on the potential frequency of legal challenge arising purely because of the new rules, or the value of the remedies sought in those cases, or how the courts might rule when the facts of cases are as yet unknown. The European Commission's impact assessment for the Remedies Directive similarly could not estimate these figures and there is insufficient data on the impact of new remedies regime applied to the UK regulations as this has only been in place since December 2009.

38. The Directive is not being enacted to benefit all businesses, but to increase competition and business efficiency by reducing some of the barriers to entry. Whilst a qualitative response has been received from Industrial stakeholders they too are unable to quantify the effect of implementing the New Directive beyond basic familiarisation costs. They have quoted uncertainty about the future range of goods and services being procured and a lack of resources available to undertake such an assessment as reasons why the Impact Assessment cannot be quantified.

39. In their response to the first consultation, the main Industry respondent estimated that training costs were likely to be in the order of £1500 per person per day (to include external course fees, cost of employees time and travel and subsistence). We have used this as the basis for our costings, but have had to make a number of assumptions and estimates:

- a. MOD employs approximately 1800 contracting officers which is assumed to represent some 80%<sup>2</sup> of government contract officers involved in defence and security procurement. Across government this therefore accounts for 2250<sup>3</sup> contracting officers;
- b. UK Industry match government contracting officers one to one;
- c. MOD-generated guidance to help users operate the new regulations should require one working day to read for basic familiarisation;
- d. The Industry estimate of costs per day represents the High cost as it includes elements for external training and travel and subsistence; and
- e. Many contracting officers in UK Industry are already familiar with the existing public procurement regulations and would not require external training (this is reflected in the 'low' cost estimate).

### **Familiarisation Costs**

	Number of Staff	Costs per day (£)	Training Days	Total Cost (£)
Low	2250	1000	1	2,250,000
High	2250	1500	1	3,375,000
Best Estimate	2250	1200	1	2,700,000

40. Although this would appear to show an increase in the costs likely to be encountered by suppliers, there is no evidence to enable us to estimate whether or by how much the incidence of these costs would be borne by the suppliers themselves, or whether the costs would be passed to contracting authorities in the form of higher prices.

41. With the exception of the familiarisation costs detailed above we are unable to foretell the overall costs and benefits with any precision and no suitable data is therefore available. Consequently, the overall net impact cannot be forecast or monetised.

### **Impact Assessment Part 3 – Potential Impact of Key Articles**

42. This section of the IA considers the potential impact of each of the key articles within the New Directive. It does not attempt to repeat the detailed justification for MOD's policy decisions contained within the consultation documents nor is it intended to replicate the options analysis described in Part 2. Where helpful it recaps on the policy decision, whilst majoring on the possible impacts of each option.

### **Key Provisions**

#### **Article 2 – Scope**

43. The scope of the New Directive as set out in this Article covers contracts for the procurement of the following supplies, works and services:

- a. Military equipment, including any parts, components or sub-assemblies;
- b. Sensitive equipment, sensitive works and sensitive services;
- c. Works, supplies and services directly related to military equipment and sensitive equipment;
- d. Works and services for specifically military purposes or sensitive works and sensitive services.

44. The MOD's analysis of the key impact of these provisions is as follows:

#### **Military Equipment**

45. Although MOD will retain its right to use the derogation under Article 346 TFEU to exempt certain procurements, its use will be limited to exceptional cases where the decision not to apply the New Directive is taken for the protection of the essential interests of national security. In other words, there

<sup>2</sup> MOD team estimate

<sup>3</sup> We have made no adjustment for the fact that some government contracting officers will work with non-UK based suppliers

will be a strong presumption that equipment on the “1958 List” should be procured under the New Directive. It is likely that the use of Article 346 TFEU (and other exemptions) will come under closer scrutiny by the ECJ. However, where the protective measures in the New Directive fully protect our essential national security interests, we plan to use the New Directive instead of the exemption. The likely impacts are:

- a. a wider range of suppliers participating in our procurements that should lead to better value for money although it is not possible to quantify the benefits in monetary terms;
- b. a larger proportion of our procurements being conducted under the New Directive this means more contracts will be subject to remedies regimes and judicial review of procurement decisions.

### Sensitive Security Contracts

46. As this is a mandatory provision, it has to be transposed. The net effect of the scope of the New Directive is that more procurement will take place under the implementing regulations. The likely impacts are similar to those for military equipment. With the exemption for sensitive contracts being more tightly drawn than the equivalent in the UK Regulations, more sensitive security contracts will be subject to regulated competition.

