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PUBLIC PROCUREMENT

EU GUIDELINES 2006

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Public Procurement

13.10.2005 - **New Standard forms for the publication of procurement notices**

Total public procurement in the EU – i.e. the purchases of goods, services and public works by governments and public utilities - is estimated at about 16% of the Union's GDP or €1500 billion in 2002. Its importance varies significantly between Member States ranging between 11% and 20% of GDP. The opening up of public procurement within the Internal Market has increased cross-border competition and improved prices paid by public authorities. There remains potential for significant further competition in procurement markets and for further savings for taxpayers.

Read more ...

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Public Procurement

Introduction

Total public procurement in the EU – i.e. the purchases of goods, services and public works by governments and public utilities - is estimated at about 16% of the Union's GDP or €1500 billion in 2002. Its importance varies significantly between Member States ranging between 11% and 20% of GDP. The opening up of public procurement within the Internal Market has increased cross-border competition and improved prices paid by public authorities. There remains potential for significant further competition in procurement markets and for further savings for taxpayers.

Public procurement is subject to Community and international rules although not all public procurement is subject to these obligations. Under these rules public sector procurement must follow transparent open procedures ensuring fair conditions of competition for suppliers. Some purchases (e.g. military equipment for the defence sector) are however, excluded and purchases below thresholds must respect the principles of the Treaty only.

The legislative package of public procurement Directives, approved in 2004 by the European Parliament and the EU's Council of Ministers, will help simplify and modernise procurement procedures, for example by facilitating electronic procurement in the public sector.

The correct and rapid implementation of the new Directives should help open up public procurement, improve the functioning of the Internal Market and enable the EU to reap the full benefits from an enlarged Internal Market.

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Citizens Signpost Service

Important legal notice

English (en)

Welcome to the Citizens Signpost Service.

On the move in Europe and wondering about your rights? Problem with car registration or obtaining social security cover in another EU country?

The CSS is aimed at EU citizens who encounter problems with mobility in the European Internal Market.

The CSS is an advisory service which gives guidance and practical advice to citizens on specific problems they encounter in the EU and its Internal Market.

The service is free.

The reply provided by multilingual legal experts is personalised, objective, and quick. They experts clarify the relevant rules. They direct the citizen towards the body which can best help solve the problem. They advice on how to assert the citizen's rights and obtain redress.

Replies are given by phone or e-mail in the language requested by the citizen (one of the 20 official languages).

The service operates in conjunction with Your Europe website which offers general guides and country-specific factsheets with information on citizens'rights.

To know more about the Citizens Signpost Service, please click "About this site".

To submit your enquiry

Your Europe

last update: 02-09-2005

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Public Procurement

News

Archive

2005

06.12.2005 Public procurement: new Commission initiatives on more open and efficient defence procurement (IP/05/1534)

17.11.2005 Commission proposes clarification of EU rules on public-private partnerships (IP/05/1440)

Speech of C. McCreevy: "Public-Private Partnerships – Options to ensure effective competition"

13.10.2005 New Standard forms for the publication of procurement notices

15.07.2005 Infringement procedures against Germany, Spain, Greece, Italy, Portugal and France

Commission provides assistance on implementation of new “e-procurement” rules

12.05.2005 Green Paper on Public Private Partnership: Report on public consultation

27.04.2005 Commission takes further action on Greek legislation excluding certain companies from public contracts

19.04.2005 Defence Procurement - Public consultation - Contributions

22.03.2005 Commission acts on Greek legislation excluding certain companies from public contracts

16.03.2005 Commission acts to enforce EU law in Spain, UK, Portugal and Italy

Four further Commission decisions on public procurement infringement cases in Germany and Italy

19.01.2005 The Commission has issued an actionplan for electronic public procurement

14.01.2005 Commission acts to enforce EU law in Germany, Greece, Spain, Italy, Austria, Portugal and Finland

13.01.2005 Implemention of the new directives (Legislative package) - Legal acts

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Public Procurement

SIMAP and TED

- SIMAP
- TED - Tenders Electronic Daily, the EU database of procurement contracts advertised in the Official Journal - S Series

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Consultations

- **Consultations**
- **Green Papers**

Consultations

13.09.2004	How Europe can make the most of electronic procurement
14.04.2004	Consultation with the contracting authorities prior to revision of the "remedies" Directives in the field of public procurement
11.03.2004	Directives on review procedures: results of the consultations
04.02.2003	Commission extends the on-line consultation on the operation of remedies in the area of public procurement until 29 February 2004
27.10.2003	Commission consults on how rejected bidders can challenge decisions
24.02.1999	Commission launches consultation round on concessions (24.02.1999)

- Draft interpretative communication
- Press release

Green Papers

23.09.2004	Defence Procurement		COM(2004)608
04.05.2004	Public Private Partnerships		COM(2004)327
21.05.2003	Services of General Interest		COM(2003)270
27.11.1996	Public procurement in the European Union - Exploring the Way Forward		es da de el en fr it nl pt fi sv
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Public Procurement Legislation

- **New Directives (Legislative Package)**
- **New directives (Legislative package) -Implementation**
- **Current Directives**
- **Directives on remedies**
- **Standard Forms Directive and CPV regulations**

New Directives (Legislative Package)

- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (30.04.2004)
  - Corrigendum da de el en es fr it nl pt fi sv
- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004)
  - Corrigendum da de el en es fr it nl pt fi sv
- Commission welcomes adoption of modernising legislation (03.02.2004)
- Commission welcomes conciliation agreement on simplified and modernised legislation (03.12.2003)
- Agreement on public procurement directives (2.12.2003)
- Proposal for a directive on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (10.05.2000)
- Proposal for a Directive on coordinating the procurement procedures of entities operating in the water, energy and transport sectors (10.05.2000)
- Commission proposes to simplify and modernise the legal framework (10.05.2000)

Implementation of the new directives (Legislative package) - Legal acts

- **Commission Regulation (EC) No 1564/2005** of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council
  cs da de et el en es fr it lv lt hu mt nl pl pt sk sl fi sv

- **Commission Directive 2005/51/EC** of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European

Parliament and the Council on public procurement
cs da de et el en es fr it lv lt hu mt nl pl pt sk sl fi sv

- **Decision 2005/15/EC** on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (7.1.2005)
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Current Directives

- Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively
- Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts
- Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts
- Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts

Consolidated Texts

- Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts
- Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts
- Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts

Directives on remedies

- Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

Standard Forms Directive and CPV regulations

- Commission Regulation (EC) No 2151/2003 of 16 December 2003 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV)
- Commission Directive 2001/78/EC of 13 September 2001 on the use of standard forms

in the publication of public contract notices

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Last update on 03-01-2006

IP/04/150

Brussels, 3rd February 2004

Public procurement: Commission welcomes adoption of modernising legislation

The European Commission has welcomed the definitive adoption by the EU's Council of Ministers and the European Parliament of the legislative package simplifying and modernising the public procurement Directives and adapting them to modern administrative needs. The Council has formally endorsed the text agreed in December 2003 in a conciliation procedure between its representatives and those of the Parliament (see IP/03/1649). The Parliament formally approved the conciliation text at its plenary session in Brussels on 29th January. The Directives, some of which were adopted in the 1970s and last updated in the early 1990s, impose EU-wide competitive tendering for public contracts above a certain value, transparency and equal treatment for all tenderers to ensure that the contract is awarded to the tender offering best value for money. The package of amendments was proposed by the Commission in May 2000 (see IP/00/461). It will reduce red tape, set out clearly, on the basis of European Court of Justice case-law, how social and environmental criteria can be applied in awarding contracts and ensure that contracting authorities and bidders can save time and money by using new technology to manage the tendering process. The amended Directives will shortly be published in the EU's Official Journal and will then need to be written into national law within 21 months of publication.

Internal Market Commissioner Frits Bolkestein said: "These reforms of public procurement rules are crucial for Europe's competitiveness. The modernisation introduced by the legislative package will help build on the already huge savings the existing Directives have delivered. The package brings in simplifications and changes that those at the sharp end – contracting authorities and bidders - have asked for. Taxpayers will win twice. Electronic procurement and simpler procedures will bring administrative costs down. And more cross-border competition for contracts will cut prices."

Objectives of the legislative package

The legislative package, which was based on extensive consultations with contracting authorities and businesses, has two main objectives. The first is to simplify and clarify the existing Directives. The second is to adapt them to modern administrative needs, for example by facilitating electronic procurement and, for complex contracts, by introducing more scope for dialogue between contracting authorities and tenderers in order to determine contract conditions.

With the objective of enhancing transparency in the award process and of combating corruption and organised crime, the legislative package also includes measures designed to make for greater clarity in the criteria determining the award of the contract and the selection of tenderers.

A study published today by the Commission (see IP/04/149) shows that public procurement accounts for over 16% of the Union's GDP and that the existing public procurement Directives have increased cross-border competition and reduced by around 30% the prices paid by public authorities for goods and services. The study also provides evidence that the implementation of the measures in the new legislative package will deliver further gains.

The full texts of the legislative package as definitively adopted will be made available at:

http://europa.eu.int/comm/internal_market/en/publproc/general/2k-461.htm

IP/03/1649

Brussels, 3rd December 2003

Public procurement: Commission welcomes conciliation agreement on simplified and modernised legislation

The European Commission has welcomed the agreement reached in Brussels on 2nd December by representatives of the European Parliament and the EU's Council of Ministers, after a successful conciliation procedure, on the legislative package simplifying and modernising the public procurement Directives. The Directives impose competitive tendering for public contracts, transparency and equal treatment for all tenderers to ensure that the contract is awarded to the tender offering best value for money. The package of amendments was proposed by the Commission in May 2000 (see IP/00/461). The main point at issue was the circumstances in which contracting authorities could take social and environmental criteria into account in attributing contracts. This has now been resolved, on the basis of recent case law from the European Court of Justice. Conciliation procedures take place when the European Parliament, the Council and the Commission have been unable to reach full agreement on a Commission legislative proposal but where enough common ground exists to suggest that such agreement might be achievable. The agreement reached by the conciliation committee will now need to be ratified by a plenary session of the Parliament and by the Council.

Internal Market Commissioner Frits Bolkestein said: "Europe needs these reforms of public procurement rules and I trust the agreement will now be endorsed by the Parliament and the Council. Public procurement accounts for around 14% of the Union's GDP, so modernising it and opening up procurement markets across borders is crucial to Europe's competitiveness, to giving taxpayers high quality and good value for money and to creating new opportunities for EU businesses. The compromise reached over award criteria is an acceptable one which allows national authorities to use appropriate and objective environmental and social criteria transparently for the public good, without creating scope for arbitrary and unfair contract awards based on issues unconnected with the works or services to be provided."

Objectives of the legislative package

The legislative package, which was based on extensive consultations with contracting authorities and businesses, has two main objectives. The first is to simplify and clarify the existing Directives. The second is to adapt them to modern administrative needs, for example by facilitating electronic procurement and, for complex contracts, by introducing more scope for dialogue between contracting authorities and tenderers in order to determine contract conditions. The package also excludes telecommunications, a sector now subject to effective competition, from the scope of the legislation.

With the objective of enhancing transparency in the award process and of combating corruption and organised crime, the legislative package also includes measures designed to make for **greater clarity in the criteria determining the award of the contract and the selection of tenderers**. It was principally over some of these measures and in particular the ways in which social and environmental criteria can be taken into account, that the conciliation procedure was necessary.

Social and environmental criteria

The text agreed takes current law as interpreted by the Court of Justice – in particular in the "Finnish buses" case (C/513/99, see European Court of Justice press release CJE/02/73) as its starting point. The Court ruled that the contracting authority must award a contract to the tenderer whose tender is the most economically advantageous, but that it may nevertheless take **environmental criteria (**in the Finnish buses case, exhaust emissions and noise levels) into account when deciding which bids to take into consideration (i.e. the awardcriteria), provided that those criteria are expressly mentioned in the contract documents or the tender notice, are connected with the subject-matter of the contract, do not give the contracting authority an unrestricted freedom of choice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

The text would also allow contracting authorities to require specific environmentally friendly production methods - such as organic production for foodstuffs for schools.

Under the compromise text agreed, similar conditions would be attached to the use of **social criteria** – in practice, that would mean, for example, that contracting authorities could take into account, for the construction of a public building, accessibility criteria for people with disabilities. In addition the text provides the possibility of reserving contracts for sheltered workshops or sheltered employment programmes for disabled people

The text would allow companies who have not complied with EU legislation in economic, social or environmental fields to be excluded from tendering processes.

Electronic signatures

The text agreed encourages the use of electronic signatures and allows Member States to require that electronically transmitted tenders be accompanied by the electronic equivalent of handwritten signatures, that is, a "qualified electronic signature". The integrity of data and the confidentiality of tenders are provided for elsewhere in the Directives and do not depend on the choice of whether to require electronic signatures and in which form.

C/03/352
Brussels, 2 December 2003

15379/03 (Presse 352)

Parliament-Council conciliation committee

Agreement on public procurement directives

The Council and the European Parliament meeting this evening in the Conciliation Committee[1] reached an agreement on two proposals:

- Directive on coordination of procedures for the award of public supply contracts, public service contracts and public works contracts ("classical" directive), and
- Directive on coordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors ("utilities" directive).

This agreement must be now endorsed by the Parliament (majority of votes cast) and the Council (qualified majority voting procedure) for the Directives to be adopted.

In the context of a global compromise package, the Conciliation Committee settled all the questions arising from the amendments adopted by the European Parliament in second reading. The agreement includes notably:

On both Directives:

♦ *Award criteria*

This has been the core of the conciliation. The solution agreed on is based on the principle that the only criteria retained are those which can be used efficiently and objectively because they are linked to the subject matter of the contract. The agreement is focused on the following elements:

- A possibility for Member States to reserve certain contracts for "sheltered workshops";
- The non-respect of the Directives 2000/78/EC and 76/207/EEC on equal treatment of workers may be considered as an offence concerning the professional conduct of the economic operator concerned;
- The production methods used by economic operators can be taken into account by the contracting authority in the definition of environmental requirements contained in the technical specifications of the contract;
- The contracting authority should, whenever possible, to lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. The technical specifications should be clearly indicated, so that all tenders know what the requirements established by the contracting authority cover.

[1] The Conciliation Committee has 30 members: 15 members of the European Parliament and 15 representatives from the Council. The meeting was co-chaired by Mrs. Charlotte Cederschiold, Vice-President of the European Parliament and Mr. Rocco Buttiglione, Italian Minister of European Affairs.

Internet: http://ue.eu.int/
E-mail: press.office@consilium.eu.int

- *Exclusion of electronic auctions for some contracts on works and complex services*

The agreement reached provides that some contracts on works and complex services, such as those involving an intellectual in -put, can be excluded from electronic auctions.

- *Monitoring mechanisms*

Recognising the importance of ensuring the effective implementation of the future legislation, the Council and the European Parliament agreed to allow the Member States to appoint or establish an independent body for ensuring an effective, available and transparent implementation of these legislation.

On the horizontal directive:

- *Exclusion of contracts for the purchase of schoolbooks with fixed prices*

A total exclusion of schoolbook contracts would also exclude competition on other issues than the price, such as payment terms and delivery. This idea was finally rejected by the Conciliation Committee as considered opposed to the whole ethos of these proposals.

The solution retained is that in the case of public service contracts, the award criteria should not affect the application of national provisions on the remuneration of certain services such as those setting out a fixed price for school books. Where the price is determined by regulatory means, the contracting authority evaluates tenders on the basis of other criteria than the price.

- *Qualification systems*

Finally the Conciliation Committee decided not to introduce specific rules on qualification systems.

On the utilities directive:

- The most important point agreed regards the requests to the Commission to intervene in cases where third countries do not comply with international labour standards in the field of procurement.

IP/00/461

Brussels, 10 May 2000

Public procurement: Commission proposes to simplify and modernise the legal framework

The European Commission has adopted a package of amendments to simplify and modernise the public procurement Directives. These Directives impose competitive tendering for public contracts, transparency and equal treatment for all tenderers to ensure that the contract is awarded to the tender offering best value for money. Contracts for public works and for purchases of goods and services by public authorities and public utilities account for around 14% of the Union's GDP. The Lisbon European Council acknowledged the importance of this legislative package for the competitiveness of European companies, effective allocation of public resources, economic growth and job creation, and recommended its adoption and implementation by 2002.

Internal Market Commissioner Frits Bolkestein said: "Public procurement in the Union represents the equivalent of half the German economy, some €1 000 billion. This package of amendments to the existing rules will open up all the benefits of the Single Market to guarantee the competitiveness of companies, best value for money for taxpayers and improved quality of public services. These amendments will enable purchasers and suppliers to use computerised resources for all public procurement procedures and so derive maximum benefit from electronic commerce. The Commission has done its utmost to simplify these rules - the Council and the European Parliament should do as much."

The legislative package adopted today has two objectives. The first is to simplify and clarify the existing Community Directives, and the second is to adapt them to modern administrative needs in an economic environment that is changing as a result of things such as liberalisation of telecommunications or the transition to the new economy. With the object of enhancing transparency in the award process and of combating corruption and organised crime, the legislative package also includes measures designed to make for greater clarity in the criteria determining the award of the contract and the selection of tenderers.

Simplification: making the texts clearer and more comprehensible

Simplification is an essential feature of the legislative package. The aim is to make the Directives easier to understand for everybody who is involved in public procurement, either as a buyer or as a supplier. The following examples illustrate this simplification effort:

- The three old Directives, covering supplies, services and works, are to be consolidated and recast in a single coherent text, which should make it possible to reduce the number of articles by nearly a half.
- The new provisions are presented in a more user-friendly manner: they have been set out in such a way as to reflect the normal order of an award procedure.

- The new structure and the new provisions are designed to guide users through all the stages of the award procedure.
- The thresholds which determine the application of the new instruments are also to be simplified and will be expressed in euros instead of special drawing rights.

Modernisation and flexibility: award procedures adapted to the needs of a modern administration and the new economy

One of the recurring demands during the consultations conducted by the Commission in preparing the proposals it adopted today was the modernisation of award procedures to adapt them to the administrative requirements of the 21st century. The new proposals accordingly relax some of the provisions which were considered too inflexible to achieve the objective of best value for money. The following examples illustrate the adjustments proposed:

- For complex contracts, new procurement arrangements would allow a "dialogue" between awarding authorities and tenderers to determine the contract conditions; the new procedure would offer guarantees that the principles of transparency and equal treatment would not be adversely affected by this "dialogue".
- In order to enable administrations to benefit from economies of scale flowing from a long-term procurement policy and to guarantee security of supply and the necessary flexibility for recurring purchases, the new proposals are more flexible in the approach to standard-form contracts.
- Public-sector buyers would enjoy more flexibility in defining the purpose of the contract: under the new provisions public-sector purchasers could specify their requirements in terms of performance and not only in terms of standards.

Modernisation also means adjusting procedures to an economic environment that is changing. Although the present Directives were updated in the 1990s, they do date back to the 1970s. A response was therefore needed to changes resulting from things such as the information technology revolution or the liberalisation of telecommunications. The following examples illustrate this modernisation:

- The use of information technologies in public procurement is a vital factor in helping the public authorities to adapt to the changing environment and to make for more effective procurement. For this reason the legislative package is designed to encourage the public authorities to make greater use of electronic means, for instance by shortening the time taken to publish notices or the tendering period in certain circumstances.
- As a result of liberalisation and effective competition in telecommunications, the new provisions exclude this sector from the directive which used to apply to it.
- In anticipation of similar developments in other sectors, such as electricity or water, the legislative package provides a mechanism for excluding them once liberalisation and effective competition are a reality.

The Commission’s proposals derive directly from the action plan it adopted in 1998 to redynamise European public procurement policy (see IP/98/233). This action plan was adopted after the Commission had conducted wide-ranging consultations of the principal political and economic actors which highlighted the need to simplify and clarify the present legal framework while maintaining its stable foundations.

Public Procurement

Key Documents

- **Thresholds (22.12.2005)**
  - New thresholds enter into force from 1st January 2006. For the member States that have transposed the directives 2004/17/EC and 2004/18/EC these are laid down in Regulation 2083/2005 of 19 December 2005.
    cs da de et el en es fr it lv lt hu nl pl pt sk sl fi sv
  - The corresponding values in the national currencies other than euros of these thresholds are given in a Communication which can be consulted here:
    cs da de et el en es fr it lv lt hu nl pl pt sk sl fi sv
  - New values for the thresholds laid down by the outgoing legislation (Council Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC) have also been published and can be consulted at the following link:
    cs da de et el en es fr it lv lt hu nl pl pt sk sl fi sv
  - These thresholds will be applied, from 1st January 2006 until 31 January 2006 in the Member States that have not transposed directives 2004/17/EC and 2004/18/EC.

- **Buying green: how public authorities can help save the environment and taxpayer's money (26.10.2004)**
  - Buying green! A Handbook on environmental public procurement
  - Press release

- **Communication from the Commission - List of services regarded as excluded from the scope of Directive 93/38/EEC (pursuant to Article 8 thereof) (30.04.2004)**
  da de el en es fr it nl pt fi sv

- **Interpretative communication of the commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (15.10.2001)**
  - Communication
  - Press release
  - Frequently asked questions

- **Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental**

considerations into public procurement (05.07.2001)

- Communication
- Press release
- Frequently asked questions

- **Commission confirms EU rules apply to concessions to run public services (04.05.2000)**
  - Communication
  - Press release

- **Communication from the Commission - List of services regarded as excluded from the scope of Directive 93/38/EEC (pursuant to Article 8 thereof) (03.06.1999)**
  - Communication

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Last update on 03-01-2006

Environment

English

Green Public Procurement

Guidelines

- Guidelines on Greening Public Procurement by using the **Leaflet**, **Eco-label and GPP**
- **Environmental Database**
- **Handbook on green public procurement**

Ecolabels

European Eco-labels and national ecolabels can be very use authorities because they provide authorities with technical spe can be cut and pasted into the tender documents.

However, this can only be done with ecolabel specifications wh established through large stakeholder consultation procedures sufficient public, transparent and non-discriminatory character

According to the new public procurement directives informatio labels is permitted to be used in procurement procedures if th following conditions:

- the specifications are appropriate to define the characte supplies or services that are the object of the contract,
- the requirements for the label are drawn up on the basis information,
- the labels are adopted using a procedure in which all sta government bodies, consumers, manufacturers, distribu environmental organisations can participate, and
- they are accessible to all interested parties.

Also, contracting authorities cannot require the purchased pro bear the ecolabel as such, but they can only request complian with underlying technical specifications.

The Ecolabel will be allowed as a way of proving compliance w specifications. But, of course, contracting authorities should al complying with the underlying technical specifications but not

In example, the European "Flower" is awarded by an indepenc only to products that meet a set of strict environmental and p that take into account the full life cycle of the product. These with full stakeholder participation and cover some twenty proc as textiles, paints, paper products, detergents, household app several other new product groups under development. The sch

covers services, and criteria for the first service group, tourist
are already available.

The Commission has issued "Guidelines on greening public prc
using the European eco-label criteria" (November 2001). This
informs public and private procurement officers about the poss
"greening" their procurement via the European eco-label and i
respecting current European legislation related to public procu

Below you can download a document entitled "Guidelines on g
procurement by using the European eco-label criteria" (Novem
of the official EU languages.

es da de el en fr it nl pt fi sv (**pdf** ~26K exce

Environmental Product database

This data base groups together in one web-site information on
product criteria, such as those used by eco-labelling and envir
declaration schemes, in order to provide corporate and public
background information on what criteria are relevant for a par

It is aimed at providing environmental information on 100 Pro
groups. It contains layered information (for example: Office pı
copying paper). It contains basic information, such as: is ther
what are the main environmental aspects, what could be inclu
specifications? It is aimed at both corporate and public purcha

The database can be consulted at the following address:
http://europa.eu.int/comm/environment/green_purch

Handbook on green public procurement

The principal aim of the **Handbook** cs es da de el en fr it
pl pt sk sl sv is to explain in concrete and non legal terms
use of best practice examples- how public purchasers can inte
environmental considerations into public procurement procedu
it clarifies the legal possibilities created by the new public proc
directives which allow for environmental considerations in tech
specifications, selection and award criteria and contract perfor
takes into account the most recent jurisprudence of the Court
field.

The Handbook is a strong promotional tool and is primarily ain
authorities at all administrative levels all over the European Uı
expected that, by clarifying the existing legal possibilities, "gre
procurement will become more attractive to contracting autho
annually spend between 14 and 16 % of EU GDP.

It should be of particular use to local authorities, as they do nı
access to a good range of legal and environmental advice.

The Handbook is a working document of the Commission servi
translated in all official languages and published in book forma
It will be possible to **download it** from the EUROPA website.

- Press Release de en fr (Word format)

Last update: Friday, December 23, 2005

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Environment

English

Welcome

Welcome to the European Union Eco-label Homepage

The Flower is the symbol of the European Eco-label – your guide to greener products and services.

It is a voluntary scheme designed to encourage businesses to market products and services that are kinder to the environment and for European consumers - including public and private purchasers - to easily identify them.

You can find the Flower throughout the European Union as well as in Norway, Liechtenstein and Iceland. The European Eco-label is part of a broader strategy aimed at promoting sustainable consumption and production.

New pages

- **Green events** - a new page on how the EU Eco-label contributes in greening major sports events
- **Fairs** - information on the Eco-label at fairs for consumers and producers
- **GPP** - link to our new GPP web page
- **Heat pumps** - work on the new product group criteria development
- **Printed paper** - work on the new product group criteria development
- **Revision** of the Eco-label scheme you can **find here** the interim report of the evaluation project

Latest News

December 2005

- New web-based tool for textile applicants
- 2005 campaign promoting the Flower in France
- Promotion of the EU Eco-label at Fairs

November 2005

- European Quality and Flower Week in Poland - conference and promotion of the EU Eco-label
- Australian wool adopts the EU Eco-label

October 2005

- Awareness Workshop on the Implementation of the Eco-label Scheme
- Italian lab ready to perform Eco-label tests for appliances
- A tool for Green Public Purchasing in the Netherlands

September 2005

- Opening session on the Eco-label for campsite service at the Camp Ground fair in Friedrichshafen
- Workshop on "the EU Eco-label and the development of sustainable tourism:operational implementation in tourist accommodation services"
- Mourne launches new sustainable tourism manual for business

August 2005

contracted which is being carried out by an external consultant on both the EMAS (part 1) and Eco-label schemes (part II).

- Fashion retailer H&M has been awarded the Flower!
- Best labelling options
- Permanent European Eco-label museum

July 2005

- Promoting the Flower at the Eco-Efficienfy Biennal in Turin in May 2005
- Award ceremony in Finland for the first Flower-labelled lubricant in Europe
- First Eco-label awards for the new Campsites services

June 2005

- Promotion of the EU Eco-label at PLMA fair
- Flower Week campaign participates in ACT2005

May 2005

- Eco-labelled shoes in Spain
- Tourism convention in Turin

April 2005

- Autogrill - portrait of a buyer of eco-labelled products
- First hotel to be awarded the Flower in Portugal

March 2005

- Win a weekend at an eco-labelled hotel!
- "Flowering of eco-fashion" gets 55 million viewers
- XENIA fair for tourist accomodation

February 2005

- First Flower licences in Hungary, Poland, Lithuania and Czech Republic
- Meet the Eco-label team at the ITB and BIT tourism fairs

January 2005

- More than 225 companies now have the Flower

- Lubricants criteria adopted

December 2004

- Tourist accommodation services: growing success
- The Flower week in Finland

November 2004

- LIFE "ShMILE" project launched!
- Project to promote the Eco-label for footwear

October 2004

- European Flower week in Belgium
- Euro Info Centre Network and first Eco-label promotional campaign

September 2004

- Canadian company Cogent Environmental Solutions awarded Flower for "ECOgent"

August 2004

- Buying green - Handbook on environmental public procurement now available

[**Read all the news**]

Last update: 26/12/2005

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The use of the European Eco-label in Green Public Procurement approaches

European Commission – DG Environment

With the support of GPP expert from BIO Intelligence Service

September 2005

1

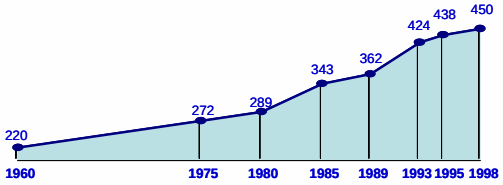
EU Eco-label and GPP

- Why is it worth doing green public procurement (GPP)?
- Why is it easy to do it with the EU Eco-label?
- Practically, how can a purchaser use the EU Eco-label in a call for tender?
- Success stories

2

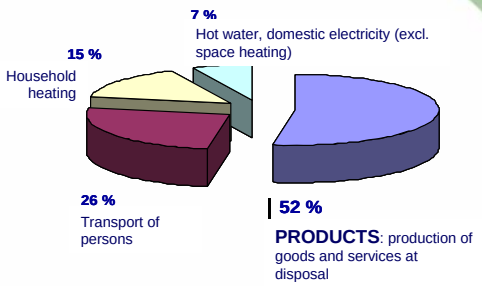
Introduction: increase of environmental damage and influence of products

- Our production, purchasing and consumption modes lead to an increase in environmental damage.
- Two examples:



Evolution of the production of household waste in France (kg/inhab/yr)

Source : ADEME 2003



Repartition of greenhouse gases emissions in France from different economic sectors

Source : ADEME 2003

3

What is Green Public Procurement ?

Basing all purchasing decisions and allocation of contracts on environmental criteria along with other criteria such as price and quality

4

What is the importance and the role of public procurement ?

- Public procurement represents **16% of EU's GDP** – over 1 000 billion Euro
  - Public procurement plays an important role in the development of the market of products with reduced environmental impacts
  - Public authorities have to set the example in this field
- Publicly purchased items come from every sector of the economy
  - "From pencils to power stations"

5

How do Public Procurement Directives allow to take environmental considerations into account in call for tenders ?

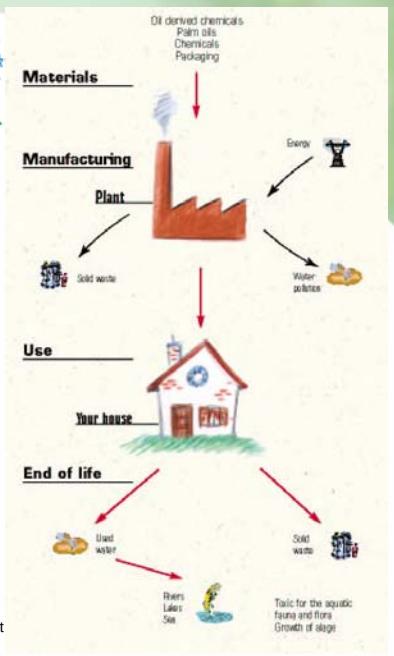
- In March 2004, the Council and the European Parliament adopted new public procurement directives clarifying how environmental considerations could be integrated in the call for tenders.
- Public purchasers can take into account these environmental elements when buying products, services or works.
- Generally speaking, environmental considerations can be placed at the following stages of a call for tenders procedure:
  - Definition of the subject of the contract
  - Technical specifications
  - Selection of the candidates
  - Award of the contract
  - Execution of the contract

(more information on http://europa.eu.int/comm/environment/green_purchasing/html/general/overview_en.cfm)

6

The easiest way to do Green Public Procurement: use the European Eco-label

- The EU Eco-label is an official label managed by the European Commission which certifies that a product or service is of good environmental quality and guaranteed technical performance
- An eco-labelled product generates less environmental impacts on air, water, soil and human health
- Throughout its life cycle, from raw material extraction to end of life ("from cradle to grave")
- Added value: usage cost generally lower than average



Example: life cycle of a detergent

What could be the environmental benefits linked to the development of EU Eco-labelled products ?

- With only a modest 5% market share for EU Eco-labelled products in the European Union, the savings compared to typically performing versions (standard product) would be substantial :

RESOURCE SAVED /AVOIDED PER YEAR	Amount saved per year
• **Electricity**	**14,700,000 kWh**
• **CO_2 produced from energy use**	**9,318,000 tonnes CO_2**
• **Water use**	**12,285,000 million litres**
• **Reduced use of hazardous substances**	**13,800 tonnes**
• **Material savings (other than hazardous substances)**	**530,700 tonnes**
• **Reduced discharges to water**	**30,400 tonnes COD**
• **Reduced air pollution**	**17,500 tonnes pollutants**

8

Source: « The Direct and Indirect benefits of the Eco-label », AEAT in Confidence, 2004

The EU Eco-label can be used to do green public procurement

- Examples of successful call for tenders:
  - "Communauté urbaine de Dunkerque", France: use of some EU Eco-label criteria in a call for tender of all-purpose cleaners for the cleaning of public premises
  - City of Angers, France: progressive use of the whole set of EU Eco-label criteria for all-purpose cleaners in a 3-year period of call for tenders for the cleaning of public premises
  - French green building programme "HQE" recommends the use of eco-labelled paints and varnishes for new public buildings
  - …

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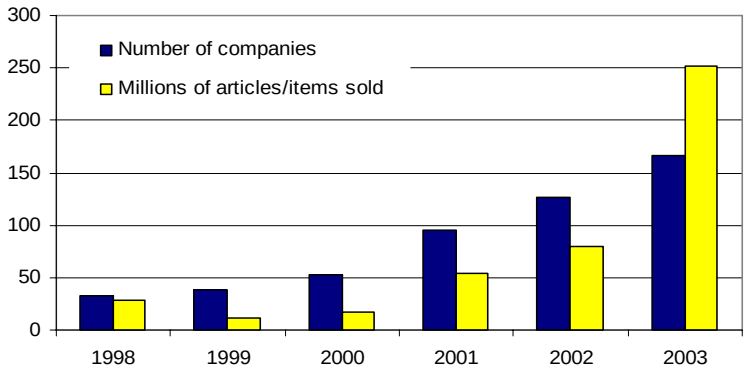
What is the size of the market of European Eco-labelled products

- European Eco-Label
  - 260 holders as of September 2005
  - About 2 500 articles split in 23 product groups



10

What are the advantages of using the EU Eco-label in GPP approaches? (1/3)

➔ ***You do not have to be an expert in environmental issues to do green purchasing***

- The EU Eco-label is an official European recognition of the ecological quality of a product
- The requirements for the award of the EU Eco-label relate to both technical performance and environmental characteristics of the product
- The EU Eco-label covers 23 product and service groups, including products bought by public purchasers; cleaning products, office equipment, DIY, tourist accommodations…
- European consensus on the scientific reliability of the criteria

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What are the advantages of using the EU Eco-label in GPP approaches? (2/3)

➔ ***You are sure of using a scheme that is fully compatible with the Internal Market Principles***

- The European Eco-label scheme is
  - Public, transparent and non discriminatory
  - Valid and identical throughout the European Union and EEA countries
  - Open to overseas products (guarantee to offer equal opportunities to all competitors)

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What are the advantages of using the EU Eco-label in GPP approaches? (3/3)

➔ ***You directly know the minimum number of companies capable of meeting your requirements.***

- On the Green Store : www.eco-label.com

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Practically, how can the European Eco-label criteria can be used in a public call for tenders ? (1/2)

- In the **elaboration of the technical specifications**
  - In order to define the characteristics of the products or service considered,
  - you can directly cut and paste the relevant EU Eco-label criteria into the technical specifications
- The EU Eco-label will be allowed as a way of proving compliance with the specifications.

- Remark: Contracting authorities cannot require tenderers to be registered under a certain eco-label scheme.

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Practically, how can the European Eco-label criteria can be used in a public call for tenders ? (1/2)

- Use of variants:
  - In order to have more flexibility, use variants when drafting the technical specifications, e.g.:
    - Variant 1: no environmental specification
    - Variant 2: some EU Eco-label criteria
    - Variant 3: all EU Eco-label criteria
- At the end of the call for tenders, the choice between standard solutions and variants, between different variants and within a given category of offers (e.g. within a given variant) must be made in accordance with your award criteria (obligatorily the most economically advantageous of the offers).

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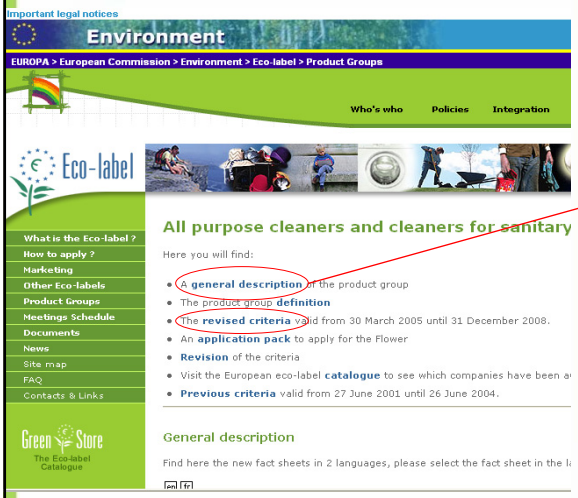
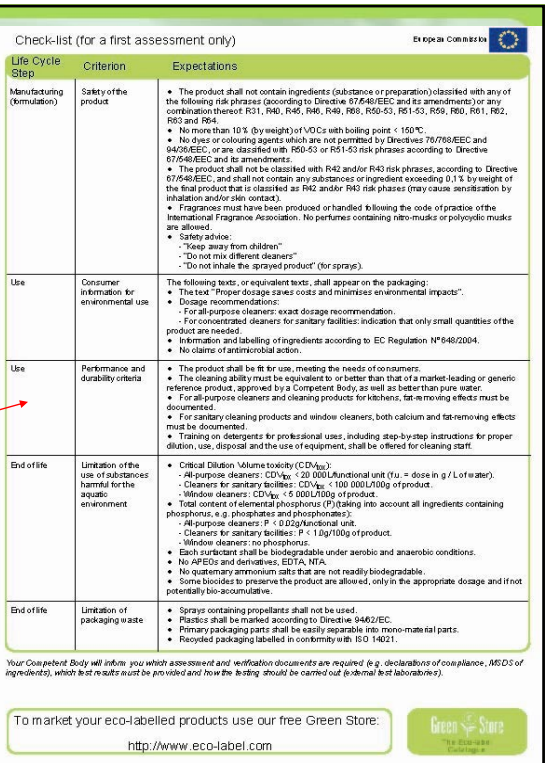
Example: call for tenders of all-purpose cleaners

- Go to the all-purpose cleaners page of the Eco-label web site: www.europa.eu.int/ecolabel

- A summary of the criteria can be found in the general description of the product group
- The complete criteria are available in all the EU languages





Practically, how can the European Eco-label criteria can be used in a public call for tenders ? (2/2)

- The EU Eco-label can be used as a **benchmark** against which to assess offers at the award stage.
- Example: call for tenders of light bulbs

The EU eco-label criteria for light bulbs require that they should have an average life-span of 10 000 hours. When reflecting this in a call for tender for light bulbs, 10 000 hours could be set as the technical specification for the minimum life span, and a bonus point could be given in the award criteria for every 1000 hours over and above 10 000.

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Success stories

- « Communauté urbaine de Dunkerque », France
- City of Angers, France

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« Communauté urbaine de Dunkerque », France

Profile of the Communauté Urbaine de Dunkerque

- Group of 18 municipalities
- 212 241 inhabitants
- Number of employees : 1 319 agents

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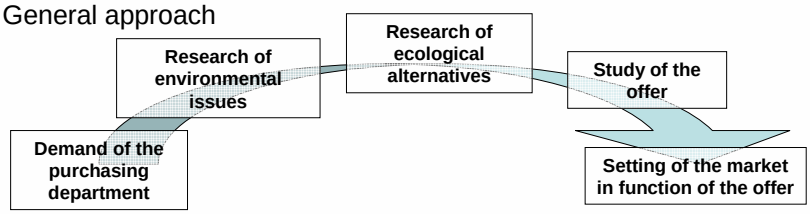
« Communauté urbaine de Dunkerque », France

- Internal organisation
  - Political act
    - adoption of a 'délibération' relative to sustainable development in public procurement
  - General approach



- Categories of products concerned by GPP:
  - Paper, cleaning products, electronic appliances, light bulbs and phytosanitary products

« Communauté urbaine de Dunkerque », France

Example of a tender of cleaning products

- Reasons for choosing this product category:
  - Test tender (all purpose cleaners, window cleaners…)
  - Existence of ecological criteria
- Identified environmental issues
  - Limitation of water pollution
- Characteristics inserted in the technical specifications:
  - High biodegradability rate
  - Natural substances
  - Limitation of the use of hazardous substances for the environment and health (based on the DID-list)

« Communauté urbaine de Dunkerque », France

Example of a call for tender of cleaning products

- Used reference
  - European Eco-label (some criteria)
- Demand of samples to test the efficiency of the products
- Results
  - Necessity to divide the tender into lots, to ensure SMEs will answer
  - No over-cost
  - Very positive feedback from employees: efficiency and lack of respiratory and skin irritations

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City of Angers, France

Profile of the city of Angers

- 157 000 inhabitants
- Number of employees : 2750 agents
- Global budget of the city : 250 million euros
- Green Procurement, as part of the Agenda 21, is managed by the Directorate General, in partnership with the Sustainable Development department, the Public Procurement department and purchasing directorates.

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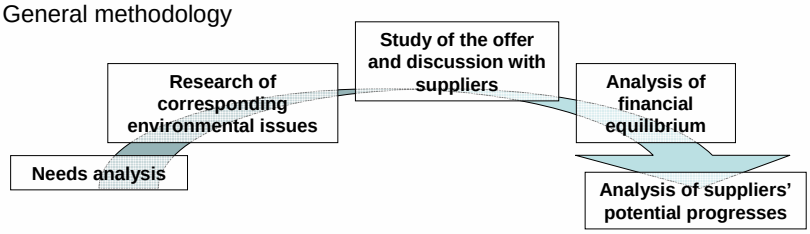
City of Angers, France

- Internal organisation
  - Creation of working groups on every topic
  - General methodology



- Categories of products concerned by GPP:
  - School furniture, cleaning products, cleaning of public premises, textiles, school supply, coffee, paper

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City of Angers, France

Example of a call for tender for cleaning services

- Reasons for choosing this product category
  - Important consumption
  - Existence of environmental criteria
- Identified environmental issues
  - Mainly linked to the use of cleaning products:
    - Limitation of the use of hazardous substances for the environment and health
    - Limitation of water pollution
    - Reduction of packaging waste

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City of Angers, France

Example of a call for tender of cleaning products

- Characteristics
  - Use of products complying with the EU Eco-label criteria
- Example of reference used
  - EU Eco-label
- Results
  - The call for tender was fruitful.
  - Progressive approach (3-year call for tender):
    - Year 1: no ecological specification
    - Year 2: use of 1 product complying with all EU Eco-label criteria
    - Year 3: use of 2 products complying with all EU Eco-label criteria

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Conclusion

- Public purchasers become actors of Sustainable Development.
- It is possible to do Green Public Procurement thanks to the revised European Procurement Directives.
- The European Eco-label makes it easy to implement GPP in a practical way.
- The Success Stories demonstrate it is possible to use the EU Eco-label to do GPP.

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GUIDELINES ON GREENING PUBLIC PROCUREMENT

BY USING

THE EUROPEAN ECO-LABEL CRITERIA

NOVEMBER 2001

GUIDELINES ON GREENING PUBLIC PROCUREMENT BY USING THE EUROPEAN ECO-LABEL CRITERIA

(November 2001)

Important: This note is primarily for use by the members of the European Union Eco-Labelling Board. It can be used to inform public and private procurement officers about the possibilities of "greening" their procurement via the European eco-label and its criteria, while respecting current European legislation related to public procurement.

You are a public or private procurement officer? Yes.
You wish to "green" your purchasing? Yes.
The European eco-label can make this easy. How and why?
You do not have to work out what makes a product green: This has already been fully assessed at European level. Consultations on the eco-label criteria involve the European Commission, the Member States, the national eco-label authorities, industry, consumers, retailers, environmentalists, and many others. The final eco-label criteria for each product group are established by a Commission Decision and published in the Official Journal. They are therefore public, transparent and non-discriminatory. *(They may be downloaded directly from the eco-label web-site at "http://europa.eu.int/ecolabel", or else may be obtained from any of the national European Eco-label Competent Bodies – see contact information below)*

The EU eco-label is public, transparent and non-discriminatory:

The European eco-label is valid and identical throughout the European Union, as well as the EEA countries (Norway, Iceland, and Liechtenstein).

Overseas products can also be awarded the eco-label under exactly the same conditions as EU products. There can therefore be no suggestion at any stage that you are unfairly favouring local or regional products. The European eco-label is fully compatible with the Internal Market.

In taking into consideration a product that has been awarded the EU eco-label (or that meets its criteria), you can be sure that you are referring to a product that is greener than most others:

The criteria have a selective character, so that generally less than 30% of products on the market can qualify.

The simplest way to proceed:

Cut and paste the eco-label criteria for the product in question into the **technical specifications** of the call for tenders. You may download the eco-label criteria directly from the eco-label web-site at http://europa.eu.int/ecolabel**.**

You must also make clear that you will accept as proof of compliance with these criteria:

- either a copy of contract allowing the company to use the eco-label on its products, *(Note if they already have the eco-label this means that the product has been checked by an independent third-party certifier, i.e. one of the European Eco-label Competent Bodies set up in each Member State.* ***You will therefore not have to check any further****).*

- or documentation (test reports, declarations,…) showing compliance with each and all of the criteria. (***In this case it is up to you to check the evidence they provide you with****).*

Important Note: In order to give yourself more flexibility (e.g. in case you might not receive any offers that meet all your environmental specifications), **we recommend that you use the possibility of variants when drafting your technical specifications**. Variant 1 should have your "minimal" (ie non-environmental) technical specifications. Your variant 2 should be variant 1 plus the eco-label criteria (i.e. minimal plus environmental). Then if you receive one or more offer for variant 2 (minimal plus environmental) you may then choose the most economically advantageous of these. If you do not receive any offers for variant 2, you may still choose the most economically

advantageous of the offers for variant 1 (minimal specifications).

For even greater flexibility, you may also wish to have other variants intermediate between variants 1 and 2. Depending on your constraints (eg budgetary), at the end of the call for tenders **you are free to choose the most appropriate variant**, and within that variant you must then choose the most economically advantageous of the offers.

For which categories of products have EU eco-label criteria been established?

Washing machines, dishwashers, refrigerators, indoor paints and varnishes, soil improvers, tissue paper, copying paper, laundry detergents, light bulbs, textile products, footwear, bed-mattresses, personal and portable computers, detergents for dishwashers, hard surface cleaners and cleaners for sanitary installations, and hand dishwashing detergents.

Work is being carried out to finalise criteria for tourist accommodation, furniture, TVs, vacuum cleaners and hard floor coverings ***(see the eco-label web-site at*** http://europa.eu.int/ecolabel ***for full details and criteria)***.

What you cannot do:

You cannot require that a product has been awarded the eco-label. You must treat equally those products that meet all of its requirements ("are equivalent") but have not been awarded the eco-label, as long as they are capable of submitting the necessary means of proof.

Can I put eco-label criteria in the award criteria of the call for tenders?

Yes, but not all, only those that give you directly an economic advantage (i.e. generally – but not always- those related to the product itself and not its production). The economic advantage must be attributable to the product or service in question.

For example, **you may** include criteria related to the energy consumption of the product during its use phase, or related to the disposal costs of the product at the end of its life. You **may not** include in the award criteria an eco-label criterion that refers, for example, to the emissions to air or water during the production of the product. Such criteria can however be taken into account may when defining the technical specifications (see above).

In general **it is simpler and clearer to use eco-label criteria in the technical specifications** (see above), **making use of variants** to give yourself the degree of flexibility you require.

Where can I find more information?

Contact the European eco-label Competent Body in your country (*see the eco-label web-site at* http://europa.eu.int/ecolabel *for contact info).*

European Green Procurement Database

English

Themes covered by the database

- Cleaning products and services
- Clothing and textiles
- Construction and building
- Electrical appliances and electronics
- Energy and water supply
- Gardening, horticulture
- Office purchasing
- Personal care
- Public health and sanitary
- Publications and paper products
- Telecommunication
- Timber
- Transport of persons and goods

Welcome to the frontpage of the products and services database

The aim of the database is to provide public purchasers with objective and scientifically accurate information on potential environmental criteria for their calls for tender.
This database informs users about existing Eco-labels for the product groups they are interested in, the main environmental issues and potential questions they can ask suppliers.
The current database covers about 100 product or service groups of most relevance to corporate and public purchasers.
Product and service groups are arranged in categories and a few themes or areas of interest. Click on a theme to find more details.
See also the document for the tree structure of the themes, categories and groups [63 Kb], included in the database.

Caveats: This database is running in a trial period for twelve months. Comments on the functionality of the database, on technical issues related to the product groups, on the scope of the products and services included or on other issues are all welcome. Please send them to the email box below. They will be taken into account during the further development of the database.
During the trial phase, the database will only be available in English. However, it is planned to extend the database into other EU official languages as it is further developed.

Waste

Click on a theme to display the categories of product or service groups covered in the database, and to find general information on this theme.

search the database
search the site
ok

If you are looking for a specific group of products or services, select it in the dropdown list:

Product or Service Group

Remark concerning how to print the pages of this Web site:
To obtain good printed versions of the pages, you may chose the Landscape mode.

For general comments, please send your message to the following address:
env-products-database@cec.eu.int

This database will be regularly updated and upgraded.
Last update: 21-01-2003

Structure of the database

	CATEGORY	PRODUCTS AND SERVICES	Cleaning products and services	Clothing and textiles	Construction and building	Electrical appliances and electronics	Energy and water supply	Gardening, horticulture	Office purchasing	Personal care	Public health and sanitary	Publications and paper products	Telecommunication	Timber	Transport of persons and goods	Waste
		THEMES														
1	Batteries	Batteries for consumer goods			X	X	X		X				X		X	X
2	Burners and boilers	Combined oil-burner and boiler units			X		X									
3		Atomizing oil burners			X		X									
4		Fan-assisted gas burners			X		X									
5	Cleaners	Detergents for manual use	X	X												
6		Dishwashing agents	X													
7		Pipe cleaners (plumbing)	X		X											
8		Floor-cleaning products	X		X				X		X					
9		Hand dishwash detergents	X						X		X					
10		Laundry detergents	X	X							X					
11		Sanitary cleaning products	X		X				X		X					
12		All purpose cleaners	X		X				X		X					
13		Mechanical washing aids	X	X												
14		Toilet chemicals	X		X				X		X					
15		Stain removers and bleaches	X	X												
16		Sanitary paper products	X		X				X		X	X				
17		Household and toilet paper	X		X				X		X	X				
18	Clothing and textile	Textile products		X	X				X							
19		Clothes		X												
20		Bedlinen and T-shirts		X												
21		Bed mattresses		X	X											
22		Hand dryers (cotton)		X	X				X							
23		Footwear		X												
24	Building materials	Building materials			X								X			
25		Flooring			X											
26		Textile floor covering		X	X											
27		Glues for floor coatings			X											
28		Wall coverings			X											
29		Windows			X								X			
30		Highly heat-insulating multi-layer window glass			X											
31		Wood doors			X								X			
32		Indoor paints and varnishes			X											
33		Construction machinery			X											
34		Bus-controlled devices for system engineering in buildings			X		X									
35		Sanitary fittings			X		X									
36		Hand showers			X		X									
37		Pavement tiles			X											

Structure of the database

	CATEGORY	PRODUCTS AND SERVICES	Cleaning products and services	Clothing and textiles	Construction and building	Electrical appliances and electronics	Energy and water supply	Gardening, horticulture	Office purchasing	Personal care	Public health and sanitary	Publications and paper products	Telecommunication	Timber	Transport of persons and goods	Waste
38	Gardening and agriculture	Composters					X									
39		Chain lubricants					X									
40		Chain saws					X									
41		Lawnmowers					X									
42		Horticultural substrates					X									
43		Soil improvers					X									
44	Home appliance	Refrigerators and appliances for cooling				X										
45		Central heating systems			X		X									
46		Hot-air hand driers				X				X						
47		Washing machines				X										
48		Dishwashers				X										
49		Water heaters			X	X	X			X						
50		Vacuum cleaners				X										
51		Coffee makers				X		X								
52		Coffee filters				X		X			X					
53		Television sets				X		X								
54		Video-recorders				X		X								
55	Lights	Electronic ballasts for fluorescent lamps			X	X	X		X							
56		Light sources			X	X	X		X							
57		Light bulbs			X	X	X		X							
58	Office equipment and furniture	Copiers				X			X			X				
59		Fax equipment				X			X				X			
60		Printers				X			X			X				
61		Toner cartridges for printing and copying				X			X			X				
62		Personal computers				X			X							
63		Portable computers				X			X							
64		Office chairs and other seating			X				X					X		
65		Furniture (except chairs and other seating)			X				X					X		
66		Fire extinguishers							X		X					

Structure of the database

	CATEGORY	PRODUCTS AND SERVICES	Cleaning products and services	Clothing and textiles	Construction and building	Electrical appliances and electronics	Energy and water supply	Gardening, horticulture	Office purchasing	Personal care	Public health and sanitary	Publications and paper products	Telecommunication	Timber	Transport of persons and goods	Waste
67	Office supplies (not paper specific)	Text markers						X								
68		Correction fluids						X								
69		Writing instruments						X								
70		Envelopes						X			X					
71		Adhesive labels						X			X					
72		Paper labels						X			X					
73		Ring binders / organisers						X								
74	Paper products	Paper						X			X					
75		Fine paper						X			X					
76		Recycled paper						X			X					
77		Copying paper						X			X					
78		Printing paper						X			X					
79		Writing paper						X			X					
80		Newsprint for journals, magazines and catalogues						X			X					
81		Publications *(service)*						X			X					
82		Printed matter						X			X					
83		Converted paper products						X			X					
84		Products made of recycled paper						X			X					
85	Personal care products	Nappies / diapers	X						X	X						
86		Medical thermometers								X						
87		Hand washing liquid	X						X	X						
88		Shampoos and soap	X						X	X						
89		Hand towel roll services	X	X					X	X						
90		Hand dryers (paper)	X						X	X						
91		Fabric towel rolls for use in towel dispensers	X						X	X						
92	Energy	Gas-fired calorific-value plants			X		X									
93	Transport	Goods transport *(service)*												X		
94		Public transport *(service)*												X		
95	Vehicles and fuels	Commercial vehicles, municipal vehicles and busses												X		
96		Car tyres												X		
97		Car care products	X											X		
98		Carwash installations *(service)*	X											X		
99		Motor bicycles												X		

Structure of the database

	CATEGORY	PRODUCTS AND SERVICES	Cleaning products and services	Clothing and textiles	Construction and building	Electrical appliances and electronics	Energy and water supply	Gardening, horticulture	Office purchasing	Personal care	Public health and sanitary	Publications and paper products	Telecommunication	Timber	Transport of persons and goods	Waste
100	Waste	Rubbish bags	X					X		X						X
101		Container for used oil	X					X		X				X		X
102		Container for glass	X					X		X						X
103		Waste glass collection *(service)*	X													X
104		Waste oil collection *(service)*	X											X		X
105		Collecting and recovery centres for paper and paperboards *(service)*	X								X					X
106		End-of-use vehicle collection and decontamination centres *(service)*	X											X		X
107		Construction waste management and recycling centres *(service)*	X		X											X
108	Others	Playthings for outdoor use			X											
109		Tickets for public transport						X			X					
110		Guidelines for packaging												X		X
111		Transportation packaging												X		X
112		Cooling and insulating liquids												X		

IP/04/1045

Brussels, 26 August 2004

Buying green: how public authorities can help save the environment and taxpayer's money

The European Commission has produced a Handbook on Green Public Procurement. It explains in clear, non-technical terms how public purchasers, such as schools, hospitals and national and local administrations, can take into account the environment when buying goods, services and works. Each year public authorities spend some 16% of EU GDP, around €1,500 billion, on goods, services and works. If they opt for environmentally sound goods, services and works, they will help the EU reach sustainable development. Green purchasing increases demand for green goods, encourages green production and helps environmentally friendly technologies conquer the market. It also considers efficient use of energy and resources as well as waste prevention, thus contributing to saving taxpayer's money. The new Handbook gives best-practice examples and provides advice all along the steps of a procurement procedure.

Margot Wallström, Commissioner for the Environment, said: "Public authorities have enormous purchasing power. If, for example, all public authorities in the Union switched to green electricity, it would save 60 million tonnes of CO2, or 18% of the EU's Kyoto commitment on cutting greenhouse gas emissions by 2012."

Frits Bolkestein, Internal Market Commissioner , said: "This Handbook provides clear and practical guidance to local, regional and other contracting authorities in the process of dealing with the new possibilities created by the new public procurement Directives. With this Handbook we respond to the needs of all these authorities to take action to protect the environment by using public demand. I hope that the Handbook will also encourage the sharing of best practices and experiences to further green procurement policies. In this respect, the Handbook already presents practical examples taken from a wide range of authorities across the EU."

Towards green public procurement

The EU's new Public Procurement Directives, formally adopted on 31 March 2004 (see IP/04/150), make clear that public authorities can in many different ways adopt environmental considerations into their procurement procedures. Yet a recent study examining procurement practices in the EU15 Member States shows that only 19% of all public administrations undertake a significant amount of green purchasing (by using environmental criteria in more than half of their purchases). Major barriers are the lack of knowledge to set the right environmental criteria in tender documents, budgetary constraints due to the often higher "up front" price of green products and services, and legal uncertainty.

The Handbook seeks to help overcome these barriers: it explains in clear, non-technical terms how to introduce environmental considerations in the different stages of a procurement procedure. It insists on the importance of taking into account the life-cycle cost of the purchased products, services and works, and it refers to an online database which gives environmental information on some 100 products and services (see http://europa.eu.int/comm/environment/green_purchasing/cfm/fo/greenpurchasing/index.cfm). It also points to valuable information on many national websites and databases and to technical specifications of European and national eco labels.
The Handbook and further information can be found at:
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Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC

List of services regarded as excluded from the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1] pursuant to Article 8 thereof

(2004/C 115/03)

(Text with EEA relevance)

Directive 93/38/EEC is applicable in particular to contracts awarded by telecommunications operators; however its constraints are no longer justified where there is effective competition after the liberalisation of this sector. For this purpose Article 8 of the Directive lays down that where there is effective competition in the telecommunications services market, procurements for the provision of these services may be exempted from the scope of the Directive. In its Communication on public procurement in the European Union [2], the Commission indicated that it would examine whether this Article could be applied.

In a Communication published on 3 June 1999 in the *Official Journal of the European Communities* [3], the Commission provided, for information purposes, a list of telecommunications services regarded as excluded from the scope of Directive 93/38/EEC by virtue of Article 8 thereof. This list was based on the competitive situation, as referred to by the Court of Justice of the European Communities in its judgment of 26 March 1996 in Case C-392/93 *The Queen* v. *HM Treasury*, exparte *British Telecommunications plc* [4], in connection with the interpretation of the same article in the precedent directive [5], which existed at that time. The Communication stated that the list would be updated according to developments in the condiÂ--tions of effective competition in telecommunications markets in question.

Subsequently, the Commission submitted to the European Parliament and to the Council a proposal for a directive coordinating the procurement procedures of entities operating in the water, energy and transport sectors [6]. This proposal excluded the telecommunications sector as a relevant activity since it was no longer necessary to regulate purchases by entities operating in this sector. It was consequently proposed that the exclusion comes into force simultaneously in all Member States, since the Commission, when adopting its proposal in May 2000, was certain that rapid progress following liberalisation would continue and produce effects before the proposal could come into force.

The Commission also submitted to the European Parliament and to the Council a proposal for a directive on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts [7]. In view of the situation of effective competition in the telecommunications sector following the implementation of the Community rules aimed at liberalising that sector, public contracts relating to telecommunications are to be excluded from the scope of this Directive whenever they are awarded with the principal purpose of enabling contracting authorities to carry out specific activities in the telecommunications sector.

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(1) OJ L 199, 9.8.1993, p. 84. Directive as last amended by Directive 98/4/EC (OJ L 101, 1.4.1998, p. 1).
(2) Public Procurement in the European Union, Communication of the Commission 11.3.1998, COM(98) 143 final.
(3) 'List of services regarded as excluded from the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors pursuant to Article 8 thereof', Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC (OJ C 156, 3.6.1999, p. 3).
(4) [1996] ECR I-1631.
(5) Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 297, 29. 10. 1990, p. 1).
(6) Proposal for a directive of the European Parliament and the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors, COM(2000) 276 of 10 May 2000 (OJ C 29E, 30.1.2001, p. 112).
(7) Proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2000) 275 of 10 May 2000 (OJ C 29E, 30.1.2001, p. 11).

On 31 December 2000, the last additional implementation period granted to a Member State [1] for full liberalisation of the telecommunications market has elapsed, which now formally completes the liberalisation process in all 15 Member States.

Moreover, in its Sixth Report on the Implementation of the Telecommunications Regulatory Package [2], the Commission noted the progress achieved by the Member States in implementing the legislative framework underpinning the full liberalisation of telecommunications markets. In particular, it noted that the national regulatory authorities are applying the key regulatory principles of the current framework and are active in opening up the market to competition. Liberalisation has now occurred in the telecommunications sector and effective competition exists in all Member States, as indicated in the annexes to the sixth report.

On 2 January 2001, the Regulation of the European Parliament and of the Council on unbundled access to the local loop [3] entered into force. This regulation sets out the obligations on notified operators and on national regulatory authorities to ensure the provision of unbundled access to the local loop in order to promote and to enforce further competition in voice tele-phony and data services. Its provisions are directly applicable in all 15 Member States.

In a notice published on 13 March 2002 in the *Official Journal of the European Communities* [4], the Commission invited the contracting authorities in the telecommunications sector in Greece, Luxembourg and Portugal to inform it, under Article 8(2) of Directive 93/38/EEC, of which of the remaining telecommunications services they considered to be excluded from the scope of that Directive, pursuant to its Article 8(1), given that other entities were free to offer the same services in the same geographical area under essentially identical conditions [5].

Since the regulatory framework for telecommunications had been successful in creating the conditions for effective competition in the telecommunications sector during the transition from monopoly to full competition, the European Parliament and the Council adopted a new regulatory framework for electronic communications networks and services [6], which replaced the former one by 25 July 2003 [7] and 31 October 2003 [8] respectively.

On 31 March 2004, the European Parliament and the Council adopted the legislative package on public procurement [9], which excludes telecommunications, as a sector now subject to effecÂ-tive competition, from the scope of the legislation [10].

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(1) Commission Decision 97/607/EC (OJ L 245, 9.9.1997, p. 6).
(2) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2000) 814 of 7 December 2000.
(3) Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ L 336, 30.12.2000, p. 4).
(4) Notice to contracting authorities in the telecommunications sector in Greece, Luxembourg and Portugal (2002/C 64/07) (OJ C 64, 13.3.2002, p.10).
(5) One contracting entity from the Member States concerned replied to the Commission's invitation.
(6) Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ L 108, 24.4.2002, p. 21); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).
(7) Articles 26 to 28 of the Framework Directive.
(8) Article 19 in conjunction with Article 17(1) of the Directive on privacy and electronic communications.
(9) Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
(10) Articles 3 to 7 of Directive 2004/17/EC no longer include telecommunications as a relevant activity; see also Articles 13, 57 and 68 of Directive 2004/18/EC.

In view of the above, the Commission is publishing, for the purposes of information, the folÂ-lowing list of telecommunications services regarded as excluded from the scope of Directive 93/38/EEC by virtue of Article 8 thereof. The list provides an update of the aforementioned communication according to developments in the conditions of effective competition in the telecommunications markets in question.

The effect of the applicability of Article 8(1) is that purchases for the provision of telecomÂ-munications services within all 15 Member States will no longer be subject to the detailed provisions of that Directive.

The categorisation of the services has been done to facilitate the task of analysing competition and to help industry understand the practical impact of telecommunications liberalisation on the application of procurement rules. Taken together, the Commission considers that these categories cover all of the telecommunications services referred to in Article 1(14) and (15) of Directive 93/38/EEC and comply with the terminology used in Art. 1(4)(c)(ii) of that Directive.

Categories of services exempted	Geographical areas concerned
Public fixed telephony	All 15 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom)
Public mobile telephony	All 15 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom)
Satellite services	All 15 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom)
Transmission of data/value-added services (telephone cards, Internet, call-back conÂ-nection)	All 15 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom)

31999Y0603(01)

Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC

Official Journal C 156 , 03/06/1999 P. 0003 - 0004

Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC

(1999/C 156/03)

(Text with EEA relevance)

List of services regarded as excluded from the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors pursuant to Article 8 thereof

Directive 93/38/EEC is applicable in particular to contracts awarded by telecommunications operators; however, its constraints are no longer justified where there is effective competition after the recent liberalisation of this sector. For this purpose Article 8 of the Directive lays down that where there is effective competition in the telecommunications services market, the procurements for the provision of these services may be exempted from the scope of the Directive. In its communication on public procurement in the European Union(1) the Commission indcated that it would examine whether this Article could be applied.

In a notice published on 2 September 1998 in the Official Journal of the European Communities(2), the Commission invited contracting entities in the telecommunications sector to notify it, under Article 8(2) of Directive 93/38/EEC, of any telecommunications services they regarded as excluded from the scope of that Directive, pursuant to Article 8(1) thereof, on the ground that other entities were free to offer the same services in the same geographical area and substantially under the same conditions(3).

Moreover, in its fourth report on the implementation of the telecommunications regulatory package(4), the Commission noted the progress achieved by the Member States in implementing the legislative framework underpinning the full liberalisation of telecommunications markets. In particular, it noted that the national regulatory authorities are operational in all Member States and have started to apply the principles set out in the regulations.

The analysis of the declarations of exemption from the contracting entities was based, on the one hand, on the factors submitted by the operators as indicating the existence, as a matter of law and of fact, of a competitive situation as referred to by the Court of Justice of the European Communities in its judgment of 26 March 1996 in Case C-392/93 The Queen v. H. M. Treasury, ex parte British Telecommunications plc(5) in connection with the interpretation of the same article in an earlier directive(6) and, on the other, on the progress achieved by the Member States in implementing the regulations on telecommunications and the tangible results in the Member States' telecommunications markets of effective application of the measures transposed into national law, as indicated by the data contained in the aforementioned fourth report. Liberalisation has now occurred in the telecommunications sector and effective competition exists in most Member States, despite the fact that some Member States still benefit from transitional periods as regards the implementation of the telecommunications regulatory package.

In view of the above, the Commission is publishing, for information purposes, the following list of telecommunications services exempted from the scope of Directive 93/38/EEC by virtue of Article 8 thereof. The list will be updated according to developments in the conditions of effective competition in telecommunications markets in question. The effect of the applicability of Article 8(1) is that purchases by the entities providing an excluded service within the geographical area concerned will no longer be subject to the detailed provisions of the Directive.

The categorisation of the services has been done to facilitate the task of analysing

competition and to help industry understand the practical impact of the telecommunications liberalisation on the application of procurement rules. Taken togehter, the Commission considers that these categories cover all of the telecommunications services referred to in Article 1(14) and (15) of the Directive and comply with the terminology used in Article 1(4)(c)(ii) of that Directive.

>TABLE>

(1) "Public procurement in the European Union", Communication of the Commission of 11 March 1998 (COM(1998) 143 final).

(2) Notice to contracting entities in the telecommunications sector (98/C 273/07) (OJ C 273, 2.9.1998, p. 12).

(3) 32 contracting entities from the Member States replied to the Commission's invitation.

(4) Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions (COM(1998) 594 of 25 November 1998).

(5) [1996] ECR I, p. 1631.

(6) Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 297, 29.10.1990, p. 1).

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.10.2001
COM(2001) 566 final

INTERPRETATIVE COMMUNICATION OF THE COMMISSION

on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement

TABLE OF CONTENTS

EXECUTIVE SUMMARY

- The aim of this Communication, which follows on from the Commission's Communication on "Public procurement in the European Union" of 11 March 1998[1], is to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. This Communication also figures among the actions announced in the Social Policy Agenda adopted by the European Council of Nice in December 2000[2]. The Agenda is part of the integrated European approach set out in Lisbon whose goal is economic and social renewal. It seeks in particular to provide a dynamic and positive interaction between economic, social and employment policies, which mutually reinforce one another.

- The introduction of other possibilities and, in particular, of practices that go beyond the current system of the public procurement directives would require intervention by the Community legislator.

- All relevant national rules in force in the social field, including those implementing relevant Community rules in the field, are binding on contracting authorities, insofar as they are compatible with Community law. Such rules include, in particular, provisions on workers' rights and on working conditions.

- Non-compliance by tenderers with certain social obligations may in some cases lead to their exclusion. It is for Member States to determine in which cases this should arise.

- It is especially during the execution of the contract, that is, once the contract has been awarded, that public procurement can be used by contracting authorities as a means of encouraging the pursuit of social objectives. Contracting authorities can require the successful tenderer to comply with contractual clauses relating to the manner in which the contract is to be performed, which are compatible with Community law. Such clauses may include measures in favour of certain categories of persons and positive actions in the field of employment.

- The public procurement directives also offer various possibilities for taking account of social considerations that relate to the products or services required, in particular when drawing up the technical specifications and selection criteria.

- Public purchasers are free to pursue social objectives in respect of public procurement contracts not covered by the public procurement directives, within the limits laid down by the general rules and principles of the EC Treaty. It is for Member States to determine whether contracting authorities may, or must, pursue such objectives in their public procurement.

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1 COM(98) 143.

2 Social Policy Agenda, COM (2000) 379 of 28.6.2000.

INTRODUCTION

The purpose of this Communication, which follows on from the Commission's Communication on "Public procurement in the European Union" of 11 March 1998, is to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. The Communication should thus make it possible to integrate various social considerations into public procurement in the best way possible and in this way contribute to sustainable development - a concept which combines economic growth, social progress and respect for the environment.

Public procurement policy is one of the components of Internal Market policy. In this respect, the public procurement directives[3] aim to guarantee "the attainment of free movement of goods" and "the attainment of freedom of establishment and freedom to provide services in respect of public works contracts"[4]. Attainment of these objectives necessitates co-ordination of public procurement procedures in order to ensure effective competition and non-discrimination in respect of such procedures and optimal allocation of public money through the choice of the best tender. Contracting authorities[5] must be allowed to obtain best value for money while complying with certain rules, especially as regards selection of candidates in accordance with objective requirements and award of contracts solely on the basis of price or of the most economically advantageous tender based on a set of objective criteria.

Internal market policy can be pursued while at the same time integrating pursuit of other objectives, including social policy objectives.

Social policy has played a central role in building Europe's economic strength, through the development of a unique social model[6]. Economic progress and social cohesion, and a high level of protection and improvement of the quality of the environment, are complementary pillars of sustainable development and are at the heart of the process of European integration. Raising living standards, promoting a high level of employment and social protection, improving living and working conditions and promoting quality of life are goals of the European Union[7]. The Social Policy Agenda adopted at the Nice European Council in December 2000 forms part of the integrated European approach that aims to achieve the economic and social renewal outlined by the Lisbon European Council in March 2000. Specifically, it seeks to ensure the positive and dynamic interaction of economic,

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3 Council Directive 92/50/EEC of 18.6.1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14.6.1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14.6.1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC; Council Directive 93/38/EEC of 14.6.1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by European Parliament and Council Directive 98/04/EC.

4 This objective means that "it is necessary to improve and extend the safeguards in the directives that are designed to introduce transparency into the procedures and practices for the award of such contracts, in order to be able to monitor compliance with the prohibition of restrictions more closely and at the same time to reduce disparities in the competitive conditions faced by nationals of different Member States" (recital 6 of Council Directive 89/440/EEC of 18.7.1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, OJ L 210/1 of 21.7.1989).

5 For the purposes of this Communication, the term "contracting authorities" shall include "contracting entities" within the meaning of Directive 93/38/EEC, unless specified otherwise.

6 Preface to the Communication on the Social Policy Agenda, cited above.

7 Communication from the Commission: "Promoting core labour standards and improving social governance in the context of globalisation", COM(2001) 416 of 18.7.2001.

employment and social policies, and to forge a political agreement that mobilises all key players to work jointly towards the new strategic goal[8].

In addition, the Treaty of Amsterdam sets as one of the priorities of the European Union the elimination of inequalities and the promotion of equal opportunities between men and women in all policies and activities of the European Union. Article 13 of the Treaty also lays down the need to combat all forms of discrimination[9]. The Charter of Fundamental Rights of the European Union, proclaimed at the Nice European Council, restates the European Union's aim to fully integrate fundamental rights in all its policies and actions[10].

The public procurement directives currently in force contain no specific provision on the pursuit of social policy goals within the framework of public procurement procedures[11]. The Commission, as stated in its 1998 Communication referred to above, nevertheless considers that current Community public procurement law offers a range of possibilities which, if properly pursued, should make it possible to attain desired objectives.

The expression "social considerations" used in this Communication covers a very wide range of issues and fields. It can mean measures to ensure compliance with fundamental rights, with the principle of equality of treatment and non-discrimination (for example, between men and women), with national legislation on social affairs, and with Community directives applicable in the social field[12]. The expression "social considerations" also covers the concepts of preferential clauses (for example, for the reintegration of disadvantaged persons or of unemployed persons, and positive actions or positive discrimination in particular with a view to combating unemployment and social exclusion).

This Communication aims to identify the possibilities under existing Community law applicable to public procurement for taking social considerations into account in the best way in public procurement. The Communication examines the different phases of a procurement procedure and sets out, for each phase, whether and to what extent social considerations can be taken into account.

It should be noted that, in any event, interpretation of Community law is ultimately the role of the European Court of Justice.

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8 See preface to the Communication on the Social Policy Agenda, cited above.

9 Article 13 covers all forms of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

10 See Communication on core labour standards, cited above, Part 3.

11 The only provisions referring explicitly to provisions of a social nature are to be found in Article 23 of Directive 93/37/EEC, Article 28 of Directive 92/50/EEC and Article 29 of Directive 93/38/EEC. As regards Article 9 of Directive 93/37/EEC, which lays down a special award procedure for the design and construction of public housing, it should be noted that the sole aim of this provision dating from the 1970s was to permit Member States to provide for the possibility for award of a contract for the construction of public housing to a single contractor who would be responsible for both design and construction. The other relevant provisions of the directive are fully applicable to such procedures.

12 At Community level, there are a number of legislative texts that may apply to public procurement. They include, in particular, texts on safety and health at work (for example, Council Directive 89/391/EEC of 12.6.1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183/1 of 29.6.1989, and Directive 92/57/EEC of 24.6.1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites), working conditions and the application of employment law (for example, Directive 96/71/EC of the European Parliament and of the Council of 16.12.1996 concerning the posting of workers in the framework of the provision of services, OJ L 18/1 of 21.1.1997, and Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82/16 of 22.3.2001, codifying Directive 77/187/EEC).

If it were considered that the current public procurement regime does not offer sufficient possibilities for taking social considerations into account, modification of the public procurement directives would be necessary. It should be noted that in the proposals for modification of the public procurement directives adopted by the Commission on 10 May, 2000, specific mention is made of the possibility to use contractual conditions regarding execution of a contract that have as their goal the promotion of employment of disadvantaged or excluded persons, or the combating of unemployment[13].

I CONTRACTS COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES

1.1. Definition of the subject-matter of the contract

The first occasion for taking social considerations into account in respect of a public procurement contract is the phase just before the public procurement directives will be applicable: the actual choice of the subject-matter of the contract or, to put it more simply "what do I, public authority, wish to construct or purchase"? At this stage, contracting authorities have a great deal of scope for taking social considerations into account and choosing a product or service that corresponds to their social objectives. How far this will actually be done depends to a great extent on the awareness and knowledge of the contracting authority.

As the Commission states in its Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, the possibilities for taking account of environmental considerations vary from one type of contract to another[14]. This is also true as regards the possibilities for taking account of social considerations. Public contracts for works and services, in respect of which it is possible to lay down the manner in which the contract is to be performed, provide the best opportunity for a contracting authority to take account of social concerns. In the case of supply contracts, apart from the basic choice of the subject-matter of the contract ("what shall I purchase?"), the possibilities to take social considerations into account are more limited. A contracting authority can, for example, choose to buy goods or services which meet the specific needs of a given category of person, such as the socially disadvantaged or excluded[15]. In this context, it should be noted that service contracts which have a social objective relate in most cases to services within the meaning of Annex IB of Directive 92/50/EEC or Annex XVIB of Directive 93/38/EEC and are thus not subject to the detailed procedural rules of the directives, and in particular the rules on selection and award[16] (see Chapter II, last paragraph, below).

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13 See recital 22 of the proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2000) 275 final (OJ C 29 E of 30.1.01, pp. 11-111), relating to Article 23(3) of the proposal, and recital 32 of the proposal for a Directive coordinating the procurement procedures of entities operating in the water, energy and transport sectors, COM(2000) 0276 final (OJ C 29 E of 30.1.01, pp. 112-188), relating to Article 33, third subparagraph, of the proposal.

14 See the Chapter on the definition of the subject-matter of a contract in the Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274 final of 4.7.2001.

15 Certain service contracts targeted at a particular social category have, by their very nature, a social objective (for example, a contract for training for long-term unemployed persons). Another example is contracts for the purchase of computer hardware/services adapted to the needs of disabled persons.

16 For example, social and sanitary services, educational and vocational training services, or recreational and cultural services. The services listed in Annex IB to Directive 92/50/EEC and Annex XVI B to Directive 93/38/EEC are subject only to the provisions of the public procurement directives on technical specifications and the publication of an award notice. However, they remain

If different solutions exist which would meet the needs of a contracting authority, the contracting authority is free to define contractually what it considers as corresponding best to its social concerns in the subject-matter of the contract, and it may also use variants in this respect (see Part 1.2, below).

This freedom is, however, not entirely unlimited. A contracting authority, as a public body, has to observe the general rules and principles of Community law, and in particular the principles regarding free movement of goods and the freedom to provide services laid down in Articles 28 to 30 (ex 30 to 36), and 43 to 55 (ex 52 to 66) of the EC Treaty[17].

This implies that the subject-matter of a public contract may not be defined in such a way that it has as its aim, or that it results in, a reservation of access to the contract for domestic companies to the detriment of tenderers from other Member States.

Existing Community legislation, and national legislation that is compatible with Community law, on social or other matters may well also limit or influence the freedom of choice of the contracting authority.

In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards social policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States.

In any event, the fact that a contract is intended for a "social" use, (for example, construction of a school, a hospital or a retirement home), is of no particular relevance to the application of the public procurement directives, since such contracts must be awarded according to the rules of such directives, if they fall within their scope.

The choice of subject-matter of the contract made by a contracting authority is initially reflected in the technical specifications.

1.2. Technical specifications

As the Commission stated in its above-mentioned Communication on integrating environmental considerations into public procurement[18], the public procurement directives[19] contain a set of provisions regarding technical rules. According to these provisions, the technical specifications that have to be met by the supplies, services or works must be indicated in the general documents or in the contract documents for each contract.

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subject to the provisions of the EC Treaty, which means, among other things, that there must be a sufficient degree of transparency, and respect of the principle of equal treatment of tenderers.

17 Council and European Parliament Communication on the Internal Market and the Environment, COM(1999) 263 final of 8.6.1999, pp. 8 and 9.

18 See Chapter II, point 1, of the Communication on the possibilities for incorporating environmental considerations into public procurement cited above, in which the Commission examines the concept of "technical specifications" within the meaning of the public procurement directives.

19 See Article 14 of Directive 92/50/EEC, Article 8 of Directive 93/36/EEC, Article 10 of Directive 93/37/EEC, and Article 18 of Directive 93/38/EEC.

Under the public procurement directives, contracting authorities can use technical specifications that define the subject-matter of the purchase or service more precisely, provided that they comply with the rules set out in the directives, and that they do not eliminate or favour a given tenderer[20].

In the above-mentioned Communication, the Commission states that the provisions of the public procurement directives on technical specifications apply without prejudice to legally binding national technical rules that are compatible with Community law[21]. These national rules can include, among others, requirements concerning product safety, public health and hygiene or access for the disabled to certain buildings or public transport (for example, accessibility standards on the width of corridors and doors, adapted toilets, access ramps), or access to certain products or services (for example, in the field of information technology[22]).

Thus, for public works contracts, for example, contracting authorities may be subject to the provisions of Directive 92/57/EEC on health and safety on construction sites[23]. Directive 92/57/EEC contains rules on the technical organisation of construction sites. In practice, it can lead to technical requirements relating to a given contract being included in the contract documents, whose aim is to ensure the safety and health of workers and others on the construction site. Such requirements can include measures to avoid accidents at work, such as sign-posting, conditions for storage of dangerous products or plans of routes for the passage of equipment.

In addition to such specifications, which incorporate regulations in the social field, technical specifications with a social connotation exist which serve to characterise in an objective way a product or service[24].

Contracting authorities may, among other things, require that products be manufactured using a specific production process, provided that this characterises the product in relation to other competing products, and in such a way as to meet the needs of the contracting authority[25]. As regards the use of "social labels" that concern the “social” capacity of an undertaking, see Point 1.3.2, below[26].

Moreover, contracting authorities may take account of variants[27]. Variants allow contracting authorities to choose the option which best meets their needs in financial

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20 In this context, see Article 8(6) of Directive 93/36/EEC, Article 10(6) of Directive 93/37/EEC, Article 14(6) of Directive 92/50/EEC and Article 18(5) of Directive 93/38/EEC.

21 This means that they must comply, among other things, with the case law of the Court of Justice regarding measures having an equivalent effect to quantitative restrictions.

22 The e-Europe initiative calls upon contracting authorities, in order to achieve the objective of an "information society for all", to ensure the widest possible access to information technologies for persons with special needs, and to adopt the "web accessibility" initiative for Internet sites.

23 This obliges contracting authorities to take account of the health and safety of workers on construction sites both in the award and the execution of their works contracts.

24 For example, the purchase of computer equipment or services adapted to the needs of the visually impaired. Such requirements are used to define the technical characteristics of the product and therefore relate to the subject-matter of the contract.

25 As stated in the Communication on the possibilities for incorporating environmental considerations into public procurement cited above, requirements which bear no relation to the product or the service itself, such as a requirement relating to the way in which an undertaking is managed, are not technical specifications within the meaning of the public procurement directives and cannot therefore be imposed. Thus, requirements concerning the use in a contractor's office of recycled paper, the application of specific waste disposal methods on the contractor's premises, or the recruitment of staff from certain groups of persons (ethnic minorities, disabled persons, women) would not qualify as technical specifications.

26 A "social label" relating to the "social" capacity of an undertaking cannot currently be considered a "technical specification" within the meaning of the public procurement directives.

27 All the directives allow the contracting authorities, when the criterion used is that of the most economically advantageous offer, to take account of variants which are submitted by a tenderer and which meet the minimum requirements set by the contracting authorities. Contracting authorities must state in the contract documents the minimum technical specifications to be respected by

and social terms, while fulfilling the minimum conditions set out in the contract documents. Variants may, for example, concern different technical solutions concerning the ergonomic characteristics of a product, or be intended to ensure access for disabled persons to given equipment or services, including tools and services provided "on line" or electronically.

1.3. Selection of candidates or tenderers

The directives essentially contain two sets of rules on selection.

On the one hand, the directives contain an exhaustive list of cases in which the personal situation of a candidate or tenderer may lead to its exclusion from a procurement procedure. These cases essentially concern bankruptcy, conviction of an offence, grave professional misconduct or non-payment of statutory contributions. The causes of exclusion are interpreted strictly. However, application of these provisions on exclusion remains optional for contracting authorities.

On the other hand, the directives provide that the suitability of tenderers or candidates to participate in a procurement procedure or to submit a tender must be assessed on the basis of criteria relating to their economic, financial or technical capacity[28]. The directives set out exhaustive and mandatory, qualitative selection criteria, which can be used to justify the choice of candidates or tenderers[29]. Selection criteria different from those set out in the directives would thus not comply with the current directives.

In the Beentjes case cited above, the Court found that a condition regarding the employing of long-term unemployed persons had no relation to the checking of tenderers' suitability on the basis of their economic and financial standing and their technical knowledge and ability (ground 28 of the judgment)[30]. The Commission notes in this respect that contracting authorities can include a condition relating to the employment of long-term unemployed when setting conditions relating to the execution of a contract (see point 1.6, below).

With regard to economic and financial standing**,** the directives set out a number of references which can be provided to prove the good standing of candidates or tenderers in respect of a given contract. This list of references is not exhaustive. However, any other reference required by the contracting authority must be necessary, from an objective point of view, to prove the economic and financial standing of the tenderers as regards a specific contract[31]. In view of the references which may currently be required in order to assess the economic and financial standing of tenderers, it is not possible for social considerations to be included in such references.

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the variants and any specific requirements to be met. They must indicate in the contract notice if variants are not authorised (Article 24 of Directive 92/50/EEC, Article 16 of Directive 93/36/EEC, Article 19 of Directive 93/37/EEC and Article 34(3) of Directive 93/38/EEC).

28 Article 15 of Directive 93/36/EEC, Article 18 of Directive 93/37/EEC, Article 23 of Directive 92/50/EEC and Article 31(1) of Directive 93/38/EEC.

29 In the Beentjes judgment of 20.9.1988 in Case 31/87, the Court stated that, according to the public procurement directives, "the suitability of contractors is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability" (point 17 of the judgment).

30 Similarly, a criterion regarding the good standing of executives of an undertaking was rejected by the Court of Justice, on the basis that it «constituted a means of proof which does not come within the closed category authorised by directive» 71/305/EEC on economic and financial standing of undertakings, in its judgment of 10.2.82 in Case 76/81, Transporoute (points 9 and 10).

31 See the Transporoute judgment referred to above, point 9.

As regards proof of technical capacity, the directives permit social considerations to be taken into account to a certain extent. The possibilities for taking social considerations into account under the directives are set out below (see point 1.3.2, below).

The Directives specify[32] that the information required as evidence of an operator's financial and economic standing and its technical capability must be confined to the subject-matter of the contract.

In the "utilities" sectors, the contracting authorities' discretion in this respect is wider, due to the fact that Article 31(1) of Directive 93/38/EEC requires only that "objective rules and criteria" be used, which are laid down in advance and made available to interested candidates or tenderers.

1.3.1. Exclusion of candidates or tenderers for non-compliance with social legislation

In its above-mentioned 1998 Communication, the Commission reiterated the fact that the public procurement directives currently in force contain provisions that permit the exclusion, at the selection stage, of candidates or tenderers who "breach national social legislation, including those relevant to the promotion of equality of opportunities".

The public procurement directives permit the exclusion of a tenderer who "has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority"[33].

The public procurement directives also permit the exclusion of a tenderer who "has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*" or who "has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify"[34].

A tenderer who has been convicted by a judgment that has the force of *res judicata* for failure to comply with national legislation concerning, for example, the prohibition of clandestine employment, may be excluded from a public procurement procedure in accordance with the provisions mentioned above[35].

In addition, the public procurement directives permit contracting authorities in Member States that have provided for this possibility in their national legislation, to exclude from a public procurement procedure any candidate or tenderer who has not respected the provisions of such legislation.

Circumstances can thus be envisaged in which tenderers who have not complied with social legislation can be excluded from public procurement procedures, where such

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32 See, for example, Article 32(4) of Directive 92/50/EEC.

33 See Articles 20(e) of Directive 93/36/EEC and 24(e) of Directive 93/37/EEC, to which reference is made in Articles 31(2) of Directive 93/38/EEC and 29(e) of Directive 92/50/EEC.

34 See Articles 20(c) and (d) of Directive 93/36/EEC, 24(c) and (d) of Directive 93/37/EEC, to which reference is made in Articles 31(2) of Directive 93/38/EEC and 29(c) and (d) of Directive 92/50/EEC.