47. Although the absence of an equivalent Article 30 appears to place an unwarranted burden on utility companies, it fits with the Commission’s desire to seek to open the security market to competition to the fullest extent possible.

### Security Classification

48. This section considers the potential impact of the implementing Security Agreements/Arrangements in order to manage “Classified information” as defined in Article 1 of the New Directive.

49. The negotiation of Security Agreements/Arrangements is an important activity that is undertaken by nations in order to provide assurances that classified information exchanged bi-laterally will be protected. This is a normal activity which is undertaken as required where classified information needs to be exchanged and there is no agreement in place, or where existing agreements need to be reviewed. It is not therefore anticipated that there will be any direct impact in respect of security of information as a consequence of implementing the New Directive.

### **Article 3 – Mixed contracts**

50. The IA for Article 3 considers the impact of implications of implementing the New Directive’s rules on mixed contracts, in particular single contracts that cover requirements that are within the scope of the New Directive and the Classic/Utilities Directives or the New Directive and exemptions/derogations.

51. As this is a mandatory provision, it has to be transposed. Its impact is difficult to gauge, but it should be beneficial to practitioners as it prevents single requirements having to be procured under different regimes.

### **Article 7 – Protection of Classified Information**

52. This new provision allows confidentiality obligations to be imposed on suppliers to protect classified information communicated to them throughout the tendering and contracting procedure.

53. Currently, where classified material is to be included in tenders, potential tenderers must protect the information in accordance with the relevant security requirements. The New Directive recognises and formalises this approach in procurement law. The net impact is likely to be minimal, as potential tenderers already have to protect classified information adequately.

### **Article 8 – Thresholds**

54. The thresholds above which the New Directive shall apply are aligned to Directive the Utilities Directive. This represents an increase from the thresholds contained within the Classic Directive.

55. However, in practice, Union Law requires that the principles of the internal market also apply below these thresholds. Therefore the imposition has no discernable financial impact.

#### **Article 10 – Public contracts and framework agreements awarded by central purchasing bodies**

56. This provision addresses the use of central purchasing bodies. It differs slightly from Article 11 of the Classic Directive containing a revised definition of central purchasing bodies.

57. The impact will be minimal. Contracting authorities/entities in the UK already use central purchasing bodies where they deliver value for money. This provision will not change the present situation.

#### **Article 11 - Use of exclusions**

58. Article 11 provides that contracts excluded by Articles 12 and 13 of the New Directive cannot be used simply to avoid the requirements of the New Directive. One stakeholder requested the inclusion of this Article which states that none of the rules, procedures, programmes, agreements, arrangements or contracts referred to in section 3 (exclusions) may be used to circumvent the Directive. MOD believes that this means that the exclusions should not be used improperly. However, this is not what the New Directive says and to transpose a sensible provision would risk gold-plating. MOD believes this is not necessary in any case as improper use of the exclusions would breach the New Regulations and the New Directive.

59. MOD has not transposed this Article so there is no impact.

#### **Article 12 - Contracts awarded pursuant to international rules**

60. This provision helps to clarify the ability to use international treaty organisations, such as NATO and OCCAR, to place contracts for the benefit of Member States. The European Defence Agency can also place contracts on behalf of the participating Member States. International arrangements can also be taken forward on a bilateral or multi-lateral basis through Memoranda of Understandings, which can establish contracting arrangements. On this basis, the new arrangements should facilitate international cooperation. However it is not clear whether the implementation of the New Directive will cause any material change, so its impact is neutral.

#### **Article 13 – Specific exclusions**

61. This provision contains many of the exemptions present in the Classic Directive. Article 13 of the New Directive and new exemptions have been created to address the specific needs of the defence and security sectors.

62. As this is a mandatory provision, it has to be transposed. In general, the exclusions at Article 13 are more tightly drawn than the exclusions in the current UK Regulations. Whilst they are sufficient to protect key areas of business such as support to military operations and R&D, the net effect of the scope of, and specific exclusions in, the New Directive is that more procurements will be subject to regulation.

#### **Articles 15 and 16 – Service contracts listed in Annexes I and II**

63. This provision details contracts which have as their object services covered by the New Directive. Whilst substantively the same as the equivalent Articles in the Classic Directive a number of services are reclassified making them requirements subject to the New Directive.

64. As this is a mandatory provision, it has to be transposed. The likely impact is that services reclassified under Annex I of the New Directive will benefit from regulated competition amongst suppliers from the EU. It will also open up opportunities for service providers in the UK to participate in the Single Market for these services.

## **Article 18 - Technical specifications**

65. Article 18 is slightly different from the equivalent provision in Article 23 of the Classic Directive. Article 18 removes the requirement for technical specifications to take into account accessibility criteria for people with disabilities; makes specific reference to technical requirements under international standardisation agreements to guarantee interoperability; and includes in the list of standards “civil technical specification” and national “defence standards”. The impact of implementing these standards is minimal and there is no anticipated impact on procurement costs.

## **Articles 21 and 50 to 54 and Annex V - Sub-contracting and Rules applicable to Sub-contracting**

66. MOD will transpose Article 21 (3) as an option for contracting authorities/entities. The application of the optional provisions provided for Article 21(3) will, if targeted at appropriate contracts, provide an open and fair process for contracting authorities/entities and suppliers to diversify the supply chain that may lead to better value for money for the taxpayer and suppliers alike. However, there are likely to be increased staff and overhead costs for suppliers. There may also be the risk of legal challenge for the contracting authority/entity or supplier due to difficulties in ensuring equality of treatment and proportionality. Transposing Article 21(3) as an option rather than mandating it reduces the risk of additional cost as contracting authorities/entities will only apply this Article to suitable procurements. Therefore, Article 21(3) should improve value for money for the taxpayer.

67. Although there are possible adverse consequences to the transposition of Article 21(5), such as those outlined by stakeholders, their impact is uncertain and thus difficult to gauge. The MOD believes that contracting authorities/entities will only use this provision with great caution. However, future guidance will seek to address the risks to minimise their impact.

68. Article 21 (4) is optional. MOD’s decision not to transpose this provision has no financial impact.

## **Article 22 - Security of Information**

69. This is a new provision designed to meet Member States’ concerns about the protection of classified information, during the tendering and contract award process.

70. The negotiation of Security Agreements/Arrangements is an important activity that is undertaken by nations in order to provide assurances that classified information exchanged bi-laterally will be protected. This is a normal activity which is undertaken as required where classified information needs to be exchanged and there is no agreement in place, or where existing agreements need to be reviewed. It is not therefore anticipated that there will be any direct impact in respect of security of information as a consequence of implementing the New Directive.

## **Article 23 - Security of Supply**

71. This Article will deliver operational benefits, as it allows for security of supply requirements to be identified and captured in the contract. The benefit of this should be a reduction in the risk of delay when purchasing from foreign export control regimes and provide a more secure supply chain leading to potentially better UK crisis management. Contracting authorities/entities will therefore have to carefully scrutinise their security of supply requirements to ensure they strike the right balance between cost and operational risk.

## **Article 25 – Procedures to be applied**

72. The New Directive does not include the open procedure or the use of dynamic purchasing systems to award contracts, both of which are covered by the Classic Directive. However, since these procedures are rarely, if ever, used in defence and security procurements, their removal has very little impact.

73. The New Directive provides contracting authorities/entities a free choice between use of the negotiated procedure with prior publication of a contract notice and the restricted procedure. This positive change in process should be absorbed easily with limited cost impact.

## **Article 28 - Cases justifying use of negotiated procedure without publication of a contract notice**

74. The New Directive replicates the relevant justifications for use of this procedure. In addition, this Article can be used in a crisis where the minimum time periods to be complied with under the other procedures are not compatible with the urgent need to act that the crisis has caused. This reduces the burden on contracting authorities/entities that will no longer be required to run a call for competition in all cases whilst seeking to respond to the crisis in the most effective way possible.

75. Moreover, the length of contracts which can be awarded for additional deliveries and repetition of similar works and services is increased from the three years to five years. This change adapts the procurement rules to the specific needs of the defence sector in particular, where equipment generally remains in service use for much longer than other kinds of equipment. The increase in the permitted length of contracts will ease the burden on contracting authorities/entities because calls for competition for additional deliveries or repetition of services will not be required as often.