35 Conviction for infringement of the prohibition on employing unregistered workers can, under Article L362.-6.2 of the French Labour Code, lead to temporary exclusion (of up to 5 years) or definitive exclusion from participation in public procurement procedures.

non-compliance is deemed to constitute grave professional misconduct or an offence having a bearing on its professional conduct. These exclusion clauses can also include, for example, non-compliance with provisions on equality of treatment, or on health and safety, or with provisions in favour of certain categories of persons[36]. A contracting authority may, for example, exclude a tenderer from its Member State who has not introduced an equal opportunities policy as required by the national legislation of the Member State where the contracting authority is established, provided that non-compliance with such legislation constitutes grave misconduct in the Member State in question.

Grave professional misconduct is a concept that is not yet defined by European legislation or case law[37]. It is thus for the Member States to define this concept in their national legislation and to determine whether non-compliance with certain social obligations constitutes grave professional misconduct.

1.3.2. Taking social considerations into account when verifying the technical capability of candidates or tenderers

The public procurement directives lay down the means by which the technical capability of a candidate or tenderer can be demonstrated. The directives contain an exhaustive list of references or evidence that candidates or tenderers can be required to provide in order to demonstrate their technical capability in view of the nature, quantity and purpose of the contract in question[38]. Hence, each particular requirement laid down by the contracting authority with regard to the technical capability of the candidate or tenderer must be based on one of the references listed in the directives.

The purpose of the selection phase is to identify those tenderers who are considered by the contracting authority to be capable of executing a given contract. Requirements must therefore have a direct link to the subject-matter of the contract in question[39].

At this stage of selection, a contracting authority can require references concerning tenderers' experience and know-how[40]. It may, for example, verify the composition and management of the personnel of the enterprise, its technical equipment and its quality control system, in order to ensure that it has the capability, in terms of staff qualifications and resources, to properly perform the contract.

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36 In Spain, non-compliance with legislation on the employment of the disabled constitutes grave professional misconduct, and can lead to the exclusion of the tenderer in question. In France, there are approximately 30 possible grounds for exclusion for non-compliance with employment legislation (for example, labour legislation requires undertakings with more than 100 employees to employ two disabled persons; the head of the company can be punished by the works inspectorate; this may allow a contracting authority to exclude the enterprise for serious professional misconduct).

37 Final report on the Falcone study on public procurement and organised crime (1998) – Volume I: 24.5.1999 - Institute of Advanced Legal Studies – University of London.

38 Article 23 of Directive 93/36/EEC, Article 27 of Directive 93/37/EEC and Article 32 of Directive 92/50/EEC.

39 Article 32(2) of Directive 92/50/EEC expressly states that these requirements must be defined according to the nature, quantity and purpose of the services to be provided.

40 For service contracts, the capability of service providers to provide certain services may be evaluated in particular with regard to their skills, efficiency, experience and reliability (Article 32.1 of Directive 92/50/EEC). In this context, see also the Beentjes judgment cited above, point 37.

If a contract requires specific know-how in the "social" field, specific experience may be used as a criterion as regards technical capability and knowledge in proving the suitability of candidates[41].

The references permitted by the public procurement directives[42] allow account to be taken of the "social capacity" of the undertaking (sometimes also known as "social responsibility"[43]) only if this demonstrates the technical capability, within the meaning set out above, of the undertaking to perform a given contract.

1.4. Award of the contract

Once the candidates or tenderers have been selected, contracting authorities enter the phase of evaluation of tenders, leading to the award of the contract.

Selection of candidates or tenderers and the award of a contract are two distinct operations that are governed by separate rules.

For the award of public procurement contracts, the public procurement directives[44] permit the use of two different criteria, namely the lowest price and the most economically advantageous tender.

When a contract is to be awarded to the most economically advantageous tender, the public procurement directives require the contracting authority to indicate in the contract documents or in the contract notice the award criteria it will apply, where possible in descending order of importance. As a result, the contracting authority is required to state all the criteria it intends to use when evaluating tenders, and is required, at the time of evaluation of tenders, not to use criteria other than those set out in the contract notice or contract documents.

1.4.1. The criterion of the most economically advantageous tender

The public procurement directives list, by way of example, a number of criteria that the contracting authorities can use as a basis to identify which tender would be the most advantageous from an economic point of view[45]. Other criteria may also be applied.

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41 For example, specific experience of management of a crèche, or of training services for the long-term unemployed.

42 Of all the references listed exhaustively in the public procurement directives for establishing the technical capability of a tenderer, the following are those which might concern social considerations in certain cases: (1) a list of projects completed in the previous five years, accompanied by certificates of due performance for the most important projects, or a list of the major services provided in the previous three years; (2) a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities; or (3) a statement of the technicians or technical bodies which the candidate can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality control.

43 The terms "responsibility" or "social capacity" reflect a trend on the part of businesses to gradually take greater account of social and ethical (and environmental) considerations in their business and investment plans, sometimes over and above simple compliance with social legislation. Businesses' approach to social responsibility varies considerably depending on the sector and on national - or even regional - cultures. In its Green Paper "Promoting a European framework for corporate social responsibility", COM(2001) 366 of 18.7.2001, the Commission stresses the importance of corporate social responsibility, as it can be a positive contribution to the strategic goal decided in Lisbon (cf. point 6 of the Green Paper). With this Green Paper, the Commission aims to launch a broad debate on how the European Union could promote such social responsibility at both European and international level (point 7). Moreover, various "social labels" of a voluntary nature are currently emerging on the market. In its Green Paper, the Commission defines the concept of "social label" as "words and symbols on products which seek to influence the purchasing decisions of consumers by providing an assurance about the social and ethical impact of a business process on other stakeholders".

44 Article 26 of Directive 93/36/EEC, Article 30 of Directive 93/37/EEC, Article 36 of Directive 92/50/EEC and Article 34 of Directive 93/38/EEC.

45 The criteria cited as examples in the directives are price, delivery or performance dates, running costs, cost-effectiveness, quality, the aesthetic and functional character, the technical value, after-sales service and technical assistance.

As a general rule, the public procurement directives impose two conditions with regard to criteria used for determining the most economically advantageous tender. First, the principle of non-discrimination has to be observed[46]. Second, the criteria used should generate an economic advantage for the contracting authority. The European Court of Justice has confirmed that the aim of the public procurement directives is to avoid the risk of preference being given to national tenderers or candidates whenever a contract is awarded by contracting authorities, and to avoid the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations that are not economic in nature[47].

The common factor shared by all criteria used for evaluation of offers is that they must, like the criteria cited as examples, all concern the nature of the work which is the subject-matter of the contract or the manner in which it is carried out[48]. They must permit the contracting authority to compare tenders in an objective way in order to determine which tender best meets its needs in respect of a given contract. An award criterion must allow the intrinsic qualities of a product or service to be assessed.

Award criteria must therefore be linked to the subject-matter of the contractor or the manner in which it is performed[49].

Social criteria are not included among the various criteria given as examples in the public procurement directives. However, if the term "social criterion" is construed as a criterion that makes it possible to evaluate, for example, the quality of a service intended for a given category of disadvantaged persons[50], such a criterion may legitimately be used if it assists in the choice of the most economically advantageous tender within the meaning of the directives.

The use of quotas to reserve contracts for a given category of supplier[51] or the use of price preferences[52] would, however, be incompatible with the current public procurement directives. This would also be the case for criteria relating to whether tenderers employ a certain category of person or have set up a programme for the promotion of equal opportunities, as they would be considered criteria which are unrelated to the subject-matter of a given contract or to the manner in which the contract is executed. Such criteria, which do not assist in the choice of the most economically advantageous tender, are not permitted under the public procurement

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46 A criterion that favours local tenderers, and that is likely to make it more difficult for potential tenderers established in other Member States to be awarded the contract in question and to perform the services which are the subject-matter of the contract, would constitute a restriction on the freedom to provide services within the meaning of Article 49 (ex 59) of the EC Treaty.

47 Judgment of the Court of 3.10.2000 in Case C-380/98 "University of Cambridge", point 17, in which the Court refers to the judgments of 15.1.1998, Mannesmann Anlagenbau Austria *et al.*, Case C-44/96, ECR p. I-73, point 33; and BFI Holding, of 10.11.98, Case 360/96, points 42 and 43. See also the judgment of 1.2.2001 in Case C-237/99, Commission v. French Republic, "HLM", points 41 and 42.

48 Conclusions of Advocate General Darmon of 4.5.1988 in the Beentjes case cited above, point 35.

49 See, for example, Article 30(1) of Directive 93/37/EEC. In this context, see also the conclusions of Advocate-General Colomer presented on 5 June 2001 in joined cases C-285/99 and C-286/99, Lombardini, footnote 23.

50 In the context of a contract to provide computer services to all the employees of a local authority (services under Annex IA), a criterion relating to the method proposed by the tenderer to ensure, at all times and in a satisfactory fashion, a quality service which meets the needs of any disabled person, may, in principle, be one of the criteria to be taken into account in determining the most economically advantageous tender.

51 In the United States, 20% of contracts are reserved for "small minority businesses", i.e., undertakings controlled by minorities. The United States has a derogation to this effect in the Agreement on Government Procurement.

52 Certain categories of tenderer benefit from a price preference where the tender submitted by tenderer A, despite the fact that it is higher than that of tenderer B, is considered equivalent to that of B insofar as A applies a given social policy, for example, an active policy for the promotion of women.

directives, given the objective of the directives, which is to allow the intrinsic qualities of a product or service to be assessed. Moreover, such criteria would be considered incompatible with the commitments entered into by the Member States under the Agreement on Government Procurement concluded under the auspices of the WTO[53].

Criteria involving social considerations may be used to determine the most economically advantageous tender where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject-matter of the contract[54].

The question arises whether the concept of "most economically advantageous tender" implies that each individual award criterion has to provide an economic advantage which directly benefits the contracting authority, or if it is sufficient that each individual criterion has to be measurable in economic terms, without the requirement that it directly provides an economic advantage for the contracting authority in the given contract.

This question was put to the European Court of Justice in case C-513/99. The judgment in this case is expected by the end of 2001. This judgment, which concerns a question relating to the environment, could be applied by analogy to provide elements for a response as regards use of social considerations[55].

Both in its Green Paper[56] and in the above-mentioned Communication on public procurement[57], the Commission clearly favoured the first interpretation.

The Commission notes that contracting authorities have the possibility to set certain conditions for the execution of a contract and that, at that stage, they can take account of certain social objectives (see point 1.6, below).

1.4.2. "Additional criterion"

This concept was first developed by the European Court of Justice[58].

The concept was first mentioned in the Beentjes case cited above, where the Court held that a criterion relating to the employment of long-term unemployed persons

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53 Certain states that are signatories to the Agreement on Government Procurement made express reservations to allow their contracting authorities to apply a social criterion when awarding contracts. The United States, for example, reserved the right to reserve certain contracts for minorities. However, no such reservation was made by the European Community. As a result, such criteria must be considered as being contrary to the provisions of the public procurement directives, especially where they relate to the award of contracts.

54 In one case handled by the Commission, a contracting authority had based itself principally on the following elements to award a contract to the local transport company: the fact that the company was based in the area had repercussions both from a taxation point of view and in terms of the creation of stable jobs. Moreover, the local purchase of large quantities of equipment and services by the service provider guaranteed local jobs. The Commission considered that these criteria could not constitute criteria on the basis of which contracting authorities could evaluate tenders insofar as they did not make it possible to measure an economic advantage inherent in the service which was the subject-matter of the contract to the benefit of the contracting authority. Moreover, these elements had the effect of discriminating against other tenderers insofar as this resulted in giving an advantage in the evaluation of tenders to the only service provider established in the area concerned. This was therefore an infringement of the general principle of non-discrimination between service providers set out in Article 3 of Directive 92/50/EEC.

55 Case C-513/99 Stagecoach Finland Oy/AB, OJ C 102/10 of 8.4.2000.

56 Green Paper on "Public procurement in the European Union: Exploring the way forward", COM(1996) 583 of 27.11.1996.

57 See Chapter 4.3 of the 1998 Communication cited above on the integration of environmental considerations into public procurement. See also point 48 of the Communication on *Social and regional aspects of public procurement*, COM(89) 400 adopted by the Commission on 22.9.1989 (OJ C 311, 12.12.1989).

58 See Beentjes case cited above (at point 29) and Case C-255/98, Commission of the European Communities v. French Republic, judgment of 26.9.2000, School buildings - Nord-Pas-de-Calais Region (ECR 2000, I-7445).

was not relevant either to the checking of a candidate's economic and financial suitability or of the candidate's technical knowledge and ability, or to the award criteria listed in the relevant directive. The Court also held that this criterion was nevertheless compatible with the public procurement directives if it complied with all relevant principles of Community law.

In Case C-225/98, the Court of Justice held[59] that contracting authorities can base the award of a contract on a condition related to the combating of unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two or more economically equivalent tenders. This condition was regarded by the Member State in question as an additional, non-determining criterion and was considered only after tenders were compared from a purely economic point of view. Finally, the Court of Justice stated that the application of the award criterion regarding combating unemployment must not have any direct or indirect impact on those submitting bids from other Member States of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to ascertain that such a condition existed.

This might also be the case for other conditions in the social field.

1.5. Abnormally low tenders

Under the current public procurement directives[60], where contracting authorities consider a tender to be abnormally low, their only obligation is to ask for an explanation from the tenderer before being able to reject the tender. The contracting authority must verify the content of the tender in question, and can reject it if it appears to be unreliable, although it is not required by the directives to do so. In Member States that have adopted legislation to this effect, contracting authorities can nevertheless be required to reject abnormally low tenders where this is due, for example, to non-compliance with employment or labour law rules.

The public procurement directives list, by way of example, certain elements that the contracting authority can take into account such as the economy of the manufacturing process, technical solutions and exceptionally favourable conditions available to the tenderer. Elements relating to non-compliance with rules on safety or employment can, under the current public procurement directives, be taken into consideration to reject an abnormally low tender. In keeping with the general approach of the directives, the practical rules regarding such verification are governed by national law, it being understood that such rules must permit the tenderer to present its position.

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[59] See the General Report on the Activities of the European Union, 2000, point 1119, p. 407.

[60] Article 27 of Directive 93/36/EEC, Article 30 of Directive 93/37/EEC, Article 37 of Directive 92/50/EEC and Article 34(5) of Directive 93/38/EEC.

1.6. Execution of a contract

One way to encourage the pursuit of social objectives is in the application of contractual clauses or of conditions for execution of the contract, provided that they are implemented in compliance with Community law and, in particular, that it does not discriminate directly or indirectly against tenderers from other Member States.

Contracting authorities can impose contractual clauses relating to the manner in which a contract will be executed. The execution phase of public procurement contracts is not currently regulated by the public procurement directives.

However, the clauses or conditions regarding execution of the contract must comply with Community law and, in particular, not discriminate directly or indirectly against non-national tenderers[61] (see point 3.2, below).

In addition, such clauses or conditions must be implemented in compliance with all the procedural rules in the directives, and in particular with the rules on advertising of tenders[62]. They should not be (disguised) technical specifications. They should not have any bearing on the assessment of the suitability of tenderers on the basis of their economic, financial and technical capacity, or on the award criteria[63]. Indeed, "the contract condition should be independent of the assessment of the bidders' capacity to carry out the work or of award criteria"[64].

Transparency must also be ensured by mentioning such conditions in the contract notice, so they are known to all candidates or tenderers[65].

Finally, a public procurement contract should, in any event, be executed in compliance with all applicable rules, including those in the social and health fields (see Chapter III, below).

Contract conditions are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract. It is therefore sufficient, in principle, for tenderers to undertake, when submitting their bids, to meet such conditions if the contract is awarded to them. A bid from a tenderer who has not accepted such conditions would not comply with the contract documents and could not therefore be accepted[66]. However, the contract conditions need not be met at the time of submitting the tender.

Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations. Listed below are some examples of

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61 By way of example, a clause stipulating that a successful tenderer must employ a certain number or percentage of long-term unemployed or apprentices, without requiring the unemployed or apprentices to be from a particular region or registered with a national body, for instance for the execution of a works contract, should not, *a priori*, amount to discrimination against tenderers from other Member States.

62 See point 31 of the Beentjes judgment cited above.

63 See point 28 of the Beentjes judgment cited above.

64 Communication on *Regional and Social Aspects of Public Procurement*, cited above, point 59.

65 "In order to meet the directive' s aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts" (see the Beentjes judgment cited above, point 21).

66 The judgment of the Court of Justice of 22.6.1992 in Case C-243/89 "Storebaelt" stated that a contracting authority must reject bids which do not comply with the tender conditions to avoid infringing the principle of equal treatment of tenderers, which lies at the heart of the public procurement directives.

additional specific conditions which a contracting authority might impose on the successful tenderer while complying with the requirements set out above, and which allow social objectives to be taken into account:

- the obligation to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract;

- the obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity[67];

- the obligation to comply with the substance of the provisions of the ILO core conventions during the execution of the contract, in so far as these provisions have not already been implemented in national law;

- the obligation to recruit, for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer.

It should be noted that it would appear more difficult to envisage contractual clauses relating to the manner in which supply contracts are executed, since the imposition of clauses requiring changes to the organisation, structure or policy of an undertaking established on the territory of another Member State might be considered discriminatory or to constitute an unjustified restriction of trade.

II PUBLIC PROCUREMENT CONTRACTS NOT COVERED BY THE DIRECTIVES

The public procurement directives apply only to certain public procurement contracts, and in particular those whose value equals or exceeds the relevant threshold set out in the directives.

Under Community law, it is for Member States to decide whether public procurement contracts not covered by the Community directives should be subject to national rules.

Member States are also free, within the limits laid down by Community law, to decide whether public procurement contracts not covered by the directives may - or must - be used to pursue objectives other than the objective of "best value for money" pursued by the public procurement directives.

Without prejudice to national legislation in the field, contracting authorities remain free, in respect of such contracts, to define and apply, in their procurement procedures, selection and award criteria of a social nature, provided that they comply

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[67] In the case of services contracts, this might for example involve establishing a policy aimed at promoting ethnic and racial diversity in the workplace, through instructions given to the persons in charge of recruitment, promotion or staff training. It may also involve the appointment by the contractor of a person responsible for implementing such a policy in the workplace.

with the general rules and principles of the EC Treaty[68]. This implies, among other things, an appropriate degree of transparency and compliance with the principle of equality of treatment of tenderers.

Practices that reserve contracts to certain categories of persons, for example to disabled persons ("sheltered workshops") or to the unemployed, are permitted. Such practices must not, however, constitute direct or indirect discrimination as regards tenderers from other Member States[69], or constitute an unjustified restriction on trade[70]. Thus, reservation of a contract for national tenderers would be contrary to the rules and general principles of the EC Treaty. However, where for example, contracts are also open to sheltered workshops from other Member States, this should not in principle be discriminatory. In such cases, award of the contract should be made in accordance, among other things, with the principles of equality of treatment of tenderers and of transparency[71] (see also Chapter III, below).

Contracting authorities have a certain freedom not only as regards contracts not covered by the directives, but also as regards the services listed in Annex IB to Directive 92/50/EEC and Annex XVIB to Directive 93/38/EEC, which cover most services of a "social" nature (for example, health and social services). Such contracts are subject only to the provisions of the public procurement directives on technical specifications and advertising (award notice). The detailed rules in the directives on selection of candidates and award of contracts do not apply to contracts for such services. However, procurement in respect of such service contracts remains subject to national law and to the rules and principles of the EC Treaty, as outlined above.

III SOCIAL PROVISIONS APPLICABLE TO PUBLIC PROCUREMENT

3.1. Introduction

From the outset, it must be reiterated that, even if the public procurement directives do not contain a specific provision to this effect, all Community, international and national regulations, rules and provisions, which are applicable in the social field shall apply fully during the performance of a public procurement contract following award of the contract. Where necessary, they should be stated in the contract notice or contract documents. The public procurement directives already permit[72] contracting authorities to identify, or for them to be obliged by a Member State to identify, in the contract documents the national competent authority or authorities from whom tenderers may obtain relevant information on obligations regarding

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68 For more details, see Chapter III of the Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, cited above.

69 In the United Kingdom, a preference scheme, the "Priority Suppliers Scheme", whose aim was to encourage employment of disabled workers through the award of government supply contracts, stipulated that certain undertakings registered on a list could submit a second tender to bring it into line with the lowest tender, a rule that could not benefit similar tenderers from other Member States. This scheme was discontinued at the time of negotiations on codified directive 93/36/EEC and was replaced in November 1994 by a procedure that complied with Community law, the "Special Contract Arrangement". Eligibility for the scheme was extended to employers of disabled persons throughout the European Union, and application of the scheme is limited to public procurement contracts whose value is below the thresholds set out in the directives.

70 Article XXIII of the Agreement on Government Procurement ("Exceptions to the Agreement") provides the parties to the Agreement with the possibility of "imposing or enforcing measures [...] relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour", provided such measures do not "constitute a means of arbitrary or unjustifiable discrimination" and are not "a disguised restriction on international trade". This possibility was not implemented in the public procurement directives.

71 In this context, see the judgments of the Court of Justice of 18.11.1999 in Case C-275/98, Unitron, and of 7.12.2000 in Case C-324/98, Telaustria.

72 Article 23 of Directive 93/37/EEC, Article 28 of Directive 92/50/EEC and Article 29 of Directive 93/38/EEC.

safety and working conditions which are applicable at the place where the works are carried out or on the sites where the services are provided[73].

These obligations include respect of national rules deriving from Community directives in the social field. Of particular relevance in the context of public procurement are the directives on the health and safety of workers and the directives on the "transfer of undertakings" and the "posting of workers" (see Point 3.2.2.2, below), as well as recent directives on equality of treatment[74].

Such obligations may also derive from certain Conventions of the International Labour Organisation (ILO)[75]. As regards core labour standards recognised at international level, the fundamental principles and rights at the workplace defined by the International Labour Organisation of course apply in their entirety to the Member States[76].

Bids from tenderers who have not taken account of obligations on employment protection provisions and working conditions identified by the contracting authority in the contract documents cannot be considered as complying with the contract documents. Moreover, where tenderers have not taken sufficient account of these obligations in their tenders, their tenders might be considered as abnormally low and, in some cases, might be rejected for this reason (see point 1.5, above).

Questions have frequently been asked[77] about the interpretation and application of certain rules or regulations of a social nature which must be complied with in respect of public procurement contracts and which might seem difficult to identify in the context of public procurement, and particularly during execution of the contract. Particularly frequent are questions on the application of labour law and the protection of working conditions in respect of workers posted by an undertaking in order to provide a service in another Member State, as particular account has to be taken of such conditions when tenderers are drawing up their bids. Another matter on which questions are frequently posed in respect of public procurement concerns cases where a successful tenderer takes over some or all of the employees of the organisation previously holding the contract.

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73 Under the current public procurement directives, contracting authorities that make use of this possibility and thus provide such information in the tender documents are required to ensure that tenderers have taken the obligations relating to protection provisions and working conditions into account in the preparation of their tenders, by asking tenderers to state this in their tenders. In this way, tenderers can obtain the necessary information in advance on the social obligations that will be applicable if the contract is awarded to them. It also permits tenderers to take account in the preparation of their tenders of the costs that compliance with such obligations would involve.

74 Directive 2000/43/EC of 29.6.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180/22) and Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303/16).

75 Conventions No. 87 of 9.7.1948 and No. 98 of 1.7.1949 (on, respectively, freedom of association and protection of the right to organise, and application of the right to organise and collective bargaining); No. 29 of 28.6.1930 and No. 105 of 25.6.1957 (abolition of forced labour); No. 111 of 25.6.1958 (discrimination in employment and occupation); No. 100 of 29.6.1951 (principle of equal remuneration and abolition of all discrimination); No. 138 of 26.6.1973 and No. 182 of 17.6.1999 (minimum age and prohibition of the worst forms of child labour).

76 Commission Communication on core labour standards, cited above, point 3.1. In this context, the Commission states that, since rapid ratification by all Member States of the eight core ILO Conventions goes hand in hand with the European Union's commitment to promoting core labour standards, on 15.9.2000 it sent the Member States a recommendation on ratifying the most recent basic Convention, i.e. Convention No. 182 cited above (recommendation published in OJ L 243 of 28.9.2000).

77 The wish to improve social protection for workers and their working conditions is frequently behind such questions. Moreover, the objective of ensuring social protection of workers has been recognised by the Court of Justice as an imperative requirement of general interest which may justify national measures restricting the exercise of one of the fundamental freedoms of Community law (judgments of 17 December 1981, Webb, Case 279/80, ECR 3305; of 3.2.1982, Seco and Desquenne & Giral, Joined Cases 62/81 and 63/81, ECR. 223; of 27.3.1990, Rush Portuguesa, Case C-113/89, ECR I-345; of 28.3.1996, Guiot, Case C-272/94, ECR I-1905; of 23.11.1999, Arblade, Joined Cases C-369/96 and C-376/96).

Moreover, understanding the extent of relevant obligations in the social field may play an important role in dealing with and verifying tenders which are suspected of being abnormally low.

The Commission explains in this Communication the scope of Community provisions that are of particular relevance in answering such questions.

3.2. DETERMINING THE WORKING CONDITIONS APPLICABLE

In the case of national, international and Community standards and rules that must be applied in the social field, a distinction must be made between situations of a cross-border nature and other situations (which can, in principle, be considered purely national).

In "national" situations, the contracting authorities, tenderers and contractors must comply, as a minimum standard, with all obligations relating to employment protection conditions and working conditions, including those deriving from collective and individual rights, that arise from applicable labour legislation, case law and/or collective agreements, provided that they are compatible with Community legislation and the rules and general principles of Community law, and in particular the principles of equal treatment and non-discrimination.

In “cross-border” situations, requirements justified by overriding reasons in the general interest that are in force in the host country (the catalogue of such rules was put on a Community basis by Directive 96/71/EC, see point 3.2.1.2 below) must, among others, be complied with by service providers, in the respect of the principle of equal treatment.

In both situations, provisions more favourable to workers may, however, also be applied (and must then also be complied with), provided that they are compatible with Community law.

3.2.1. The limits laid down by Community law on the application of national provisions

3.2.1.1. The EC Treaty

Since the relevant provisions can be applied only if they are compatible with Community law, the limits and restrictions laid down by Community law should be examined.

The established case law of the Court, as summarised in the Arblade judgment[78], is that Article 49 (ex 59) of the EC Treaty requires not only the elimination of any discrimination against a service provider established in another Member State by reason of its nationality, but also the elimination of any restriction, even if it applies indiscriminately to national service providers and to those from other Member States, which is likely to prevent, hamper or make less attractive the activities of a service provider established in another Member State where it lawfully provides similar

[78] See the Arbalde judgment, cited above,and in particular points 33-39.

services[79]. Moreover, even in the absence of harmonisation in the field, as a fundamental principle of the EC Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, insofar as that interest is not protected by the rules to which the service provider is subject in the Member State in which he is established[80]. Moreover, application of such national rules of a Member State to service providers established in another Member State must be necessary to ensure attainment of the objective pursued and must not exceed what is necessary to attain the objective.[81]

The Court has already accepted worker protection[82], including protection of workers in the construction sector[83], as an imperative reason in the general interest. However, purely administrative considerations would not justify such a derogation from Community law by a Member State, especially if the effect of the derogation is to restrict the exercise of one of the principal freedoms under Community law[84]. It must be stressed that the imperative reasons in the general interest which justify the substantive provisions of a regulation may also justify the supervisory measures needed to ensure that they are complied with[85].

Exclusion from participation in a public procurement contract of an undertaking established in another Member State because it was not affiliated to a national collective agreement in force in the relevant sector in the country of the contracting authority would thus not only be contrary to the public procurement directives, but might also be an infringement of the freedom to provide services and, in certain cases, of the right of establishment[86].

3.2.1.2. Provisions of secondary legislation of particular relevance to public procurement

Directive 96/71/EC ("posting of workers")

According to the case-law of the Court of Justice[87], Community law does not prevent Member States from extending their legislation, or collective labour agreements entered into by the social partners , including as regards minimum wages, to any person who carries out work, even temporarily, within their territory, irrespective of the country in which the employer is established.

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79 See the judgments of 25.7.1991, Säger, Case C-76/90, ECR p. I-4221, point 12; of 9.8.1994, Vander Elst v. OMI of 9.8.1994 in Case C-43/93, ECR p. I-3803, point 14; of 12.12.1996, Reisebüro Broede, Case C-3/95, ECR p. I-6511, point 25; and of 9.7.1997, Parodi, Case C-222/95, ECR p. I-3899, point 18, and point 10 of the Guiot judgment, cited above.

80 See, in particular, the Webb judgment cited above, point 17, and judgments of 26.2.1991, Commission/Italy, Case C-180/89, ECR p. I-709, point 17; Commission v. Greece, Case C-198/89, ECR p. I-727, point 18; Säger, cited above, point 15; Vander Elst, cited above, point 16, and Guiot, cited above, point 11.

81 See in particular the Säger judgment, cited above, point 15, and judgments of 31.3.1993, Kraus, Case C-19/92, ECR p. I-1663, point 32; of 30.11.1995, Gebhard, Case C-55/94, ECR p. I-4165, point 37, and Guiot, cited above, points 11 and 13.

82 See the Webb judgment, cited above, point 19, and judgments of 3.2.1982, Seco and Desquenne & Giral, cited above, point 14, and of 27.3.1990, Rush Portuguesa, cited above, point 18.

83 Guiot judgment, cited above, point 16.

84 See, in particular, the judgment of 26.1.1999, Terhoeve, Case C-18/95, ECR p. I-345, point 45.

85 In this context, see the Rush Portuguesa judgment, cited above, point 18, and the Arblade judgment, cited above, points 61 to 63 and 74. However, although in the latter judgment, the Court confirmed the importance of social protection of workers and the justification for certain supervisory measures needed to ensure that it is complied with, it added that such supervisory measures could be accepted only "where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71" (see point II.3.2, above). The organised system for cooperation or exchanges of information between Member States thus provided for will therefore make certain supervisory measures superfluous after expiry of the date for implementation of that Directive (16.11.1999). See also, in this context, the answer to Written Question E-00/0333 by Mrs B. Weiler.

86 See, in this context, the conclusions of the Advocate-General in Case C-493/99, Commission v. Germany, of 5.4.2001.

87 See, in particular, the Rush Portuguesa judgment, cited above, point 18.

Having regard to this case-law and the relevant provisions of the 1980 Rome Convention[88], Directive 96/71/EC concerning the posting of workers in the framework of a transnational provision of services aims to co-ordinate the legislation of Member States by preparing a list of mandatory rules of general interest at Community level and by rendering obligatory the existing "possibilities" for Member States as regards transnational situations. It seeks to guarantee both the fundamental freedoms under the EC Treaty and worker protection, and is intended to provide greater legal certainty to enterprises, as service providers, and to "posted" workers within the framework of the freedom to provide services. In Community labour law, the Directive provides a significant level of protection to workers. To this end, the Directive lays down a common list of rules for minimum protection of workers which employers must observe in the host country in respect of workers posted in the situations described above. It also guarantees a level playing field for all tenderers in the field of public procurement, and legal clarity as to the elements to be taken into account when preparing tenders.

This core of mandatory rules for minimum protection of workers is found either in legislation or in collective agreements which have been declared universally applicable within the meaning of the Directive, and covers the following matters:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay;
- conditions of hiring-out of workers (in particular by temporary employment undertakings);
- health, safety and hygiene at work;
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- equality of treatment between men and women and other provisions on non-discrimination.

It should be noted that the Directive states that the rules laid down by collective agreements that have been declared universally applicable[89] are mandatory in the construction sector. Member States may, however, extend the application of these rules to other sectors. Rules that are laid down in legislative provisions apply to all sectors.

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88 On the law applicable to contractual obligations, OJ 1980 L 266.

89 Article 3 of the "posting of workers" Directive lays down what is meant by collective agreements or arbitration awards which are "universally applicable" (Article 3(1)) or which have been "declared universally applicable" (Article 3(8)). In any event, application of such collective agreements must comply with the principle of equality of treatment as set out in the last paragraph of the Article in question. There is equality of treatment within the meaning of this provision "where national undertakings in a similar position are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1", and "are required to fulfil such obligations with the same effects".

The "posting of workers" Directive thus introduces certain "social clauses" into the relationship between service providers operating in one Member State and the party to whom the service is provided who is situated in another Member State (host Member State), which may be a public authority. The service provider who posts workers to a host Member State must comply with a minimum set of labour law requirements in force in that Member State.

Directive 2001/23/EC (Safeguarding workers' rights in the event of "transfers of undertakings")

If an undertaking takes over certain activities carried out previously by another undertaking, subsequent to a procedure for the award of a public procurement contract, this might fall within the scope of the Directive on "transfers of undertakings". Such a transfer may arise as part of a procedure for the award of public service contracts[90], as part of the privatisation of a sector where there is a transfer of an entity in the form of an administrative concession[91], or as a result of a public procurement procedure, for example for a public services contract[92].

The Community directive applicable in this field [93] aims to ensure the continuity of the existing employment relations of any person protected as an employee under national employment legislation[94], regardless of the nature of the post held by such person[95].

The essential and decisive criterion for establishing whether the "transfer of undertakings" Directive applies in particular instances, and particularly whether there is a transfer within the meaning of the Directive, is whether the economic entity transferred retains its identity after its transfer[96]. This may be the case if, for example, its operations are genuinely continued or taken over[97]. The term "entity" thus refers to an organised and stable set of persons and elements allowing the exercise of an economic activity in pursuit of a given objective[98]. In order to establish whether the conditions for a transfer of an economic entity are met, it is necessary to take into account all the circumstances that characterise the operation in question. However, these elements are only some of the aspects of the overall assessment required and should only form part of the assessment by the national judge whose task it is to make this assessment[99].

Despite the fact that it may provide an indication that there has been no transfer within the meaning of the Directive, the absence of a contractual link between the transferor (that is, the entity that held the contract previously) and the transferee (the

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90 See, for example, the proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway, 26.7.2000, COM (2000) 7, in particular Article 9(3).

91 Case C-343/98, Collino, judgment of 14.9.2000 on the transfer for value, in the form of an administrative concession, by an entity operating public telecommunications services (and managed by a public body forming part of central government) to a private-law company established by another public body which holds its entire capital.

92 Case C-172/99, Oy Liikenne, judgment of 25.1.2001 concerning bus services.

93 Directive 2001/23/EC, cited above.

94 See the judgments of 11.7.1985, Case 105/84, Danmols Inventar; of 19.5.1992, Case C-29/91, Sophie Redmond Stichting; and of 10.12.1998, joined cases C-173/96 and C-247/96, Sanchez Hidalgo *et al*.

95 See the Collino case, cited above.

96 Judgments of 14.4.1994, Case C-392/92, Schmidt; of 19.9.1995, Case C-48/94, Rygaard; of 26.9.2000, Case C-175/99, Mayeur.

97 Judgments of 18.3.1986, Case 24/85, Spijkers; of 11.3.1997, Case C-13/95, Süzen; and of 10.12.1998, joined cases C-127/96, C-229/96 and C-74/97, Hernández Vidal, as well as the judgment of 2.12.1999 in the Allen *et al case, Case C-234/98* and the Oy Liikenne case cited above.

98 See, for example, the Süzen, Hidalgo *et al.*, Allen *et al.* and Oy Liikenne cases cited above.

99 See the Spijkers, Süzen, Sanchez Hidalgo *et al.* and Hernández Vidal cases cited above.

new tenderer to whom the contract is awarded), should not be a deciding factor in this respect[100]. The Directive applies in all cases where there is a change in contractual relations, in the natural or legal person responsible for operating the undertaking, and who therefore enters into the contractual obligations of an employer *vis-à-vis* the employees of the undertaking[101].

As confirmed in the recent judgment in the Oy Liikenne case[102], the fact that the transfer takes place following a public procurement procedure does not pose any specific problems as regards application of the "transfer of undertakings" Directive. Moreover, the two directives can be reconciled, due to their objectives[103]. What is more, further to the case law of the Court of Justice on public procurement, contracting authorities have an obligation to inform tenderers of all conditions relating to the performance of a contract, so that tenderers can take them into account when preparing their tenders. An operator must thus be in a position to assess whether, if it is awarded the contract, it will be in its interests to buy major assets of the current holder of the contract and take over all or some of his staff, or whether it will be required to do so. In such event, it should be in a position to assess whether it will find itself in the situation of a transfer of undertaking within the meaning of Directive 2001/23/EC[104].

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100 Judgment of 10.2.1988, Case 324/86, Tellerup, known as "Daddy's Dance Hall", and the Süzen, Hidalgo *et al.*, Mayeur and Oy Liikenne cases cited above.

101 See Tellerup judgment, cited above, and the Süzen, Hidalgo *et al.*, Mayeur and Oy Liikenne cases cited above. Moreover, the Directive also applies subsequent to a transfer decision taken unilaterally by the public body (local authority), see judgment of 19.5.1992, Case C-29/91, Sophie Redmond Stichting. Moreover, the fact that the service was transferred by a public-law body, which was a local authority in the case in question, would not exclude application of the Directive because the activity involved is not covered by the exercise of public powers. See Collino (point 32) and Hidalgo *et al.* (point 24) cases cited above. On the other hand, a reorganisation of the structures of public administration or the transfer of administrative tasks between public administrations is not a transfer of an undertaking. See judgment of 15.10.1996, Case C-298/94, Henke and the Mayeur case cited above.

102 Judgment of 25.1.2001, Case C-172/99, in particular, point 21/22.

103 See also the conclusions of Advocate-General Léger in Case C-172/99, in particular points 28 to 37; and point 22 of the judgment in this case.

104 Oy Liikenne judgment cited above, point 23.

IP/01/1418

Brussels, 15th October 2001

Public procurement: Commission issues guidelines for taking social considerations into account

The European Commission has clarified how Community law offers numerous possibilities to public purchasers who wish to integrate social considerations into public procurement procedures. The clarifications take the form of an interpretative Communication that explains how social concerns may be taken into account at each separate stage of the contract award procedure. As public procurement amounts to over €1,000 billion every year across the European Union (14% of EU GDP), taking social concerns into account in these purchases could contribute to sustainable development as well as economic and social renewal in the Union.

Internal Market Commissioner Frits Bolkestein said “This Communication will be a useful tool to help public authorities to apply social considerations to their purchasing, whilst at the same time ensuring value for money for taxpayers and equal access for all Community suppliers.”

Employment and Social Affairs Commissioner Anna Diamantopoulou added “these guidelines are useful because they seek to make clear to public authorities the full scope for designing social policy into their tendering activities.”

The Communication interprets existing law, comprising EC Treaty Internal Market rules and the public procurement Directives. It therefore refers both to public contracts that are covered by the EC Directives on public procurement as well as those that are not covered by these Directives but are nevertheless subject to Treaty rules. In doing so, it seeks to reconcile the respective goals of social policy and efficient and fair public procurement in the Internal Market.

The Communication examines in detail the different stages in a public procurement procedure and explains how, at each stage, social considerations may be taken into account, while at the same time ensuring rational use of public money and equal access for all Community enterprises to public procurement. For example, technical specifications with a social connotation can be used which serve to characterise a product or service. When selecting tenderers to submit a bid, certain social considerations may also be taken into account. Thus, non-compliance by tenderers with certain social obligations may lead to their exclusion from public procurement procedures. In addition, if a contract requires specific know-how in the "social" field, specific experience in this field may be used as a criterion in proving the technical capability of tenderers.

Contracting authorities can apply an additional condition relating to the campaign against unemployment when awarding a contract, provided that this condition is in line with all the fundamental principles of Community law, and that the authorities have to consider two or more economically equivalent bids.

It is especially during the execution of the contract that public procurement can be used by contracting authorities as a means of encouraging the pursuit of social objectives. Contracting authorities can require the successful tenderer to comply with contractual clauses relating to the manner in which the contract is to be performed. Such clauses may include measures in favour of certain categories of persons, positive actions in the field of employment and measures to ensure equal opportunities.

Public purchasers are also free to pursue social objectives in respect of public procurement contracts not covered by the public procurement Directives, within the limits laid down by national law and the general rules and principles of the Treaty.

The Communication highlights also the fact that relevant (national) rules in force in the social field, including provisions on workers' rights and on working conditions, apply in any event during performance of public procurement contracts. The limits imposed by EC law on the application of such rules are explained. Furthermore, EC legislation which is of particular relevance to public procurement, such as the Directives on posting of workers in the framework of provision of services (96/71/EC) and on safeguarding of employees' rights in the event of the transfer of undertakings (2001/23/EC), is also discussed.

The Communication figures among the actions announced in the Social Policy Agenda adopted by the European Council of Nice in December 2000. The Agenda is part of the integrated European approach set out in Lisbon with a view to ensuring economic and social renewal, and seeks to provide a dynamic and positive interaction between economic, social and employment policies, which are mutually reinforcing. The Communication will help to make economic and social renewal a reality by identifying the legal options open to public purchasers who wish to go down that route.

The interpretative Communication is available on the Commission's Europa website: http://simap.eu.int/

MEMO/01/324

Brussels, 15th October, 2001

Interpretative Communication on integrating social considerations into public procurement – frequently asked questions

(see also IP/01/1418)

Is it possible to adequately take into account social considerations under the public procurement Directives?

Yes. The Communication makes clear that there are numerous possibilities for taking account of social considerations in public procurement under the Directives, provided that the principles of non-discrimination and transparency are respected. Guidance is given about where in the tender process social considerations should be taken into account.

When is it most appropriate to take social considerations into account in the procurement procedure?

It is especially during the execution of the contract, that is, once the contract has been awarded, that public procurement can be used by contracting authorities as a means of encouraging the pursuit of social objectives. Contracting authorities can require the successful tenderer to comply with contractual clauses relating to the manner in which the contract is to be performed, which may include clauses in favour of certain categories of persons and positive actions in the field of employment.

Can a contracting authority take account of the needs of the disabled in its purchasing policy?

Yes. In deciding what you want to purchase, contracting authorities can specify their requirements regarding access for the disabled to certain buildings or public transport (for example, accessibility standards on the width of corridors and doors, adapted toilets, access ramps), or access to certain products or services (for example, in the field of information technology for the visually impaired). In addition, contracting authorities can impose an obligation on a successful tenderer to recruit, for the execution of the contract, a number of disabled persons over and above the minimum number laid down by national legislation.

Can a contracting authority use its procurement policy as a tool to combat unemployment?

Yes. Contracting authorities can require successful tenderers to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract.

Can a contracting authority promote equal opportunities through its purchasing policy?

Yes. Contracting authorities can require successful tenderers to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity.

How can a tenderer be sure that its competitors will not benefit from submitting tenders that do not comply with applicable employment and safety rules?

Tenderers who have not complied with social legislation can be excluded from public procurement procedures, where this is deemed to constitute grave professional misconduct or an offence having a bearing on their professional conduct. In addition, elements relating to non-compliance with rules on safety or employment can, under the current public procurement Directives, be taken into consideration to reject an abnormally low tender.

Can a contracting authority take social considerations into account when awarding a contract?

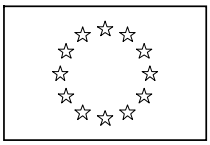
Yes. Criteria involving social considerations may be used to determine the most economically advantageous tender where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject-matter of the contract. For example, a criterion that makes it possible to evaluate the quality of a service intended for a given category of disadvantaged persons may be used. In addition, it may also be possible to use a condition related to the combating of unemployment as an additional criterion in respect of two or more economically equivalent tenders, provided it complies with the fundamental principles of Community law [namely? non-discrimination? equal treatment?].

What rules on employment and protection of working conditions are applicable to workers posted to work on a public procurement contract in another Member State?

The Communication explains the relevance to public procurement of Directive 96/71/EC on the posting of workers in connection with the cross-border provision of services. This Directive lays down a common list of rules for minimum protection of workers which employers must observe in respect of workers they post to other Member states. It also guarantees a level playing field for all tenderers in the field of public procurement, and legal clarity as to the elements to be taken into account when preparing tenders.

Can a contracting authority require that a successful tenderer take on the employees of the previous contractor?

Yes. The fact that the transfer of an undertaking, within the meaning of Directive 2001/23/EC on the safeguarding of employees' rights in the event of a transfer of undertaking, takes place following a public procurement procedure does not pose any specific problems as regards application of this Directive. However, contracting authorities have an obligation to inform tenderers in advance of all conditions relating to the performance of a contract, including whether and on what conditions such a transfer of undertaking might take place if the tenderer is awarded the contract, so that tenderers can take them into account when preparing their tenders.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 4.7.2001
COM(2001) 274 final

COMMISSION INTERPRETATIVE COMMUNICATION

on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement

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EXECUTIVE SUMMARY

- Achieving sustainable development in practice requires that economic growth supports social progress and respects the environment, that social policy underpins economic performance, and that environmental policy is cost-effective.

- As stated in the Commission Communication of May 2001 on "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development" to be presented to the meeting of the European Council in Gothenburg in June 2001, Member States should consider how to make better use of public procurement to favor environmentally-friendly products and services. . The present Communication is a contribution to that end.

- The objective of this document is to analyse and to set out the possibilities of the existing Community legal framework with regard to the integration of environmental considerations into public procurement.

- The introduction of further possibilities that go beyond the ones offered by the existing legal framework requires intervention from the Community legislator.

- Existing environmental and other legislation, either Community legislation or national legislation compatible with Community law, is binding upon contracting authorities and may have an influence on the choices to be made and the specifications and criteria to be drawn up by contracting authorities.

- The main possibilities for "green purchasing" are to be found at the start of a public purchase process, namely when making the decision on the subject matter of a contract. These decisions are not covered by the rules of the public procurement directives, but are covered by the Treaty rules and principles on the freedom of goods and services, notably the principles of non-discrimination and proportionality.

- The public procurement directives themselves offer different possibilities to integrate environmental considerations into public purchases, notably when defining the technical specifications, the selection criteria and the award criteria of a contract.

- In addition, contracting authorities may impose specific additional conditions that are compatible with the Treaty rules.

- Public contracts not covered by the public procurement directives are subject to the rules and principles of the Treaty. Here, it depends on national law whether contracting authorities have further possibilities for "green purchasing".

INTRODUCTION

The objective of this document is to analyse and to set out the possibilities of the existing Community legal framework with regard to the integration of environmental considerations in public procurement, offering thus to public purchasers the possibility to contribute to sustainable development.

Public procurement policy is one of the many elements of Single Market policy, which includes its strategic targets (in particular the free movement of goods, persons and services). Public procurement policy aims at contributing to the realisation of the Single Market by the creation of competition necessary for the non-discriminatory award of public contracts and the rational allocation of public money through the choice of the best offer presented. Implementing these principles enables public purchasers to obtain the best value for money, following certain rules on how to define the subject matter of the contract, for the selection of the candidates according to objective requirements and the award of the contract solely on the basis of the price or alternatively on the basis of a set of objective criteria.

The history of the Community Directives on public procurement dates from 1971, when the first directive relating to public work contracts was adopted. Since then, directives on public supply contracts and public service contracts have been adopted, as well as directives for the utilities sector.[1] The basic concept and system of the Directives, though amended several times, was never essentially modified.

The public procurement directives do not contain any explicit reference to environmental protection or considerations or any other aspects beyond the core internal market policy, which is, regarding the time of adoption of these directives, not surprising.

Since the adoption of the public procurement directives, action in the field of **environment** has evolved at the initiative of the Community and the Member States.

The Amsterdam Treaty has reinforced the principle of integration of environmental requirements into other policies, recognising that it is key in order to achieve sustainable development.[2]

Also the Commission proposal for the Sixth Environmental Action Programme, which covers the years 2001 - 2010, has identified public procurement as an area which has considerable

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[1] Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, replaced by Council Directive 93/37/EEC, amended by European Parliament and Council Directive 97/52/EC;
Council Directive 77/62/EEC coordinating procedures for the award of public supply contracts, replaced by Council Directive 93/36/EEC, amended by European Parliament and Council Directive 97/52/EC;
Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, amended by European Parliament and Council Directive 97/52/EC;
Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement of entities operating in the water, energy, transport and telecommunications sectors, amended by European Parliament and Council Directive 98/04/EC.

[2] Article 6 of the consolidated version of the Treaty establishing the European Community states that "environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development".

potential for 'greening' the market through public purchasers using environmental performance as one of their purchase criteria.[3]

Sustainable development offers the European Union a positive long-term vision of a society that is more prosperous and more just, and which promises a cleaner, safer, healthier environment – a society which delivers a better quality of life for us, for our children, and for our grandchildren. Achieving this in practice requires that economic growth supports social progress and respects the environment, that social policy underpins economic performance, and that environmental policy is cost-effective.[4] In relation to public procurement, this means that the legislative framework should facilitate the taking into account of environmental concerns alongside its primary economic purpose.

There is no inherent contradiction between economic growth and the maintenance of an acceptable level of environmental quality. Accordingly, the issue should not be seen as one of economic growth versus the environment, but to achieve synergies between the two. The Commission has recognised in its Communication on the Single Market and the Environment[5] that the increasing openness of markets coupled with growing environmental challenges and greater environmental awareness have revealed synergies, but that there are inevitably also tensions between the functioning of the Single Market and the implementation of environmental policy. It is therefore stated that the Community must seek a coherent approach to the pursuit of the objectives of the Treaty in relation to both the Single Market and the environment whilst also honouring its international obligations.

Also at world level, environmental action has evolved significantly. An example of these evolutions is the adoption of the Kyoto Protocol. The European Union has made a commitment in the Protocol to the Climate Change Convention agreed in Kyoto, which has set an ambitious target for reduction of greenhouse gases by the time frame 2008-2012.

With the growing amount of scientific information available and the increasing public awareness of both the origins as well as the consequences of environmental pollution, there has been, for several decades, in increase in the interest in contributing to the prevention of environmental pollution and contributing to sustainable development. A considerable number of consumers in the European Union, both private and public, tend more and more to purchase environmentally sound products and services.

Public purchasers and other entities covered by the public procurement directives constitute an important group of consumers. By their purchases, which represent more than 1000 billion Euros or about 14% of the Union's GDP, public purchasers could substantially contribute to sustainable development. Conscious of the responsibility regarding the realisation of sustainable development, initiatives for "greening" public procurement at national and local level have already been launched in a number of Member States.

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3 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the sixth environment action programme of the European Community: 'Environment 2010: Our future, Our choice' - adopted by the Commission on 24.01.2001 - COM (2001) 31 final

4 Communication from the Commisison: "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development". Commission's proposal to the Gothenburg European Council; COM(2001)264 final, adopted on 15.05.2001.

5 Adopted by the Commission on 08.06.1999; COM(1999) 263 final, p. 4.

Even though the Commission has indicated already some of the main possibilities in the Communication of March 1998[6], public purchasers are confronted with the fact that it is often not clear to what extent environmental considerations are compatible with the existing Community legislation on public procurement.

The Commission has committed itself to explain in greater detail the possibilities for taking into account environmental considerations in public purchases that are offered by the existing public procurement legislation.

In addition to this interpretative communication, the Commission intends to produce a handbook on green public procurement with examples on how to draw up green calls for tender in conformity with Community law.[7]

One must keep in mind, as is expressly mentioned in the Communication of 11 March 1998, that the Commission cannot, in an interpretative document such as this one, propose solutions which go beyond the existing public procurement regime. Moreover interpretation of Community law is ultimately of the sole competence of the Court of Justice.

If it is considered that the current public procurement regime does not allow adequate possibilities for the taking into account of environmental considerations, then modification of the public procurement Directives would be necessary. One should note that in the proposals for modification of the public procurement directives, adopted by the Commission on 10.05.2000, environmental characteristics are listed explicitly amongst the criteria which may serve to identify the most economically advantageous tender.[8]

The objective of this document is therefore to examine and clarify the possibilities offered by the existing public procurement regime in order to enable the optimum consideration of environmental protection in public procurement. The document will follow the different phases of a contract award procedure and examine at each stage how environmental concerns may be taken into consideration.

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6 Commission Communication "Public Procurement in the European Communities", adopted by the Commission on 11 March 1998; COM (1998) 143 final.

7 Commission Communication in Integrated Product Policy, adopted by the Commission on 07.02.2001 – COM(2001) 68 final.

8 Article 53 of the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts - (COM (2000) 275 final of 10.05.2000) and Article 54 of the Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors - (COM (2000) 276 final of 10.05.2000).

I DEFINITION OF THE SUBJECT MATTER OF THE CONTRACT

The first occasion for taking into account environmental considerations relative to a public contract, is the phase just before the public procurement directives will be applicable: the actual choice of the subject matter of the contract or, to simplify the question "what do I, public authority, wish to construct or purchase"? At this stage, purchasing authorities have a "wide" opportunity to take into account environmental considerations and choose an environmentally sound product or service. How far this will effectively be done depends to a great extent on the awareness and knowledge of the purchasing entity.

It should be emphasised that existing environmental or other legislation, either Community legislation or national legislation compatible with Community law, may well limit or influence this freedom of choice[9].

The possibilities for the taking into account of environmental considerations differ according to the different types of contracts.

Work contracts cover not only the final product, the work, but also the design and execution of the works. The best opportunities for contracting authorities to take into consideration environmental concerns are to be found in the phase of the design and the conceptual work. Contracting authorities could give clear instructions to the architects and / or engineers to design for example, a low-energy consuming administrative building, not only taking account of insulation and the use of specific construction materials, but also the installation of solar cells for the generation of warmth. They could equally require that the building be designed so that the use of elevators is necessary only to a limited extent and that the orientation of offices and tables limits the use of artificial lamps.[10]

Contracting authorities are responsible not only for the choice of the work or concept/design itself, but also for the overall execution of the works and all that happens on and around the construction site. Purchasing entities are therefore entitled to define the requirements for the execution of the works. This offers a number of possibilities for the taking into account of environmental considerations, through, for instance, requirements relating to energy and water use or waste management on and around the construction site. Here, one could think of the construction of bridges over rivers in natural reserves and in areas where tides of the sea must not be disturbed because of the specific geographical situation where the work has to be carried out[11].

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9 Like, for instance, the obligation, for certain categories of works, to carry out an environmental impact assessment. See footnote 11.

10 Different national administrations have already issued guidelines to their contracting authorities on "sustainable construction".

11 Example of the Oresund bridge construction or the Vasco de Gama bridge in Lisbon.

For a specific category of work contracts, Community law imposes an obligation to make, previous to the decision of having the work executed, an environmental impact assessment[12] This obligation, which originates from environmental legislation and not from the public procurement Directives, influences the choice of the purchasing entity. The obligation for the competent authorities to take into account the results of the environmental impact assessment in the decision whether or not to give authorisation or consent for development, tends to lead to more environmentally sound requirements for the execution of the works.

As to **service contracts**, the nature of these contracts implies also a possibility to prescribe a mode of performing. Contracting authorities could, for example, prescribe a specific method of building cleaning, using only those products that are least harmful for the environment. They could also define that, for instance, public transport services are to be carried out by electric buses. They could also prescribe the method for the collection of household waste.

Supply contracts relate, generally, to the purchase of final or end products. Therefore, apart from the basic and essential choice of the subject matter of the contract ("what shall I purchase?"), the possibilities to take into account environmental considerations in addition to this choice are not as extensive as for works and service contracts. Environmental awareness will influence this choice.

The public procurement Directives do not prescribe in any way what contracting authorities should buy and are consequently neutral as far as the subject matter of a contract is concerned.

If different possibilities exist for fulfilling their needs, contracting authorities are free to define the subject matter of the contract in the way that they consider to be the most environmentally sound[13] even through the use of variants (see paragraph II.1.4).

This freedom is, however, not entirely unlimited. A contracting authority, as a public body, has to observe the general rules and principles of Community law. More precisely, these are the principles regarding the free movement of goods and services as laid down in Articles 28 to 30 (formerly 30 to 36), and 43 to 55 (formerly 52 to 66) of the EC Treaty. [14]

This implies that the subject matter of a public contract may not be defined with the objective or the result that the access to the contract is limited to domestic companies to the detriment of tenderers from other Member States.

Contracting authorities are free to define the subject matter of the contract, or alternative definitions of the subject matter through the use of variants, in the way that that they consider to be the most environmentally sound, provided this choice does not result in a restricted access to the contract in question to the detriment of tenderers from other Member States.

The question of whether a measure is compatible with Community law depends on a case-by-case assessment. As announced in the Communication from the Commission to the European Parliament and the Council on the Single Market and the Environment, the Commission will produce a handbook on the application of articles 28 – 30 of the Treaty.

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12 Projects covered by Directive 85/337/EEC (Official Journal of the European Communities L 175 of 05.07.1985, p. 40), amended by Directive 97/11/EEC (Official Journal of the European Communities L 073 of 14.03.1997, p. 05).

13 Contracting authorities have the possibility to either prescribe the solution chosen, or avoid prescribing requirements which would lead the tenderers to offer products whose production processes would damage more the environment. They could, for example, require recycled paper which is not bleached

14 COM(1999) 263 final of 08.06.1999, p. 8 and 9.

The rules set out above are applicable to all public contracts, irrespective of the fact whether they fall within or outside the scope of application of the public procurement Directives.[15]

After having made the first choice on the subject matter of the contract, the public procurement Directives oblige contracting authorities to specify the characteristics of the subject in a manner such that it fulfils the use for which it is intended by the contracting authority. To this end, the Directives contain a number of provisions relating to common rules in the technical field, to be specified in the contract documents relating to each contract.

[15] With the exception of those contracting entities which are covered by the Utilities Directive (Directive 93/38/EEC), but which are nevertheless private bodies.

II CONTRACTS COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES

1. TECHNICAL SPECIFICATIONS OF THE SUBJECT MATTER OF CONTRACTS AND THE POSSIBILITY TO DEFINE REQUIREMENTS RELATING TO ENVIRONMENTAL PERFORMANCE

As a preliminary remark, it should be emphasised that environmental or other legislation, either Community legislation or national legislation compatible with Community law is of course binding for contracting authorities. All public procurement directives contain the rule that the way contracting authorities define technical specifications is *"without prejudice to the legally binding national technical rules."*[16] This implies that, on condition that this legislation is compatible with Community law, national legislation may, for instance, prohibit the use of specific substances which the national authorities consider harmful for the environment, or may oblige the observance of a specific minimum level of environmental performance. Contracting authorities are, of course, bound to observe such legislation.

In order to enhance transparency, the Directives oblige contracting authorities to indicate the technical specifications in the general or contractual documents relating to each contract. The objective of these rules is the opening up of public markets, the creation of genuine competition and preventing markets being reserved for national or specific undertakings (i.e. avoiding discrimination). Technical specifications include all characteristics required by the contracting authority in order to ensure that the product or service fulfils the use for which it is intended. These technical specifications give objective and measurable details of the subject matter of the contract and therefore have to be linked to the subject matter of the contract.

The public procurement Directives contain a detailed system of obligatory references to standards and comparable instruments, with a clear hierarchy: preference is given to the European instruments and in the absence of these, reference can be made to international or national standards or comparable instruments.[17]

In addition to this obligation, the Directives prohibit mentioning products of a specific make or source or of a particular production because these generally favour or eliminate certain undertakings. The indication of trade marks, patents, types, or of a specific origin or production is authorised only in cases where the subject of the contract may not be sufficiently precise and intelligible to all parties concerned. Such indication must always be accompanied by the terms *"or equivalent"* where the directives provide such exceptions.

Contracting authorities can depart from these rules and refrain from the reference to standards or comparable instruments. This is notably the case where the contract is of a genuine innovative nature for which the use of such instruments would not be appropriate.

It should be emphasized that the obligation to refer to (European) standards, does not imply that contracting authorities are bound to purchase only products or services in conformity with these. The obligation is only to refer to these instruments as a benchmark, leaving the possibility for suppliers to offer equivalent solutions.

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16 These are technical specifications the observance of which is mandatory by law or regulation in order to place a product on the market or to use it.

17 See the Annexes to this Communication.

At present very few European and national standards exist that deal with environmental performance of products and services.[18] This implies that until environmental performance attributes will be integrated into standards, contracting authorities can define the required level of performance, provided that this does not lead to discrimination.

Contracting authorities are free to define on specific points that they require a higher level of environmental protection than that laid down in legislation or in standards, on condition that the level required does not limit the access to the contract and lead to discrimination to the detriment of potential tenderers.

1.1. The possibility to prescribe which basic or primary materials shall be used

The concept of "technical specification" includes the possibility of prescribing the basic or primary materials to be used, if this contributes to the characteristics of the product or service in such a manner that it fulfils the use for which it is intended by the contracting authority. As long as these prescriptions observe Community law and are, in particular, non-discriminatory, contracting authorities may prescribe for a specific contract the materials which are to be used. This could include for instance that for a specific contract the window frames of an administrative building are made of wood or a requirement for recycled glass or other recycled materials.

1.2. The possibility to require the use of a specific production process

The definition of technical specifications in the Directives does not explicitly refer to production processes[19]. However, provided that this will not reserve the market to certain undertakings[20], the use of a specific production process may be required by contracting authorities if this helps to specify the performance characteristics (visible or invisible) of the product or service. The production process covers all requirements and aspects related to the manufacturing of the product which contributes to the characterising of the products without the latter being necessarily visible in the end-product.

This implies that the product differs from identical products in terms of its manufacture or appearance (whether the differences are visible or not) because an environmentally-sound production process has been used, e.g. organically grown foodstuffs[21], or "green" electricity. Contracting authorities must be careful that the prescription of a specific production process is not discriminatory.[22].

Requirements which do not relate to the production itself, like the way how the firm is run, on the contrary, are no technical specifications and can therefore not be made mandatory.[23]

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18 The Commission supports European standardisation organisations in integrating environmental aspects into the standardisation process.

19 It should be observed that the Government Procurement Agreement explicitly lists production process in the definition of technical specification.

20 See for example article 8 § 6 of Directive 93/36/EEC.

21 Contracting authorities may, for instance, for the description of what they consider organically grown foodstuffs, use the technical specifications laid down in Council Regulation n° 2092/91 of 24 June on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs. Official Journal of the European Communities L 198 of 22/07/1991 p. 1 – 15.

22 They may not prescribe that green electricity is generated by wind-energy only; indeed, water-energy and solar energy can also be used for the production of green electricity and the technical prescription should therefore be that the green electricity is produced by using renewable energy sources.

23 For example, the use of recycled paper in offices, the application of specific waste disposal methods on the contractors premises, the engagement of specific groups of workers (ethnic, handicapped, women).

1.3. The possibility to refer to ECO-labels

Eco-labels certify products that are deemed to be more environmentally sound than similar products in the same product group. The labels are awarded on a voluntary basis to products fulfilling specific criteria and they aim at informing consumers about environmentally sound products.

Different types of Eco-labels exist: the European Eco-label[24], national Eco-labels and pluri-national Eco-labels. There are also private Eco-labels.[25]

For the various product groups, the underlying criteria are specified in the relevant instruments.[26]

These criteria are based on the life cycle of the product and relate to different aspects, such as: performance of the products, materials contained in the products, production processes, take back and recycling, user instructions and consumer information. They are technical specifications within the meaning of the public procurement directives.

European, pluri-national and national Eco-label decisions are taken in accordance with procedures laid down in the relevant instruments[27]. These systems guarantee transparency and are open to all producers / suppliers.

Private Eco-labels are issued by private persons or organisations. In order to use a private Eco-label, the authorisation from the owner of the label is necessary. There are no common characteristics or a common system agreed or harmonised at national, pluri-national or Community level. Private Eco-labels do not provide the same guarantees as to their transparency and equal access, as European and national Eco-labels decisions.

In the absence of mandatory references[28], or where they require a higher level of environmental protection than that laid down in standards or legislation, contracting authorities can define the technical specifications related to the environmental performances in line with Eco-label criteria and may indicate that products having these Eco-label certificates are deemed to comply with the technical prescriptions of the contract documents.

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24 The European eco-label system was first laid down in Council Regulation (EEC) n° 880/92 of 23 March 1992 on a Community eco-label award scheme. Official Journal of the European Communities L 099 of 11.04.1992, p.1-7. This regulation has been repealed and replaced by European Parliament and Council Regulation N° 1980/2000 of 17 July 2000 on a revised Community Eco-label Award Scheme; Official Journal of the European Communities L 237 of 21.09.2000, p.1.
The Internet site: http://europa.eu.int/comm/environment/ecolabel/prodgr.htm contains a list of all product groups for which a European eco-label exists or is under development or revision.

25 An important group of private Eco-labels are the labels identifying timber as being the product of sustainable forestry.

26 So, for instance, criteria for the European Eco-label for personal computers are specified in the Commission Decision of 26 February 1999 establishing ecological criteria for the award of the Community Eco-label to personal computers; Official Journal of the European Communities L 70 of 17. 3. 1999; p.46.

27 European Eco-label decisions are taken in accordance with the procedure defined in European Parliament and Council Regulation n° 1980/2000 (EEC) and (pluri-)national Eco-label decisions are taken on the basis of the procedures defined in the national rules. Article 10 of the European Eco-label Regulation states that *"in order to encourage the use of Eco-labelled products the Commission and other institutions of the Community, as well as other public authorities at national level should, without prejudice to Community law, set an example when specifying their requirements for products."*

28 Like for instance a European, international or national standard covering also environmental aspects of a product – see above paragraph II.1.

Contracting authorities have to be careful not to limit the means of proof only to Eco-label certificates[29]. They shall accept also other means of proof, like test reports. This is of particular relevance in the case of national and private Eco-labels, to ensure that the specification and the means to assess the conformity with the specification would not result in the reservation of the contract to national / local companies. [see also Article 8 of Directive 93/36/EEC.]

1.4. The possibility to use variants

Products and services that are less damaging for the environment can be , generally speaking , more expensive than other products and services. When defining the subject matter of a contract, contracting authorities have to find a balance between their financial considerations, on the one hand, and their objectives of greening their purchases, on the other hand.

The use of variants[30] enables contracting authorities to assess which option best meets both of these requirements.

When using this possibility, contracting authorities first define a standard definition for the subject matter of the contract that lays down the minimum requirements. In addition to this standard definition, contracting authorities can define one or more variants, laying down alternative definitions of the subject matter, like for instance a higher environmental performance or the use of a specific production process which was not a requirement in the standard definition.

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29 Eco-labelled products often represent a limited part of a certain product market: European eco-labelled products represent normally less than 20% and in some cases even less than 5% of the product markets.

30 All public procurement directives provide for the possibility that where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting entities. Contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and specific requirements for their presentation. Where variants are not permitted, they shall so indicate in the tender notice. Article 24 of Directive 92/50/EEC; Article 16 of Directive 93/36/EEC; Article 19 of Directive 93/37/EEC and Article 34 (3) of Directive 93/38/EEC.

2. SELECTION OF THE CANDIDATES

This chapter sets out the rules of the public procurement Directives relating to the selection of those candidates whom the contracting authority considers able to execute its contract.

The rules laid down in the public procurement Directives consist of three different types.

The first set of rules concerns the grounds that justify a candidate's exclusion from participating in a public contract. These relate to, e.g. the state of bankruptcy, conviction for offences, grave professional misconduct, non-payment of social security contributions or taxes.

The second set of rules concerns the candidate's financial and economic standing. These rules do not offer possibilities to take into account environmental considerations.

The third set of rules concerns the candidate's technical capacity. These rules enable, to a certain extent, environmental considerations to be taken into account, by defining e.g. a minimum level of equipment or facilities, guaranteeing the correct execution of the contract. The Directives specify[31] that the information required for evidence of the operator's financial and economic standing as well as for technical capacity must be confined to the subject matter of the contract. The possibilities contained in these rules will be set out below.

In the Utilities sectors, the contracting entities dispose of a wider margin of appreciation for the assessment of the capacity of candidates or tenderers in so far as Directive 93/38/EEC only requires that objective rules and criteria are applied which are defined beforehand and are put at the disposal of interested candidates or tenderers.

2.1. Grounds for exclusion from participation in the contract

All public procurement Directives define the grounds on which enterprises may be excluded from participating in tender procedures. These grounds read, as far as relevant, as follows:

> *Any supplier/contractor/service provider may be excluded from participation in the contract who:*
>
> *(c) has been convicted of an offence concerning his professional conduct by a judgement, which has the force of res judicata;*
>
> *(d) h.as been guilty of grave professional misconduct proven by any means, which the contracting authorities can justify;*

[31] See for example art. 23 § 3 of Directive 93/36/EEC.

In the case where legislation qualifies the non-compliance with environmental legislation as an offence concerning professional conduct,[32] the public procurement directives allow a contracting authority to exclude a candidate from participation on the ground mentioned under (c) where this undertaking is convicted for committing this offence and where the judgement has the force of res judicata.

Moreover, the Commission has proposed a Community Directive defining a minimum set of criminal offences to the detriment of the environment .[33]

The concept of grave professional misconduct is a concept which is, as such, not yet defined in European legislation or case law[34] and it is therefore left to the Member states to define this concept in national legislation.

2.2. Requirements relating to the technical capacity of the candidates

The public procurement Directives define the means by which evidence of a contractor's technical capability may be supplied. The public procurement Directives exhaustively list[35] the references by which technical capacity may be proved according to the nature, quantity and purpose of the contract. Therefore, each individual requirement relating to the candidate's technical capacity, defined by a contracting authority must come within one of the references listed in the Directives.

The objective of the selection phase is to identify those candidates, which are considered by the contracting authority to be capable of executing the contract in the best way. Therefore, the different requirements must have a direct link to the subject matter or the execution of the contract at stake.[36]

Among the references listed exhaustively by the public procurement Directives, the following could in specific cases relate to environmental aspects:

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32 Some countries have framed what are called "ecological offences" in their Criminal Code. For instance, Article 325 of the current Spanish Criminal Code (Organic Law No. 10/1995 of 23 November 1995) provides that *"anyone who, in breach of the laws or other general provisions to protect the environment, causes or whose actions directly or indirectly give rise to emissions, discharges, radiation, extraction or excavation, silting, noise, vibrations, injections or deposits in the atmosphere, soil, subsoil, or inland, marine or ground waters, including any influencing transboundary areas, or who undertakes water abstraction which may seriously upset the balance of natural systems, shall be liable to a term of imprisonment of between six months and four years, penalties payable over periods of between eight and twenty-four months and disqualification from pursuing an occupation or holding office for a period ranging from one to three years. If there is a risk of serious damage to human health, the term of imprisonment shall be in the upper half of the range".*

33 An approximation of a minimum set of offences against the environment, as envisaged in the Commission proposal, would not prevent Member States from providing for additional offences and/or additional sanctions as more stringent protective measures (article 176 EC).

34 Final Report on the Falcone Study on procurement and organised crime (1998) – Volume I: 24.05.1999 - Institute of Advanced Legal Studies – University of London.

35 Case 76/81: Transporoute et travaux v. Ministère des travaux public; judgement of 10 February 1982; *Jur*. 1982; p. 417.

36 The service directive (92/50/EEC) indicates expressly that these requirements must be defined according to the nature, quantity and purpose of the services to be provided.

– a statement of the tools, plant and technical equipment available to the candidate for executing the contract;

– a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities;

– a statement of the technicians or technical bodies which the candidate can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality control.

2.2.1. The possibility to require specific (environmental) experience

If the contract needs specific know-how in the field of the environment, specific experience is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of candidates[37] and may therefore be required (e.g. the construction of a waste treatment plant).

2.2.2. The possibility to require suppliers to operate an environmental management scheme

Environmental management schemes have been set up by an international standard (ISO 14001) and in an EC Regulation (EMAS[38]).

The Regulation establishes a voluntary environmental management scheme, based on harmonised lines and principles throughout the European Union, open to organisations operating in the European Union and the European Economic Area, in all sectors of economic activities.

The aim of the European environmental management scheme is to promote continuous environmental performance improvements of activities, products and services by committing organisations to evaluate and manage their significant environmental impacts.

The implementation of EMAS requires following several steps. The environmental review is the initial step which allows organisations to evaluate their environmental situation and therefore to build up the appropriate management system to lead to better environmental performance through clear environmental objectives. Regular environmental audits provide for the means to check that the environmental management system works and to follow the progress of the organisation towards better environmental performance.

Amongst these steps, registration in the scheme requires that the organisation adopts an environmental policy containing, in particular, the following key commitments:

- Compliance with all relevant environmental legislation;
- Prevention of pollution; and
- achieving continuous improvements in environmental performance.

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37 Case 31/87: Gebroeders Beentjes bv. / State of the Netherlands. Judgement of 20 September 1988; Conclusion, par.35; *Jur*. 1988, p. 4635.

38 The ECO Management and audit scheme was first developed in Council Regulation EEC – n° 1836 / 93 of 29 June 93 - Official Journal of the European Communities L.168. The regulation has been revised and replaced by Regulation 761/2001 of the European Parliament and of the Council allowing voluntary participation by organisations in a Community Eco-management and audit scheme (EMAS).

As part of EMAS all participating countries have created verification mechanisms, by which compliance to EMAS is verified and information validated by independent verifiers who are accredited by accreditation bodies. This validation leads to request for registration which is granted by the Competent Bodies, designated by the Member State.

The lists of registered organisations from the EU Member States plus the EEA countries is regularly communicated to the Commission and a complete list is available from Commission services.[39]

The contents of the environmental programmes and environmental management schemes may differ from company to company and organisation to organisation because they are "tailor-made". This is the reason that it is not possible to give a general answer to the question whether or not EMAS as such can be qualified as one of the possible references relative to the technical capacity of a company or organisation which are listed exhaustively in the public procurement directives. The question of whether or not a specific environmental management and audit scheme can be qualified as one of these references depends on the contents of the specific system.

It is however important to underline that common to all environmental management and audit schemes is that the company or organisation fulfils a number of minimum criteria and that all such systems represent a high level of environmental performance and management.

In order to be relevant as a means of proof of technical capacity, the system should have an impact on the quality of the supply or the capacity of a company (for example the equipment and technicians) to execute a contract with environmental requirements (for example a works contract for which the contractor has to deal with waste on the construction site).

Therefore, whenever elements of a company's or organisation's environmental programme and management scheme could be regarded as one or more of the references that could be required for establishing a company's technical capacity[40] the EMAS registration could serve as a means of proof.

In such cases, Article 11 (2) of the EMAS Regulation states that *"In order to encourage the organisation's participation in EMAS the Commission and other institutions of the Community as well as other public authorities at national level should consider, without prejudice to Community law, how registration under EMAS may be taken into account when setting criteria for their procurement policies."* Contracting authorities could explicitly mention in their contract documents or the tender notice that whenever companies have an environmental management and audit system which covers the requirements as to the

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39 A list of registered sites is also published on the Internet: http://europa.eu.int/comm/environment/emas. At the beginning of 2001, over 3000 sites have been registered in the EU.

40 See before in paragraph 2.2: (a) a statement of the tools, plant and technical equipment available to the candidate for executing the contract; (b) a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities; or (c) a statement of the technicians or technical bodies which the candidate can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality control.

technical capacity, this system will be accepted as a sufficient means of proof. At the same time, contracting authorities may not exclude other means by accepting only an EMAS registration as means of proof: any other certificate (e.g. ISO 14001) or any other means of proof should also be accepted.

3. AWARD OF THE CONTRACT

Once the candidates have been selected, the contracting authorities enter the phase of the evaluation of the tenders, resulting in the award of the contract.

The public procurement Directives contain two options for the award of contracts: either the lowest price or the '*most economically advantageous tender*'. The aim of this second option is to help the contracting authorities get the best value for money.

In order to define which tender should be considered the most economically advantageous, the contracting authority has to indicate beforehand which criteria will be decisive and will be applied. These different criteria should be mentioned either in the contract notice or in the contract documents, where possible in descending order of importance.

3.1. The most economically advantageous tender

The Directives give examples of the criteria that may be applied in order to define the most economically advantageous tender[41]. Other criteria are possible.

As a general rule, the public procurement directives impose two conditions with regard to the criteria which will be applied for determining the most economically advantageous tender. First, the principle of non-discrimination has to be observed and second, the criteria applied shall generate an economic advantage for the contracting authority. As confirmed by the European Court of Justice, the aim of the public procurement directives is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations that are not economic.[42] Economic considerations can include aspects of environmental protection, like, for instance the energy consumption of a product.

The common factor shared by all criteria used for the evaluation of tenders is that they must, like those expressly cited, concern the nature of the work to be carried out or the manner in which it is done.[43] The criteria applied should give the contracting authority discretion to compare objectively the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in the directives.[44]

The objective of this assessment is to establish which tender best fulfils the needs of the contracting authority. Therefore the function of the award criteria is to assess the intrinsic quality of the tenders. This implies that the award criteria have to be linked to the subject matter of the contract.[45]

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41 Price, delivery date, delivery period, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics of the goods or services, after-sales service, technical assistance, profitability, technical merit.

42 Case C-380/98: The Queen and H.M. Treasury, ex parte: University of Cambridge; judgement of 3 October 2000; Reference for a preliminary ruling. (Jur. 2001, I-8035) and Case C-237/99: Commission / France (HLM); judgement of 1st of February.2001, (not yet published)

43 Case 31/87: Gebroeders Beentjes - *(infra)* - Conclusion of the Advocate-General.

44 Case 31/87: Gebroeders Beentjes - *(infra)* - par. 27.

45 See for example art 26 § 1 (b) Directive 93/36/EEC "various criteria according to the contract in question".

Environmental considerations are not explicitly mentioned in the current public procurement legislation[46]; nevertheless the article on award criteria has to be interpreted in such a way that environmental considerations can result in the definition of specific award criteria. The "environmental soundness" of a product, without further specification, is, as such, not measurable and does not necessarily have an economic advantage for the contracting authority. However, contracting authorities could take into account the "environmental soundness" of products or services, for example, the consumption of natural resources, by "translating" this environmental objective into specific, product-related and economically measurable criteria by requiring a rate of energy consumption.[47] In most cases, such criteria relate to the quality or performance of the product or the execution of works or services (i.e. quality or technical merit as mentioned amongst the award criteria). Hence, environmental aspects relating to a product or service would be considered on an equal footing as the functional and aesthetic characteristics of goods or services, criteria that are explicitly listed in the public procurement Directives, in terms of assessment of what is economically measurable.

Environmental elements can serve to identify the most economically advantageous tender, in cases where these elements imply an economic advantage for the purchasing entity, attributable to the product or service which is the object of the procurement.

The question rises whether the concept of "economically most advantageous tender" implies that each individual award criterion has to have an economic advantage which directly benefits the contracting authority, or that each individual award criterion has to be measurable in economic terms, without the requirement of directly bringing an economic advantage for the contracting authority in the contract at stake. This question has been put to the European Court of Justice in case C-513/99.[48] The judgement is expected by the end of 2001.

Both in the Green Paper[49] and in the Communication[50] on public procurement the Commission has clearly taken a position in favour of the first interpretation.

The Commission notes in this respect that contracting authorities retain the possibility to define the subject matter of a contract and to integrate at this stage of the tender procedure their environmental preferences linked to eventual indirect economic advantages, including through the use of variants (see paragraph II.1.4).

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46 One should note that in the proposals for modification of the public procurement directives, which are adopted by the Commission on 10.05.2000, environmental characteristics are listed explicitly amongst the criteria which may serve for identifying the most economically advantageous tender (see footnote 8).

47 Eco-label criteria can be used to define the most economically advantageous tender where they satisfy the conditions set out in this section.

48 Case C-513/99: Stagecoach Finland Oy Ab, formerly Oy Swebus Finland Ab, of Espoo (request for a preliminary ruling). Official Journal of the European Communities, C 102 of 8.4.2000, p. 10.

49 Green paper: public procurement in the European Union: exploring the way forward, adopted by the Commission on 27th November 1996; COM (96) 583 final

50 Commission Communication "Public Procurement in the European Communities", adopted by the Commission on 11 March 1998, COM (1998) 143 final.

3.2. The possibility to take into consideration all costs incurred during the whole life cycle of a product

Life cycle costing is the taking into account of all costs incurred during the production, consumption/use and disposal of a product or service (cradle to grave approach)[51].

The price paid by a contracting authority to purchase a product, reflects and takes account of those costs incurred in the phases which are already completed (normally: design, materials, production; sometimes also testing and transport) and should therefore not be taken into consideration a second time in the award process[52]. On the contrary, all costs occurring after the purchase of the product, which will be borne by the contracting authority and thus will affect directly the economic aspects of the product, may be taken into account.

Costs incurred during the life cycle of a product and will be born by the contracting authority may be taken into account for the assessment of the most economically advantageous tender.

The Directives explicitly mention as possible award criteria running costs and cost effectiveness. Such costs might include direct running costs (energy, water and other resources used during the lifetime of the product); spending to save (for example, investing in higher levels of insulation to save energy and thus money in the future); as well as the costs of maintenance or recycling of the product. In evaluating tenders, a purchasing organisation can also take account of costs of treatment of waste or re-cycling.

3.3. The possibilities to take into account externalities

Externalities are damages or benefits, which are not paid for by the polluter or beneficiary under normal market conditions. They are defined as: "The costs and benefits which arise when the social or economic activities of one group of people have an impact on another, and when the first group fail to fully account for their impact."[53]

External costs and benefits are opposed to "traditional" costs and benefits such as operating costs or income from sales. The characteristic of the latter costs is that they are paid for with a price determined by the market.

As a general rule, externalities are not borne by the purchaser of a product or service, but by society as a whole and therefore do not qualify as award criteria as defined above (see 3.1). The Commission notes in this respect that contracting authorities retain the possibility to define the subject matter of a contract or impose conditions relating to the execution of the contract and to integrate at these stages of the tender procedure their environmental preferences linked to eventual occurrence of external costs.

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51 In general, these phases are, not necessarily in the following order: design of the product; purchase of the materials; production; transport; testing; use; disposal; recycling.

52 Transport costs or costs for testing the product, if borne by the supplier and reflected in the price, may not be taken into consideration a second time by the contracting authority by adding them to the price to be paid to the supplier.

53 European Commission, DG Environment: A Study on the Economic Valuation of Environmental Externalities from Landfill Disposal and Incineration of Waste. Final Main Report; October 2000. Page 9.

Only in specific cases, for instance where external costs are due to the execution of the contract and at the same time are borne directly by the purchaser of the product or service in question, these costs could be taken into account.

In such cases, contracting authorities should be careful not to introduce systems that lead to preferences or disguised discrimination. Up till now, there does not exist a harmonised system for the qualification and economic evaluation of externalities. However, there is work being undertaken in the EU which aims at the co-ordination of the methodologies of economic evaluation of external costs in the field of transport, which could, in time remove risks of discrimination involved in adopting this approach.

3.4. Additional criteria

This concept has been developed by the case law of the European Court of Justice.[54]

The concept was first set out in case 31/87, where the Court held that such criteria (the employment of long term unemployed persons) have neither a relationship to the checking of a candidate's economic and financial suitability and the candidate's technical knowledge and ability nor a connection with the award criteria as listed in article 9 of the directive. The Court held further that these criteria are nevertheless compatible with the Directives on public procurement if they comply with all relevant principles of Community law.

In case C-225/98 the ECJ held that[55] the awarding authorities could apply a condition relating to the campaign against unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two or more economically equivalent bids. Such a condition could be applied as an accessory criterion once the bids had been compared from a purely economic point of view. As regards the criterion relating to the campaign against unemployment the Court made it clear that it must not have any direct or indirect impact on those submitting bids from other Member States of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to ascertain that such a condition existed.

This could be equally applicable to conditions relating to environmental protection or performance.

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54 Case 31/87: Gebroeders Beentjes - *(infra)* and Case C-225/98: Commission of the European Communities v. French Republic, judgement of 26 September 2000 Construction and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Département du Nord. (Jur. 2000, I-7445.)

55 See the General Report on the activities of the European Union in 2000, point 1119, page 407.

4. EXECUTION OF THE CONTRACT

Contracting authorities have the possibility to define the (detailed) contract clauses, relating to the mode of execution of the contract. Contract clauses may not be (disguised) technical specifications, selection criteria or award criteria. They relate merely to the execution of the contract itself. This means that all applicants, should they eventually be awarded the contract, must be in a position to execute these clauses. As a matter of transparency, they should be announced in advance to all applicants.

The public procurement directives do not cover contract clauses. As such, contract clauses must observe the general Treaty rules and principles, notably the principle of non-discrimination.

Contracting authorities have a broad range of possibilities for defining contract clauses having as their object the protection of the environment.

The following are examples of specific additional conditions, which have a bearing on the performance or execution of the contract and which ultimately meet general environmental objectives, which are sufficiently specific, observe Community law principles and are in conformity with the Directives:[56]

– Delivery / packaging of goods in bulk rather than by single unit

– Recuperation or re-use of packaging material and the used products by the supplier

– Delivery of goods in re-usable containers

– Collection, take-back recycling or re-use of waste produced during or after use or consumption of a product by the supplier

– Transport and delivery of chemicals (like cleaning products) in concentrate and dilution at the place of use.

As to the question whether it may be required that a certain mode of environmentally sound transport is used for the delivery of goods, one should note that such a requirement should be defined in such a way that it has a bearing on the performance or execution of the contract and it should comply with Community law principles. A contracting authority may therefore require that the transport of products to be delivered be effected by a certain type of transport, as long as, in the specific circumstances of the contract, this requirement does not lead to discrimination.

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[56] OECD document ENV/EPOC/PPC(98)17REV1.

III CONTRACTS NOT COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES

For contracts not covered by the public procurement Directives, the detailed rules stemming from the public procurement Directives and set out in the previous chapters do not apply.

Indeed Community law leaves it to the Member States to decide whether or not public procurement not covered by the Community Directives should be subject to national procurement rules.

Within the limits set by the treaty and Community law, Member states are free to adopt their national legislation. It will therefore depend on the national legislation whether public procurement may, or even shall be used to fulfil other objectives than the "best value for money" objective of the public procurement directives.

When defining the subject matter of such a contract, a broad range of requirements and conditions may be imposed, even if these conditions and requirements may probably not have a direct link to the subject matter of the contract. Of course these requirements and conditions must observe the rules of the Treaty and principles flowing from the Treaty. Thus, the Court of Justice has held that inclusion of clauses referring to national standards or a specific origin in an invitation to tender may cause economic operators who produce products equivalent to products certified as complying with the national standard to refrain from tendering.[57] If measures impose on the national of one Member State more rigorous rules, or put him in law or in fact in an unfavourable position compared with the national of the Member State imposing the measure, these measures could infringe the Treaty rules on free movement of goods and services.

As regards the qualification of candidates, purchasing authorities are free to impose requirements and define conditions that go beyond what is possible under the public procurement directives. The criteria need not to be limited to the financial and economic situation of a candidate, or to his technical capacity. Of course, the requirements for qualification have to be compatible with Community law and Community law principles, notably the rules and principles relating to the free provision of services, such as non-discrimination and mutual recognition.

As regards the evaluation of tenders, award criteria may be defined freely by a purchasing authority, as long as the Treaty rules and Community law principles are observed, and the criteria remain objective, transparent and non-discriminatory.

The question of whether the Treaty rules or the principles of Community law are observed, depends on a case-by-case assessment.

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57 Case 45/87: Commission / Ireland (Dundalk); Judgement of 22 September 1988; *Jur*. 1988; p. 4929 and Case C-243/89: Commission/Denmark (Bridge over the Storebaelt); judgement of 22.06.1993 – Jur. 1993; p. I/3353.

ANNEX 1: COMMON RULES IN THE TECHNICAL FIELD

The common rules in the technical field are laid down in article 14 of Directive 92/50/EEC (services), article 8 of Directive 93/36/EEC (supplies) and Article 10 of Directive 93/37/EEC (works). Even though the wording of these articles is not entirely identical the content of the rules articles is the same. Therefore, and by way of example, the text of article 14 of Directive 92/50//EEC is reproduced below.

DIRECTIVE 92/50/EEC

TITLE IV

Common rules in the technical field

Article 14

1. The technical specifications defined in Annex II shall be given in the general documents or the contractual documents relating to each contract.

2. Without prejudice to the legally binding national technical rules and insofar as these are compatible with Community law, such technical specifications shall be defined by the contracting authorities by reference to national standards implementing European standards or by reference to European technical approvals or by reference to common technical specifications.

3. A contracting authority may depart from paragraph 2 if:

   a) the standards, European technical approvals or common technical specifications do not include any provisions for establishing conformity, or technical means do not exist for establishing satisfactorily the conformity of a product with these standards, European technical approvals or common technical specifications;

   b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment. Amended by Directive 91/263/EEC, or Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications or other Community instruments in specific service or product areas;

   c) these standards, European technical approvals or common technical specifications would oblige the contracting authority to use products or materials incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to the transition, with a given period, to European standards, European technical approvals or common technical specifications;

   d) the project concerned is of a genuinely innovative nature for which use of existing European standards, European technical approvals or common technical specifications would not be appropriate.

4. Contracting authorities invoking paragraph 3 shall record, wherever possible, the reasons for doing so in the contract notice published in the Official Journal of the European Communities or in the contract documents and in all cases shall record these reasons in their internal documentation and shall supply such information on request to Member States and to the Commission.

5. In the absence of European standards or European technical approvals or common technical specifications, the technical specifications:

   a) shall be defined by reference to the national technical specifications recognized as complying with the basic requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives, and in particular in accordance with the procedures laid down in Directive 89/106/EEC;

b) may be defined by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials;

c) may be defined by reference to other documents.

In this case, it is appropriate to make reference in order of preference to:

i. national standards implementing international standards accepted by the country of the contracting authority;

ii. other national standards and national technical approvals of the country of the contracting authority;

iii. any other standard.

6. Unless it is justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain service providers. In particular, the indication of trade marks, patents, types, or of specific origin or production shall be prohibited. However, if such indication is accompanied by the words <or equivalent;, it shall be authorized in cases where the contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.

For the utilities sector, the common rules in the technical field are laid down in Article 18 of this Directive. These rules differ from the ones in Directives 92/50/EEC, 93/36/EEC and Directive 93/37/EEC in that they are less detailed and exhaustive. Article 18 of Directive 93/38/EEC is reproduced below.

DIRECTIVE 93/38/EEC

TITLE III

Technical specifications and standards

Article 18

1. Contracting entities shall include the technical specifications in the general documents or the contract documents relating to each contract.

2. The technical specifications shall be defined by reference to European specifications, where these exist.

3. In the absence of European specifications, the technical specifications should as far as possible be defined by reference to other standards having currency within the Community.

4. Contracting entities shall define such further requirements as are necessary to complete European specifications or other standards. In so doing, they shall prefer specifications which indicate performance requirements rather than design or description characteristics, unless the contracting entity has objective reasons for considering that such specifications are inadequate for the purposes of the contract.

5. Technical specifications which mention goods of a specific make or source or of a particular process, and which have the effect of favouring or eliminating certain undertakings, shall not be used unless such specifications are indispensable for the subject of the contract. In particular, the indication of trade marks, patents, types, of specific origin or production shall be prohibited; however, such an indication accompanied by the works ‘or equivalent‘ shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.

6. Contracting entities may derogate from paragraph 2 if:

a) it is technically impossible to establish satisfactorily that a product conforms to the European specifications;

b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, or of Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications;

c) in the context of adapting existing practice to take account of European specifications, use of those specifications would oblige the contracting entity to acquire supplies incompatible with equipment already in use *or would entail disproportionate cost or disproportionate technical difficulty. Contracting entities which have recourse to this derogation shall do so only as part of clearly-defined and recorded strategy with a view to a changeover to European specifications;*

d) he relevant European specification is inappropriate for the particular application or does not take account of technical developments which have come about since its adoption. Contracting entities which have recourse to this derogation shall inform the appropriate standardizing organization, or any other body empowered to review the European specification, of the reasons why they consider the European specification to be inappropriate and shall request its revision;

e) the project is of a genuinely innovative nature for which use of European specifications would not be appropriate.

7. Notices published pursuant to Article 21 (1) (a) or Article 21 (2) (a) shall indicate any recourse to the derogations referred to in paragraph 6.

8. This Article shall be without prejudice to compulsory technical rules in so far as these are compatible with Community law.

ANNEX 2: DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

The contents of the definition of certain technical specifications of Annex II of Directive 92/50/EEC (services), Annex III of Directive 93/36/EEC (supplies), Annex II of Directive 93/37/EEC (works), and Article 1, paragraphs 8 – 13 of Directive 93/38/EEC (utilities) are the same, even though the wording of these definitions is not entirely identical. Therefore, and by way of example, the text of Annex II of Directive 92/50//EEC is reproduced below.

ANNEX II

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purpose of this Directive the following terms shall be defined as follows:

1) Technical specifications: the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

2) Standard: a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory.

3) European standard: a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as <European Standards (EN); or <Harmonization documents (HD); according to the common rules of these organizations or by the European Telecommunications Standards Institute (ETSI) as a <European Telecommunication Standard; (ETS).

4) European technical approval: a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of applications and use. European approval shall be issued by an approval body designated for this purpose by the Member State;

5) Common technical specification: a technical specification laid down in accordance with a procedure recognized by the Member States to ensure uniform application in all Member States which has been published in the Official Journal of the European Communities.

6) Essential requirements: requirements regarding safety, health and certain other aspects in the general interest, that the construction works can meet.

IP/01/959

Brussels, 5th July 2001

Commission issues guidelines for environment-friendly procurement

The European Commission has clarified how Community law offers numerous possibilities to public purchasers who wish to integrate environmental considerations into public procurement procedures. The clarifications take the form of an interpretative Communication that explains how environmental concerns may be taken into account at each separate stage of the contract award procedure. As public procurement amounts to over €1,000 billion every year across the European Union (14% of EU GDP), 'greening' these purchases could contribute substantially to sustainable development.

Internal Market Commissioner Frits Bolkestein said "This Communication explains in concrete terms how current public procurement legislation enables public authorities to apply environmental considerations to their purchasing, whilst at the same time ensuring value for money for taxpayers and equal access for all Community suppliers."

Environment Commissioner, Margot Wallström added "I would like to encourage public authorities to seize the opportunities offered by this Communication to ensure that the public not only benefits from savings through the purchase of energy efficient or recyclable goods, but also from the contribution that green public procurement could make to environmental issues such as combating climate change or improving waste management."

Environmental criteria

The Communication interprets existing law, comprising EC Treaty Internal Market rules and the public procurement Directives. It therefore refers both to public contracts that are covered by the EC Directives on public procurement as well as those that are not covered by these Directives but are nevertheless subject to Treaty rules. In doing so, it seeks to reconcile the respective goals of protection of the environment and efficient and fair public procurement in the Internal Market.

The Communication examines the different stages in a public procurement procedure and explains how, at each stage, the protection of the environment may be taken into account. For example, when defining the subject matter of a contract, public purchasers can, like private purchasers, decide to purchase environment-friendly products or services, defined according to their environmental performance and the production process used. Similarly, the public purchaser may specify the raw materials and the production processes to be used in the contract.

Public authorities could, for example, request that energy for public buildings is supplied from a renewable source, or that food for a school canteen comes from organic produce. From the very start of the public procurement procedure, public purchasers can orient their policies towards products and services that better protect the environment.

The Communication explains how contracting authorities can define technical specifications related to environmental performance of a product in line with “Eco-label” criteria. It also sets out in which conditions registration of an environmental management scheme can serve to demonstrate aspects of suppliers’ and contractors’ technical capacity.

The Commission proposal for a Sixth Environmental Action Programme (see IP/01/102) has identified public procurement as an area which has considerable potential for “greening” the market through public purchasers using environmental performance as one of their purchase criteria. This Communication will help to make such action a reality by clearly identifying the legal options open to public purchasers who wish to go down that route.

Handbook

As a follow up to this interpretative Communication, the Commission intends to produce a practical handbook on green public procurement. This will be aimed principally at local authorities, and will contain examples of best practice in green public procurement throughout the EU, as well as practical guidance on how to integrate the environment into day to day purchasing without infringing Internal Market rules.

In order to promote and explain the possibilities set out in the interpretative Communication the Commission will hold an information event in Brussels in the autumn.

This interpretative Communication is available on the Commission's Europa website: http://simap.eu.int/ and http://europa.eu.int/comm/environment/gpp

MEMO/01/257

Brussels, 5 July 2001

Interpretative Communication on public procurement and the environment – frequently asked questions

(see also IP/01/959)

According to the interpretative communication, is it possible to adequately take into account environmental considerations under the public procurement Directives?

The Communication makes it clear that there are numerous possibilities for the 'greening' of public procurement under the directives. This is particularly so if three guiding principles are followed – non-discrimination, transparency, and thought about where in the tender process environmental elements should be taken into account. Generally speaking, the earlier in the tender process (definition of the subject of the contract, technical specifications) you place environmental considerations, the more is possible.

Is it possible to ask for process and production methods under the Directives?

In the technical specifications of the tender, process and production methods can be requested where these help to specify the performance characteristics of the performance or service. This includes both process and production methods that physically affect the end product (e.g. absence of chemicals) and those that do not but nevertheless affect the nature of the end product – for example organic food, or furniture produced from sustainable timber. It is not possible to require that the factory producing the goods use recycled paper in its office, as this does not relate to the production of the goods.

Can I ask for specific materials – for example, that windows be made of wood – in the technical specifications?

It is possible both to ask for specific materials to be used in an object supplied or in a works contract, and also to ask for a type of material to not be used. So you could ask for your windows to be made of wood, or not to be made of a specific product, for example.

How can I use Eco-labels in my procurement?

You can use Eco-label criteria to help determine your environmental technical specifications. You can also accept an Eco-label certificate as proof of compliance with those criteria, although you must accept other means of proof – you cannot say that you only accept products with an Eco-label certificate.

How can I use company environmental management systems in my procurement?

The references a contracting authority may require as proof of a company's technical capacity are listed exhaustively in the public procurement Directives. Environmental management systems can play a role in so far as these fall within one of the categories or references listed in the Directives.

Thus, environmental management systems can be accepted as proof of technical competence where the specific scheme applied has an impact on the capacity of the company to execute a contract with environmental requirements. Other means of proof of technical capacity must also be accepted. It is also possible to require the putting into place of specific environmental management systems for works contracts where there are significant environmental issues to deal with, for example.

What happens where I want to ask for better performance than a European standard in the environmental field?

The purchaser is obliged to refer to the European standard, but may request better environmental performance than the standard in the technical specifications.

What kind of environmental criteria can I use at the award stage?

Only those criteria that have a link to the subject matter of the contract and give the contracting authority a direct economic benefit. This could include giving a bonus to products that are more energy efficient, that will last longer, or that will cost less to dispose of. In case the environmental aspects do not bring an economic benefit to the contracting authority, these aspects can only be taken into account at the beginning of the tender procedure, where the contracting authority defines the technical requirements of the contract.

How can contracting authorities balance their budgetary constraints and the intention to "buy green"?

Although green products will often save the public purchaser money in the longer term, they may have a higher up front cost. . If contracting authorities want to make a balance between environmental choices and budgetary restraints, they may define one or more variant options in addition to their "basic" option. In the variants they can define a higher environmental performance. At the end of the tender procedure, contracting authorities can decide which variant best meets their needs.

Can I request that products or services be supplied using specific methods of transport?

Yes – in the contract clauses for the execution of the contract, the means of delivery of the goods can be specified, as long as this does not lead to discrimination. Other possible ways of reducing the environmental impact of transport activities linked to the provision of goods or services, could include requesting that deliveries of goods be made in bulk, or that cleaning products are transported in concentrated form, and diluted at the place of use.

The interpretative Communication mentions a handbook. What will this consist of?

This will give practical advice to public purchasers on how to take into account the environment in their purchasing policies.

It will be user-friendly – focussing on the simplest way to do things, and giving examples of best practice in green public procurement from the whole of the EU.

Because the availability of scientific and technical information is essential for making well-balanced decisions we will create a website with further information on best practice in greening public procurement, and links to other websites where such information is available.

32000Y0429(01)

Commission interpretative communication on concessions under Community law

Official Journal C 121 , 29/04/2000 P. 0002 - 0013

Commission interpretative communication on concessions under Community law

(2000/C 121/02)

On 24 February 1999 the Commission adopted and published a Draft Commission interpretative communication on concessions under Community law on public contracts(1) and submitted it to a wide range of bodies for consultation. Taking into account the substantial input(2) it has received following publication of the initial draft in the Official Journal of the European Communities, the Commission has adopted this interpretative communication.

1. INTRODUCTION

1. Concessions have long been used in certain Member States, particularly to carry out and finance major infrastructure projects such as railways and large parts of the road network. Involvement of the private sector has declined since the first quarter of the 20th century as governments began to prefer to be directy involved in the provision and management of infrastructure and public services.

2. However due to budgetary restrictions and a desire to limit the involvement of public authorities and enable the public sector to take advantage of the private sector's experience and methods, interest in concessions has been heightened over the last few years.

3. First of all, it should be pointed out that the Community does not give preference to any particular way of organising property, whether public or private: Article 295 (ex Article 222) of the Treaty guarantees neutrality with regard to whether enterprises are public or private.

4. Given that this form of association with operators is being used more and more frequently, particularly for major infrastructure projects and certain services, the Commission feels this interpretative communication is needed to keep the operators concerned and the public authorities informed of the provisions it considers apply to concessions under current Community law. Indeed, the Commission is repeatedly faced with complaints concerning infringements of Community law on concessions when public authorities have called on economic operators' know-how and capital to carry out complex operations. It has thus decided to define the concept of "concessions" and set out the guidelines it has followed up to now when investigating cases. This interpretative communication is therefore part of the transparency required to clarify the current legal framework in the light of the experience gained when investigating the cases examined up to now.

5. In the draft version of this interpretative communication(3), the Commission had stated that it also intended to deal with the other forms of partnership used to call upon private-sector financing and know-how. The Commission decided not to consider the forms of partnership whose characteristics are different from those of a concession as defined in this interpretative communication. Such an approach was also favoured in the input received. The wide range of situations, which are in constant flux, as revealed in the feedback on the draft interpretative communication, calls for an indepth consideraton of the characteristics they have in common. The discussion set off by the publication of the draft interpretative communication must therefore continue on this matter.

6. The comments on concessions have enabled the Commission to refine its analysis and define the characteristics of concessions which distinguish them from public contracts, in particular the delegation of services of general interest operated by this kind of partnership.

7. The Commission wishes to reiterate that this text does not seek to interpret the specific regimes deriving from Directives adopted in different sectors, such as energy and transport.

This interpretative communication (hereinafter referred to as the "communication") will specify the rules and the principles of the Treaty governing all forms of concession and the specific rules that Directive 93/37/EEC on public works contracts(4) (hereinafter "the works Directive") lays down for public works concessions.

2. DEFINITION AND GENERAL PROBLEM OF CONCESSIONS

Concessions are not defined in the Treaty. The only definition to be found in secondary Community law is in the works Directive, which lays down specific provisions for works concessions(5). However, other forms of concessions do not fall within the scope of the directives on public contracts(6).

However, this does not mean that concessions are not subject to the rules and principles of the Treaty. Indeed, insofar as these concessions result from acts of State, the purpose of which is to provide economic activities or the supply of goods, they are subject to the relevant provisions of the Treaty and to the principles which derive from Court Case law.

In order to delimit the scope of this communication, and before specifying which regime applies to concessions, their distinctive features must be described. To this end, a brief review of the concept of works concessions as found in the works Directive should prove useful.

2.1. WORKS CONCESSIONS

2.1.1. Definition as given in Directive 93/37/EEC

The Community legislator has chosen to base its definition of works concessions on that of public works contracts.

The text of the works Directive states that public works contracts are "contracts for pecuniary interest concluded in writing between a contractor and a contracting authority (...) which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work (...), or the execution by whatever means of a work corresponding to the requirements specified by the contracting authority" (Article 1(a)).

Article 1(d) of the same Directive defines a public works concession as "a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment".

According to this definition, the main distinctive feature of a works concession is that a right to exploit a construction is granted as a consideration for having erected it; this right may also be accompanied by payment.

2.1.2. Distinction between the concepts of "public works contract" and "works concession"

The Commission believes that the right of exploitation is a criterion that reveals several characteristics which distinguish a works concession from a public works contract.

For example, the right of exploitation allows the concessionaire to demand payment from those who use the structure (e.g. by charging tolls or fees) for a certain period of time. The period for which the concession is granted is therefore an important part of the remuneration of the concessionnaire. The latter does not receive remuneration directly from the awarding authority, but acquires from it the right to obtain income from the use of the structures built (7).

The right of exploitation also implies the transfer of the responsibilities of operation. These responsibilities cover the technical, financial and managerial matters relating to the construction. For example, it is the concessionaire who is responsible for making the investments required so that it may be both available and useful to users. He is also responsible for paying off the construction. Moreover, the concessionaire bears not only the usual risks inherent in any construction - he also bears much of the risk inherent in the management and use of the facilities(8).

From these considerations, it follows that, in works concessions, the risks inherent in exploitation are transferred to the concessionaire(9).

The Commisison notes that more and more public works contracts are the subject of complex legal arrangements(10). As a result, the boundary between these arrangements and public works concessions can sometimes be difficult to define.

In the Commission's view, the arrangement is a public works contract as understood under Community law if the cost of the construction is essentially borne by the awarding authority

and the contractor does not receive remuneration from fees paid directy by those using the construction.

The fact that the Directive allows for a payment in addition to the right of exploitation does not change this analysis. Such situations have occurred. The State therefore bears part of the costs of operating the concession in order to keep prices down for the user (providing "social prices"(11)). A variety of procedures are possible (guaranteed flat rate, fixed sum but paid on the basis of the number of users, etc.). These do not necessarily change the nature of the contract if the sum paid covers only a part of the cost of the construction and of operating it.

The definition of a concession allows the State to make a payment in return for work carried out, provided that that this does not eliminate a significant element of the risk inherent in exploitation. By specifying that there may be payment in addition to the right to exploit the construction, the works Directive states that operation of the structure must be the source of the concessionaire's revenue.

Even though the origin of the resources - directly paid by the user of the construction - is, in most cases, a significant factor, it is the existence of exploitation risk, involved in the investment made or the capital invested, which is the determining factor, particularly when the awarding authority has paid a sum of money.

However, even within public works contracts, part of the risk may be borne by the contractor (12). However, the duration of concessions makes these risks more likely to occur, and makes them relatively greater.

On the other hand, risks arising from the operation's financial arrangements, which could be considered "economic risks", are part and parcel of concessions. This type of risk is highly dependent on the income the concessionaire will be able to obtain from the amount of use of the construction(13) and is is significant factor distinguishing concessions from public works contracts.

In conclusion, the risks arising from the operation of the concession are transferred to the concessionaire with the right of exploitation; specific risks are divided between the grantor and the concessionaire on a case by case basis, according to their respective ability to manage the risk in question.

If the public authorities undertake to bear the risk arising from managing the construction by, for example, guaranteeing that the financing will be reimbursed, there is no element of risk. The Commission considers such cases to be public works contracts, not concessions(14).

2.2. SERVICE CONCESSIONS

Article 1 of Directive 92/50/EEC on public service contract (hereinafter referred to as the "services Directive") states that this Directive applies to "public services contracts", defined as "contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of (...)".

Unlike the works Directive, the services Directive does not define "service concessions"(15).

With the sole intention of distinguishing service concessions from public services contracts, and therefore limit the scope of the Communication, it is important to describe the essential characteristics of concessions.

For this purpose, it would seem useful to work on the basis of factors deriving from the above-mentioned concept of works concessions which take into account the Court's case law on the subject(16) and the opinio juris(17).

Works concessions are assumed to serve a different purpose from service concessions. This may lead to possible differences in terms of investment and duration between the two types of concessions. However, given the above criteria, the characteristics of concession contracts are generally the same, regardless of their subject.

Thus, as with works concessions, the exploitation criterion is vital for determining whether a service concession exists(18). Application of this criterion means that there is a concession when the operator bears the risk involved in operating the service in question (establishing and exploiting the system), obtaining a significant part of revenue from the user, particularly by charging fees in any form. As is the case for works concessions, the way in which the operator is remunerated is a factor which helps to determine who bears the exploitation risk.

Similarly, service concessions are also characterised by a transfer of the responsibility of exploitation.

Lastly, service concessions normally concern activities whose nature and purpose, as well as

the rules to which they are subject, are likely to be the State's responsibility and may be subject to exclusive or special rights(19).

It should also be pointed out that, in the Lottomatica judgment mentioned above, the Court clearly distinguished between a transfer of responsibility to the concessionaire as concerns operating a lottery, which may be considered to be a responsibility of the State as described above, and simply supplying computer systems to the administration. In that case it concluded that without such a transfer the arrangement was a public contract.

2.3. DISTINCTION BETWEEN WORKS CONCESSIONS AND SERVICE CONCESSIONS

Given that only Directive 93/37/EEC provides for a special system of procedures for granting public works concessions, it is worth determining exactly what this type of concession is, especially if it is a mixed contract which also includes a service element. This is virtually always the case in practice, since public works concessionaires often provide services to users on the basis of the structure they have built.

As for delimiting the scope of the provisions in the works and services Directives, recital 16 of the latter specifies that if the works are incidental rather than the object of the contract they do not justify treating the contract as a public works contract. In the Gestión Hotelera Internacional case the Court of Justice interpreted these provisions and stated that "where the works [. .] are merely incidental to the main object of the award, the award, taken in its entirety, cannot be characterised as a public works contract"(20). The problem of mixed contracts was also addressed by the Court of Justice in another case(21) which determined that, when a contract includes two elements which may be separated (e.g. supplies and services), the rules which apply to each should be applied separately.

Although these principles have been established for public contracts, the Commission considers that a similar approach should be taken to determine whether or not a concession is subject to the works Directive. Its field of application ratione materiae is effectively the same in the case of both works contracts and works concessions(22).

In view of this, the Commission maintains that the first thing to determine is whether the building of structures and carrying out of work on behalf of the grantor constitute the main subject matter of the contract, or whether the work and building are merely incidental to the main subject matter of the contract.

If the contract is principally concerned with the building of a structure on behalf of the grantor, the Commission holds that it should be considered to be a works concession.

In this case, the rules laid down by the works Directive must be complied with, as long as the Directive's applicaton threshold is reached (EUR 5000000), even if some of the aspects are service-related. The fact that the works are performed or the structures are built by third parties does not change the nature of the basis contract. The subject matter of the contract is identical.

In contrast, a concession contract in which the construction work is incidental or which only involves operating an existing structure is regarded as a service concession.

Moreover, in practice, operations may be encountered which include building a structure or carrying out works at the same time as the provision of services. Thus, alongside a public works concession, service concessions may be concluded for complementary activities which are, however, independent of the exploitation of the concession of the structure. For example, motorway catering services may be the subject of a different service concession from that involving its construction or management. In the Commission's view, if the objects of these contracts may be separated, the rules which apply to each type should be applied respectively.

2.4. SCOPE OF THIS INTERPRETATIVE COMMUNICATION

As already stated, even though concessions are not directly addressed by the public contracts directives, they are nonetheless subject to the rules and principles of the Treaty, insofar as they are granted via acts that are attributable to the State and their object is the provision of economic activities.

Any act of State(23) laying down the terms governing economic activities, be it contractual or unilateral, must be viewed in the light of the rules and principles of the Treaty, in particular Articles 43 to 55 (ex Articles 52 to 66)(24).

This communication therefore concerns acts attributable to the State whereby a public authority entrusts to a third party - by means of a contractual act or a unilateral act with the prior consent of the third party - the total or partial management of services for which that

authority would normally be responsible and for which the third party assumes the risk. Such services are convered by this communication only if they constitute economic activities within the meaning of Articles 43 to 55 (ex Articles 52 to 66) of the Treaty.

These acts of State will henceforth be referred to as "concessions", regardless of their legal name under national law.

In view of the above, and without prejudice to any provisions of Community law which might be applicable, this communication does not concern:

- acts whereby a public authority authorises the exercice of an economic activity even if these acts would be regarded as concessions in certain Member States(25);

- acts concerning non-economic activities such as obligatory schooling or social security.

On the other hand, it should be noted that, when a concession expires, renewal is considered equivalent to granting a new concession, and is therefore covered by the communication.

A particular problem arises in cases where are forms of interorganic delegation between the concessionaire and the grantor which do not fall outside the administrative sphere of the contracting authority(26). The question of whether and to what extent Community law applies to this kind of relationship has been addressed by the Court(27). However, other cases currently pending before the Court could introduce new elements in this respect(28).

On the other hand, relationships between public authorities and public enterprises entrusted with the operation of services of general economic interest are, in principle, covered by this communication(29). It is true that, according to the Court's established case law(30), nothing in the Treaty prevents Member States from granting exclusive rights for certain services of general interest for non-economic public interest reasons whereby those services are not subject to open competition(31). Nonetheless, the Court adds that the way in which such a monopoly is organised and carried out must not infringe the provisions of the Treaty on the free movement of goods and services, nor the competition rules(32). In addition, the way in which these exclusive rights are granted are subject to the rules of the Treaty, and may therefore be covered by this communication.

3. REGIME APPLYING TO CONCESSIONS

As mentioned above, only works concessions for an amount equal to or greater than the threshold specified in Directive 93/37/EEC (EUR 5000000) are subject to a specific regime.

Nonetheless, like any act of State laying down the terms governing economic activities, concessions are subject to the provisions of Articles 28 to 30 (ex Articles 30 to 36) and 43 to 55 (ex Articles 52 to 66) of the Treaty, and to the principles emerging from the Court's case law(33) - notably the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality(34).

The Treaty does not restrict Member States' freedom to grant concessions provided that the methods used to do so are compatible with Community law.

The Court's case law holds that, even if Member States remain free under the Treaty to lay down the substantive and procedural rules, they must respect all the relevant provisions of Community law, and particularly the prohibitions deriving from the principles enshrined in the Treaty concerning right of establishment and freedom to provide services(35). Moreover, the Court emphasised the importance of the principles and rules enshrined in the Tretay by specifying in particular that the public procurement directives were intended to "facilitate the attainment within the Community of freedom of establishment and freedom to provide services" and "to ensure the effectiveness of the rights conferred by the Treaty in the field of public works and supply contracts"(36).

Certain Member States have sometimes thought that concessions were not governed by the rules of the Treaty in that they involved delegation of a service to the public, which would be possible only on the basis of mutual trust (intuitu personae). According to the Treaty and the Court's established case law, the only reasons which would enable State acts which violate Articles 43 and 49 (ex Articles 52 and 59) of the Treaty to escape prohibition under these Articles are those referred to in Articles 45 and 55 (ex Articles 55 and 66). The very restrictive conditions specified by the Court for the application of these Articles are described below(37). There is nothing in the Treaty or in the Court's case law which implies that concessions would be treated differently.

In what follows, the Commission will refer to the rules of the Treaty and the principles deriving from Court case law that are applicable to concessions covered by this communication.

3.1. THE RULES AND PRINCIPLES SET OUT IN THE TREATY OR LAID DOWN BY THE COURT

As has already been stated above, the Treaty makes no specific mention of public contracts or concessions. Several of its provisions are nonetheless relevant, i.e. the rules instituting and guaranteeing the proper operation of the Single Market, namely:

- the rules prohibiting any discrimination on grounds of nationality (Article 12(1) (ex Article 6 (1)));

- the rules on the free movement of goods (Articles 28 (ex Article 30) et seq.), freedom of establishment (Articles 43 (ex Article 59) et seq.), freedom to provide services (Articles 49 (ex Article 59) et seq.) and the exceptions to those rules provided for in Articles 30, 45 and 46 (ex Articles 36, 55 and 56)(38);

- Article 86 (ex Article 90) of the Treaty might help to determine if the granting of these rights is legitimate.

These rules and principles arrived at by the Court are clarified below.

It is true that the case law cited refers in part to public contracts. Nonetheless, the scope of the principles which emerge from it often goes beyond public contracts. They are therefore applicable to other situations, such as concessions.

3.1.1. Equality of treatment

According to the established case law of the Court "the general principle of equality of treatment, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified"(39) .

Moreover the Court asserted that the principle of equality of treatment, of which Articles 43 (ex 52) and 49 (ex 59) of the Treaty are a particular expression, "forbids not only overt discrimination by reason of nationality [...] but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result"(40).

The principle of equality of treatment implies in particular that all potential concessionaires know the rules in advance and that they apply to everybody in the same way. The case law of the Court, in particular the Raulin(41) and Parliament/Council(42) judgments, lays down that the principle of equality of treatment requires not only that conditions of access to an economic activity be non-discriminatory, but also that public authorities take all the measures required to ensure the exercise of this activity.

The Commission considers that it follows from this case law that the principle of open competition must be adhered to.

In the Storebaelt und Walloon Buses judgments, the Court has the occasion to set out the scope of the principle of equality of treatment in the area of public contracts, by asserting on the one hand that this principle requires that all offers conform to the tender specifications to guarantee an objective comparison between offers(43) and, on the other hand, this principle is violated, and transparency of the procedure impaired, when an awarding entity takes account of changes to the initial offers of one tenderer who thereby obtains an advantage over his competitors. Moreover, the Court notes that "the procedure for comparing tenders had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency, so as to afford equality of opportunity to all tenderers when formulating their tenders"(44).

The Court has therefore specified in this case law concerning application of the Directives that the principle of equality of treatment between tenderers is quite separate from any possible discrimination on the basis of nationality or other criteria.

The application of this principle to concessions (which is obviously only possible when the awarding authority negotiates with several potential concessionaires) leaves the grantor free to choose the most appropriate award procedure, for example by reference to the characteristics of the sector in question, and to lay down the requirements which candidates must meet throughout the various phases of a tendering procedure(45). However, this implies that the choice of candidates must be made on the basis of objective criteria and the procedure must be conducted in accordance with the procedural rules and basic requirements originally set(46). Where these rules have not yet been set, the application of the principle of equality of treatment requires in any event that the candidates be chosen objectively.

The following should therefore be considered to contravene the above-mentioned rules of the

Treaty and the principle of equality of treatment: provisions reserving public contracts only to companies of which the State or the public sector, whether directly or indirectly, is a major, or the sole, shareholder(47); practices allowing the acceptance of bids which do not meet the specifications, or which have been amended after being opened or allowing alternative solutions when this was not provided for in the initial project. In addition the nature of the initial project must not be changed during negotiation with regard to the criteria and requirements laid down at the beginning of the procedure.

Furthermore, in certain cases, the grantor may be unable to specifiy his requirements in sufficiently precise technical terms and will look for alternative offers likely to provide various solutions to a problem expressed in general terms. In such cases, however, in order to ensure fair and effective competition, the specifications must always state in a non-discriminatory and objective manner what is asked of the candidates and above all the way in which they must draw up their bids. In this way, each candidate knows in advance that he has the possibility of proposing various technical solutions. More generally, the specifications must not contain elements that infringe the abovementioned rules and principles of the Treaty. The requirements of the grantor may also be determined in collaboration with companies in the sector, provided that this does not restrict competition.

3.1.2. Transparency

The Commission points out that in its case law the Court has emphasised the connection between the principle of transparency and the principle of equality of treatment, whose useful effect it seeks to ensure in undistorted competitive conditions(48).

The Commission notes that in virtually all the Member States the administrative rules or practices adopted with regard to concessions provide that bodies wishing to entrust the management of an economic activity to a third party must, in order to ensure a minimum of transparency, make their intention public according to appropriate rules.

As confirmed by the Court in its most recent case law, the principle of non-discrimination on grounds of nationality, implies that there is an obligation to be transparent so that the contracting authority will be able to ensure it is adhered to(49).

Transparency can be ensured by any appropriate means, including advertising depending on, and to allow account to be taken of, the particularities of the relevant sector(50). This type of advertising generally contains the information necessary to enable potential concessionaires to decide whether they are interested in participating (e.g. selection and award criteria, etc.). This includes the subject of the concession and the nature and scope of the services expected from the concessionaire.

The Commission considers that, under these circumstances, the obligation to ensure transparency is met.

3.1.3. Proportionality

The principle of proportionality is recognised by the established case law of the Court as "being part of the general principles of Community law"(51); it also binds national authorities in the application of Community law(52), even when these have a large area of discretion (53).

The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought(54). In choosing the measures to be taken, a Member State must adopt those which cause the least possible disruption to the pursuit of an economic activity(55).

When applied to concessions, this principle, which allows contracting authorities to define the objective to be reached, especially in terms of performance and technical specifications, nonetheless requires that any measure chosen be both necessary and appropriate in relation to the objective set.

Thus, for example, when selecting candidates, a Member State may not impose technical, professional or financial conditions which are excessive and disporportionate to the subject of the concession.

The principle of proportionality also requires that competition and financial stability be reconciled; the duration of the concession must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital(56), whilst maintaining a risk inherent in exploitation by the concessionaire.

3.1.4. Mutual recognition

The principle of mutual recognition has been laid down by the Court and gradually defined in greater detail in a large number of judgments on the free circulation of goods, persons and services.

According to this principle, a Member State must accept the products and services supplied by economic operators in other Community countries if the products and services meet in like manner the legitimate objectives of the recipient Member State(57).

The application of this principle to concessions implies, in particular, that the Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognised as equivalent to those required by the Member State in which the service is provided(58).

3.1.5. Exceptions provided for by the Treaty

Restrictions on the free movement of goods, the freedom of establishment and the freedom to provide services are allowed only if they are justified by one of the reasons stated in Articles 30, 45, 46 and 55 (ex Articles 36, 55, 56 and 66) of the Treaty.

With particular reference to Article 45 (ex Article 55) (which allows restrictions on the freedom of establishment and the freedom to provide services in the case of activities connected, even occasionally, with the exercise of official authority), the Court has on numerous occasions stressed(59) that "since it derogates from the fundamental rule of freedom of establishment, Article 45 (ex Article 55) of the Treaty must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect". Such exceptions must be restricted to those activities referred to in Articles 43 and 49 (ex Articles 52 and 59), which in themselves involve a direct and specific connection with the exercise of official authority(60).

Consequently, the exception included in Article 45 (ex Article 55) must apply only to cases in which the concessionairs directly and specifically exercises official authority.

This exception therefore does not automatically apply to activities carried out by virtue of an obligation or an exclusivity established by law or qualified by the national authorities as being in the public interest(61). It is true that any activity delegbated by the public authorities normally has a connotation of public interest, but this stil does not mean that such activity necessarily involves exercising official authority.

As an example, the Court of Justice dismisses application of the exception under Article 45 (ex Article 55) on the basis of findings such as:

- the activities transferred remained subject to supervision by the official authorities, which had at their disposal appropriate means for ensuring the protection of the interests entrusted to them(62),

- the activities transferred were of a technical nature and therefore not connected with the exercise of official authority(63).

As stated above, the principle of proportionality requires that any measure restricting the exercise of the freedoms provided for in Articles 43 and 49 (ex Articles 52 and 59) should be both necessary and appropriate in the light of the objectives pursued(64). This implies, in particular, that in the choice of the measures for achieving the objective pursued, the Member State must give preference to those which least restrict the exercise of these freedoms(65).

Furthermore, with regard to the freedom to provide services, the host Member State must check that the interest to be safeguarded is not safeguarded by the rules to which the applicant is subject in the Member State where he normally pursues his activities.

3.1.6. Protection of the rights of individuals

In consistent case law on the fundamental freedoms guaranteed by the Treaty, the Court has stated that decisions to refuse or reject must state the reasons and must be open to judicial appeal by the affected parties(66).

These requirements are generally applicable since, as the Court has stated, they derive from the constitutional traditions common to the Member States and enshrined in the European Convention on Human Rights(67).

They are therefore also applicable to individuals who consider that they have been harmed by the award of a concession within the meaning of the communication.

3.2. SPECIFIC PROVISION OF DIRECTIVE 93/37/EEC ON WORKS CONCESSIONS

The Commission considers it worthwhile to point out that the rules and principles explained

above are applicable to works concessions. However, Directive 93/37/EEC also provides a specific system for these which includes, among other things, advertising rules.

It goes without saying that, for concessions whose value is below the threshold laid down by Directive 93/37/EEC, only the rules and principles of the Treaty are applicable.

3.2.1. The upstream phase: choice of concessionaire

3.2.1.1. Rules on advertising and transparency

Awarding authorities must publish a concession notice in the Official Journal of the European Communities according to the model laid down in Directive 93/37/EEC to put the contract up for competition at the European level(68) .

A problem encountered by the Commission involves the award of concessions between public entities. Some Member States seem to consider that the provisions of Directive 93/37/EEC applicable to works concessions do not apply to contracts concluded between a public authority and a legal person governed by public law.

Nevertheless, Directive 93/37/EEC requires a preliminary advertisement for all contracts for public works concessions, irrespective of whether the potential concessionaire is private or public. Furthermore, Article 3(3) of Directive 93/37/EEC expressly states that the concessionaire can be one of the awarding authorities covered by the directive, which implies that this type of relation is subject to publication in accordance with Article 3(1) of the same directive.

3.2.1.2. Choice of type of procedure

As far as works concessions are concerned, the grantor is free to choose the most appropriate procedure, and in particular to begin negotiated procedures.

3.2.2. The downstream phase: contracts awarded by the contract holder(69)

Directive 93/37/EEC lays down certain rules on contracts awarded by public works concessionaires for works for a value of EUR 5000000 or more. However, they vary according to the type of concessionaire.

If the concessionaire is an awarding authority within the meaning of the Directive, the contracts for such works must be awarded in full compliance with all the Directive's provisions on public works contracts(70).

If the concessionaire is not an awarding authority, the Directive stipulates that he must comply only with certain advertising rules. However, these rules are not applicable when the concessionaire awards works contracts to affiliated undertakings within the meaning of Article 3(4) of the Directive. The Directive also stipulates that a comprehensive list of such firms must be enclosed with the application for the concession and must be updated following any subsequent changes in the relationship between firms. Since this list is comprehensive, the concessionaire may not cite the non-applicability of the advertising rules as grounds for awarding a works contract to a firm which does not figure on the abovementioned list.

Consequently the concessionaire is always obliged to make known his intention to award a works contract to a third party whether or not he is an awarding authority.

Lastly, the Commission considers that a Member State is in breach of the provisions of Directive 93/37/EEC on works carried out by third parties if, without any invitation to tender, it uses as an intermediary a firm with which it is linked to award works contracts to third-party firms.

3.2.3. Rules applicable to review

Article 1 of Directive 89/665/EEC provides that "Member States shall take the necessary measures to ensure that [...] decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible" in the conditions set out in the Directives, "on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law".

This provision of the Directive applies to works concessions(71).

The Commission also draws attention to the requirements of Article 2(7) of Directive 89/665/EEC, which stipulates that "the Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced."

This implies that the Member States must not take any material or procedural measures which might render ineffektive the mechanisms introduced by this Directive.

As for concessionaires who are awarding authorities, in addition to the obligations already

mentioned above, public contracts awarded by them are subject to the obligation to state reasons laid down in Article 8 of Directive 93/37/EEC, which makes it compulsory for the awarding authority to give the reasons for its decision within fifteen days, and to the review procedures provided for by Directive 89/665/EEC.

3.3. CONCESSIONS IN THE UTILITIES SECTORS

Directive 93/38/EEC on contracts awarded by entities operating in the water, energy, transport and telecommunications sectors (hereinafter referred to as the "utilities Directive") does not have any specific rules either on works concessions or on service concessions.

In deciding which rules apply, the legal personality of the grantor as well as his activity are therefore decisive elements. There are several possible situations.

In the first case, the State or other public authority not operating specifically in one of the four sectors governed by the utilities Directive awards a concession involving an economic activity in one of these four sectors. The rules and principles of the Treaty described above apply to this award, as does the works Directive if it is a works concession.

In the second case, a public authority operating specificially in one of the four sectors governed by the utilities Directive decides to grant a concession. The rules and principles of the Treaty are therefore applicable insofar as the grantor is a public entity. Even in the case of a works concession, only the rules and principles of the Treaty are applicable, since the works Directive does not cover concessions granted by an entity operating specifically in one of the four sectors governed by Directive 93/38/EEC.

Lastly, if the grantor is a private entity, it is not subject to either the rules or the principles described above(72).

The Commission is confident that the publication of this communication will help to clarify the rules of the game and to open up markets to competition in the field of concessions.

Moreover, the Commission wishes to emphasise that the transparency which the publication of this communication provides in no way prejudices possible future proposals for legislation on concessions, if this becomes necessary to reinforce legal certainty.

Lastly, the Court, which currently has preliminary matters before it(73), may further clarify elements deriving from the rules of the Treaty, the Diretives and case law. This communication may therefore be supplemented in due course in order to take these new elements into account.

(1) OJ C 94, 7.4.1999, p. 4.

(2) The Commission wishes to thank the economic operators, representatives of collective interests, public authorities and individuals whose input helped to improve this communication.

(3) See point 2.1.2.4 of the Commission communication on public procurement in the European Union, COM(98) 143, adopted on 11 March 1998.

(4) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54).

(5) Council Directive 93/37/EEC, mentioned above.

(6) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1). Council Directive 93/36/EEC of 14 July 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p. 1). Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84).

(7) The best-known example of a public works concession is a contract whereby a State grants a company the right to build and exploit a motorway and authorises it to earn revenue by charging tolls.

(8) Verification will have to be on a case by case basis, taking account of various elements such as the subject matter, duration and the amount of the contract, the economic and financial capacity of the concessionaire, as well as any other useful element which helps establish that the concessionaire effectively carries risk.

(9) If recovery of expenditure were guaranteed by the awarding authority without the risk involved in the management of the construction, there would be no element of risk and the contract should be regarded as a works contract rather than a concession contract. Moreover,

if the concessionaire receives whether directly or indirectly during the course of the contract or even when the contract comes to an end, payment (by way of reimbursement, covering losses etc.) other than connected with exploitation, the contract could no longer be regarded as a concession. In this situation, the compatibility of any subsequent financing should be considered in the light of any relevant Community law.

(10) For example, the Commission has already been faced with cases where a consortium composed of contractors and banks undertook to carry out a project to meet the needs of the awarding authority, in exchange for reimbursement by the awarding authority of the loan taken out by the contractors with the banks, together with a profit for the private partners. The Commission interpreted these as public works contracts since the consortium did not undertake any exploitation, and therefore bore no attendant risk. The Commission came to the same conclusion in another case where, although the private partner carrying out the work was ostensibly exploiting the construction, the public authority had in fact guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.

(11) For example, if the toll for a motorway is set by the State at a level which does not cover operating costs.

(12) For example, risks arising from changes in legislation during the life of the contract (such as changes in environmental protection which make it necessary to modify the construction, or changes in tax law which disrupt the financial arrangements in the contract) or the risk of technical obsolescence. Moreover, this type of risk is more likely to arise in the context of concessions, bearing in mind that these normally extend over a relatively long period of time.

(13) It should be noted that economic risk exists where income depends on the amount of use. This holds true even in the case of a nominal toll, i.e. one borne by the grantor.

(14) In a case investigated by the Commission, although the private partner was ostensibly exploiting the construction, the public authority had guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.

(15) The absence of a reference to the concept of service concessions in the services Directive calls for some comment. Although, when preparing this Directive, the Commission had proposed including a special arrangement for this type of concession similar to the existing arrangement for works concessions, the Council did not accept this proposal. The question of wheather the granting of service concessions falls entirely under the arrangements introduced by the services Directive was therefore raised. As specified above, this Directive applies to "contracts for pecuniary interest concluded in writing between a service provider and a contracting authority", with certain exceptions which are described in the Directive and which do not include concession contracts.

A literal interpretation of this definition, followed by certain authors, could lead to inclusion of concession contracts within the scope of the services Directive, since these are for pecunciary interest and concluded in writing. This approach would mean that the granting of a service concession would have to comply with the rules set out in this Directive, and would hence be subject to a more complex procedure than works concessions.

However, in the absence of Court case law on this point, the Commission has not accepted this interpretation in the actual cases it has had to investigate. A preliminary matter pending before the Court raises the question of the definition of service concessions and the legal arrangements which apply to them (Case C-324/98 Telaustria Verlags Gesellschaft mbH v. Post & Telekom Austria (Telaustria)).

(16) Judgment of 26 April 1994, Case C-272/91 Commission v. Italy (Lottomatica), ECR I-1409.

(17) Conclusions of Advocate-General La Pergola in Case C-360/96. Arnhem.

Conclusions of Advocate-General Alber in Case C-108/98, RI.SAN Srl v. Comune d'Ischia.

(18) In its judgment of 10 November 1998 in Case C-360/98 (Arnhem), para. 25, the Court concluded that it could not be a public service concession on the grounds that the remuneration consisted solely of a sum paid by the public authority and not of the right to operate the service.

(19) Conclusions of the Advocate-General in the Arnhem case; Conclusions of the Advocate-General in the RI.SAN Srl case; both referred to above.

(20) Judgment of 19 April 1994, case C-331/92, Gestión Hotelera, ECR I-1329.

(21) Judgment of 5 December 1989, Case C-3/88, Data Processing, ECR, p. 4035.

(22) Moreover, the Court has already applied the same principle in order to delimit supply contracts and services in its judgment of 18 November 1999 on Case C-107/98, Teckal Srl v. Comune di Viano and AGAC di Reggio Emilia (Teckal).

(23) In the largest sense, i.e. the acts adopted by all public bodies belonging to the organisation of the State (local authorities, regions, departments, autonomous communities, municipalities) as well as any other entity which, even if it has its own legal existence, is linked to the State in such a tight manner that it is to be considered to be part of the State's organisation. The notion of acts of State also comprises acts which are attributable to the State, that is acts for which the public authorities are responsible, even though not adopted by them, given that the authorities can intervene to prevent their adoption or impose amendments.

(24) A similar line of reasoning should be followed for supply concessions, which must be viewed in the light of Articles 28 to 30 (ex Articles 30 to 36) of the Treaty.

(25) For example, taxi concessions, authorisations to use the public highway (newspaper kiosks, café terraces), or acts relating to pharmacies and filling stations.

(26) Similar to "in-house" relationships. The latter issue was first analysed by Advocates-General La Pergola (in the Arnhem case referred to above), Cosmas (in the Teckal case referred to above) and Alber (in the RI.SAN case referred to above).

(27) In the abovementioned Teckal case, the Court laid down that, for Directive 93/36/EEC to apply, "it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority", and added "The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities" (recital 50).

(28) Cases C-94/99 ARGE and C-324/98 Telaustria referred to above.

(29) In the audiovisual sector, account should be taken of the Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam, amending the Treaty on European Union (in force since 1 May 1999).

(30) Judgments of 30 April 1974, Case 155/73, Sacchi, and of 18 June 1991, Case C-260/89, Elleniki Radiophonia.

(31) Elleniki Radiophonia judgment mentioned above, point 10.

(32) Elleniki Radiophonia judgment mentioned above, point 12.

(33) It is worth pointing out that in the transport sector, the relevant rules on freedom to provide services are set out in Article 51 (ex Article 61) which refers to Articles 70 to 80 (ex Articles 74 to 84) of the Treaty. This is without prejudice to the fact that as the Court has consistently held, the general principles of Community law are applicable to the sector (see the judgments of 4 April 1974, Case C-167/73, Commission v. France, of 30 April 1986. Joined Cases 209/84 and 213/84, Ministère Public v. ASJES e. al., of 17 May 1994, Case C-18/93, Corsica ferries, of 1 October 1998, Case C-38/97 Autotrasporti Librandi snc v. Cuttica).

Moreover, transport services by rail, road and inland waterway are covered by Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, which set out the mechanisms and procedures that public authorities can employ to ensure that their objectives for public transport are met.

(34) Obviously, acts and behaviour of the concessionaire to the extent that these are attributable to the State within the meaning of the case law of the Court of Justice are governed by the above rules and principles.

(35) Judgment of 9 July 1987 Joint Cases 27/86; 28/86 and 29/86, Bellini.

(36) Judgments of 10 March 1987, Case 199/85, Commission v. Italy, and of 17 November 1993, Case C-71/92, Commission v. Spain.

(37) Lottomatica judgment mentioned above. In this judgment, the Court of Justice ruled that, in view of the facts, the tasks of the concessionaire were limited to activities of a technical nature and, as such, were subject to the provisions of the Treaty.

(38) The Commission points out that restrictive but non-discriminatory measures are contrary to Articles 43 (ex Article 52) and 49 (ex Article 59) of the Treaty if they are not motivated by

overriding reasons of public interest worth protecting. This is the case when the measures are neither appropriate nor necessary for achieving the objective in question.

(39) Judgment of 8 October 1980. Case 810/79, Überschär.

(40) Judgment of 13 July 1993, Case C-330/91, Commerzbank; also see Judgment of 3 February 1982, Joined Cases 62 and 63/81, Seco and Desquenne.

(41) Judgment of 26 February 1992, Case C-357/89.

(42) Judgment of 7 July 1992, Case C-295/90.

(43) Judgment of 22 June 1993, Case C-243/89, Storebaelt, point 37.

(44) Judgment of 25 April 1996, Commission v. Belgium, Case C-87/94. Walloon Buses. See also Judgment of the Court of First Instance (hereinafter referred to as the "CFI") of 17 December 1998, T-203/96, Embassy Limousines & Services.

(45) In this respect, it is worth emphasising that this Communication does not prejudge the interpretation of specific transport rules provided for by the Treaty at in current or future regulations.

(46) Thus, for example, even if the specifications provide for the possibility for candidates to make technical improvements to the solutions proposed by the awarding authority (and this will often be the case for complex infrastructure projects), such improvements may not relate to the basic requirements of a project and must be delimited.

(47) Data processing, judgment mentioned above, point 30.

(48) Walloon Buses Judgment, referred to above, point 54.

(49) Judgment of 18 November 1999, Case C-275/98, Unitron Scandinavia, point 31.

(50) Transparency can be ensured, among other means, by way of publishing a tender notice, or pre-information notice in the daily press or specialist journals or by posting appropriate notices.

(51) Judgment of 11 July 1989, Case 265/87, Schröder, ECR p. 2237, point 21.

(52) Judgment of 27 October 1993, Case 127/92, point 27.

(53) Judgment of 19 June 1980, Joined Cases 41/79, 121/79 and 796/79, Testa et al., point 21.

(54) This is for example the case concerning the obligation to achieve a high level of environmental protection regarding application of the precautionary principle.

(55) See for example the judgment of 17 May 1984, Case 15/83, Denkavit Netherlands or the judgment of the CFI of 19 June 1997, Case T-260/94, Air Inter SA, point 14.

(56) Cf. the CFI's recent case law according to which the Treaty is applicable "when a measure adopted by a Member State constitutes a restriction of the freedom of establishment of nationals of other Member States on its territory and at the same time provides advantages to an enterprise by granting it an exclusive right, unless the aim of the measure taken by the State is legitimate and compatible with the Treaty and is permanently justified by overriding considerations of general interest [...]". In such cases, the CFI adds that "it is necessary that the measure taken by the State be suited to ensuring the objective it is pursuing is achieved, and does not go beyond what is required to achieve that objective." (Judgment of 8 July 1999, Case T-266/97, Vlaamse Televisie Maatschappij NV, point 108).

(57) This principle derives from case law relating to freedom of establishment and freedom to provide services (in particular in the Vlassopoulou Judgment of 7 May 1991 (Case C-340/89) and the Dennemeyer Judgment of 25 July 1991 (Case C-76/90). In the first Judgment, the Court of Justice found that "even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in exercising their right of establishment guaranteed to them by Article 43 (ex Article 52) of the EC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State." In the Dennemeyer Judgment the Court stated in particular that "a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishments and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services." Lastly, in the Webb case (of 17 December 1981, Case 279/80), the Court added that the freedom to provide services requires that "[...] the Member States in which the service is provided [...] takes into account the evidence and

guarantee already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established."

(58) For example, the Member States in which the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State which attest to his professional, technical and financial capacities. Apart from applying the technical harmonisation directives, agreements on mutual recognition of voluntary certification systems can constitute proof that the qualifications of enterprises are equivalent; these agreements can be based on accreditation, which provide proof that the conformity assessment body is competent.

(59) Judgment of 15 March 1988, Case 147/86, Commission v. Greece.

(60) Judgment of 21 June 1974, Case 2/74, Reyners.

(61) Conclusions of Advocate-General Mischo in Case C-3/88, Data Processing, referred to above.

(62) Judgment of 15 March 1988, Case 147/86, referred to above.

(63) Cases C-3/88 and C-272/91, Data Processing and Lottomatica, referred to above.

(64) Case T-260/94, Air Inter SA, referred to above. For example, the Court rejected the application of the exception relating to public policy when it was supported by insufficient reasons and the objective could be achieved by other means which did not restrict freedom of establishment or freedom to provide services (recital 15 of the Judgment C-3/88, Data Processing, referred to above.)

(65) Judgment of 28 March 1996, Case C-272/94, Guiot/Climatec.

(66) Judgment of 7 May 1991, Case C-340/89, Vlassopoulou, point 22.

(67) Judgment of 15 October 1987, Case 222/86, Heylens, point 14.

(68) "In order to meet the Directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts" (Judgment of 20 September 1988, Case 31/87, Beentjes, point 21).

(69) It should be reiterated that, under Article 3(2) of the Directive, the contracting authority may require the concessionaire to award to third parties contracts representing a minimum percentage of the total value of the work. The contracting authority may also request the candidates for concession contracts to specify this minimum percentage in their tenders.

(70) This is also the case for service concessionaires who are awarding authorities under these Directives. The provisions of the Directives apply to procedures to award concession contracts.

(71) In this context, it should be noted that Advocate-General Elmer, in Case C-433/93, Commission v. Germany, found that according to the case law of the Court (the Judgments of 20 September 1988, in Case 31/87, Beentjes, and 22 June 1989, in Case 103/88, Constanzo) "the Directives on public contracts confer on individuals rights which they may exercise, in certain conditions, directly before the national courts, vis-à-vis the State and awarding authorities". The Advocate-General also maintainted that Directive 89/665/EEC, adopted after this judgment, did not seek to restrict the rights which case law confers on individuals vis-à-vis public authorities. On the contrary, the Directive sought to reinforce "the existing arrangements at both national and Community levels ... particularly at a stage when infringements can be corrected" (second recital of Directive 89/665/EEC).

(72) Nonetheless, insofar as the concessionaire has exclusive or special rights for activities governed by the Utilities Directive, he must comply with this Directive's rules on public contracts.

(73) For example, the Telaustria case referred to above.

IP/00/436

Brussels, 4 May 2000

Internal Market: Commission confirms EU rules apply to concessions to run public services

The European Commission has adopted guidelines explaining how EC Treaty rules and principles apply to partnerships between the public and the private sectors. The Commission's Communication defines "concessions" as cases where public authorities entrust a third party to run infrastructure projects or other public services on its behalf and the third party assumes the operating risks. The Communication confirms that such concessions, which are used increasingly in all Member States, should be subject to EU rules and principles on non-discrimination, equal treatment, transparency, mutual recognition and proportionality.

Community law neither gives a general definition of concessions nor lays down specific rules to apply to them (with the exception of works concessions, to which certain rules of Directive 93/37/EEC on public works contracts apply. This has led to much uncertainty about the rules applying in this field.

In the interests of transparency, the Commission has therefore decided to inform operators and the public authorities concerned about the rules and principles which it feels apply to concessions under Community law as it stands. These rules and principles are designed to give Community firms free access to public service concessions and to ensure that Community law is fully respected by Member States when concessions are awarded.

A "draft Commission interpretative Communication on concessions under Community law on public contracts" was adopted by the Commission on 24 February 1999 (see IP/99/130) and published in the Official Journal on 7 April 1999. It was published in draft form because the Commission wanted to consult all interested parties. For the main part the contributions sent to the Commission, of which full account has been taken, welcomed the Commission's initiative.

Adoption of this Communication does not rule out the possibility of a Community legislative instrument being drawn up and adopted later if that should prove necessary.

No substantial differences from the draft adopted in 1999

Like the draft version, this Communication is in two parts. The first is devoted to the distinction between works and service concessions and public contracts. The second part goes on to deal with the rules applicable. There are therefore no substantial differences between this interpretative Communication and the draft adopted by the Commission in 1999. The few amendments made to the draft are set out below:

Definition of concession

The Commission notes that the manner in which public authorities make use of the private sector to fulfil their public service tasks can differ from one Member State to the next. However, the main distinctive feature of a concession within the meaning of Community law is the presence of an operating risk.

This interpretative Communication therefore relates to State acts by which a public authority entrusts to a third party, by contract or by unilateral measure, total or partial management of services which are normally its responsibility and for which this third party assumes the operating risks. This applies only if the services involve economic activities (e.g. operation of motorways or supply of water). On the other hand, acts are excluded which involve entrusting third parties with the management of services which are connected with the exercise of official authority(e.g. notarial services in some Member States) or where a licence is granted or an authorisation given to exercise an economic activity (e.g. in some Member States the opening of pharmacies or petrol stations).

Rules applicable to concessions

Leaving aside the differences in definitions, both public contracts and concessions are about the performance of economic activities and are therefore subject to the same rules of the Treaty and the principles which emerge from the case-law of the Court of Justice, such as non-discrimination, equal treatment, transparency, mutual recognition and proportionality.

The principle of equal treatment, which is one of the general principles, means that all bidders must be familiar with the rules and that the rules apply equally to all. As regards transparency, the Commission notes that in Member States there are often rules or administrative practices which ensure a certain degree of transparency in the award of a concession.

The principle of proportionality means that any measure chosen by the awarding authority must be necessary and appropriate for the attainment of the goals. Finally, the principle of mutual recognition means that the Member State where the service will be provided must recognise the technical specifications and controls undertaken in another Member State.

Apart from the rules and principles contained in the Treaty and case-law, the draft sets out the relevant provisions of the Directives, especially the Directive on public works contracts (93/37/EC). It adds that only works concessions are subject to some of the rules of this Directive.

It also stipulates the consequences of the application of the rules and principles of the Treaty for concessions in special sectors such as energy and transport.

The amendments made to the draft version

Other forms of partnership for involving the private sector are no longer concerned

In the draft version it published, the Commission had stated that it would also cover the other forms of partnership used to involve the private sector.

It has now decided not to deal with forms of partnership which do not have similar characteristics to those of concessions within the meaning of this Communication, this being also the approach favoured by the contributions sent in. Since many possible forms exist and they are constantly developing, careful thought needs to be given to the features common to these arrangements. The debate must therefore continue.

Distinction between the concepts of concessions and public contracts

The contributions dealing with concessions have enabled the Commission to further its analysis of the situation and to identify the specific features of concessions, which distinguish them from public contracts, in particular the delegation of services of general interest operated by this type of partnership.

The transparency obligation

The section on transparency has been clarified and specified in the light of the Court's recent judgment of 18 November 1999 in Case C-275/98, *Unitron*. As the Court confirmed, the principle of non-discrimination implies an obligation of transparency so that the awarding authority can ensure that it is complied with. This transparency can be provided by any appropriate means, including publicity.

The interpretative Communication is available on the Commission's Europa website at the following address: http://simap.eu.int

Public Procurement

Guidelines

- Guide to the Community rules on public supply contracts
  es da de en fr it nl pt
- Guide to the Community rules on public procurement of services
  da de en fr it nl pt
- Guide to the Community rules on public works contracts
  da de en fr nl pt

Contacts

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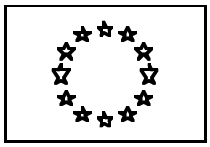

EUROPEAN COMMISSION

PUBLIC PROCUREMENT
IN THE EUROPEAN UNION

GUIDE TO THE COMMUNITY RULES ON PUBLIC SUPPLY CONTRACTS

OTHER THAN IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS

DIRECTIVE 93/36/EEC

This guide has no legal value and does not necessarily represent the official position of the Commission

CONTENTS

I. INTRODUCTION

THE COMMUNITY RULES ON PUBLIC SUPPLY CONTRACTS

1. PROHIBITIONS LAID DOWN IN THE TREATY

The EC Treaty does not specifically mention public procurement. It does, however, lay down fundamental principles which are generally applicable and which contracting authorities have to observe when awarding all contracts, including those whose value falls below the thresholds for application of the specific rules laid down in the Directive.

The Treaty principle governing public supply contracts is the free movement of goods and, more specifically, the ban, established in Articles 30 *et seq.*, on quantitative restrictions on imports and exports and all measures having equivalent effect.[1]

The principle of the free movement of goods, and the consequent ban on quantitative restrictions and measures having equivalent effect, applies both to goods originating in the Community and to goods coming from non-member countries which are put into free circulation in the Member States.

A measure having an effect equivalent to a quantitative restriction means any measure, be it a law or regulation, an administrative practice or an act of, or attributable to, a public authority, that is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

Such measures may discriminate between domestic and imported or exported goods or they may apply to domestic and imported goods alike.

A requirement for import or export licences is an example of a measure falling within the first category. There are a number of exceptions to the prohibition of measures in this category, however, which are listed in Article 36.

Article 36 allows Member States to maintain in force or introduce prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property, provided

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1 An equivalent ban is established in the ECSC Treaty by Article 4 read in conjunction with Article 86. Article 4 provides that "the following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: (a) (...) quantitative restrictions on the movement of products". Under the second paragraph of Article 86, "Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4".

that the prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The second category, namely measures that are equally applicable to domestic and to imported products, mainly comprises regulations prescribing technical requirements, quality standards or testing and type-approval conditions that have to be satisfied by any product of a certain kind that is put on sale on the domestic market. Most such regulations are introduced for consumer protection, environmental or health and safety reasons. However, they are contrary to Article 30 if their trade-restricting effect is excessive in relation to the mandatory requirements they are intended to satisfy. The basic principle applicable to technical regulations and standards is that of mutual recognition by Member States of each others' quality standards, composition rules, national testing and certification procedures, etc.

Technical regulations are now seldom harmonized at Community level unless a mandatory requirement renders harmonization indispensable. It is important that no new unjustified barriers to intra-Community trade should be introduced in the name of essential technical requirements.

Article 100a of the Treaty provides that proposals for harmonization of health, safety, environmental protection and consumer protection legislation must take as a base a high level of protection (so that it will only in exceptional circumstances be possible to restrict the movement of products meeting the harmonized Community standards) and lays down a more flexible, and hence swifter, procedure for adopting such proposals.

If, after the adoption of a Community harmonization measure, a Member State were nevertheless to adopt exceptional measures on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it would have to justify them to the Commission and the Court of Justice.

2. PROVISIONS COORDINATING NATIONAL PROCEDURES

2.1 Objectives

The Treaty places a general ban on discriminatory measures and unfair treatment.

However, these prohibitions were not sufficient, on their own, to establish a single market in the specific area of public procurement. Differences between national rules together with the lack of any obligation to open up contracts to Community-wide competition often conspired to keep national markets walled off from foreign competitors. Legislation was therefore needed to make sure that public contracts throughout the Community were open to firms from all Member States on equal terms and to make procurement procedures more transparent so that compliance with the principles laid down in the Treaty could be enforced more effectively.

To supplement the ban on restrictions on the free movement of goods, on 21 December 1976 the Council adopted Directive 77/62/EEC coordinating procedures for the award of public supply contracts.[2]

That coordination was based on three main principles:

- Community-wide advertising of contracts to develop real competition between economic operators in all the Member States;
- the banning of technical specifications liable to discriminate against potential foreign bidders;
- application of objective criteria for the selection of tenderers and the award of contracts.

Directive 77/62/EEC did not open up public procurement to the extent expected: the Community legislation did not provide sufficient guarantees and contained several gaps, and its application at national level reflected the protectionism which had characterized the sector for too long.

To make up for the deficiencies identified in these rules, a new directive was therefore adopted: Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures for the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC.[3]

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[2] OJ No L 13, 15.1.1977, p. 1. To bring Community law into line with the outcome of the Tokyo Round of trade negotiations, the Directive was subsequently adapted and supplemented by Directive 80/767/EEC of 22 July 1980 (OJ No L 215, 18.8.1980, p. 1).

The principal innovations concerned in particular:

〈 the definition of the Directive's scope;

〈 information and tendering conditions;

〈 transparency of procedures;

〈 the definition of the technical specifications.

The legislation was finally replaced by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts.[4]

Directive 93/36/EEC aligned the rules on public supply contracts on the stricter and more detailed rules already adopted for public works contracts and brought together in a single text all the rules that were previously dispersed between a number of different instruments. It had become evident that such consolidation was necessary so that Community firms could use a clear, transparent text and, hence, exercise more easily the specific rights which they enjoy.

Directive 93/36/EEC applies not only throughout the European Community but, in accordance with the Agreement on the European Economic Area,[5] also in Norway, Iceland and Liechtenstein[6].

The European Parliament and the Council are currently discussing a proposal for a Directive[7] which would align the relevant provisions of Directive 93/36/EEC on those of the new Agreement on Government Procurement (GPA)[8] signed by the European Union on completion of the Uruguay Round of trade negotiations conducted under the auspices of what is now the World Trade Organization.

2.2 Legal effect

As regards legal effect, Article 189 of the EC Treaty states that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

The Member States are obliged, therefore, to adopt and implement all the arrangements and measures necessary to bring their national law into line with the provisions of directives addressed to them.

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4 OJ No L 199, 9.8.1993, p. 1.

5 OJ No L 1, 3.1.1994, p. 1.

6 Decision of the EEA Council No 1/95 of 10 March 1995 (OJ No L 86, 20.4.1995, p. 58).

7 OJ No C 138, 3.6.1995, p. 1.

The deadline for implementation of Directive 93/36/EEC expired on 14 June 1994. The Community legislature nevertheless maintained the obligations laid down in the various earlier provisions concerning the time-limits for their transposal and application. Thus, the only time-limits for application still running are those for Greece and Portugal (1 January 1998), and only in the case of the provisions relating to contracts concluded in the water, energy, transport and telecommunications sectors.

The effectiveness of the Directives is not, however, necessarily dependent on the implementing measures taken by the Member States concerned.

In accordance with the established case-law of the Court of Justice concerning direct effect, when the time-limit for transposal into national law expires a Member State may not rely on the non-fulfilment of the formalities for transposing a directive into national law or on the adoption of measures which are inconsistent with a directive in order to preclude its courts from applying provisions capable of producing direct effects.

In accordance with the principles established by the Court to determine whether provisions have direct effect, an examination should be made in each case as to whether the nature, structure and terms of the provision in question are likely to produce direct effects in relations between Member States and individuals. Such is the case, as a general rule, where a provision expresses a clear, precise and unconditional obligation allowing the Member States to which the directive is addressed no room for interpretation.

In addition, "when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities (...) are obliged to apply those provisions".[9]

The Court took the line that it would be contradictory to hold that private individuals are entitled to avail themselves of the provisions of a directive fulfilling the above conditions before national courts, with a view to obtaining judgment against the authorities, and yet to find that the latter are not obliged to apply the provisions of the directive by disregarding those provisions of national law which are not consistent with the directive.

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[9] Paragraph 31 of the Court's judgment of 22 June 1989 in Case 103/88

II. DIRECTIVE 93/37/EEC ON PUBLIC SUPPLY CONTRACTS

1. WHAT IS MEANT BY "PUBLIC SUPPLY CONTRACTS"?

1.1 Definition

Public supply contracts are contracts for pecuniary interest concluded in writing between a supplier and a contracting authority and involving the purchase, lease, rental or hire purchase, with or without option to buy, of products. The delivery of such products may, in addition, include siting and installation operations.

1.2 The supplier

The supplier may be a natural or legal person or a group of suppliers.

1.3 The contracting authority

Article 1 of the Directive defines contracting authorities as the State, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities or bodies governed by public law.

〈 *The State*

It is worth stressing that for the purposes of applying the Directive, the concept of the State is not confined to the administration as such, but also covers bodies which, albeit not formally part of the traditional structures of the administration, have no legal personality of their own and carry out tasks that are normally the responsibility of the State administration, which they merely represent in different ways.

This point was clarified by the Court of Justice in *Beentjes v Netherlands State*,[10] in which it had to rule whether Directive 71/305/EEC[11] applied to the award of public works contracts by the Waterland Local Land Consolidation Committee, a body with no legal personality of its own.

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10 Judgment of 20 September 1988 in Case 31/87 [1988] ECR 4635.

11 Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the

In accordance with the interpretation handed down by the Court in connection with the Works Directive, but which also applies to the Supplies Directive, the definition of the State must be interpreted in functional terms. In other words, it must include bodies which, albeit formally separate from the contracting authorities, are in fact entirely dependent on them and carry out tasks on their behalf. In the case in point, the Court ruled that a body whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public contracts which it is its task to award must be regarded as falling within the notion of the State, even though it is not part of the State administration in formal terms.

This principle, which was laid down by the Court to clarify the concept of the State, should also be applied to all the other contracting authorities listed in the Directive: these should thus be understood as including bodies of any kind which they create by law, regulation or administrative action.

〈 *Bodies governed by public law*

The Directive defines bodies governed by public law on the basis of three cumulative criteria. A body governed by public law thus means any body:

(1) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

(2) having legal personality, and

(3) * either financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law,

* or subject to management supervision by those bodies,

* or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The Directive thus applies to any body with legal personality under public or private law, established in the general interest, whose operational choices and activities are or may be influenced by a contracting authority as a result of the links between them by virtue of one or more of the conditions that go to make up the third criterion.

The only bodies which are established in the general interest and fulfil the other criteria but are not regarded as contracting authorities by the Directive are those set up for the specific purpose of meeting needs of an industrial or commercial nature, i.e. needs which they satisfy by carrying on economic activities in the industrial or commercial field that involve supplying goods or services on markets which are open to other public or private operators under fully competitive conditions. These are therefore bodies which carry on a business equivalent to that of a private operator.

It should be emphasized that the exemption provided for by the Directive applies only to bodies which carry on such economic activities since they were set up in order specifically to do so. Consequently, the exemption does not apply to bodies which, while carrying on commercial or industrial activities, were in fact set up to satisfy a different general interest: e.g. a body set up specifically to carry out administrative tasks so as to meet general–interest needs of a social nature, which, to ensure that its books balance, also carries on a profitable commercial activity.

Nevertheless, each individual case must be analysed to determine whether the body governed by public law is subject to the Directive.

In the interests of greater transparency in application, the Directive sets out, in Annex I, a list[12] of bodies and categories of bodies fulfilling the criteria for bodies governed by public law. The list is as exhaustive as possible; the Directive lays down a procedure for updating it.

The obligation on a body governed by public law to comply with the Directive does not, however, depend on its prior inclusion in the list: it is under such an obligation as soon as it fulfils the criteria. Similarly, although a body may be on the list, it could be exempted from complying with the Directive if it were no longer to meet one or more of the cumulative criteria.

1.4 Types of contract

The Directive defines public supply contracts as "contracts for pecuniary interest concluded in writing involving the purchase, lease, rental or hire purchase, with or without option to buy, of products ...".

As regards form, the Directive applies only to contracts in writing.

However, the definition of supplies between contracting parties is very wide and is interpreted as such by the Commission. The definition covers the whole range of the various forms of remuneration, quantifiable in money terms, which the contracting authority undertakes to make to the supplier. The Directive also covers all forms in which the supplier, in consideration for the remuneration, undertakes to make the goods available to the contracting authority, whether immediately or in the future.

A strict interpretation, limiting the Directive's applicability only to the contracts defined as such in the various Member States, would mean that the Directive's scope varied from one Member State to another in accordance with the difference in the substance of such contracts as determined by the national law governing them. The Directive must be the same in scope, however, for all those to whom it is addressed.

Accordingly, public supply contracts include open or standing contracts, i.e. contracts concluded between a contracting authority and one or more suppliers, whose purpose is to lay down the terms - such as price conditions, quantities proposed, minimum and/or maximum quantities and delivery conditions - of the supplies ordered over a given period, for which definitive quantities and prices will therefore be determined when each order is made and in accordance therewith.

The value of these contracts must be estimated in accordance with the rules laid down in the Directive and discussed in point 2.2.

Problems could arise regarding the applicability of the Directive in respect of certain practices which are not binding on contracting authorities or suppliers and are only preliminary to the conclusion of as yet undefined contracts for the purchase, lease, rental or hire purchase, with or without option to buy, of products. It should be stressed here that contractual, procedural, administrative or other practices may not under any circumstances lead to non–compliance with the Directive in the conclusion of contracts which it defines as public supply contracts and whose estimated value, determined according to the rules, exceeds the applicable threshold.

1.5 Identification of contracts

1.5.1 Public supply contracts and public works contracts

According to the above definition of public supply contracts, delivery of the products covered by the contract may, in addition, include siting and installation operations, i.e. the activities necessary to make the products supplied operational.

In some cases, doubts may arise as to the nature of the public contract which it is wanted to award and, consequently, as to the rules to be applied.

To determine whether a contract is for supplies or for works, the subject of the contract should be examined to see whether the purpose is to make goods, i.e. movable property, available to the contracting authority or to provide the contracting authority with the result of construction and/or civil engineering works, which result constitutes immovable property (e.g. a new school) or is incorporated in immovable property that already exists (e.g. renovations to a theatre).

1.5.2 Public supply contracts and public service contracts

Directive 92/50/EEC on public service contracts,[13] to distinguish its scope from that of the Supplies Directive, takes the value of the different components of a contract as its

[13] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the

reference criterion. Accordingly, a contract whose purpose, as well as the supply of products, is to supply services covered by Directive 92/50/EEC is to be regarded as a public supply contract or a public services contract depending on whether the value of the products or the services is greater.

It must be stressed that this criterion alone is not sufficient to determine what a contracting authority must do when it wants to award a contract where the value of the services exceeds that of the supplies, but to which the Services Directive does not apply.

In such a case, before applying the value criterion, it has to be seen whether the supply of products can be dissociated from the other activities.

Where the supply of the products can be dissociated from performance of the other services required, the contracting authority may not rely on the non–applicability of the Services Directive in order to derogate from the Supplies Directive.

In any event, it is under an obligation to award the supply contract in compliance with the Supplies Directive.

The successive application of the dissociation and then the value criterion derives from a judgment which the Court of Justice delivered before the Services Directive had been adopted and, thus, from a context of Community rules similar to that obtaining in this case.

In that judgment,[14] the Court had to rule on the applicability of Directive 77/62/EEC to the award of contracts for the establishment of data–processing systems. The main argument adduced by the defendant rested on the great complexity involved in establishing a large data–processing system which, in addition to the purchase of the hardware, comprised the creation of software, the planning, installation, maintenance and technical commissioning of the system and sometimes its operation; this meant that complete responsibility for all those activities had to be entrusted to a single company. Therefore, and bearing in mind that the hardware is an ancillary element in the establishment of a data–processing system, the Directive was inapplicable, so the argument ran, since the concept of public supply contracts covered only contracts the principal object of which was the delivery of products. The Court dismissed this argument, ruling that the establishment of a data–processing system could be separated from the activities involved in its design and operation and that the Directive did apply to the supply of the necessary hardware. It pointed out that the contracting authority "could have approached companies specializing in software development for the design of the data–processing systems in question and, in compliance with the Directive, could have purchased hardware meeting the technical specifications laid down by such companies".

2. PUBLIC SUPPLY CONTRACTS COVERED BY THE DIRECTIVE

Award of the public supply contracts defined above is not always subject to the specific rules laid down in the Directive, since these do not apply to contracts falling below certain value thresholds and since there are certain exceptions to do with the subject–matter of the contract, the activity carried on by the contracting authority or special procedural rules governing the award of the contract.

2.1 Thresholds

The value threshold above which public supply contracts are covered by the Directive varies. In general, all contracting authorities must comply with the Community procedural rules where the estimated value of the contract before VAT is not less than ECU 200 000.

Nevertheless, the central entities listed in Annex I to the Directive[15] must comply with the Directive in respect of contracts whose estimated value before VAT equals or exceeds the threshold laid down in accordance with the GATT Agreement on Government Procurement.[16]

The threshold is currently SDR 130 000.[17]

Where entities listed in Annex I operate in the defence field, they must observe the SDR 130 000 threshold only in the case of contracts for products listed in Annex II to Directive 93/36/EEC.[18] Contracting authorities must observe the ECU 200 000 threshold in respect of other products not covered by this Annex.

The value of the thresholds in national currencies and the threshold of the GATT Agreement expressed in ecus are normally to be adjusted every two years from 1 January 1988 onwards.

These values are calculated on the basis of the average daily values of these currencies expressed in ecus and of the ecu expressed in SDRs over the 24 months ending on the last day of August immediately preceding the 1 January revision.

The values are published in the "C" series (Information and Notices) of the Official Journal of the European Communities ("Official Journal") at the beginning of November.

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15 The list is reproduced in Annex II to this guide.

16 OJ No L 71, 17.3.1980, p. 44.

17 OJ No L 345, 9.12.1987, p. 24.

The currency equivalents of the thresholds applicable until the forthcoming adjustment (i.e., unless adjusted early, until 31 December 1997) are the following:

National currency equivalent of:

	ECU 200.000	**ECU 750.000**	**SDR 130 000**
			ECU 137 537
Belgian franc	7 898 547	29 619 550	5 431 710
Luxembourg franc	7 898 547	29 619 550	5 431 710
Danish krone	1 500 685	5 627 567	1 031 998
German mark	381 161	1 429 353	262 118
Greek drachma	58 015 458	217 557 969	39 896 348
French franc	1 316 439	4 936 647	905 295
Finish markka	1 223 466	4 587 996	841 359
Dutch guilder	427 359	1 602 595	293 888
Irish pound	160 564	602 116	110 418
Italian lira	397 087 000	1 489 076 250	273 070 685
Austrian schilling	2 681 443	10 055 413	1 843 988
Pound sterling	158 018	592 568	108 667
Spanish peseta	31 992 917	119 973 438	22 001 042
Portuguese escudo	39 297 792	147 366 719	27 024 493
Swedish krona	1 865 157	6 994 337	1 282 640

On the subject of thresholds, it is worth noting that the European Parliament and the Council are currently discussing a proposal for a Directive[19] which would align the relevant provisions of Directive 93/36/EEC on those of the new Agreement on Government Procurement (GPA)[20] signed by the European Union on completion of the Uruguay Round of trade negotiations conducted under the auspices of what is now the World Trade Organization.

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[19] OJ No C 138, 3.6.1995, p. 1

2.2 Estimation of contract value

2.2.1 Methods

In establishing whether or not the relevant threshold is reached, the way in which the value of a contract is calculated is obviously crucial. To ensure that identical calculation methods are used throughout the Community and to prevent evasion of the procurement rules by artificially low valuations, the Directive lays down specific rules.

Where the contract is to be concluded in the form of a lease, rental or hire–purchase agreement, the calculation method varies according to the contract's duration.

The estimated value is to be calculated on the basis of:

- where its term is 12 months or less, the total value for the contract's duration;
- where its term exceeds 12 months, the total value for the contract's duration, including the estimated residual value of the products;
- where the contract is concluded for an indefinite period or where its term cannot be defined, the monthly value multiplied by 48.

Where contracts are of a regular nature or are to be renewed over a given period, the following must be taken into account:

- either the actual aggregate value of similar successive contracts awarded over the previous 12 months or accounting period, adjusted where possible for anticipated changes in quantity or value over the subsequent 12 months;
- or the estimated aggregate value of the successive contracts concluded during the 12 months following the initial delivery or accounting period, where this exceeds 12 months.

In any event, the choice between these two valuation methods must not be made with the intention of keeping contracts outside the scope of the Directive.

If a proposed procurement of supplies of the same type may lead to contracts being awarded at the same time in separate lots, the estimated value of all the lots must be taken into account. If it reaches the relevant threshold, all the lots must be awarded in compliance with the Directive. The same rules apply when estimating the value of leasing, rental or hire–purchase contracts.

"Supplies of the same type" are to be understood as products which are intended for identical or similar uses, e.g. supplies of a range of foods or of different items of office furniture.

Where provision is explicitly made for options, the basis for calculating the estimated contract value must be the highest possible total permitted for the purchase, lease, rental or hire purchase, options included.

2.2.2 Time of estimation

The value of the supplies which it is wanted to procure may vary depending on a number of factors. The time at which the value is estimated, therefore, may turn out to be crucial to determining whether the contract attains the threshold laid down in the Directive.

Accordingly, contracting authorities are obliged, regardless of any earlier estimate of the contract, to take account of the value which the supplies that are the subject of the contract will have when the award procedure is initiated by the dispatch of the notice for publication or by an invitation to negotiate.

2.2.3 Splitting of contracts

There is a blanket prohibition on the splitting of a procurement requirement with the intention of circumventing the rules on estimating the contract value and, more widely, on applying the Directive as a whole.

For example, where a contracting authority comprises several departments that are not decentralized from an administrative viewpoint and, consequently, cannot be regarded as contracting authorities in their own right with the power to award public supply contracts within the meaning of the Directive, it must take into account all the requirements of its constituent departments when estimating the value of a contract.

2.3 Exclusions

Before indicating what contracts are excluded from application of the Supplies Directive, it should be emphasized that, since these are derogations, the provisions establishing them must be interpreted restrictively.

As far as supply contracts in the utilities sectors are concerned, the Directive does not apply to "contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC[21] or fulfilling the conditions in Article 6(2) of that Directive".

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[21] Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ No L 297, 29.10.1990

Directive 90/531/EEC has been replaced by Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[22]; references to Directive 90/531/EEC are therefore to be understood as applying to Directive 93/38/EEC.

The text of these articles is as follows:

Article 2

1. This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. Relevant activities for the purposes of this Directive shall be:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water, or

(ii) electricity, or

(iii) gas or heat,

or the supply of drinking water, electricity, gas or heat to such networks;

(b) the exploitation of a geographical area for the purpose of:

(i) exploring for or extracting oil, gas, coal or other solid fuels, or

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

3. For the purpose of applying paragraph 1(b), special or exclusive rights shall mean rights deriving from authorizations granted by a competent authority of the Member State concerned, by law, regulation or administrative action, having as their result the reservation for one or more entities of the exploitation of an activity defined in paragraph 2.

A contracting entity shall be considered to enjoy special or exclusive rights in particular where:

(a) for the purpose of constructing the networks or facilities referred to in paragraph 2, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway;

(b) in the case of paragraph 2(a), the entity supplies with drinking water, electricity, gas or heat a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned.

4. The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the contracting entities.

5. The supply of drinking water, electricity, gas or heat to networks which provide a service to the public by a contracting entity other than a public authority shall not be considered as a relevant activity within the meaning of paragraph 2(a) where:

(a) in the case of drinking water or electricity:

- the production of drinking water or electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than that referred to in paragraph 2, and

- supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of drinking water or energy, having regard to the average for the preceding three years, including the current year;

(b) in the case of gas or heat:

- the production of gas or heat by the entity concerned is the unavoidable consequence of carrying on an activity other than that referred to in paragraph 2, and

- supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the entity's turnover having regard to the average for the preceding three years, including the current year.

6. The contracting entities listed in Annexes I to X shall fulfil the criteria set out above. In order to ensure that the lists are as exhaustive as possible, Member States shall notify the Commission of amendments to their lists. The Commission shall revise Annexes I to X in accordance with the procedure in Article 40.

Article 6

1. This Directive shall not apply to contracts or design contests which the contracting entities award for purposes other than the pursuit of their activities as described in Article 2(2) or for the pursuit of such activities in a non–member country, in conditions not involving the physical use of a network or geographical area within the Community.

2. However, this Directive shall apply to contracts or design contests awarded or organized by the entities which exercise an activity referred to in Article 2(2)(a)(i) and which:

(a) are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by these projects or irrigation or drainage installations; or

(b) are connected with the disposal or treatment of sewage.

3. The contracting entities shall notify the Commission at its request of any activities they regard as excluded under paragraph 1. The Commission may periodically publish lists of the categories of activities which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 7

1. This Directive shall not apply to contracts awarded for purposes of resale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.

2. The contracting entities shall notify the Commission at its request of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish lists of the categories of products or activities which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 8

1. This Directive shall not apply to contracts which contracting entities exercising an activity described in Article 2(2)(d) award for purchases intended exclusively to enable

them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions.

2. The contracting entities shall notify the Commission at its request of any services which they regard as excluded under paragraph 1. The Commission may periodically publish the list of services which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 9

1. This Directive shall not apply to:

(a) contracts which the contracting entities listed in Annex I award for the purchase of water;

(b) contracts which the contracting entities listed in Annexes II to V award for the supply of energy or of fuels for the production of energy.

2. The Council shall re–examine the provisions of paragraph 1 when it has before it a report from the Commission together with appropriate proposals.

The public supply contracts awarded in the fields of water, energy, transport and telecommunications excluded from the scope of the Supplies Directive are, therefore, those covered by the abovementioned articles of Directive 90/531/EEC, which are not the subject of this guide.

It seems appropriate, however, to make a few observations about the distinction between contracts covered by the Supplies Directive and those covered by Directive 90/531/EEC.

It should be emphasized that the latter, in view of the qualifications provided for by Article 6(2), applies only to contracts which the contracting entities, exercising an activity referred to by the Directive, award for the pursuit of such activities.

Consequently, a contracting authority which carries on several activities at the same time may rely on the non–applicability of Directive 93/36/EEC only in respect of the public supply contracts which it awards in the exercise of the activities covered by the abovementioned articles of Directive 90/531/EEC.

For example, a municipality running a tram service will not comply with the Supplies Directive when purchasing the vehicles to be used for that service but will have to do so when purchasing school furniture.

On the other hand, the Supplies Directive does apply when a municipality that does not itself operate such a service purchases or hires vehicles to put them at the disposal of an entity which runs the transport network on its behalf.

The Directive does not apply to public contracts governed by different procedural rules and awarded:

- in pursuance of an international agreement, concluded in conformity with the EC Treaty, between a Member State and one or more non–member countries and covering supplies intended for the joint implementation or exploitation of a project by the signatory States: all such agreements must, however, be communicated to the Commission, which may examine them in consultation with the Advisory Committee for Public Contracts;[23]
- to undertakings in a Member State or a non–member country in pursuance of an international agreement relating to the stationing of troops;
- pursuant to the particular procedure of an international organization: it should be pointed out here that international organizations are not contracting authorities within the meaning of the Directive, which consequently does not apply to them. This exclusion thus covers contracts which, although concluded by contracting authorities, have to be awarded in accordance with the particular rules of an international organization.

Lastly, the Directive excludes public supply contracts from its scope:

- where the supplies are declared secret; or
- where their performance must be accompanied by special security measures in accordance with the provisions laid down by law, regulation or administrative action in force in the Member State concerned; or
- where the protection of the basic interests of that State's security so requires.

These last three exclusions from the Directive give concrete expression, in the public procurement field, to the powers already reserved for the Member States by Article 36 of the EC Treaty, which allows them in certain cases to derogate from the prohibitions on import and export restrictions enshrined in Articles 30 and 34 respectively. These three exclusions from the Directive must be interpreted as strictly and according to the same criteria as exceptions under Article 36.

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[23] This Committee was set up by Council Decision 71/306/EEC (OJ No L 185, 16.8.1971, p. 15), as

2.4 Defence procurement

Without prejudice to the abovementioned exclusions (see point 2.3), the Directive applies to all products which are the subject of public supply contracts, including those which are the subject of contracts awarded by contracting authorities in the field of defence, except for the products to which Article 223(1)(b) of the EC Treaty applies. In accordance with that Article, the exception covers only arms, munitions and war material appearing on the list laid down by the Council Decision of 15 April 1958, and only where those items are intended for specifically military purposes.

3. AWARD PROCEDURES

The Directive provides for three types of procedure for awarding public supply contracts: the open procedure, the restricted procedure, and the negotiated procedure, which may be used only in exceptional circumstances listed exhaustively in the Directive. According to the circumstances justifying its use, the negotiated procedure may or may not comprise a call for competition.

N.B.

In open and restricted procedures, the contracting authorities are allowed to request further information from tenderers so as to assess their tenders more fully, but they may not negotiate the conditions of the contract with them.

This principle, which is essential to the transparency of both procedures, was stated quite clearly by the Council and the Commission when Directive 89/440/EEC concerning coordination of procedures for the award of public works contracts was adopted.

They stressed in a joint statement that "in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination".[24]

3.1 Open procedures

An open procedure is one where all interested suppliers may submit tenders in response to a published contract notice.