## **Article 29 - Framework Agreements**

76. This Article increases the maximum permitted duration for framework agreements from four years to seven years. This is another change that adapts the procurement rules to the specific needs of the defence sector in particular, where the extended period of in-service use can lead to framework agreements that have longer durations than normal. The increase in the permitted duration will therefore ease rather than increase the burden on contracting authorities/entities and suppliers alike. Contracting authorities/entities will not be required to run competitions for the award of framework agreements as often, delivering savings and other benefits in the use of resources. Equally, suppliers will not have to bid for framework agreements so frequently, delivering savings in bid costs.

## **Article 38 - Verification of the suitability and choice of participants and award of contracts**

77. This Article reduces the minimum number of participants to be invited to tender under the restricted procedure from five to three. It also allows contracting authorities/entities to re-advertise the requirement and invite candidates selected from either of the two adverts to tender, negotiate or participate in dialogue, where the number of candidates requesting to participate is too low. The reduction in the minimum number of participants, in particular, eases the burden on contracting authorities/entities and suppliers. For contracting authorities/entities, there will not be as many tenders to evaluate which should enable a shortening of the time taken to reach contract award. For some suppliers, there will be savings in bid costs because they will be tendering for fewer contract opportunities but will also have an increased chance of success in those competitions where they are invited to tender.

## **Article 39 - Personal Situation of the candidate or tenderer**

78. This Article requires contracting authorities/entities to exclude candidates or tenderers who have been convicted of terrorist offences or offences linked to terrorist activities. In addition, the grounds for discretionary exclusion have been expanded to include breaches of previous contractual requirements relating to security of information or security of supply, or cases where a candidate or tenderer is known to lack reliability to the extent they pose a risk to national security. These requirements do not impact on the procurement procedures of contracting authorities/entities.

## **Article 42 - Technical and/or professional ability**

79. This Article introduces the following changes concerning the evidence of technical and professional ability:

- a. The required list of principal deliveries or services provided can go back five years rather than three years;
- b. Checks on production capacities may be carried out as a matter of course rather than just where products or services to be provided are complex;
- c. The description of tools, materials and technical equipment is specifically adapted for defence and security procurements and so includes requirements to demonstrate the ability to cope with additional requirements resulting from a crisis;
- d. Evidence may be required to demonstrate the ability to process, store and transmit classified information at the level of protection required by the contracting authority/entity. Member States

are permitted to require that the evidence provided must comply with their national laws on security clearances;

- e. Economic operators may be required to supply evidence of their technical or professional ability by other documents considered appropriate by a contracting authority/entity where, for valid reasons, the required references cannot otherwise be provided.

80. These adaptations and changes require minimal changes to selection procedures e.g. Pre-Qualification Questionnaires (PQQ) and will therefore result in little or no cost impact.

#### **Article 43 – Quality assurance standards**

81. This makes reference to independent accredited bodies. However, since its implementation will not require MOD to change its Appropriate Certification Policy, it will have no effect in terms of Certification requirements on MOD suppliers. This change is therefore considered neutral in terms of impact and cost for MOD. Other stakeholders have been silent on this point.

#### **Articles 55 – 64 Rules to be applied to reviews**

82. These Articles largely replicate the new remedies regime implemented by the Remedies Directive in December 2009. Since this regime is already implemented in UK Regulations, no additional impact is anticipated over and above our general view that the increase in the scope of contracts covered by regulation could potentially increase the level of legal challenge. However since predictive data is not available on the potential frequency of legal challenge, the value of the remedies that may be sought, or the likely judicial outcome, the impact of these Articles and their provisions cannot be quantified in financial terms.

#### **Articles 70 and 71 – Amendments**

83. The purpose of these mandatory Articles is to remove those procurements covered by the New Directive from the scope of the Classic and Utilities Directives.

84. Except to the extent already discussed under Scope above, there is no anticipated cost impact associated with this change

#### **Conclusion**

85. The mandatory nature of the New Directive imposes some significant additions and amendments to be made to the UK procurement regime. In some cases, there are choices in implementing, and MOD's role has been to identify, consult and then decide on those choices which represent the best policy options for the UK

86. BIS guidance encourages systematic assessment of impacts over a suggested £5M threshold, avoidance of “gold-plating” and taking a minimalist approach to implementation. MOD has adhered to BIS guidance and selected the options that represent the least cost and greatest benefit within the confines of the mandate laid down in the New Directive. However, it has not been possible to monetise the impact of the New Directive, with the exception of familiarisation costs, as we are unable to foretell the impacts with any precision and no suitable data is therefore available.