3.2 Restricted procedures

A restricted procedure is one where, of the suppliers who have expressed their interest following publication of the contract notice, only those so invited by the contracting authority may submit tenders.

An accelerated form of restricted procedure may be used where, for reasons of urgency, suppliers cannot be allowed the periods normally required under restricted procedures.

In such cases, contracting authorities are required to indicate in the contract notice published in the Official Journal the grounds for using the accelerated form of the procedure.

As this is an exception which is likely to restrict competition, it should be construed strictly, i.e. reserved for cases where the contracting authority can prove the objective need for urgency and the genuine impossibility of allowing the normal periods prescribed for this procedure.

The use of an accelerated procedure must be limited, therefore, to the types and quantities of products which it can be shown are urgently required. Other products must be supplied under a normal procedure.

It should be emphasized that the use of two procedures and hence the splitting of a supplies contract into two parts may not in any circumstances justify non–compliance with the Directive where such splitting would mean reducing the estimated value of one or both contracts below the threshold for applying the Directive: in such cases, too, the value of the contracts must be estimated in accordance with the rules described in point 2.2.

3.3 Negotiated procedures

A negotiated procedure is one where the contracting authority consults the suppliers of its choice and negotiates with them the terms of the contract, e.g. the technical, administrative or financial conditions.

In a negotiated procedure, the Directive enables the contracting authority to act flexibly not only at the time it awards the contract but also during the prior discussions. The procedure is not, however, to be equated with private contracting. It requires the contracting authority to play an active role in determining the terms of the contract, with special reference to prices, delivery deadlines, quantities, technical characteristics and guarantees.

Nor does the procedure relieve the contracting authority of the obligation to comply with certain rules of good administrative practice. In other words, it has to:

〈 compare effectively tenders and the advantages they offer; and

〈 apply the principle of equal treatment between competitors.

Reliance on this flexible procedure is justified by the exceptional circumstances in which the contract has to be awarded and so is allowed only in the cases listed exhaustively in the Directive.

Since these constitute derogations from the rules of the Directive, which are designed to ensure that firms competing for public supply contracts can effectively rely on the rights conferred on them by the Treaty, they must be interpreted strictly[25] and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies with the contracting authority seeking to rely on those circumstances[26].

According to circumstances, the Directive allows the negotiated procedure to be used with or without prior publication of a contract notice in the Official Journal.

3.3.1 Negotiated procedures with prior publication of a contract notice

In this procedure, the contracting authority has to select the candidates it invites to take part in the negotiated procedure from among those presenting the qualifications specified in the notice. Such qualifications can be only those provided for in Articles 20 to 24 of the Directive, i.e. they must relate exclusively to the supplier's personal standing and financial, economic and technical capacity.

An accelerated form of negotiated procedure with prior publication of a notice may be used where, for reasons of urgency, suppliers cannot be allowed the periods normally required under negotiated procedures. The considerations set out above in connection with accelerated restricted procedures apply here, and contracting authorities also have to indicate in the notice the grounds for using the accelerated form of the procedure.

Public supply contracts may be awarded by negotiated procedure with prior publication of a contract notice where an open or restricted procedure has elicited only irregular tenders[27] or tenders which are unacceptable[28] under national provisions compatible with Title IV of the Directive (Common rules on participation; Criteria for qualitative selection; and Criteria for the award of contracts), in so far as the original terms of the contract, as specified in the tender notice and contract documents, are not substantially altered.

Otherwise, the open or restricted procedure has to be started again from the beginning in full compliance with the provisions of the Directive applicable to each of the procedures. For instance, changes in the financing conditions, the deadlines for delivery or the technical specifications identifying the products to be supplied are to be regarded as substantial alterations to the original terms of the contract.

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[25] Paragraph 36 of the Court's judgment of 17 November 1993 in Case C-71/92 *Commission v Spain* [1993] ECR I-5978.

[26] Paragraph 14 of the Court's judgment of 10 March 1987 in Case 199/85 *Commission v Italy* [1987] ECR 1039.

[27] For example, tenders which do not comply with the tender requirements, in which prices are sheltered from normal competitive forces or which comprise unconscionable clauses.

[28] For example, tenders received late, submitted by tenderers who do not have the requisite

Furthermore, a contracting authority may legitimately resort to the negotiated procedure only where it has issued a prior official statement that the tenders received during the preceding open or restricted procedure were irregular or unacceptable, and has declared that procedure closed.

Prior publication of a contract notice is not required where contracting authorities include in the negotiated procedure all suppliers who satisfy the qualitative selection criteria referred to in Articles 20 to 24 of the Directive and who submitted during the earlier open or restricted procedure tenders complying with the formal requirements of the tendering procedure.

3.3.2 Negotiated procedures without prior publication of a contract notice

The negotiated procedure without prior publication of a contract notice may be used in the following exceptional cases:

(1) where no tenders or appropriate tenders are received in response to an open or restricted procedure, in so far as the terms of the contract established for that procedure are not substantially altered during the negotiated procedure and provided that the contracting authority submits a report to the Commission setting out all the information required to prove that these circumstances are met;

"Inappropriate tenders" means not only unacceptable or irregular tenders, but also tenders which are completely irrelevant to the contract and are therefore incapable of meeting the contracting authority's needs as specified in the contract documents. Such tenders are consequently regarded as not having been submitted;

(2) where the articles involved are manufactured purely for the purposes of research, experiment, study or development. This provision does not extend to quantity production to establish commercial viability or to recover R&D costs; nor does it cover capital goods purchased for research or experimental laboratories;

(3) where, for technical or artistic reasons or for reasons connected with protection of exclusive rights, the goods supplied can be manufactured or delivered only by a particular supplier.

This rule therefore lays down two conditions, both of which must be proven to be satisfied: the goods must have special technical or artistic features or must be protected by exclusive rights, and there must be only one potential supplier.

In a case[29] concerning the supply of pharmaceutical products and specialities in which the defendant tried to use the existence of exclusive rights as a justification for derogating from the Directive, the Court stressed that it was not sufficient for the products in question to be protected by exclusive rights; they also had to be capable

[29] Paragraph 17 of the Court's judgment of 3 May 1994 in Case C-328/92 *Commission v. Spain*

of being manufactured or delivered only by a particular supplier, a requirement that was satisfied only with respect to those products and specialities for which there was no competition on the market;

(4) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events that could not be foreseen by the contracting authority, suppliers cannot be allowed the periods laid down for open or restricted procedures, or for a negotiated procedure with prior publication of a notice, including accelerated procedures – whether restricted or negotiated. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

N.B.

The concept of unforeseeable events is taken to mean occurrences that overwhelmingly transcend the normal bounds of economic and social life (for example, an earthquake or flooding in the wake of which essential supplies are needed as a matter of the utmost urgency in order to provide relief and shelter for the victims). It should also be stressed that reliance on this exceptional procedure is allowed in the Directive only for obtaining the types and quantities of products that are genuinely necessary to cope with the emergency immediately, in other words, given the minimum time–limits to be allowed under the accelerated procedures, for a period of around one month. For the products needed subsequently, the contracting authority has time to put contracts up for Community-wide competition in accordance with the requirements of the Directive.

In the health-care sector, the Court has accepted that, given doctors' freedom to prescribe pharmaceutical products, an urgent need for a particular pharmaceutical speciality may well arise in a hospital pharmacy; it has, however, stressed that this cannot justify *a priori* systematic recourse to private contracting for all supplies of pharmaceutical products and specialities to hospitals;

(5) for additional deliveries by the original supplier, where:

- they are intended
  - · either as a partial replacement of normal supplies or installations
  - · or as the extension of existing supplies or installations; and
- a change of supplier obliges the contracting authority to acquire material having different technical characteristics which would result in
  - · either incompatibility with the supplies or installations covered by the original contract
  - · or disproportionate technical difficulties in operation and maintenance.

The length of such contracts and of recurrent contracts may, as a general rule, not exceed three years.

3.4 Information concerning the contracting authority's decision

3.4.1 Rejection of applications and tenders

Any eliminated candidate has the right to ask the contracting authority for the reasons for his rejection, and any tenderer whose bid has been rejected has the right to ask for the reasons and for the name of the successful tenderer.

The contracting authority must provide the information requested within fifteen days of receiving the request.

3.4.2 Cancellation of an award procedure

Contracting authorities may decide not to award a contract in respect of which a prior call for competition has been made or to recommence the procedure.

In such cases, they must inform the Office for Official Publications of the European Communities ("Publications Office") of their decision.

They must also inform candidates or tenderers who so request of the grounds for their decision.

3.4.3 Contract report

For each contract awarded, contracting authorities are obliged to draw up a report, which must contain at least the following information:

- the name and address of the contracting authority, the subject and value of the contract;
- the names of the candidates or tenderers selected, with reasons;
- the names of the candidates or tenderers rejected, with reasons;
- the name of the successful tenderer and the reasons why his tender was chosen and, if known, any share of the contract which the tenderer intends to subcontract to third parties;
- for negotiated procedures, the circumstances justifying the use of the procedure. The circumstances may, of course, be only those provided for in the Directive.

This report, or the main features of it, must be communicated to the Commission at its request.

4. COMMON ADVERTISING RULES

4.1 Contract notices

Transparency at all stages of award procedures is a key factor in fostering competition between economic operators and genuinely opening up public procurement in the European Union.

With a view to achieving greater transparency, the new Directive has increased the number of notices that contracting authorities must, under certain conditions, submit for publication in the Official Journal and input into the TED (Tenders Electronic Daily) database concerning the contracts they award under open, restricted or negotiated procedures.

4.1.1. Indicative notice

The purpose of this notice is to make contracting authorities' procurement programmes known to potentially interested suppliers.

Contracting authorities must, as soon as possible after the beginning of their budgetary year, make known by means of an indicative notice the total procurement by product area which they intend to award during the subsequent 12 months.

This form of advertising is mandatory where the total amount by product area, estimated in accordance with the abovementioned rules laid down by the Directive, equals or exceeds ECU 750 000.

Product areas must be established by reference to the headings in the CPA nomenclature (Classification of Products According to Activities).[30]

The aim is to draw procurement programmes to the attention of potential suppliers as soon as they are established[31] and to enable firms – even those located furthest away from the contracting authority – to compete for contracts on an equal footing wherever possible.

4.1.2 Contract notice

The obligation to publish a contract notice when the award procedure is about to be launched is a key aspect of the drive to build a single market in public procurement. Publication of the notice enables economic operators in all Member States to be informed of contracts put up for tender throughout the Union and provides them with the information they need in order to assess the contracts which interest them.

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30 OJ No L 342, 31.12.1993, p. 1.

This obligation must be complied with both where an open or restricted procedure is used and, in accordance with the conditions and limits already explained, in the case of a negotiated procedure.

4.1.3 Contract award notice

Contracting authorities which have awarded a contract must, irrespective of the procedure used (open or restricted procedure or negotiated procedure with or without prior publication of a contract notice), publish a notice setting out the most important points concerning the conditions in which the contract has been awarded. Contract award notices are intended not only to ensure greater transparency in award procedures but also to generate more interest among suppliers in the Community and encourage more of them to take part in award procedures.

4.2 Content and presentation of notices

Contracting authorities are required to draw up notices in accordance with the models given in Annex IV to the Directive, giving the information specified in the relevant model.

Where the items are mandatory, the information required must be given. Where they are optional and not relevant to the contract in question, the contracting authority should indicate the fact, by entering "not applicable" or words to that effect.

Certain items of the contract notice call for some explanation.

In the section relating to the minimum economic and technical standards required of the supplier, the information and formalities specified must comply with Articles 22 and 23 of the Directive.

In the section concerning the criteria to be used for awarding the contract, the contracting authority must enter either:

- "the lowest price", or
- "the most economically advantageous tender", or
- where it is using the restricted procedure and specifies the award criteria in the invitation to tender, "award criteria specified in the invitation to tender", or words to that effect.

Where the contracting authority indicates that it will award the contract to "the most economically advantageous tender", it must specify the factors that will be taken into consideration either in the same section of the notice or in the contract documents. In the latter case, it must add in that section of the notice the words "award criteria stated in the contract documents".

The contract notice relating to an open or standing contract must, as far as possible, clearly state the nature and proposed quantities of the supplies.

In the case of contract award notices, the Directive allows certain derogations. Publication of the notice remains mandatory, of course, but contracting authorities may, in certain cases, withhold information whose release would impede law enforcement or be otherwise contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, whether public or private, or might prejudice fair competition between suppliers.

While conveying clear and comprehensive information, notices must be concise: the Directive stipulates that they must not run to more than one page of the Official Journal, or approximately 650 words.

4.3 Model notices

The model notices specified in the Directive are given below.

4.3.1 Indicative notice

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority and, if different, of the service from which additional information may be obtained.

2. Nature and quantity or value of the products to be supplied. CPA reference number.

3. Estimated date for initiating the award procedures in respect of the contract or contracts (if known).

4. Other information.

5. Date of dispatch of the notice.

6. Date of receipt of the notice by the Publications Office.

4.3.2 Contract notice

Open procedures

1. Name, address, telegraphic address and telephone, telex and fax numbers of the contracting authority.

2. (a) Award procedure chosen;
(b) Form of the contract for which tenders are being requested.

3. (a) Place of delivery;
(b) Nature and quantity of the goods to be supplied. CPA reference number;
(c) Indication of whether the supplier can tender for part of the goods required.

4. Time–limit for delivery, if any.

5. (a) Name and address of the service from which the contract documents and additional documents may be requested;
(b) Final date for making such requests;
(c) Where applicable, the amount and terms of payment of the sum to be paid to obtain such documents.

6. (a) Final date for receipt of tenders;
(b) Address to which they must be sent;
(c) Language or languages in which they must be drawn up.

7. (a) Persons authorized to be present at the opening of tenders;
(b) Date, time and place of such opening.

8. Where applicable, any deposits and guarantees required.

9. Main terms concerning financing and payment and/or references to the provisions in which these are contained.

10. Where applicable, the legal form to be taken by the grouping of suppliers to whom the contract is awarded.

11. Information concerning the supplier's own position, and information and formalities necessary for an appraisal of the minimum economic and technical standards required of the supplier.

12. Period during which the tenderer is bound to keep open his tender.

13. Criteria for the award of the contract. Criteria other than that of the lowest price must be mentioned if they do not appear in the contract documents.

14. Where applicable, prohibition on variants.

15. Other information.

16. Date of publication of the indicative notice in the Official Journal or reference to its non-publication.

17. Date of dispatch of the notice.

18. Date of receipt of the notice by the Publications Office.

Restricted procedures

1. Name, address, telegraphic address and telephone, telex and fax numbers of the contracting authority.

2. (a) Award procedure chosen;
(b) Where applicable, justification for use of the accelerated procedure;
(c) Form of the contract for which tenders are being requested.

3. (a) Place of delivery;
(b) Nature and quantity of the goods to be supplied. CPA reference number;
(c) Indication of whether the supplier can tender for part of the goods required.

4. Time–limit for delivery, if any.

5. Where applicable, the legal form to be taken by the grouping of suppliers to whom the contract is awarded.

6. (a) Final date for receipt of requests to participate;
(b) Address to which they must be sent;
(c) Language or languages in which they must be drawn up.

7. Final date for dispatch of invitations to tender.

8. Where applicable, any deposits and guarantees required.

9. Information concerning the supplier's personal position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.

10. Criteria for the award of the contract where they are not mentioned in the invitation to tender.

11. Envisaged number or range of suppliers who will be invited to tender.

12. Where applicable, prohibition on variants.

13. Other information.

14. Date of publication of the indicative notice in the Official Journal or reference to its non-publication.

15. Date of dispatch of the notice.

16. Date of receipt of the notice by the Publications Office.

Negotiated procedures

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority.

2. (a) Award procedure chosen;

(b) Where applicable, justification for use of the accelerated procedure;

(c) Where applicable, form of the contract for which tenders are invited.

3. (a) Place of delivery;

(b) Nature and quantity of the goods to be supplied. CPA reference number;

(c) Indication of whether the supplier can tender for part of the goods required.

4. Time–limit for delivery, if any.

5. Where applicable, the legal form to be taken by the grouping of suppliers to whom the contract is awarded.

6. (a) Final date for receipt of requests to participate;

(b) Address to which they must be sent;

(c) Language or languages in which they must be drawn up.

7. Where applicable, any deposits and guarantees required.

8. Information concerning the supplier's personal position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.

9. Envisaged number or range of suppliers who will be invited to tender.

10. Where applicable, prohibition on variants.

11. Where applicable, names and addresses of suppliers already selected by the awarding authority.

12. Where applicable, date(s) of previous publications in the Official Journal.

13. Other information.

14. Date of dispatch of the notice.

15. Date of receipt of the notice by the Publications Office.

4.3.3 Contract award notice

1. Name and address of awarding authority.

2. Award procedure chosen. In the case of the negotiated procedure, without prior publication of a contract notice, justification (Article 6(3)).

3. Date of award of contract.

4. Criteria for award of contract.

5. Number of tenders received.

6. Name(s) and address(es) of supplier(s).

7. Nature and quantity of goods supplied, where applicable, by supplier. CPA reference number.

8. Price or range of prices (minimum/maximum) paid.

9. Where appropriate, value and proportion of contract likely to be subcontracted to third parties.

10. Other information.

11. Date of publication of the contract notice in the Official Journal.

12. Date of dispatch of the notice.

13. Date of receipt of the notice by the Publications Office.

4.4 Method of setting time-limits

The time–limits specified in contract notices must be such that their expiry can be determined by suppliers in all Member States on an equal footing.

Contracting authorities are therefore not allowed to set such time-limits in a way that would place much greater difficulties in the way of suppliers from other Member States, by referring to the date of publication of the notice in a national or regional official gazette, for example.

4.5 National advertising

In order to ensure that equivalent information is disseminated at both national and Community level, the Directive provides that any notices published in the official gazettes or in the press of the country of the contracting authority must not contain information other than that published in the Official Journal of the European Communities. In addition, notices may not be published at national level before they are dispatched for publication at Community level and must mention the date of such dispatch.

4.6 Who is responsible for publishing notices?

Notices are published by the Publications Office.

In general terms, contracting authorities have to transmit their notices as quickly as possible and through the most appropriate channels. This means that they should, wherever possible, use the modern methods of communication provided for by the Directive so that notices are published early enough to serve their purpose.

In particular, the Directive requires them:

- to send the indicative notice as soon as possible after the beginning of each budgetary year;
- in the case of accelerated restricted or negotiated procedures, to send notices by telex, telegram or fax;
- to send the contract award notice not later than 48 days after the award of the contract in question;
- to be able to supply proof of the date of dispatch of notices to the Publications Office.

The address for correspondence is:

Supplement to the Official Journal of the European Communities

Office for Official Publications of the European Communities
2, rue Mercier
L–2985 Luxembourg
Telephone: (352) 499 28 23 32
Telex: 1324 pubof LU
2731 pubof LU
Fax: (352) 49 00 03
(352) 49 57 19

Within twelve days (or five days in the case of the accelerated form of restricted or negotiated procedures), the Publications Office publishes the notices in the Supplement to the Official Journal[32] and via the TED (Tenders Electronic Daily) database[33]. Notices are published in full in their original language only and in summary form in the other Community languages.

The Publications Office takes responsibility for the necessary translations and summaries.

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[32] The Supplement to the Official Journal may be obtained in all Member States and in other countries from the addresses listed in Annex IV.

[33] For any information concerning this database and the arrangements for accessing it, please contact the Office for Official Publications of the European Communities, 2, rue Mercier, L–2985 Luxembourg

The costs of publishing notices in the Supplement to the Official Journal are borne by the Community.

4.7 Time–limits

In order to give all potential suppliers throughout the Community a chance to tender for a contract or seek an invitation to take part in an award procedure before the closing date, the Directive lays down minimum periods to be allowed at the different stages of the procedures: contracting authorities may not set shorter deadlines than those specified in the Directive, but they are, of course, free to allow longer periods, and they must do so in certain cases. The Directive also lays down maximum periods within which contracting authorities have to dispatch contract documents and provide additional information.

4.7.1 Open procedures

(a) Time–limit set by the contracting authority for the receipt of tenders: not less than 52 days from the date of dispatch of the notice for publication in the Official Journal.

This time–limit must be appropriately extended:

- where the contract documents, supporting documents or additional information are too bulky to be supplied within the time–limit laid down by the Directive; or
- where tenders can be made only after a visit to the site or after on–the–spot inspection of the documents supporting the contract documents.

(b) Time–limit for dispatch of the contract documents and supporting documents by the contracting authority: within six days of receipt of the request, provided that such information has been requested in good time.

(c) Time–limit for additional information relating to the contract documents to be supplied by the contracting authority: not later than six days prior to the closing date for the receipt of tenders, provided that such information has been requested in good time.

4.7.2 Restricted procedures

(a) Time–limit set by the contracting authority for the receipt of requests to participate: not less than 37 days (or 15 days, in the case of accelerated restricted procedures) from the date of dispatch of the notice for publication in the Official Journal.

(b) Time–limit for additional information relating to the contract documents to be supplied by the contracting authority: not later than six days (or four days in the case of accelerated restricted procedures) prior to the closing date for the receipt of tenders, provided that such information has been requested in good time.

(c) Time–limit set by the contracting authority for the receipt of tenders: not less than 40 days (or 10 days in the case of accelerated restricted procedures) from the date of dispatch of the written invitation.

This time–limit must be appropriately extended where tenders can be made only after a visit to the site or after on–the–spot inspection of the documents supporting the contract documents.

4.7.3 Negotiated procedures with prior publication of a contract notice

Time–limit set by the contracting authority for the receipt of requests to participate: not less than 37 days (or 15 days in the case of accelerated negotiated procedures) from the date of dispatch of the notice for publication in the Official Journal.

4.7.4 Summary tables

OPEN PROCEDURES

The **contract documents** and **supporting documents** must be supplied within **six days** of the request

Any **additional information** concerning the contract documents must be communicated not later than **six days** prior to the time-limit for the receipt of tenders

Time-limit for the **receipt of tenders**, from the date when the notice is sent for publication in the Official Journal:

Not less than **52 days**

RESTRICTED PROCEDURES AND NEGOTIATED PROCEDURES WITH PRIOR PUBLICATION OF A CONTRACT NOTICE

Time-limit for the **receipt of applications to take part**, from the date when the notice is sent for publication in the OJ:

Not less than **37 days**

Not less than **15 days (accelerated procedures)**

The **invitation to submit a tender** must be sent **simultaneously** to all successful candidates, along with the **contract documents** and **supporting documents**

Any **additional information** concerning the contract documents must be communicated not later than **six days** (**four** days in the case of accelerated procedures) prior to the time-limit for the receipt of tenders

RESTRICTED PROCEDURES ONLY

Time-limit for the **receipt of tenders**, from the date of dispatch of the written invitation to tender:

Not less than **40 days**

Not less than **10 days** (accelerated procedures)

4.8 Method of calculating certain time–limits

All the time-limits laid down in the Directive must be calculated in accordance with Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time–limits.

Under these rules, periods expressed as a certain number of days from a particular event:

(a) run from the day following the day on which the event takes place;

(b) begin at 00h00 on the first day, as defined in (a), and end at 24h00 on the last day of the period;

(c) end, if the last day of the period falls on a public holiday or a Saturday or Sunday, and the period is not expressed in hours, at 24h00 on the following working day.

Periods expressed in hours, which are common for certain acts to be performed by suppliers, end at the time and date stated.

Periods include public holidays and weekends unless these are expressly excluded or the periods are expressed as a certain number of working days. Public holidays are all days designated as such in the Member State in which the relevant act has to be performed.

For further details, the reader is referred to the text of the Regulation. [34]

4.9 Submission of requests to participate

In restricted procedures and negotiated procedures with prior publication of a contract notice, requests to participate may be made by letter or by telegram, telex, fax or telephone. If they are made by one of the last four methods, they must be confirmed by letter dispatched before the closing date for the receipt of such requests.

Where the accelerated form of those procedures is used, requests to participate must be made, in accordance with the Directive, by the most rapid means of communication possible. If they are made by telegram, telex, fax or telephone, they must be confirmed by letter dispatched before the closing date for the receipt of requests to participate.

4.10 Rules governing the dispatch and content of invitations to tender

Invitations to tender must be made in writing and sent simultaneously to all selected candidates.

The letter of invitation should normally be accompanied by the contract documents and supporting documents and include at least the following information:

(a) where it is not accompanied by the contract documents and supporting documents, which the contracting authority does not have since they are the responsibility of another department, the address of the department from which they may be requested, the deadline for submitting such a request and the amount and terms of payment of any charge for obtaining such documents;

(b) the closing date for the receipt of tenders, the address to which they must be sent and the language(s) in which they must be drawn up;

(c) a reference to the published contract notice;

(d) an indication of any documents to be attached, either to support verifiable statements made, or to supplement the information provided by the candidate to show that he meets the selection criteria;

(e) the criteria for the award of the contract, if not stated in the contract notice.

Where the accelerated form of restricted or negotiated procedures is used, the Directive requires contracting authorities to send out invitations to tender by the most rapid means of communication possible.

5. COMMON RULES IN THE TECHNICAL FIELD

The contracting authorities have to indicate, in the general or contractual documents relating to each contract, the technical specifications with which the goods must comply.

For the purposes of the Directive:

> (1) **"Technical specifications"** means the totality of the technical requirements contained in particular in the contract documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical requirements shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling;
>
> (2) **"Standard"** means a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory;
>
> (3) **"European standard"** means a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as 'European standards (EN)' or 'Harmonization documents (HD)' according to the common rules of these organizations;
>
> (4) **"European technical approval"** means a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. The European approval shall be issued by an approval body designated for this purpose by the Member State;
>
> (5) **"Common technical specification"** means a technical specification laid down in accordance with a procedure recognized by the Member States to ensure uniform application in all Member States which has been published in the Official Journal.

5.1 What technical specifications should be referred to?

The common rules in the technical field have been brought into line with the Community's new policy on standardization and certification and determine how much discretion contracting authorities have when defining contract specifications.

The Directive provides that "without prejudice to the legally binding national technical rules, in so far as these are compatible with Community law, the technical specifications

implementing European standards, or by reference to European technical approvals or by reference to common technical specifications".

In practical terms, this provision should be interpreted as requiring contracting authorities to define the technical specifications for the products to be supplied - except in exceptional cases - by reference to national standards transposing European standards or to European technical approvals or to common technical specifications wherever they exist.

In this provision, the Community legislature's purpose has been to use Community standards to remove the technical discrimination to which abusive reliance on national standards in contract documents has given rise.

5.2 Exceptions

A contracting authority may depart from this general rule if:

- the standards, European technical approvals or common technical specifications do not include any provision for establishing conformity, or technical means do not exist for establishing satisfactorily the conformity of a product to these standards, European technical approvals or common technical specifications;

- application of the general rule prejudices the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment[35] or Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications[36] or other Community instruments in specific service or product areas;

- use of these standards, European technical approvals or common technical specifications would oblige the contracting authority to acquire supplies incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to the changeover, within a given period, to European standards, European technical approvals or common technical specifications.

  This exception also applies in cases where a European standard is technically inappropriate through being technically obsolete or intended for application in a different context. In such situations, the contracting authority could clearly not be required to have a strategy for the changeover to European standards. It would, however, be desirable for the contracting authority to take the necessary steps with a view to securing the updating of the European standard;

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[35] OJ No L 217, 5.8.1986, p. 21. Directive amended by Directive 91/263/EEC (OJ No L 128, 23.5.1991, p. 1).

〈 the project concerned is of a genuinely innovative nature for which the use of existing European standards, European technical approvals or common technical specifications would not be appropriate.

Contracting authorities relying on these possibilities for departing from the general rule must, wherever possible, state the reasons for doing so in the contract notice published in the Official Journal or in the contract documents. They are required, at all events, systematically to record the reasons in their internal documentation and to communicate them on request to Member States and to the Commission.

5.3 Cases where no European standards, European technical approvals or common technical specifications exist

In the absence of European standards, European technical approvals or common technical specifications, the technical specifications for contracts:

(a) are to be defined by reference to the national technical specifications recognized as complying with the essential requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives, and in particular in accordance with the procedures laid down in Council Directive 89/106/EEC of 21 December 1988 on construction products;[37]

(b) may be defined by reference to national technical specifications relating to the design and method of calculation and execution of works and use of materials;

(c) may be defined by reference to other documents. In such cases, reference should be made, in order of preference, to:

(i) national standards implementing international standards accepted by the country of the contracting authority;

(ii) other national standards and national technical approvals of the country of the contracting authority;

(iii) any other standard.

5.4 Prohibition of discriminatory specifications

There is a general ban on technical specifications which mention goods of a specific make or source or of a particular process and which have the effect of favouring or eliminating certain enterprises or products. Among the specifications that can have such a discriminatory effect, and are therefore prohibited, the Directive mentions in particular the indication of trade marks, patents, types or a specific origin or production.

An exception to this general ban is only allowed where the subject–matter of the contract cannot otherwise be described by specifications which are sufficiently precise and intelligible to all concerned. Reliance on this derogation should not, however, have discriminatory effects; to that end, the Directive requires that such indications be accompanied by the words "or equivalent". Contracting authorities relying on this or other derogations must always be able to provide evidence that they are necessary.

The judgment delivered by the Court of Justice in a case involving a public contract for the supply and maintenance of a meteorological station[38] is relevant here: the contract documents defined a technical specification by reference to a specific computer system, without mentioning that it was open to the supplier to use an equivalent system.

As the Court stressed, the fact that the indication of a specific computer system was not followed by the words "or equivalent" could not only deter economic operators using similar systems from taking part in the tendering procedure, but also "impede the flow of imports in intra-Community trade, contrary to Article 30 of the Treaty, by reserving the contract exclusively to suppliers intending to use the system specifically indicated".

The Court therefore held that failure to add the words "or equivalent" after reference to a product of a specific make ran contrary not only to the provisions of the Directive but also to the bans on discrimination laid down in the Treaty.

5.4.1 Principle of equivalence and mutual recognition and the new approach to technical harmonization and standardization

At all events, the above provisions could not be interpreted and applied in such a way as to limit the obligations arising already from Article 30 of the Treaty, whose liberalization effect the Directive is designed to complement in the field of public procurement.

Where Community harmonization has determined the essential requirements which products must meet, contracting authorities must presume that products manufactured in accordance with the standards drawn up by the competent standards bodies conform to the essential requirements laid down in the directive concerned. They may not refuse products simply because they were not manufactured in accordance with such standards, if evidence is supplied that those products conform to the essential requirements established by Community legislative harmonization.

If there are no common technical rules or standards, a contracting authority cannot reject products from other Member States on the sole grounds that they comply with different

technical rules or standards, without first checking whether they meet the requirements of the contract.[39]

In accordance with the mutual recognition principle, it must consider on equal terms products from other Member States manufactured in accordance with technical rules or standards which afford the same degree of performance and protection of the legitimate interests concerned as products manufactured in conformity with the technical specifications stipulated in the contract documents.

Such evidence may be supplied, in particular, by complying with the conformity assessment procedures as listed in Council Decision 90/683/EEC of 13 December 1990 concerning the modules for the various phases of the conformity assessment procedures which are intended to be used in the technical harmonization directives.[40] In the absence of common technical coordinates, these conformity assessment procedures, based primarily on quality instruments (tests, certification of products, quality assurance, etc.), are such as to ensure that the products to be supplied can match the performance required by the contracting authorities.

In addition, to ensure that these quality assessment procedures are applied consistently and in a harmonized fashion, it is recommended that the services of competent bodies operating on the basis of similar criteria be enlisted. Compliance with the standards in the EN 45000 and EN 29000 series by such bodies constitutes a presumption of competence, which may, for example, be validated by accreditation.

The European Organization for Testing and Certification (EOTC), whose task it is to provide a European structure for such bodies, may also be able to help contracting authorities in their choice.

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39 Judgment of 22 September 1988 in Case 45/87 *Commission v Ireland* [1988] ECR 4929.

6. PARTICIPATION IN PROCEDURES AND AWARD OF CONTRACTS

For there to be effective Community–wide competition and, hence, genuine liberalization of intra–Community trade in the field of public supply contracts, steps had to be taken to prevent prospective suppliers being selected and their tenders assessed according to criteria selected arbitrarily by the contracting authorities.

Title IV of the Directive therefore lays down common rules on participation which contain provisions on procedures for granting permission to bid and set the criteria for selecting potential suppliers and those for awarding contracts.

6.1 Common rules on participation

6.1.1 When and how is the suitability of suppliers checked and the contract awarded?

The Directive provides that contracts are to be awarded on the basis of the criteria laid down in Title IV, Chapter 3 ("Criteria for the award of contracts") after the suitability of suppliers not excluded under Article 20 (supplier's good repute) has been checked. It stipulates that contracting authorities must base such checks on the criteria of economic, financial and technical capacity referred to in Articles 22 to 24.

The suitability of suppliers must therefore be checked not only in open, but also in restricted and negotiated procedures.

However, a favourable verdict does not have the same consequences in the three procedures.

In open procedures, compliance with the predetermined selection criteria gives the tenderers concerned an automatic right to participate in the award procedure. The contracting authority will, therefore, be obliged to examine all bids from such tenderers.

In restricted and negotiated procedures, however, candidates who satisfy the predetermined selection criteria may be excluded from the procedure, since contracting authorities, subject to certain conditions specified in point 6.1.2 below, may limit the number of candidates they invite to tender or negotiate and, therefore, may effect a choice.

In the system set up by the Directive, examination of the suitability of suppliers and award of the contract are two different steps in the procurement procedure. In its interpretation of similar provisions in Directive 71/305/EEC on public works contracts, the Court,[41] without finding a rigid chronological division between the two stages, nevertheless stressed the clear distinction drawn in the Directive between the criteria for checking the suitability of a tenderer and those for awarding the contract. In its judgment,

the Court stated that "even though the Directive (...) does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules".

Consequently, when examining tenders, contracting authorities may not, for example, allow themselves to be influenced by the tenderer's financial capacity or give a tenderer who has not satisfied the pre–established selection criteria a second chance because they deem his tender advantageous.

Contracting authorities are under the further obligation to respect fully the confidential nature of any information furnished by candidates or tenderers.

6.1.2 Selection and number of candidates invited to submit a tender or to negotiate

Suppliers invited to submit a tender may be selected only from among those who have requested to participate in the procedure and display the qualifications required for that procedure; those qualifications may be based only on the criteria for qualitative selection provided for in Articles 20 to 24 of the Directive.

In accordance with Article 19, "in restricted and negotiated procedures the contracting authorities shall, on the basis of information given relating to the supplier's personal position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Articles 20 to 24 those whom they will invite to submit a tender or to negotiate".

N.B.

Contracting authorities are not obliged to invite all candidates to bid who meet the requirements of the contract.

Those who are invited, however, must all satisfy such conditions and may be chosen by the contracting authority only on the basis of these qualitative selection criteria, which must be transparent and objective and laid down in advance.

Contracting authorities may, therefore, limit the numbers of those invited to tender or negotiate only by taking into consideration the candidates with the best qualifications in accordance with the selection criteria specified in the contract notice.

In order to be able to invite fewer candidates than those who meet the requirements of the contract, contracting authorities must have previously stated in the contract notice the proposed number, or range, of suppliers who will be invited to tender or negotiate.

Where this has not been stated, they may not eliminate any of the candidates who have submitted correct applications and possess the requisite qualifications.

In *restricted procedures*, the range encompassing the number of candidates who will be invited to tender must be determined with reference to the nature of the supplies to be provided. The Directive lays down that the range must number at least five suppliers.

Where a contracting authority wants to limit the decisions it will have to take and stipulate a single figure instead of a range, there is all the more reason why that figure, which may not be increased, must not be less than five.

N.B.

The Directive also provides that, in any event, the number of candidates invited to tender must be sufficient to ensure genuine competition.

Having determined a minimum number in advance in accordance with the Directive, a contracting authority could find itself unable to stick to that number because it had received too few applications from sufficiently qualified suppliers. In that eventuality, it can be considered that there is genuine competition where at least three candidates are invited to tender, assuming that sufficient applications to take part were received from eligible suppliers.

In *negotiated procedures* with prior publication of a contract notice, the Directive lays down that the minimum number of candidates invited to negotiate may not be less than three, on condition, of course, that there are sufficient suitable candidates.

6.1.3 Inviting nationals from other Member States

In any event, where candidates are invited to tender under a restricted or negotiated procedure, the Directive requires contracting authorities - and makes it the duty of Member States to see that this obligation is fulfilled - to issue invitations, without discrimination, to suppliers in other Member States who satisfy the necessary requirements, and to do so under the same conditions as apply to domestic suppliers.

In this respect, it can be presumed as a general rule that there is no discrimination on grounds of nationality when suppliers are selected if, in its selection, the contracting authority maintains the same proportion between domestic candidates and those from other Member States as that observed among candidates with the requisite qualifications. If a check is made, however, such a presumption will be without prejudice to a more detailed assessment of the information taken into account at the selection stage.

6.1.4 Groups of suppliers

Groups of suppliers must be allowed to submit a tender without having to assume a particular legal form. However, a group may be required to assume a particular legal form

if it is awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

6.1.5 Tenders proposing variants on the specifications

Contracting authorities are obliged to state the technical specifications of the products sought. It is very important, however, both for economic agents and for users, that it should be possible to tender goods which, albeit not corresponding to those stipulated by the contracting authority, do meet the latter's requirements.

This possibility helps to stimulate the search for new technologies and enables users as a whole to benefit from a wider range of products and from technical progress.

The Directive provides, therefore, that variants may be proposed in tenders. However, this possibility is subject to certain conditions.

First of all, it is possible to propose variants where a contract is awarded to the most economically advantageous tender and not on the basis of the lowest price. A variant can be fairly assessed and compared with tenders meeting different requirements only by examining the tenders from several viewpoints, which means that several assessment criteria must be used.

The Directive leaves it to the discretion of contracting authorities to decide whether they wish to authorize or prohibit variants and to establish what type of variants they are prepared to consider and the conditions for the submission of such variants – they may, for instance, require that a basic tender be submitted along with the variant.

However, if they decide to prohibit variants, contracting authorities must say so in the contract notice.

Where variants are allowed, the contracting authority is not bound to say so in the contract notice, but must mention in the contract documents the minimum conditions which variants must comply with and the procedures for their submission.

Thereafter, it may take into consideration only those variants that meet the minimum requirements set out in the contract documents.

Furthermore, contracting authorities may not reject a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals, to common technical

specifications, or by reference to national technical specifications recognized as complying with the essential requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives,

or again by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials.

Contracting authorities which have admitted variants may not reject a tender proposing a variant simply because it would lead, if successful, to a services contract. Such a prohibition relates to variants which, in addition to the supply of products, provide for the supply of services whose value exceeds that of the products (see point 1.5).

6.1.6 Subcontracting

Subcontracting in public contracts is not regulated as such by the Directive. However, to ensure transparency of the conditions under which contracts are performed, the Directive provides that, in the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

6.2 Selection of suppliers

In accordance with the case–law of the Court of Justice concerning the Works Directive, which, as far as selection is concerned, is based on principles and criteria similar to those laid down in the Supplies Directive, the suitability of suppliers may be examined only on the basis of the qualitative criteria established in the Directive.[42] These relate to the good repute and professional qualifications of the supplier, i.e. trade registration, economic and financial standing, and technical capacity.

N.B.

The aim of the relevant provisions of the Directive is not, however, to restrict the national authorities' powers to set the level of those capacities for the purposes of participation in different contracts, but to determine what references or evidence contracting authorities may require to be submitted.[43] *National competence in this field is not unlimited, though, since all the relevant provisions of Community law, and in particular - as we are dealing with supplies here - the prohibitions enshrined in Article 30 of the EC Treaty, must be complied with.*

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[42] Judgment of 10 February 1982 in Case 76/81 *Transporoute v Minister of Public Works* [1982] ECR 417.

[43] Judgment of 9 July 1987 in Joined Cases 27 to 29/86 *CEI v Association intercommunale pour les autoroutes des Ardennes* [1987] ECR 3268; *Case 31/87 Beentjes v Netherlands State* [1988]

6.2.1 Supplier's personal situation

Article 20 of the Directive gives an exhaustive list of the grounds to do with a supplier's personal situation on which contracting authorities may exclude candidates or tenderers from a procedure, without further verification.

Any supplier may be disqualified who:

> (a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors or who is in any analogous situation arising from a similar procedure under national laws and regulations;
>
> (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding–up or administration by the court or for an arrangement with creditors or is the subject of any other similar proceedings under national laws or regulations;
>
> (c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;
>
> (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;
>
> (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;
>
> (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;
>
> (g) is guilty of serious misrepresentation in supplying the information required under the provisions of the Directive on the criteria for qualitative selection.

As regards (d) and (g), it is for the contracting authority to prove that such circumstances exist. Otherwise, it is for the candidate or tenderer, if the contracting authority so requests in the notice, to prove that none of the circumstances mentioned apply.

However, the type of evidence that contracting authorities may require of suppliers is regulated by the same article of the Directive. Where a contracting authority requires such proof, it has to accept as sufficient evidence:

- for (a), (b) or (c), the production of an extract from the "judicial record" or, failing this, of an equivalent document issued by a judicial or administrative authority in the country of origin or in the country from which that person comes showing that none of these cases applies to the supplier;

〈 for (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country concerned does not issue such documents or certificates or where these do not cover all the cases mentioned in (a), (b) or (c), they may be replaced by a declaration on oath or, in Member States where such an oath is not used, by a solemn declaration made by the interested party before the competent judicial or administrative authority, a notary or a competent professional or trade body in the country of origin or in the country from which that party comes.

6.2.2 Enrolment in the professional or trade register

As evidence of general professional capacity, the contracting authority may, pursuant to Article 21, request suppliers to prove that they are enrolled in the professional or trade register or to provide a declaration on oath or a certificate in accordance with the conditions laid down by the laws of the Member State in which they are established. The registers concerned are:

〈 in Belgium, the Registre du commerce/Handelsregister;

〈 in Denmark, the Aktieselskabsregistret, Foreningsregistret and the Handelsregistret;

〈 in Germany, the Handelsregister and the Handwerksrolle;

〈 in Greece, the ¬ÈÔÙÂˆÌÈÍ¸ fi ¬ÈÔÏÁ˜·ÌÈÍ¸ fi ≈Ï OÒÈÍ¸ ≈ ÈÏÂÎÁÙfiÒÈÔ;

〈 in Spain, the Registro Mercantil or, in the case of non–registered individuals, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question;

〈 in France, the Registre du commerce and the Répertoire des métiers;

〈 in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato and the Registro delle Commissioni provinciali per l'artigianato;

〈 in Luxembourg, the Registre aux firmes and the Rôle de la chambre des métiers;

〈 in the Netherlands, the Handelsregister;

〈 in Austria, the Firmenbuch, the Gewerberegister, the Mitgliederverzeichnisse der Landeskammern;

〈 in Portugal, the Registo Nacional das Pessoas Colectivas;

〈 in Finland, the Kaupparekisteri/Handelsregistret;

〈 in Sweden, the aktiebolags-, handels- eller föreningsregistren;

〈 in the United Kingdom and Ireland, the supplier may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies that he is certified as incorporated or registered or, if he is not so certified, a certificate

profession in question in the country in which he is established in a specific place under a given business name and under a specific trading name.

6.2.3 Financial and economic standing

Under Article 22, proof of the supplier's financial and economic standing required for each contract may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from bankers;

(b) the submission of the firm's balance sheets or extracts therefrom, where publication of a balance sheet is required under company law in the country in which the supplier is established;

(c) a statement of the firm's overall turnover and its turnover in respect of the goods to which the contract relates for the previous three financial years.

The list is not exhaustive: according to the contract, the contracting authority may require other references. They must, however, be objectively necessary for establishing that the supplier's economic and financial standing is appropriate to the subject–matter of the contract, and non–discriminatory.

All the references required must be specified in the contract notice (in the case of open procedures) or in the contract notice or invitation to tender (in the case of restricted or negotiated procedures).

If, for any valid reason, the supplier is unable to furnish the references requested, the contracting authority must allow him to establish his economic and financial standing by means of any other document. However, it is for the contracting authority to assess whether such documents are appropriate.

6.2.4 Technical capacity

As regards the supplier's technical capacity, Article 23 contains an exhaustive list of the evidence which contracting authorities may require.

According to the nature, quantity and purpose of the goods to be supplied, evidence of the supplier's technical capacity may be furnished by one or more of the following means:

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

· in the case of public contracting authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;

· in the case of private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected;

(b) a description of the firm's technical facilities, its measures for ensuring quality and its study and research facilities;

(c) indication of the technicians or technical bodies involved, whether or not belonging directly to the supplier's firm, especially those responsible for quality control;

(d) samples, description and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;

(e) certificates drawn up by official quality control institutes or agencies of recognized competence attesting conformity to certain specifications or standards of products clearly identified by references to specifications or standards;

(f) where the goods to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in which the supplier is established, subject to that body's agreement, on the production capacities of the supplier and, if necessary, on his study and research facilities and quality control measures.

In open procedures, the references required as evidence of the supplier's technical capacity must appear in the contract notice; in restricted or negotiated procedures, they must be specified in the contract notice or the invitation to tender.

Article 23 also provides that the extent of the information required by contracting authorities "must be confined to the subject of the contract", in other words, the information specified must be strictly necessary for assessing whether the supplier's technical capacity is appropriate to the desired supply. Contracting authorities must furthermore take into consideration the legitimate interests of suppliers as regards the protection of their firms' technical or commercial secrets.

6.2.5 Additional information

To ensure the transparency of the selection process, additional qualitative requirements may not be specified after publication of the contract notice or transmission of the invitation to tender.

After that stage, the contracting authority may, within the limits of the above–mentioned selection criteria, request suppliers only to supplement or clarify the certificates and documents submitted.

This is an option which is open to contracting authorities and which they may use at their discretion, but not in a discriminatory manner. Nor does it give a supplier who has not furnished proper evidence that he satisfies the requirements for a particular contract the right to be invited to rectify his omissions.

6.2.6 Official lists of approved suppliers

Some Member States compile official lists of approved suppliers. This may in practice result in discrimination against foreign suppliers, who have more difficulty in learning of the existence of such lists and of the procedures for getting their names on them.

Accordingly, the Community legislature has introduced in Directive 93/36/EEC a rule which, while recognizing the advantage of open lists of approved suppliers, lays down the limits and conditions under which Member States may use them.

Such lists must be adapted to the qualitative selection criteria laid down in the Directive, discussed above and set out in Articles 20(1)(a) to (d) and (g), 21, 22 and 23.

Suppliers on such lists in the Member States in which they are established may, on the occasion of each contract, claim such enrolment as alternative evidence, within the limits examined below, that they fulfil the qualitative criteria set out in Articles 20 to 23.

A supplier who chooses to use such alternative evidence must submit to the contracting authority a registration certificate issued by the appropriate authority indicating the references which made enrolment possible and his classification on the list.

As regards the evidential value of such a certificate, Article 25 provides that: "certified registration in official lists of suppliers by the competent bodies shall, for the contracting authorities of other Member States, constitute a presumption of suitability only as regards Article 20(1)(a) to (d) and (g), Article 21, Article 22(1)(b) and (c) and Article 23(1)(a).

Information which can be deduced from registration in official lists may not be questioned. However, with regard to the payment of social security contributions, an additional certificate may be required of any registered suppliers whenever a contract is offered".

Apart from the evidence provided by such objective facts, the supplier may, as regards those references where suitability can be presumed, be requested by the contracting authority to supplement that information so that his suitability for the contract concerned may be assessed.

As regards those references where suitability cannot be presumed, the contractor is obliged to submit the documents required by the contracting authority in accordance with the Directive.

As the Court has confirmed[44] with regard to the lists of approved contractors regulated by the analogous provisions of the Works Directive, it should be emphasized that the

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44 Joined Cases 27 to 29/86 *CEI v. Association intercommunale pour les autoroutes des Ardennes*

evidential value of a certificate of registration on an official list of authorized suppliers in one Member State to contracting authorities in other Member States is confined to the objective facts which made registration possible and does not extend to the resultant classification. The contracting authorities, while they may not question the information deduced from registration, may determine the level of financial and commercial standing and technical capacity required in order to participate in a given contract.

Within the limits described above, a supplier registered in his country on a list of approved suppliers has the right, therefore, to use that registration as alternative evidence for contracting authorities in the other Member States. In no circumstances, however, could a contracting authority demand, as a condition of admission to the contract, that suppliers established in other Member States should be registered on an official list in its country. Such a requirement would in fact constitute a measure having equivalent effect to a quantitative restriction on imports, which is prohibited under Article 30 of the Treaty.

Moreover, Member States which have official lists of approved suppliers are obliged to open them to suppliers from other Member States and, in order to enrol them, may not require evidence and declarations other than those required of national suppliers and, in any event, other than those laid down in Articles 20 to 23.

6.3 Criteria for the award of contracts

The criteria on which contracting authorities base the award of contracts must be either the lowest price or the most economically advantageous tender.

The criterion of the lowest price is not difficult to apply, since only the price requested by tenderers is to be taken into consideration and the contract must be awarded to the tenderer asking the lowest price.

What constitutes the most economically advantageous tender, however, requires further clarification. The Directive states that contracting authorities may base themselves on "various criteria according to the contract in question: e.g. price, delivery date, running costs, cost–effectiveness, quality, aesthetic and functional characteristics, technical merit, after–sales service and technical assistance".

This list is not exhaustive. It is clear from the examples given, though, that the most economically advantageous tender can only be decided on objective grounds, equally applicable to all tenders and strictly related to the subject of the contract. Variation is allowed, to reflect the inherent requirements of the desired supplies and the use which the contracting authority intends to make of them.

Where contracting authorities do not award contracts on the basis of the lowest price only but intend to use various criteria to determine the most economically advantageous

tender, they must list these criteria either in the contract notice or in the contract documents.

Criteria which have not been announced in this way may not be used to select the tender. This disclosure obligation would not be met – as the Court made clear[45] in connection with the same requirement in the Works Directive – by a general reference to a provision of national law.

The Directive also provides that, where possible, the criteria should be listed in descending order of importance: suppliers need to know on what basis their tenders will be assessed.

Under the Supplies Directive currently in force, it is not possible, as it was under the previous Community legislation, to base an award on criteria different to the above in the context of national laws designed to give certain categories of tenderer an advantage.

This facility must not be confused with the regional preference arrangements, which expired on 31 December 1992.

Consequently, the lowest price and the most economically advantageous tender are the only criteria which contracting authorities may use in order to grant their supply contracts.

6.3.1 Abnormally low tenders

Where tenders appear to be abnormally low in relation to the goods to be supplied, the contracting authority must – before it may reject those tenders – request the tenderers concerned, in writing, to supply details of the constituent elements of the tenders which it considers relevant and must verify those constituent elements taking account of the explanations received.

The Directive specifies the types of explanation that the contracting authority may take into consideration, i.e. those relating to the economics of the manufacturing process or to the technical solutions chosen or to the exceptionally favourable conditions available to the tenderer for the supply of the goods or to the originality of the supplies proposed by the tenderer.

The aim of this procedure, in which the contracting authority must examine tenders in detail in the light of explanations given by the tenderers concerned, is to protect the latter against arbitrariness on the part of the contracting authority by affording them the assurance that, at whatever level the procedure is triggered, they will be given an opportunity to show that their tenders are soundly based before they are rejected.

Consequently, the fact that the contracting authority is expressly empowered to establish whether the explanations furnished by a tenderer are acceptable does not, under any circumstances, authorize it to decide in advance, by rejecting the tender without even

seeking an explanation from the tenderer, that no acceptable explanation could be given. The aim of the procedure could not be achieved if it were left to the contracting authority to judge whether or not it was appropriate to seek explanations.[46]

In addition, if the award criterion is the lowest price, the Directive requires the contracting authority to inform the Commission of those tenders which it rejects as too low.

In such cases, the tenders excluded would, if correctly priced, satisfy the criterion laid down for winning the contract. Consequently, it is particularly important to ensure maximum transparency and to allow the Commission to verify, where appropriate, whether the price was indeed abnormally low and therefore unacceptable.

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[46] This interpretation is in line with the rulings handed down by the Court concerning the same procedure for the examination of abnormally low tenders provided for by Directive 71/305/EEC on public works contracts, namely in Case 76/81 *Transporoute v Minister of Public Works* [1982] ECR 417; Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839; and Case C-

7. GRANTING OF SPECIAL OR EXCLUSIVE RIGHTS TO ENGAGE IN A PUBLIC SERVICE ACTIVITY

Under the Supplies Directive, the granting of a special or exclusive right to carry on a public service activity is not subject to any particular procedural requirement.[47] This rule concerns only public supply contracts.

The Directive nevertheless stipulates[48] that, when a contracting authority grants to a body which is not itself a contracting authority – regardless of its legal status – special or exclusive rights to engage in a public service activity, the instrument granting that right must require the body in question to observe the principle of non–discrimination on grounds of nationality when awarding public supply contracts to third parties.

In this context, supply contracts awarded by a body which has been granted such a special or exclusive right are deemed to be public supply contracts since they are awarded in the pursuit of a public service activity. In reality, such supplies are not intended for the contracting authority, but are to be used by the entity itself in the management and operation of the public service. It must also be stressed that the entity – although within any limits and under any supervision imposed in connection with the grant of the exclusive or special right – carries on the activity independently of the contracting authority and is directly liable to the recipients of the service which it provides.

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[47] The absence of Community procedural rules does not mean, of course, that any grant of exclusive or special rights is legitimate under Community law as a whole.

ANNEXES

I. **List of bodies and categories of bodies governed by public law**

II. **List of contracting authorities subject to the GATT Agreement**

III. **List of products which, when supplied to defence authorities listed in Annex II, are subject to the GATT Agreement**

IV. **List of addresses from which the Supplement to the Official Journal can be obtained**

V. **Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits**

ANNEX I

List of bodies and categories of bodies governed by public law

LIST OF BODIES AND CATEGORIES OF BODIES GOVERNED BY PUBLIC LAW REFERRED TO IN ARTICLE 1(b)

I. BELGIUM

Bodies

- Archives générales du Royaume et Archives de l'État dans les Provinces - Algemeen Rijksarchief en Rijksarchief in de Provinciën,
- Conseil autonome de l'enseignement communautaire - Autonome Raad van het Gemeenschapsonderwijs,
- Radio et télévision belges, émissions néerlandaises - Belgische Radio en Televisie, Nederlandse uitzendingen,
- Belgisches Rundfunk- und Fernsehzentrum der Deutschsprachigen Gemeinschaft (Centre de radio et télévision belge de la Communauté de langue allemande - Centrum voor Belgische Radio en Televisie voor de Duitstalige Gemeenschap),
- Bibliothèque royale Albert Ier - Koninklijke Bibliotheek Albert I,
- Caisse auxiliaire de paiement des allocations de chômage - Hulpkas voor Werkloosheidsuitkeringen,
- Caisse auxiliaire d'assurance maladie-invalidité - Hulpkas voor Ziekte- en Invaliditeitsverzekeringen,
- Caisse nationale des pensions de retraite et de survie - Rijkskas voor Rust- en Overlevingspensioenen,
- Caisse de secours et de prévoyance en faveur des marins naviguant sous pavillon belge - Hulp- en Voorzorgskas voor Zeevarenden onder Belgische Vlag,
- Caisse nationale des calamités - Nationale Kas voor de Rampenschade,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie diamantaire - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders der Diamantnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie du bois - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders in de Houtnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de batellerie - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders der Ondernemingen voor Binnenscheepvaart,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de chargement, déchargement et manutention de marchandises dans les ports débarcadères, entrepôts et stations (appelée habituellement «Caisse spéciale de compensation pour allocations familiales des régions maritimes») - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders gebezigd door Ladings- en Lossingsondernemingen en door de Stuwadoors in de Havens, Losplaatsen, Stapelplaatsen en Stations (gewoonlijk genoemd: "Bijzondere Compensatiekas voor kindertoeslagen van de zeevaartgewesten"),
- Centre informatique pour la Région bruxelloise - Centrum voor Informatica voor het Brusselse Gewest,
- Commissariat général de la Communauté flamande pour la coopération internationale - Commissariaat-generaal voor Internationale Samenwerking van de Vlaamse Gemeenschap,
- Commissariat général pour les relations internationales de la Communauté française de Belgique - Commissariaat-generaal bij de Internationale Betrekkingen van de Franse Gemeenschap van België,
- Conseil central de l'économie - Centrale Raad voor het Bedrijfsleven,
- Conseil économique et social de la Région wallonne - Sociaal-economische Raad van het Waals Gewest,
- Conseil national du travail - Nationale Arbeidsraad,
- Conseil supérieur des classes moyennes - Hoge Raad voor de Middenstand,
- Office pour les travaux d'infrastructure de l'enseignement subsidié - Dienst voor Infrastructuurwerken van het Gesubsidieerd Onderwijs,
- Fondation royale - Koninklijke Schenking,
- Fonds communautaire de garantie des bâtiments scolaires - Gemeenschappelijk Waarborgfonds voor Schoolgebouwen,

- Fonds d'aide médicale urgente - Fonds voor Dringende Geneeskundige Hulp,
- Fonds des accidents du travail - Fonds voor Arbeidsongevallen,
- Fonds des maladies professionnelles - Fonds voor Beroepsziekten,
- Fonds des routes - Wegenfonds,
- Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises - Fonds tot Vergoeding van de in geval van Sluiting van Ondernemingen Ontslagen Werknemers,
- Fonds national de garantie pour la réparation des dégâts houillers - Nationaal Waarborgfonds inzake Kolenmijnschade,
- Fonds national de retraite des ouvriers mineurs - Nationaal Pensioenfonds voor Mijnwerkers,
- Fonds pour le financement des prêts à des États étrangers - Fonds voor Financiering van de Leningen aan Vreemde Staten,
- Fonds pour la rémunération des mousses enrôlés à bord des bâtiments de pêche - Fonds voor Scheepsjongens aan Boord van Vissersvaartuigen,
- Fonds wallon d'avances pour la réparation des dommages provoqués par des pompages et des prises d'eau souterraine - Waals Fonds van Voorschotten voor het Herstel van de Schade veroorzaakt door Grondwaterzuiveringen en Afpompingen,
- Institut d'aéronomie spatiale - Instituut voor Ruimte-aëronomie,
- Institut belge de normalisation - Belgisch Instituut voor Normalisatie,
- Institut bruxellois de l'environnement - Brussels Instituut voor Milieubeheer,
- Institut d'expertise vétérinaire - Instituut voor Veterinaire Keuring,
- Institut économique et social des classes moyennes - Economisch en Sociaal Instituut voor de Middenstand,
- Institut d'hygiène et d'épidémiologie - Instituut voor Hygiëne en Epidemiologie,
- Institut francophone pour la formation permanente des classes moyennes - Franstalig Instituut voor Permanente Vorming voor de Middenstand,
- Institut géographique national - Nationaal Geografisch Instituut,
- Institut géotechnique de l'État - Rijksinstituut voor Grondmechanica,
- Institut national d'assurance maladie-invalidité - Rijksinstituut voor Ziekte- en Invaliditeitsverzekering,
- Institut national d'assurances sociales pour travailleurs indépendants - Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen,
- Institut national des industries extractives - Nationaal Instituut voor de Extractiebedrijven,
- Institut national des invalides de guerre, anciens combattants et victimes de guerre - Nationaal Instituut voor Oorlogsinvaliden, Oudstrijders en Oorlogsslachtoffers,
- Institut pour l'amélioration des conditions de travail - Instituut voor Verbetering van de Arbeidsvoorwaarden,
- Institut pour l'encouragement de la recherche scientifique dans l'industrie et l'agriculture - Instituut tot Aanmoediging van het Wetenschappelijk Onderzoek in Nijverheid en Landbouw,
- Institut royal belge des sciences naturelles - Koninklijk Belgisch Instituut voor Natuurwetenschappen,
- Institut royal belge du patrimoine artistique - Koninklijk Belgisch Instituut voor het Kunstpatrimonium,
- Institut royal de météorologie - Koninklijk Meteorologisch Instituut,
- Enfance et famille - Kind en Gezin,
- Compagnie des installations maritimes de Bruges - Maatschappij der Brugse Zeevaartinrichtingen,
- Mémorial national du fort de Breendonck - Nationaal Gedenkteken van het Fort van Breendonck,
- Musée royal de l'Afrique centrale - Koninklijk Museum voor Midden-Afrika,
- Musées royaux d'art et d'histoire - Koninklijke Musea voor Kunst en Geschiedenis,
- Musées royaux des beaux-arts de Belgique - Koninklijke Musea voor Schone Kunsten van België,
- Observatoire royal de Belgique - Koninklijke Sterrenwacht van België,
- Office belge de l'économie et de l'agriculture - Belgische Dienst voor Bedrijfsleven en Landbouw,
- Office belge du commerce extérieur - Belgische Dienst voor Buitenlandse Handel,
- Office central d'action sociale et culturelle au profit des membres de la communauté militaire - Centrale Dienst voor Sociale en Culturele Actie ten behoeve van de Leden van de Militaire Gemeenschap,
- Office de la naissance et de l'enfance - Dienst voor Borelingen en Kinderen,

- Office de la navigation - Dienst voor de Scheepvaart,
- Office de promotion du tourisme de la Communauté française - Dienst voor de Promotie van het Toerisme van de Franse Gemeenschap,
- Office de renseignements et d'aide aux familles des militaires - Hulp- en Informatiebureau voor Gezinnen van Militairen,
- Office de sécurité sociale d'outre-mer - Dienst voor Overzeese Sociale Zekerheid,
- Office national d'allocations familiales pour travailleurs salariés - Rijksdienst voor Kinderbijslag voor Werknemers,
- Office national de l'emploi - Rijksdienst voor de Arbeidsvoorziening,
- Office national des débouchés agricoles et horticoles - Nationale Dienst voor Afzet van Land- en Tuinbouwprodukten,
- Office national de sécurité sociale - Rijksdienst voor Sociale Zekerheid,
- Office national de sécurité sociale des administrations provinciales et locales - Rijksdienst voor Sociale Zekerheid van de Provinciale en Plaatselijke Overheidsdiensten,
- Office national des pensions - Rijksdienst voor Pensioenen,
- Office national des vacances annuelles - Rijksdienst voor de Jaarlijkse Vakantie,
- Office national du lait - Nationale Zuiveldienst,
- Office régional bruxellois de l'emploi - Brusselse Gewestelijke Dienst voor Arbeidsbemiddeling,
- Office régional et communautaire de l'emploi et de la formation - Gewestelijke en Gemeenschappelijke Dienst voor Arbeidsvoorziening en Vorming,
- Office régulateur de la navigation intérieure - Dienst voor Regeling der Binnenvaart,
- Société publique des déchets pour la Région flamande - Openbare Afvalstoffenmaatschappij voor het Vlaams Gewest,
- Orchestre national de Belgique - Nationaal Orkest van België,
- Organisme national des déchets radioactifs et des matières fissiles - Nationale Instelling voor Radioactief Afval en Splijtstoffen,
- Palais des beaux-arts - Paleis voor Schone Kunsten,
- Pool des marins de la marine marchande - Pool van de Zeelieden ter Koopvaardij,
- Port autonome de Charleroi - Autonome Haven van Charleroi,
- Port autonome de Liège - Autonome Haven van Luik,
- Port autonome de Namur - Autonome Haven van Namen,
- Radio et télévision belges de la Communauté française - Belgische Radio en Televisie van de Franse Gemeenschap,
- Régie des bâtiments - Regie der Gebouwen,
- Régie des voies aériennes - Regie der Luchtwegen,
- Régie des postes - Regie der Posterijen,
- Régie des télégraphes et des téléphones - Regie van Telegraaf en Telefoon,
- Conseil économique et social pour la Flandre - Sociaal-economische Raad voor Vlaanderen,
- Société anonyme du canal et des installations maritimes de Bruxelles - Naamloze Vennootschap "Zeekanaal en Haveninrichtingen van Brussel",
- Société du logement de la Région bruxelloise et sociétés agréées - Brusselse Gewestelijke Huisvestingsmaatschappij en erkende maatschappijen,
- Société nationale terrienne - Nationale Landmaatschappij,
- Théâtre royal de la Monnaie - De Koninklijke Muntschouwburg,
- Universités relevant de la Communauté flamande - Universiteiten afhangende van de Vlaamse Gemeenschap,
- Universités relevant de la Communauté française - Universiteiten afhangende van de Franse Gemeenschap,
- Office flamand de l'emploi et de la formation professionnelle - Vlaamse Dienst voor Arbeidsvoorziening en Beroepsopleiding,
- Fonds flamand de construction d'institutions hospitalières et médico-sociales - Vlaams Fonds voor de Bouw van Ziekenhuizen en Medisch-Sociale Instellingen,
- Société flamande du logement et sociétés agréées - Vlaamse Huisvestingsmaatschappij en erkende maatschappijen,
- Société régionale wallonne du logement et sociétés agréées - Waalse Gewestelijke Maatschappij voor de Huisvesting en erkende maatschappijen,

– Société flamande d'épuration des eaux - Vlaamse Maatschappij voor Waterzuivering,
– Fonds flamand du logement des familles nombreuses - Vlaams Woningfonds van de Grote Gezinnen.

Categories

– les centres publics d'aide sociale,
– les fabriques d'église (church councils).

II. DENMARK

Bodies

– Københavns Havn,
– Danmarks Radio,
– TV 2/Danmark,
– TV2 Reklame A/S,
– Danmarks Nationalbank,
– A/S Storebæltsforbindelsen,
– A/S Øresundsforbindelsen (alene tilslutningsanlæg i Danmark),
– Københavns Lufthavn A/S,
– Byfornyelsesselskabet København,
– Tele Danmark A/S with subsidiaries,
– Fyns Telefon A/S,
– Jydsk Telefon Aktieselskab A/S,
– Københavns Telefon Aktieselskab,
– Tele Sønderjylland A/S,
– Telecom A/S,
– Tele Danmark Mobil A/S.

Categories

– De kommunale havne (municipal ports),
– Andre Forvaltningssubjekter (other public administrative bodies).

III. GERMANY

1. **Legal persons governed by public law**

Authorities, establishments and foundations governed by public law and created by federal, State or local authorities in particular in the following sectors:

1.1. *Authorities*

– Wissenschaftliche Hochschulen und verfaßte Studentenschaften (universities and established student bodies),
– berufsständige Vereinigungen (Rechtsanwalts-, Notar-, Steuerberater-, Wirtschaftsprüfer-, Architekten-, Ärzte- und Apothekerkammern) (professional associations representing lawyers, notaries, tax consultants, accountants, architects, medical practitioners and pharmacists),

– Wirtschaftsvereinigungen (Landwirtschafts-, Handwerks-, Industrie- und Handelskammern, Handwerksinnungen, Handwerkerschaften) (business and trade associations: agricultural and craft associations, chambers of industry and commerce, craftsmen's guilds, tradesmen's associations),
– Sozialversicherungen (Krankenkassen, Unfall- und Rentenversicherungsträger) (social security institutions: health, accident and pension insurance funds),
– kassenärztliche Vereinigungen (associations of panel doctors),
– Genossenschaften und Verbände (cooperatives and other associations).

1.2. *Establishments and foundations*

Non-industrial and non-commercial establishments subject to State control and operating in the general interest, particularly in the following fields:

– Rechtsfähige Bundesanstalten (federal institutions having legal capacity),
– Versorgungsanstalten und Studentenwerke (pension organizations and students' unions),
– Kultur-, Wohlfahrts- und Hilfsstiftungen (cultural, welfare and relief foundations).

2. **Legal persons governed by private law**

Non-industrial and non-commercial establishments subject to State control and operating in the general interest (including 'Kommunale Versorgungsunternehmen' - municipal utilities), particularly in the following fields:

– Gesundheitswesen (Krankenhäuser, Kurmittelbetriebe, medizinische Forschungseinrichtungen, Untersuchungs- und Tierkörperbeseitigungsanstalten) (health: hospitals, health resort establishments, medical research institutes, testing and carcase-disposal establishments),
– Kultur (öffentliche Bühnen, Orchester, Museen, Bibliotheken, Archive, zoologische und botanische Gärten) (culture: public theatres, orchestras, museums, libraries, archives, zooligical and botanical gardens),
– Soziales (Kindergärten, Kindertagesheime, Erholungseinrichtungen, Kinder- und Jugendheime, Freizeiteinrichtungen, Gemeinschafts- und Bürgerhäuser, Frauenhäuser, Altersheime, Obdachlosenunterkünfte) (social welfare: nursery schools, children's playschools, rest-homes, children's homes, hostels for young people, leisure centres, community and civic centres, homes for battered wives, old people's homes, accommodation for the homeless),
– Sport (Schwimmbäder, Sportanlagen und -einrichtungen) (sport: swimming baths, sports facilities),
– Sicherheit (Feuerwehren, Rettungsdienste) (safety: fire brigades, other emergency services),
– Bildung (Umschulungs-, Aus-, Fort- und Weiterbildungseinrichtungen, Volkshochschulen) (education: training, further training and retraining establishments, adult evening classes),
– Wissenschaft, Forschung und Entwicklung (Großforschungseinrichtungen, wissenschaftliche Gesellschaften und Vereine, Wissenschaftsförderung) (science, research and development: large-scale research institutes, scientific societies and associations, bodies promoting science),
– Entsorgung (Straßenreinigung, Abfall- und Abwasserbeseitigung) (refuse and garbage disposal services: street cleaning, waste and sewage disposal),
– Bauwesen und Wohnungswirtschaft (Stadtplanung, Stadtentwicklung, Wohnungsunternehmen, Wohnraumvermittlung) (building, civil engineering and housing: town planning, urban development, housing enterprises, housing agency services),
– Wirtschaft (Wirtschaftsförderungsgesellschaften) (economy: organizations promoting economic development),
– Friedhofs- und Bestattungswesen (cemeteries and burial services),
– Zusammenarbeit mit den Entwicklungsländern (Finanzierung, technische Zusammenarbeit, Entwicklungshilfe, Ausbildung) (cooperation with developing countries: financing, technical cooperation, development and training).

IV. GREECE

Categories

Other legal persons governed by public law whose public works contracts are subject to State control.

V. SPAIN

Categories

– Entidades Gestoras y Servicios Comunes de la Seguridad Social (administrative entities and common services of the health and social services),
– Organismos Autónomos de la Administración del Estado (independent bodies of the national administration),
– Organismos Autónomos de las Comunidades Autónomas (independent bodies of the autonomous communities),
– Organismos Autónomos de las Entidades Locales (independent bodies of local authorities),
– Otras entidades sometidas a la legislación de contratos del Estado español (other entities subject to Spanish State legislation on procurement).

VI. FRANCE

Bodies

1. National public bodies:

1.1. with scientific, cultural and professional character:

– Collège de France,
– Conservatoire national des arts et métiers,
– Observatoire de Paris;

1.2. Scientific and technological:

– Centre national de la recherche scientifique (CNRS),
– Institut national de la recherche agronomique,
– Institut national de la santé et de la recherche médicale,
– Institut français de recherche scientifique pour le développement en coopération (ORSTOM);

1.3. with administrative character:

– Agence nationale pour l'emploi,
– Caisse nationale des allocations familiales,
– Caisse nationale d'assurance maladie des travailleurs salariés,
– Caisse nationale d'assurance vieillesse des travailleurs salariés,
– Office national des anciens combattants et victimes de la guerre,
– Agences financières de bassins.

Categories

1. National public bodies:

– universités (universities),
– écoles normales d'instituteurs (teacher training colleges).

2. Administrative bodies at regional, departmental and local level:

– collèges (secondary schools),
– lycées (secondary schools),
– établissements publics hospitaliers (public hospitals),
– offices publics d'habitations à loyer modéré (OPHLM) (public offices for low-cost housing).

3. Groupings of territorial authorities:

– syndicats de communes (associations of local authorities),

– districts (districts),

– communautés urbaines (municipalities),

– institutions interdépartementales et interrégionales (institutions common to more than one Département and interregional institutions).

VII. IRELAND

Bodies

– Shannon Free Airport Development Company Ltd,

– Local Government Computer Services Board,

– Local Government Staff Negotiations Board,

– Córas Tráchtála (Irish Export Board),

– Industrial Development Authority,

– Irish Goods Council (Promotion of Irish Goods),

– Córas Beostoic agus Feola (CBF) (Irish Meat Board),

– Bord Fálite Éireann (Irish Tourism Board),

– Údarás na Gaeltachta (Development Authority for Gaeltacht Regions),

– An Bord Pleanála (Irish Planning Board).

Categories

– Third Level Educational Bodies of a Public Character,

– National Training, Cultural or Research Agencies,

– Hospital Boards of a Public Character,

– National Health & Social Agencies of a Public Character,

– Central & Regional Fishery Boards.

VIII. ITALY

Bodies

– Agenzia per la promozione dello sviluppo nel Mezzogiorno.

Categories

– Enti portuali e aeroportuali (port and airport authorities),

– Consorzi per le opere idrauliche (consortia for water engineering works),

– Le università statali, gli istituti universitari statali, i consorzi per i lavori interessanti le università (State universities, State university institutes, consortia for university development work),

– Gli istituti superiori scientifici e culturali, gli osservatori astronomici, astrofisici, geofisici o vulcanologici (higher scientific and cultural institutes, astronomical, astrophysical, geophysical or vulcanological observatories),

– Enti di ricerca e sperimentazione (organizations conducting research and experimental work),

– Le istituzioni pubbliche di assistenza e di beneficenza (public welfare and benevolent institutions),

– Enti che gestiscono forme obbligatorie di previdenza e di assistenza (agencies administering compulsory social security and welfare schemes),
– Consorzi di bonifica (land reclamation consortia),
– Enti di sviluppo o di irrigazione (development or irrigation agencies),
– Consorzi per le aree industriali (associations for industrial areas),
– Comunità montane (groupings of municipalities in mountain areas),
– Enti preposti a servizi di pubblico interesse (organizations providing services in the public interest),
– Enti pubblici preposti ad attività di spettacolo, sportive, turistiche e del tempo libero (public bodies engaged in entertainment, sport, tourism and leisure activities),
– Enti culturali e di promozione artistica (organizations promoting culture and artistic activities).

IX. LUXEMBOURG

Categories

– Établissements publics de l'État placés sous la surveillance d'un membre du gouvernement (public establishments of the State placed under the supervision of a member of the Government),
– Établissements publics placés sous la surveillance des communes (public establishments placed under the supervision of the communes),
– Syndicats de communes créés en vertu de la loi du 14 février 1900 telle qu'elle a été modifiée par la suite (associations of communes created under the law of 14 February 1900 as subsequently modified).

X. THE NETHERLANDS

Bodies

– De Nederlandse Centrale Organisatie voor Toegepast Natuurwetenschappelijk Onderzoek (TNO) en de daaronder ressorterende organisaties.

Categories

– De waterschappen (administration of water engineering works),
– De instellingen van wetenschappelijk onderwijs vermeld in artikel 8 van de Wet op het Wetenschappelijk Onderwijs (1985), de academische ziekenhuizen (Institutions for scientific education, as listed in Article 8 of the Scientific Education Act (1985), teaching hospitals).

XI. PORTUGAL

Categories

– Estabelecimentos públicos de ensino, investigação científica e saúde (public establishments for education, scientific research and health),
– Institutos públicos sem carácter comercial ou industrial (public institutions without commercial or industrial character),
– Fundações públicas (public foundations),
– Administrações gerais e juntas autónomas (general administration bodies and independent councils).

XII. THE UNITED KINGDOM

Bodies

- Central Blood Laboratories Authority,
- Design Council,
- Health and Safety Executive,
- National Research Development Corporation,
- Public Health Laboratory Services Board,
- Advisory, Conciliation and Arbitration Service,
- Commission for the New Towns,
- Development Board For Rural Wales,
- English Industrial Estates Corporation,
- National Rivers Authority,
- Northern Ireland Housing Executive,
- Scottish Enterprise,
- Scottish Homes,
- Welsh Development Agency.

Categories

- Universities and polytechnics, maintained schools and colleges,
- National Museums and Galleries,
- Research Councils,
- Fire Authorities,
- National Health Service Authorities,
- Police Authorities,
- New Town Development Corporations,
- Urban Development Corporations.

XIII. AUSTRIA

All bodies subject to budgetary supervision by the "Rechnungshof" (audit authority) not having an industrial or commercial character.

XIV. FINLAND

Public or publicly controlled entities or undertakings not having an industrial or commercial character.

XV. SWEDEN

All non-commercial bodies whose procurement is subject to supervision by the National Board for Public Procurement.

ANNEX II

List of contracting authorities subject to the GATT Agreement

ANNEX II

LIST OF CONTRACTING AUTHORITIES SUBJECT TO THE GATT AGREEMENT ON GOVERNMENT PROCUREMENT

BELGIUM

A. L'État, exception faite pour les marchés passés dans le cadre de coopération au développement qui, en vertu d'accords internationaux conclus avec des pays tiers et se rapportant à la passation de marchés, sont soumis à d'autres dispositions, incompatibles avec les dispositions du présent arrêté ([1]):	De Staat, met uitzondering van de opdrachten inzake ontwikkelingssamenwerking die, krachtens internationale overeenkomsten met derde landen inzake het plaatsen van opdrachten, andere bepalingen behelzen die niet verenigbaar zijn met de bepalingen van dit besluit ([1]):
- la Régie des postes ([2]),	- de Regie der Posterijen ([2]);
- la Régie des bâtiments,	- de Regie der Gebouwen;
- le Fonds des routes,	- het Wegenfonds
B. Le Fonds général des bâtiments scolaires de l'État	Het Algemeen Gebouwenfonds voor de rijksscholen
Le Fonds de construction d'institutions hospitalières et médico-sociales	Het Fonds voor de bouw van ziekenhuizen en medisch-sociale inrichtingen
La Société nationale terrienne	De Nationale Landmaatschappij
L'Office national de sécurité sociale	De Rijksdienst voor sociale zekerheid
L'Institut national d'assurances sociales pour travailleurs indépendants	Het Rijksinstituut voor de sociale verzekeringen der zelfstandigen
L'Institut national d'assurance maladie-invalidité	Het Rijksinstituut voor ziekte- en invaliditeitsverzekering
L'Institut national de crédit agricole	Het Nationaal Instituut voor landbouwkrediet
L'Office national des pensions	De Rijksdienst voor pensioenen
L'Office central de crédit hypothécaire	Het Centraal Bureau voor hypothecair krediet
L'Office national du ducroire	De Nationale Delcrederedienst
La Caisse auxiliaire d'assurance maladie-invalidité	De Hulpkas voor ziekte- en invaliditeitsverzekering
Le Fonds des maladies professionnelles	Het Fonds voor de beroepsziekten
La Caisse nationale de crédit professionnel	De Nationale Kas voor beroepskrediet
L'Office national des débouchés agricoles et horticoles	De Nationale Dienst voor afzet van land- en tuinbouwprodukten
L'Office national du lait et de ses dérivés	De Nationale Zuiveldienst
L'Office national de l'emploi	De Rijksdienst voor arbeidsvoorziening
La Régie des voies aériennes	De Regie der Luchtwegen

([1]) Non-warlike materials contained in Annex II.

([2]) Postal business only.

DENMARK

1. Statsministeriet	- to departementer
2. Arbejdsministeriet	- fem direktorater og institutioner
3. Udenrigsministeriet (tre departementer)	
4. Boligministeriet	- fem direktorater og institutioner
5. Energiministeriet	- ét direktorat og Forsøgsanlaeg Risø
6. Finansministeriet (to departementer)	- fire direktorater og institutioner inklusive Direktoratet for Statens Indkøb
	- fem andre institutioner
7. Ministeriet for Skatter og Afgifter (to departementer)	- fem direktorater og institutioner
8. Fiskeriministeriet	- fire institutioner
9. Industriministeriet (Fulde navn: Ministeriet for Industri, Handel, Håndv®rk og Skibsfart)	- ni direktorater og institutioner
10. Indenrigsministeriet	- Civilforsvarsstyrelsen
	- ét direktoratet
11. Justitsministeriet	- Rigspolitichefen
	- fem andre direktorater og institutioner
12. Kirkeministeriet	
13. Landbrugsministeriet	- 19 direktorater og institutioner
14. Miljøministeriet	- fem direktorater
15. Kultur- og Kommunikationsministeriet ([1])	- tre direktorater og adskillige statsejede museer og højere uddannelsesinstitutioner
16. Socialministeriet	- fire direktorater
17. Undervisningsministeriet	- seks direktorater
	- 12 universiteter og andre højere l®reanstalter
18. Økonomiministeriet (tre departementer)	
19. Ministeriet for Offentlige Arbejder ([2])	- statshavne og statslufthavne
	- fire direktorater og adskillige institutioner
20. Forsvarsministeriet ([3])	
21. Sundhedsministeriet	- adskillige institutioner inklusive Statens Seruminstitut og Rigshospitalet

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([1]) With the exception of telecommunications services of the 'Post- og Telegrafv®senet'.

([2]) With the exception of the 'Danske Statsbaner'.

([3]) Non-warlike materials contained in Annex II.

FEDERAL REPUBLIC OF GERMANY

1. Auswärtiges Amt
2. Bundesministerium für Arbeit und Sozialordnung
3. Bundesministerium für Bildung und Wissenschaft
4. Bundesministerium für Ernährung, Landwirtschaft und Forsten
5. Bundesministerium der Finanzen
6. Bundesministerium für Forschung und Technologie
7. Bundesministerium des Inneren (nur ziviles Material)
8. Bundesministerium für Gesundheit
9. Bundesministerium für Frauen und Jugend
10. Bundesministerium für Familie und Senioren
11. Bundesministerium der Justiz
12. Bundesministerium für Raumordnung, Bauwesen und Städtebau
13. Bundesministerium für Post- und Telekommunikation ([1])
14. Bundesministerium für Wirtschaft
15. Bundesministerium für wirtschaftliche Zusammenarbeit
16. Bundesministerium der Verteidigung ([2])
17. Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit

NB: According to existing national obligations, the entities contained in this list must, in conformity with special procedures, award contracts to certain groups in order to remove dificulties caused by the last war.

([1]) With the exception of telecommunications equipment.

([2]) Non-warlike materials contained in Annex II.

FRANCE

1. Main purchasing entities

A. *General budget*

- Premier ministre
- Ministère d'État, ministère de l'éducation nationale, de la jeunesse et des sports
- Ministère d'État, ministère de l'économie, des finances et du budget
- Ministère d'État, ministère de l'équipement, du logement, des transports et de la mer
- Ministère d'État, ministère des affaires étrangères
- Ministère de la justice
- Ministère de la défense ([1])
- Ministère de l'intérieur et de la centralisation
- Ministère de l'industrie et de l'aménagement du territoire
- Ministère des affaires européennes
- Ministère d'État, ministère de la fonction publique et des réformes administratives
- Ministère du travail, de l'emploi et de la formation professionnelle
- Ministère de la coopération et du développement
- Ministère de la culture, de la communication, des grands travaux et du bicentenaire
- Ministère des départements et territoires d'outre-mer
- Ministère de l'agriculture et de la forêt
- Ministère des postes, des télécommunications et de l'espace ([2])
- Ministère chargé des relations avec le Parlement
- Ministère de la solidarité, de la santé et de la protection sociale
- Ministère de la recherche et de la technologie
- Ministère du commerce extérieur
- Ministère délégué auprès du ministère d'État, ministère de l'économie, des finances et du budget, chargé du budget
- Ministère délégué auprès du ministère d'État, ministère des affaires étrangères, chargé de la francophonie
- Ministère délégué auprès du ministère d'État, ministère des affaires étrangères
- Ministère délégué auprès du ministère de l'industrie et de l'aménagement du territoire, chargé de l'aménagement du territoire et des reconversions
- Ministère délégué auprès du ministère de l'industrie et de l'aménagement du territoire, chargé du commerce et de l'artisanat
- Ministère délégué auprès du ministère de l'industrie et de l'aménagement du territoire, chargé du tourisme
- Ministère délégué auprès du ministère de l'équipement, du logement, des transports et de la mer, chargé de la mer
- Ministère délégué auprès du ministère de la culture, de la communication, des grands travaux et du bicentenaire, chargé de la communication
- Ministère délégué auprès du ministère de la solidarité, de la santé et de la protection sociale, chargé des personnes âgées

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([1]) Non-warlike materials contained in Annex II.

([2]) Postal business only.

- Secrétariat d'État chargé des droits des femmes
- Secrétariat d'État chargé des anciens combattants et des victimes de guerre
- Secrétariat d'État chargé de la prévention des risques technologiques et naturels majeurs
- Secrétariat d'État auprès du premier ministre, chargé du plan
- Secrétariat d'État auprès du premier ministre, chargé de l'environnement
- Secrétariat d'État auprès du premier ministre
- Secrétariat d'État auprès du premier ministre, chargé de l'action humanitaire
- Secrétariat d'État auprès du ministère d'État, ministère de l'éducation nationale, de la jeunesse et des sports, chargé de l'enseignement technique
- Secrétariat d'État auprès du ministère d'État, ministère de l'éducation nationale, de la jeunesse et des sports, chargé de la jeunesse et des sports
- Secrétariat d'État auprès du ministère d'État, ministère de l'économie, des finances et du budget, chargé de la consommation
- Secrétariat d'État auprès du ministère des affaires étrangères, chargé des relations culturelles internationales
- Secrétariat d'État auprès du ministère de l'intérieur, chargé des collectivités territoriales
- Secrétariat d'État auprès du ministère de l'équipement, du logement, des transports et de la mer, chargé des transports routiers et fluviaux
- Secrétariat d'État auprès du ministère du travail, de l'emploi et de la formation professionnelle, chargé de la formation professionnelle
- Secrétariat d'État auprès du ministère de la culture, de la communication, des grands travaux et du bicentenaire, chargé des grands travaux
- Secrétariat d'État auprès du ministère de la solidarité, de la santé et de la protection sociale, chargé de la famille
- Secrétariat d'État auprès du ministère de la solidarité, de la santé et de la protection sociale, chargé des handicapés et des accidentés de la vie

B. *Budget Annex*

In particular:

- Imprimerie nationale

C. *Special Treasury accounts*

In particular:

- Fonds forestier national
- Soutien financier de l'industrie cinématographique et de l'industrie des programmes audiovisuels
- Fonds national d'aménagement foncier et d'urbanisme
- Caisse autonome de la reconstruction

2. National administrative public bodies

- Académie de France à Rome
- Académie de marine
- Académie des sciences d'outre-mer
- Agence centrale des organismes de sécurité sociale (ACOSS)
- Agences financières de bassins
- Agence nationale pour l'amélioration des conditions de travail (ANACT)
- Agence nationale pour l'amélioration de l'habitat (ANAH)
- Agence nationale pour l'emploi (ANPE)

- Agence nationale pour l'indemnisation des français d'outre-mer (ANIFOM)
- Assemblée permanente des chambres d'agriculture (APCA)
- Bibliothèque nationale
- Bibliothèque nationale et universitaire de Strasbourg
- Bureau d'études des postes et télécommunications d'outre-mer (BEPTOM)
- Caisse d'aide à l'équipement des collectivités locales (CAECL)
- Caisse des dépôts et consignations
- Caisse nationale des allocations familiales (CNAF)
- Caisse nationale d'assurance maladie des travailleurs salariés (CNAM)
- Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS)
- Caisse nationale des autoroutes (CNA)
- Caisse nationale militaire de sécurité sociale (CNMSS)
- Caisse nationale des monuments historiques et des sites
- Caisse nationale des télécommunications([1])
- Caisse de garantie du logement social
- Casa de Velasquez
- Centre d'enseignement zootechnique de Rambouillet
- Centre d'études du milieu et de pédagogie appliquée du ministère de l'agriculture
- Centre d'études supérieures de sécurité sociale
- Centres de formation professionnelle agricole
- Centre national d'art et de culture Georges Pompidou
- Centre national de la cinématographie française
- Centre national d'études et de formation pour l'enfance inadaptée
- Centre national d'études et d'expérimentation du machinisme agricole, du génie rural, des eaux et des forêts
- Centre national et de formation pour l'adaptation scolaire et l'éducation spécialisée (CNEFASES)
- Centre national de formation et de perfectionnement des professeurs d'enseignement ménager agricole
- Centre national des lettres
- Centre national de documentation pédagogique
- Centre national des oeuvres universitaires et scolaires (CNOUS)
- Centre national d'opthalmologie des quinze-vingts
- Centre national de préparation au professorat de travaux manuels éducatifs et d'enseignement ménager
- Centre national de promotion rurale de Marmilhat
- Centre national de la recherche scientifique (CNRS)
- Centre régional d'éducation populaire d'Île-de-France
- Centres d'éducation populaire et de sport (CREPS)
- Centres régionaux des oeuvres universitaires (CROUS)
- Centres régionaux de la propriété forestière
- Centre de sécurité sociale des travailleurs migrants
- Chancelleries des universités
- Collèges d'État

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([1]) Postal business only.

- Commission des opérations de bourse
- Conseil supérieur de la pêche
- Conservatoire de l'espace littoral et des rivages lacustres
- Conservatoire national des arts et métiers
- Conservatoire national supérieur de musique
- Conservatoire national supérieur d'art dramatique
- Domaine de Pompadour
- École centrale - Lyon
- École centrale des arts et manufactures
- École française d'archéologie d'Athènes
- École française d'Extrême-Orient
- École française de Rome
- École des hautes études en sciences sociales
- École nationale d'administration
- École nationale de l'aviation civile (ENAC)
- École nationale des Chartes
- École nationale d'équitation
- École nationale du génie rural, des eaux et forêts (ENGREF)
- Écoles nationales d'ingénieurs
- École nationale d'ingénieurs des techniques et industries agricoles et alimentaires
- Écoles nationales d'ingénieurs des travaux agricoles
- École nationale d'ingénieurs des travaux ruraux et des techniques sanitaires
- École nationale d'ingénieurs des travaux des eaux et forêts (ENITEF)
- École nationale de la magistrature
- Écoles nationales de la marine marchande
- École nationale de la santé publique (ENSP)
- École nationale de ski et d'alpinisme
- École nationale supérieure agronomique - Montpellier
- École nationale supérieure agronomique - Rennes
- École nationale supérieure des arts décoratifs
- École nationale supérieure des arts et industries - Strasbourg
- École nationale supérieure des arts et industries textiles - Roubaix
- Écoles nationales supérieures d'arts et métiers
- École nationale supérieure des beaux-arts
- École nationale supérieure des bibliothécaires
- École nationale supérieure de céramique industrielle
- École nationale supérieure de l'électronique et de ses applications (ENSEA)
- École nationale supérieure d'horticulture
- École nationale supérieure des industries agricoles alimentaires
- École nationale supérieure du paysage (rattachée à l'École nationale supérieure d'horticulture)
- École nationale supérieure des sciences agronomiques appliquées (ENSSA)
- Écoles nationales vétérinaires

- École nationale de voile
- Écoles normales d'instituteurs et d'institutrices
- Écoles normales nationales d'apprentissage
- Écoles normales supérieures
- École polytechnique
- École technique professionnelle agricole et forestière de Meymac (Corrèze)
- École de sylviculture - Crogny (Aube)
- École de viticulture et d'Ónologie de la Tour Blanche (Gironde)
- École de viticulture - Avize (Marne)
- Établissement national de convalescents de Saint-Maurice
- Établissement national des invalides de la marine (ENIM)
- Établissement national de bienfaisance Koenigs-Wazter
- Fondation Carnegie
- Fondations Singer-Polignac
- Fonds d'action sociale pour les travailleurs immigrés et leurs familles
- Hôpital-hospice national Dufresne-Sommeiller
- Institut de l'élevage et de médecine vétérinaire des pays tropicaux (IEMVPT)
- Institut français d'archéologie orientale du Caire
- Institut géographique national
- Institut industriel du Nord
- Institut international d'administration publique (IIAP)
- Institut national agronomique de Paris-Grignon
- Institut national des appellations d'origine des vins et eaux-de-vie (INAOVEV)
- Institut national d'astronomie et de géophysique (INAG)
- Institut national de la consommation (INC)
- Institut national d'éducation populaire (INEP)
- Institut national d'études démographiques (INED)
- Institut national des jeunes aveugles - Paris
- Institut national des jeunes sourds - Bordeaux
- Institut national des jeunes sourds - Chambéry
- Institut national des jeunes sourds - Metz
- Institut national des jeunes sourds - Paris
- Institut national de physique nucléaire et de physique des particules (I.N2.P3)
- Institut national de promotion supérieure agricole
- Institut national de la propriété industrielle
- Institut national de la recherche agronomique (INRA)
- Institut national de recherche pédagogique (INRP)
- Institut national de la santé et de la recherche médicale (INSERM)
- Institut national des sports
- Instituts nationaux polytechniques
- Instituts nationaux des sciences appliquées
- Institut national supérieur de chimie industrielle de Rouen

- Institut national de recherche en informatique et en automatique (INRIA)
- Institut national de recherche sur les transports et leur sécurité (INRETS)
- Instituts régionaux d'administration
- Institut supérieur des matériaux et de la construction mécanique de Saint-Ouen
- Lycées d'État
- Musée de l'armée
- Musée Gustave Moreau
- Musée de la marine
- Musée national J.J. Henner
- Musée national de la Légion d'honneur
- Musée de la poste
- Muséum national d'histoire naturelle
- Musée Auguste Rodin
- Observatoire de Paris
- Office de coopération et d'accueil universitaire
- Office français de protection des réfugiés et apatrides
- Office national des anciens combattants
- Office national de la chasse
- Office national d'information sur les enseignements et les professions (ONISEP)
- Office national d'immigration (ONI)
- ORSTOM - Institut français de recherche scientifique pour le développement en coopération
- Office universitaire et culturel français pour l'Algérie
- Palais de la découverte
- Parcs nationaux
- Réunion des musées nationaux
- Syndicat des transports parisiens
- Thermes nationaux - Aix-les-Bains
- Universités

3. Other national public bodies

- Union des groupements d'achats publics (UGAP)

IRELAND

1. Main purchasing entities

- Office of Public Works

2. Other departments

- President's Establishment
- Houses of the Oireachtas (Parliament)
- Department of the Taoiseach (Prime Minister)
- Central Statistics Office
- Department of the Gaeltacht (Irish-speaking areas)
- National Gallery of Ireland
- Department of Finance
- State Laboratory
- Office of the Comptroller and Auditor General
- Office of the Attorney general
- Office of the Director of Public Prosecutions
- Valuation Office
- Civil Service Commission
- Office of the Ombudsman
- Office of the Revenue Commissioners
- Department of Justice
- Commissioners of Charitable Donations and Bequests for Ireland
- Department of the Environment
- Department of Education
- Department of the Marine
- Department of Agriculture and Food
- Department of Labour
- Department of Industry and Commerce
- Department of Tourism and Transport
- Department of Communications
- Department of Defence ([1])
- Department of Foreign Affairs
- Department of Social Welfare
- Department of Health
- Department of Energy

([1]) Non-warlike materials contained in Annex II.

ITALY

1. Ministero del tesoro ([1])
2. Ministero delle finanze ([2])
3. Ministero di grazia e giustizia
4. Ministero degli affari esteri
5. Ministero della pubblica istruzione
6. Ministero dell'interno
7. Ministero dei lavori pubblici
8. Ministero dell'agricoltura e delle foreste
9. Ministero dell'industria, del commercio e dell'artigianato
10. Ministero del lavoro e della previdenza sociale
11. Ministero della sanità
12. Ministero per i beni culturali e ambientali
13. Ministero della difesa ([3])
14. Ministero del bilancio e della programmazione economica
15. Ministero delle partecipazioni statali
16. Ministero del turismo e dello spettacolo
17. Ministero del commercio con l'estero
18. Ministero delle poste e delle telecomunicazioni ([4])
19. Ministero dell'ambiente
20. Ministero dell'università e della ricerca scientifica e tecnologica

NB: This Agreement shall not prevent the implementation of provisions contained in Italian Law No 835 of 6 October 1950 (Official Gazette No 245 of 24 October 1950 of the Italian Republic) and in modifications thereto in force on the date on which this Agreement is adopted.

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([1]) Acting as the central purchasing entity for most of the other Ministries or entities.

([2]) Not including purchases made by the tobacco and salt monopolies.

([3]) Non-warlike materials contained in Annex II.

([4]) Postal business only.

LUXEMBOURG

1. Ministère d'État: service central des imprimés et des fournitures de l'État
2. Ministère de l'agriculture: administration des services techniques de l'agriculture
3. Ministère de l'éducation nationale: lycées d'enseignement secondaire et d'enseignement secondaire technique
4. Ministère de la famille et de la solidarité sociale: maisons de retraite
5. Ministère de la force publique: armée ([1]) - gendarmerie - police
6. Ministère de la justice: établissements pénitentiaires
7. Ministère de la santé publique: hôpital neuropsychiatrique
8. Ministère des travaux publics: bâtiments publics - ponts et chaussées
9. Ministère des communications: postes et télécommunications ([2])
10. Ministère de l'énergie: centrales électriques de la Haute- et de la Basse-Sûre
11. Ministère de l'environnement: commissariat général à la protection des eaux

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([1]) Non-warlike materials contained in Annex II.

([2]) Postal business only.

THE NETHERLANDS

A. Ministries and central government bodies

1. Ministerie van Algemene Zaken
2. Ministerie van Buitenlandse Zaken
3. Ministerie van Justitie
4. Ministerie van Binnenlandse Zaken
5. Ministerie van Financiën
6. Ministerie van Economische Zaken
7. Ministerie van Onderwijs en Wetenschappen
8. Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer
9. Ministerie van Verkeer en Waterstaat
10. Ministerie van Landbouw, Natuurbeheer en Visserij
11. Ministerie van Sociale Zaken en Werkgelegenheid
12. Ministerie van Welzijn, Volksgezondheid en Cultuur
13. Kabinet voor Nederlands Antilliaanse en Arubaanse Zaken
14. Hogere Colleges van Staat

B. Central procurement offices

Entities listed above under A generally make their own specific purchases; other general purchases are effected through the entities listed below:

1. Directoraat-generaal Rijkswaterstaat
2. Directoraat-generaal voor de Koninklijke Landmacht ([1])
3. Directoraat-generaal voor de Koninklijke Luchtmacht ([1])
4. Directoraat-generaal voor de Koninklijke Marine ([1])

([1]) Non-warlike materials contained in Annex II.

UNITED KINGDOM

Cabinet Office
- Civil Service College
- Civil Service Commission
- Civil Service Occupational Health Service
- Office of the Minister for the Civil Service
- Parliamentary Counsel Office

Central Office of Information

Charity Commission

Crown Prosecution Service

Crown Estate Commissioners

Customs and Excise Department

Department for National Savings

Department of Education and Science
- University Grants Committee

Department of Employment
- Employment Appeals Tribunal
- Industrial Tribunals
- Office of Manpower Economics

Department of Energy

Department of Health
- Central Council for Education and Training in Social Work
- Dental Estimates Board
- English National Board for Nursing, Midwifery and Health Visitors
- Medical Boards and Examining Medical Officers (War Pensions)
- National Health Service Authorities
- Prescriptions Pricing Authority
- Public Health Laboratory Service Board
- Regional Medical Service
- United Kingdom Central Council for Nursing, Midwifery and Health Visiting

Department of Social Security
- Attendance Allowance Board
- Occupational Pensions Board
- Social Security Advisory Committee
- Supplementary Benefits Appeal Tribunals

Department of the Environment
- Building Research Establishment
- Commons Commissioners
- Countryside Commission
- Fire Research Station (Boreham Wood)
- Historic Buildings and Monuments Commission
- Local Valuation Panels
- Property Services Agency
- Rent Assessment Panels
- Royal Commission on Environmental Pollution
- Royal Commission on Historical Monuments of England
- Royal Fine Art Commission (England)

Department of the Procurator General and Treasury Solicitor
- Legal Secretariat to the Law Officers

Department of Trade and Industry
- Laboratory of the Government Chemist

- National Physical Laboratory
- Warren Spring Laboratory
- National Weights and Measures Laboratory
- Domestic Coal Consumers' Council
- Electricity Consultative Councils for England and Wales
- Gas Consumers' Council
- Transport Users Consultative Committee
- Monopolies and Mergers Commission
- Patent Office

Department of Transport
- Coastguard Services
- Transport and Road Research Laboratory
- Transport Tribunal

Export Credits Guarantee Department

Foreign and Commonwealth Office
- Government Communications Headquarters
- Wilton Park Conference Centre

Government Actuary's Department

Home Office
- Boundary Commission for England
- Gaming Board for Great Britain
- Inspectors of Constabulary
- Parole Board and Local Review Committees

House of Commons

House of Lords

Inland Revenue, Board of

Intervention Board for Agricultural Produce

Lord Chancellor's Department
- Council on Tribunals
- County Courts (England and Wales)
- Immigration Appellate Authorities
  - Immigration Adjudicators
  - Immigration Appeals Tribunal
- Judge Advocate-General and Judge Advocate of the Fleet
- Lands Tribunal
- Law Commission
- Legal Aid Fund (England and Wales)
- Pensions Appeals Tribunals
- Public Trustee Office
- Office of the Social Security Commissioners
- Special Commissioners for Income Tax (England and Wales)
- Supreme Court (England and Wales)
  - Court of Appeal: Civil and Criminal Divisions
  - Courts Martial Appeal Court
  - Crown Court
  - High Court
- Value Added Tax Tribunals

Ministry of Agriculture, Fisheries and Food
- Advisory Services
- Agricultural Development and Advisory Service
- Agricultural Dwelling House Advisory Committees
- Agricultural Land Tribunals
- Agricultural Science Laboratories
- Agricultural Wages Board and Committees

Plant Variety Rights Office
Royal Botanic Gardens, Kew

Ministry of Defence ([1])
Meteorological Office
Procurement Executive

National Audit Office

National Investment Loans Office

Northern Ireland Court Service
Coroners Courts
County Courts
Crown Courts
Enforcement of Judgements Office
Legal Aid Fund
Magistrates Court
Pensions Appeals Tribunals
Supreme Court of Judicature and Courts of Criminal Appeal

Northern Ireland, Department of Agriculture

Northern Ireland, Department for Economic Development

Northern Ireland, Department of Education

Northern Ireland, Department of the Environment

Northern Ireland, Department of Finance and Personnel

Northern Ireland, Department of Health and Social Services

Northern Ireland Office
Crown Solicitor's Office
Department of the Director of Public Prosecutions for Northern Ireland
Northern Ireland Forensic Science Laboratory
Office of Chief Electoral Officer for Northern Ireland
Police Authority for Northern Ireland
Probation Board for Northern Ireland
State Pathologist Service

Office of Arts and Libraries
British Library
British Museum
British Museum (Natural History)
Imperial War Museum
Museums and Galleries Commission
National Gallery
National Maritime Museum
National Portrait Gallery
Science Museum
Tate Gallery
Victoria and Albert Museum
Wallace Collection

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([1]) Non-warlike materials contained in Annex II.

Office of Fair Trading

Office of Population Censuses and Surveys
- National Health Service Central Register

Office of the Parliamentary Commissioner for Administration and Health Service Commissioners

Overseas Development Administration
- Overseas Development and National Research Institute

Paymaster General's Office

Postal Business of the Post Office

Privy Council Office

Public Record Office

Registry of Friendly Societies

Royal Commission on Historical Manuscripts

Royal Hospital, Chelsea

Royal Mint

Scotland, Crown Office and Procurator Fiscal Service

Scotland, Department of the Registers of Scotland

Scotland, General Register Office
- National Health Service Central Register

Scotland, Lord Advocate's Department

Scotland, Queen's and Lord Treasurer's Remembrancer

Scottish Courts Administration
- Accountant of Court's Office
- Court of Justiciary
- Court of Session
- Lands Tribunal for Scotland
- Pensions Appeal Tribunals
- Scottish Land Court
- Scottish Law Commission
- Sherriff Courts
- Social Security Commissioners' Office

Scottish Office
- Central Services
- Department of Agriculture and Fisheries for Scotland
  - Artificial Insemination Service
  - Crofters Commission
  - Red Deer Commission
  - Royal Botanic Garden, Edinburgh
- Industry Department for Scotland
  - Scottish Electricity Consultative Councils
- Scottish Development Department
  - Rent Assessment Panel and Committees
  - Royal Commission on the Ancient and Historical Monuments of Scotland
  - Royal Fine Art Commission for Scotland
- Scottish Education Department
  - National Galleries of Scotland
  - National Library of Scotland
  - National Museums of Scotland

Scottish and Health Departments
- HM Inspectorate of Constabulary
- Local Health Councils
- Mental Welfare Commission for Scotland
- National Board for Nursing, Midwifery and Health Visiting for Scotland

- Scottish Antibody Production Unit
- Scottish Council for Postgraduate Medical Education
- Scottish Crime Squad
- Scottish Criminal Record Office
- Scottish Fire Service Training School
- Scottish Health Boards
- Scottish Health Service - Common Services Agency
- Scottish Health Service Planning Council
- Scottish Police College

Scottish Record Office

HM Stationery Office

HM Treasury

- Central Computer and Telecommunications Agency
- Chessington Computer Centre
- Civil Service Catering Organisation
- National Economic Development Council
- Rating of Government Property Department

Welsh Office

- Ancient Monuments (Wales) Commission
- Council for the Education and Training of Health Visitors
- Local Government Boundary Commission for Wales
- Local Valuation Panels and Courts
- National Health Service Authorities
- Rent Control Tribunals and Rent Assessment Panels and Committees

GREECE

1. Õ_ïõñãåßï Åèíéê_ò Ïéêïííùßáò
2. Õ_ïõñãåßï _áéäåßáò êáé ÈñçóêåõìÜôùí
3. Õ_ïõñãåßï Åì_ïñßïõ
4. Õ_ïõñãåßï Âéïìç÷áíßáò,ÅíYñãåéáò êáé Ôå÷íïëïãßáò
5. Õ_ïõñãåßï Eì_ïñéê_ò Íáõôéëßáò
6. Õ_ïõñãåßï _ñïåäñßáò ôçò ÊõâYñíçóçò
7. Õ_ïõñãåßï Áéãáßïõ
8. Õ_ïõñãåßï Eóùôåñéê_í
9. Õ_ïõñãåßï Äéêáéïóyíçò
10. Õ_ïõñãåßï Eîùôåñéê_í
11. Õ_ïõñãåßï Åñãáóßáò
12. Õ_ïõñãåßï _ïëéôéóìïy êáé Å_éóôçì_í
13. Õ_ïõñãåßï _åñéâÜëëïíôïò,xùñïôáîßáò êáé Äçìïóßùí 'Åñãùí
14. Õ_ïõñãåßï Ïéêïííìéê_í
15. Õ_ïõñãåßï Ìåôáöïñ_í êáé Å_éêïéíùíé_í
16. Õ_ïõñãåßï Õãåßáò, _ñïíïßáò êáé Êïéíùíéê_í Áóöáëßóåùí
17. Õ_ïõñãåßï Ìáêåäïíßáò-ÈñÜêçò
18. Ãåíéêü Å_éôåëåßï Óôñáôïy ([1])
19. Ãåíéêü Å_éôåëåßï Íáõôéêïy ([1])
20. Ãåíéêü Å_éôåëåßï Aåñï_ïñßáò ([1])
21. Õ_ïõñãåßï Ãåùñãßáò
22. Ãåíéê_ Ãñáììáôåßá Ôy_ïõ êáé _ëçñïöïñé_í
23. Ãåíéê_ Ãñáììáôåßá ÍYáò ÃåíéÜò
24. Ãåíéêü xçìåßï ôïõ ÊñÜôïõò
25. Ãåíéê_ Ãñáììáôåßá Ëáïê_ò Å_éìüñöùóçò
26. Ãåíéê_ Ãñáììáôåßá Éóüôçôáò ôùí Äyï Öyëùí
27. Ãåíéê_ Ãñáììáôåßá Êïéíùíéê_í Áóöáëßóåùí
28. Ãåíéê_ Ãñáììáôåßá Á_ïä_ìïõ Åëëçíéóìïy
29. Ãåíéê_ Ãñáììáôåßá Âéïìç÷áíßáò
30. Ãåíéê_ Ãñáììáôåßá 'Åñåõíáò êáé Ôå÷íïëïãßáò
31. Ãåíéê_ Ãñáììáôåßá Áèëçôéóìïy
32. Ãåíéê_ Ãñáììáôåßá Äçìïóßùí 'Åñãùí
33. Åèíéê_ Óôáôéóôéê_ Õ_çñåóßá
34. Åèíéêüò Ïñãáíéóìüò _ñïíïßáò
35. Ïñãáíéóìüò Åñãáôéê_ò Åóôßáò
36. Åèíéêü Ôõ_ïãñáöåßï
37. Eëëçíéê_ Å_éôñï__ Áôïìéê_ò ÅíYñãåéáò

([1]) Non-warlike materials contained in Annex II.

38. Ôáìåßï Åèíéê_ò Ïäï_ïéßáò
39. Åèíéêü Êá_ïäéóôñéáêü _áíå_éóô_ìéï Áèçí_í
40. _áíå_éóô_ìéï Áéãáßïõ
41. Áñéóôïô Yëåéï _áíå_éóô_ìéï Èåóóáëïíßêçò
42. Äçìïêñßôåéï _áíå_éóô_ìéï ÈñÜêçò
43. _áíå_éóô_ìéï Éùáííßíùí
44. _áíå_éóô_ìéï _áôñ_í
45. _ïëõôå÷íåßï Kñ_ôçò
46. Óéâéôáíßäåéïò Ó÷ïë_
47. _áíå_éóô_ìéï Ìáêåäïíßáò (Oéêïíîìéêüò êáé Êïéíùíéêüò Å_éóô_ìåò)
48. Áéãéíßôåéï Íïóïêïìåßï
49. Áñåôáßåéï Íïóïêïìåßï
50. Åèíéêü ÊYíôñï Äçìüóéáò Äéïßêçóçò
51. Åëëçíéêü Ôá÷õäñìåßá
52. Ïñãáíéóìüò Äéá÷åßñéóçò Äçìïóßïõ Õëéêïy
53. Ïñãáíéóìüò Ãåùñãéê_í Áóöáëßóåùí
54. Ïñãáíéóìüò Ó÷ïëéê_í Êôéñßùí

SPAIN

1. Ministerio de Asuntos Exteriores
2. Ministerio de Justicia
3. Ministerio de Defensa ([1])
4. Ministerio de Economía y Hacienda
5. Ministerio del Interior
6. Ministerio de Obras Públicas y Transportes
7. Ministerio de Educación y Ciencia
8. Ministerio de Trabajo y Seguridad Social
9. Ministerio de Industria, Comercio y Turismo
10. Ministerio de Agricultura, Pesca y Alimentación
11. Ministerio para las Administraciones Públicas
12. Ministerio de Cultura
13. Ministerio de Relaciones con las Cortes y de la Secretaría del Gobierno
14. Ministerio de Sanidad y Consumo
15. Ministerio de Asuntos Sociales
16. Ministerio del Portavoz del Gobierno

([1]) Non-warlike materials contained in Annex II.

PORTUGAL

Presidência do Conselho de Ministros

1. Auditoria Jurídica da Presidência do Conselho de Ministros
2. Centro de Estudos e Formação Autárquica
3. Centro de Estudos Técnicos e Apoio Legislativo
4. Centro de Gestão da Rede Informática do Governo
5. Conselho Nacional de Planeamento Civil de Emergência
6. Conselho Permanente de Concertação Social
7. Departamento de Formação e Aperfeiçoamento Profissional
8. Gabinete de Macau
9. Gabinete do Serviço Cívico dos Objectores de Consciência
10. Instituto da Juventude
11. Instituto Nacional de Administração
12. Secretaria-Geral da Presidência do Conselho de Ministros
13. Secretariado para a Modernização Administrativa
14. Serviço Nacional de Protecção Civil
15. Serviços Sociais da Presidência do Conselho de Ministros

Ministério da Administração Interna

1. Direcção-Geral de Viação
2. Gabinete de Estudos e Planeamento de Instalações
3. Governos Civis
4. Guarda Fiscal
5. Guarda Nacional Republicana
6. Polícia de Segurança Pública
7. Secretaria-Geral
8. Secretariado Técnico dos Assuntos para o Processo Eleitoral
9. Serviço de Estrangeiros e Fronteiras
10. Serviço de Informação e Segurança
11. Serviço Nacional de Bombeiros

Ministério da Agricultura

1. Agência do Controlo das Ajudas Comunitárias ao Sector do Azeite
2. Direcção-Geral da Hidráulica e Engenharia Agrícola
3. Direcção-Geral da Pecuária
4. Direcção-Geral das Florestas
5. Direcção-Geral de Planeamento e Agricultura
6. Direcção-Geral dos Mercados Agrícolas e da Indústria Agro-alimentar
7. Direcção Regional de Agricultura da Beira Interior
8. Direcção Regional de Agricultura da Beira Litoral
9. Direcção Regional de Agricultura de Entre Douro e Minho

10. Direcção Regional de Agricultura de Trás-os-Montes
11. Direcção Regional de Agricultura do Alentejo
12. Direcção Regional de Agricultura do Algarve
13. Direcção Regional de Agricultura do Ribatejo e Oeste
14. Gabinete para os Assuntos Agrícolas Comunitários
15. Inspecção Geral e Auditoria de Gestão
16. Instituto da Vinha e do Vinho
17. Instituto de Qualidade Alimentar
18. Instituto Nacional de Investigação Agrária
19. Instituto Regulador Orientador dos Mercados Agrícolas
20. Obra Social - Secretaria Geral
21. Rede de Informação de Contabilidades Agrícolas
22. Secretaria Geral
23. IFADAP - Instituto Financeiro de Apoio ao Desenvolvimento da Agricultura e Pescas
24. INGA - Instituto Nacional de Intervenção e Garantia Agrícola

Ministério do Ambiente e Recursos Naturais

1. Direcção-Geral da Qualidade do Ambiente
2. Direcção-Geral dos Recursos Naturais
3. Gabinete dos Assuntos Europeus
4. Gabinete de Estudos e Planeamento
5. Gabinete de Protecção e Segurança Nuclear
6. Instituto Nacional do Ambiente
7. Instituto Nacional de Defesa do Consumidor
8. Instituto Nacional de Meteorologia e Geofísica
9. Secretaria-Geral
10. Serviço Nacional de Parques, Reservas e Conservação da Natureza
11. Gabinete do Saneamento Básico da Costa do Estoril
12. Delegações Regionais
13. Instituto Nacional da Água

Ministério do Comércio e Turismo

1. Comissão de Aplicação de Coimas em Matéria Económica
2. Direcção-Geral de Concorrência e Preços
3. Direcção-Geral de Inspecção Económica
4. Direcção-Geral do Comércio Externo
5. Direcção-Geral do Comércio Interno
6. Direcção-Geral do Turismo
7. Fundo de Turismo
8. Gabinete para os Assuntos Comunitários
9. ICEP - Instituto do Comércio Externo de Portugal
10. Inspecção Geral de Jogos
11. Instituto de Promoção Turística

12. Instituto Nacional de Formação Turística
13. Regiões de turismo
14. Secretaria-Geral
15. ENATUR - Empresa Nacional de Turismo, EP
16. AGA - Administração-Geral do Açúcar e do Álcool, EP

Ministério da Defesa Nacional ([1])

1. Estado-Maior General das Forças Armadas
2. Estado-Maior da Força Aérea
3. Comando Logístico-Administrativo da Força Aérea
4. Estado-Maior do Exército
5. Estado-Maior da Armada
6. Direcção-Geral do Material Naval
7. Direcção das Infra-Estruturas Navais
8. Direcção de Abastecimento
9. Fábrica Nacional de Cordoaria
10. Hospital da Marinha
11. Arsenal do Alfeite
12. Instituto Hidrográfico
13. Direcção-Geral de Armamento
14. Direcção-Geral de Pessoal e Infra-estruturas
15. Direcção-Geral de Política de Defesa Nacional
16. Instituto de Defesa Nacional
17. Secretaria-Geral

Ministério da Educação

1. Auditoria Jurídica
2. Direcção-Geral da Administração Escolar
3. Direcção-Geral da Extensão Educativa
4. Direcção-Geral do Ensino Superior
5. Direcção-Geral dos Desportos
6. Direcção-Geral dos Ensinos Básico e Secundário
7. Direcção Regional de Educação de Lisboa
8. Direcção Regional de Educação do Algarve
9. Direcção Regional de Educação do Centro
10. Direcção Regional de Educação do Norte
11. Direcção Regional de Educação do Sul
12. Editorial do Ministério da Educação
13. Gabinete Coordenador do Ingresso no Ensino Superior
14. Gabinete de Estudos e Planeamento
15. Gabinete de Gestão Financeira
16. Gabinete do Ensino Tecnológico, Artístico e Profissional

([1]) Non-warlike materials contained in Annex II.

17. Inspecção Geral de Educação
18. Instituto de Cultura da Língua Portuguesa
19. Instituto de Inovação Educacional
20. Instituto dos Assuntos Sociais da Educação
21. Secretaria-Geral

Ministério do Emprego e Segurança Social

1. Auditoria Jurídica
2. Caixa Nacional de Seguros e Doenças Profissionais
3. Caixas de Previdência Social
4. Casa Pia de Lisboa
5. Centro Nacional de Pensões
6. Centros Regionais de Segurança Social
7. Comissão para a Igualdade e Direitos das Mulheres
8. Departamento de Estatística
9. Departamento de Estudos e Planeamento
10. Departamento de Relações Internacionais e Convenções da Segurança Social
11. Departamento para Assuntos do Fundo Social Europeu
12. Departamento para os Assuntos Europeus e Relações Externas
13. Direcção-Geral da Acção Social
14. Direcção-Geral da Família
15. Direcção-Geral das Relações de Trabalho
16. Direcção-Geral de Apoio Técnico à Gestão
17. Direcção-Geral de Higiene e Segurança no Trabalho
18. Direcção-Geral do Emprego e Formação Profissional
19. Direcção-Geral dos Regimes de Segurança Social
20. Fundo de Estabilização Financeira da Segurança Social
21. Inspecção Geral da Segurança Social
22. Inspecção Geral do Trabalho
23. Instituto de Gestão Financeira da Segurança Social
24. Instituto do Emprego e Formação Profissional
25. Instituto Nacional para o Aproveitamento dos Tempos Livres dos Trabalhadores
26. Secretaria-Geral
27. Secretariado Nacional de Reabilitação
28. Serviços Sociais do MESS
29. Santa Casa da Misericórdia de Lisboa

Ministério das Finanças

1. ADSE - Direcção-Geral de Protecção aos Funcionários e Agentes da Administração Pública
2. Auditoria Jurídica
3. Direcção-Geral da Administração Pública
4. Direcção-Geral da Contabilidade Pública e Intendência Geral do Orçamento
5. Direcção-Geral da Junta de Crédito Público

6. Direcção-Geral das Alfândegas
7. Direcção-Geral das Contribuições e Impostos
8. Direcção-Geral do Património do Estado
9. Direcção-Geral do Tesouro
10. Gabinete de Estudos Económicos
11. Gabinete dos Assuntos Europeus
12. GAFEEP - Gabinete para a análise do Financiamento do Estado e das Empresas Públicas
13. Inspecção Geral de Finanças
14. Instituto de Informática
15. Junta de Crédito Público
16. Secretaria-Geral
17. SOFE - Serviços Sociais do Ministério das Finanças

Ministério da Indústria e Energia

1. Delegação Regional da Indústria e Energia de Lisboa e Vale do Tejo
2. Delegação Regional da Indústria e Energia do Alentejo
3. Delegação Regional da Indústria e Energia do Algarve
4. Delegação Regional da Indústria e Energia do Centro
5. Delegação Regional da Indústria e Energia do Norte
6. Direcção-Geral da Indústria
7. Direcção-Geral da Energia
8. Direcção-Geral de Geologia e Minas
9. Gabinete de Estudos e Planeamento
10. Gabinete para a Pesquisa e Exploração do Petróleo
11. Gabinete para os Assuntos Comunitários
12. Instituto Nacional da Propriedade Industrial
13. Instituto Português da Qualidade
14. LNETI - Laboratório Nacional de Engenharia e Tecnologia Industrial
15. Secretaria-Geral

Ministério da Justiça

1. Centro de Estudos Judiciários
2. Centro de Identificação Civil e Criminal
3. Centros de Observação e Acção Social
4. Conselho Superior de Magistratura
5. Conservatória dos Registos Centrais
6. Direcção-Geral dos Registos e Notariado
7. Direcção-Geral dos Serviços de Informática
8. Direcção-Geral dos Serviços Judiciários
9. Direcção-Geral dos Serviços Prisionais
10. Direcção-Geral dos Serviços Tutelares de Menores
11. Estabelecimentos Prisionais
12. Gabinete de Direito Europeu

13. Gabinete de Documentação e Direito Comparado
14. Gabinete de Estudos e Planeamento
15. Gabinete de Gestão Financeira
16. Gabinete de Planeamento e Coordenação do Combate à Droga
17. Hospital-prisão de S. João de Deus
18. Instituto Corpus Christi
19. Instituto da Guarda
20. Instituto de Reinserção Social
21. Instituto de S. Domingos de Benfica
22. Instituto Nacional da Política e Ciências Criminais
23. Instituto Navarro Paiva
24. Instituto Padre António Oliveira
25. Instituto S. Fiel
26. Instituto S. José
27. Instituto Vila Fernando
28. Instituto de Criminologia
29. Instituto de Medicina Legal
30. Polícia Judiciária
31. Secretaria-Geral
32. Serviços Sociais

Ministério das Obras Públicas, Transportes e Comunicações

1. Conselho de Mercados de Obras Públicas e Particulares
2. Direcção-Geral de Aviação Civil
3. Direcção-Geral dos Edifícios e Monumentos Nacionais
4. Direcção-Geral dos Transportes Terrestres
5. Gabinete da Travessia do Tejo
6. Gabinete de Estudos e Planeamento
7. Gabinete do Nó Ferroviário de Lisboa
8. Gabinete do Nó Ferroviário do Porto
9. Gabinete para a Navegabilidade do Douro
10. Gabinete para as Comunidades Europeias
11. Inspecção Geral de Obras Públicas, Transportes e Comunicações
12. Junta Autónoma das Estradas
13. Laboratório Nacional de Engenharia Civil
14. Obra Social do Ministério das Obras Públicas, Transportes e Comunicações
15. Secretaria-Geral

Ministério dos Negócios Estrangeiros

1. Direcção-Geral dos Assuntos Consulares e Administração Financeira
2. Direcção-Geral das Comunidades Europeias
3. Direcção-Geral da Cooperação
4. Instituto de Apoio à Emigração e às Comunidades Portuguesas

5. Instituto de Cooperação Económica
6. Secretaria-Geral

Ministério do Planeamento e Administração do Território

1. Academia das Ciências
2. Auditoria Jurídica
3. Centro Nacional de Informação Geográfica
4. Comissão Coordenadora da Região Centro
5. Comissão Coordenadora da Região de Lisboa e Vale do Tejo
6. Comissão Coordenadora da Região do Alentejo
7. Comissão Coordenadora da Região do Algarve
8. Comissão Coordenadora da Região Norte
9. Departamento Central de Planeamento
10. Direcção-Geral da Administração Autárquica
11. Direcção-Geral do Desenvolvimento Regional
12. Direcção-Geral do Ordenamento do Território
13. Gabinete Coordenador do projecto do Alqueva
14. Gabinete de Estudos e Planeamento da Administração do Território
15. Gabinete para os Aeroportos da Região Autónoma da Madeira
16. Inspecção Geral de Administração do Território
17. Instituto Nacional de Estatísticas
18. Instituto António Sérgio de Sector Cooperativo
19. Instituto de Investigação Científica e Tropical
20. Instituto Geográfico e Cadastral
21. Junta Nacional de Investigação Científica e Tecnológica
22. Secretaria-Geral

AUSTRIA

LIST OF CENTRAL PURCHASING ENTITIES

1. Bundeskanzleramt
2. Bundesministerium für auswärtige Angelegenheiten
3. Bundesministerium für wirtschaftliche Angelegenheiten, Abteilung Präsidium 1
4. Bundesministerium für Arbeit und Soziales Amtswirtschaftsstelle
5. Bundesministerium für Finanzen
   (a) Amtswirtschaftsstelle
   (b) Abteilung VI/5 (EDV-Bereich des Bundesministeriums für Finanzen und des Bundesrechenamtes)
   (c) Abteilung III/1 (Beschaffung von technischen Geräten, Einrichtungen und Sachgütern für die Zollwache)
6. Bundesministerium für Gesundheit, Sport und Konsumentenschutz
7. Bundesministerium für Inneres
8. Bundesministerium für Justiz, Amtswirtschaftsstelle
9. Bundesministerium für Landesverteidigung (non-warlike materials contained in Annex I, Part II, Austria of the GATT Agreement on Government Procurement)
10. Bundesministerium für Land- und Forstwirtschaft
11. Bundesministerium für Umwelt, Jugend und Familie Amtswirtschaftsstelle
12. Bundesministerium für Unterricht und Kunst
13. Bundesministerium für öffentliche Wirtschaft und Verkehr
14. Bundesministerium für Wissenschaft und Forschung
15. Österreichisches Statistisches Zentralamt
16. Österreichische Staatsdruckerei
17. Bundesamt für Eich- und Vermessungswesen
18. Bundesversuchs- und Forschungsanstalt Arsenal (BVFA)
19. Bundesstaatliche Prothesenwerkstätten
20. Bundesprüfanstalt für Kraftfahrzeuge
21. Generaldirektion für die Post- und Telegraphenverwaltung (postal business only)

FINLAND

LIST OF CENTRAL PURCHASING ENTITIES

1. Oikeusministerioe/Justitieministeriet
2. Rahapaja Oy/Myntverket Ab
3. Painatuskeskus Oy/Tryckericentralen Ab
4. Metsaehallitus/Forststyrelsen
5. Maanmittaushallitus/Lantmaeteristyrelsen
6. Maatalouden tutkimuskeskus/Lantbrukets forskningscentral
7. Ilmailulaitos/Luftfartsverket
8. Ilmatieteen laitos/Meteorologiska institutet
9. Merenkulkuhallitus/Sjoefartstyrelsen
10. Valtion teknillinen tutkimuskeskus/Statens tekniska forskningscentral
11. Valtion Hankintakeskus/Statens upphand - lingscentral
12. Vesi- ja ympaeristoehallitus/Vatten- och miljoe - styrelsen
13. Opetushallitus/Utbildningsstyrelsen

SWEDEN

LIST OF CENTRAL PURCHASING ENTITIES

The listed entities include regional and local subdivisions

1. Rikspolisstyrelsen
2. Kriminalvaardsstyrelsen
3. Foersvarets sjukvaardsstyrelse
4. Fortifikationsfoervaltningen
5. Foersvarets materielverk
6. Statens raeddningsverk
7. Kustbevakningen
8. Socialstyrelsen
9. Laekemedelsverket
10. Postverket
11. Vaegverket
12. Sjoefartsverket
13. Luftfartsverket
14. Generaltullstyrelsen
15. Byggnadsstyrelsen
16. Riksskatteverket
17. Skogsstyrelsen
18. AMU-gruppen
19. Statens lantmaeteriverk
20. Naerings- och teknikutvecklingsverket
21. Domaenverket
22. Statistiska centralbyraan
23. Statskontoret

ANNEX III

List of products which, when supplied to defence authorities listed in Annex II, are subject to the GATT Agreement

LIST OF PRODUCTS WHICH, WHEN SUPPLIED TO DEFENCE AUTHORITIES LISTED IN ANNEX II, ARE SUBJECT TO THE GATT AGREEMENT

Chapter 25: Salt; sulphur; earths and stone; plastering materials, lime and cement

Chapter 26: Metallic ores, slag and ash

Chapter 27: Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes

except:

ex 27.10: special engine fuels

Chapter 28: Inorganic chemicals; organic and inorganic compounds of precious metals, of rare-earth metals, of radioactive elements and of isotopes

except:

ex 28.09: explosives

ex 28.13: explosives

ex 28.14: tear gas

ex 28.28: explosives

ex 28.32: explosives

ex 28.39: explosives

ex 28.50: toxic products

ex 28.51: toxic products

ex 28.54: explosives

Chapter 29: Organic chemicals

except:

ex 29.03: explosives

ex 29.04: explosives

ex 29.07: explosives

ex 29.08: explosives

ex 29.11: explosives

ex 29.12: explosives

ex 29.13: toxic products

ex 29.14: toxic products

ex 29.15: toxic products

ex 29.21: toxic products

ex 29.22: toxic products

ex 29.23: toxic products

ex 29.26: explosives

ex 29.27: toxic products

ex 29.29: explosives

Chapter 30: Pharmaceutical products

Chapter 31: Fertilizers

Chapter 32:	Tanning and dyeing extracts; tannings and their derivatives; dyes, colours, paints and varnishes; putty, fillers and stoppings; inks
Chapter 33:	Essential oils and resinoids; parfumery, cosmetic or toilet preparations
Chapter 34:	Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing and scouring preparations, candles and similar articles, modelling pastes and 'dental waxes'
Chapter 35:	Albuminoidal substances; glues; enzymes
Chapter 37:	Photographic and cinematographic goods
Chapter 38:	Miscellaneous chemical products *except*: ex 38.19: toxic products
Chapter 39:	Artificial resins and plastic materials, cellulose esters and ethers; articles thereof *except*: ex 39.03: explosives
Chapter 40:	Rubber, synthetic rubber, factice, and articles thereof *except*: ex 40.11: bullet-proof tyres
Chapter 41:	Raw hides and skins (other than furskins) and leather
Chapter 42:	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silk-worm gut)
Chapter 43:	Furskins and artificial fur; manufactures thereof
Chapter 44:	Wood and articles of wood; wood charcoal
Chapter 45:	Cork and articles of cork
Chapter 46:	Manufactures of straw of esparto and of other plaiting materials; basketware and wickerwork
Chapter 47:	Paper-making material
Chapter 48:	Paper and paperboard; articles of paper pulp, of paper or of paperboard
Chapter 49:	Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans
Chapter 65:	Headgear and parts thereof
Chapter 66:	Umbrellas, sunshades, walking-sticks, whips, riding-crops and parts thereof
Chapter 67:	Prepared feathers and down and articles made of feathers or of down; artificial flowers; articles of human hair
Chapter 68:	Articles of stone, of plaster, of cement, of asbestos, of mica and of similar materials
Chapter 69:	Ceramic products
Chapter 70:	Glass and glassware

Chapter 71:	Pearls, precious and semi-precious stones, precious metals, rolled precious metals, and articles thereof; imitation jewellery
Chapter 73:	Iron and steel and articles thereof
Chapter 74:	Copper and articles thereof
Chapter 75:	Nickel and articles thereof
Chapter 76:	Aluminium and articles thereof
Chapter 77:	Magnesium and beryllium and articles thereof
Chapter 78:	Lead and articles thereof
Chapter 79:	Zinc and articles thereof
Chapter 80:	Tin and articles thereof
Chapter 81:	Other base metals employed in metallurgy and articles thereof
Chapter 82:	Tools, implements, cutlery, spoons and forks, of base metal; parts thereof *except*: ex 82.05: tools ex 82.07: tools, parts
Chapter 83:	Miscellaneous articles of base metal
Chapter 84:	Boilers, machinery and mechanical appliances; parts thereof *except*: ex 84.06: engines ex 84.08: other engines ex 84.45: machinery ex 84.53: automatic data-processing machines ex 84.55: parts of machines under herading No 84.53 ex 84.59: nuclear reactors
Chapter 85:	Electrical machinery and equipment; parts thereof *except*: ex 85.13: telecommunication equipment ex 85.15: transmission apparatus
Chapter 86:	Railway and tramway locomotives, rolling-stock and parts thereof; railway and tramway tracks fixtures and fittings; traffic signalling equipment of all kinds (not electrically powered) *except*: ex 86.02: armoured locomotives, electric ex 86.03: other armoured locomotives ex 86.05: armoured wagons ex 86.06: repair wagons ex 86.07: wagons

Chapter 87:	Vehicles, other than railway or tramway rolling-stock, and parts thereof
	except:
	87.08: tanks and other armoured vehicles
	ex 87.01: tractors
	ex 87.02: military vehicles
	ex 87.03: breakdown lorries
	ex 87.09: motorcyles
	ex 87.14: trailers
Chapter 89:	Ships, boats and floating structures
	except:
	89.01 A: warships
Chapter 90:	Optical, photographic, cinematographic, measuring, checking, precision, medical and surgical instruments and apparatus; parts thereof
	except:
	ex 90.05: binoculars
	ex 90.13: miscellaneous instruments, lasers
	ex 90.14: telemeters
	ex 90.28: electrical and electronic measuring instruments
	ex 90.11: microscopes
	ex 90.17: medical instruments
	ex 90.18: mechano-therapy appliances
	ex 90.19: orthopaedic appliances
	ex 90.20: X-ray apparatus
Chapter 91:	Clocks and watches and parts thereof
Chapter 92:	Musical instruments; sound recorders or reproducers; television image and sound recorders or reproducers; parts and accessories of such articles
Chapter 94:	Furniture and parts thereof; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings
	except:
	ex 94.01 A: aircraft seats
Chapter 95:	Articles and manufactures of carving or moulding material
Chapter 96:	Brooms, brushes, powder-puffs and sieves
Chapter 98:	Miscellaneous manufactured articles

ANNEX IV

List of addresses from which the Supplement to the Official Journal can be obtained

list

ANNEX V

Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits

REGULATION (EEC , EURATOM) No 1182/71 OF THE COUNCIL

of 3 June 1971

determining the rules applicable to periods, dates and time limits

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof;

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament[1];

Whereas numerous acts of the Council and of the Commission determine periods, dates or time limits and employ the terms 'working days' or 'public holidays';

Whereas it is necessary to establish uniform general rules on the subject;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules;

Whereas, to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods, dates and time limits;

Whereas no authority to establish such rules is provided for in the Treaties;

HAS ADOPTED THIS REGULATION:

Article 1

Save as otherwise provided, this Regulation shall apply to acts of the Council or Commission which have been or will be passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.

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1 OJ No C 51, 29.4.1970, p. 25.

CHAPTER I

Periods

Article 2

1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.

To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the *Official Journal of the European Communities* the lists transmitted by the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of this Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question.

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4:

(a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period;

(b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;

(c) a period expressed in weeks, months or years

provisions of such acts - fixed at a given date shall occur at the beginning of the first hour of the day

shall start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;

(d) if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having thirty days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

This provision shall not apply to periods calculated retroactively from a given date or event.

5. Any period of two days or more shall include at least two working days.

CHAPTER II

Dates and time limits

Article 4

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply to the times and periods of entry into force, taking effect, application, expiry of validity, termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts.

2. Entry into force, taking effect or application of acts of the Council or Commission - or of falling on that date.

This provision shall also apply when entry into force, taking effect or application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

3. Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission - or of any provisions of such acts - fixed at a given date shall occur on the expiry of the last hour of the day falling on that date.

This provision shall also apply when expiry of validity, termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment.

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date, it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date.

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place.

Article 6

This Regulation shall enter into force on 1 July 1971.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Luxembourg, 3 June 1971.

For the Council
The President
R. PLEVEN

FOR FURTHER INFORMATION

EUROPEAN COMMISSION
Rue de la Loi 200
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Belgium

Unit XV/B/3

Public procurement:
formulation and application of Community law

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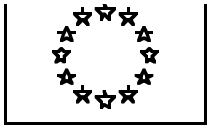

EUROPEAN COMMISSION

PUBLIC PROCUREMENT IN THE EUROPEAN UNION

GUIDE TO THE COMMUNITY RULES ON PUBLIC PROCUREMENT OF SERVICES

OTHER THAN IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS

DIRECTIVE 92/50/EEC

This Guide has no legal value and does not necessarily represent the official position of the Commission.

CONTENTS

APPENDICES

I. Objectives and scope of the public procurement directives

1. Objectives

The creation of a common market for public-sector procurement and construction contracts was unlikely to come about entirely as a result of the obligations Member States had undertaken in the Treaties to remove restrictions on foreign goods, services and businesses. It was still likely to be frustrated by differences in national regulations. Community legislation was necessary to make sure that government contracts were open to all nationalities on equal terms and to make tendering procedures more transparent so that compliance with the principles laid down in the Treaties could be monitored and enforced.

Therefore, to back up the prohibition of import restrictions resulting from discriminatory public purchasing and to make it easier for resident and non-resident foreign firms to compete for public-sector contracts, the Council issued directives to coordinate procurement procedures in all public-sector procurement subject to the Treaties.

The public procurement directives are based on three main principles:

- Community-wide advertising of contracts so that firms in all Member States have an opportunity of bidding for them.

- The banning of technical specifications liable to discriminate against potential foreign bidders.

- Application of objective criteria in tendering and award procedures.

The latter principle is ensured by the following requirements:

- Contracts are to be put out to open tender (open to all interested parties) or restricted tender (open only to selected candidates), at the choice of the authority placing the contract. Authorities may have recourse to negotiated tendering only in specified *exceptional* circumstances.

- Interested parties may only be excluded from participating (in restricted or negotiated tenders) or from final selection (in open, restricted or negotiated tenders) on certain specified qualitative criteria.

- Contracts may be awarded only on economic or technical criteria, namely either the lowest price or the economically most advantageous tender overall.

The first directives which coordinated public procurement procedures for works (Directive 71/305/EEC[1]) and supplies (Directives 77/62/EEC[2] and 80/767/EEC[3]) did not open markets to the extent hoped for. Community legislation did not provide sufficient guarantees and left several lacunae. Its application at national level reflected a long-standing protectionism typical of this sector.

In order to cure the deficiencies of the original rules, new directives were adopted: Council Directive 88/295/EEC[4] of 22 March 1988 amending Directives 77/62/EEC and 80/767/EEC, and Council Directive 89/440/EEC[5] of 18 July 1989 amending Directive 71/305/EEC.

The principal innovations concerned notably:

- the definition of the field of application of the public procurement directives;
- information and competitive conditions;
- transparency of award procedures;
- the definition of technical specifications.

It had also become necessary to remove the disparities between the earlier directive on works (71/305/EEC) and the later directive on supplies (77/62/EEC). The innovations introduced in Directive 71/305/EEC were, therefore, more numerous and more detailed than those made to Directive 77/62/EEC.

Subsequently it became necessary to coordinate the disparate legislative provisions into two codified versions so that citizens of the European Union could consult texts which were clear and transparent and rely more easily on the specific rights conferred on them.

The directives on works were coordinated in Council Directive 93/37/EEC ("the Works Directive") of 14 June 1993[6] and the directives on supplies were consolidated in Council Directive 93/36/EEC ("the Supplies Directive") of 14 June 1993.[7] The latter also aligned the text on Supplies with that on Works.

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1 OJ L185, 16.8.71, p. 5.

2 OJ L13, 15.01.77, p. 1.

3 OJ L215, 18.08.80, p. 1. This Directive implemented the Community's obligations under the 1979 GATT Agreement on public procurement.

4 OJ L127, 20.5.88, p. 1.

5 OJ L210, 21.7.89, p. 1.

6 OJ L199, 9.8.93, p. 54.

A year earlier the Council adopted Directive 92/50/EEC ("the Services Directive") of 18 June 1992[8] on public procurement procedures for the award of public service contracts, thus completing the Community regulatory framework for the award of public procurement contracts. The Services Directive follows the same structure as the Works and the Supplies Directives but also contains special provisions on the conduct of design contests.

A tabular comparison of the operative provisions of the Supplies, Works and Services Directives is set out in Appendix I to this Guide.

It should be noted that public works, supplies and services contracts in the water, energy, transport and telecommunications sectors are covered by a separate Directive 93/38/EEC[9] which is not discussed in this Guide.

2. Legal effects of directives

Article 189 of the EC Treaty provides that directives are binding on Member States as to the result to be achieved, but leaves to the national authorities the choice of forms and methods.

Member States are obliged to transpose the provisions of directives into their national laws. Since the Works Directive is merely a consolidation of earlier directives, the Community legislator has not laid down a period for implementation: the Directive is immediately applicable.
As far as services and supplies are concerned, Member States were obliged to adapt their legal, regulatory and administrative provisions to conform to the Services Directive by 1 July 1993, and to the Supplies Directive by 14 June 1994.

The effectiveness of directives is not necessarily dependent on the adoption of implementing measures by the Member States.

According to the Court of Justice's case law on direct effect, once the time limit for transposing a directive into national law has passed, any provisions of the directive which are capable of directly affecting the legal relationship between the Member State to which the directive was addressed and private individuals can be enforced by such individuals in the courts of the Member State, and the Member State cannot avoid such enforcement on the ground that the formalities for incorporating the directive into its national law have not been completed or that contrary provisions still exist in its national law.

To determine whether provisions are capable of having direct effect in this way, the Court has ruled that in each particular case the nature, background and wording of the provision

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8 OJ L209, 24.7.92, p. 1.

9 coordinating the procurement procedures of entities operating in the water, energy, transport and

in question must be considered. It is worth noting that the Court of Justice has already had occasion to declare the rules on participation and advertising as having direct effet.

This is generally the case where the provision imposes a clear, precise and unconditional obligation not leaving the Member State any discretion.

Moreover, "when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions."[10] In effect, the Court considers that it would be contradictory to rule that an individual may rely upon the provisions of a directive in proceedings before the national courts against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and to refrain from applying conflicting provisions of national law.

II. Public procurement of services: Council Directive 92/50/EEC ("the Services Directive")

1. What is meant by public procurement of services?

1.1 Definition of a public service contract[11]

A public service contract means broadly a contract in writing whereby a service provider (as defined in 1.2 below) provides services to a contracting authority (as defined in 1.3 below) in return for pecuniary consideration. The Services Directive does not define services. Article 60 of the EC Treaty gives, as examples, activities of an industrial or commercial character and activities of craftsmen or of the professions. Moreover, services are considered to be services within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to the freedom of movement for goods, capital and persons. For the purposes of the Services Directive, the meaning of services is very wide. It includes every activity not covered by the following:

- public supply contracts within the meaning of the Supplies Directive;
- public works contracts within the meaning of the Works Directive;
- any contracts in relation to activities falling within the scope of Directive 93/38/EEC (see 1.1.1 below);
- certain other defined activities excluded by reason of their nature (see 1.1.2 below).

In addition, certain contracts which fall within the definition of public service contracts are nevertheless excluded from the scope of the Services Directive on public policy grounds (see 2.3 below).

It should be noted that, for the purposes of the Services Directive, it is immaterial whether the benefit of the services is provided to the contracting authority or to a third party on behalf of the contracting authority.

The Commission's original proposal[12] contained provisions on public service concessions analogous to those existing in the Works Directive for public works concessions. However, the Member States in Council decided not to include this type of contract because of wide divergence of national practices in matters of public service concessions. Thus the Services Directive does not apply to public service concessions, which broadly means that the Directive does not apply to contracts whereby a public authority transfers the execution of a service to the public lying within its responsibility to an undertaking of its choice and the latter agrees to execute the activity in return for the right to exploit the service, or this right together with payment. Nevertheless, the award of such contracts is, of course, subject to the Treaty rules concerning the freedom to provide services and to the

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11 Article 1(a) of the Services Directive.

general principles of Community law such as non-discrimination, equality of treatment, transparency and mutual recognition.

1.1.1 Contracts in the water, energy, transport and telecommunications sectors

Contracts of any kind awarded in the fields referred to in articles 2, 7, 8 and 9 of Council Directive 93/38/EEC[13] or fulfilling the conditions of article 6(2) of that Directive are excluded from the definition of a public service contract for the purposes of the Services Directive.[14] Where a contracting authority is also carrying out activities which confer on it the status of public utility or "contracting entity" within the meaning of Council Directive 93/38/EEC, all public service contracts which relate to its activities as a utility are excluded from the scope of the Services Directive. This exclusion applies even if Directive 93/38/EEC is not applicable by virtue of one of the exclusions in articles 7, 8 or 9 of that Directive. A detailed explanation of Directive 93/38/EEC will be set out in a separate guide.

It follows that the Services Directive does not apply to public service contracts in the following areas:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

  (i) drinking water; or

  (ii) electricity; or

  (iii) gas or heat;

  or the supply of drinking water, electricity, gas or heat to such networks;

(b) the exploitation of a geographical area for the purpose of:

  (i) exploring for or extracting oil, gas, coal or other solid fuels, or

  (ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable;

(d) the provisions or operation of public telecommunications networks or the provision of one or more public telecommunications services.

Where the contracting authority carries out activities within (a)(i) above, the exclusion shall also apply to contracts which:

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13 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L199, 9.8.93, p. 84.

- are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by these projects or irrigation or drainage installations; or
- are connected with the disposal or treatment of sewage.

1.1.2 Other service activities excluded from the definition of a public service contract

The following contracts are also excluded from the definition of a public service contract for the purposes of the Services Directive:[15]

- contracts for the acquisition or rental, by whatever means, of land, existing buildings, or other immoveable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to the Directive;
- contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time;
- contracts for voice telephony, telex, radiotelephony, paging and satellite services;
- contracts for arbitration and conciliation services;
- contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services;
- employment contracts;
- research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.

1.1.3 Full application of the Services Directive - Services in Annex IA

Annex IA to the Services Directive lists 16 categories of services which are subject to all the provisions of the Directive.[16] In effect, these services were identified as being of priority interest from the point of view of development of cross-border operations.

In Annex I to the Service Directive these services are identified by reference to the CPC classification. In the light of the Community system of classification of products by activity (CPA),[17] Annex IA has been rewritten in Table 1 to show the CPA reference

15 Article 1(a)(iii) to (ix) of the Services Directive.

16 Article 8 of the Services Directive.

17 Council Regulation (EEC) No 3696/93 of 29 October 1993 on the statistical classification of products by

numbers. A detailed breakdown of these categories as well as the corresponding CPC numbers, is set out in Appendix II.

Table 1
Annex IA services

Category No	Subject	CPA Reference No
1.	Maintenance and repair services	17.40.90, 17.52.90, 28.21.90, 28.22.90, 28.30.91, 28.30.92, 29.11.91, 29.11.92, 29.12.91, 29.12.92, 29.13.90, 29.21.91, 29.22.91, 29.21.92, 29.22.92, 29.23.91, 29.23.92, 29.24.91, 29.24.92, 29.32.91, 29.32.92, 29.40.91, 29.40.92, 29.51.91, 29.51.92, 29.52.91, 29.52.92, 29.53.91, 29.53.92, 29.54.91, 29.54.92, 29.55.91, 29.55.92, 29.56.91, 29.56.92, 29.60.91, 29.60.92, 30.01.90, 30.02.90, 31.10.91, 31.10.92, 31.20.91, 31.20.92, 31.62.91, 31.62.92, 32.20.91, 32.20.92, 32.30.91, 32.30.92, 33.10.91, 33.10.92, 33.20.91, 33.20.92, 33.40.90, 33.50.91, 33.50.92, 35.11.91, 35.11.92, 35.11.93, 35.12.90, 35.20.91, 35.20.92, 35.30.91, 35.30.92, 36.30.90, 50.2, 50.40.40, 52.7
2.	Land transport services(1), including armoured car services, and courier services, except transport of mail	60.21.2, 60.21.3, 60.21.4, 60.22, 60.23, 60.24.1, 60.24.22, 60.24.3, 64.12, 74.60.14
3.	Air transport services of passengers and freight, except transport of mail	62.10.10, 62.10.22, 62.10.23, 62.20.10, 62.20.20(part), 62.20.30, 62.30.10
4.	Transport of mail by land(1) and by air	60.24.21, 62.10.21, 62.20.20(part)
5.	Telecommunications services(2)	64.20.1, 64.20.2
6.	Financial services (a) Insurance services (b) Banking and investment services(3)	66, 67.2 65, 67.1
7.	Computer and related services	72.10.10, 72.20.2, 72.20.3, 72.3, 72.4, 72.5, 72.6
8.	R&D services(4)	73
9.	Accounting, auditing and book-keeping services	74.12.1, 74.12.2
10.	Market research and public opinion polling services	74.13
11.	Management consultant services(5) and related services	74.14, 74.15
12.	Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services	74.20.2, 74.20.3, 74.20.4, 74.20.5, 74.20.6, 74.20.7, 74.3
13.	Advertising services	74.4
14.	Building-cleaning services and property management services	70.3, 74.7
15.	Publishing and printing services on a fee or contract basis	22.21, 22.22.3, 22.23, 22.24.1, 22.25, 22.3
16.	Sewage and refuse disposal services; sanitation and similar services	90

(1) Except for rail transport services covered by Category 18.
(2) Except voice telephony, telex, radiotelephony, paging and satellite services.
(3) Except contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services.
(4) Except research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.
(5) Except arbitration and conciliation services.

1.1.4 Limited application of the Services Directive - Services in Annex IB

Annex IB to the Services Directive lists 11 categories of services which are subject only to the provisions of the directive on technical specifications (see 5. below) and on the transmission to the Commission of a contract award notice (see 4.1.3 below). In these categories of services it was considered necessary merely to give service providers the minimum information necessary to explore the market, and to create an information base which would permit informed judgments to be made about possible application of the procedural and other rules of the Services Directive to some or all of these categories.

These categories are set out in Table 2. In the same way for Table 1 above, the CPA reference numbers have been shown, but a detailed breakdown and the corresponding CPC numbers are given in Appendix II to this Guide.

Table 2
Annex IB services

Category N°	Subject	CPA Reference No
17.	Hotel and restaurant services	55
18.	Rail transport services	60.1, 60.21.1
19.	Water transport services	61
20.	Supporting and auxiliary transport services	63
21.	Legal services	74.11
22.	Personnel placement and supply services	74.5
23.	Investigation and security services, except armoured car services	74.60.11, 74.60.12, 74.60.13, 74.60.15, 74.60.16
24.	Education and vocational education services	80
25.	Health and social services	85
26.	Recreational, cultural and sporting services	92.11.3, 92.12, 92.13, 92.2, 92.31.2, 92.32.1, 92.33.1, 92.34, 92.4, 92.5, 92.6, 92.7
27.	Other services	

It should be noted that a service falls in the last category "other services" only in the exceptional case where it is not possible to place it in any of the categories 1 to 16 in Annex IA or categories 17 to 26 in Annex IB.

1.2 Service providers

A service provider is any natural or legal person which offers to provide services. A public body may also be a service provider within the meaning of the Services Directive.[18]

1.3 Contracting authorities

For the purposes of the Services Directive, the following are all contracting authorities:[19]

- the State,
- regional and local authorities,
- bodies governed by public law as defined below,
- associations formed by one or more local or regional authorities or bodies governed by public law.

1.3.1 The State

For the purposes of the Directive, the State includes the administration of the State. However, where an organisation without legal personality[20] does not form part of the State's administration in the traditional sense but carries out functions which would normally fall within the competence of the State, it is also to be considered as part of the State for the purposes of the Directive.

This point was clarified by the Court in its judgment of 20 September 1988 in Case 31/87[21] in which the question arose whether Directive 71/305/EEC applied to public works contracts placed by the local land consolidation committee, an organisation which did not have legal personality.

According to the Court's interpretation, which is equally valid for the Services Directive, the term "the state" must be interpreted from a functional point of view so as to include a body which, although not formally part of the State administration, is a vehicle which depends on, and through which, the state acts.

Consequently, a body whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public contracts which it is its task to award, must be regarded as falling within the notion of the State, even though it is not part of the State administration in formal terms.[22]

The Commission considers that the principle stated by the Court in relation to the term 'the State' can be applied equally to the definition of all the other contracting authorities defined by the Service Directive, so as to include any entity created by legal, regulatory or administrative act of one such contracting authority.

1.3.2 Body governed by public law[23]

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

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19 Article 1(b) of the Services Directive.

20 If the organisation has legal personality it falls to be considered under the heading "Body governed by public law" below.

21 Case 31/87, *Gebroeders Beentjes B.V. v Netherlands*, [1988] ECR 4635

22 *loc. cit.*, at paragraph 12.

- having legal personality, and
- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

Thus the Services Directive applies to all public or private law entities whose activity and operational decisions are or can be influenced by a contracting authority by reason of one or more of the links described in the third indent above, and which were established with a public or general interest purpose.

The only entities established with a public or general interest purpose and fulfilling the other criteria but which the Services Directive does not consider as contracting authorities, are those which were established specifically to satisfy needs of an industrial or commercial character, that is to say, needs which such entities satisfy by carrying out economic activities of an industrial or commercial nature consisting in the supply of goods or services to private or public economic operators in open markets which are fully subject to competition. In effect, such entities carry out an activity which can be assimilated to that of a private undertaking.

It is important to emphasise that the exclusion for entities which carry out industrial or commercial activities of a private entrepreneurial nature applies only if the entity in question was set up with the specific object of carrying out such activities. Thus the exclusion does not apply to entities which, while carrying on industrial or commercial activities, were in fact established with a public or general interest purpose, for example, an entity established specifically to execute certain administrative tasks of general public interest in the social sphere but which also carries on a commercial activity in order to finance its budget.

Nevertheless, each individual case must be analysed on its particular facts to determine whether it is a case of a public law entity subject to the obligations of the directive.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to the Works Directive. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35 of that Directive. However, the obligation for a body governed by public law to comply with the Services Directive does not depend on the inclusion of that body in the list. The obligation arises when the body fulfils the criteria discussed above. Equally, where a body ceases to fulfil those criteria, it will cease to be subject to the Services Directive, even if its name is still on the list.

1.4 Types of contract

As far as the form of the public service contract is concerned, the Services Directive applies only to contracts in written form which, in practice, will include all contracts above the value threshold discussed below.[24]

The Commission interprets the definition of the contracting parties obligations very widely. All forms of consideration moving from the contracting authority and capable of valuation in money terms satisfy the requirement of pecuniary consideration.[25] Equally, the Services Directive covers all arrangements whereby a services provider undertakes to provide services at any time to or on behalf of the contracting authority. The wide notion of services envisaged by the Directive cannot be limited by any narrower concepts of service contracts which may exist in national law.

Binding framework contracts concluded between a contracting authority and a service provider the purpose of which is to establish the terms, such as prices, quantities, conditions of supply, of services which may be ordered during a specified period, are public service contracts which must be valued in accordance with the Services Directive and awarded in accordance with its terms if the relevant threshold is attained.

Problems can arise in relation to certain practices which give rise to non-binding preliminary understandings between contracting authorities and service providers. It should be emphasised that no such practices (contractual, procedural, administrative or other) can have the effect of avoiding application of the Services Directive to the conclusion of contracts which the Services Directive treats as public service contracts and the estimated value of which exceeds the relevant threshold.

1.5 Borderline between the different directives and types of activity

As a general rule it is not possible to avoid the application of the Directives by including the service in a contract which for one reason or another is not subject to the Works, Supplies or Services Directive. In such cases it is necessary to examine whether the contracting authority could have split the transactions into separate contracts, one or more of which would have been subject to the Directives.

An illustration of this principle is to be found in the Court's judgment in Case C-3/88[26] in which the Italian Government argued that certain contracts for the purpose of computer hardware for a data processing system were not supply contracts because the principal object of the contract was the provision of services (at a time before the Services Directive was in force), namely the creation of software, the planning, installation, maintenance and technical commissioning of the system, and sometimes its operation. The Court rejected this argument because, on the facts of the case, the Italian Government could have approached companies specialising in software development for the design of the data-

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24 Article 1(a) of the Services Directive.

25 "*A titre onéreux*" in the French text, "for pecuniary interest" in the English text, "entgeltlichen" in the German text, "onder bezwarende titel" in the Dutch text, "gensidigt bebyrdende" in the Danish text, i.e. not a contract which constitutes a unilateral promise by the service provider without consideration moving from the other party.

processing systems in question and, in compliance with Directive 77/62/EEC,[27] could have purchased hardware meeting the technical specifications laid down by such companies.

1.5.1 Borderline between public service contracts and public supply contracts[28]

The Services Directive defines the borderline between a public service contract and a public supply contract by reference to the relative values of the service and supply elements. Where a public contract intended to cover both the supply of products within the meaning of the Supplies Directive, and the provision of services listed in the annexes to the Services Directive, it will fall within the scope of the Services Directive if the value of the services is greater than the value of the supplies; otherwise it will fall within the Supplies Directive.

For example, suppose that a local authority wishes to acquire certain telecommunications services, the value of which is estimated at ECU 240,000, together with certain telecommunication equipment the value of which is estimated at ECU 230,000. If the telecommunications services do not include voice telephony, telex, radiotelephony, paging or satellite services, the contract will qualify as a public service contract because the value of the services within Annex IA and Annex IB exceeds the value of the supplies. If, however, the telecommunications services include voice telephony services to an estimated value of ECU 100,000, the value of Annex IA and Annex IB services will not be greater than the value of the supplies, and so the contract will qualify as a public supply contract.

1.5.2 Borderline between public service or supply contracts and public works contracts

Provided a contract fulfils the definition of a works contract laid down in article 1(a) of the Works Directive, it is a works contract for the purposes of the public procurement directives irrespective of whether the contract includes supplies and/or services. The Works Directive applies in particular to those contracts where the contractor carries out the design and lets contracts for the execution of the works. Thus, there is no need for a value criterion to determine whether a contract is a services (or supplies) contract rather than a works contract.[29]

1.5.3 Borderline between contracts for Annex IA services and contracts for Annex IB services[30]

The Services Directive provides that where a contract has as its object services listed in both Annexes IA and IB, it shall be awarded in the same way as a contract for Annex IA

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27 The then directive on supplies.

28 Article 2 of the Services Directive.

29 Note that in the case of a mixed contract for the performance of the works which are merely incidental to some other operation, such as an assignment of property, the contract will not fall within the scope of the Works Directive, see Case C-331/92, *Gestion Hotelera Internacional SA v Communidad Autonoma de Canarias and others*, [1994] ECR I-1329.

services where the value of the services listed in Annex IA is greater than the value of services listed in Annex IB. Where this is not the case it shall be awarded in the same way as a contract for Annex IB services. This principle is nevertheless subject to the dissociation principle mentioned in 1.5 above in cases where Annex IB Services have been added to a contract in order to avoid the full rigours of the Services Directive.

1.6 Service contracts subsidised by contracting authorities

Where a contracting authority subsidises by more than 50% a service contract awarded by another entity in connection with any of the following works contracts:[31]

- Class 5, Group 502 of the NACE nomenclature (Civil engineering: construction of roads, bridges, railways, etc.)
- building works in relation to:
    - hospitals
    - sports facilities
    - recreation and leisure facilities
    - school and university buildings
    - administrative buildings

the provisions of the Services Directive must be applied.

Three possibilities arise:-

- the subsidised entity is itself a contracting authority in which case it applies the Services Directive itself;
- the subsidised entity is not a contracting authority, and the contracting authority providing the subsidy chooses the service provider itself (even though the services are for the subsidised authority), in which case the contracting authority is obliged to respect the Directive;
- the subsidised entity is not a contracting authority, but chooses the service provider itself. In this case the contracting authority providing the subsidy must ensure that the subsidised entity respects the provisions of the Services Directive as though it were itself a contracting entity. The Services Directive leaves it to the Member States as to how this should be done, for example, by including the necessary rules in the conditions for the grant of the subsidy, and providing that the subsidy should be recovered if the conditions are not satisfied.

It should be observed that the list of the types of works to which this rule applies is exhaustive whereas the list of institutions - hospitals, sports, recreation and leisure facilities, school and university buildings, buildings used for administrative purposes - is generic. A restrictive interpretation of these categories would hinder the objectives of the Directive, namely to improve transparency in public procurement. Thus, for example, old peoples' houses and institutions for the physically handicapped should be assimilated to hospitals where the provisions of medical and surgical services to the old and the handicapped is a main objective of such institutions.

This provision has a parallel in the Works Directive where the same rules apply to works contracts in the above areas which are subsidised to more than 50% by a contracting authority. The parallelism stops there. The rule does not apply to a services contract which is not subsidised, even when connected with a works contract which is.

2. When public service contracts fall within the Services Directive

Not all public service contracts, as defined above, are subject to the procedural rules of the Services Directive. Assuming none of the exclusions examined above apply, the Services Directive is only applicable to public service contracts which exceed a certain value threshold.

2.1 Value threshold[32]

A public service contract is subject to the provisions of the Services Directive if its estimated value, net of VAT, is greater than or equal to ECU 200,000.

The values of the ECU 200,000 threshold in national currencies is revised every two years with effect from 1 January 1994. The calculation of these values is based on the average daily values of the relevant currency expressed in ECUs over the 24 months terminating on the last day of August immediately preceding the 1 January revision. The values obtained are published in the *Official Journal of the European Communities* at the beginning of November.

The value of the thresholds in national currencies which are applicable until the next date for revision (31.12.97) are as follows:

Thresholds values in national currencies of **ECU 200,000**

Franc belge	7,898,547	Irish pound	160,564
Franc luxembourgeois	7,898,547	Lira italiana	397,087,000
Dansk krone	1,500,685	Oster. Schilling	2,681,443
Deutsche Mark	381,161	Pound sterling	158,018
Drachmi	58,015,458	Peseta	31,992,917
Franc français	1,316,439	Escudo	39,297,792
Markka	1,223,466	Svensk krona	1,865,157
Nederlandse gulden	427,359		

In relation to the provisions of the Directive referred to in the paragraph 2.1 above, one should point out that the European Parliament and the Council are currently examining a proposal for a Directive which will modify the provisions of Directive 92/50/EEC in order to take into account the new Government Procurement Agreement[33] signed by the

32 Article 7(1) of the Services Directive

European Union following the Uruguay Round Trade Negotiations undertaken within of the scope of the World Trade Organisation.

2.2 Calculation of the contract value

2.2.1 Methods

The general rule is that the contracting authority must take into account the estimated total remuneration for the service net of VAT. For certain types of service contracts, the Services Directive specifies certain items which constitute remuneration, notably:[34]

- the premium payable, in the case of insurance services;
- fees, commissions and interest, in the case of banking and other financial services;
- fees or commissions, in the case of design contracts.

The Commission considers this list to be illustrative and does not limit, in any way, the general principle that the total remuneration received must be taken into account.

In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value is:[35]

- in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;
- in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.

In the case of regular contracts or of contracts which are to be renewed within a given time, the contract value may be established on the basis of:[36]

- either the actual aggregate cost of similar contracts for the same categories of services awarded over the previous fiscal year of twelve months, adjusted, where possible, for anticipated changes in quantity or value over the twelve months following the initial contract,
- or the estimated aggregate cost during the twelve months following the first service performed or during the term of the contract, where this is greater than twelve months.

Where a proposed contract provides for options, the basis for calculating the contract value shall be the maximum total possible assuming that all the options will be exercised.[37]

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34 Article 7(4) of the Services Directive.

35 Article 7(5) of the Services Directive.

36 Article 7(6) of the Services Directive.

In any event, selection of the valuation method may not be made with the intention of avoiding the application of the Services Directive.[38]

2.2.2 Split contracts[39]

The Services Directive prohibits any division of services with the intention of avoiding application of the value thresholds. This prohibition is directed at any division of a contract which is not justified by objective considerations and so is presumed to be designed to avoid application of the Directive.

2.2.3 Division of the contract into lots

Where the services are divided into several lots, each one the subject of a contract, the cumulative value of all the lots must be taken into account in determining whether the ECU 200,000 threshold has been reached. If the threshold is reached, the Services Directive must be applied to each contract, irrespective of the fact that its individual value may be less than ECU 200,000.[40]

A contracting authority need not apply the provisions of the Services Directive to any lots which have an estimated individual value net of VAT of less than ECU 80,000, provided that the total value of such lots does not exceed 20% of the total value of all the lots. Exclusion of lots in this way does not prevent their value from being taken into account to determine whether the other lots must be awarded in accordance with the Services Directive.

Example:

A services contract for maintenance of buildings is divided into the following lots:

Lot 1	ECU 100,000
Lot 2	ECU 60,000
Lot 3	ECU 45,000
Lot 4	ECU 45,000
Total	ECU 240,000

The cumulative value is ECU 240,000 so the value threshold for application of the Services Directive has clearly been reached. Each of the lots 2, 3 and 4 is less than ECU 80,000 but the derogation is permitted only up to 20% of the cumulative value, namely ECU 48,000. The contracting authority therefore has the option of excluding Lot 3 or Lot 4, but not both, from application of the Services Directive. The three lots not excluded must be awarded in accordance with the Directive because their total value *including* the excluded lot, is not less than ECU 200,000.

2.2.4 Intended repetition of similar services

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38 Article 7(3) of the Services Directive.

39 Article 7(3) of the Services Directive.

It should be remembered that when a contracting authority intends to have recourse to the negotiated procedure without publication of a notice for the purposes of procuring new services as a repetition of similar services (see 3.3.2.6), it must aggregate the value of the original services and the intended subsequent services in determining whether the threshold has been achieved.

2.3 Public service contracts excluded from the scope of the Services Directive

Certain contracts which fall within the definition of a public service contract (see 1.1 above) are nevertheless excluded from the scope of the Services Directive for reasons of public policy.

2.3.1 Exclusion of certain public service contracts in the field of defence[41]

Assuming none of the exceptions described above apply, the Services Directive applies to public service contracts awarded by contracting authorities in the field of defence except those to which the provisions of Article 223(1)(b) of the EC Treaty apply. Article 223(1)(b) allows a Member State to take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material. By decision of 15 April 1958 the Council established a list of the products which, when destined for military purposes, fall within this provision. Thus public service contracts will fall within the exception if they are for services in relation to products on the list, e.g. services for their design, transport, maintenance, etc. The Commission considers that this exception applies only when the listed products are used *exclusively* for military purposes.

2.3.2 Public service contracts excluded on grounds of secrecy or public security[42]

The Services Directive does not apply to public service contracts when:

- the services are declared to be secret; or
- the execution of the services must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned; or
- the protection of the basic interests of that State's security so requires.

2.3.3 Exclusion of public service contracts governed by different procedural rules[43]

The Services Directive does not apply to public service contracts governed by different procedural rules and awarded:

(a) in pursuance of an international agreement concluded between a Member State and one or more third countries and covering services intended for the

41 Article 4(1) of the Services Directive.

42 Article 4(2) of the Services Directive.

joint implementation or exploitation of a project by the signatory States; any agreement shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts set up by Council Decision 71/306/EEC;

(b) to undertakings in a Member State or a third country in pursuance of an international agreement relating to the stationing of troops;

(c) pursuant to the particular procedure of an international organisation.

3. Contract award procedures

Like the Works and the Supplies Directives, the Services Directive provides that contract procedures may be one of three types: the open procedure and the restricted procedure, which contracting authorities are free to choose, and the negotiated procedure, which can only be used in exceptional circumstances.[44]

Important

In open and restricted procedures contracting authorities may request further information from tenderers in order to facilitate assessment of their offers, but it is forbidden to negotiate the terms of such offers. This important aspect of the transparency of open and restricted procedures has been stated clearly by the Council and the Commission in the following terms: "In open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities, and provided this does not involve discrimination."[45]

3.1 The open procedure

In an open procedure any interested service provider may submit an offer in response to the publication of the contract notice.[46]

3.2 The restricted procedure

In a restricted procedure there are two stages.[47] In the first stage any interested service provider may submit a request to participate in response to the publication of the contract notice. Such service provider is called a "candidate". In the second stage the contracting authority invites the submission of tenders from selected candidates. These candidates must be selected in accordance with the rules described in 6 below.

A restricted procedure may be accelerated[48] when urgency renders it impracticable to respect the normal deadlines for restricted procedures (see 4.8.2). Since this is an exception which may limit competition, it must be interpreted restrictively and limited to those cases where the contracting authority can prove the existence of objective circumstances giving rise to urgency and a real impossibility of respecting the normal deadlines for restricted procedures.

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44 Article 11 of the Services Directive.

45 OJ L111, 30.4.94, p. 114

46 Article 1(d) of the Services Directive.

47 Article 1(e) of the Services Directive.

The reasons justifying recourse to the accelerated procedure must be set out in the contract notice published in the Official Journal (see 4.3.2).

3.3 The negotiated procedure

Negotiated procedures are those procedures whereby contracting authorities consult the service providers of their choice and negotiate with one or more of them the contract conditions, for example, the technical, administrative or financial conditions.[49]

In the negotiated procedure the contracting authority has the possibility of acting as a free economic operator not only in the award of the contract, but in the preliminary discussions. However, this procedure cannot be assimilated to one of complete freedom of contract. The contracting authority must respect certain rules of good administration when:

- setting the contractual conditions, notably as to price, deadlines and technical characteristics;
- comparing the offers and their respective advantages;
- applying the principle of equality of treatment among the candidates.

Recourse to the negotiated procedure is justified only in the exceptional cases set out exhaustively in the Services Directive.[50]

In accordance with the case-law of the Court, these provisions must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.[51]

The cases where recourse to a negotiated procedure is justified fall into two categories: those where a contract notice must be published and those where a contract notice need not be published.

3.3.1 Negotiated procedure with publication of a contract notice[52]

As in the restricted procedure, the contracting authority must publish a contract notice inviting expressions of interest (candidatures) and then select the candidates to be invited to negotiate on the basis of the qualification criteria set out in the contract notice. The only permitted criteria are those set out in articles 29 to 35 of the Services Directive (personal situation, professional registration, financial and economic standing, ability and technical capacity).

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49 Article 1(f) of the Services Directive.

50 Article 11 of the Services Directive. See Case C-328/92, *Commission* v *Spain*, (pharmaceutical products), [1994] ECR I-1569 on supplies; and Case C-24/91, *Commission* v *Spain* (university buildings), [1992] ECR I-1989 on works.

51 Case 199/85, *Commission* v *Italy* (incinerator plant in Milan), [1987] ECR 1039, at paragraph 14.

As with the restricted procedure, a negotiated procedure can be accelerated if the conditions of urgency set out in 3.2 above are satisfied.

There are three cases in which the Services Directive allows recourse to the negotiated procedure with prior publication of a contract notice.

3.3.1.1 Irregular or unacceptable offers[53]

A contracting authority may have recourse to the negotiated procedure with prior publication of a contract notice, where in an open or restricted procedure all the offers made are irregular[54] or unacceptable[55] having regard to the applicable national provisions that are in accordance with articles 23 to 28 of the Services Directive, insofar as the original terms of the contract are not substantially altered. The theory here is that since the original open or restricted procedure failed to produce regular acceptable tenders or requests to participate[56], it is necessary to close the procedure officially and start again, but this time recourse to the negotiated procedure is permitted so that the process of negotiation can be used to avoid the former irregular or unacceptable aspects of the tenders.

However, recourse to the negotiated procedure the second time round is only permitted if the contractual conditions are not substantially modified. The Commission considers that changes to the financial arrangements, the period for execution of the services, the technical specifications, etc. are substantial modifications which do not allow recourse to the negotiated procedure.

Since a new procedure is involved, a new contract notice must be published. However, the contract notice may be dispensed with provided all the parties invited to negotiate include the tenderers or candidates who, in the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the tendering procedure and satisfy the qualification criteria for selection set out in articles 29 to 35 of the Services Directive (personal situation, professional registration, financial and economic standing, ability and technical capacity). If any of these are excluded (whether or not additional parties are invited to negotiate) a contract notice must be published to enable the excluded parties to resubmit requests to participate.

3.3.1.2 Overall pricing not possible[57]

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53 Article 11(2)(a) of the Services Directive. This exception is also available under the Works and Supplies Directive.

54 For example, tenders which do not comply with the rules of the procurement, tenders the prices of which are manifestly not the result of competitive bidding, or tenders which contain oppressive one-sided clauses.

55 For example, tenders which are submitted after expiry of the deadline, or by tenderers who do not have the necessary qualifications, or which contain prices which are either too high having regard to the contracting authority's budget or which are abnormally low.

56 i.e. a request made by the service provider that it be invited to submit a tender in a restricted procedure, or invited to negotiate in a negotiated procedure.

The negotiated procedure, with publication of a contract notice, may be used in exceptional cases where the nature of the services or the risks involved do not permit prior overall pricing. The theory here is that tenderers would not be able to put in a fixed overall price for the services but would have to incorporate contingencies which render a straight-forward comparison of pricing impossible. An example might arise in the case of repair services where the extent of the repairs necessary would not become apparent until the work had commenced.

3.3.1.3 Contract conditions cannot be specified with precision[58]

The negotiated procedure, with publication of a contract notice, may be used when the nature of the services to be procured is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures. This may arise in particular, in the case of insurance, banking and investment services falling within category no. 6 of Annex IA to the Services Directive, as well as intellectual services generally.

3.3.2 Negotiated procedure without publication of a contract notice

A contracting authority may have recourse to the negotiated procedure without publication of a contract notice in the six cases[59] described below.

3.3.2.1 Absence of tenders[60]

The negotiated procedure may be used without publication of a contract notice in the absence of tenders or of appropriate tenders in response to an open or restricted procedure, provided that the original terms of the contract are not substantially altered. The contracting authority must first terminate the prior open or restricted procedure and inform the Official Journal accordingly.[61] The theory here is that no-one was interested in responding to the open or restricted procedure, and that any offer received can be assimilated to the absence of a tender because the offer had no relevance to the procurement requirements of the contracting authority, as defined in the contract documents.

The requirement that the terms of contract must not be substantially altered when put out for negotiation is the same as in case 3.3.1.1 above.

Tenders are considered not to be appropriate when they are inacceptable or irregular in the sense explained above, and, in addition, their content has no relevance to the procurement and are, therefore, totally inadequate for the contracting authority's purposes as defined in the contract documents. For this reason, the submission of such tenders is assimilated to the absence of tenders.

3.3.2.2 When, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider[62]

This is a very narrow exception and applies only in those cases where it can be said that to invite tenders or expressions of interest would be abusive because there is only one service provider who can provide the particular service.[63] The safest cases where the exception can be used are those

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58 Article 11(2)(c) of the Services Directive.

59 Article 11(3) of the Services Directive.

60 Article 11(3)(a) of the Services Directive.

61 See Article 12(2) of the Services Directive.

62 Article 11(3)(b) of the Services Directive.

where a particular service provider has the exclusive right to carry out a particular service. However, the exception does not apply if the exclusive right is licensed to other parties or can reasonably be obtained on licence. Thus, for example, a sculptor would have the exclusive right to repair or remake a work of art sculpted by himself, but he would not have the exclusive right to produce photographs of the work if he had already licensed other parties to produce such photographs.

The cases where, in the absence of exclusive rights, technical or artistic reasons justify recourse to a negotiated procedure are very narrow indeed. An example might be found where a local authority had already commissioned a work of art and later decided to commission a second work of art to make a "pair". In such circumstances it would be necessary to show for objective reasons that it could not be envisaged that the second work of art be provided by a different artist.

3.3.2.3 Where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates must be invited to participate in the negotiations.[64]

Recourse to the negotiated procedure is permitted here because the design contest will already have been subject to publicity if the value of the contract is not less than the threshold of ECU 200,000 (see 8 below).

3.3.2.4 Extreme urgency[65]

The negotiated procedure may be used without publication of a contract notice. In so far as strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be kept. The circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.

Unforeseeable events here means events which fall outside the field of normal economic and social activity, such as floods or earthquakes which necessitate urgent services to assist the victims.[66] It should be observed that recourse to this procedure is permitted by the Services Directive only to the extent necessary to procure services necessary to deal with the immediate urgent situation. Taking into account the minimum deadline imposed (see 4.8 below) this means for services covering a period of about one month. For services required after such period, the contracting authority has sufficient time to publish a contract notice and award a service contract in accordance with normal procedures, invoking urgency as a grounds for use of shorter deadlines.[67]

3.3.2.5 Additional services[68]

The negotiated procedure may be used without publication of a contract notice for additional services not included in the project initially considered or in the contract first

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64 Article 11(3)(c) of the Services Directive.