#### **Impact Assessment Part 4 – Checklist of Specific Impact Tests**

##### **Economic Tests**

##### **Competitive assessment**

87. The New Directive, as with other EU procurement Directives, is intended to facilitate greater competition by opening markets and specifically by providing deterrents against and sanctions for breaches of the rules. Indeed, one of the key aims of the New Directive is to open the majority of defence procurements to competition, enabling more efficient acquisition of military or security capability.

### **Small firms impact test**

88. In common with prime contractors, small firms will benefit from greater visibility of advertised opportunities within the European defence and security market. Though the UK has chosen not to transpose the permissive sub-contracting provisions, for the reasons stated in the main text of the consultation documents, it has transposed the least burdensome option under Article 21 (3), which gives contracting authorities/entities the option of requiring award to third parties, thus creating potential opportunities for SMEs, where it is appropriate to do so.

### **Legal aid impact test**

89. As the New Defence Directive primarily affects companies, there is no anticipated impact on Legal Aid.

### **Other economic issues**

90. There is a possibility that the new rules could generate receipts for Government, as a result of civil financial penalties on contracting authorities/entities. In one sense, this is not new money, but rather public money changing hands from one public body to another. However, the number of civil financial penalties and the corresponding number of receipts is expected to be very low (i.e. isolated instances and possibly few or none). The value of receipts is entirely unpredictable.

## **Sustainability Tests**

### **Sustainable development**

91. The New Directive replicates many of the provisions in the Classic Directive, including:
- a. The definition of “technical specifications” includes environmental performance levels;
  - b. Technical specifications may be drawn by the contracting authority/entity in terms of performance or functional requirements which may include environmental characteristics;
  - c. Selection criteria for works and service contracts may include minimum standards for environmental management measures that the economic operator is able to apply when performing the contract, but only where it is necessary for the performance of that contract; and
  - d. Conditions for performance of contracts may take environmental considerations into account provided they are compatible with EU law.
92. The impacts of the New Directive cannot be monetised, as discussed, due to the unpredictability of facts and data on potential future remedies cases. The impacts, if any, are more likely to be economic than social or environmental. However, the tools in the New Directive should allow contracting authorities/entities to comply with the five Sustainable Development principles:
- a. Living within environmental limits;
  - b. Ensuring a strong, healthy and just society;
  - c. Achieving a sustainable economy;
  - d. Promoting good governance; and
  - e. Using sound science responsibly.

### **Carbon assessment/other environment**

93. There are no environmental characteristics to this policy proposal and therefore these tests are not relevant.

## **Social Tests**

### **Health impact assessment**

94. The proposal should have no impact on health, well-being or health inequalities.

### **Race equality, disability equality, gender equality, human rights**

95. The New Directive replicates many of the provisions in the Classic Directive, including:
- a. The definition of “technical specifications” includes accessibility for disabled persons;
  - b. There is also a special provision for reserved contracts that allows us to “reserve” the contract for “supported factories or businesses” where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market; and
  - c. Conditions for performance of contracts may take social considerations into account provided they are compatible with EU law.
96. The policy is derived from EU law, via the European Commission, and so should be compliant with other EU laws on race, disability, equality and human rights. Public consultation has not produced any evidence that suggests the proposed policy has any bearing on race equality, disability equality, gender equality or human rights. The policy improves the rights of all businesses in tendering for public contracts, and is not skewed in favour of or against any particular group.

### **Rural proofing**

97. The proposal should have no impact in different rural areas

## Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

### Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

**Basis of the review:** [The basis of the review could be statutory (forming part of the legislation), it could be to review existing policy or there could be a political commitment to review];

**Review objective:** [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]

**Review approach and rationale:** [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]

**Baseline:** [The current (baseline) position against which the change introduced by the legislation can be measured]

**Success criteria:** [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]

**Monitoring information arrangements:** [Provide further details of the planned/existing arrangements in place that will allow a systematic collection of monitoring information for future policy review]

**Reasons for not planning a PIR:** [If there is no plan to do a PIR please provide reasons here]

The Commission is committed to a review of the implementation of the Defence & Security Directive by 21 August 2016, to evaluate the extent to which the objectives have been achieved. The UK will be a full participant in the review, using MOD's established statistical reporting regime and its engagement with key Government and industrial stakeholders to inform the UK's contribution. In common with OGC's approach to previous directives the MOD does not therefore plan to run a separate PIR.