65 Article 11(3)(d) of the Services Directive. This exception is also found in the Works and Supplies Directive.

66 C-194/88R, *Commission* v *Italy* (incinerator), [1988] ECR 5647. The Court ordered the Italian Republic to suspend the award of a public works contract on the grounds that urgency was not due to unforeseeable events and, therefore, the contracting authority should have published a notice in the Official Journal of the EC.

67 In Case C-24/91, *Commission* v *Spain*, [1992] ECR I-1989, the Court found that the extreme urgency relied on by the Spanish Government was not incompatible with the time limits provided for in the context of an accelerated procedure. Hence the award of contracts for the extension and renovation of the Faculty of Political Science without publication of a contract notice constituted a breach of Community law. See also Case C-107/92, *Commission* v *Italy* (avalanche barriers), [1994] ECR I-4655.

concluded but which have, through unforeseen circumstances, become necessary for the performance of the service described therein.

In such a case, recourse to the negotiated procedure without publication of a contract notice is permitted provided the following three conditions are satisfied:

- the contract for the new service is awarded to the service provider who supplied the original services;
- the additional services cannot be technically or economically separated from the main contract without great inconvenience for the contracting authority or such services, although separable from the performance of the original contract, are strictly necessary for its completion;
- the aggregate estimated value of contracts awarded for additional services does not exceed 50% of the amount of the main contract.

This exception is to be found also in the Works Directive.

3.3.2.6 Repetition of services[69]

The negotiated procedure may be used without publication of a contract notice for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authority awarded an earlier contract. Four conditions must be satisfied:

- the new services must conform to a basic project for which a first contract was awarded by open or restricted procedure. Thus this condition is not satisfied if the first contract was awarded by negotiated procedure for any reason;
- when the first contract was put up for tender, notice was given that the negotiated procedure might be adopted for the procurement of additional services;
- the total estimated cost of the subsequent services must be taken into consideration in estimating the value of the contract for the purposes of determining the applicability of the Directive.
- recourse to the negotiated procedure without a contract notice takes place within three years of the original contract.

3.4 Information about the contracting authority's decisions

3.4.1 Rejection of candidatures and tenders[70]

69 Article 11(3)(f) of the Services Directive. This exception is also available under the Works Directive. This exception is also available under the Works Directive.

Any eliminated candidate or tenderer may request the contracting authority to inform him of the reasons for the rejection of his application or tender. In the case of a rejected tender he may also request the name of the successful tenderer.

The contracting authority is obliged to communicate the information requested within 15 days of receipt of the request.

3.4.2 Cancellation of a procurement procedure

A contracting authority which has commenced a procurement procedure may decide to cancel it or to begin a new procedure. In such cases it must communicate the grounds of its decision to the Office for Official Publications of the European Communities.[71] It must also communicate such decision to any candidate or tenderer who so requests in writing.

3.4.3 Report of contract award

For each services contract awarded which falls within the Services Directive, the contracting authority must draw up a written report[72] which includes at least the following:

- the name and address of the contracting authority, the subject and value of the contract;
- the names of the candidates or tenderers admitted and the reasons for their selection;
- the names of the candidates or tenderers rejected and the reasons for their rejection;
- the name of the successful tenderer and the reasons why his tender was selected and, if known, the part of the contract which the successful tenderer intends to subcontract to third parties;
- for negotiated procedures, with or without publication of a contract notice, the circumstances justifying recourse to such procedures. The permitted circumstances are described in 3.3 above.

The report, or the main features of it, must be communicated to the Commission if it so requests.

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71 Article 12(2) of the Services Directive.

4. Common advertising rules

4.1 Contract notices

One of the most important elements of the Community's public procurement rules is the establishment of transparent procedures which provide equal opportunities for all interested economic operators to tender in open procedures, or submit an expression of interest in restricted and negotiated procedures. Such transparency is achieved through the publication of a series of notices about the contract.

4.1.1. Annual indicative notice[73]

The Directive requires contracting authorities to publish, as soon as possible after the beginning of their budgetary year, an indicative notice about their intended total procurement for the year in each of the service categories listed in Annex IA (i.e. the service categories for which all the rules of the Services Directive are applicable). Contracting authorities are released from this obligation only if the total estimated value of the envisaged contracts is less than ECU 750,000.

If a contracting authority fails to publish an annual indicative notice when so obliged, the Court of Justice can condemn the Member State concerned for failure to respect its obligations under the EC Treaty.[74] By such failure, the contracting authority could wrongly prevent a service provider from participating in an award procedure, or cause a service provider to incur abnormal costs. For example, where a contracting authority failed to include a complex study in its annual indicative notice, a tenderer would be unable to start preparing some of the basic documentation, with the result that, once the contract notice was published, he was obliged to employ extra staff to deal with the work-load required to complete the tender within the deadline.

There is an obvious practical incentive for a contracting authority to publish an annual indicative notice, namely, to reduce the deadlines for the receipt of tenders in both open and restricted procedures (see 4.8 below). Such reduction is possible even if the annual indicative notice is published voluntarily.

4.1.2. Individual contract notice

The obligation of contracting authorities to publish a notice announcing the intention to award a contract constitutes a key element for the creation of the Single Market. It permits economic operators from all Member States to be fully informed about public contracts all over the Community. The number of possible tenderers increases together with the likelihood of better service at competitive prices.

An individual contract notice must be published before any open or restricted procedure or design contest.[75] The general rule is that it must also be published before negotiated procedures. However, in a number of cases exhaustively described in the Directive,

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73 Article 15 of the Services Directive.

74 e.g. Case C-272/91, *Commission v Italy* (concession for lottery computerisation system), [1994] ECR I-1409.

contracting authorities may award a contract under a negotiated procedure without prior publication of a notice (see 3.3.2 above).

4.1.3. Contract award notice

Contracting authorities who have awarded a contract, regardless of the procedure used, or who have held a design contest, must send a notice of the results to the Office of the Official Publications of the EC.[76] This notice must be sent at the latest forty-eight days after the award of the contract in question or the closure of the design contest in question. This rule applies also to contracts for the services listed in Annex IB to the Directive. However, in the case of public contracts for services listed in Annex IB, contracting authorities are required to indicate in the notice whether or not they agree to its publication. All other notices concerning the award of a service contract or the holding of a design contest are published in full in the Official Journal of the European Communities and in the TED data bank in all the official languages of the Communities, although only the text in the original language will be considered authentic.

4.2 Contents and layout of notices

The Services Directive provides that the notices should be drawn in accordance with the models set out in Annexes III and IV of the Directive.[77]

Most of the titles included in these notices are mandatory. As a result, a notice may not be valid unless all these titles have been specified. However, in the case of optional titles, a contracting authority may consider them irrelevant to the contract in question, and should simply indicate on the notice "Not applicable".

All notices should be clear and concise. Their length should not be greater than one page of the Official Journal, or approximately 650 words.[78]

Some of the titles included in the various types of notices require further clarification.

4.2.1 Individual contract notices

One of the rubrics included in this type of notice concerns the economic and technical capacity required for the selection of service providers. According to the Services Directive, contracting authorities may not require any conditions other than those specified in Articles 31 and 32 when they request information concerning economic and technical capacity (see 6.2.3 and 6.2.4 below).

The rubric in the notice concerning the criteria for the award of the contract should indicate either:

(a) that the award will be made to the economically most advantageous tender; or

(b) that the award will be made to the tender with the lowest price; or

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76 Article 16(1) of the Services Directive.

77 Article 17(1) of the Services Directive.

(c) in a case of restricted procedure, the contracting authority may describe the criteria for the award of the contract in the invitation to tender. In such a case, the relevant title of the individual pre-contract notice should state that the award criteria will be set out in the invitation to tender.

If the contract is to be awarded to the economically most advantageous offer the contracting authority must state the award criteria which it intends to apply either in the contract documents or in the tender notice. If it decides to state them in the contract documents it should be mentioned under the relevant title of the contract notice that the award criteria will be listed in the contract documents.

4.2.2 Contract award notices

As a general rule, contract award notices must be sent to the Office for Official Publication of the European Communities. The notice will be published in the case of public contracts for services listed in Annex IA to the Services Directive. In the case of contracts involving only Annex IB services, the award notice will be published only if the contracting authority has indicated its agreement.[79] However, as an exception to this general rule, publication is not necessary if:[80]

- it would impede law enforcement;
- it would be contrary to public interest;
- it would prejudice the legitimate interests of a particular enterprise, public or private;
- it might prejudice fair competition between service providers.

4.3 Model notices[81]

The model notices for award procedures involving service contracts are set out in Annex III to the Services Directive and also below. All relevant rubrics must be completed in a material fashion. Thus, for example, persons authorised to be present at the opening of tenders, and the date, time and place of opening are material so as to enable potential suppliers to discuss the identity of their competitors, and to check whether they meet the criteria laid down for qualitative selection.[82]

4.3.1 Prior information - Annex IIIA of the Services Directive

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority, and, if different, of the service from which additional information may be obtained.

79 Article 16(2) and (3) of the Services Directive.

80 Article 16(5) of the Services Directive.

81 For the notices used in design contests, see section 8.4 below.

2. Intended total procurement in each of the service categories listed in Annex I A.
3. Estimated date for initiating the award procedures, per category.
4. Other information.
5. Date of dispatch of the notice.
6. Date of receipt of the notice by the Office for Official Publications of the European Communities.

4.3.2. Individual contract notice

Open procedures - Annex IIIB of the Services Directive

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority.
2. Category of service and description. CPC reference number.
3. Place of delivery.
4. (a) Indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.
   (b) Reference of the law, regulation or administrative provision.
   (c) Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.
5. Indication of whether service providers can tender for a part of the services concerned.
6. Where applicable, non-acceptance of variants.
7. Duration of contract or time limit for completion of the service.
8. (a) Name and address of the service from which the necessary documents may be requested.
   (b) Final date for making such requests.
   (c) Where applicable, the amount and terms of payment of any sum payable for such documents.
9. (a) Persons authorized to be present at the opening of tenders.
   (b) Date, time and place of the opening.
10. Where applicable, any deposits and guarantees required.
11. Main terms concerning financing and payment and/or references to the relevant provisions.
12. Where applicable, the legal form to be taken by the grouping of service providers winning the contract.
13. Information concerning the service provider's own position, and information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.
14. Period during which the tenderer is bound to keep open his tender.

15. Criteria for the award of the contract and, if possible their order of importance. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents.
16. Other information.
17. Date of dispatch of the notice.
18. Date of receipt of the notice by the Office for Official Publications of the European Communities.

Restricted procedures - Annex IIIC of the Services Directive

1. Name, address, telegraphic address, telephone, telex and fax number of the contracting authority.
2. Category of service and description. CPC reference number.
3. Place of delivery.
4. (a) Indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.
   (b) Reference of the law, regulation or administrative provision.
   (c) Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.
5. Indication of whether the service provider can tender for a part of the services concerned.
6. Envisaged number or range of service providers which will be invited to tender.
7. Where applicable, non-acceptance of variants.
8. Duration of contract, or time limit for completion of the service.
9. Where applicable, the legal form to be assumed by the grouping of service providers winning the contract.
10. (a) Where applicable, justification for the use of the accelerated procedure.
    (b) Final date for the receipt of requests to participate.
    (c) Address to which they must be sent.
    (d) Language(s) in which they must be drawn up.
11. Final date for the dispatch of invitations to tender.
12. Where applicable, any deposits and guarantees required.
13. Information concerning the service provider's own position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.

14. Criteria for the award of the contract and, if possible, their order of importance if these are not stated in the invitation to tender.
15. Other information.
16. Date of dispatch of the notice.
17. Date of receipt of the notice by the Office for Official Publications of the European Communities.

Negotiated procedures - Annex IIID of the Services Directive

1. Name, address, telegraphic address, telephone, telex and fax number of the contracting authority.
2. Category of service and description. CPC reference number.
3. Place of delivery.
4. (a) Indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.
   (b) Reference of the law, regulation or administrative provision.
   (c) Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.
5. Indication of whether the service provider can tender for a part of the services concerned.
6. Envisaged number or range of service providers which will be invited to tender.
7. Where applicable, non-acceptance of variants.
8. Duration of contract, or time limit for completion of the service.
9. Where applicable, the legal form to be assumed by the grouping of service providers winning the contract.
10. (a) Where applicable, justification for the use of the accelerated procedure.
    (b) Final date for the receipt of requests to participate.
    (c) Address to which they must be sent.
    (d) Language(s) in which they must be drawn up.
11. Where applicable, any deposits and guarantees required.
12. Information concerning the service provider's own position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.

selected by the contracting authority.

14. Other information.
15. Date of dispatch of the notice.
16. Date of receipt of the notice by the Office for Official Publications of the European Communities.
17. Previous date(s) of publication in the *Official Journal of the European Communities.*

4.3.3. Contract award notice - Annex IIIE of the Services Directive

This notice is the same for open, restricted and negotiated procedures, *including negotiated procedures without prior publication of a contract notice*.

1. Name and address of the contracting authority.
2. Award procedure chosen. In the case of the negotiated procedure without prior publication of a tender notice, justification (Article 11(3)).
3. Category of service and description. CPC reference number.
4. Date of award of the contract.
5. Criteria for award of the contract.
6. Number of tenders received.
7. Name and address of service provider(s).
8. Price or range of prices (minimum/maximum) paid.
9. Where appropriate, value and proportion of the contract which may be subcontracted to third parties.
10. Other information.
11. Date of publication of the contract notice in the *Official Journal of the European Communities*.
12. Date of dispatch of the notice.
13. Date of receipt of the notice by the Official Publications of the European Communities.
14. In the case of contracts for services listed in Annex IB, agreement by the contracting authority to publication of the notice (Article 16(3)).

4.4 Determining the time limits

In order to ensure a non-discriminatory treatment of all tenderers, time limits should be fixed in such a way so as to be easily understood by all economic operators, irrespective of their Member State. The Commission does not accept that time limits be determined by referring to national holidays, or to the publication of the notice in the national or local press, because this would put foreign tenderers at a disadvantage.

4.5 Advertising of tenders at national level[83]

The Directive provides that notices in the local press or in the national official journals must not contain information other than that published in the Official Journal of the European Communities. The objective of this provision is to ensure the same level of information for all economic operators, irrespective of their Member State.

For the same reason, notices cannot be published in national official journals or in the local press before the date of dispatch to the Office for Official Publications. Contracting authorities must be able to supply proof of the date of dispatch. This date should also be mentioned in the local publication.

4.6 Who publishes the notices?

Notices required by the Services Directive are published by the Office for Official Publications of the European Communities. Contracting authorities are required to send the notices to the Office as rapidly as possible and by the most appropriate channels.[84] This implies that contracting authorities should use all the modern means of communication in order to send the notices as quickly as possible. In particular, contracting authorities must fulfil the following obligations:

- send the annual indicative notice as soon as possible after the beginning of the budgetary year;
- in case of accelerated procedures, send the notice by telex, telegram or fax;
- send the contract award notice no later than forty-eight days after the award of the contract in question;
- be able to supply proof of the date of dispatch of the various notices to the Office of Official Publications.

The address for correspondence is:

Supplement to the Official Journal of the European Communities
Office of Official Publications of European Communities
2, rue Mercier
L -2985 Luxembourg
Tel: (352) 499 28 23 32
Telex: 1324 PUBOF LU/2731 pubof LU
Fax: (352) 49 00 03/(352) 49 57 19

83 Article 17(6) of the Services Directive.

The annual indicative notice and the contract award notice must be published in full in the Official Journal and in the TED data bank in all the official languages of the Community.[85] The contract notices and the notices for design contests are published in full in their original language with a summary of the important elements of each notice being published in the other official languages of the Communities.[86] The notices must be published in the Supplement of the Official Journal and in the TED data bank within 12 days after their dispatch.[87] In the case of accelerated procedure, this time limit should be reduced to 5 days.

The Office for Official Publications is responsible for carrying out the necessary translations and summaries[88]. The cost for the publications is at present borne by the Communities.

4.7 Recommended standard format of contract notices

In its Recommendation 91/561/EEC the Commission initiated a new system for the standardisation of information contained in contract notices. This system has been perfected in order to contribute to a better realisation of public procurement policy objectives, notably through the use of a common terminology to facilitate competitors' comprehension of contract notices, while at the same time simplifying the task not only of contracting authorities in the preparation of notices, but also of the Office for Official Publications of the European Communities in their publication.

Standard forms for service contracts have yet to be worked out. For works and supplies contracts, standard forms are set out for the different Member States in the Supplement to the Official Journal, S217A to 217N[89] of 16 November 1991.

Under this standardised system, the task of the contracting entities is basically to select the appropriate words or phrases and to add any pertinent information to the standardised case. In its Recommendation 91/561/EEC the Commission has requested Member States to take the necessary measures to ensure that contracting authorities may make use of this method of drafting contract notices.

4.8 Minimum and maximum deadlines to be respected

One of the objectives of the Services Directive is to ensure that all potential tenderers get a fair opportunity to express their interest for the contract in question or submit their tenders. In order for this objective to be achieved, the Directive fixes minimum time limits for the

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85 Article 17(3) of the Services Directive.

86 Article 17(4) of the Services Directive.

87 Article 17(3) and (5) of the Services Directive.

88 Article 17(3) of the Services Directive.

89 217A, B and C (Belgium in German, French and Dutch), 217D (Denmark), 217E (Germany), 217F (Greece), 217G (Spain), 217H (France), 217I (Ireland), 217J (Italy), 217K (Luxembourg), 217L (Netherlands), 217M

receipt of tenders or expressions of interests, or maximum time limits for the dispatch of contract documents and other related documents necessary for submission.

Clearly, contracting authorities may extend the time limits for the receipt of tenders beyond the legal minimum or shorten the time limits for the dispatch of the contract documents if they consider it appropriate. Moreover, they have an obligation to extend the time limits for receipt of tenders in the cases where the contract documents are too bulky to be supplied within the minimum time limits or where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents.[90]

4.8.1 Open Procedure

(a) *Minimum* deadline for receipt of tenders

- as a general rule, 52 days from the date of dispatch of the notice for publication in the Official Journal,[91]
- in cases where the contracting authority has published an annual indicative notice which includes the services in question, 36 days from the date of dispatch of the notice.[92]

The above time limits must be extended in the circumstances outlined in 4.8 above.

(b) The *maximum* time limit for the dispatch of contract documents and other supporting documents is fixed by the Services Directive at 6 days after the receipt of the request (provided that the request has been sent in good time).[93]

(c) Moreover, the *maximum* time limit for the dispatch of additional information relating to the contract documents is 6 days before the final date fixed for receipt of tenders, provided such information has been requested in good time.[94]

4.8.2 Restricted Procedure

Minimum deadline for receipt of requests to participate:

- 37 days from the date of dispatch of the notice for publication in the Official Journal;[95]
- 15 days in accelerated restricted procedures, i.e. where urgency renders impracticable the time limit of 37 days.[96]

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90 Articles 18(5) and 19(7) of the Services Directive

91 Article 18(1) of the Services Directive.

92 Article 18(2) of the Services Directive.

93 Article 18(3) of the Services Directive.

94 Article 18(4) of the Services Directive.

95 Article 19(1) of the Services Directive.

Minimum deadline for the receipt of tenders

- as a general rule, 40 days from the date of dispatch of the written invitation to tender;[97]
- in cases where the services concerned were included in the annual indicative notice published by the contracting authority, 26 days from the date of dispatch of the written invitation to tender;[98]
- 10 days from the date of dispatch of the written invitation to tender in accelerated restricted procedures, i.e. in cases where urgency renders impracticable the time limits of 40 or 26 days as the case may be.[99]

Maximum deadline for dispatch of additional information relating to the contract documents:

- 6 days before the final date fixed for the receipt of tenders, provided such information has been requested in good time;[100]
- 4 days in accelerated restricted procedures, i.e. where urgency renders impracticable the time limits of 40 (or 26) days for receipt of tenderers.[101]

The above time limits must be extended in the circumstances outlined in 4.8 above.

4.8.3 Negotiated procedures with prior publication of a contract notice[102]

Minimum deadline for receipt of requests to participate

- 37 days from the date of dispatch of the notice for publication in the Official Journal;[103]
- in accelerated negotiated procedures, i.e. where urgency renders impracticable the deadline of 37 days, 15 days from the date of dispatch of the notice for publication in the Official Journal.[104]

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97 Article 19(3) of the Services Directive.

98 Article 19(4) of the Services Directive.

99 Article 20(1)(b) of the Services Directive.

100 Article 19(6) of the Services Directive.

101 Article 20(2) of the Services Directive.

102 Articles 19 and 20 of the Services Directive.

103 Article 19(1) of the Services Directive.

4.8.4 Summary tables

Open procedures

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC as rapidly as possible and by most appropriate channels	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+12
18(3)	Requests for contract and supporting documents	To be received in good time.
18(3)	Supply of contract documents and supporting documents	Within six days of receipt of request
18(4)	Supply of additional information	No later than six days before the date fixed for receipt of tenders
18(1)	The date fixed for receipt of tenders (where the contract was not the subject of an annual indicative notice for the current budgetary year)	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+52. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
18(2)	The date fixed fo receipt of tenders (where the contract was included in an annual indicative notice for the current budgetary year)	As above except that Day D+52 becomes Day D+36
18(5)	Site visits and on the spot inspection of documents supporting the contract documents	The above limits of D+52 or D+36 should be extended accordingly

Restricted procedures

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC as rapidly as possible and by most appropriate channels	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+12
19(1) 19(5)	Time limit for receipt of requests to participate or *dispatch* of written confirmations of requests made by telegram, telex, fax or telephone	A specific date given in the notice, and which must be no earlier than the first working day on or after Day 37. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(2)	Dispatch of letters of invitation to tender	No legal deadline but as specified in contract notice.
19(2)(a)	Requests for supporting documents not included in the letter of invitation	To be received in good time
19(6)	Supply of additional information	No later than six days before the date fixed for receipt of tenders
19(3)	The date fixed for receipt of tenders (where the contract was not the subject of an annual indicative notice for the current budgetary year)	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+40. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(4)	The date fixed for receipt of tenders (where the contract was included in an annual indicative notice for the current budgetary year)	As above except that Day D+40 becomes Day D+26

19(7)	Site visits and on the spot inspection of documents supporting the contract documents	The above limits of D+40 or D+26 should be extended accordingly

Urgent restricted procedures

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC by telex, telegram or fax	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+5
19(1) 20(3)	Time limit for receipt of requests to participate or *dispatch* of written confirmations of requests made by telegram, telex, fax or telephone	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+15. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(2)	Dispatch of letters of invitation to tender	No legal deadline, but as specified in contract notice.
19(2)(a)	Requests for supporting documents not included in the letter of invitation	To be received in good time
20(2)	Supply of additional information	No later than four days before the date fixed for receipt of tenders
19(3)	The date fixed for receipt of tenders (whether or not the contract was the subject of an annual indicative notice for the current budgetary year)	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+10. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(7)	Site visits and on the spot inspection of the documents supporting the contract documents	The above limit of D+10 should be extended accordingly

Negotiated procedures (with publication of a contract notice)

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC as rapidly as possible and by most appropriate channels	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+12
19(1) 19(5)	Time limit for receipt of requests to participate or *dispatch* of written confirmations of requests made by telegram, telex, fax or telephone	A specific date given in the notice, and which must be no earlier than the first working day on or after Day 37. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(2)	Dispatch of letters of invitation to negotiate	No legal deadline, but as specified in the contract notice.

Urgent negotiated procedures (with publication of a contract notice)

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC by telex, telegram or fax	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+5
19(1) 20(3)	Time limit for receipt of requests to participate or *dispatch* of written confirmations of requests made by telegram, telex, fax or telephone	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+15. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.

19(2)	Dispatch of letters of invitation to negotiate	No legal deadline, but as specified in the contract notice.

4.9 Method of calculating time limits

Time limits must be calculated in accordance with the provisions of Council Regulation 1182/71 of 3 June 1971.

The relevant rules for the purposes of the Services Directive are:

(a) Where actions must occur in a contracting authority's Member State within a period of D days after an event, the day after the day in which the event occurs is counted as day 1, the next day as day 2, and so on until day D. If day D is a working day* in the Member State, the action must be taken before the expiry of the last hour in day D. If day D is not a working day,* the action must be taken before expiry of the last hour of the next following working day.[105]

(b) Where a deadline fixed by a contracting authority for receipt of documents must not be less than D days from a given event, the day after the day in which the event occurs is counted as day 1 and so on until day D. If day D is a working day* in the contracting authority's Member State, such authority must fix the deadline no earlier than that day D (which means the last hour in that day D). If day D is not a working day,* the authority must fix the deadline as no earlier than the next following working day* (which means the last hour in such working day*).[106]

(c) Where a contracting authority is obliged to act no later than D days before a particular date, the day before such date is counted as day 1, the day before that as day 2 and so on until day D and the authority must act no later than the last hour on day D.[107]

(d) Where in a notice or other document, a contracting authority sets a pre-fixed date as the deadline for action, such action is valid if accomplished no later than the last hour on that date.[108]

(e) Where in a notice or other document, a contracting authority sets a pre-fixed date and hour as the deadline for action, such action is valid if accomplished no later than the prescribed hour on the prescribed date.[109]

* A working day is any day other than a Saturday, Sunday or a day designated as a public holiday in the Member State and published as such by the Commission in the Official Journal of the EC.

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105 Regulation 1182/71, article 3.

106 *Ibid.*

107 *Ibid.*, but see article 3(4), last sentence.

108 By implication based on Regulation 1182/71, article 3.

4.10 Means whereby service providers request to participate in restricted and negotiated procedures

Requests to participate in a restricted procedure or in a negotiated procedure with a prior publication of a notice may be made by letter, telegram, fax, telex or telephone. However, in the case of a request by telegram, fax, telex or telephone, service providers must confirm their request by letter, dispatched before the end of the deadline.[110]

In case of an accelerated procedure, the Services Directive requires that requests for participation be made by the most rapid means of communication possible. However, requests made otherwise than by letter will not be valid unless they are confirmed by letter dispatched before the expiry of the deadline.[111]

4.11 Means of inviting candidates to tender in restricted and negotiated procedures[112]

In both negotiated procedures with a prior publication of a notice and restricted procedures, contracting authorities must invite the selected candidates in writing to present their offers. These invitations must be sent simultaneously to all selected candidates.

The invitation letter must be accompanied by the contract documents and other supporting documentation. Moreover, it must include the following information:

- the address of the service from which contract documents may be requested, the final date for making such a request and the amount and terms of payment of any sum to be paid for such documents. (This is only required if the invitation letter is not accompanied by the contract documents and other supporting documentation.)

- the final date for the receipt of the tenders, the address to which they must be sent and the language or languages in which they must be drawn up.

- a reference to the contract notice published;

- and indication of any documents to be annexed, either to support verifiable statements or to supplement information provided for the purposes of proving his economic and financial standing and technical capacity and ability;

- the criteria for the award of the contract if these are not given in the notice.

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110 Article 19(5) of the Services Directive.

111 Article 20(3) of the Services Directive.

5. Common technical rules

The rules discussed in this section apply to service contracts where the services involved fall within Annex IA or Annex IB of the Services Directive.

5.1 Which technical specifications may be required?

Contracting authorities must indicate in the general documents, or in the contract documents relating to each contract, the technical specifications to which the services must conform. The choice of these specifications is not unlimited. The Services Directive provides a set of rules to deter contracting authorities from favouring national service providers by choosing standards which, in practice, only the latter can meet.

Accordingly, contracting authorities have to define technical specifications by reference:

- to national standards implementing European standards or;
- to European technical approvals or;
- to common technical specifications.

However this general rule does not apply if legally binding national technical rules, which are compatible with Community law, provide otherwise.

The definitions of the various terms mentioned above are as follows:[113]

Technical specifications: the totality of the technical prescription contained in particular in the tender documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority.

These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling.

They shall also include rules relating to design and costing, the text, inspection and acceptance conditions for works, and methods or techniques or construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

Standard: a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory.

European standard: a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as "European Standards" (EN) or "Harmonization documents" ((HD) according to the

common rules of these organizations or by the European Telecommunications Standards Institute (ETSI) as a "European Telecommunication Standard" (ETS).

European technical approval: a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of applications and use. European approval shall be issued by an approval body designated for this purpose by the Member State;

Common technical specification: a technical specification laid down in accordance with a procedure recognized by the Member States to ensure uniform application in all Member States which has been published in the *Official Journal of the European Communities*.

Essential requirements: requirements regarding safety, health and certain other aspects in the general interest, that the construction works can meet.

5.2 Exceptions

In four categories of cases set out in the Services Directive,[114] contracting authorities may derogate from the general rule set out above. These four categories are set out below.

(a) where national standards implementing European standards, European technical approvals or common technical specifications do not include any provision for establishing conformity; or there are no technical means for satisfactorily establishing the conformity of a product with national standards, implementing European standards, European technical approvals or common technical specifications.

This exception may be invoked, in particular, where difficulties in establishing conformity with technical specifications defined in accordance with the general rule may give rise to legal uncertainty.

(b) where the definition of technical specifications in accordance with the general rule would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment;[115] or Council Decision 87/95/EC of 22 December 1986 on standardization in the field of information technology and telecommunications;[116] or other Community instruments in specific service or product areas.

The absence of technical harmonisation at a European level with regard to any relevant products and services justifies recourse to this exception.

(c) where the use of technical specifications defined in accordance with the general rule would oblige the contracting authority to use products or material

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114 Article 14(3) of the Services Directive.

115 OJ L217, 5.8.86, p. 21, amended by Directive 91/263/EEC (OJ L128, 23.5.91, p. 1).

incompatible with equipment already in use; or would entail disproportionate costs or disproportionate technical difficulties,

However this exception may only be invoked where there exists a clearly defined and recorded strategy with a view to the transition, within a given period, to European standards, European technical approvals or common technical specifications.

(d) where the project concerned is of a genuinely innovative nature for which use of existing European standards, European technical approvals or common technical specifications would not be appropriate.

Contracting authorities who make use of one of these exceptions to the general rule must mention the reasons for doing so in their internal documentation, and they must supply such information on request to Member States and to the Commission. Wherever possible, contracting authorities should also mention their reasons for doing so in the contract notice or in the contract documents.[117]

5.3 Alternative specifications where there are no European standards, no European technical approvals and no common technical specifications

In the absence of European standards or European technical approvals or common technical specifications, the Services Directive provides that technical specifications should be defined on the basis of the following rules:

(a) by reference to the national technical specifications when these are recognized as complying with the basic requirements listed in the Community directives on technical harmonization; such compliance should be established in accordance with procedures laid down in such directives, and in particular in accordance with the procedures laid down by Directive 89/106/EC;[118]

(b) by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials;

(c) by reference to other documents.

If, in the absence of European standards, European technical approvals and common technical specifications, a contracting authority decides to refer to other documents, it is appropriate to make reference in order of preference to:

i) national standards implementing international standards accepted by the country of the contracting authority; or

ii) other national standards and national technical approvals of the country of the contracting authority; or

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117 Article 14(4) of the Services Directive.

iii) any other standard.

However, all the rules in this section 5.3 must be applied in accordance with the decisions of the Court of Justice with regard to "measures having equivalent effect to quantitative restrictions".

It should be emphasised that the definition of technical specifications otherwise than by reference to national standards implementing European standards, European technical approvals or common technical specifications may account to a barrier to trade if it excludes the use of products manufactured in other Member States.[119] Such a barrier will be compatible with Community law only if it is justified by mandatory requirements or it falls within Article 36 of the Treaty.

As a result, a contracting authority may not reject tenders solely on the grounds of non-compliance with national standards or other standards to which it refers for the definition of technical specifications. It may only reject a tender if it establishes that the relevant mandatory requirements, if any, were not met.[120]

5.4 Discriminatory specifications are prohibited in all cases

The Services Directive prohibits Member States from introducing in the contractual clauses, technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain service providers. This is particularly the case of trade marks, patents or types of specific production or of specific origin. However, derogations from this general rule are permitted if the contracting authority establishes that:

(a) they are justified by the subject of the contract; or

(b) such indication is accompanied by the words "or equivalent", and the contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.[121]

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119 See Case 45/87, *Commission* v *Ireland* (water pipes), [1988] ECR 1369.

120 See e.g., Case 120/78, *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein*, (Cassis de Dijon), [1981] ECR 649.

121 e.g., in Case C-359/93, *Commission* v *Netherlands*, 24 January 1995, the Court held that failure to put the words "or equivalent" after the specification "UNIX" for a software system amounted to a breach of the

6. Participation in contract award procedure, and award of the contract

In order to achieve effective Community-wide competition and thereby a real liberalisation of intra-Community exchanges in the field of public procurement of services, it was necessary to prevent the selection of service providers and the evaluation of their offers on the basis of arbitrary criteria chosen by contracting authorities. For this reason, Title VI of the Services Directive lays down common rules on participation in contract procedures, criteria for quantitative selection of service providers and criteria for the award of contracts.

6.1 Common rules on participation in contract award procedures

Article 23 of the Services Directive provides that contracts must be awarded:

- on the basis of the criteria laid down in Chapter 3 of its Title VI (see 6.3 below);
- taking into account the requirements of article 24 in relation to variants (see 6.1.4 below);
- after exclusion of certain unsuitable categories of service providers (see 6.2.1 below);
- and after checking their suitability by reference to economic and financial standing (see 6.2.3 below) and technical capacity and ability (see 6.2.4 below).

The suitability of service providers must be checked in open procedures as well as restricted and negotiated procedures. It should be noted, however, that a favourable outcome of such check does not produce the same effects in the three procedures.

In an open procedure, the fact that a tenderer meets the predetermined selection criteria gives him an automatic right to participate in the award procedure. The contracting authority is, therefore, obliged to examine all the offers made by the qualifying tenderers.

In restricted and negotiated procedures, on the other hand, candidates who satisfy the predetermined selection criteria can be excluded from the award procedure because the contracting authority may limit the number of candidates to be invited to tender or to negotiate. It does not have an altogether free choice in the matter (see 6.1.1).

The logic of the Services Directive is that the verification of the suitability of service providers and the award of the contract are two distinct operations in a contract procedure. While not recognising a rigid and formal chronological separation of these two phases, the Court has emphasised the clear separation which must exist as to the rules used. As the Court said,[122] "even though the Directive ... does not rule out the possibility that

examination of the tenderers' suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules."

It follows that, when awarding the contract, the contracting authority may not take into consideration a greater or lesser financial capacity of a tenderer. Equally in the light of a favourable offer, it may not bring back a tenderer who had been previously excluded as not satisfying the predetermined selection criteria as to suitability.

In all this, contracting authorities are obliged to respect confidentiality of information provided by candidates or tenderers.

6.1.1 Choice of the number of candidates in restricted and negotiated procedures

The selection of service providers who will be invited to tender or to negotiate can only be made from among those who submitted their candidatures in response to the contract notice and who have the necessary qualifications. Such qualifications must be based on the qualitative selection criteria discussed below in 6.2 below.

Article 27(1) of the Services Directive provides that "in restricted and negotiated procedures the contracting authorities shall, on the basis of information given relating to the service provider's position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Articles 29 to 35 those whom they will invite to submit a tender or to negotiate."

Important

Contracting authorities are not obliged to invite all the candidates who satisfy the qualification criteria. Those who are invited, on the other hand, can only be chosen on the basis of the objective transparent qualitative selection criteria laid down at the commencement of the procedure.

Thus contracting authorities can only limit the number of persons invited to tender or negotiate by taking the candidates who have the best qualifications having regard to the selection criteria laid down in the contract notice. Moreover, they can only do this if they indicated in the contract notice the number or range of candidates which would be selected to tender or negotiate. In the absence of such indication, all candidates who present correct candidatures and who have the required qualifications must be selected to tender or negotiate.

In restricted procedures the range of service providers invited to tender must be determined in the light of the nature of the service to be provided and must include at least five service providers. If the contracting authority intends to set an upper limit as well, it should state such upper limit in the contract notice, e.g. between 5 and 20 service providers.[123] Once stated in the contract notice, the range or minimum number cannot be changed.

Important

The Services Directive provides that the number of candidates invited to tender in restricted procedures shall be sufficient to ensure genuine competition. It may happen that, having fixed a minimum number of candidates in the contract notice, a contracting authority finds itself faced with an insufficient number of candidates having the qualifications required for the contract. In such a case the contracting authority has no choice but to invite tenders from all the candidates who meet the qualification criteria.

In negotiated procedures with prior publication of a contract notice, the number of candidates admitted to negotiate may not be less than three, provided that there is a sufficient number of candidates.[124]

6.1.2 Invitations to service providers who are nationals of other Member States[125]

In any event the Services Directive requires that Member States and contracting authorities ensure that invitations to tender or negotiate are issued without discrimination to nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals.[126]

As a general rule the Commission considers that one may presume an absence of discrimination on the grounds of nationality if, in selecting candidates, the contracting authority maintains the proportion of national and non-national service providers who satisfied the qualification criteria. Thus, for example, if 20 candidatures were received, 15 of which meet the qualifications, and 3 of the 15 are from service providers in other Member States, one would expect at least one out of 5 candidates selected to tender to be from another Member State.

If for any reason the matter had to be investigated in depth, for example, in the case of a complaint, the above presumption does not prejudge the findings of a more detailed assessment of the elements taken into consideration by the contracting authority.

6.1.3 Legal form of service providers[127]

Groups of service providers must be allowed to submit tenders without having to adopt any specific legal form. However, if a group of service providers is awarded the contract, it may be required to transpose itself into a specific legal form if such transformation is necessary for the performance of the contract.

Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity as natural persons, shall

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124 Article 27(3) of the Services Directive.

125 Article 27(4) of the Services Directive.

126 A provision which reserves a part of the works (or services) to tenderers having their registered office in the region where the works (or services) are to be carried out, amounts to a discrimination against tenderers from other Member States; Case C-360/89, *Commission* v *Italy*, [1992] ECR I-3401; Case C-21/88, *Du Pont de Nemours Italiana S.p.A.* v *Unità Sanitaria Locale No. 2 di Carrara*, [1990] ECR I-889.

not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be a legal person. The rule applies equally in the reverse situation where the candidate or tenderer is a legal person and the law of the Member State in which the contract is awarded require that the service be provided by a natural person.
Since the identity of the individuals involved in providing a service is important, contracting authorities are entitled to require service providers who are legal persons to indicate in their tender or request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of their service.

6.1.4 Offers containing variants[128]

As observed in 4 above, contracting authorities are obliged to state in the general or contractual documents the technical specifications of the services they are looking for. Nevertheless, it is important for economic operators and users that services may also be offered which do not correspond to those identified by the contracting authority but which satisfy its requirements. The existence of such a possibility stimulates research into new technologies and allows users to benefit from technical progress and a larger range of services.

Subject to certain conditions, the Services Directive allows tenderers to propose variants.

The first condition is that variants can only be permitted when the contract is awarded on the basis of the economically most advantageous offer. The assessment of a variant and its comparison with offers made in accordance with the technical specifications can only be carried out fairly by examining the offers under different aspects, which implies the existence of evaluation criteria other than merely the lowest price.

The Services Directive leaves it to the discretion of the contracting authority to prohibit or authorize variants, and, in the latter hypothesis, to establish the types of variants it will take into consideration and the manner in which service providers should present them. For example, the contracting authority could require that a basic offer be prepared at the same time as the variant.

The second condition is that, when variants are permitted, the contracting authority is not obliged to mention this fact in the contract notice,[129] but it is obliged to state in the contract documents the minimum conditions which variants must satisfy, and the manner of their presentation.

The third condition is that variants may only be taken into consideration if they meet the minimum requirements set out in the technical documents.[130]

Contracting authorities may not reject the submission of a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals or to common

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128 Article 24 of the Services Directive.

129 If variants are prohibited, this fact must be indicated in the contract notice.

130 Thus for example, it is not permitted to negotiate with a tenderer who has submitted an offer which is not in accordance with the contractual specifications. Case C-243/89, *Commission* v *Denmark* (Storebaelt Bridge)

technical specifications or even by reference to national technical specifications referred to in section 4 above.

Moreover, contracting authorities which have admitted variants may not reject a variant on the sole ground that it would lead, if successful, to a supply contract rather than a public service contract. This limitation applies in particular to variants which result in a supply of products the value of which exceeds the value of the services.

6.1.5 Sub-contracting[131]

Sub-contracting by service providers is not regulated by the Services Directive. However, in order to ensure transparency in the execution of public service contracts, the Services Directive requires that, in the contract documents, the contracting authority may require the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

6.1.6 Obligations relating to employment protection provisions and the working conditions in force where the services are to be provided[132]

The contracting authority may state in the contract documents, or be obliged by a Member State so to state, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the services are to be performed and which shall be applicable to the services provided on site during the performance of the contract. In such a case the contracting authority must request service providers to indicate that they have taken account of such obligations when drawing up their offer.

6.1.7 Conditions not provided for in the Services Directive

As it appears from the principles stated by the Court in the *Beentjes* case[133] the participation of tenderers may be made subject to conditions which are not provided for by the Services Directive, and which would require the service provider to prove his capacity to satisfy certain contractual clauses if the contract were awarded to him. (In the *Beentjes* case the requirement was that the contractor was able to employ persons who had been unemployed for a long time.) Such conditions do not fall within the permitted criteria laid down by the Services Directive for qualitative selection or for award of the contract.

Such clauses must, of course, satisfy all the relevant requirements of Community law, notably the freedom of establishment, the freedom to provide services and the prohibition against any discrimination based on nationality.

As far as concerns compatibility with the Services Directive, such clauses must not have any direct or indirect discriminatory effect vis-à-vis tenderers from other Member States. In other words, it must not be the case that such condition can be satisfied, in practice,

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131 Article 25 of the Services Directive.

132 Article 28 of the Services Directive.

only by national tenderers, or can be satisfied only with great difficulty by tenderers from other Member States.

Supplementary conditions must in any event be indicated by the contracting authority in the contract notice so that service providers are able to assess whether a public contract containing such conditions interests them.[134]

6.2 Selection of candidates

It is essential to avoid the use of discriminatory criteria for the exclusion of service providers from a public procurement procedure. The Services Directive does not limit itself "to stating the criteria for selection on the basis of which contractors may be excluded from participation by the authority awarding the contract. It also prescribes the manner in which contractors may furnish proof that they satisfy these criteria."[135] These criteria, discussed below, are the personal situation of the service provider (article 29) as well as his professional qualifications, namely professional registration (article 30), economic and financial standing (article 31) and ability and technical capacity (article 32).

Important

The purpose of the Directive is not to limit the competence of Member States to fix the level of economic and financial standing or ability and technical capacity necessary for a particular contract, but to determine the references or means of proof which may be produced by the service provider to establish such level of standing and capacity. Nevertheless, such competence is not unlimited because Member States are obliged to respect all the provisions of Community law, and notably those which flow from the principles of the Treaty in relation to the freedom of establishment and the freedom to provide services.

6.2.1 Personal situation of service providers

Article 29 provides an exhaustive list of the cases where the personal situation of the service provider can lead to his exclusion from the contract procedure.

Thus a service provider may be excluded if he:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding-up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgement which has the force of *res judicata*;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

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134 For a more detailed analysis of the *Beentjes* case and its possible applications, see Commission Communication of 22 September 1989 - Public Procurement, Regional and Social Aspects, OJ C311, 12.12.89, p. 11 at paragraphs 44 ff.

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under Chapter 2 of title VI of the Services Directive (criteria for quantitative selection).

In the cases (d) and (g) it is for the contracting authority to prove the existence of the grounds for exclusion. In the other cases the contracting authority may require the service provider to provide proof that he does not fall within the grounds of exclusion.

The contracting authority is not free to specify the means of proof to be produced by service providers. It is obliged to accept as sufficient evidence:

- for (a), (b) or (c), the production of an extract from the 'judicial record' or, failing this, of an equivalent document issue by a competent judicial or administrative authority in the country of origin or in the country whence that person comes showing that these requirements have been met,
- for (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country concerned does not issue such documents or certificates, they may be replaced by a declaration on oath made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

6.2.2 Professional registration[136]

Unlike the Works or the Supplies Directive, the Services Directive allows a contracting authority to require service providers to prove that they possess the necessary authorisation or membership of a professional organisation in order to provide the relevant services in the home state. Thus, for example, a contracting authority inviting tenders for architectural services is entitled to require the tenderers to produce a certificate of admission to practise the profession of architect in the home state.

As far as concerns professional status in the broad sense, a contracting authority can require service providers to prove that they hold a professional registration issued in accordance with the legislation of the Member State where they are established. The relevant professional and trade registers or declarations or certificates are:

- in Belgium, the 'registre du commerce - Handelsregister' and the 'ordres professionels - Beroepsorden';
- in Denmark, the 'Erhvervs- og Selskabstyrelsen';
- in Germany, the 'Handelsregister', the 'Handwerksrolle' and the 'Vereinsregister';
- in Greece, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in

the cases provided for by existing national legislation, for the provision of research services as mentioned in Annex IA, the professional register *'Μητρῶο Μελετητῶν' and 'Μητρῶο Γραφείων Μελετῶν';*

- in Spain, the 'Registro Central de Empresas Consultoras y de Servicios del Ministerio de Economia y Hacienda';
- in France, the 'registre du commerce' and the 'répertoire des métiers';
- in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato', the 'Registro delle commissioni provinciali per l'artigianato' or the 'Consiglio nazionale degli ordini professionali';
- in Luxembourg, the 'registre aux firmes' and the 'rôle de la Chambre des métiers';
- in the Netherlands, the 'Handelsregister';
- in Austria, the Firmenbuch, the Gewerberegister, the Mitgliederverzeichnisse der Landeskammern;
- in Portugal, the 'Registro nacional das Pessoas Colectivas';
- in the United Kingdom and Ireland, the service provider may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name;
- in Finland, Kaupparekisteri/Handelsregistret;

  in Sweden, aktiebolags-, handels- eller föreningsregistren.

It goes without saying that to require a service provider established in another Member State to possess a general or specific professional registration in the contracting authority's state could not only be contrary to the Services Directive, but would also amount to a serious infringement of the freedom to provide services within the Community.[137]

It should also be emphasised that to state such a requirement in the contract notice, even if the contracting authority does not subsequently enforce the requirement, amounts to an infringement of the freedom to provide services due to the dissuasive effect which such a notice could have on service providers in other Member States.

6.2.3 Financial and economic standing

Article 31 of the Services Directive provides that, as a general rule, a service provider may be required to prove his financial and economic standing by furnishing one or more of the following references:

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137 cf. Case 76/81, *SA Transporoute et Travaux* v *Minister of Public Works*, [1982] ECR 417, a case in which the contracting authority wrongfully required that the contractor possess an establishment permit in the contracting

(a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;

(b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;

(c) a statement of the undertaking's overall turnover and its turnover in respect of the services to which the contract relates for the previous three financial years.

This list is not exhaustive. The Services Directive allows a contracting authority to state in the contract notice which of the above references it has chosen and which other references of financial and economic standing are to be produced by the service provider. In so doing, the contracting authority must confine the information requested to the subject of the contract and shall take into account the legitimate interests of the service providers as regards the protection of their technical or trade secrets.[138]

It follows that a contracting authority is allowed not only to fix the level of financial and economic standing in order to participate in a given contract procedure, but also the means of proof of such level. Any requirements which go beyond those indicated by the Services Directive must be pertinent means of proof, that is to say, they must serve the objective purpose of proving the required financial and economic standing in relation to the importance of the services to be provided. In particular, they must not discriminate between national service providers, on the one hand, and service providers from other Member States, on the other.

For example, in its judgment of 9 July 1987 the Court accepted that, in assessing a party's financial and economic standing, it may fix a maximum value of works which may be carried out at any one time.[139]

If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, the Services Directive obliges the contracting authority to allow the service provider to prove by any other document that he meets the necessary level of financial and economic standing. The contracting authority must assess, in such cases, whether the documents actually produced are appropriate.

6.2.4 Ability and technical capacity

As far as concerns proof of ability and technical capacity, article 32 of the Services Directive sets out an exhaustive list of the means of proof that a contracting authority may require, according to the nature, quantity and purpose of the services to be provided:

(a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;

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138 Article 32(4) of the Services Directive.

139 Joined Cases 27, 28 and 29/86, *Construction et Entreprises Industrielles S.A. v Association Intercommunale pour les Autoroutes des Ardennes; Ing. A. Bellini & Co SpA v Régie des Bâtiments and Belgian State*, [1987]

(b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided;

- where provided to contracting authorities, evidence to be in the form of certificates issued or countersigned by the competent authority,
- where provided to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected;

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

(d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the tools, plant or technical equipment available to the service provider for carrying out the services;[140]

(f) a description of the service provider's measures for ensuring quality and his study and research facilities;

(g) where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in which the service provider is established, subject to that body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;

(h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

Information requested by the contracting authority must be confined to the subject of the contract and due consideration shall be given to the legitimate interests of the service providers as regards the protection of their technical or trade secrets.[141]

The contracting authority is obliged to state in the contract notice (or the invitation to tender in restricted procedures) those references in the above exhaustive list which it wishes to receive.

Where contracting authorities require the production of certificates drawn up by independent bodies for attesting conformity of the service with certain quality assurance

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140 It is not permissible for the contracting authority to require proof that such tools, plant, etc. are situated in the contracting authority's state (Case C-71/92, *Commission* v *Spain* (pharmaceutical products), [1993] ECR I-5923.

standards, they are obliged to refer to quality assurance systems based on the relevant EN 29 000 European standards series certified by bodies conforming to the EN 45 000 European standards series.[142] They are also obliged to recognize equivalent certificates from bodies established in other Member States. Where service providers have no access to such certificates, or no possibility of obtaining them within the relevant time limits, contracting authorities must allow service providers to prove that they meet the required standards by producing evidence of equivalent quality assurance measures, although it is open to contracting authorities to assess whether any documents produced are appropriate.

6.2.5 Supplementary information[143]

The selection of candidates and the award of contracts must be transparent. It follows that any fixing of quality standards after publication of the contract notice is prohibited. All that the contracting authority may do after publication of the contract notice is to request service providers to supplement the certificates and documents submitted or to clarify them.

While this possibly is left to the discretion of the contracting authority, it may not be used in a discriminatory manner.

The service provider, however, has no right to be invited by the contracting authority to correct any mistakes which he may have made when responding to the contract notice.

6.2.6 Official lists of approved service providers

Article 35 of the Services Directive sets out the rules in accordance with which Member States may set up and operate official lists of approved service providers, and lays down the probative value arising out of registration in the official lists kept by contracting authorities in other Member States.

Member States are not obliged to have official lists of service providers, but if they do, they must adapt them to the provisions of the Services Directive. In deciding whether to register a company, the Member State may take into account subsidiary companies belonging to the first company but only if the latter actually has available the resources of its subsidiaries.[144]

A service provider registered in an official list kept by the Member State where he is established may only rely upon such registration to prove that he satisfies the qualitative criteria as to personal situation, professional registration, financial and economic standing, ability and technical capacity, subject to the limitation set out below.

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142 Article 33 of the Services Directive

143 Article 34 of the Services Directive.

The Court of Justice has stated clearly that a contracting authority may not require that service providers established in other Member States obtain a registration in an official list of the contracting authority's state.[145] Such a requirement would nullify the effect of article 59 EC which is to remove restrictions on the freedom to provide services by persons established in a Member State other than that in which the service is to be provided.

A service provider who chooses to use an official list registration as a means of proof must produce to the contracting authority a certificate of registration delivered by the competent authority in his home Member State which mentions the references which enabled the service provider to be registered in the list and the classification given in this list.

A certificate of registration establishes a presumption of suitability corresponding to the service provider's classification only in respect of the following matters:-

- honorability within the meaning of paragraphs (a) to (d) and (g) of article 29 (see 6.2.1 above);
- possession of the necessary authorisation or membership within the meaning of article 30(1) in order to be able to provide the service in the home state (see 6.2.2 above);
- possession of a professional or trade registration, declaration or certificate within the meaning of article 30(1) and (2) (see 6.2.2 above);
- balance sheet or extract therefrom within the meaning of article 31(1)(b) (see 6.2.3 above);
- statement of the service provider's turnover and his turnover in respect of the services to which the contract relates for the previous three financial years within the meaning of article 31(1)(c) (see 6.2.3 above);
- the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services within the meaning of article 32(2)(a) (see 6.2.4 above).

The contracting authority to whom the certificate is produced:

- must accept the certificate as evidence that the service provider does not fall within the grounds of exclusion specified in paragraphs (a) to (d) and (g) of article 29 and shall not be entitled to require the service provider to supply information relating to those grounds;
- shall not be entitled to require the service provider to provide information specified in articles 31(1)(b) and (c) and 32(2)(a);
- shall not question any information which can be deduced from the certificate.

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145 Case 76/81 *S.A. Transporoute et Travaux* v. *Ministère des Travaux publics*, [1982] ECR 417; see also Case C-

As the Court of Justice has confirmed,[146] the probative value of a certificate of registration in an official list of approved service providers in one Member State vis-à-vis a contracting authority in another Member State is limited to the objective elements on which such registration was based and does not extend to the classification which follows from such elements. While a contracting authority may not question any information which can be deduced from the certificate, it may nevertheless predetermine the level of financial and economic standing and technical knowledge and ability required in order to participate in a given contract procedure.

Consequently a contracting authority is required to accept that a contractor's economic and financial standing and technical knowledge and ability are sufficient for works corresponding to his classification only in so far as that classification is based on equivalent criteria in regard to the capacities required. If that is not the case, however, the contracting authority is entitled to reject a tender submitted by a service provider who does not fulfil the required conditions.

6.3 The award of the contract

6.3.1 Permitted award criteria[147]

The contracting authority must award the contract either on the basis of the lowest price only, or on the basis of the economically most advantageous tender.

The criterion of the lowest price only does not raise any difficulties of interpretation. Only the prices offered by the tenderers may be taken into consideration, and the contract must be awarded to the tender who asks for the lowest price.

The criterion of the economically most advantageous tender, on the other hand, requires further explanation in order to determine the components capable of defining such offer. The Services Directive indicates that the contracting authority may base itself on various criteria depending on the contract in question: for example, quality technical merit, aesthetic and functional characteristics, technical assistance and after sales service, delivery date, delivery period or period of completion, price.

This list is not exhaustive, but the examples given show that the criteria used must be objective and strictly limited to the purpose of the contract. The criteria permitted are various and non-exhaustive in order to be able to meet all the requirements of the many different types of service contracts.[148]

Where a contracting authority intends to award a contract on the basis of the economically most advantageous tender, it must state in the contract documents or in the contract notice

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146 Joined Cases 27 to 29/86, above.

147 Article 36 of the Services Directive.

148 In Case 274/83, *Commission* v *Italy*, [1985] ECR 1057, the Court ruled that, in order to determine the most economically advantageous tender, the authority making the decision cannot rely solely on the quantitative

the award criteria which it intends to apply. This obligation is not satisfied by merely making a general reference to a provision of national legislation.[149]

The Services Directive provides, moreover, that these award criteria should, where possible, be stated in descending order of importance which the contracting authority attributes to them. It is important that the participants be informed in effect of the basis on which their offers will be evaluated.

6.3.2 Abnormally low offers[150]

If the contracting authority considers that there is a level below which an offer cannot be considered as being serious having regard to the services provided, it may only reject such offer for this reason if it first respects the following procedure.

The contracting authority must first request in writing that the tenders concerned provide details of the constituent elements of the tender which it considers relevant and verify those elements taking account of the explanations received.

The Services Directive provides that the contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the method by which the service is provided, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer for the provision of the service, or the originality of the service proposed by the tender. It is implicit in this that, when considering the explanations given, the contracting authority may not take account of subjective considerations and it must treat all the abnormally low tenders equally without discriminating on the grounds of nationality.

The purpose of this procedure is to protect the tenderers concerned from arbitrary assessments on the part of the contracting authority by guaranteeing that, at whatever level this procedure is invoked, the tenderers will have the possibility of proving that their offers are serious before they can be rejected.

It follows that, although the contracting authority has the express right to determine whether the justifications provided by a tenderer are unacceptable, it may not prejudge the issue by rejecting the offer out of hand and without asking the tenderer to justify it. This objective would not be achieved if the contracting authority was free to choose whether or not it was appropriate to seek justifications, or was permitted to reject tenders which were abnormally low on a purely arithmetic criteria.[151]

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149 Case 31/87, *Gebroeders Beentjes BV v Netherlands*, [1988] ECR 4635.

150 Article 37 of the Services Directive.

151 See Case 76/81, *SA Transporoute et Travaux v Ministère des Travaux publics*, [1982] ECR 417; Case 103/88, *Fratelli Costanzo SpA v Commune de Milan*, [1989] ECR 1839; Case C-295/89, *Impressa Dona Alfonso di Dona Alfonso & Figli s.n.c. v Consorzio per lo sviluppo industriale del Commune di Monfalcone*, [1991] ECR

7. Public service contracts made with another government body by reason of an exclusive right held by the latter[152]

The Services Directive does not apply to public service contracts awarded to an entity which is itself a contracting authority, on the basis of an exclusive right which the latter enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

8. Design contests

A design contest is defined as a national procedure used by a contracting authority to acquire a plan or design selected by a jury after being put out to competition.[153] The main areas in which design contests are used include area planning, town planning, architecture, civil engineering and data processing.

8.1 When the Services Directive applies to a design contest - value threshold

A design contest can, but need not necessarily, comprise the award of prizes.

If prizes are not envisaged, but the design contest will lead to the award of a service contract, the contest must be conducted in accordance with the rules described below if the value of the service contract, net of VAT, is not less than ECU 200,000.[154] The rules explained in section 2 above on the valuation of the service contract apply.

If prizes are envisaged, the design contest must be conducted in accordance with the rules described below if the total amount (i.e. value) of contest prizes and payments to participants is not less than ECU 200,000. In applying this rule account must be taken of *all* prizes and payments made to participants.[155]

8.2 Admission of participants[156]

As a general principle of Community law, qualification to participate in any design contest, whatever the value of the prizes, must be determined on criteria which do not amount to obstacles to the free movement of goods or the freedom to provide services. In the case of design contests which fall within the scope of the Services Directive, it is provided expressly that, where the number of participants is limited, the contracting authority shall lay down clear non-discriminatory admission criteria. In any event, the number of candidates invited to participate must be sufficient to ensure genuine competition. Thus, for example, it would not be possible to circumvent the provisions on the award of a public services contract by holding a design contest to which they admit less than the minimum number - necessary to ensure genuine competition. Thus, where the prize is the award of a public service contract, the number of participants admitted

153 Article 1(g) of the Services Directive.

154 Article 13(1) of the Services Directive.

155 Article 13(2) of the Services Directive.

should be at least as many as would have been required if the service contract had been awarded by invitation to tender.[157]

It is not permitted to limit participants by reference to the territory or part of a territory of a Member State. Thus, for example, local authority could not limit participants to "all ratepayers". It is also prohibited to require that the participants be natural or legal persons.

8.3 The jury and its decision or opinion[158]

The jury must be composed exclusively of natural persons who are independent of participants in the contest. Thus, for example, it would not be possible to appoint to the jury a director of a consulting company where some of the company's employees were participating in the contest.

Where a particular professional qualification is required of participants in the contest, at least a third of the members of the jury must have the same qualification or its equivalent (for example, as determined by the relevant Council Directive on the mutual recognition of diplomas and qualifications.

Projects must be submitted to the jury anonymously. The jury must deliberate and come to its decision or opinion autonomously, i.e. free from outside influence, and solely on the criteria set out in the design contest notice (see 8.4.1 below).

8.4 Advertising requirements for a design contest

Where a contracting authority wishes to hold a design contest it must publish a notice in the Official Journal in the form set out in 8.4.1 below.[159] The general provisions on publication of contract notices apply here (see section 4 above). In particular the notice must contain the name and address, telephone, telex and fax numbers of the service from which rules of the contest can be obtained.

The results of a design contest must also be published in the Official Journal using the form set out in 8.4.2 below.

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157 Cf. article 27(2), 2nd paragraph of the Services Directive.

158 Article 13(6) of the Services Directive.

8.4.1 Design contest notice - Annex IVA of the Services Directive

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority and of the service from which additional documents may be obtained.
2. Project description.
3. Nature of the contest: open or restricted.
4. In the case of open contests: final date for receipt of projects.
5. In the case of restricted contests:
   (a) the number of participants envisaged;
   (b) where applicable, names of participants already selected;
   (c) criteria for the selection of participants;
   (d) final date for receipt of requests to participate.
6. Where applicable, indication of whether participation is reserved to a particular profession.
7. Criteria to be applied in the evaluation of projects.
8. Where applicable, names of the selected members of the jury.
9. Indication of whether the decision of the jury is binding on the contracting authority.
10. Where applicable, number and value of prizes.
11. Where applicable, details of payments to all participants.
12. Indication of whether the prize-winners are permitted any follow-up contracts.
13. Other information.
14. Date of dispatch of the notice.
15. Date of receipt of the notice by the Office for Official Publications of the European Communities.

8.4.2 Results of a design contest - Annex IVB of the Services Directive

1. Name, address, telegraphic address, telex and fax numbers of the contracting authority.
2. Project description.
3. Total number of participants.
4. Number of foreign participants.
5. Winner(s) of the contest.
6. Where applicable, the prize(s).
7. Other information.
8. Reference of the design contest notice.
9. Date of dispatch of the notice.
10. Date of the receipt of the notice by the Office for Official Publications of the European Communities.

APPENDICES

I **Comparative Table of the provisions of Directives 92/50/EEC, 93/36/EEC and 93/37/EEC.**

II **CPA classification of services listed in Annexes IA and IB to Directive 92/50/EEC.**

III **List of bodies governed by public law as set out in Annex I to Directive 93/37/EEC.**

IV **Regulation No 1182/71 determining the rules applicable to periods, dates and time limits.**

APPENDIX I

COMPARATIVE TABLE OF THE PROVISIONS OF DIRECTIVES 92/50/EEC, 93/36/EEC AND 93/37/EEC

Comparative table of the provisions of the Directives on Works (93/37/EEC), Supplies (93/36/EEC) and Services (92/50/EEC)

SUBJECT	Article of the Directive		
	Works	**Supplies**	**Services**
GENERAL PROVISIONS - Definitions			
Definition of contract	1(a)	1(a)	1(a)(i)
Exclusion of utilities contracts	4(a)	2(1)(a)	1(a)(ii)
Exclusion of other contracts			1(a)(iii)-(ix)
Definition of contracting authorities	1(b)	1(b)	1(b)
Definition of contractor/supplier/service provider	1(c)	1(c)	1(c)
Definition of open procedure	1(e)	1(d)	1(d)
Definition of restricted procedure	1(f)	1(e)	1(e)
Definition of negotiated procedure	1(g)	1(f)	1(f)
Definition of a work/supply/service	1(c)	None	None
Definition of public works concession	1(d)	N.A.	N.A.
Definition of contractor/supplier/service provider	None	None	1(c)(1)
Definition of tenderer and candidate	1(h)	1(c)	1(c)(2)
Definition of design contest	N.A.	N.A.	1(g)
GENERAL PROVISIONS - Scope			
Procedures to be adapted to the provisions of the Directive	None	None	3(1)
Non discrimination rule	Not express	Not express	3(2)
Application to Annex IA services	N.A.	N.A.	8
Application to Annex IB services	N.A.	N.A.	9
Mixed Annex IA and IB services	N.A.	N.A.	10
Mixed services/supplies rule	N.A.	N.A.	2
Subsidised contracts	2	None	3(3)
Exclusion of certain defence contracts	N.A.	3	4(1)
Exclusion on grounds of secrecy/special security	4(b)	2(1)(b)	4(2)
Exclusion for alternative international procedures	5	4	5
Exclusion of contracts with a contracting authority on the basis of an exclusive right	N.A.	2(2)	6
GENERAL PROVISIONS - Thresholds			
Basic threshold	6(1)	5(1)(a)(i)	7(1)
GATT threshold	N.A.	5(1)(a)(ii)	N.A.
Total remuneration rule	Not express	Not express	7(2)
Value of supplies provided for works or services	6(5)	N.A.	None
Time of valuation	Not express	5(1)(b)	Not express

Prohibition on choice of valuation method to avoid application of Directive	N.A.	5(3)(2)	7(3)
Prohibition on splitting contract with intention to avoid application of the Directive	6(4)	5(6)	7(3)
Valuation of certain nominate service contracts	N.A.	N.A.	7(4)(1)
Division of the contract into lots	6(3)	5(4) contra	7(4)(2)
48 month rule where no total price	None	5(2)	7(5)
12 month rule where regular or renewable contracts	None	5(3)	7(6)
Options	None	5(5)	7(7)
Revision of thresholds	6(2)	5(1)(c) and (d)	7(8)
GENERAL PROVISIONS - Choice of procedure			
Procedures to be applied	7(1)	6(1)	11(1)
Negotiated procedure with contract notice	7(2)	6(2)	11(2)
Irregular tenders	7(2)(a)	6(2)	11(2)(a)
R and D	7(2)(b)	See below	None
Overall pricing not possible	7(2)(c)	N.A.	11(2)(b)
Precision not possible in contract specifications	None	N.A.	11(2)(c)
Negotiated procedure without contract notice	7(3)	6(3)	11(3)
Absence of tenders	7(3)(a)	6(3)(a)	11(3)(a)
R and D	See above	6(3)(b)	None
Technical and artistic reasons	7(3)(b)	6(3)(c)	11(3)(b)
Prior design contest	None	N.A.	11(3)(c)
Extreme urgency	7(3)(c)	6(3)(d)	11(3)(d)
Additional works/supplies/services	7(3)(d)	6(3)(e)	11(3)(e)
Repetition of works/supplies/services	7(3)(e)	None	11(3)(f)
Open or restricted procedure in all other cases	7(4)	6(4)	11(4)
GENERAL PROVISIONS - Information/Reporting			
Information for eliminated candidates or rejected tenderers	8(1)	7(1)	12(1)
Reasons for not awarding the contract/recommencing the procedure	8(2)	7(2)	12(2)
Written report of the contract procedure	8(3)	7(3)	12(3)
COMMON RULES IN THE TECHNICAL FIELD			
Technical specifications to be given in the contract documents	10(1)	8(1)	14(1)
Basic rule - European standards/European technical approvals/common technical specifications	10(2)	8(2)	14(2)
No provisions for establishing conformity	10(3)(a)	8(3)(a)	14(3)(a)
Prejudice directives on telecommunications	N.A.	8(3)(b)	14(3)(b)
Incompatible products/disproportionate cost	10(3)(b)	8(3)(c)	14(3)(c)

Genuinely innovative project	10(3)(c)	8(3)(d)	14(3)(d)
Reasons for departures to be stated in OJ	10(4)	8(4)	14(4)
Absence of European standards etc	10(5)	8(5)	14(5)
As a general rule, no mention of specific products	10(6)	8(6)	14(6)
COMMON ADVERTISING RULES - Notices			
Annual indicative notice	11(1)	9(1)	15(1)
Contract notice	11(2)	9(2)	15(2)
Contract award notice	11(5)	9(3)	16(1)
Publication of service contract/design contract notices	N.A.	N.A.	16(2)
Notices for Annex IB service contracts	N.A.	N.A.	16(3)
Protection of public interest and legitimate commercial interests	11(5)	9(3)	16(5)
Notices to be drawn up in accordance with models	11(6)	9(4)	17(1)
Notices to be sent to OJ	11(7)	9(5)	17(2)
Publication of annual indicative and post award notices in OJ and TED data bank	11(8)	9(6)	17(3)
Publication of contract notices in OJ and TED data bank	11(9)	9(7)	17(4)
Delay for publication by OJ	11(10)	9(8)	17(5)
Notices not to be published in national press before date of dispatch to OJ	11(11)	9(9)	17(6)
Proof of dispatch	11(12)	9(10)	17(7)
Length of notices and cost of publication	11(13)	9(11)	17(8)
COMMON ADVERTISING RULES - Open procedures			
Time limits - open procedures	12(1)	10(1)	18(1)
Reduction of time limits when a relevant annual indicative notice published	12(2)		18(2)
Latest date for supply of supporting documents if requested in good time	12(3)	10(2)	18(3)
Latest date for supply of additional information if requested in good time	12(4)	10(3)	18(4)
Bulky documents and on the spot investigations	12(5)	10(4)	18(5)
COMMON ADVERTISING RULES - Restricted and negotiated procedures			
Time limits for requests to participate in restricted and negotiated procedures	13(1)	11(1)	19(1)
Invitations to tender in restricted and negotiated procedures	13(2)	11(2)	19(2)
Time limit for receipt of tenders in restricted procedures	13(3)	11(3)	19(3)
Reduction of time limit for tenders when a relevant annual indicative notice published	13(4)		19(4)
Requests to participate may be made by letter, telegram, telex, fax or telephone	13(5)	11(4)	19(5)

Latest date for supply of additional information if requested in good time	13(6)	11(5)	19(6)
Time limit to be adjusted for on site inspections	13(7)	11(6)	19(7)
COMMON ADVERTISING RULES - Accelerated procedures			
Accelerated restricted and negotiated procedures - reduction in time limits	14(1)	12(1)	20(1)
Additional information	14(2)	12(2)	20(2)
Requests to participate and invitations to tender	14(3)	12(3)	20(3)
COMMON ADVERTISING RULES - Miscellaneous			
Optional publication in the OJ	17	13	21
Procedure for modification of drawing up, transmission, etc of notices	35(2)	14	22
COMMON RULES ON PARTICIPATION			
Contracts to be awarded on basis of criteria	18	15(1)	23
When variants may be taken into account	19(1) and (2)	16(1)(1)	24(1)(1)
Variant may not be refused on grounds of specifications	19(3)	16(1)(2)	24(2)(2)
Variant may not be rejected if it would lead to a services/supply contract	N.A.	16(2)	24(3)
Sub-contracting to be indicated by tenderer	20	17	25
Tenders by groups	21	18	26(1)
Legal personality not a ground for rejection	None	None	26(2)
Indication of relevant professional qualifications of responsible staff	None	None	26(3)
Selection of invitees in restricted and negotiated procedures	22(1)	19(1)	27(1)
Range of candidates in restricted procedures	22(2)	19(2)	27(2)
Minimum number in negotiated procedures	22(3)	19(3)	27(3)
Invitations without discrimination	22(4)	19(4)	27(4)
Information about worker protection provisions	23(1)	N.A.	28(1)
Worker protection provisions to be taken in to account	23(2)	N.A.	28(2)
CRITERIA FOR QUALITATIVE SELECTION			
Honorability	24	20	29
Authorisation/membership in home state for the purposes of providing the services	N.A.	N.A.	30(1)
Request to prove enrolment in professional register	25	21(1)	30(2)
The relevant professional registers	25	21(2)	30(3)
Proof of financial and economic standing	26(1)	22(1)	31(1)
Specify in invitation to tender	26(2)	22(2)	31(2)
Alternative means of proof	26(3)	22(3)	31(3)
Ability of service providers	None	None	32(1)

Evidence of technical capability	27(1)	23(1)	32(2)
Specify in notice or in invitation to tender	27(2)	23(2)	32(3)
Protection of technical or trade secrets	None	23(3)	32(4)
EN 29000/EN45000	None	None	33
Supplementary information	28	24	34
Official lists	29(1)	25(1)	35(1)
Certification of registration in official list	29(2)	25(2)	35(2)
Effect of certificate	29(3)	25(3)	35(3)
No additional proof to be required	29(4)	25(4)	35(4)
Address of body for registration in official list	29(5)	25(5)	35(5)
CRITERIA FOR AWARD OF CONTRACTS			
Economically most advantageous tender/lowest price	30(1)	26(1)	36(1)
Economically most advantageous criterion to be stated in contract documents	30(2)	26(2)	36(2)
Exception for preferential rules	30(3)	None	None
Abnormally low tenders	30(4)	27	37
FINAL PROVISIONS			
Calculation of time limits	33	30	38
SPECIAL PROVISIONS IN CERTAIN SECTORS			
MFN treatment for other Member States	None	28	None
Special provisions for housing schemes	9	N.A.	None
CONCESSION CONTRACTS			
General provisions	3	N.A.	None
Concession contract notice	11(3)	N.A.	None
Concessionaires contract notice	11(4)	N.A.	None
Time limit for receipt of candidatures	15	N.A.	None
Time limit for requests to participate in works contracts placed by concessionaires	16	N.A.	None
DESIGN CONTESTS			
Scope of application	None	None	13(1) and (2)
Communication of rules	None	None	13(3)
Admission of participants	None	None	13(4) and (5)
Jury	None	None	13(6)
Publication of notice of intention to hold	None	None	15(3)
Publication of results	None	None	16(1)
Form and manner of publication	None	None	17

APPENDIX II

CPA CLASSIFICATION OF SERVICES LISTED
IN ANNEXES IA AND IB TO DIRECTIVE 92/50/EEC

Details of Services included in Annex 1A

CPA Reference No	Subject	CPC Reference No
	1. Maintenance and Repair Services	
17.40.90	Repair services of tarpaulins and camping equipment	88690.1
17.52.90	Repair services of nets and ropework	88690.2
28.21.90	Repair and maintenance services of tanks, reservoirs and containers of metal	88610.1
28.22.90	Repair and maintenance services of central heating boilers	88610.2
28.30.91	Installation services of steam generators, except central heating hot water boilers, including related pipe system	88610.3
28.30.92	Repair and maintenance services of steam generators, except central heating hot water boilers	88610.4
29.11.91	Installation services of engines and turbines, except aircraft, vehicle and cycle engines	88620.1
29.11.92	Repair and maintenance services of engines and turbines, except aircraft, vehicle and cycle engines	88620.2
29.12.91	Installation services of pumps and compressors	88620.3
29.12.92	Repair and maintenance services of pumps and compressors	88620.4
29.13.90	Repair and maintenance services of taps and valves	88620.5
29.21.91	Installation services of furnaces and furnace burners	88620.6
29.22.91	Installation services of lifting and handling equipment, except of lifts and escalators	88620.8
29.21.92	Repair and maintenance services of furnaces and furnace burners	88620.7
29.22.92	Repair and maintenance services of lifting and handling equipment	88620.9a
29.23.91	Installation services of non-domestic cooling and ventilation equipment	88620.9b
29.23.92	Repair and maintenance services of non-domestic cooling and ventilation equipment	88620.9c
29.24.91	Installation services of other general purpose machinery n.e.c.	88620.9d
29.24.92	Repair and maintenance services of other general purpose machinery n.e.c.	88620.9e
29.32.91	Installation services of agricultural and forestry machinery	88620.9f
29.32.92	Repair and maintenance services of agricultural and forestry machinery	88620.9g
29.40.91	Installation services of machine-tools	88620.9h

29.40.92	Repair and maintenance services of machine-tools	88620.9i
29.51.91	Installation services of machinery for metallurgy	88620.9j
29.51.92	Repair and maintenance services of machinery for metallurgy	88620.9k
29.52.91	Installation services of machinery for mining, quarrying and construction	88620.9l
29.52.92	Repair and maintenance services of machinery for mining, quarrying and construction	88620.9m
29.53.91	Installation services of machinery for food, beverage and tobacco processing	88620.9n
29.53.92	Repair and maintenance services of machinery for food, beverage and tobacco processing	88620.9o
29.54.91	Installation services of machinery for textile, apparel and leather production	88620.9p
29.54.92	Repair and maintenance services of machinery for textile, apparel and leather production	88620.9q
29.55.91	Installation services of machinery for paper and paperboard production	88620.9r
29.55.92	Repair and maintenance services of machinery for paper and paperboard production	88620.9s
29.56.91	Installation services of other special purpose machinery n.e.c.	88620.9t
29.56.92	Repair and maintenance services of other special purpose machinery n.e.c.	88620.9u
29.60.91	Installation services of weapons and weapons systems	88620.9v
29.60.92	Repair and maintenance services of weapons and weapons systems	88620.9w
30.01.90	Installation services of office machinery	88630.1
30.02.90	Installation services of computers and other information processing equipment	88630.2
31.10.91	Installation services of electric motors, generators and transformers	88640.1
31.10.92	Repair, maintenance and rewinding services of electric motors, generators and transformers	88640.2
31.20.91	Installation services of electricity distribution and control apparatus	88640.3
31.20.92	Repair and maintenance services of electricity distribution and control apparatus	88640.4
31.62.91	Installation services of other electrical equipment n.e.c., except electrical signalling equipment for motorways, roads and airports	88640.5
31.62.92	Repair and maintenance services of other electrical equipment n.e.c.	88640.6
32.20.91	Installation services of television and radio transmitters	88650.1

32.20.92	Repair and maintenance services of television and radio transmitters	88650.2
32.30.91	Installation services of professional radio, television, sound and video equipment	88650.3
32.30.92	Repair and maintenance services of professional radio, television, sound and video equipment	88650.4
33.10.91	Installation services of medical and surgical equipment and apparatus	88660.1
33.10.92	Repair and maintenance services of medical and surgical equipment and apparatus	88660.2
33.20.91	Installation services of instruments and apparatus for measuring, checking, testing, navigating and other purposes	88660.3
33.20.92	Repair and maintenance services of instruments and apparatus for measuring, checking, testing, navigating	88660.4
33.40.90	Repair and maintenance services of professional photographic, cinematographic and optical instruments	88660.5
33.50.91	Installation services of industrial time measure instruments and apparatus	88660.6
33.50.92	Repair and maintenance services of industrial time measure instruments and apparatus	88660.7
35.11.91	Repair and maintenance services of ships and floating platforms and structures	88680.1
35.11.92	Reconditioning of ships	88680.2
35.11.93	Demolition of ships	88680.3
35.12.90	Repair and maintenance services of pleasure and sporting boats	88680.4
35.20.91	Repair and maintenance services of railway and tramway locomotives and rolling stock	88680.5
35.20.92	Reconditioning of railway and tramway locomotives and rolling stock	88680.6
35.30.91	Repair and maintenance services of aircraft and aircraft engines	88680.7
35.30.92	Reconditioning of aircraft	88680.8
36.30.90	Repair and maintenance services of musical instruments	88690.3
50.2	Maintenance and repair services of motor vehicles	611d 611e 611f
50.40.40	Maintenance and repair services of motorcycles	61220
52.7	Repair services of personal and household goods	633a 633b 633c 633d

	2. Land transportation services,[1] including armoured car services and courier services, except transport of mail	
60.21.2	Urban and suburban regular passenger transportation, other than by railways	712a
60.21.3	Inter-urban passenger transportation, other than by railways	712b
60.21.4	Other scheduled passenger land transportation	712c
60.22	Taxi services and rental services of passenger cars with operator	712d
60.23	Other land passenger transportation services	712e
60.24.1	Freight transportation services by road, specialized vehicles	712f
60.24.22	Transportation of other freight	71239.3
60.24.3	Rental services of commercial freight vehicles with operator	712h
64.12	Courier services other than national post services	751b
74.60.14	Armoured car services	87304
	3. Air transport services of passengers and freight, except transport of mail	
62.10.10	Scheduled passenger transportation services by air	73110
62.10.22	Transportation of containerized freight, scheduled	73220.1
62.10.23	Transportation of other freight by air, scheduled	73290.1
62.20.10	Non-scheduled passenger transportation services by air	73120
62.20.20(part)	Non-scheduled freight transportation services by air	73210.1 73290.2
62.20.30	Rental services of aircrafts with crew	73400
62.30.10	Space transportation services	73300
	4. Transport of mail by land and air	
60.24.21	Mail transportation	71235
62.10.21	Mail transportation by air, scheduled	73210.1
62.20.20(part)	Non-scheduled freight transportation services by air	73210.1 73290.2
	5. Telecommunications services[2]	
64.20.1	Data and message transmitting services	752a
64.20.2	Other telecommunications services	752b

	6. Financial services: **(a) insurance services** **(b) banking and investment services[3]**	
66	Insurance and pension funding services, except compulsory social security services	812a 812b 812c
67.2	Services auxiliary to insurance and pension funding	814
65	Financial intermediation services, except insurance and pension funding services	811a 811d 811b 811e 811c
67.1	Services auxiliary to financial intermediation, except to insurance and pension funding	813a 813b 813c
	7. Computer and related services	
72.10.10	Hardware consultancy services	84100
72.20.2	Programming services of packaged software products	841b
72.20.3	Software consultancy and other supply services	842a
72.3	Data processing services	842b 843
72.4	Database services	844
72.5	Maintenance and repair services of office, accounting and computing machinery	845
72.6	Other computer-related services	849
	8. R&D services[4]	
73	Research and development services	851 852
	9. Accounting, auditing and book-keeping services	
74.12.1	Accounting and auditing services	862a
74.12.2	Book-keeping services, except tax returns	862b
	10. Market research and public opinion polling services	
74.13	Market research and public opinion polling services	864

	11. Management consultant services[(5)] and related services	
74.14	Business and management consultancy services	865, 866a
74.15	Management holdings services	866b
	12. Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services	
74.20.2	Architectural services	867a
74.20.3	Engineering services	867b
74.20.4	Integrated engineering services for turnkey projects	867c
74.20.5	Urban planning and landscape architectural services	867d
74.20.6	Project management services related to construction and civil engineering works	--
74.20.7	Engineering-related scientific and technical consulting services	867e
74.3	Technical testing and analysis services	867f
	13. Advertising Services	
74.4	Advertising services	871
	14. Building-cleaning services and property management services	
70.3	Real estate agency services on a fee or contract basis	822a 822b
74.7	Industrial cleaning services	874
	15. Publishing and printing services on a fee or contract basis	
22.21	Newspaper printing services	884h
22.22.3	Printing services, other than printing of newspaper	884i
22.23	Bookbinding and finishing services	884j
22.24.1	Composition and plate-making services	884k
22.25	Other services related to printing	884l

22.3	Reproduction services of recorded media	884m 884n 884o
	16. Sewage and refuse disposal services; sanitation and similar services	
90	Sewage and Refuse disposal services, sanitation and similar services	940a 940b 940c

(1) Except for rail transport services covered by Category 18.

(2) Except voice telephony, telex, radiotelephony, paging and satellite services.

(3) Except contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services.

(4) Except research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.

(5) Except arbitration and conciliation services.

Details of services included in Annex 1B

	17. Hotel and restaurant services	
55	Hotel and restaurant services	64
	18. Rail transport services	
60.1	Railway transportation services	711a 711b 711c
60.21.1	Urban and suburban passenger railway transportation	711d
	19. Water transport services	
61	Water transport services	72
	20. Supporting and auxiliary transport services	
63	Supporting and auxiliary transport services; travel agency services	74
	21. Legal Services	
74.11	Legal services	861
	22. Personnel placement and supply services	
74.5	Labour recruitment and provision of personnel services	872

	23. Investigation and security services except armoured car services	
74.60.11	Investigation services	87301
74.60.12	Security consultation services	87302
74.60.13	Alarm monitoring services	87303
74.60.15	Guard services	87305
74.60.16	Other security services	87309
	24. Education and vocational education services	
80	Education services	92
	25. Health and social services	
85	Health and social work services	93
	26. Recreational, cultural and sporting services	
92.11.3	Motion picture and video tape production and related services	961a
92.12	Motion picture or video tape distribution services	961b
92.13	Motion picture projection services	961c
92.2	Radio and television services	961d
92.31.2	Artistic and literary creation and interpretation services	961e
92.32.1	Arts facilities operation services	961f
92.33.1	Fair and amusement park services	961g
92.34	Other entertainment services	961h
92.4	News agency services	962
92.5	Library, archives, museums and other cultural services	963a 963b 963c
92.6	Sporting services	964a 964b
92.7	Other recreational services	964c 964d
	27. Other services	

APPENDIX III

LIST OF BODIES GOVERNED BY PUBLIC LAW AS SET OUT IN ANNEX I TO DIRECTIVE 93/37/EEC

LISTS OF BODIES AND CATEGORIES OF BODIES GOVERNED BY PUBLIC LAW REFERRED TO IN ARTICLE 1 (b)

I. BELGIUM

Bodies

- Archives générales du Royaume et Archives de l'État dans les Provinces - Algemeen Rijksarchief en Rijksarchief in de Provinciën,
- Conseil autonome de l'enseignement communautaire - Autonome Raad van het Gemeenschapsonderwijs,
- Radio et télévision belges, émissions néerlandaises - Belgische Radio en Televisie, Nederlandse uitzendingen,
- Belgisches Rundfunk- und Fernsehzentrum der Deutschsprachigen Gemeinschaft (Centre de radio et télévision belge de la Communauté de langue allemande - Centrum voor Belgische Radio en Televisie voor de Duitstalige Gemeenschap),
- Bibliothèque royale Albert Ier - Koninklijke Bibliotheek Albert I,
- Caisse auxiliaire de paiement des allocations de chômage - Hulpkas voor Werkloosheidsuitkeringen,
- Caisse auxiliaire d'assurance maladie-invalidité - Hulpkas voor Ziekte- en Invaliditeitsverzekeringen,
- Caisse nationale des pensions de retraite et de survie - Rijkskas voor Rust- en Overlevingspensioenen,
- Caisse de secours et de prévoyance en faveur des marins naviguant sous pavillon belge - Hulp- en Voorzorgskas voor Zeevarenden onder Belgische Vlag,
- Caisse nationale des calamités - Nationale Kas voor de Rampenschade,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie diamantaire - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders der Diamantnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie du bois - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders in de Houtnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de batellerie - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders der Ondernemingen voor Binnenscheepvaart,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de chargement, déchargement et manutention de marchandises dans les ports débarcadères, entrepôts et stations (appelée habituellement «Caisse spéciale de compensation pour allocations familiales des régiones maritimes») - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders gebezigd door Ladings- en Lossingsondernemingen en door de Stuwadoors in de Havens, Losplaatsen, Stapelplaatsen en Stations (gewoonlijk genoemd: "Bijzondere Compensatiekas voor kindertoeslagen van de zeevaartgewesten"),
- Centre informatique pour la Région bruxelloise - Centrum voor Informatica voor het Brusselse Gewest,
- Commissariat général de la Communauté flamande pour la coopération internationale - Commissariaat-generaal voor Internationale Samenwerking van de Vlaamse Gemeenschap,
- Commissariat général pour les relations internationales de la Communauté française de Belgique - Commissariaat-generaal bij de Internationale Betrekkingen van de Franse Gemeenschap van België,
- Conseil central de l'économie - Centrale Raad voor het Bedrijfsleven,
- Conseil économique et social de la Région wallonne - Sociaal-economische Raad van het Waals Gewest,
- Conseil national du travail - Nationale Arbeidsraad,
- Conseil supérieur des classes moyennes - Hoge Raad voor de Middenstand,
- Office pour les travaux d'infrastructure de l'enseignement subsidié - Dienst voor Infrastructuurwerken van het Gesubsidieerd Onderwijs,
- Fondation royale - Koninklijke Schenking,
- Fonds communautaire de garantie des bâtiments scolaires - Gemeenschappelijk Waarborgfonds voor Schoolgebouwen,
- Fonds d'aide médicale urgente - Fonds voor Dringende Geneeskundige Hulp,
- Fonds des accidents du travail - Fonds voor Arbeitsongevallen,
- Fonds des maladies professionnelles - Fonds voor Beroepsziekten,
- Fonds des routes - Wegenfonds,
- Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises - Fonds tot Vergoeding van de in geval van Sluiting van Ondernemingen Ontslagen Werknemers,
- Fonds national de garantie pour la réparation des dégâts houillers - Nationaal Waarborgfonds inzake Kolenmijnschade,
- [illegible]

- Fonds pour le financement des prêts à des États étrangers - Fonds voor Financiering van de Leningen aan Vreemde Staten,
- Fonds pour la rémunération des mousses enrôlés à bord des bâtiments de pêche - Fonds voor Scheepsjongens aan Boord van Vissersvaartuigen,
- Fonds wallon d'avances pour la réparation des dommages provoqués par des pompages et des prises d'eau souterraine - Waals Fonds van Voorschotten voor het Herstel van de Schade veroorzaakt door Grondwaterzuiveringen en Afpompingen,
- Institut d'aéronomie spatiale - Instituut voor Ruimte-aëronomie,
- Institut belge de normalisation - Belgisch Instituut voor Normalisatie,
- Institut bruxellois de l'environnement - Brussels Institut voor Milieubeheer,
- Institut d'expertise vétérinaire - Instituut voor Veterinaire Keuring,
- Institut économique et social des classes moyennes - Economisch en Sociaal Instituut voor de Middenstand,
- Institut d'hygiène et d'épidémiologie - Instituut voor Hygiëne en Epidemiologie,
- Institut francophone pour la formation permanente des classes moyennes - Franstalig Instituut voor Permanente Vorming voor de Middenstand,
- Institut géographique national - Nationaal Geografisch Instituut,
- Institut géotechnique de l'État - Rijksinstituut voor Grondmechanica,
- Institut national d'assurance maladie-invalidité - Rijksinstituut voor Ziekte- en Invaliditeitsverzekering,
- Institut national d'assurances sociales pour travailleurs indépendants - Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen,
- Institut national des industries extractives - Nationaal Instituut voor de Extractiebedrijven,
- Institut national des invalides de guerre, anciens combattants et victimes de guerre - Nationaal Instituut voor Oorlogsinvaliden, Oudstrijders en Oorlogsslachtoffers,
- Institut pour l'amélioration des conditions de travail - Instituut voor Verbetering van de Arbeidsvoorwaarden,
- Institut pour l'encouragement de la recherche scientifique dans l'industrie et l'agriculture - Instituut tot Aanmoediging van het Wetenschappelijk Onderzoek in Nijverheid en Landbouw,
- Institut royal belge des sciences naturelles - Koninklijk Belgisch Instituut voor Natuurwetenschappen,
- Institut royal belge du patrimoine artistique - Koninklijk Belgisch Instituut voor het Kunstpatrimonium,
- Institut royal de météorologie - Koninklijk Meteorologisch Instituut,
- Enfance et famille - Kind en Gezin,
- Compagnie des installations maritimes de Bruges - Maatschappij der Brugse Zeevaartinrichtingen,
- Mémorial national du fort de Breendonck - Nationaal Gedenkteken van het Fort van Breendonck,
- Musée royal de l'Afrique centrale - Koninklijk Museum voor Midden-Afrika,
- Musées royaux d'art et d'histoire - Koninklijke Musea voor Kunst en Geschiedenis,
- Musées royaux des beaux-arts de Belgique - Koninklijke Musea voor Schone Kunsten van België,
- Observatoire royal de Belgique - Koninklijke Sterrenwacht van België,
- Office belge de l'économie et de l'agriculture - Belgische Dienst voor Bedrijfsleven en Landbouw,
- Office belge du commerce extérieur - Belgische Dienst voor Buitenlandse Handel,
- Office central d'action sociale et culturelle au profit des membres de la communauté militaire - Centrale Dienst voor Sociale en Culturele Actie ten behoeve van de Leden van de Militaire Gemeenschap,
- Office de la naissance et de l'enfance - Dienst voor Borelingen en Kinderen,
- Office de la navigation - Dienst voor de Scheepvaart,
- Office de promotion du tourisme de la Communauté française - Dienst voor de Promotie van het Toerisme van de Franse Gemeenschap,
- Office de renseignements et d'aide aux familles des militaires - Hulp- en Informatiebureau voor Gezinnen van Militairen,
- Office de sécurité sociale d'outre-mer - Dienst voor Overzeese Sociale Zekerheid,
- Office national d'allocations familiales pour travailleurs salariés - Rijksdienst voor Kinderbijslag voor Werknemers,
- Office national de l'emploi - Rijksdienst voor de Arbeidsvoorziening,
- Office national des débouchés agricoles et horticoles - Nationale Dienst voor Afzet van Land- en Tuinbouwprodukten,
- Office national de sécurité sociale - Rijksdienst voor Sociale Zekerheid,
- Office national de sécurité sociale des administrations provinciales et locales - Rijksdienst voor Sociale Zekerheid van de Provinciale en Plaatselijke Overheidsdiensten,

– Office national des pensions - Rijksdienst voor Pensioenen,
– Office national des vacances annuelles - Rijksdienst voor de Jaarlijkse Vakantie,
– Office national du lait - Nationale Zuiveldienst,
– Office régional bruxellois de l'emploi - Brusselse Gewestelijke Dienst voor Arbeidsbemiddeling,
– Office régional et communautaire de l'emploi et de la formation - Gewestelijke en Gemeenschappelijke Dienst voor Arbeidsvoorziening en Vorming,
– Office régulateur de la navigation intérieure - Dienst voor Regeling der Binnenvaart,
– Société publique des déchets pour la Région flamande - Openbare Afvalstoffenmaatschappij voor het Vlaams Gewest,
– Orchestre national de Belgique - Nationaal Orkest van België,
– Organisme national des déchets radioactifs et des matières fissiles - Nationale Instelling voor Radioactief Afval en Splijtstoffen,
– Palais des beaux-arts - Paleis voor Schone Kunsten,
– Pool des marins de la marine marchande - Pool van de Zeelieden ter Koopvaardij,
– Port autonome de Charleroi - Autonome Haven van Charleroi,
– Port autonome de Liège - Autonome Haven van Luik,
– Port autonome de Namur - Autonome Haven van Namen,
– Radio et télévision belges de la Communauté française - Belgische Radio en Televisie van de Franse Gemeenschap,
– Régie des bâtiments - Regie der Gebouwen,
– Régie des voies aériennes - Regie der Luchtwegen,
– Régie des postes - Regie der Posterijen,
– Régie des télégraphes et des téléphones - Regie van Telegraaf en Telefoon,
– Conseil économique et social pour la Flandre - Sociaal-economische Raad voor Vlaanderen,
– Société anonyme du canal et des installations maritimes de Bruxelles - Naamloze Vennootschap "Zeekanaal en Haveninrichtingen van Brussel",
– Société du logement de la Région bruxelloise et sociétés agréées - Brusselse Gewestelijke Huisvestingsmaatschappij en erkende maatschappijen,
– Société nationale terrienne - Nationale Landmaatschappij,
– Théâtre royal de la Monnaie - De Koninklijke Muntschouwburg,
– Universités relevant de la Communauté flamande - Universiteiten afhangende van de Vlaamse Gemeenschap,
– universités relevant de la Communauté française - Universiteiten afhangende van de Franse Gemeenschap,
– Office flamand de l'emploi et de la formation professionnelle - Vlaamse Dienst voor Arbeidsvoorziening en Beroepsopleiding,
– Fonds flamand de construction d'institutions hospitalières et médico-sociales - Vlaams Fonds voor de Bouw van Ziekenhuizen en Medisch-Sociale Instellingen,
– Société flamande du logement et sociétés agréées - Vlaamse Huisvestingsmaatschappij en erkende maatschappijen,
– Société régionale wallonne du logement et sociétés agréées - Waalse Gewestelijke Maatschappij voor de Huisvesting en erkende maatschappijen,
– Société flamande d'épuration des eaux - Vlaamse Maatschappij voor Waterzuivering,
– Fonds flamand du logement des familles nombreuses - Vlaams Woningfonds van de Grote Gezinnen.

Categories

– les centres publics d'aide sociale,
– les fabriques d'église (church councils).

II. DENMARK

Bodies

– Køebenhavns Havn,
– Danmarks Radio,
– TV 2/Danmark,
– TV2 Reklame A/S,
– Danmarks Nationalbank,

– A/S Øresundsforbindelsen (alene tilslutningsanlaeg i Danmark),
– Københavns Lufthavn A/S,
– Byfornyelsesselskabet København,
– Tele Danmark A/S avec ses filiales,
– Fyns Telefon A/S,
– Jydsk Telefon Aktieselskab A/S,
– Københavns Telefon Aktieselskab,
– Tele Søenderjylland A/S,
– Telecom A/S,
– Tele Danmark Mobil A/S.

Categories

– De kommunale havne (municipal ports),
– Andre Forvaltningssubjekter (other public administrative bodies).

III. GERMANY

1. Legal persons governed by public law

Authorities, establishments and foundations governed by public law and created by federal, State or local authorities in particular in the following sectors:

1.1. Authorities

– Wissenschaftliche Hochschulen und verfasste Studentenschaften (universities and established student bodies),
– berufsstaendige Vereinigungen (Rechtsanwalts-, Notar-, Steuerberater-, Wirtschaftspruefer-, Architekten-, AErzte- und Apothekerkammern) (professional associations representing lawyers, notaries, tax consultants, accountants, architects, medical practitioners and pharmacists),
– Wirtschaftsvereinigungen (Landwirtschafts-, Handwerks-, Industrie- und Handelskammern, Handwerksinnungen, Handwerkerschaften) (business and trade associations: agricultural and craft associations, chambers of industry and commerce, craftmen's guilds, tradesmen's associations),
– Sozialversicherungen (Krankenkassen, Unfall- und Rentenversicherungstraeger) (social security institutions: health, accident and pension insurance funds),
– kassenaerztliche Vereinigungen (associations of panel doctors),
– Genossenschaften und Verbaende (cooperatives and other associations).

1.2. Establishments and foundations

Non-industrial and non-commercial establishments subject to state control and operating in the general interest, particularly in the following fields:

– Rechtsfaehige Bundesanstalten (federal institutions having legal capacity),
– Versorgungsanstalten und Studentenwerke (pension organizations and students' unions),
– Kultur-, Wohlfahrts- und Hilfsstiftungen (cultural, welfare and relief foundations).

2. Legal persons governed by private law

Non-industrial and non-commercial establishments subject to State control and operating in the general interest (including 'kommunale Versorgungsunternehmen' - municipal utilities), particularly in the following fields:

– Gesundheitswesen (Krankenhaeuser, Kurmittelbetriebe, medizinische Forschungseinrichtungen, Untersuchungs- und Tierkoerperbeseitigungsanstalten) (health: hospitals, health resort establishments, medical research institutes, testing and carcase-disposal establishments),
– Kultur (oeffentliche Buehnen, Orchester, Museen, Bibliotheken, Archive, zoologische und botanische Gaerten) (culture: public theatres, orchestras, museums, libraries, archives, zoological and botanical gardens),
– Soziales (Kindergaerten, Kindertagesheime, Erholungseinrichtungen, Kinder- und Jugendheime, Freizeiteinrichtungen, Gemeinschafts- und Buergerhaeuser, Frauenhaeuser, Altersheime, Obdachlosenunterkuenfte) (social welfare: nursery schools, children's playschools, rest-homes, children's homes, hostels for young people, leisure centres, community and civic centres, homes for battered wives, old people's homes, accommodation for the

– Sport (Schwimmbaeder, Sportanlagen und -einrichtungen) (sport: swimming baths, sports facilities),
– Sicherheit (Feuerwehren, Rettungsdienste) (safety: fire brigades, other emergency services),
– Bildung (Umschulungs-, Aus-, Fort- und Weiterbildungseinrichtungen, Volkshochschulen) (education: training, further training and retraining establishments, adult evening classes),
– Wissenschaft, Forschung und Entwicklung (Grossforschungseinrichtungen, wissenschaftliche Gesellschaften und Vereine, Wissenschaftsfoerderung) (science, research and development: large-scale research institutes, scientific societies and associations, bodies promoting science),
– Entsorgung (Strassenreinigung, Abfall- und Abwasserbeseitigung) (refuse and garbage disposal services: street cleaning, waste and sewage disposal),
– Bauwesen und Wohnungswirtschaft (Stadtplanung, Stadtentwicklung, Wohnungsunternehmen, Wohnraumvermittlung) (building, civil engineering and housing: town planning, urban development, housing enterprises, housing agency services),
– Wirtschaft (Wirtschaftsfoerderungsgesellschaften) (economy: organizations promoting economic development),
– Friedhofs- und Bestattungswesen (cemeteries and burial services),
– Zusammenarbeit mit den Entwicklungslaendern (Finanzierung, technische Zusammenarbeit, Entwicklungshilfe, Ausbildung) (cooperation with developing countries: financing, technical cooperation, development aid, training).

IV. GREECE

Categories

Other legal persons governed by public law whose public works contracts are subject to State control.

V. SPAIN

Categories

– Entidades Gestoras y Servicios Comunes de la Seguridad Social (administrative entities and common services of the health and social services)
– Organismos Autónomos de la Administración del Estado (independent bodies of the national administration)
– Organismos Autónomos de las Comunidades Autónomas (independent bodies of the autonomous communities)
– Organismos Autónomos de las Entidades Locales (independent bodies of local authorities)
– Otras entidades sometidas a la legislación de contratos del Estado español (other entities subject to Spanish State legislation on procurement).

VI. FRANCE

Bodies

1. National public bodies:

1.1. with scientific, cultural and professional character:

– Collège de France,
– Conservatoire national des arts et métiers,
– Observatoire de Paris.

1.2. Scientific and technological:

– Centre national de la recherche scientifique (CNRS),
– Institut national de la recherche agronomique,

– Institut français de recherche scientifique pour le développement en coopération (ORSTOM).

1.3. with administrative character:

– Agence nationale pour l'emploi,
– Caisse nationale des allocations familiales,
– Caisse nationale d'assurance maladie des travailleurs salariés,
– Caisse nationale d'assurance vieillesse des travailleurs salariés,
– Office national des anciens combattants et victimes de la guerre,
– Agences financières de bassins.

Categories

1. National public bodies:

– universités (universities),
– écoles normales d'instituteurs (teacher training colleges).

2. Administrative public bodies at regional, departmental and local level:

– collèges (secondary schools),
– lycées (secondary schools),
– établissements publics hospitaliers (public hospitals),
– offices publics d'habitations à loyer modéré (OPHLM) (public offices for low-cost housing).

3. Groupings of territorial authorities:

– syndicats de communes (associations of local authorities),
– districts (districts),
– communautés urbaines (municipalities),
– institutions interdépartementales et interrégionales (institutions common to more than one Département and interregional institutions).

VII. IRELAND

Bodies

– Shannon Free Airport Development Company Ltd,
– Local Government Computer Services Board,
– Local Government Staff Negotiations Board,
– Córas Tráchtála (Irish Export Board),
– Industrial Development Authority,
– Irish Goods Council (Promotion of Irish Goods),
– Córas Beostoic agus Feola (CBF) (Irish Meat Board),
– Bord Fáilte Éireann (Irish Tourism Board),
– Údarás na Gaeltachta (Development Authority for Gaeltacht Regions),
– An Bord Pleanála (Irish Planning Board).

Categories

– Third level Educational Bodies of a Public Character,
– National Training, Cultural or Research Agencies,
– Hospital Boards of a Public Character,
– National Health & Social Agencies of a Public Character,
– Central & Regional Fishery Boards.

VIII. ITALY

Bodies

- Agenzia per la promozione dello sviluppo nel Mezzogiorno.

Categories

- Enti portuali e aeroportuali (port and airport authorities),
- Consorzi per le opere idrauliche (consortia for water engineering works),
- Le università statali, gli istituti universitari statali, i consorzi per i lavori interessanti le università (State universities, State university institutes, consortia for university development work),
- Gli istituti superiori scientifici e culturali, gli osservatori astronomici, astrofisici, geofisici o vulcanologici (higher scientific and cultural institutes, astronomical, astrophysical, geophysical or vulcanological oberservatories),
- Enti di ricerca e sperimentazione (organizations conducting research and experimental work),
- Le istituzioni pubbliche di assistenza e di beneficenza (public welfare and benevolent institutions),
- Enti che gestiscono forme obbligatorie di previdenza e di assistenza (agencies administering compulsory social security and welfare schemes),
- Consorzi di bonifica (land reclamation consortia),
- Enti di sviluppo o di irrigazione (development or irrigation agencies),
- Consorzi per le aree industriali (associations for industrial areas),
- Comunità montane (groupings of municipalities in mountain areas),
- Enti preposti a servizi di pubblico interesse (organizations providing services in the public interest),
- Enti pubblici preposti ad attività di spettacolo, sportive, turistiche e del tempo libero (public bodies engaged in entertainment, sport, tourism and leisure activities),
- Enti culturali e di promozione artistica (organizations promoting culture and artistic activities)

IX. LUXEMBOURG

Categories

- Les établissements publics de l'État placés sous la surveillance d'un membre du gouvernement (public establishments of the State placed under the supervision of a member of the Government),
- Les établissements publics placés sous la surveillance des communes (public establishments placed under the supervision of the communes),
- Les syndicats de communes créés en vertu de la loi du 14 février 1900 telle qu'elle a été modifiée par la suite (associations of communes created under the law of 14 February 1900 as subsequently modified).

X. THE NETHERLANDS

Bodies

- De Nederlandse Centrale Organisatie voor Toegepast Natuurwetenschappelijk Onderzoek (TNO) en de daaronder ressorterende organisaties.

Categories

- De waterschappen (administration of water engineering works),
- De instellingen van wetenschappelijk onderwijs vermeld in artikel 8 van de Wet op het Wetenschappelijk Onderwijs (1985), de academische ziekenhuizen (Institutions for scientific education, as listed in Article 8 of the Scientific Education Act (1985)) wet op het Wetenschappelijk Onderwijs (1985) (teaching hospitals).

XI. PORTUGAL

Categories

- Estabelecimentos públicos de ensino investigaçaço científica e saúde (public establishments for education, scientific research and health), - Institutos públicos sem carácter comercial ou industrial (public institutions without commercial or industrial character),
- Fundações públicas (public foundations),
- Administracões gerais e juntas autonómas (general administration bodies and independent councils).

XII. THE UNITED KINGDOM

Bodies

- Central Blood Laboratories Authority,
- Design Council,
- Health and Safety Executive,
- National Research Development Corporation,
- Public Health Laboratory Services Board,
- Advisory, Conciliation and Arbitration Service,
- Commission for the New Towns,
- Development Board For Rural Wales,
- English Industrial Estates Corporation,
- National Rivers Authority,
- Northern Ireland Housing Executive,
- Scottish Enterprise,
- Scottish Homes,
- Welsh Development Agency.

Categories

- Universities and polytechnics, maintained schools and colleges,
- National Museums and Galleries,
- Research Councils,
- Fire Authorities,
- National Health Service Authorities,
- Police Authorities,
- New Town Development Corporations,
- Urban Development Corporations.

XIII. AUSTRIA

All bodies subject to budgetrary supervision by the "Rechnungshof" (audit authority) not having an industrial or commercial character.

XIV. FINLAND

Public or publicly controlled entities or undertakings not having an industrial or commercial character.

XV. SWEDEN

All non-commercial bodies whose procurement is subject to supervision by the National Board for Public Procurement.

APPENDIX IV

REGULATION NO 1182/71 DETERMINING THE RULES APPLICABLE TO PERIODS, DATES AND TIME LIMITS

REGULATION (EEC , EURATOM) N 1182/71 OF THE COUNCIL OF 3 JUNE 1971

determining the rules applicable to periods , dates and time limits

THE COUNCIL OF THE EUROPEAN COMMUNITIES ,

Having regard to the Treaty establishing the European Economic Community , and in particular Article 235 thereof ;

Having regard to the Treaty establishing the European Atomic Energy Community , and in particular Article 203 thereof ;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament (1);

Whereas numerous acts of the Council and of the Commission determine periods , dates or time limits and employ the terms " working days " or " public holidays " ;

Whereas it is necessary to establish uniform general rules on the subject ;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules ;

Whereas , to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods , dates and time limits ;

Whereas no authority to establish such rules is provided for in the Treaties ;

HAS ADOPTED THIS REGULATION :

Article 1

Save as otherwise provided , this Regulation shall apply to acts of the Council or Commission which have been or will be passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community .

(1) OJ N° C51, 29.4.1970, p.25.

CHAPTER I

Periods

Article 2

1. For the purposes of this Regulation , " public holidays " means all days designated as such in the Member State or in the Community institution in which action is to be taken .

To this end , each Member State shall transmit to the Commission the list of days designated as public holidays in its laws . The Commission shall publish in the *Official Journal of the European Communities* the lists transmitted by the Member States , to which shall be added the days designated as public holidays in the Community institutions .

2. For the purposes of this Regulation , " working days " means all days other than public holidays , Sundays and Saturdays .

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place , the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question .

Where a period expressed in days , weeks , months or years is to be calculated from the moment at which an event occurs or an action takes place , the day during which that event occurs or that action takes place shall not be considered as falling within the period in question .

2. Subject to the provisions of paragraphs 1 and 4 :

(a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period ;

(b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period ;

(c) a period expressed in weeks , months or years shall start at the beginning of the first hour of the first day of the period , and shall end with the expiry of the last hour of the last day of the period which , by its number , corresponds to the day from which the period runs , except that , where a period expressed in months or years is to be calculated from the end of a month , it shall end with the expiry of the last hour of the last day of the last month of the period ;

3. Periods shall include public holidays , Sundays and Saturdays except where these are expressly excluded or where periods are expressed in working days .

4. Where a period , calculated from the moment at which an event occurs or an action takes place , ends at midnight , it shall be considered to end with the expiry of the last hour of the last day of the period .

Article 4

1. Where , for the purposes of the application of the provisions of acts of the Council or Commission , a period is to be calculated backwards from a given date or event , the date or day during which the given date occurs or the event takes place shall not be considered as falling within the period in question .

2. Subject to the provisions of paragraph 4 , a period calculated backwards shall include the first hour and the last hour of the period in accordance with the provisions of Article 3 (2) (a) , (b) and (c) .

3. Periods shall include public holidays , Sundays and Saturdays except where these are expressly excluded or where periods are expressed in working days .

4. Where a period , calculated backwards from the moment at which an event occurs or an action takes place , ends at midnight , it shall be considered to end with the expiry of the last hour of the last day of the period .

Article 5

Where , for the purposes of the application of the provisions of acts of the Council or Commission , a period is to be calculated from the moment at which an event occurs or an action takes place , the event in question or the action in question shall be taken into account in calculating the period concerned in accordance with the provisions of Article 3 .

Article 6

Where , for the purposes of the application of the provisions of acts of the Council or Commission , a period is to be calculated backwards from a given date or event , the date in question or the event in question shall be taken into account in calculating the period concerned in accordance with the provisions of Article 4 .

Article 7

Where , for the purposes of the application of the provisions of acts of the Council or Commission , a period - expressed in years , months , weeks or days - fixed at a given date shall occur at the beginning of the first hour of the day falling on that date

last week , month or year is the same day of the week , or falls on the same date , as the day from which the period runs . if , in a period expressed in months or in years , the day on which it should expire does not occur in the last month , the period shall end with the expiry of the last hour of the last day of that month ;

(d) if a period includes parts of months , the month shall , for the purpose of calculating such parts , be considered as having thirty days .

3. The periods concerned shall include public holidays , Sundays and Saturdays , save where these are expressly excepted or where the periods are expressed in working days .

4. Where the last day of a period expressed otherwise than in hours is a public holiday , Sunday or Saturday , the period shall end with the expiry of the last hour of the following working day .

This provision shall not apply to periods calculated retroactively from a given date or event .

5. Any period of two days or more shall include at least two working days.

CHAPTER II

Dates and time limits

Article 4

1. Subject to the provisions of this Article , the provisions of Article 3 shall , with the exception of paragraphs 4 and 5 , apply to the times and periods of entry into force , taking effect , application , expiry of validity , termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts .

2. Entry into force , taking effect or application of acts of the Council or Commission - or of taking effect or application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place .

3. Expiry of validity , the termination of effect or the cessation of application of acts of the Council or Commission - or of any provisions of such acts - fixed at a given date shall occur on the expiry of the last hour of the day falling on that date .

This provision shall also apply when expiry of validity , termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place .

Article 5

1. Subject to the provisions of this Article , the provisions of Article 3 shall , with the exception of paragraphs 4 and 5 , apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment .

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date , it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date .

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place .

Article 6

This Regulation shall enter into force on 1 July 1971.

This Regulation shall be binding in its entirety and directly applicable in all Member States .

Done at Luxembourg , 3 June 1971 .

For the Council
The President
R . PLEVEN

FOR FURTHER INFORMATION

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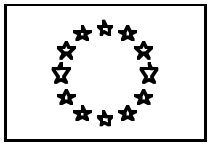

EUROPEAN COMMISSION

PUBLIC PROCUREMENT IN THE EUROPEAN UNION

GUIDE TO THE COMMUNITY RULES ON PUBLIC WORKS CONTRACTS

OTHER THAN IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS

DIRECTIVE 93/37/EEC

This guide has no legal value and does not necessarily represent the official position of the Commission

CONTENTS

ANNEXES

I. INTRODUCTION

THE COMMUNITY RULES ON PUBLIC WORKS CONTRACTS

1. GENERAL PRINCIPLES LAID DOWN IN THE TREATY

The EC Treaty does not specifically mention public procurement. It does, however, lay down fundamental principles which are generally applicable and which contracting authorities have to observe when awarding all contracts, including (as will be explained further on) those whose value falls below the threshold for application of the specific rules laid down in the Directive. The Treaty principles governing public works contracts are, in particular: the right of establishment (Articles 52 *et seq.*), the freedom to provide services (Articles 59 *et seq.*) and the general ban on discrimination on grounds of nationality (Article 6).

1.1 Right of establishment

Under the first of these principles, the EC Treaty[1] requires Member States to allow individuals and companies from other Member States to establish and carry on a business or self-employed activities in their territory under the conditions laid down for their own nationals, subject to the provisions on capital movements.

The principle of equality of treatment with the Member States' own nationals applies to all forms of business and self-employment carried on by natural or legal persons, including those involving the setting-up of agencies, branches or subsidiaries and the formation and management of companies or firms, including cooperatives and other legal persons governed by public or private law, except those which are non-profit-making.

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[1] The ECSC Treaty has no provisions on the right of establishment. Articles 52 *et seq.* of the EC Treaty are consequently applicable to the fields covered by the ECSC Treaty, as they do not conflict with provisions of that Treaty. Article 97 of the Euratom Treaty provides that no restrictions based on nationality may be applied to natural or legal persons, whether public or private, under the jurisdiction of a Member State, where they desire to participate in the construction of nuclear installations of a scientific or industrial nature in the Community. This provision guarantees *inter alia* the right of establishment in connection with the construction of such installations and is directly applicable. In so

The only business or self-employed activities which are not covered by the right of establishment are those connected, even occasionally, with the exercise of official authority.

In accordance with the case-law of the Court of Justice of the European Communities, this exception is to be construed strictly and cannot be given a scope which would exceed the objective for which it was inserted in the Treaty (it is to be found in Article 55). Its purpose being to enable Member States to exclude non-nationals from taking up functions involving the exercise of official authority which are connected with one of the business or self-employed activities referred to in Article 52, this need is fully satisfied when the exclusion of non-nationals is limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority.[2]

The right of establishment rules out both direct discrimination, where non-nationals have to comply with rules or requirements that do not apply to nationals, and indirect discrimination, in other words requirements which are applicable irrespective of nationality but whose effect is exclusively or principally to hinder the taking-up or pursuit of the activity by foreign nationals.[3]

The right of establishment may be limited on grounds of public policy, public security or public health: Article 56 allows Member States to apply provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on any of those grounds.

On the "principle of national treatment", the Court had this to say:[4]

"Under the terms of the second paragraph of Article 52, freedom of establishment is to be exercised under the conditions laid down for its own nationals by the law of the country where establishment is effected.

In the event that the specific activities in question are not subject to any rules in the host State, so that a national of that Member State does not have to have any specific qualification in order to pursue them, a national of any other Member State is entitled to establish himself on the territory of the first State and pursue those activities there.

However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability. Such provisions may stipulate in particular that pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be.

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2 Judgment of 22 June 1974 in Case 2/74 *Reyners v Belgium* [1974] ECR 631.

3 General programme for the abolition of restrictions on freedom of establishment (OJ No 2, 15.1.1962, p. 36/62); judgment of the Court of Justice of 28 April 1977 in Case 71/76 *Thieffry v Conseil de l'ordre des avocats à la Cour de Paris* [1977] ECR 765.

4 Paragraphs 33 to 37 of the judgment of 30 September 1995 in Case C-55/94 *Gebhard v Consiglio*

Where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 provides that the Council is to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.

It follows, however, from the Court' s case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

1.2 Freedom to provide services

The freedom to provide services[5] is, like the right of establishment, governed by the principle of national treatment. Under the second paragraph of Article 60 of the Treaty, "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

The basic difference between the right of establishment and the freedom to provide services is that the former involves a permanent business establishment in the host country, while the latter involves only temporary residence in the other Member State where the service is provided.

Freedom to provide services covers the performance of services, normally for consideration, in a Member State other than that of the service provider, where the services are not otherwise governed by the Treaty's provisions on the free movement of goods, capital and persons (in which case those special provisions are applicable). Services include activities of an industrial and commercial character and activities of craftsmen and the professions.

Transport services are excluded from the provisions on freedom to provide services and are governed exclusively by Title IV of the Treaty (Transport). There is also a special rule for banking and insurance services. These are to be liberalized in step with the progressive liberalization of capital movements.

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5 Like the right of establishment, the freedom to provide services is not regulated by the ECSC Treaty. Consequently, Articles 59 *et seq.* of the EC Treaty are also applicable to the coal and steel industries, as they do not conflict with provisions of the ECSC Treaty. In the Euratom Treaty, the principle of the freedom to provide services is established by Article 97. In so far as Articles 59 *et seq.* of the

The exceptions made in the establishment rules for activities connected with the exercise of official authority and for restrictions on grounds of public policy, public security and public health also apply to the provision of services.

Under the principle of national treatment all laws, regulations and administrative provisions and practices capable of restricting or impeding access to or the practice of self-employed occupations in the services sector by other Member States' nationals or subjecting other Member States' nationals to different treatment from the Member State's own nationals are prohibited. Differences of treatment may derive from rules that overtly discriminate between nationals and non-nationals or from rules that apply to both.

As the Court has stated,[6] "Article 59 of the Treaty entails, in the first place, the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided. National rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article 56 of the Treaty.

In the absence of harmonization of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation.

As the Court has consistently held, such restrictions come within the scope of Article 59 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.

Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules".

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[6] Judgment of 25 July 1991 in Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and*

2. PROVISIONS COORDINATING NATIONAL PROCEDURES

2.1 Objectives

The abovementioned Treaty principles place a general ban on discriminatory measures and unfair treatment.

However, these prohibitions were not sufficient, on their own, to establish a single market in the specific area of public procurement. Differences between national rules together with the lack of any obligation to open up contracts to Community-wide competition often conspired to keep national markets walled off from foreign competitors. Legislation was therefore needed to make sure that public contracts throughout the Community were open to firms from all Member States on equal terms and to make procurement procedures more transparent so that compliance with the principles laid down in the Treaty could be enforced more effectively.

To make it easier for firms to exercise their right of establishment and freedom to provide services in competing for public works contracts, on 26 July 1971 the Council adopted Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts.[7]

That coordination was based on three main principles:

- Community-wide advertising of contracts to develop real competition between economic operators in all the Member States;
- the banning of technical specifications liable to discriminate against potential foreign bidders;
- application of objective criteria for the selection of tenderers and the award of contracts.

Directive 71/305/EEC did not open up public procurement to the extent expected: the Community legislation did not provide sufficient guarantees and contained several gaps, and its application at national level reflected the protectionism which had characterized the sector for too long.

To make up for the deficiencies identified in these rules, a new directive was therefore adopted: Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts.[8]

The principal innovations concerned in particular:

- the definition of the Directive's scope;
- information and tendering conditions;
- transparency of procedures;
- the definition of the technical specifications.

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7 OJ No L 185, 16.8.1971, p. 5

The need then became evident to combine the provisions of the above two Directives into a single consolidated instrument, so that the Community citizen could use a clear, transparent text and, hence, exercise more easily the specific rights which he enjoys.

The Works Directives were thus consolidated as Directive 93/37/EEC.[9]

Directive 93/37/EEC applies not only throughout the European Community but, in accordance with the Agreement on the European Economic Area,[10] also in Norway, Iceland and Liechtenstein[11].

The European Parliament and the Council are currently discussing a proposal for a Directive[12] which would align the relevant provisions of Directive 93/37/EEC on those of the new Agreement on Government Procurement (GPA)[13] signed by the European Union on completion of the Uruguay Round of trade negotiations conducted under the auspices of what is now the World Trade Organization.

2.2 Legal effect

As regards legal effect, Article 189 of the EC Treaty states that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

The Member States are obliged, therefore, to adopt and implement all the arrangements and measures necessary to bring their national law into line with the provisions of directives addressed to them.

As Directive 93/37/EEC is only a consolidation of the existing Works Directives, the Community legislature has obviously not set a deadline for its transposal, and it is therefore applicable immediately. It has, however, maintained the obligations laid

down in the various earler provisions concerning the time-limits for their transposal and application. Thus, the only time–limits for application still running are those for Greece and Portugal (1 January 1998), and only in the case of the provisions relating to contracts concluded in the water, energy, transport and telecommunications sectors.

The effectiveness of the Directives is not, however, necessarily dependent on the implementing measures taken by the Member States concerned.

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9 OJ No L 199, 9.8.1993, p. 54.

10 OJ No L 1, 3.1.1994, p. 1.

11 Decision of the EEA Council No 1/95 of 10 March 1995, OJ No L 86, 20.4.1995, p. 58.

12 OJ No C 138, 3.6.1995, p. 1.

In accordance with the established case–law of the Court of Justice concerning direct effect, when the time–limit for transposal into national law expires a Member State may not rely on the non–fulfilment of the formalities for transposing a directive into national law or on the adoption of measures which are inconsistent with a directive in order to preclude its courts from applying provisions capable of producing direct effects.

In accordance with the principles established by the Court to determine whether provisions have direct effect, an examination should be made in each case as to whether the nature, structure and terms of the provision in question are likely to produce direct effects in relations between Member States and individuals. Such is the case, as a general rule, where a provision expresses a clear, precise and unconditional obligation allowing the Member States to which the directive is addressed no room for interpretation.

In addition, "when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities (...) are obliged to apply those provisions".[14]

The Court took the line that it would be contradictory to hold that private individuals are entitled to avail themselves of the provisions of a directive fulfilling the above conditions before national courts, with a view to obtaining judgment against the authorities, and yet to find that the latter are not obliged to apply the provisions of the directive by disregarding those provisions of national law which are not consistent with the directive.

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[14] Paragraph 31 of the Court's judgment of 22 June 1989 in Case 103/88 *Fratelli Costanzo v Comune*

II. THE CONSOLIDATED DIRECTIVE 93/37/EEC

1. WHAT IS MEANT BY "PUBLIC WORKS CONTRACTS"?

1.1 Definition

Public works contracts are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority, which have as their object:

- either the execution, or both the execution and design, of works related to one of the activities (building and civil engineering, installation and building completion work) covered by Class 50 of NACE[15] or of a work;
- or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

A work is defined by the Directive as "the outcome of building or civil engineering works taken as a whole" – e.g. a hospital, theatre or bridge – "that is sufficient of itself to fulfil an economic and technical function", i.e. fully equipped and completed.

1.2 The contractor

As the Court has stated,[16] the concept of the contractor must be interpreted so as to include not only a natural or legal person who will himself carry out the works but also a person who will have the contract carried out through agencies or branches or will have recourse to technicians or outside technical divisions. or even a group of undertakings, whatever its legal form. In the case in point, the Court ruled that "a holding company which does not itself execute works may not, because its subsidiaries which do not carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures".[17]

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15 The general industrial classification of economic activities within the European Communities. A list of the activities covered by Class 50 is given in Annex I.

16 Judgment of 14 April 1994 in Case C-389/92 *Ballast Nedam Groep NV v Belgian State* [1994] ECR I-1289

1.3 The contracting authority

The Directive defines contracting authorities as the State, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities or bodies governed by public law.

〈 *The State*

It is worth stressing that for the purposes of applying the Directive, the concept of the State is not confined to the administration as such, but also covers bodies which, albeit not formally part of the traditional structures of the administration, have no legal personality of their own and carry out tasks that are normally the responsibility of the State administration, which they merely represent in different ways.

This point was clarified by the Court of Justice in *Beentjes v Netherlands State*,[18] in which it had to rule whether Directive 71/305/EEC applied to the award of public works contracts by the Waterland Local Land Consolidation Committee, a body with no legal personality of its own. To that end, the Court stressed that "the objective of Directive 71/305/EEC is to coordinate national procedures for the award of public works contracts concluded in Member States on behalf of the State, regional or local authorities or other legal persons governed by public law" and that the term "the State" within the meaning of Article 1(b) Directive 71/305/EEC defining contracting authorities "must be interpreted in functional terms. The aim of the Directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions of the Directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration.

Consequently, a body such as that in question here, whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award, must be regarded as falling within the notion of the State for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms."

〈 *Bodies governed by public law*

The Directive defines bodies governed by public law on the basis of three cumulative criteria. A body governed by public law thus means any body:

(1) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

(2) having legal personality, and

(3) * either financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law,

* or subject to management supervision by those bodies,

* or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The Directive thus applies to any body with legal personality under public or private law, established in the general interest, whose operational choices and activities are or may be influenced by a contracting authority as a result of the links between them by virtue of one or more of the conditions that go to make up the third criterion.

The only bodies which are established in the general interest and fulfil the other criteria but are not regarded as contracting authorities by the Directive are those set up for the specific purpose of meeting needs of an industrial or commercial nature, i.e. needs which they satisfy by carrying on economic activities in the industrial or commercial field that involve supplying goods or services on markets which are open to other public or private operators under fully competitive conditions. These are therefore bodies which carry on a business equivalent to that of a private operator.

It should be emphasized that the exemption provided for by the Directive applies only to bodies which carry on such economic activities since they were set up in order specifically to do so. Consequently, the exemption does not apply to bodies which, while carrying on commercial or industrial activities, were in fact set up to satisfy a different general interest: e.g. a body set up specifically to carry out administrative tasks so as to meet general–interest needs of a social nature, which, to ensure that its books balance, also carries on a profitable commercial activity.

Nevertheless, each individual case must be analysed to determine whether the body governed by public law is subject to the Directive.

In the interests of greater transparency in application, the Directive sets out, in Annex I, a list[19] of bodies and categories of bodies fulfilling the criteria for bodies governed by public law and lays down a procedure for updating the list to ensure that it is as exhaustive as possible.

The obligation on a body governed by public law to comply with the Directive does not, however, depend on its prior inclusion in the list: it is under such an obligation as soon as it fulfils the criteria. Similarly, although a body may be on the list, it could be exempted from complying with the Directive if it were no longer to meet one or more of the cumulative criteria.

1.4 Form and subject of contracts

The Directive states merely that the contract must be for pecuniary interest and concluded in writing. The consideration for the work performed by the contractor must therefore take the form of a price or, at all events, be quantifiable in monetary terms.[20] The contractor's remuneration, could, for example, consist in the transfer of land or property by the contracting authority.

As far as the subject of the contract is concerned, the Directive states that it consists not only in the execution, or both the execution and design, of works, but also in "the execution by whatever means of a work corresponding to the requirements specified by the contracting authority".

By these new definitions of the subject of the contract, and particularly the latter one, the Community legislature has made it clear that all contracts relating to the execution of building and/or civil engineering works, whether or not accompanied by other tasks, are public works contracts. All the new forms of contract in which the contracting authority chooses to entrust to the contractor a fairly large number of tasks – for example arranging finance, purchasing land and devising projects – thus alleviating the workload involved in the authority's traditional role in the public works sector, are covered by the Directive.

Economic statistics show that contracting authorities very frequently choose to rely on a general contractor who designs the works according to their requirements and coordinates execution of the entire project, or else prefer to conclude a project development or management contract whereby the work is financed and executed entirely by the contractor, whom they then of course reimburse.

The scope of the Directive is thus as wide as possible in order to take in the whole gamut of contractual relationships that could be contemplated by contracting authorities to meet their specific needs.

It is worth noting that the Directive does not cover the mere purchase of existing property, unless of course the property was built to the requirements of the contracting authority, which had previously given an undertaking to purchase it after completion. Such an agreement would constitute a property development contract and would be subject to the Directive.

Similarly, mere renting of property for which there is no link with any construction or purchase contract is not covered by the Directive.

Neither do public service contracts (e.g. for property management) constitute public works contracts: these are subject to Directive 92/50/EEC on the public procurement of services in so far as any works entailed are only incidental and do not form the subject-matter of the contract.[21]

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[20] Nevertheless, where the consideration consists wholly or partly in the right to exploit the construction covered by the contract, the latter is not a public works contract, but a public works concession. Concessions are subject to different rules outlined in section 7.

[21] Judgment of the Court of Justice of 19 April 1994 in Case C-331/94 *Gestión Hotel*

In line with the definition given in the Directive, a public works contract must have as its main object the execution of building and/or civil engineering work covered by Class 50 of NACE, or the execution of a work.

1.5 Contracts subsidized to more than 50% by contracting authorities

The Directive requires Member States to take the necessary measures to ensure that contracting authorities comply or ensure compliance with its provisions where they subsidize directly by more than 50% a works contract awarded by an entity other than themselves, whether that entity is public or private.

This requirement applies, however, only to contracts concerning civil engineering works (covered by Class 50, Group 502, of the NACE nomenclature) and to contracts relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.

The subsidies to be taken into consideration are all the different forms of assistance, including that provided by the Community, which are directly intended for the works contracts in question.

In view of the subsidy it is granting and its experience in awarding contracts, a contracting authority could itself choose the contractor, even if the outcome of the works is not intended for its own use. In such cases, it must itself comply with the provisions of the Directive.

If, on the other hand, the choice of contractor is left to the recipient of the subsidy, the contracting authority must require the recipient to comply with the Directive, for example by including such compliance among the general conditions to be met in order to obtain certain grants or among the specific conditions laid down in the instrument granting the subsidy.

The list of the types of works concerned given in the relevant article of the Directive is exhaustive. However, the list of premises, namely hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes, is a generic list of categories of premises. These categories should not be construed narrowly, since a restrictive interpretation would undermine the aim of the Directive, which is to ensure greater transparency in the award of public works contracts.

Homes for retired people or the physically disabled should thus, for example, be treated in the same way as hospitals where their purpose is to provide medical or surgical care for sick people, whether elderly or disabled, rather than assisting the elderly or disabled and only occasionally administering minor treatment.

2. PUBLIC WORKS CONTRACTS COVERED BY THE DIRECTIVE

Deciding whether or not a contract constitutes a public works contract as defined above is only the first step in determining whether it falls within the scope of the Directive. The latter applies above a given value threshold and subject to certain exceptions linked to the activities of certain bodies, the purpose of the contract or special conditions governing it.

2.1 Threshold

The provisions of the Directive apply to public works contracts whose estimated value excluding VAT is not less than ECU 5 million.

The value of this threshold in national currencies is based on the average daily values of those currencies expressed in ecus over the 24 months ending on the last day of August immediately preceding each adjustment. These values, which are calculated by the Commission and are normally to be adjusted by it every two years from 1 January 1992 onwards, are published in the "C" (Information and Notices) series of the Official Journal of the European Communities ("Official Journal") in November.

The currency equivalents of the thresholds applicable until the forthcoming adjustment (i.e., unless adjusted early, until 31 December 1997) are the following:

National currency equivalent of:

	ECU 5 000 000	**ECU 1 000 000**
Belgian franc/Luxembourg franc	197 463 667	39 492 733
Danish krone	37 517 115	7 503 423
German mark	9 529 019	1 905 804
Greek drachma	1 450 386 458	290 077 291
French franc	32 910 979	6 582 196
Finish markka	30 586 642	6 117 328
Dutch guilder	10 683 965	2 136 793
Irish pound	4 014 106	802 821
Italian lira	9 927 175 000	1 985 435 000
Austrian schilling	67 036 083	13 407 217
Pound sterling	3 950 456	790 091
Spanish peseta	799 822 917	159 964 583
Portuguese escudo	982 444 792	196 488 958
Swedish krona	46 628 913	93 325 783

2.2 Estimation of contract value

2.2.1 Rules

In general terms, the value to be taken into account in determining whether a public works contract reaches the threshold is the estimated value excluding VAT of the contract which the contracting authority intends to award. The estimation should therefore include all the services, materials, etc. to be covered by the contract. For example, where a contracting authority chooses to award a development contract, the estimated contract value should include not only activities covered by Class 50 of the NACE nomenclature, but also all other tasks to be entrusted to the contractor under that contract.

Alongside the above general rule, which flows from the way in which public works contracts are defined, the Directive lays down rules for estimating the contract value in three specific cases.

Where the contracting authority itself makes available to the contractor supplies needed to carry out the works, the contract value must include the estimated value of those supplies as well as the value of the works.

Supplies should be understood here as referring not only to materials to be incorporated in the building or structure, but also to the plant or equipment necessary for the works: a contracting authority could, for example, provide the contractor with a crane or lorries. In the case of plant and equipment, the value to be taken into account will of course not always be the purchase price, but instead the price normally charged on the market for hiring it. Which of the two prices is taken into account will depend on the average life of the equipment and the length of time it is made available by the contracting authority: if an item of equipment is designed to have a useful life that is longer than the time it is made available (for example, the equipment is made to last for five years and the contractor can use it for one year), the value to be taken into account will be the hire price. If, on the other hand, the equipment is made available for longer than its average life, the contracting authority will have to include its purchase price in the estimate of the contract value.

Where a work is subdivided into several lots, each one the subject of a contract, the aggregate value of all the lots must be taken into account in determining whether or not the threshold has been reached. If that is the case, the Directive is to be applied to the award of each contract, irrespective of the value of the lot to which it relates. Nevertheless, contracting authorities are allowed to award freely lots whose estimated value excluding VAT is less than ECU 1 million. Permission to depart from the Directive is, however, limited: the aggregate value of lots awarded freely may not exceed 20% of the total estimated value of all lots.

Let us take an example: a contract for building works is divided into three lots, estimated at ECU 3 million, ECU 1 200 000 and ECU 900 000. The aggregate estimated value is therefore ECU 5 100 000, which clearly exceeds the threshold for application of the Directive. However, the derogation may be used for the lot estimated at ECU 900 000, since its individual value is less than ECU 1 million and does not exceed 20% of the total value of all the lots. The Directive does not apply to this lot, which need not be

Where a contracting authority intends "subsequently" to award, by negotiated procedure, further works consisting of the repetition of similar works to the successful tenderer for the contract that is being put up for tender, it must include in the calculation of the value of the first contract the estimated total cost of the subsequent works and, where appropriate, the estimated value of all the necessary supplies that it will make available to the contractor.

2.2.2 Splitting of contracts

Lastly, no work or contract may be split up with a view to avoiding application of the Directive. This blanket prohibition catches any splitting which is not justified on objective grounds and is thus solely designed to circumvent the rules laid down in the Directive.

2.3 Exclusions

As far as works contracts in the utilities sectors are concerned, the Works Directive does not apply to contracts awarded in the areas listed in Articles 2, 7, 8 and 9 of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[22] or to contracts which satisfy the tests of Article 6(2) of that Directive. Directive 90/531/EEC has been replaced by Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[23]; references to Directive 90/531/EEC are therefore to be understood as applying to Directive 93/38/EEC.

The text of these articles is as follows:

Article 2

1. This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. Relevant activities for the purposes of this Directive shall be:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water, or

(ii) electricity, or

(iii) gas or heat,

or the supply of drinking water, electricity, gas or heat to such networks;

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22 OJ No L 297, 29.10.1990, p. 1

(b) the exploitation of a geographical area for the purpose of:

(i) exploring for or extracting oil, gas, coal or other solid fuels, or

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

3. For the purpose of applying paragraph 1(b), special or exclusive rights shall mean rights deriving from authorizations granted by a competent authority of the Member State concerned, by law, regulation or administrative action, having as their result the reservation for one or more entities of the exploitation of an activity defined in paragraph 2.

A contracting entity shall be considered to enjoy special or exclusive rights in particular where:

(a) for the purpose of constructing the networks or facilities referred to in paragraph 2, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway;

(b) in the case of paragraph 2(a), the entity supplies with drinking water, electricity, gas or heat a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned.

4. The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the contracting entities.

5. The supply of drinking water, electricity, gas or heat to networks which provide a service to the public by a contracting entity other than a public authority shall not be considered as a relevant activity within the meaning of paragraph 2(a) where:

(a) in the case of drinking water or electricity:

- the production of drinking water or electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than that referred to in paragraph 2, and

- supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of drinking water or energy, having regard to the average for the preceding three years, including the current year;

(b) in the case of gas or heat:

- the production of gas or heat by the entity concerned is the unavoidable consequence of carrying on an activity other than that referred to in paragraph 2, and

having regard to the average for the preceding three years, including the current year.

6. The contracting entities listed in Annexes I to X shall fulfil the criteria set out above. In order to ensure that the lists are as exhaustive as possible, Member States shall notify the Commission of amendments to their lists. The Commission shall revise Annexes I to X in accordance with the procedure in Article 40.

Article 6

1. This Directive shall not apply to contracts or design contests which the contracting entities award for purposes other than the pursuit of their activities as described in Article 2(2) or for the pursuit of such activities in a non–member country, in conditions not involving the physical use of a network or geographical area within the Community.

2. However, this Directive shall apply to contracts or design contests awarded or organized by the entities which exercise an activity referred to in Article 2(2)(a)(i) and which:

(a) are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by these projects or irrigation or drainage installations; or

(b) are connected with the disposal or treatment of sewage.

3. The contracting entities shall notify the Commission at its request of any activities they regard as excluded under paragraph 1. The Commission may periodically publish lists of the categories of activities which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 7

1. This Directive shall not apply to contracts awarded for purposes of resale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.

2. The contracting entities shall notify the Commission at its request of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish lists of the categories of products or activities which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 8

1. This Directive shall not apply to contracts which contracting entities exercising an activity described in Article 2(2)(d) award for purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions.

2. The contracting entities shall notify the Commission at its request of any services which they regard as excluded under paragraph 1. The Commission may periodically publish the list of services which it considers to be covered by this exclusion for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any

sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 9

1. This Directive shall not apply to:

(a) contracts which the contracting entities listed in Annex I award for the purchase of water;

(b) contracts which the contracting entities listed in Annexes II to V award for the supply of energy or of fuels for the production of energy.

2. The Council shall re–examine the provisions of paragraph 1 when it has before it a report from the Commission together with appropriate proposals.

The public works contracts awarded in the fields of water, energy, transport and telecommunications excluded from the scope of the Works Directive are, therefore, those covered by the abovementioned articles of Directive 90/531/EEC, replaced by Directive 93/38/EEC, which are not the subject of this guide.

It should be emphasized that Directive 93/38/EEC, in view of the qualifications provided for by Article 6(2), applies only to contracts which the contracting entities, exercising an activity referred to by the Directive, award for the pursuit of such activities.

Consequently, a contracting authority which carries on several activities at the same time may rely on the non–applicability of the Works Directive only in respect of the public works contracts which it awards in the exercise of activities covered by the abovementioned articles of Directive 93/38/EEC.

A municipality running a metro system, for example, will not apply the Works Directive when having a new line built to extend the network, but will have to apply it when having a school or theatre built. The Works Directive will also apply in cases where the contract for the new line is awarded by a municipality that does not run the transport system itself but has the works carried out to extend a network run on its behalf by another entity.

The Directive does not apply to public contracts governed by different procedural rules and awarded:

- in pursuance of an international agreement, concluded in conformity with the Treaty, between a Member State and one or more non–member countries and covering works intended for the joint implementation or exploitation of a project by the signatory States. All such agreements must, however, be communicated

to the Commission, which may examine them in consultation with the Advisory Committee for Public Contracts;[24]

- to undertakings in a Member State or a non–member country in pursuance of an international agreement relating to the stationing of troops;

- pursuant to the particular procedure of an international organization.

Lastly, the Directive does not apply to works contracts:

- which are declared secret; or

- the performance of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned; or

- where the protection of the basic interests of that State's security so requires.

[24] This Committee was set up by Council Decision 71/306/EEC of 26 July 1971 (OJ No L 185, 16.8.1971, p. 15), as amended by Council Decision 77/63/EEC of 21 December 1976 (OJ No L 13,

3. AWARD PROCEDURES

The new Directive provides for three types of contract award procedure: the open procedure and the restricted procedure, between which contracting authorities are free to choose, and the negotiated procedure, which they may use only in exceptional circumstances.

N.B.

When the Works Directive was adopted, the Council and the Commission stressed in a joint statement that "in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination".

Furthermore, a special procedure may be used for the award of specific contracts relating to the design and construction of a public housing scheme.

3.1 Open procedures

An open procedure is one where all interested contractors may submit tenders in response to a published contract notice.

3.2 Restricted procedures

A restricted procedure is one where, of the contractors who have expressed their interest following publication of the contract notice, only those so invited by the contracting authority may submit tenders.

Candidates invited to bid must be chosen, on the basis of the information on their personal standing and the information and formalities necessary for evaluating the minimum economic and technical conditions set out in the contract notice, from among those possessing the qualifications specified in Articles 24 to 29 of the Directive.

An accelerated form of restricted procedure may be used where, for reasons of extreme urgency, contractors cannot be allowed the periods normally required under restricted procedures. As this is an exception which is likely to restrict competition, it should be construed strictly, i.e. reserved for cases where the contracting authority can prove the objective need for urgency and the genuine impossibility of abiding by the normal periods prescribed for this procedure.

The reasons for the use of the accelerated form of the procedure must be given in the contract notice published in the Official Journal.

3.3 Negotiated procedures

A negotiated procedure is one where a contracting authority consults the contractors of its choice and negotiates the terms of the contract, for example the technical, administrative or financial conditions, with one or more of them.

In negotiated procedures, the contracting authority is able to act in the same way as a private economic operator not only when awarding the contract, but also during the prior discussions.

The procedure is not, however, to be equated with private contracting. It requires the contracting authority to adopt an active approach in determining the terms of the contract, such as prices, completion deadlines, technical specifications and guarantees. Neither does the negotiated procedure relieve the contracting authority of the obligation to comply with certain rules of good administrative practice. In other words, it has to:

- compare effectively tenders and the advantages they offer; and
- apply the principle of equal treatment between tenderers.

Reliance on this flexible procedure is justified by the exceptional circumstances in which the contract has to be awarded and so is allowed only in the cases listed exhaustively in the Directive.

According to the case–law of the Court of Justice, "those provisions which authorize derogations from the rules" laid down in the Directive "intended to ensure the effectiveness of the rights" regarding freedom of establishment and the freedom to provide services "in the field of public works contracts, must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances".[25]

According to circumstances, the Directive allows the negotiated procedure to be used with or without prior publication of a contract notice in the Official Journal.

3.3.1 Negotiated procedures with prior publication of a contract notice

Here, the contracting authority has to select the candidates it invites to take part in the negotiated procedure from among those presenting the qualifications specified in the notice. Such qualifications can be only those provided for by Articles 24 to 29 of the

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[25] Judgment of 10 March 1987 in Case 199/85 *Commission v Italy* [1987] ECR 1039. See also: Case C-24/91 *Commission v Spain* [1992] ECR I-1989; Case C-107/92 *Commission v Italy* [1993] ECR I-4655; Case C-328/92 *Commission v Spain* [1994] ECR I-1569; Case C-57/94

Directive, i.e. they must relate exclusively to the contractor's personal standing and economic and technical capacity.

An accelerated form of the procedure is allowed under the same conditions as for restricted procedures.

Public works contracts may be awarded by negotiated procedure, with prior publication of a notice, in the following three cases:

(1) where an open or restricted procedure has elicited only irregular tenders[26] or tenders which are unacceptable[27] under national provisions compatible with Title IV of the Directive (Common rules on participation: General provisions; Criteria for qualitative selection; and Criteria for the award of contracts), in so far as the original terms of the contract, as specified in the contract notice and contract documents, are not substantially altered. Otherwise, the open or restricted procedure has to be started again from the beginning in full compliance with the provisions of the Directive applicable to each of the procedures.

Changes to the financing conditions, the deadlines for completion, the requirements for acceptance of the works, or the construction technique, for example, are to be regarded as substantial alterations to those terms.

A contracting authority may legitimately resort to the negotiated procedure only where it has issued a prior official statement that the tenders received during the preceding open or restricted procedure were irregular or unacceptable, and has declared that procedure closed.

Contracting authorities need not publish a notice where they include in the negotiated procedure all contractors who satisfy the selection criteria referred to in Articles 24 to 29 of the Directive and who submitted during the prior open or restricted procedure tenders complying with the formal requirements of the tendering procedure, i.e. the procedural rules mentioned in the contract documents;

(2) where the works are carried out solely for the purpose of research, experiment or development, and not with a view to establishing commercial viability or recovering research and development costs.

For some research work involving highly confidential data, the assessment of the suitability of candidates for inclusion in the negotiated procedure, although based on the selection criteria laid down in the Directive, may take account of the confidentiality aspect. Even in such cases, however, the nationality of the contractors may not enter into the assessment;

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[26] For example, tenders which do not comply with the tender requirements, in which prices are sheltered from normal competitive forces or which comprise unconscionable clauses.

[27] For example, tenders submitted by tenderers who do not have the requisite

(3) in exceptional cases, when the nature of the works or the risks attaching thereto do not permit prior overall pricing.

3.3.2 Negotiated procedures without prior publication of a contract notice

Public works contracts may be awarded by negotiated procedure, without prior publication of a contract notice, in the following five cases:

(1) where no tenders or appropriate tenders are received in response to an open or restricted procedure, in so far as the original terms of the contract are not substantially altered. In this case, the contracting authority has to draw up a report setting out all the grounds for reliance on this procedure and send it to the Commission, on request, for verification.

"Inappropriate tenders" means not only unacceptable or irregular tenders, but also tenders which are completely irrelevant to the contract and are therefore incapable of meeting the contracting authority's needs as specified in the contract documents. Such tenders are consequently regarded as not having been submitted;

(2) where, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works can be assigned to one contractor only;

(3) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events that could not be foreseen by the contracting authority, contractors cannot be allowed the periods laid down for open or restricted procedures - even in the accelerated form - or for negotiated procedures with prior publication of a contract notice. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

N.B.

The concept of unforeseeable events is taken to mean occurrences that overwhelmingly transcend the normal bounds of economic and social life (for example, an earthquake or flooding).

It should also be stressed that the negotiated procedure is allowed only for having work carried out that is strictly necessary in order to cope with such unforeseeable events as a matter of extreme urgency;

(4) for additional works not included in the project initially allocated or in the contract first concluded but which have, through unforeseen circumstances, become necessary for carrying out the work described therein.

In such cases, contracting authorities may have recourse to the negotiated procedure, provided that:

(a) the works are assigned to the contractor carrying out the project, and

(b) they cannot be technically or economically separated from the main contract without great inconvenience to the contracting authority, or

although the works can be separated from the execution of the main contract, they are strictly necessary to its later stages, and

(c) the aggregate value of contracts awarded for additional works does not exceed 50% of the value of the main contract;

(5) for new works consisting of the repetition of similar works entrusted to the initial contractor by the same contracting authority, provided that:

(a) such works conform to a basic project which was the subject of an initial contract awarded by open or restricted procedure, and

(b) as soon as the first project was put up for tender, notice was given that such a procedure might be adopted, and

(c) the total estimated cost of subsequent works was taken into consideration by the contracting authority when it estimated the value of the initial contract for the purposes of determining whether the threshold for application of the Directive was reached.

The negotiated procedure may, however, be applied in such cases only during the three years following conclusion of the initial contract.

3.4 Special procedure for public housing schemes

For the award of contracts relating to both the design and the construction of a public housing scheme whose size and complexity, and the estimated duration of the work involved, require that planning be based from the outset on close collaboration within a team comprising representatives of the contracting authority, experts and the contractor who is to carry out the works, the Directive allows contracting authorities to apply a special procedure for selecting the contractor most suitable for integration into the team.

Where they apply this procedure, however, contracting authorities must observe the common advertising rules laid down in the Directive for restricted procedures and the criteria for the qualitative selection of candidates.

They must in particular include in the contract notice the personal, technical and financial conditions to be fulfilled by candidates in accordance with Articles 24 to 29 of the Directive and as accurate as possible a description of the works to be carried out so as to enable interested contractors to form a valid idea of the project.

3.5 Cancellation of an award procedure

Contracting authorities may decide not to award a contract in respect of which a prior call for competition has been made, or to recommence the procedure.

In such cases, they must inform the Office for Official Publications of the European Communities (the "Publications Office") of their decision.

They must also inform candidates or tenderers who so request of the grounds for their decision.

4. COMMON ADVERTISING RULES

4.1 Contract notices

The Directive provides for three types of notice that contracting authorities must submit for publication in the Official Journal of the European Communities and input into the TED database concerning the award of contracts under the open, restricted or negotiated procedure:

- **the indicative notice**, which gives prior information on contracts to be awarded and is thus confined to a brief statement of the main features of such contracts. Contracting authorities are required to publish an indicative notice concerning works contracts they intend to award as soon as they have taken the planning decision, but before initiating an award procedure. The purpose of the indicative notice is to enable interested contractors to schedule their work, to be better informed of opportunities and - particularly in the case of firms from different Member States - to compete on an equal footing with firms located close to the contracting authority. Publication of an indicative notice, which is not compulsory, accordingly allows contracting authorities to shorten the deadlines for responding to the contract notice;[28]

- **the contract notice,** which must be published when the award procedure is launched. Publication of this notice is one of the fundamental obligations that contracting authorities have to fulfil and is intended to develop effective competition between contractors in all Member States by providing them with the information they need in order to express their interest in contracts awarded throughout the Community;

- **the contract award notice,** setting out the most important points concerning the conditions in which contracts have been awarded. This notice ensures greater transparency in award procedures while enabling unsuccessful contractors more accurately to assess their chances of winning other comparable contracts.

4.2 Content and presentation of notices

Contracting authorities are required to draw up notices in accordance with the models given in Annex IV to the Directive, setting out the information specified in the relevant model.

Where the items are mandatory, the information required must be given. Where they are optional and not relevant to the contract in question, the contracting authority should indicate the fact, by entering "not applicable" or words to that effect.

Certain items of the contract notice call for some explanation.

In the section relating to the minimum standards required of the contractor, the information and formalities specified must comply with Articles 24 to 29 of the Directive.

As far as proof of the contractor's financial and economic standing is concerned, Article 26 of the Directive allows contracting authorities using the restricted or negotiated procedure to specify the necessary references in either the contract notice or the invitation to tender. Where the contracting authority opts for the latter, it must mention the fact in the relevant section of the notice.

In the section concerning the criteria to be used for awarding the contract, the contracting authority must enter either:

- "the lowest price", or
- "the most economically advantageous tender", or
- where it is using the restricted procedure and specifies the award criteria in the invitation to tender, "award criteria stated in the invitation to tender", or words to that effect.

Where the contracting authority indicates that it will award the contract to "the most economically advantageous tender", it must specify the factors that will be taken into consideration either in the same section of the contract notice or in the contract documents. In the latter case, it must add in that section of the notice the words "award criteria stated in the contract documents".

In the case of contract award notices, the Directive allows certain derogations. Publication of the notice remains mandatory, of course, but contracting authorities may, in certain cases, withhold information whose release would impede law enforcement or be otherwise contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, whether public or private, or might prejudice fair competition between contractors.

While conveying clear and comprehensive information, notices must be concise: the Directive stipulates that they must not run to more than one page of the Official Journal, or approximately 650 words.

4.3 Model notices

The model notices specified in the Directive are given below:

4.3.1 Indicative notice

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.

2. (a) Site;

(b) Nature and extent of the services to be provided and, where relevant, the main characteristics of any lots by reference to the work;

(c) If available, an estimate of the cost range of the proposed services.

3. (a) Estimated date for initiating the award procedures in respect of the contract or contracts;

(b) If known, estimated date for the start of the work;

(c) If known, estimated date for completion of the work;

of the work.

4. If known, terms of financing of the work and of price revision and/or references to the provisions in which these are contained.

5. Other information.

6. Date of dispatch of the notice.

7. Date of receipt of the notice by the Publications Office.

4.3.2 Contract notice

Open procedures

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.

2. (a) Award procedure chosen;

(b) Nature of contract for which tenders are being requested.

3. (a) Site;

(b) Nature and extent of the services to be provided and general nature of the work;

(c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots;

(d) Information concerning the purpose of the work or the contract where the latter also involves the drawing–up of projects.

4. Any time–limit for completion.

5. (a) Name and address of the service from which the contract documents and additional documents may be requested;

(b) Where applicable, amount and terms of payment of the sum to be paid to obtain such documents.

6. (a) Final date for receipt of tenders;

(b) Address to which tenders must be sent;

(c) Language or languages in which tenders must be drawn up.

7. (a) Where applicable, persons authorized to be present at the opening of tenders;

(b) Date, hour and place of opening of tenders.

8. Any deposit and guarantees required.

9. Main terms concerning financing and payment and/or references to the provisions in which these are contained.

10. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.

11. Minimum economic and technical standards required of the contractor to whom the contract is awarded.

12. Period during which the tenderer is bound to keep open his tender.

13. Criteria for the award of the contract. Criteria other than that of the lowest price must be mentioned where they do not appear in the contract

documents.

14. Where applicable, prohibition on variants.

15. Other information.

16. Date of publication of the indicative notice in the Official Journal or references to its non-publication.

17. Date of dispatch of the notice.

18. Date of receipt of the notice by the Publications Office.

Restricted procedures

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.

2. (a) Award procedure chosen;

(b) Where applicable, justification for the use of the accelerated procedure;

(c) Nature of the contract for which tenders are being requested.

3. (a) Site;

(b) Nature and extent of the services to be provided and general nature of the work;

(c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots;

(d) Information concerning the purpose of the work or the contract where the latter also involves the drawing–up of projects.

4. Any time–limit for completion.

5. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.

6. (a) Final date for receipt of requests to participate;

(b) Address to which requests must be sent;

(c) Language or languages in which requests must be drawn up.

7. Final date for dispatch of invitations to tender.

8. Any deposit and guarantees required.

9. Main terms concerning financing and payment and/or the provisions in which these are contained.

10. Information concerning the contractor's personal situation and minimum economic and technical standards required of the contractor to whom the contract is awarded.

11. Criteria for the award of the contract where they are not mentioned in the invitation to tender.

12. Where applicable, prohibition on variants.

13. Other information.

14. Date of publication of the indicative notice in the Official Journal or reference to its non-publication.

15. Date of dispatch of the notice.

16. Date of receipt of the notice by the Publications Office.

Negotiated procedures

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.

2. (a) Award procedure chosen;

(b) Where applicable, justification for the use of the accelerated procedure;

(c) Nature of the contract for which tenders are being requested.

3. (a) Site;

(b) Nature and extent of the services to be provided and general nature of the work;

(c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots;

(d) Information concerning the purpose of the work or the contract where the latter also involves the drawing–up of projects.

4. Any time–limit for completion.

5. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.

6. (a) Final date for receipt of tenders;

(b) Address to which tenders must be sent;

(c) Language or languages in which tenders must be drawn up.

7. Any deposit and guarantees required.

8. Main terms concerning financing and payment and/or the provisions in which these are contained.

9. Information concerning the contractor's personal situation and information and formalities necessary in order to evaluate the minimum economic and technical standards required of the contractor to whom the contract is awarded.

10. Where applicable, prohibition on variants.

11. Where applicable, name and address of contractors already selected by the awarding authority.

12. Date(s) of previous publications in the Official Journal.

13. Other information.

14. Date of publication of the indicative notice in the Official Journal.

15. Date of dispatch of the notice.

16. Date of receipt of the notice by the Publications Office.

4.3.3 Contract award notice

1. Name and address of awarding authority.
2. Award procedure chosen.
3. Date of award of contract.
4. Criteria for award of contract.
5. Number of tenders received.
6. Name and address of successful contractor(s).
7. Nature and extent of the services provided, general characteristics of the finished structure.
8. Price or range of prices (minimum/maximum) paid.
9. Where appropriate, value and proportion of contract likely to be subcontracted to third parties.
10. Other information.
11. Date of publication of the contract notice in the Official Journal.
12. Date of dispatch of the notice.
13. Date of receipt of the notice by the Publications Office.

In describing the subject-matter of contracts, the Commission has recommended that contracting authorities use the Common Procurement Vocabulary.[29]

4.4 Method of setting time–limits

The time–limits specified in contract notices must be such that their expiry can be determined by contractors in all Member States on an equal footing.

It would not be acceptable for contracting authorities to set such time-limits by specifying a particular number of days from the date of publication of the notice in a national or regional official gazette, for example. Such practice would place much greater difficulties in the way of contractors from other Member States and thus runs contrary to the principle of the freedom to provide services.

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[29] Commission recommendation of 30 July 1996 on the use of the Common Procurement Vocabulary

4.5 National advertising

In order to ensure that equivalent information is disseminated at both national and Community level, the Directive provides that any notices published in the official gazettes or in the press of the country of the contracting authority must not contain information other than that published in the Official Journal of the European Communities. In addition, notices may not be published at national level before they are dispatched for publication at Community level and must mention the date of such dispatch.

4.6 Who is responsible for publishing notices?

Notices are published by the Publications Office.

In general terms, contracting authorities have to transmit their notices as quickly as possible and through the most appropriate channels. In particular, the Directive requires them:

- to send the indicative notice as soon as possible after the decision approving the planning of the works contracts that they intend to award;
- in the case of accelerated restricted or negotiated procedures, to send notices by telex, telegram or fax;
- to send the contract award notice not later than 48 days after the award of the contract in question;
- to be able to supply proof of the date of dispatch of notices to the Publications Office.

The address for correspondence is:

Supplement to the Official Journal of the European Communities

Office for Official Publications of the European Communities
2, rue Mercier
L–2985 Luxembourg
Telephone: (352) 499 28 23 32
Telex: 1324 pubof LU
2731 pubof LU
Fax: (352) 49 00 03
(352) 49 57 19

Within twelve days (or five days in the case of the accelerated form of restricted or negotiated procedures), the Publications Office publishes the notices in the Supplement to the Official Journal[30] and via the TED (Tenders Electronic Daily) database[31]:

〈 indicative and contract award notices in full in all the official languages of the Community;

〈 contract notices in full in their original language only and in summary form in all the other languages.

The Publications Office takes responsibility for the necessary translations and summaries.

The costs of publishing notices in the Supplement to the Official Journal are borne by the Community.

4.7 Time–limits

In order to give all potential contractors throughout the Community a chance to tender for a contract or seek an invitation to take part in an award procedure before the closing date, the Directive lays down minimum periods to be allowed at the different stages of the procedures: contracting authorities may not set shorter deadlines than those specified in the Directive, but they are, of course, free to allow longer periods. The Directive also lays down maximum periods within which contracting authorities have to dispatch contract documents and provide additional information.

4.7.1 Open procedures

(a) Time–limit set by the contracting authority for the receipt of tenders:

- not less than 52 days from the date of dispatch of the notice for publication in the Official Journal, where the contracting authority has not published an indicative notice;

- not less than 36 days from that date, where the contracting authority has published an indicative notice;

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[30] The Supplement to the Official Journal may be obtained in all Member States from the addresses listed in Annex III.

[31] For any information concerning this database and the arrangements for accessing it, please contact:
Office for Official Publications of the European Communities
2, rue Mercier
L–2985 Luxembourg
Telephone: (352) 499 28 25 63 - 499 28 25 64
Telex: 1324 pubof LU

The above time–limits must be appropriately extended:

- where the contract documents, supporting documents or additional information are too bulky to be supplied within the time–limits laid down by the Directive; or

- where tenders can be made only after a visit to the site or after on–the–spot inspection of the documents supporting the contract documents.

(b) Time–limit for dispatch of the contract documents and supporting documents by the contracting authority: not more than six days following receipt of the request, provided that it is made in good time.

(c) Time–limit for additional information relating to the contract documents to be supplied by the contracting authority: not later than six days prior to the closing date for the receipt of tenders, provided that such information has been requested in good time.

4.7.2 Restricted procedures

(a) Time–limit set by the contracting authority for the receipt of requests to participate: not less than 37 days (or 15 days, in the case of accelerated restricted procedures) from the date of dispatch of the notice for publication in the Official Journal.

(b) Time–limit for additional information relating to the contract documents to be supplied by the contracting authority: not later than six days (or four days, in the case of accelerated restricted procedures) prior to the closing date for the receipt of tenders, provided that such information has been requested in good time.

(c) Time–limit set by the contracting authority for the receipt of tenders:

- not less than 40 days (or 10 days, in the case of accelerated restricted procedures) from the date of dispatch of the written invitation to submit a tender, where the contracting authority has not published an indicative notice;

- not less than 26 days (or 10 days, in the case of accelerated restricted procedures) from the same date, where the contracting authority has published an indicative notice.

The above time–limits must be appropriately extended where tenders can be made only after a visit to the site or after on–the–spot inspection of the documents supporting the contract documents.

4.7.3 Negotiated procedures with prior publication of a contract notice

Time–limit set by the contracting authority for the receipt of requests to participate:

not less than 37 days (or 15 days, in the case of accelerated negotiated procedures) from the date of dispatch of the notice for publication in the Official Journal.

4.7.4 Summary tables

OPEN PROCEDURES

The **contract documents** and **supporting documents** must be supplied within **six days** of the request

Any **additional information** concerning the contract documents must be communicated not later than **six days** prior to the time-limit for the receipt of tenders

Time-limit for the **receipt of tenders:**

Not less than **52 days** (if no indicative notice has been published)

Not less than **36 days** (if an indicative notice has been published)

RESTRICTED PROCEDURES AND NEGOTIATED PROCEDURES WITH PRIOR PUBLICATION OF A CONTRACT NOTICE

Time-limit for the **receipt of applications to take part**, from the date when the notice is sent for publication in the OJ:

Not less than **37 days**

Not less than **15 days (accelerated procedures)**

The **invitation to submit a tender** must be sent **simultaneously** to all successful candidates, along with the **contract documents** and **supporting documents**

Any **additional information** concerning the contract documents must be communicated not later than **six days** (**four** days in the case of accelerated procedures) prior to the time-limit for the receipt of tenders

RESTRICTED PROCEDURES ONLY

Time-limit for the **receipt of tenders**, from the date of dispatch of the written invitation to tender:

Not less than **40 days** (if no indicative notice has been published)

Not less than **26 days** (if an indicative notice has been published)

Not less than **10 days** (accelerated procedures)

4.8 Method of calculating certain time–limits

Closing dates for the receipt of tenders and requests to participate must be calculated in accordance with Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time–limits.[32]

Under these rules, periods expressed as a certain number of days from a particular event:

(a) run from the day following the day on which the event takes place;

(b) begin at 00h00 on the first day, as defined in (a), and end at 24h00 on the last day of the period;

(c) end, if the last day of the period falls on a public holiday or a Saturday or Sunday, and the period is not expressed in hours, at 24h00 on the following working day.

Periods expressed in hours, which are common for certain acts to be performed by contractors, end at the time and date stated.

Periods include public holidays and weekends unless these are expressly excluded or the periods are expressed as a certain number of working days. Public holidays are all days designated as such in the Member State in which the relevant act has to be performed.

For further details, the reader is referred to the text of the Regulation.

4.9 Submission of requests to participate

In restricted procedures and negotiated procedures with prior publication of a contract notice, requests to participate may be made by letter or by telegram, telex, fax or telephone. If they are made by one of the last four methods, they must be confirmed by letter dispatched before the closing date for the receipt of such requests.

Where the accelerated form of those procedures is used, requests to participate must be made, in accordance with the Directive, by the most rapid means of communication possible. If they are made by telegram, telex, fax or telephone, they must be confirmed by letter dispatched before the closing date for the receipt of requests to participate.

4.10 Rules governing the dispatch and content of invitations to tender

Invitations to tender must be made in writing and sent simultaneously to all selected candidates.

The letter of invitation should normally be accompanied by the contract documents and supporting documents and include at least the following information:

(a) where it is not accompanied by the contract documents and supporting documents, which the contracting authority does not have since they are the responsibility of another department, the address of the department from which they may be requested, the deadline for submitting such a request and the amount and terms of payment of any charge for obtaining such documents;

(b) the closing date for the receipt of tenders, the address to which they must be sent and the language(s) in which they must be drawn up;

(c) a reference to the published contract notice;

(d) an indication of any documents to be attached, either to support verifiable statements made, or to supplement the information provided by the candidate to show that he meets the selection criteria;

(e) the criteria for the award of the contract, if not stated in the contract notice.

Where the accelerated form of restricted or negotiated procedures is used, the Directive requires contracting authorities to send out invitations to tender by the most rapid means of communication possible.

5. COMMON RULES IN THE TECHNICAL FIELD

The contracting authorities have to indicate, in the general or contractual documents relating to each contract, the technical specifications with which the works must comply.

5.1 Definition of technical specifications

The following terms are defined in Annex III to the Directive:

(1) **"Technical specifications"**: the totality of the technical requirements contained in particular in the contract documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical requirements shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. They shall also include rules relating to design and costing, the test, inspection and acceptances for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to lay down, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

(2) **"Standard"**: a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory;

(3) **"European standard"**: a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as 'European standards (EN)' or 'Harmonization documents (HD)' according to the common rules of these organizations;

(4) **"European technical approval"**: a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. The European approval shall be issued by an approval body designated for this purpose by the Member State;

(5) **"Common technical specification"**: a technical specification laid down in accordance with a procedure recognized by the Member States to ensure uniform application in all Member States which has been published in the Official Journal;

(6) **"Essential requirements"**: requirements regarding safety, health and certain other aspects in the general interest that the construction works must meet.

5.2 What technical specifications should be referred to?

5.2.1 General rule

The common rules in the technical field have been brought into line with the Community's new policy on standardization and reflect the progress made in pursuing that policy in recent years.

Without prejudice to the application of legally binding national technical rules, provided that these are compatible with the Treaty, the Directive thus requires contracting authorities to define the technical specifications applicable to the contract by reference to national standards implementing European standards, to European technical approvals or to common technical specifications.

5.2.2 Exceptions

A contracting authority may depart from this general rule if:

- the standards, European technical approvals or common technical specifications do not include any provision for establishing conformity, or technical means do not exist for establishing satisfactorily the conformity of a product to these standards, European technical approvals or common technical specifications;

- use of these standards, European technical approvals or common technical specifications would oblige the contracting authority to acquire products or materials incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to the changeover, within a given period, to European standards, European technical approvals or common technical specifications.

This exception also applies in cases where use of a standard, a European technical approval or a common technical specification would entail disproportionate technical difficulties because they are inappropriate, through being technically obsolete or intended for application in a different context. In such situations, a contracting authority would clearly be entitled to depart from the general rule without having a strategy for the changeover to European standards, European technical approvals or common technical specifications;

- the project concerned is of a genuinely innovative nature for which the use of existing European standards, European technical approvals or common technical specifications would not be appropriate.

Contracting authorities relying on these possibilities for departing from the general rule

documents. They are required, at all events, systematically to record the reasons in their internal documentation and to communicate them on request to Member States and to the Commission.

5.2.3 Cases where no European standards, European technical approvals or common technical specifications exist

In the absence of European standards, European technical approvals or common technical specifications, the Directive provides that the technical specifications:

(a) are to be defined by reference to the national technical specifications recognized as complying with the essential requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives, and in particular in accordance with the procedures laid down in Council Directive 89/106/EEC of 21 December 1988 on construction products;[33]

(b) may be defined by reference to national technical specifications relating to the design and method of calculation and execution of works and use of materials;

(c) may be defined by reference to other documents.

In this case, reference should be made, in order of preference, to:

(i) national standards implementing international standards accepted by the country of the contracting authority;

(ii) other national standards and national technical approvals of the country of the contracting authority;

(iii) any other standard.

5.3 Prohibition of discriminatory specifications

Since the free movement of goods and the freedom to provide services throughout the Community are fundamental principles on which the single market is based, all discriminatory technical specifications are prohibited.

The Directive thus prohibits the inclusion of technical specifications which mention products of a specific make or source or a particular process and thereby favour or eliminate certain firms, unless such specifications are justified by the subject of the contract.

In particular, the indication of trade marks, patents or types or of a specific origin or production is prohibited; however, if such indication is accompanied by the words "or equivalent", it is allowed in cases where the contracting authorities are unable to give a

description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.

A contracting authority using such specifications must be able to provide evidence that they are necessary.

Principle of mutual recognition

As far as product specifications are concerned, the provisions of the Directive must at all events be interpreted in the light of the Court's case–law on measures having an effect equivalent to quantitative restrictions.

If there are no common technical rules or standards, a contracting authority cannot reject tenders involving the use of products from other Member States on the sole grounds that the products comply with different technical rules or standards, without first checking whether they meet the requirements of the contract.[34]

In accordance with the mutual recognition principle, it must consider on equal terms products from other Member States manufactured in accordance with technical rules or standards which afford the same degree of protection of the legitimate interests concerned as the relevant national rules.

6. COMMON RULES ON PARTICIPATION

The common rules on advertising and technical aspects would not be enough to ensure that the principles of the right of establishment and freedom to supply services were genuinely applied in the public procurement field, if participation – the most crucial aspect of the contract award procedure – could be affected by the arbitrary decisions of contracting authorities.

Title IV of the Directive therefore lays down common rules on participation, which govern the selection of contractors, the award of contracts and certain special conditions as regards eligibility.

6.1 When and how is the suitability of contractors checked and the contract awarded?

The Directive provides that contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV, with due regard to the provisions of Article 19 on variants, after the suitability of contractors not excluded under Article 24 (contractor's good repute) has been checked.

It stipulates that contracting authorities must base such checks on the criteria of economic, financial and technical capacity referred to in Articles 26 to 29. The suitability of contractors must therefore be checked not only in open, but also in restricted and negotiated procedures.

In the system set up by the Directive, examination of the suitability of contractors and award of the contract are two different steps in the procurement procedure. The Court,[35] without finding a rigid chronological division between the two stages, nevertheless stressed the clear distinction drawn in the Directive between the criteria for checking the suitability of a tenderer and those for awarding the contract. In its judgment, the Court stated that "even though the Directive (...) does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules".

Consequently, when examining tenders, contracting authorities may not, for example, allow themselves to be influenced by the tenderer's financial capacity or give a tenderer who has not satisfied the pre–established selection criteria a second chance because they deem his tender advantageous.

6.2 Selection of contractors

In coordinating procedures for the award of public contracts, it was essential to ensure that contractors were not eliminated on discriminatory grounds.

Thus, as the Court of Justice has held, the Directive is not limited to stating the criteria for selection on the basis of which contractors may be excluded from participation by the authority awarding the contract, but also prescribes the manner in which contractors may furnish proof that they satisfy those criteria.[36]

The criteria concerned cover the good repute and the professional capacity of the contractor, i.e. trade registration, economic and financial standing, and technical capability.

In accordance with the decisions of the Court,[37] the suitability of contractors may be examined only on the basis of the qualitative selection criteria laid down in the Directive, i.e. criteria which refer to the contractors' economic and financial standing and technical capability.

N.B.

The aim of the abovementioned provisions of the Directive is not to restrict the national authorities' powers to set the level of those capacities for the purposes of participation in different contracts, but to determine what references or evidence they may require to be submitted.

As the Court has emphasized, it is important to specify that national competence in this field is not unlimited, though, since all the relevant provisions of Community law and, in particular, the prohibitions deriving from the principles established in the Treaty as regards the right of establishment and the freedom to provide services must be complied with.

6.2.1 Contractor's personal situation

Article 24 of the Directive contains an exhaustive list of the grounds to do with a contractor's personal situation on which he may be excluded from a procedure. Any contractor may be disqualified who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended

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[36] Judgment of 10 February 1982 in Case 76/81 *Transporoute v Minister of Public Works* [1982] ECR 417.

[37] Judgment of 9 July 1987 in Joined Cases 27 to 29/86 *CEI v Association Intercommunale pour les*

business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding–up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under Chapter 2 of Title IV of the Directive.

As regards (d) and (g), it is for the contracting authority to show that such circumstances exist. In the other cases, it is for the contractor, if the contracting authority so requests, to show that the circumstances concerned do not apply.

However, contracting authorities are not free to determine the type of evidence that may be required of contractors. Under the same article, an authority is obliged to accept as sufficient evidence:

- for (a), (b) or (c), the production of an extract from the "judicial record" or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or in the country from which that person comes showing that these requirements have been met;

- for (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country concerned does not issue such documents or certificates, they may be replaced by a declaration on oath or, in Member States where such an oath is not used, by a solemn declaration made by the interested party before a judicial or administrative authority, a notary or a competent professional or trade body in the country of origin or in the country from which that party comes.

6.2.2 Enrolment in the professional or trade register

As evidence of general professional capacity, the contracting authority may, pursuant to Article 25, request contractors to prove that they are enrolled in the professional or trade register under the conditions laid down by the laws of the Member State in which they are established. The registers concerned are:

- in Belgium, the Registre du Commerce/Handelsregister;
- in Denmark, the Handelsregistret, Aktieselskabesregistret and the Erhvervsregistret;
- in Germany, the Handelsregister and the Handwerksrolle;
- in Greece, the registrar of contractors' enterprises ("ÃÁÙÒ¸Ô ≈Ò„ÔÎÁ UÈÍ¸Ì ≈È˜ÂÈÒfiÛÂ˙Ì") of the Ministry for Environment, Town and Country Planning and Public Works,
- in Spain, the Registro Oficial de Contratistas del Ministerio de Industria, Comercio y Turismo;
- in France, the Registre du Commerce and the Répertoire des métiers;
- in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato;
- in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers;
- in the Netherlands, the Handelsregister;
- in Portugal, the Comissão de Alvarás de Empresas de Obras Públicas e Particulares (CAEOPP);
- in the United Kingdom and Ireland, the contractor may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies, or a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name;
- in Austria, the Firmenbuch, the Gewerberegister, the Mitglieder-verzeichnisse der Landeskammern;
- in Finland, the Kaupparekisteri/Handelsregistret;
- in Sweden, the aktiebolags-, handels- eller föreningsregistren.

Clearly, to require that a contractor established in another Member State should be enrolled on the professional or trade register in the country of the contracting authority would not only be contrary to the Directive but would be a very serious infringement of the principle of the freedom to supply services within the Community.

It should be emphasized, moreover, that even a mere mention of such a requirement in the

subsequently to furnish such evidence, would breach this principle on account of the dissuasive effect that such a mention might have on contractors from other Member States.

6.2.3 Financial and economic standing

Under Article 26, proof of the contractor's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from bankers;

(b) the submission of the firm's balance sheets or extracts therefrom, where publication of a balance sheet is required under company law in the country in which the contractor is established;

(c) a statement of the firm's overall turnover and the turnover on construction works for the three previous financial years.

The list is not exhaustive. The Directive requires contracting authorities to specify in the contract notice or the invitation to tender which reference or references they have chosen and what other references are to be produced.

Consequently, as regards economic and financial standing, it is for the contracting authorities not only to determine what level of capacity is required for a contractor to be eligible, but also what supporting documents are necessary. Any documents required other than the types specified in the Directive must, however, provide objectively appropriate evidence of the necessary capacity for carrying out works on the scale in question and, in particular, they must not lead to discrimination between domestic contractors and contractors from other Member States.

In *CEI v Association Intercommunale pour les Autoroutes des Ardennes*,[38] the Court of Justice acknowledged, for instance, that the criteria for determining economic and financial standing could include the total value of the works carried out at one time by the contracting firm.

Lastly, if for any valid reason the contractor is not able to furnish the references requested, the contracting authority must allow him to establish his economic and financial standing by means of any other document. However, it is for the contracting authority to assess whether such documents are appropriate.

6.2.4 Technical capability

As regards the contractor's technical capability, Article 27 contains an exhaustive list of the evidence which contracting authorities may require.

Such evidence may be furnished by:

(a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff, and, in particular, those of the person or persons responsible for carrying out the works;

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates direct to the contracting authority;

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the technicians or technical divisions which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

As in the case of economic and financial standing, contracting authorities must specify in the contract notice, the invitation to tender or the invitation to negotiate which of these references are to be produced.

6.2.5 Additional information

To ensure the transparency of the selection process, additional qualitative requirements may not be specified after publication of the contract notice or transmission of the invitation to tender.

After that stage, the contracting authority may, within the limits set by Articles 24 to 27, request contractors only to supplement or clarify the certificates and documents submitted (Article 28).

This is an option which is open to contracting authorities and which they may use at their discretion, but not in a discriminatory manner. Nor does it give a contractor who has not furnished proper evidence that he satisfies the requirements for a particular contract the right to be invited to rectify his omissions.

6.2.6 Official lists of approved contractors

Article 29 of the Directive contains special provisions on the methods whereby Member States compile and administer official lists of approved contractors and on the value to contracting authorities in other Member States of the evidence of suitability resulting from registration on such lists.

"Member States who have official lists of recognized contractors must adapt them to the provisions of Article 24(a) to (d) and (g) and of Articles 25, 26 and 27" (Article 29(1)).

These lists must therefore be drawn up and updated in the light of an objective assessment based on the criteria laid down in the Directive for the selection of contractors in an award procedure.

A holding company which does not itself carry out works but has them carried out by its subsidiaries may produce references relating to its subsidiaries for the purpose of registration on a list of approved contractors provided it can establish "that, whatever the nature of its legal link with those subsidiaries, it actually has available to it the resources of the latter which are necessary for carrying out the contracts".[39]

Contractors on such lists in the Member State in which they are established may claim such registration as alternative evidence, within the limits examined below, that they fulfil the qualitative criteria set out in Articles 24 to 27.

By decision of the Court of Justice,[40] contractors established in other Member States cannot be required to be registered in the State of the contracting authority.

Such a requirement would deprive Article 59 of the EEC Treaty of all effectiveness, the purpose of that Article being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

A contractor who chooses to use such alternative evidence must submit to the contracting authority a registration certificate issued by the appropriate authority indicating the references which made registration possible and his classification on the list.

As regards the evidential value of such a certificate, Article 29(3) lays down that: "certified registration in the official lists by the competent bodies shall, for the contracting authorities in other Member States, constitute a presumption of suitability for works corresponding to the contractor's classification only as regards Articles 24(a) to (d) and (g), 25, 26(b) and (c) and 27(b) and (d).

Information which can be deduced from registration in official lists may not be questioned. However, with regard to the payment of social security contributions, an additional certificate may be required of any registered contractor whenever a contract is offered."

Apart from the evidence provided by such objective facts, the contractor may, as regards those references where suitability can be presumed, be requested by the contracting authority to supplement that information so that his suitability for particular works may be assessed.

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39 Case C-389/92 *Ballast Nedam Groep NV v Belgian State* [1994] ECR I-1289

As regards those references where suitability cannot be presumed, the contractor is obliged to submit the documents required by the contracting authority in accordance with the Directive.

As the Court has confirmed,[41] the evidential value of a certificate of registration on an official list of approved contractors in one Member State to contracting authorities in other Member States is confined to the objective facts which made registration possible and does not extend to the resultant classification. The contracting authorities, while they may not question the information deduced from registration, may determine the level of financial and economic standing and technical capacity required in order to participate in a given contract.

Consequently, they are required to accept that a contractor's economic and financial standing and technical capacity are sufficient for works corresponding to his classification only in so far as that classification is based on equivalent criteria in regard to the capacities required. If that is not the case, however, they are entitled to reject a tender submitted by a contractor who does not fulfil the required conditions.

6.3 Number of candidates invited to submit a tender or to negotiate

In accordance with Article 22, in restricted and negotiated procedures contracting authorities select the candidates they will invite to submit a tender or to negotiate from among those with the qualifications specified in Articles 24 to 29, on the basis only of the information given relating to the contractor's personal situation and of the information and formalities necessary for the evaluation of the minimum economic and technical conditions to be satisfied in accordance with the requirements set out in the notice.

N.B.

Contracting authorities are not, however, obliged to invite all candidates to tender who satisfy the requisite conditions. As explained below, the Directive allows them to restrict numbers, with the proviso that they apply the same, transparent and objective, qualitative selection criteria already established.

Contracting authorities may, therefore, limit those invited to bid or to negotiate only if they do not exclude those candidates who best satisfy the conditions set out in the contract notice.

6.3.1 Restricted procedures

As regards the number of contractors invited to tender under restricted procedures, the Directive permits contracting authorities to prescribe a range within which the number of firms they intend to invite will fall, but only if the range is stated in the contract notice –

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[41] Judgment of the Court of 27 October 1998 in Case C-324/96 *CEI – Associazione Interregionale Autotrasportatori Associati* [1998] ECR I-6997.

any subsequent determination being prohibited – and only if the range includes at least five candidates.

The range must reflect the nature of the works to be carried out.

N.B.

The Directive also provides that, in any event, the number of candidates invited to tender must be sufficient to ensure genuine competition.

Having determined a minimum number in advance in accordance with the Directive, a contracting authority could find itself unable to stick to that number because it had received too few applications from sufficiently qualified firms.

In that eventuality, it is presumed that there is genuine competition where at least three candidates are invited to tender, assuming that sufficient applications to take part were received from eligible firms.

6.3.2 Negotiated procedures with prior publication of a contract notice

In negotiated procedures with prior publication of a contract notice, at least three candidates must be invited to negotiate, provided of course that enough suitable candidates apply.

6.3.3 Inviting nationals from other Member States

At all events, where contractors are invited to tender under a restricted or negotiated procedure, the Directive requires contracting authorities to include, without any discrimination, nationals from other Member States who have the necessary qualifications, and under the same conditions as their own nationals; the Member States must ensure that they do so.

As a general rule, it can be presumed that there is no discrimination on grounds of nationality when contractors are selected if, in its selection, the contracting authority maintains the same proportion between domestic candidates and those from other Member States as that observed among candidates with the requisite qualifications. If a check is made, however, such a presumption will be without prejudice to a more detailed assessment of the information taken into account at selection stage.

6.3.4 Notification of unsuccessful candidates

Contracting authorities must, within 15 days of the date on which the request is received, inform unsuccessful candidates who so request of the reasons why they were not invited to submit a tender or to negotiate.

6.4 Special participation conditions

6.4.1 Tenders proposing variants on the specifications

The stimulation of technical progress in the construction industry is a key element in the creation of a single market that is competitive at world level. It is therefore in the general interest that the transfer of technology and know–how from one Member State to another in the public–works field should benefit not only users in general but the industry itself.

Accordingly, and in view of current work in the Community on the establishment of performance–related specifications instead of detailed technical requirements, the Directive provides that contractors may, as long as they comply with certain conditions, propose variants.

This possibility arises only where a contract is to be awarded on the basis of the most economically advantageous tender, since this is the criterion normally adopted in the case of the largest, most complex contracts, where the submission of a variant may be very significant, and since assessment of a variant involves several criteria and not just price.

The Directive leaves it to the discretion of contracting authorities to decide whether they wish to authorize or prohibit variants and to establish what type of variants they are prepared to consider and the conditions for the submission of such variants - they may, for instance, require firms to submit a basic tender along with the variant.

However, if they decide to prohibit variants, contracting authorities must say so in the contract notice.

Where variants are allowed, the contracting authority is not obliged to say so in the contract notice, but must mention in the contract documents the minimum conditions which variants must comply with and the procedures for their submission.

Thereafter, it may take into consideration only those variants that meet the minimum requirements set out in the contract documents.

Furthermore, contracting authorities may not reject a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals, to common technical specifications or to national technical specifications recognized as complying with the essential requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives, or again by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials.

6.4.2 Subcontracting

Subcontracting in the public procurement field is not regulated as such by the Directive. However, to ensure transparency of the conditions under which contracts are performed, the Directive provides that, in the contract documents, the contracting authority may

request the tenderer to indicate, in his tender, any share of the contract which he intends to subcontract to third parties.

The Directive also states that such notification does not predetermine the main contractor's liability.

6.4.3 Groups of contractors

Groups of contractors must be allowed to submit a tender or to negotiate without having to assume a particular legal form. However, a group may be required to assume a particular legal form if it is awarded the contract. In such a case, the contracting authority must have indicated beforehand, in the contract notice, the legal form required.

As was pointed out in connection with the definition of the contractor (point 1.2), the Court has stated[42] that a company which has neither the intention nor the resources to carry out the works itself may participate in a procedure for the award of a public works contract. However, in order to prove that it has the required financial and economic standing and technical capability, it must establish that it actually has available to it the resources of the contractors by whom it intends to have the contract carried out and that those resources meet the requirements specified by the contracting authority.

6.4.4 Health and safety rules in force where the works are to be carried out

Contracting authorities are entitled, or may be obliged by the Member State to which they belong, to indicate in the contract documents the authority or authorities from which tenderers can obtain relevant information on the health and safety rules in force in the Member State, region or locality where the works will be executed and which will apply to the work carried out on the site during the performance of the contract. Where the contracting authority supplies the above information, it must ask contractors to indicate that they have taken account of such obligations in the preparation of their tender.

6.4.5 Conditions not laid down by the Directive

In accordance with the principles established by the Court in *Beentjes*,[43] participation by tenderers may be subject to conditions which are not laid down by the Directive and which relate to the contractor's ability to satisfy, should he be awarded the contract, contractual clauses - in *Beentjes* there was an obligation to employ long–term unemployed persons - which have no bearing on the selection or award criteria.

Such clauses must, of course, comply with all the relevant provisions of Community law and, in particular, with the principles of the right of establishment and the freedom to provide services, and with the prohibition on any discrimination on grounds of nationality.

As regards, more particularly, their compatibility with Directive 93/37/EEC, such clauses must not have a direct or indirect discriminatory effect as regards tenderers from other

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42 Case C-389/92 *Ballast Nedam Groep NV v Belgian State* [1994] ECR I-1289

Member States, i.e. it must not be the case, taking all the particular circumstances into account, that they can be fulfilled only by domestic tenderers or that they would be more difficult to fulfil by tenderers from other Member States.

In addition, since these special conditions are supplementary, contracting authorities must indicate them in the contract notice so that contractors can judge whether a public contract containing such contractual clauses is of interest to them.[44]

6.5 Award of the contract

6.5.1 Award criteria

The criteria on which contracting authorities base the award of contracts must be either the lowest price or the most economically advantageous tender.

Lowest price

This criterion is not difficult to apply, since only the price requested by tenderers is to be taken into consideration and the contract must be awarded to the tenderer asking the lowest price.

Where contracting authorities resort to this award criterion, they must say so:

- in the contract notice in the case of open procedures;
- in the contract notice or the invitation to tender in the case of restricted procedures.

The most economically advantageous tender

What constitutes the most economically advantageous tender, however, requires further clarification.

The Directive states that contracting authorities may base themselves on "various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit".

This list is not exhaustive. It is clear from the examples given, though, that the most economically advantageous tender can only be decided on objective grounds, equally applicable to all tenders and strictly related to the subject of the contract.

Variation is allowed, to reflect the inherent requirements of the different works to be carried out and their purpose, as laid down by the contracting authority.

In accordance with the Court's judgment in *Beentjes*,[45] the Directive gives contracting authorities a power of assessment, which must be used solely to determine the most

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[44] For a fuller analysis of the case–law and its possible applications, see the Commission communication of 22 September 1989 on Public procurement: Regional and social aspects (OJ No C 311, 12.12.1989, p. 7).

economically advantageous tender on the basis of objective criteria such as those listed by way of example in the Directive, any arbitrary criterion being prohibited.

Each criterion which the contracting authority intends to use to determine the most economically advantageous offer must be stated, either in the contract notice or in the contract documents. This obligation to publish would not be met – as the Court made clear in *Beentjes* – by a general reference to a provision of national law.

Criteria which have not been stated may not be used to select the tender.

The Directive also provides that, where possible, the criteria should be listed in descending order of importance.

While in some cases it may be difficult to rank the criteria in this way, in others one criterion will be uppermost. For example, in a bridge construction project the ranking of the criteria might well be:

(i) technical merit (stability, resistance to subsidence, elasticity, etc.);

(ii) cost, and

(iii) aesthetic merit.

If two tenders were equal on technical merit, the cheaper of the two would be preferred. If they were equal on technical merit and cost, the choice would go to the more aesthetically pleasing design, and so on.

Whenever possible, authorities should specify how criteria are ranked so that contractors know on what basis their bids will be assessed.[46]

6.5.2 Exception

By way of exception, the Directive allows a contract to be awarded on criteria other than price and economic advantage in accordance with rules that were already in force when the Directive was adopted and were designed to give preference to certain bidders; such rules must, of course, be compatible with the Treaty.

These are national rules which, under certain conditions (e.g. where prices are equal or tenders equivalent), provide for contracts to be awarded preferentially to enterprises displaying certain characteristics. Such preference is lawful only if it is extended to all enterprises anywhere in the Community which display the same characteristics.

This exception, which covers only preferences granted for the purpose of promoting certain categories of enterprise, should not be confused with the exception granted in respect of regional preference schemes,[47] which expired on 31 December 1992.

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[46] Conclusions of the 10th meeting of the Advisory Committee for Public Contracts held

6.5.3 Abnormally low tenders

Where a contracting authority receives tenders which seem to it to be abnormally low in relation to the transaction, it may not automatically reject them. Before it can do so, the authority is required by the Directive to request in writing from the tenderer concerned all details of the constituent elements of the tender which it considers relevant and to verify those constituent elements taking account of the explanations received from the tenderer.

The Directive specifies the types of explanation that the contracting authority may take into consideration, i.e. those relating to the economy of the construction method, the technical solutions chosen, the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If this procedure is not applied, no tender may be rejected because it is alleged to be abnormally low. This point was explained by the Court in the following terms:[48] "the fact that the provision (Article 29(5) of Directive 71/305/EEC[49]) expressly empowers the awarding authority to establish whether the explanations are acceptable does not under any circumstances authorize it to decide in advance, by rejecting the tender without even seeking an explanation from the tenderer, that no acceptable explanation could be given. The aim of the provision, which is to protect tenderers against arbitrariness on the part of the authority awarding contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations".

In accordance with this ruling, the contracting authority is obliged to allow the tenderer a reasonable period of time in which to submit his explanations.

The Court held in another judgment[50] that the precise, detailed procedure for examining tenders which seemed to be abnormally low was laid down by the Directive to enable bidders who had put in particularly low tenders to show that these were serious and to open up public works contracts. The Court ruled therefore that: "Article 29(5) of Council Directive 71/305/EEC prohibits Member States from introducing provisions which require the automatic disqualification from award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure which is provided under the Directive". Having explained that the provision in question in the Directive was unconditional and sufficiently precise to be relied on before national courts, the Court also ruled that "an administrative authority, including a municipal authority, is under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying such provisions of national law as are inconsistent with them".

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47 See the Commission communication of 22 September 1989 on Public procurement: Regional and social aspects (OJ No C 311, 12.12.1989, p. 7).

48 Case 76/81 *Transporoute v Minister of Public Works* [1982] ECR 417.

49 Article 29(5) of Directive 71/305/EEC corresponds to Article 30(5) of the consolidated Works Directive.

If the criterion for awarding the contract is the lowest price, the contracting authority must inform the Commission of any tenders which it rejects as too low.

In such cases, the tenders excluded would, if correctly priced, satisfy the criterion laid down for winning the contract. Consequently, it is particularly important to ensure maximum transparency and to allow the Commission to verify, where appropriate, whether the price was indeed abnormally low and therefore unacceptable.

6.5.4 Notification of unsuccessful tenderers

The contracting authority must, within 15 days of the date on which the request is received, inform any unsuccessful tenderer who so requests of the reasons for rejection of his tender and the name of the successful bidder.

6.6 Report on the contract awarded

For each contract they award, contracting authorities must draw up a report, the full text or main points of which must be communicated to the Commission at its request.

The report must contain at least:

- the name and address of the contracting authority, the subject and value of the contract;
- the names of the candidates or tenderers selected, with reasons;
- the names of the candidates or tenderers rejected, with reasons;
- the name of the successful tenderer and the reasons why his tender was chosen and, if known, any share of the contract which the tenderer intends to subcontract to third parties;
- for negotiated procedures, the circumstances justifying the use of the procedure.

7. PUBLIC WORKS CONCESSIONS

In view of their specific nature, public works concessions are subject only to advertising rules designed to introduce some transparency in this field.

The authority granting the concession is thus free to choose the procedure (it can, for example, negotiate with prospective concessionaires), to set the level of the qualitative requirements to be met by candidates and to establish the criteria for awarding the concession.

The authority granting the concession does not have unlimited freedom, however: it has to observe the rules enshrined in the Treaty, in particular those concerning the right of establishment and the freedom to provide services and the ban on discrimination on grounds of nationality.

It should also be borne in mind that the advertising rules laid down by the Directive have inevitable repercussions on the procedures for awarding the concession. For example, once the criteria for selecting candidates and the criteria for awarding the concession have been published, they must be applied by the authority, to the exclusion of all other criteria.

7.1 What is meant by a "public works concession"?

For the purposes of the Directive, a public works concession is the same as a public works contract, except that the consideration is usually in the form of the right to exploit the works but is sometimes pecuniary as well.

The key element in determining whether a public works contract or concession is involved is the form that the consideration takes. For the works to be classed as a concession, consideration must consist, at least in part, of the right to exploit the works, i.e. of the profit which the concessionaire, depending on his ability to manage the project, will gain from that right.

It is of little importance whether the revenue from that management is handled physically by the awarding authority or by the concessionaire; what matters is that all or part of such revenue is paid to the latter in consideration for the works.

Depending on the management terms prescribed by the awarding authority, the latter may guarantee the concessionaire a minimum income.

However, were the authority to remunerate the concessionaire with fixed - e.g. monthly or annual - sums in consideration for the works and for the management activity, without such remuneration being in any way proportional to the management revenue, the contract would not be a concession but a public works contract, the scope of which included, in addition to the execution of the works, provision of the requisite services for managing the project. In such a case, the "right to exploit the works" would no longer be meaningful since the risks and benefits associated with exploitation would in reality be retained by the contracting authority.

7.2 Public works concessions subject to advertising rules

Any contract for a public works concession worth ECU 5 million or more must be put out to tender at Community level in accordance with the advertising rules set out below. This means that a contracting authority could not, should the occasion arise, invoke the circumstances that make it possible to award a public works contract without prior publication of a notice in order to award a concession contract without observing the advertising rules.

7.2.1 Threshold

As regards the threshold and the method of its calculation, the same rules apply as for public works contracts (see above).

7.3 Advertising rules for public works concessions

Contracting authorities that wish to conclude a contract for a public works concession are obliged to put that contract out to Community tender by publishing a notice in the Official Journal of the European Communities and in the TED database.

Such notices must be sent, as soon as possible and via the most appropriate channels, to the Publications Office, which, not later than 12 days after dispatch, will publish them in full in the original language - the only authentic one - and in summary form in the other Community languages.

Contracting authorities must be able to prove the date of dispatch of the notice to the Publications Office.

Notices must not be published in national gazettes or in the national press by the contracting authority before that date, which must be mentioned in the notices. Furthermore, national publication must not include information other than that published at Community level.

7.3.1 Content and form of the notice

Public works concession notices must be drawn up, as regards both form and content, in accordance with the model laid down by the Directive and must not run to more than one page of the Official Journal, i.e. about 650 words.

The model is as follows:

1. Name, address, telephone number, telegraphic address, telex and fax numbers of the contracting authority.
2. (a) Site;
   (b) Subject of the concession, nature and extent of the services to be provided.
3. (a) Final date for receipt of applications;
   (b) Address to which applications must be sent;
   (c) Language or languages in which applications must be drawn up.
4. Personal, technical and financial conditions to be fulfilled by the candidates.
5. Criteria for award of contract.
6. Where appropriate, the minimum percentages of the works contracts awarded to third parties.
7. Other information.
8. Date of dispatch of the notice.
9. Date of receipt of the notice by the Publications Office.

7.3.2 Minimum time allowed for the submission of applications

Where a public works concession is resorted to, contracting authorities are obliged to set a time–limit on the submission of applications.

Such a time–limit may not be less than 52 days[51] from the date of dispatch of the notice to the Publications Office.

7.4 Rules applicable to the subcontracting of works by the concessionaire

The rules which a concessionaire must observe when he has works worth ECU 5 million or more carried out by third parties vary according to who the concessionaire is.

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[51] As in the case of public works contracts, the rules for calculating this deadline are those laid down in Regulation (EEC, Euratom) No 1182/72 of the Council of 3 June 1971 determining the rules

7.4.1 The concessionaire is a contracting authority

If the concessionaire is a contracting authority within the meaning of the Directive, contracts for the execution of such works must be allocated in full compliance with all the provisions of the Directive.

7.4.2 The concessionaire is not a contracting authority

If the concessionaire is not a contracting authority, the Directive requires only that certain advertising rules be followed.

These rules do not apply where the concessionaire concludes works contracts with firms that are not third parties. For the purposes of the Directive, firms which together form a group in order to win the concession and firms affiliated to them are not regarded as third parties. Where the concessionaire is not a group, but a single enterprise, firms affiliated to it are not regarded as third parties either.

By "affiliated firm" is meant any firm over which the concessionaire may exercise, directly or indirectly, a dominant influence, or any firm which may exercise a dominant influence over the concessionaire or which, in common with the concessionaire, is subject to the dominant influence of another firm by virtue of ownership, financial participation or the rules which govern it.

A dominant influence on the part of a firm is presumed when, directly or indirectly, in relation to another firm, it:

- holds the majority of the firm's subscribed capital, or
- controls the majority of the votes attaching to shares issued by the firm, or
- may appoint more than half of the members of the firm's administrative, managerial or supervisory body.

The Directive also provides that an exhaustive list of such firms must be attached to the application for the concession and subsequently updated in accordance with any changes in the links between the firms.

Since the list is exhaustive, a concessionaire may not claim that the advertising rules for the award of works contracts do not apply to a firm which does not appear on the list.

Where a concession is granted without such a list having been submitted - either because the concession was granted before Directive 89/440/EEC[52] came into force and without applying the rules which the Member States had agreed to observe in the Declaration by the Representatives of the Governments of the Member States, meeting within the Council, concerning procedures to be followed in the field of public works concessions,[53] or because the link between the concessionaire and one or more of the firms was

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[52] The rules on public works concessions were introduced by Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ No L 210, 21.7.1989, p. 1).

established after the concession was granted - the concessionaire is obliged to supply the authority granting the concession with a list of the firms to which he is affiliated before he can conclude a works contract with them direct, without putting it out to Community tender in accordance with the advertising rules laid down by the Directive and set out here below.

7.4.3 Publication of a tender notice

The concessionaire is obliged to advertise at Community level his intention to conclude a works contract with a third party.

To this end, he must send a notice as soon as possible and through the most appropriate channels to the Publications Office.

Within the following 12 days, the notice will be published in full in the original language, and in summary form in the other Community languages, both in the Supplement to the Official Journal of the European Communities and in the TED database.

A notice may not be published nationally before it has been sent to the Publications Office and may not contain information other than that published at Community level. The concessionaire must be able to prove the date of dispatch.

7.4.4 Form and content of the notice

The notice must comply with the following model laid down by the Directive:

1. (a) Site;
   (b) Nature and extent of the services to be provided and the general nature of the work.
2. Any time–limit for the completion of the works.
3. Name and address of the service from which the contract documents and additional documents may be requested.
4. (a) Final date for receipt of requests to participate and/or for receipt of tenders;
   (b) Address to which requests must be sent;
   (c) Language or languages in which requests must be drawn up.
5. Any deposit and guarantees required.
6. Economic and technical standards required of the contractor.
7. Criteria for the award of the contract.
8. Other information.
9. Date of dispatch of the notice.

10. Date of receipt of the notice by the Publications Office.

The notice must not run to more than one page of the Official Journal, i.e. about 650 words.

7.4.5 Minimum time–limits

In allocating works contracts, concessionaires who are not themselves contracting authorities within the meaning of the Directive must observe the following minimum time-limits:[54]

- receipt of applications to take part: not less than 37 days from the date of dispatch of the notice to the Publications Office;

- receipt of tenders: not less than 40 days from the date of dispatch of the notice to the Publications Office, or, where the concessionaire selects in advance the contractors who, following publication of the notice, have applied to take part in the contract, from the date of dispatch of the invitation to tender.

7.4.6 Exception

The concessionaire may derogate from the above advertising rules when awarding works contracts which meet the exceptional conditions laid down by the Directive in the five cases where contracting authorities may resort to a negotiated procedure without prior publication of a notice in awarding a public works contract.

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[54] As in the case of public works contracts and public works concessions, the rules for calculating

ANNEXES

I. **List of bodies and categories of bodies governed by public law**

II. **List of professional activities as set out in Class 50 of NACE**

III. **List of addresses from which the Supplement to the Official Journal can be obtained**

IV. **Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits**

ANNEX I

List of bodies and categories of bodies governed by public law

LIST OF BODIES AND CATEGORIES OF BODIES GOVERNED BY PUBLIC LAW REFERRED TO IN ARTICLE 1(b)

I. BELGIUM

Bodies

- Archives générales du Royaume et Archives de l'État dans les Provinces - Algemeen Rijksarchief en Rijksarchief in de Provinciën,
- Conseil autonome de l'enseignement communautaire - Autonome Raad van het Gemeenschapsonderwijs,
- Radio et télévision belges, émissions néerlandaises - Belgische Radio en Televisie, Nederlandse uitzendingen,
- Belgisches Rundfunk- und Fernsehzentrum der Deutschsprachigen Gemeinschaft (Centre de radio et télévision belge de la Communauté de langue allemande - Centrum voor Belgische Radio en Televisie voor de Duitstalige Gemeenschap),
- Bibliothèque royale Albert Ier - Koninklijke Bibliotheek Albert I,
- Caisse auxiliaire de paiement des allocations de chômage - Hulpkas voor Werkloosheidsuitkeringen,
- Caisse auxiliaire d'assurance maladie-invalidité - Hulpkas voor Ziekte- en Invaliditeitsverzekeringen,
- Caisse nationale des pensions de retraite et de survie - Rijkskas voor Rust- en Overlevingspensioenen,
- Caisse de secours et de prévoyance en faveur des marins naviguant sous pavillon belge - Hulp- en Voorzorgskas voor Zeevarenden onder Belgische Vlag,
- Caisse nationale des calamités - Nationale Kas voor de Rampenschade,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie diamantaire - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders der Diamantnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie du bois - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders in de Houtnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de batellerie - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders der Ondernemingen voor Binnenscheepvaart,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de chargement, déchargement et manutention de marchandises dans les ports débarcadères, entrepôts et stations (appelée habituellement «Caisse spéciale de compensation pour allocations familiales des régions maritimes») - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders gebezigd door Ladings- en Lossingsondernemingen en door de Stuwadoors in de Havens, Losplaatsen, Stapelplaatsen en Stations (gewoonlijk genoemd: "Bijzondere Compensatiekas voor kindertoeslagen van de zeevaartgewesten"),
- Centre informatique pour la Région bruxelloise - Centrum voor Informatica voor het Brusselse Gewest,
- Commissariat général de la Communauté flamande pour la coopération internationale - Commissariaat-generaal voor Internationale Samenwerking van de Vlaamse Gemeenschap,
- Commissariat général pour les relations internationales de la Communauté française de Belgique - Commissariaat-generaal bij de Internationale Betrekkingen van de Franse Gemeenschap van België,
- Conseil central de l'économie - Centrale Raad voor het Bedrijfsleven,
- Conseil économique et social de la Région wallonne - Sociaal-economische Raad van het Waals Gewest,
- Conseil national du travail - Nationale Arbeidsraad,
- Conseil supérieur des classes moyennes - Hoge Raad voor de Middenstand,
- Office pour les travaux d'infrastructure de l'enseignement subsidié - Dienst voor Infrastructuurwerken van het Gesubsidieerd Onderwijs,
- Fondation royale - Koninklijke Schenking,
- Fonds communautaire de garantie des bâtiments scolaires - Gemeenschappelijk Waarborgfonds voor Schoolgebouwen,
- Fonds d'aide médicale urgente - Fonds voor Dringende Geneeskundige Hulp,
- Fonds des accidents du travail - Fonds voor Arbeidsongevallen,
- Fonds des maladies professionnelles - Fonds voor Beroepsziekten,
- Fonds des routes - Wegenfonds,
- Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises - Fonds tot Vergoeding van de in geval van Sluiting van Ondernemingen Ontslagen Werknemers

- Fonds national de garantie pour la réparation des dégâts houillers - Nationaal Waarborgfonds inzake Kolenmijnschade,
- Fonds national de retraite des ouvriers mineurs - Nationaal Pensioenfonds voor Mijnwerkers,
- Fonds pour le financement des prêts à des États étrangers - Fonds voor Financiering van de Leningen aan Vreemde Staten,
- Fonds pour la rémunération des mousses enrôlés à bord des bâtiments de pêche - Fonds voor Scheepsjongens aan Boord van Vissersvaartuigen,
- Fonds wallon d'avances pour la réparation des dommages provoqués par des pompages et des prises d'eau souterraine - Waals Fonds van Voorschotten voor het Herstel van de Schade veroorzaakt door Grondwaterzuiveringen en Afpompingen,
- Institut d'aéronomie spatiale - Instituut voor Ruimte-aëronomie,
- Institut belge de normalisation - Belgisch Instituut voor Normalisatie,
- Institut bruxellois de l'environnement - Brussels Instituut voor Milieubeheer,
- Institut d'expertise vétérinaire - Instituut voor Veterinaire Keuring,
- Institut économique et social des classes moyennes - Economisch en Sociaal Instituut voor de Middenstand,
- Institut d'hygiène et d'épidémiologie - Instituut voor Hygiëne en Epidemiologie,
- Institut francophone pour la formation permanente des classes moyennes - Franstalig Instituut voor Permanente Vorming voor de Middenstand,
- Institut géographique national - Nationaal Geografisch Instituut,
- Institut géotechnique de l'État - Rijksinstituut voor Grondmechanica,
- Institut national d'assurance maladie-invalidité - Rijksinstituut voor Ziekte- en Invaliditeitsverzekering,
- Institut national d'assurances sociales pour travailleurs indépendants - Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen,
- Institut national des industries extractives - Nationaal Instituut voor de Extractiebedrijven,
- Institut national des invalides de guerre, anciens combattants et victimes de guerre - Nationaal Instituut voor Oorlogsinvaliden, Oudstrijders en Oorlogsslachtoffers,
- Institut pour l'amélioration des conditions de travail - Instituut voor Verbetering van de Arbeidsvoorwaarden,
- Institut pour l'encouragement de la recherche scientifique dans l'industrie et l'agriculture - Instituut tot Aanmoediging van het Wetenschappelijk Onderzoek in Nijverheid en Landbouw,
- Institut royal belge des sciences naturelles - Koninklijk Belgisch Instituut voor Natuurwetenschappen,
- Institut royal belge du patrimoine artistique - Koninklijk Belgisch Instituut voor het Kunstpatrimonium,
- Institut royal de météorologie - Koninklijk Meteorologisch Instituut,
- Enfance et famille - Kind en Gezin,
- Compagnie des installations maritimes de Bruges - Maatschappij der Brugse Zeevaartinrichtingen,
- Mémorial national du fort de Breendonck - Nationaal Gedenkteken van het Fort van Breendonck,
- Musée royal de l'Afrique centrale - Koninklijk Museum voor Midden-Afrika,
- Musées royaux d'art et d'histoire - Koninklijke Musea voor Kunst en Geschiedenis,
- Musées royaux des beaux-arts de Belgique - Koninklijke Musea voor Schone Kunsten van België,
- Observatoire royal de Belgique - Koninklijke Sterrenwacht van België,
- Office belge de l'économie et de l'agriculture - Belgische Dienst voor Bedrijfsleven en Landbouw,
- Office belge du commerce extérieur - Belgische Dienst voor Buitenlandse Handel,
- Office central d'action sociale et culturelle au profit des membres de la communauté militaire - Centrale Dienst voor Sociale en Culturele Actie ten behoeve van de Leden van de Militaire Gemeenschap,
- Office de la naissance et de l'enfance - Dienst voor Borelingen en Kinderen,
- Office de la navigation - Dienst voor de Scheepvaart,
- Office de promotion du tourisme de la Communauté française - Dienst voor de Promotie van het Toerisme van de Franse Gemeenschap,
- Office de renseignements et d'aide aux familles des militaires - Hulp- en Informatiebureau voor Gezinnen van Militairen,
- Office de sécurité sociale d'outre-mer - Dienst voor Overzeese Sociale Zekerheid,
- Office national d'allocations familiales pour travailleurs salariés - Rijksdienst voor Kinderbijslag voor Werknemers,
- Office national de l'emploi - Rijksdienst voor de Arbeidsvoorziening,
- Office national des débouchés agricoles et horticoles - Nationale Dienst voor Afzet van Land- en Tuinbouwprodukten,
- Office national de sécurité sociale - Rijksdienst voor Sociale Zekerheid,

– Office national de sécurité sociale des administrations provinciales et locales - Rijksdienst voor Sociale Zekerheid van de Provinciale en Plaatselijke Overheidsdiensten,
– Office national des pensions - Rijksdienst voor Pensioenen,
– Office national des vacances annuelles - Rijksdienst voor de Jaarlijkse Vakantie,
– Office national du lait - Nationale Zuiveldienst,
– Office régional bruxellois de l'emploi - Brusselse Gewestelijke Dienst voor Arbeidsbemiddeling,
– Office régional et communautaire de l'emploi et de la formation - Gewestelijke en Gemeenschappelijke Dienst voor Arbeidsvoorziening en Vorming,
– Office régulateur de la navigation intérieure - Dienst voor Regeling der Binnenvaart,
– Société publique des déchets pour la Région flamande - Openbare Afvalstoffenmaatschappij voor het Vlaams Gewest,
– Orchestre national de Belgique - Nationaal Orkest van België,
– Organisme national des déchets radioactifs et des matières fissiles - Nationale Instelling voor Radioactief Afval en Splijtstoffen,
– Palais des beaux-arts - Paleis voor Schone Kunsten,
– Pool des marins de la marine marchande - Pool van de Zeelieden ter Koopvaardij,
– Port autonome de Charleroi - Autonome Haven van Charleroi,
– Port autonome de Liège - Autonome Haven van Luik,
– Port autonome de Namur - Autonome Haven van Namen,
– Radio et télévision belges de la Communauté française - Belgische Radio en Televisie van de Franse Gemeenschap,
– Régie des bâtiments - Regie der Gebouwen,
– Régie des voies aériennes - Regie der Luchtwegen,
– Régie des postes - Regie der Posterijen,
– Régie des télégraphes et des téléphones - Regie van Telegraaf en Telefoon,
– Conseil économique et social pour la Flandre - Sociaal-economische Raad voor Vlaanderen,
– Société anonyme du canal et des installations maritimes de Bruxelles - Naamloze Vennootschap "Zeekanaal en Haveninrichtingen van Brussel",
– Société du logement de la Région bruxelloise et sociétés agréées - Brusselse Gewestelijke Huisvestingsmaatschappij en erkende maatschappijen,
– Société nationale terrienne - Nationale Landmaatschappij,
– Théâtre royal de la Monnaie - De Koninklijke Muntschouwburg,
– Universités relevant de la Communauté flamande - Universiteiten afhangende van de Vlaamse Gemeenschap,
– Universités relevant de la Communauté française - Universiteiten afhangende van de Franse Gemeenschap,
– Office flamand de l'emploi et de la formation professionnelle - Vlaamse Dienst voor Arbeidsvoorziening en Beroepsopleiding,
– Fonds flamand de construction d'institutions hospitalières et médico-sociales - Vlaams Fonds voor de Bouw van Ziekenhuizen en Medisch-Sociale Instellingen,
– Société flamande du logement et sociétés agréées - Vlaamse Huisvestingsmaatschappij en erkende maatschappijen,
– Société régionale wallonne du logement et sociétés agréées - Waalse Gewestelijke Maatschappij voor de Huisvesting en erkende maatschappijen,
– Société flamande d'épuration des eaux - Vlaamse Maatschappij voor Waterzuivering,
– Fonds flamand du logement des familles nombreuses - Vlaams Woningfonds van de Grote Gezinnen.

Categories

– les centres publics d'aide sociale,
– les fabriques d'église (church councils).

II. DENMARK

Bodies

– Københavns Havn,

– TV 2/Danmark,
– TV2 Reklame A/S,
– Danmarks Nationalbank,
– A/S Storebæltsforbindelsen,
– A/S Øresundsforbindelsen (alene tilslutningsanlæg i Danmark),
– Københavns Lufthavn A/S,
– Byfornyelsesselskabet København,
– Tele Danmark A/S with subsidiaries,
– Fyns Telefon A/S,
– Jydsk Telefon Aktieselskab A/S,
– Københavns Telefon Aktieselskab,
– Tele Sønderjylland A/S,
– Telecom A/S,
– Tele Danmark Mobil A/S.

Categories

– De kommunale havne (municipal ports),
– Andre Forvaltningssubjekter (other public administrative bodies).

III. GERMANY

1. **Legal persons governed by public law**

Authorities, establishments and foundations governed by public law and created by federal, State or local authorities in particular in the following sectors:

1.1. *Authorities*

– Wissenschaftliche Hochschulen und verfaßte Studentenschaften (universities and established student bodies),
– berufsständige Vereinigungen (Rechtsanwalts-, Notar-, Steuerberater-, Wirtschaftsprüfer-, Architekten-, Ärzte- und Apothekerkammern) (professional associations representing lawyers, notaries, tax consultants, accountants, architects, medical practitioners and pharmacists),
– Wirtschaftsvereinigungen (Landwirtschafts-, Handwerks-, Industrie- und Handelskammern, Handwerksinnungen, Handwerkerschaften) (business and trade associations: agricultural and craft associations, chambers of industry and commerce, craftsmen's guilds, tradesmen's associations),
– Sozialversicherungen (Krankenkassen, Unfall- und Rentenversicherungsträger) (social security institutions: health, accident and pension insurance funds),
– kassenärztliche Vereinigungen (associations of panel doctors),
– Genossenschaften und Verbände (cooperatives and other associations).

1.2. *Establishments and foundations*

Non-industrial and non-commercial establishments subject to State control and operating in the general interest, particularly in the following fields:

– Rechtsfähige Bundesanstalten (federal institutions having legal capacity),
– Versorgungsanstalten und Studentenwerke (pension organizations and students' unions),
– Kultur-, Wohlfahrts- und Hilfsstiftungen (cultural, welfare and relief foundations).

2. **Legal persons governed by private law**

Non-industrial and non-commercial establishments subject to State control and operating in the general interest (including 'Kommunale Versorgungsunternehmen' - municipal utilities), particularly in the following fields:

- Gesundheitswesen (Krankenhäuser, Kurmittelbetriebe, medizinische Forschungseinrichtungen, Untersuchungs- und Tierkörperbeseitigungsanstalten) (health: hospitals, health resort establishments, medical research institutes, testing and carcase-disposal establishments),
- Kultur (öffentliche Bühnen, Orchester, Museen, Bibliotheken, Archive, zoologische und botanische Gärten) (culture: public theatres, orchestras, museums, libraries, archives, zooligical and botanical gardens),
- Soziales (Kindergärten, Kindertagesheime, Erholungseinrichtungen, Kinder- und Jugendheime, Freizeiteinrichtungen, Gemeinschafts- und Bürgerhäuser, Frauenhäuser, Altersheime, Obdachlosenunterkünfte) (social welfare: nursery schools, children's playschools, rest-homes, children's homes, hostels for young people, leisure centres, community and civic centres, homes for battered wives, old people's homes, accommodation for the homeless),
- Sport (Schwimmbäder, Sportanlagen und -einrichtungen) (sport: swimming baths, sports facilities),
- Sicherheit (Feuerwehren, Rettungsdienste) (safety: fire brigades, other emergency services),
- Bildung (Umschulungs-, Aus-, Fort- und Weiterbildungseinrichtungen, Volkshochschulen) (education: training, further training and retraining establishments, adult evening classes),
- Wissenschaft, Forschung und Entwicklung (Großforschungseinrichtungen, wissenschaftliche Gesellschaften und Vereine, Wissenschaftsförderung) (science, research and development: large-scale research institutes, scientific societies and associations, bodies promoting science),
- Entsorgung (Straßenreinigung, Abfall- und Abwasserbeseitigung) (refuse and garbage disposal services: street cleaning, waste and sewage disposal),
- Bauwesen und Wohnungswirtschaft (Stadtplanung, Stadtentwicklung, Wohnungsunternehmen, Wohnraumvermittlung) (building, civil engineering and housing: town planning, urban development, housing enterprises, housing agency services),
- Wirtschaft (Wirtschaftsförderungsgesellschaften) (economy: organizations promoting economic development),
- Friedhofs- und Bestattungswesen (cemeteries and burial services),
- Zusammenarbeit mit den Entwicklungsländern (Finanzierung, technische Zusammenarbeit, Entwicklungshilfe, Ausbildung) (cooperation with developing countries: financing, technical cooperation, development and training).

IV. GREECE

Categories

Other legal persons governed by public law whose public works contracts are subject to State control.

V. SPAIN

Categories

- Entidades Gestoras y Servicios Comunes de la Seguridad Social (administrative entities and common services of the health and social services),
- Organismos Autónomos de la Administración del Estado (independent bodies of the national administration),
- Organismos Autónomos de las Comunidades Autónomas (independent bodies of the autonomous communities),
- Organismos Autónomos de las Entidades Locales (independent bodies of local authorities),
- Otras entidades sometidas a la legislación de contratos del Estado español (other entities subject to Spanish

VI. FRANCE

Bodies

1. National public bodies:

1.1. with scientific, cultural and professional character:

- Collège de France,
- Conservatoire national des arts et métiers,
- Observatoire de Paris;

1.2. Scientific and technological:

- Centre national de la recherche scientifique (CNRS),
- Institut national de la recherche agronomique,
- Institut national de la santé et de la recherche médicale,
- Institut français de recherche scientifique pour le développement en coopération (ORSTOM);

1.3. with administrative character:

- Agence nationale pour l'emploi,
- Caisse nationale des allocations familiales,
- Caisse nationale d'assurance maladie des travailleurs salariés,
- Caisse nationale d'assurance vieillesse des travailleurs salariés,
- Office national des anciens combattants et victimes de la guerre,
- Agences financières de bassins.

Categories

1. National public bodies:

- universités (universities),
- écoles normales d'instituteurs (teacher training colleges).

2. Administrative bodies at regional, departmental and local level:

- collèges (secondary schools),
- lycées (secondary schools),
- établissements publics hospitaliers (public hospitals),
- offices publics d'habitations à loyer modéré (OPHLM) (public offices for low-cost housing).

3. Groupings of territorial authorities:

- syndicats de communes (associations of local authorities),
- districts (districts),
- communautés urbaines (municipalities),
- institutions interdépartementales et interrégionales (institutions common to more than one Département and interregional institutions).

VII. IRELAND

Bodies

- Shannon Free Airport Development Company Ltd,
- Local Government Computer Services Board,
- Local Government Staff Negotiations Board,
- Córas Tráchtála (Irish Export Board),
- Industrial Development Authority,
- Irish Goods Council (Promotion of Irish Goods),
- Córas Beostoic agus Feola (CBF) (Irish Meat Board),

– Údarás na Gaeltachta (Development Authority for Gaeltacht Regions),
– An Bord Pleanála (Irish Planning Board).

Categories

– Third Level Educational Bodies of a Public Character,
– National Training, Cultural or Research Agencies,
– Hospital Boards of a Public Character,
– National Health & Social Agencies of a Public Character,
– Central & Regional Fishery Boards.

VIII. ITALY

Bodies

– Agenzia per la promozione dello sviluppo nel Mezzogiorno.

Categories

– Enti portuali e aeroportuali (port and airport authorities),
– Consorzi per le opere idrauliche (consortia for water engineering works),
– Le università statali, gli istituti universitari statali, i consorzi per i lavori interessanti le università (State universities, State university institutes, consortia for university development work),
– Gli istituti superiori scientifici e culturali, gli osservatori astronomici, astrofisici, geofisici o vulcanologici (higher scientific and cultural institutes, astronomical, astrophysical, geophysical or vulcanological observatories),
– Enti di ricerca e sperimentazione (organizations conducting research and experimental work),
– Le istituzioni pubbliche di assistenza e di beneficenza (public welfare and benevolent institutions),
– Enti che gestiscono forme obbligatorie di previdenza e di assistenza (agencies administering compulsory social security and welfare schemes),
– Consorzi di bonifica (land reclamation consortia),
– Enti di sviluppo o di irrigazione (development or irrigation agencies),
– Consorzi per le aree industriali (associations for industrial areas),
– Comunità montane (groupings of municipalities in mountain areas),
– Enti preposti a servizi di pubblico interesse (organizations providing services in the public interest),
– Enti pubblici preposti ad attività di spettacolo, sportive, turistiche e del tempo libero (public bodies engaged in entertainment, sport, tourism and leisure activities),
– Enti culturali e di promozione artistica (organizations promoting culture and artistic activities).

IX. LUXEMBOURG

Categories

– Établissements publics de l'État placés sous la surveillance d'un membre du gouvernement (public establishments of the State placed under the supervision of a member of the Government),
– Établissements publics placés sous la surveillance des communes (public establishments placed under the supervision of the communes),
– Syndicats de communes créés en vertu de la loi du 14 février 1900 telle qu'elle a été modifiée par la suite (associations of communes created under the law of 14 February 1900 as subsequently modified).

X. THE NETHERLANDS

Bodies

– De Nederlandse Centrale Organisatie voor Toegepast Natuurwetenschappelijk Onderzoek (TNO) en de daaronder ressorterende organisaties.

Categories

– De waterschappen (administration of water engineering works),
– De instellingen van wetenschappelijk onderwijs vermeld in artikel 8 van de Wet op het Wetenschappelijk Onderwijs (1985), de academische ziekenhuizen (Institutions for scientific education, as listed in Article 8 of the Scientific Education Act (1985), teaching hospitals).

XI. PORTUGAL

Categories

– Estabelecimentos públicos de ensino, investigação científica e saúde (public establishments for education, scientific research and health),
– Institutos públicos sem carácter comercial ou industrial (public institutions without commercial or industrial character),
– Fundações públicas (public foundations),
– Administrações gerais e juntas autónomas (general administration bodies and independent councils).

XII. THE UNITED KINGDOM

Bodies

– Central Blood Laboratories Authority,
– Design Council,
– Health and Safety Executive,
– National Research Development Corporation,
– Public Health Laboratory Services Board,
– Advisory, Conciliation and Arbitration Service,
– Commission for the New Towns,
– Development Board For Rural Wales,
– English Industrial Estates Corporation,
– National Rivers Authority,
– Northern Ireland Housing Executive,
– Scottish Enterprise,
– Scottish Homes,
– Welsh Development Agency.

Categories

– Universities and polytechnics, maintained schools and colleges,
– National Museums and Galleries,
– Research Councils,
– Fire Authorities,

– Police Authorities,
– New Town Development Corporations,
– Urban Development Corporations.

XIII. AUSTRIA

All bodies subject to budgetary supervision by the "Rechnungshof" (audit authority) not having an industrial or commercial character.

XIV. FINLAND

Public or publicly controlled entities or undertakings not having an industrial or commercial character.

XV. SWEDEN

All non-commercial bodies whose procurement is subject to supervision by the National Board for Public Procurement.

ANNEX II

List of professional activities as set out in Class 50 of NACE

list

ANNEX III

List of addresses from which the Supplement to the Official Journal can be obtained

list

ANNEX IV

Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits

REGULATION (EEC , EURATOM) No 1182/71 OF THE COUNCIL

of 3 June 1971

determining the rules applicable to periods, dates and time limits

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof;

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament[1];

Whereas numerous acts of the Council and of the Commission determine periods, dates or time limits and employ the terms 'working days' or 'public holidays';

Whereas it is necessary to establish uniform general rules on the subject;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules;

Whereas, to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods, dates and time limits;

Whereas no authority to establish such rules is provided for in the Treaties;

HAS ADOPTED THIS REGULATION:

Article 1

Save as otherwise provided, this Regulation shall apply to acts of the Council or Commission which have been or will be passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.

———————

1 OJ No C 51, 29.4.1970, p. 25.

CHAPTER I

Periods

Article 2

1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.

To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the *Official Journal of the European Communities* the lists transmitted by the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of this Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question.

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4:

(a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period;

(b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;

(c) a period expressed in weeks, months or years

provisions of such acts - fixed at a given date shall occur at the beginning of the first hour of the day

shall start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;

(d) if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having thirty days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

This provision shall not apply to periods calculated retroactively from a given date or event.

5. Any period of two days or more shall include at least two working days.

CHAPTER II

Dates and time limits

Article 4

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply to the times and periods of entry into force, taking effect, application, expiry of validity, termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts.

2. Entry into force, taking effect or application of acts of the Council or Commission - or of falling on that date.

This provision shall also apply when entry into force, taking effect or application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

3. Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission - or of any provisions of such acts - fixed at a given date shall occur on the expiry of the last hour of the day falling on that date.

This provision shall also apply when expiry of validity, termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment.

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date, it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date.

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place.

Article 6

This Regulation shall enter into force on 1 July 1971.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Luxembourg, 3 June 1971.

For the Council
The President
R. PLEVEN

FOR FURTHER INFORMATION

EUROPEAN COMMISSION
Rue de la Loi 200
B-1049 Brussels
Belgium

Unit XV/B/3

Public procurement:
formulation and application of Community law

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Public Procurement

International Activities

- Government Procurement Agreement
  The Government Procurement Agreement (GPA) and the new Member States
  As of 1 May 2004, the WTO Agreement on Government Procurement (GPA) also applies to the new EU Member States. Suppliers from the new countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) have full access to the public procurement markets of the other GPA Parties (e.g. USA, Japan, Canada,?) under the same conditions as other Member States. The WTO Committee on Government Procurement approved the necessary modifications by a decision of 23 April 2004.
  - Full text en es fr
  - Press release (15.06.2004)
- Europe Agreements
- Free trade agreements
  - Chile
  - Mexico

Contacts

Last update on 11-05-2005

IP/04/744

Brussels, 15 June 2004

Public procurement: WTO Government Procurement Agreement extended to the enlarged EU

The Government Procurement Agreement (GPA) of the World Trade Organisation (WTO) has been extended to the enlarged European Union of twenty five Member States, following intense negotiations conducted by the European Commission. Suppliers in each GPA member (now including among others the enlarged EU, as well as the United States, Canada, Hong Kong China, Japan, South Korea and Switzerland) can bid for government contracts in other GPA member countries. The GPA is the first WTO Agreement that has successfully been adapted to the enlargement of the EU.

Internal Market Commissioner Frits Bolkestein said: "This is good news for the new Member States, whose companies will now be able to bid for government contracts in important markets all over the world. It is also good news for EU taxpayers, as opening up procurement markets more widely leads to better value for money."

The WTO Government Procurement Agreement (GPA) opens up most government contracts of its members to international competition. Suppliers of each GPA member have the right to participate in procedures for the award of government contracts of other GPA Members, under the conditions laid down in the GPA. The GPA rules aim inter alia at ensuring that GPA members do not discriminate against foreign suppliers covered by the Agreement.

In order to ensure that suppliers from the new EU Member States would enjoy access to the markets of the other GPA parties, the Commission has successfully negotiated the extension of the GPA to the enlarged EU. Therefore, suppliers from the "new" EU Member States now enjoy similar access to government procurement contracts in other GPA countries as suppliers from the "old" EU Member States. In return, suppliers from other GPA countries have been given the same access to the government procurement markets of the new EU Member States as they had to markets of the EU 15.

For the full text of the GPA Committee's decision, please see:
http://www.europa.eu.int/comm/internal_market/publicprocurement/international_de.htm
For more information on the GPA, please see:
http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

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Pre-accession strategy - Pre-Accession Instruments

The Europe Agreements

The **Europe Agreements** provide the framework for bilateral relations between the European Communities and their Member States on the one hand and the partner countries on the other.

The Europe Agreements cover trade-related issues, political dialogue, legal approximation and other areas of cooperation, including industry, environment, transport and customs. They aim progressively to establish a free-trade area between the EU and the associated countries over a given period, on the basis of reciprocity but applied in an asymmetric manner (i.e. more rapid liberalisation on the EU side than on the side of the associated countries). The **Association Agreements** with Cyprus and Malta cover similar fields (except political dialogue), while the Agreement with Turkey was also aiming to achieve a Customs Union. Read more about these agreements here.

The ten candidate countries have all signed Europe Agreements with the European Union, as shown in the table below.

Country	Europe Agreement signed	Europe Agreement came into force	Official application for EU Membership
Bulgaria	March 1993	February 1995	December 1995
Czech Republic	October 1993	February 1995	January 1996
Estonia	June 1995	February 1998	November 1995
Hungary	December 1991	February 1994	March 1994
Latvia	June 1995	February 1998	October 1995
Lithuania	June 1995	February 1998	December 1995
Poland	December 1991	February 1994	April 1994
Romania	February 1993	February 1995	June 1995
Slovakia	October 1993	February 1995	June 1995
Slovenia	June 1996	February 1999	June 1996
Country	**Association Agreement signed**	**Association Agreement came into force**	**Official application for EU Membership**
Turkey	September 1963	December 1964	14 April 1987
Malta	December 1970	April 1971	16 July 1990
Cyprus	December 1972	June 1973	3 July 1990

What are the Europe Agreements?

The Europe Agreements are based on shared understanding and values, and prepare the way for the EU and the partner countries to converge

economically, politically, socially and culturally. They cover political cooperation, favourable trade relations, economic activities and cultural cooperation.

The Europe Agreements provide the means whereby the European Union offers the associated countries the trade concessions and other benefits normally associated with full memberships of the EU.

The Europe Agreements aim to establish free trade in industrial products over a gradual, transition period, although the EU opens its markets more quickly than the associated country. As a result, industrial products from the associated countries have had virtually free access to the EU since the beginning of 1995, with restrictions in only a few sectors, such as agriculture and textiles.

In addition to the liberalisation of trade, the Europe Agreements also contain provisions regarding the free movement of services, payments and capital in respect of trade and investments, and the free movement of workers. When establishing and operating in the territory of the other party, enterprises must receive treatment not less favourable than national enterprises.

Under the Agreements, the partner countries also commit themselves to approximating their legislation to that of the European Union, particularly in the areas relevant to the internal market. This includes applying legislation favouring competition and applying state-aid rulings, which are compatible with comparable legislation in the EU. Legislation will also have to be introduced which provides similar levels of protection to intellectual, industrial and commercial property.

The key instruments of the Europe Agreements

The key instruments of the Europe Agreements are as follows:

- Association Councils. These are bilateral meetings at ministerial level between the European Union and an associated country, at which all areas of approximation towards the EU is discussed.
- Association Committees. These are meetings at senior official level which review in more detail all areas covered by the Europe Agreements. They are complemented by a series of sub-committees, which provide for regular in-depth technical discussions on all areas covered by the Agreements.
- Joint Parliamentary Committees. These bring together members of the national parliaments of the associated countries and members of the European Parliament.

Preparing for membership of the EU

As accession to the European Union is now the main aim of the candidate countries, the Europe Agreements have become the framework within which these countries are preparing for membership.

Phare is identified in the Europe Agreements as the financial instrument specifically aimed at helping achieve the objectives of the Europe Agreements. By providing the funding to enable the partner countries to prepare for membership of the EU, Phare is fundamental to the process of integration and to the creation of a larger family of nations within an enlarged European Union. For further information on Phare's role in the candidate countries' preparation for accession, see support for accession preparation.

Where to find copies of the Europe Agreements?

Below, please find direct links to the full texts of these Europe Agreements, which are now collected on the Commission's EUR-LEX site.

Note that we have only indicated 3 of the Community languages on this page, but that all EU languages are of course available on EUR-LEX.

Bulgaria	en fr de
Czech Republic	en fr de
Estonia	en fr de
Hungary	en fr de
Latvia	en fr de
Lithuania	en fr de
Poland	en fr de
Romania	en fr de
Slovakia	en fr de
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TOP

Association Agreement

Latest update: March 2004

The background
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The EU-Chile Association Agreement to be initialled in Brussels 10th June, 1700 hours

IP/02/841 - Brussels, 10th June 2002

Chilean Under-secretary at the Ministry of Foreign Affairs, Cristián Barros and
External relations Director General Guy Legras

The text of the Association Agreement between the European Union and the Republic of Chile is to be initialled by External relations Director General Guy Legras and Chilean Under-secretary at the Ministry of Foreign Affairs, Cristián Barros at 1700 hours today 10th June. This step marks the beginning of the formal adoption procedures necessary for the implementation of the Agreement.

The Association Agreement comprises three main chapters: political dialogue, co-operation and trade.

Political dialogue: the European Union and Chile will seek to promote democratic values such as the respect for human rights, the freedom of the individual and the rule of Law. They will strive to co-ordinate positions and undertake joint initiatives in international fora, and co-operate in the field of foreign and security policy, as well as in the fight against terrorism. Their political dialogue will be enriched by an increased consultation and involvement of the European Union and Chilean civil societies.

Co-operation: the EU and Chile will seek to promote sustainable economic, social and environmental development. The Agreement explores new areas, not foreseen in the 1996 Framework Co-operation Agreement between the EU and Chile, for example, elements that will complement the trade negotiations such as co-operation on technical regulations, customs procedures, and intellectual property rights. The Agreement foresees an increased participation and consultation of civil society in co-operation matters.

Trade: the conclusion of negotiations will generate considerable economic and commercial benefits and thus contribute to economic growth and sustainable development for both the EU and Chile. The trade chapter covers all the areas of the EU-Chile trade relations going well beyond their respective WTO commitments:

- A Free Trade Agreement in goods, which foresees a very high degree of liberalisation and which is underpinned by strong and transparent rules. It includes a Wines and Spirits Agreement that will grant mutual protection to protected names and oenological practices, as well as increased market access on both sides; and a Sanitary and Phytosanitary Agreement which will facilitate trade in animals, animal products, and plants, while safeguarding public, animal and plant health.
- For the first time, both sides have negotiated a fully-fledged free trade agreement in services and public procurement markets as well as liberalisation of investment.
- The agreement also includes rules on competition and intellectual property, and an effective dispute settlement system.

Next steps:

Following today's initialling of the Agreement:

- the text is approved by the College of Commissioners
- the text is submitted to the Council and the European Parliament.
- the EU and Chile formally sign the Association Agreement (Autumn 2002)
- some provisions of the Agreement, mainly those related to trade and to the institutional framework, will enter into force provisionally once the European institutions and Chile have notified each other of the completion of the adoption procedures. This will probably take place in the first months of 2003 once the Chilean Congress has approved the text.
- the Agreement is ratified by the parliaments of the Member States of the European Union.
- the whole Agreement enters into force.

Top Commissioner Ferrero-Waldner | Directorate General External Relations

The EU's relations with Mexico

Overview

Latest News:

- 5th EU-Mexico Joint Committee Meeting - 26/27 October 2005 - Joint Communiqué Brussels en es
- Ministerial Meeting between the EU and Mexico - 26 May 2005 - Joint Communiqué - Luxembourg

Political and Economic Context

The electoral victory in December 2000 of Vicente Fox Quesada of the *Partido de Acción Nacional* (PAN) opened a new chapter in Mexican political history. It signaled the end of a period of 71 years of continuous government by the *Partido Revolucionario Institucional* (PRI), and increased confidence in the strength of Mexico's democratic system. This historic election raised expectations regarding significant political, economic and social reforms. While there have certainly been some positive achievements, the Fox government has often struggled to meet the weight of these expectations partly due to the lack of a majority in Congress needed to pass the necessary reforms..

As for the near future, the three main candidates for the 2006 Presidential elections will be Roberto Madrazo (PRI), Felipe Calderon (PAN) and former Mexico City mayor Andres Manuel Lopez Obrador (PRD).

On the international front, Mexico has been a willing host of high profile conferences, although its efforts to play a leading role in Latin America have at times been eclipsed by the comparative assertiveness of Brazil. Actually Mexico activism on UN Reform issues could be better understood, among other things, by the intention of at least partially counterbalancing Brazil's aspiration to de facto regional pre-eminence.

Mexico ratified the Rome Statute of the International Criminal Court (ICC) and deposited the ratification instrument at the UN headquarters in New York.

On the human rights front, the Fox government initially tried to make human rights the centre-piece of its new foreign policy. This commitment, which seemed to have lessened during the mid-term phase of the mandate, has revamped during 2005, as testified by some important initiatives at regional level.

In October 2005, South Eastern Mexico was hit successively by two hurricanes. The first, Stan, caused significant damage to the State of Chiapas, mainly through flooding caused by heavy rains. The second, Wilma, was the strongest hurricane on record to hit Mexico and caused severe damages to Cancun and other tourist centers in the State of Quintana Roo.

Economy

On the positive side, macroeconomic stability has been successfully maintained, with low inflation and the public accounts showing a very limited deficit The 3.1% annual increase in the Consumer Price Index represents a historic low and the GDP growth could be over 3% in 2005 leaving clearly behind the economic stagnation of the period 2001-2003. Regarding Foreign Trade, figures showed a good performance during 2005, especially for oil, which grew at a 12% annual rate.

From a macroeconomic perspective, the measurement of the immediate impacts of the major natural disasters in Chiapas and Quintana Roo points to limited effects. More important are the microeconomic effects on specific sectors: in the case of Chiapas, the social aspect is a priority; in Quintana Roo, the economic effect is more relevant, although it will eventually depend on the response strategies by the tourism industry.

The improvement in public finances registered this year and expected in 2006 is supported mainly by short term factors (the high price of petroleum), as no structural modifications have been introduced to strengthen the public sector's collection capacity, which implies that the vulnerability of public finances in the face of external's shocks is maintained.

However, the lack of a parliamentary majority - a state of affairs reinforced by the results of the 2003 mid-term elections – has so far prevented the Government from successfully addressing a number of areas considered by many to be crucial to the development of Mexico, in particular fiscal policy, the energy sector, and the legal system. Growing divisions between different factions of the PRI, still the largest party in the Senate has complicated further the task of obtaining parliamentary approval for new legislation on traditionally controversial topics.

The inability to date of the Fox government to push through fiscal, energy and legal reforms could have a negative effect on Mexico's international competitiveness and could leave the country less attractive as a destination for foreign direct investment. There is awareness that Mexico's privileged position with regard to the US Market – a position reinforced by the entry in force of NAFTA in 1994 – is now threatened by the growing competitiveness of other countries, most obviously China.

Depending on how poverty is measured, the percentage of Mexicans living in poverty in 2004 was 39.4% whereas in 1999 it reached 45.1%.(UN Economic Commission for Latin America and Caribbean) According to the Millenium development goals, there was an improvement between 1989 and 2002, period during which the proportion of people living with less than one dollar a day passed from 10.8 to 4.1.

However, as it is much the case across Latin America, poverty reduction will not only depend on economic growth but also on a reduction in the high levels of inequality (improvements in social cohesion). Mexico shows particularly large inequalities between regions (in general, southern states are poorer than northern states) and between ethnic groups (with indigenous populations more likely to be poor). In 1999, Mexico had a GINI coefficient of 0.57, one of the highest in Latin America (UN Economic Commission for Latin America and Caribbean), and in 2004, this rate was 0, 46, meaning that inequality has increased in the most recent years (the closer the rate is to 1, the more the income is concentrated, i.e., fewer inequalities).

EU-Mexico Relations

Bilateral relations between the EU and Mexico are governed by the Economic Partnership, Political Co-operation and Co-operation **Agreement** en es (Global Agreement) signed in Brussels on 8 December 1997. This Agreement entered into force on 1st October 2000 (published OJ L276 of 28 October 2000).

- Adopted by 32000D0658 (OJ L 276 28.10.2000 p. 44)
- Implemented by 22001D0153 (OJ L 070 12.03.2001 p. 7)

This Agreement is based on democratic principles and on the respect for human rights, which are an "essential element" that "underpins the domestic and external policies of both Parties". It also institutionalizes a regular political dialogue at the highest level and extends bilateral co-operation that existed in the 1991 Framework Agreement.

With respect to trade, the Agreement sets out the objective of establishing a free

trade area in goods and services, the mutual opening of the procurement markets, the liberalization of capital movements and payments, as well as the adoption of disciplines in the fields of competition and intellectual property rights

The trade aspects of the Agreement were subsequently adopted through the following decisions of the EU-Mexico Joint Council:

1. Decision 2/2000, establishing a Free Trade Area in goods. This decision was adopted on 23rd March 2000 by the EU-Mexico Joint Council and entered into force on 1st July 2000. The full text of the Decision is published in OJ L157 of 30 June 2000, and the annexes are published in OJ L245 of 29 September 2000.

Decision 2/2000 provides for:

a. the progressive and reciprocal liberalization of trade in goods, in conformity with Article XXIV of GATT 1994;

b. the opening of agreed government procurement markets of the Parties;

c. the establishment of a co-operation mechanism in the field of competition;

d. the setting up a consultation mechanism in respect of intellectual property matters; and

e. the establishment of a dispute settlement mechanism.

2. Decision 2/2001**, establishing a Free Trade Area in services,** adopted on 27 February 2001 by the EU-Mexico Joint Council (published OJ L 70 of 12 March 2001). This Decision entered into forced on 1st March 2001 and lays down the necessary arrangements for the implementation of:

a. the progressive and reciprocal liberalization of trade in services, in conformity with Article V of GATT;

b. the progressive liberalization of investment and related payments;

c. adequate and effective protection of intellectual property rights, in accordance with the highest international standards;

d. and the establishment of a dispute settlement mechanism.

3. Council decision of 31 January 2005 on the conclusion of an Additional Protocol to the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (JO n° L 066 du 12/03/2005 p. 0022 - 0023).

4. In addition, there exist three sectoral agreements:

- Agreement between the European Commission and the United States of Mexico concerning the mutual recognition and protection of designations for spirit drinks, signed on 27 May 1997 *OJ L 152 , 11.06.1997*
- Agreement between the European Commission and the United States of Mexico on co-operation regarding the control of precursors and chemical

substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, signed on 13 March 1997. *OJ L 077 19.03.1997* - html - Adopted by 31997D0184

- Agreement between the European Commission and the United States of Mexico on Scientific and Technological Cooperation, promoting the establishment of long-term institutional alliances between research centers, signed on 3 February 2004. Council Decision of 13 June 2005 on the conclusion of the Agreement for Scientific and Technological Cooperation (2005/766/EC). *OJ L 290 04.11.2005*

Other documents of interest

- Framework Agreement for cooperation between the European Economic Community and the United Mexican States - Unilateral Declarations - Exchange of Letters
  OJ L 340 11.12.1991 p. 2 - html - Adopted by 31991D0627 (OJ L 340 11.12.1991 p. 1)

- Decision No 1/2001 of the EU-Mexico Joint Council of 27 February 2001 establishing the Rules of Procedure of the EU-Mexico Joint Council and the Rules of Procedure of the EU-Mexico Joint Committee (2001/152/EC)
  OJ L 070 12.03.2001 p. 1 html pdf

- Decision No 2/2001 of the EU-Mexico Joint Council of 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement (2001/153/EC)
  OJ L 070 12.03.2001 p. 7 html pdf

- Decision No 1/2002 of the European Union-Mexico Joint Committee of 20 December 2002 relating to Annex III to Decision No 2/2000 of the European Union-Mexico Joint Council of 23 March 2000, concerning the definition of the concept of "originating products" and methods of administrative cooperation (2003/99/EC)
  OJ L 044 18.02.2003 p. 97 html pdf

- Decision No 3/2002 of the EU-Mexico Joint Council of 13 May 2002 relating to the tariff treatment of certain products listed in Annexes I and II to Decision No 2/2000 of the EU-Mexico Joint Council (2002/370/EC)
  OJ L 133 18.05.2002 p. 28 html pdf

- Decision No 5/2002 of the European Union-Mexico Joint Council of 24 December 2002 relating to Annex III to Decision No 2/2000 of the European Union-Mexico Joint Council of 23 March 2000, concerning the definition of the concept of "originating products" and methods of administrative cooperation (2003/98/EC)
  OJ L 044 18.02.2003 p. 1 html pdf

- Decision No 4/2002 of the EC-Mexico Joint Council of 6 November 2003 adopting rules of procedure of the EC-Mexico special committees (2003/824/EC)
  OJ L 311 27.11.2003 p. 24 html pdf

- Decision No 1/2004 of the European Union-Mexico Joint Committee of 22 March 2004 relating to Annex III to Decision No 2/2000 of the EU-Mexico Joint Council of 23 March 2000, concerning the definition of the concept of "originating products" and methods of administrative cooperation (2004/362/EC)
  OJ L 113 20.04.2004 p. 60 html pdf

- Decision No 1/2004 of the EU-Mexico Joint Council of 29 March 2004

accelerating the elimination of customs duties of certain products listed in Annex II of Decision No 2/2000 of the EU-Mexico Joint Council (2004/369/EC)
OJ L 116 22.04.2004 p. 29 html pdf

Political Relations

The Economic Partnership, Political Co-ordination and Co-operation Agreement (or "Global Agreement") signed in December 1997 provides for the institutionalization of the political dialogue "covering all bilateral and international matters of mutual interest" at all levels:

a. SUMMIT AT THE LEVEL OF PRESIDENTS - On 18th May, 2002 the First Mexico-European Union Summit en es fr took place in the framework of the Global Agreement. The leaders re-stated their belief that interregional dialogue provides an ideal forum for addressing the main issues on the current global agenda and confirmed their commitment to the United Nations. They reaffirmed their belief that the strengthening of multilateral institutions and the implementation of international law help to achieve international security, prosperity and well-being.

b. JOINT COUNCIL AT MINISTERIAL LEVEL - On the agenda of the First Joint Council meeting on the 27th of February 2001, within the framework of political dialogue, the ministers referred to current issues both within Mexico and the EU such as human rights, democracy and the fulfillment of the Nice Treaty.

At the Second EU-Mexico Joint Council meeting on 13th May 2002 the Parties confirmed the importance of the meetings to consolidate bilateral relations and also examined the results of the Agreement during its first eighteen months in force. In addition, other issues discussed were developments in Latin America, the Plan Puebla Panama, and the preparation and importance of the Second Summit of Heads of State and Government of Latin America, the Caribbean and the European Union, which was held in Madrid later that same month.

At the Third EU-Mexico Joint Council Meeting en es on 27th March 2003, the Parties drew a positive assessment of the implementation of the agreement; they discussed the impact of EU enlargement on bilateral relations; they highlighted the important potential and dynamics of bilateral trade and investment flows; they expressed satisfaction with the conclusion of negotiations of the bilateral agreement in science and technology; and they emphasized the importance of the first EU-Mexico Civil Society Forum held in Brussels in November 2002.

At the fourth EU-Mexico Joint Council on 25th May 2005 en, the parties proceeded to a discussion about ways to reinforce their political dialogue and enhance coordination in international fora. They reaffirmed their determination to contribute to achieving the Millennium Development Goals (MDGs). Future EU-Mexico cooperation should take into account specific sectoral policy dialogues and specific sectoral agreements foreseen in the global agreement. In this context, particular attention will be devoted to the issue of social cohesion The Parties expressed their endorsement in principle for institutionalization of the dialogue with the Civil Society.

The **fifth meeting of the EU-Mexico Joint Council** will be held in the first half of 2007 in Brussels.

c. **JOINT COMMITTEE AT SENIOR CIVIL SERVANT LEVEL** - On 2

October 2001 the First EU-Mexico Joint Committee meeting took place in Brussels one year after the entry into force of the Global Agreement. The agenda not only included co-operation and trade issues but also aspects of political dialogue covering among others the United Nations conference on financing development, the fight against terrorism, high level meetings between the EU and Mexico in 2000-2001 and the next summit between EU-Latin American and Caribbean countries in May 2002.

Moreover, the Second EU-Mexico Joint Committee meeting (in Puebla, Mexico, 3 October 2002), confirmed the mutual desire to strengthen political ties and to work together to bring about closer political and economic co-operation.

The Third EU-Mexico Joint Committee meeting took place in Brussels on 11 November 2003. The parties reviewed the state of bilateral cooperation, particularly in the field of human rights and emphasised the importance of the dialogue with civil society. Regarding trade aspects, the implementation of the FTA Agreement and its perspectives after the accession of the 10 new Member States in 2004, was discussed among other subjects.

The fourth EU/Mexico Joint Committee meeting took place in Mexico on 10 November 2004. Both parties showed a strong interest in upgrading the level of existing bilateral relations and expressed their willingness to work closely together in that direction. In parallel to the JC, two EU-financed seminars were carried out (on Social Cohesion and on Torture). Regarding the trade aspects, the main result was the decision to start negotiations during 2005 on Services, Agriculture and Investment, as provided for in the review clauses of the Global Agreement. As regards cooperation, the parties reviewed the existing programs and sectors and, within the general framework of the reinforcement of the bilateral cooperation, reemphasized the importance of the dialogue with civil societies.

The fifth EU/Mexico Joint Committee meeting took place in Brussels on 26-27 October 2005. Prior to starting of the meeting, the European Union expressed its solidarity to Mexico for the victims and damages caused by the hurricanes Stan and Wilma. During the political dialogue, the European Union and Mexico discussed how to strengthen bilateral political dialogue, the follow-up to the UN Summit, the preparation of the next EU-LAC Summit in Vienna and developments both in the EU, Latin America and the Caribbean Region.

The sixth meeting of the EU/Mexico Joint Committee is due to take place in Mexico in last semester 2006.

Trade Relations

Mexico is traditionally one of the EU's most important trading partners in Latin America and a strategically important market for its exports, with significant growth potential. The EU is Mexico's second trading partner after the USA. According to EUROSTAT, bilateral trade between the EU and Mexico in 2004 totaled € 21.1bn, with EU exports amounting to € 14.6bn, and Mexico's exports to the EU representing € 6.8bn, leaving the EU with a trade surplus of € 7.8bn.

The Free Trade Agreement (FTA) covers a broad spectrum of economic aspects. It includes: a full liberalization of industrial products by 2003, for the EC, and by 2007 - with a maximum 5% tariff applied by 2003 - for Mexico; substantial liberalization for agricultural and fisheries products; and, as regards rules of origin, a satisfactory balance between EU policy of harmonization and market access considerations. The FTA will also provide EU operators with access to the

Mexican procurement and services markets substantially equivalent to NAFTA.

In the 4 years following the entry into force of the FTA, bilateral trade between the EU and Mexico grew by nearly 40 %. This in accordance with both parties' imports data.

During the fourth EU-Mexico Joint Committee, which took place in Mexico in November 2004, the parties agreed to start the review clauses in agriculture, services and investments as foreseen in the Agreement. Parties are confident that such a review, once concluded, will provide a more dynamic environment for business operators and a full exploitation of the market access possibilities already offered by the FTA.

Co-operation

In past years, an annual average of approximately € 13M was committed to co-operation projects with Mexico, covering mainly areas such as tropical forests, NGOs, ECIP (European Community Investment Partners), ECHO (humanitarian aid), economic co-operation, demographic policies, and refugees and displaced persons. There were also significant activities under horizontal programs such as AL-Invest (Latin America Investment Programs), ALFA (Latin America Academic Formation) and URB-AL (horizontal program of decentralized cooperation between European Union and Latin American cities).

Bilateral co-operation activities for the period 2002-2006 focus on the priorities identified in the Country Strategy Paper (CSP). The priority action sectors are the following:

- Social development and the reduction of inequalities.
- Economic growth by facilitating the implementation of the Free Trade Area and by fostering trade and investment through SMEs projects.
- Scientific and technical co-operation.
- Consolidation of the rule of law and institutional support. The two areas of intervention are: reform of the judicial system and actions in the Human Rights domain through specialized EC budget lines.

An indicative total of €56.2 million is available from the EU for the period 2002-2006 to finance projects and programmes in these priority areas. As of early 2004, financing for the following projects had already been signed (EU contributions in brackets):

- Strengthening the rule of law (€15 million)
- Integrated and sustainable social development in Chiapas (€15 million)
- Integrated programme in support of Mexican small and medium sized enterprises (€12 million)

A programme for the facilitation of the EU-Mexico Free Trade Agreement, with an EU contribution of €8 million, was due to be agreed during the first semester of 2004. Also during 2004, preparatory work is being carried out for a new science and technology programme. It is hoped that the financing agreement for this project will be signed in early 2005.

Mexico is one of three priority countries in Latin America for the 2002-2004 European Initiative on Democracy and Human Rights. Various projects are supported under this initiative, including a project to strengthen human rights Ombudsmen in Mexico, and an innovative project using radio to promote the human rights of women.

On 3 February 2004 Mexico and the EU signed the Agreement on Scientific and Technological Cooperation, promoting the establishment of long-term institutional alliances between research centres. The agreement also allows for the participation of European and Mexican research institutes to participate in each other's national research programmes. As a first step in this direction, Mexican research centres will be able to participate in the EC's 6th Framework Programme for research and technological development.

Bilateral co-operation activities for the period 2007-2013 (CSP 2007-2013) are currently being examined by the Commission and should be made available to the public in early 2006.

The priority sectors should be:

1. Social cohesion and support to other policy dialogues,

Co-ordinated with specific policy dialogues:

- Social cohesion
- Regional development and decentralization;
- Rule of law and institutional strengthening;
- Environment.

2. Economy and competitiveness

3. Education and Culture

It is also worth noticing that cross-cutting issues of relevance, such as gender issues, indigenous populations, etc. will receive particular attention when specific projects and programs are formulated. In addition, assistance in this sector will be conveyed through horizontal and regional programs

Civil Society

The European Commission organised a first EU-Mexico Civil Society Forum in Brussels on 26 November 2002. Over 200 participants from Mexico and the EU – NGO representatives, academics, business associations – met to discuss different aspects of the EU-Mexico Agreement. The discussions, in the form of initial presentations followed by debate, were divided into three working groups covering political aspects, economic and trade relations, and development cooperation.

During the forum civil society representatives argued that civil society should have a greater say in influencing the decision-making process. They suggested the establishment of a social observatory to study the effects and implementation of the EU-Mexico Agreement, and the creation of a Joint Consultative Committee to facilitate discussions between civil society and Mexican and European authorities.

The Second EU-Mexico Civil Society Forum took place in Mexico, from 28 February to 1 March 2005. Four main areas were discussed: a) the evaluation of the political and economical impact of the Global Agreement, b) cooperation c) social cohesion and d) the institutionalization of the political dialogue. The creation of a Consultative Committee, as proposed by civil society representatives during the first Forum, has also been discussed.

See: http://www.delmex.cec.eu.int/es/eventos/foro_social.htm

Basic Data

Official name:	United States of Mexico
Capital:	Mexico City (Distrito Federal)
Surface area:	1,972,550 sq km
Population :	104,959,594 (July 2004 est.)
Official language:	Spanish / 56 indigenous languages
Currency:	New Peso. More information
Nature of the State:	Federal Republic
Administrative divisions:	31 states and 1 federal district
Head of Government (President):	Vicente Fox (PAN)
Next presidential and legislative elections:	July 2006
GDP per capita :	5.350 euros (2003)
GDP growth :	1.3% (2003)
Inflation	4.5% (2003)

Related links:

- **Delegation of the European Commission in Mexico D.F.**
  http://www.delmex.cec.eu.int/
- **EuropeAid Co-operation Office**
  http://europa.eu.int/comm/europeaid/index.htm
- **DG Trade**
  http://europa.eu.int/comm/trade/index_en.htm
- **Mexican Presidency**
  http://www.presidencia.gob.mx/
- **Mexican Government**
  http://www.gob.mx/wb2/
- **Mexican Government - Members of Cabinet**
  http://www.presidencia.gob.mx/gabinete/
- **Mexican Chamber of Deputies**
  http://www.cddhcu.gob.mx/
- **Mexican Senate**
  http://www.senado.gob.mx/
- **Mexican Political Parties:**
  - Partido Revolucionario Institucional (PRI)
    http://www.pri.org.mx/
  - Partido de Acción Nacional (PAN)
    http://www.pan.org.mx/ver2002/
  - Partido de la Revolución Democrática (PRD)
    http://www.prd.org.mx/

Last updated: December 2005

Infringements

Overall view of infringement proceedings and the implementation of Community Directives

14.12.2005	Infringement procedures against Spain, Italy and Sweden
15.07.2005	Infringement procedures against Germany, Spain, Greece, Italy, Portugal and France
06.07.2005	Commission acts on Greek legislation excluding certain companies from public contracts
27.04.2005	Commission takes further action on Greek legislation excluding certain companies from public contracts
22.03.2005	Commission acts on Greek legislation excluding certain companies from public contracts
16.03.2005	Commission acts to enforce EU law in Spain, UK, Portugal and Italy
	Four further Commission decisions on public procurement infringement cases in Germany and Italy de en
14.01.2005	Commission acts to enforce EU law in Germany, Greece, Spain, Italy, Austria, Portugal and Finland
25.10.2004	Commission acts to enforce EU law in Germany, France, Denmark, Italy and the Netherlands
13.10.2004	Commission examines discriminatory specifications in supply contracts for computers in four Member States
19.07.2004	Commission acts to enforce EU law in Italy, the Netherlands, Spain, Finland and Denmark
08.07.2004	Commission decides to refer Italy to Court over supply of helicopters
31.03.2004	Commission requests six Member States to rectify violations of EU rules
04.02.2004	Commission acts to enforce European law in France and Italy
14.01.2004	Commission calls on Belgium to set up effective review procedures for unsuccessful tenderers

18.12.2003	Commission acts to ensure six Member States apply EU rules
20.10.2003	Commission acts against Ireland, Italy and Germany; closes infringement cases against Greece and Luxembourg
24.07.2003	Commission requests Germany and Ireland to rectify breaches of EU law in awarding contracts
17.07.2003	Commission acts against six Member States
30.04.2003	Commission gives green light to Thessaloniki metro contract
03.04.2003	Commission calls on Austria and Italy to comply with Community law
20.02.2003	Commission acts against seven Member States
30.10.2002	Commission requests Germany, Italy and Sweden to rectify breaches of EU law in awarding contracts
17.10.2002	Commission requests competition in the award of concessions
17.10.2002	Commission asks France to amend its new public procurement code
25.07.2002	The Commission is initiating infringement proceedings against Spain over a concession on the A6 motorway
04.10.2001	Commission pursues infringement proceedings against Italy and Greece
17.01.2001	Standard forms to improve contract notices
31.07.2001	Commission pursues infringement proceedings against Spain, France, Germany, Italy and Austria
30.07.2001	Commission decides to request France to respect Court ruling on redress Directive
05.04.2001	Commission pursues infringement proceedings against Italy, Greece and Germany
02.03.2001	Commission pursues infringement cases against UK, Germany, Belgium, Spain and Ireland
28.07.2000	Commission refers Austria, France and Germany to Court for failure to implement Directives
27.07.2000	Commissions acts against UK, Germany and Belgium on public procurement rules
09.03.2000	Infringement procedures against Luxembourg, United Kingdom, France and Spain
13.01.2000	Commission pursues infringement procedures against Germany, Austria and Italy


Contacts

Last update on 15-12-2005

Calendar for transposition of Directives

In this section you will find the Directives addressed to the Member States classed by deadline (year and month).
Member States shall adopt the laws, regulations and administrative provisions necessary to comply with these Directives by the date indicated.
The lists are updated regularly following the adoption of Directives.

Year 2004
December
November
October
September
August
July
June
May
April
March
February
January

Year 2005
December
November
October
September
August
July
June
May
April
March
February
January

Year 2006
December

September
August
July

May
April
March
February
January

Year 2007
December
August

June
April
Marchs
February
January

Year 2008

July

April

January

Year 2009

Search a Directive by its number:

Only Directives with an implementing date higher than 2002 are available.

Years First select a year Enter

Progress in notification of national measures implementing directives

The data about communication of NEMs are published every two months for information purposes. The percentages reflect the effort of communication made by Member states notifying NEMs to the Commission. These tables include all communications officially received by the Secretariat general. Due to the regular update of the database these data are bound to change at every release.

Periodical Table : by Member State

- Situation on the 04th November 2005
- Archives

Periodical Table : by Sector

- Situation on the 04th November 2005
- Archives

Infringements

Recent decisions by the Commission: (in French)

- 13th December 2005
- 12th October 2005
- 20th July 2005
- 13th July 2005
- 05th July 2005
- 01st June 2005
- 03rd May 2005
- 27th April 2005
- 12th April 2005
- 22nd March 2005
- 16th March 2005
- 19th January 2005
- 11th January 2005

- Archives

Application of Article 228 of the EC Treaty (SEC(2005)1658final)

Commission communication
Financial Penalties for Member States

Annual report on monitoring the application of Community law

- 22nd annual report (2004)
- 21st annual report (2003)
- 20th annual report (2002)
- 19th annual report (2001)
- 18th annual report (2000)
- 17th annual report (1999)
- 16th annual report (1998)

Standard form for complaints to be submitted to the European Commission for failure by a Member State to comply with Community law.

Commission communication to the European Parliament and the European ombudsman on relations with the complainant in respect of infringements of community law (COM(2002)141 final)

Acknowledgements of receipt of multiple complaint

Decisions on multiple complaints

State Aids

Recent decisions by the Commission:

Please, select a Member State

Aids registered by the Commission in 2005 :
By sector : Industry - Agriculture - Transport - Fish

Aids registered by the Commission in 2004 :
By sector : Industry - Agriculture - Transport - Fish

Aids registered by the Commission in 2003 :
By sector : Industry - Agriculture - Transport - Fish

Aids registered by the Commission in 2002 :
By sector : Industry - Agriculture - Transport - Fish

Aids registered by the Commission in 2001 :
By sector : Industry - Agriculture - Transport - Fish

Aids registered by the Commission in 2000 :
By sector : Industry - Agriculture - Transport - Fish

Aids registered by the Commission in 1999 :
By sector : Industry - Agriculture - Transport - Fish

Aids registered by the Commission in 1998 :
By sector : Industry - Agriculture - Transport - Fish

Aids registered by the Commission in 1997 :
By sector : Industry - Agriculture - Fish

Form for the submission of complaints concerning alleged unlawful state aid

- **Introduction**

- **Complaint form**

[Secretariat-General] Last update : 4/1/2006

IP/05/1598

Brussels, 14 December 2005

Public procurement: infringement procedures against Spain, Italy and Sweden

The European Commission has taken action against Spain, Italy and Sweden to correct breaches of EU public procurement law. The Commission has formally requested Spain to modify the law on town planning (known as 'LRAU') that applies to the Valencia Community. This request takes the form of a "reasoned opinion", the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within fifteen days, the Commission may refer the matter to the European Court of Justice. The Commission has also decided to refer Spain to the Court over provisions on employment stability that apply to the Autonomous Community of Madrid. In addition, the Commission has decided, under Article 228 of the EC Treaty, to send a letter of formal notice asking Spain for full information on its execution of European Court judgements requiring it to transpose certain EU public procurement Directives correctly into national law. The Commission has decided to refer Italy to the European Court of Justice in three separate cases concerning respectively: the purchase of light helicopters for the Police and the National Fire Brigade; the review procedures relating to the award of public contracts; and the procedure followed by Azienda Casa Emilia Romagna of Reggio Emilia for the award of public works contracts relating to the maintenance and construction of council houses. Finally, the Commission made a formal request to Sweden concerning a decision by several nuclear operators to exclude a consultancy from their services contracts. This request takes the form of a "reasoned opinion", the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may refer the matter to the European Court of Justice.

The open and transparent tendering procedures required under EU public procurement law mean more competition, stronger safeguards against corruption, and better service and value for money for taxpayers.

Spain - Law 6/1994 on town planning for the Valencia Community (LRAU)

The Commission has decided to send a reasoned opinion to Spain under Article 226 of the EC Treaty. In this reasoned opinion the Commission takes the view that the award of integrated action programmes (programas de acción integrada) in accordance with the LRAU comprises public works contracts and, in some cases, public services contracts and must therefore comply with the provisions of Directives 93/37/EEC (public works contracts) and 92/50/EEC (public services contracts) and the general principles of the Treaty.

These programmes are awarded by the municipalities of the Valencia Community for the performance of public infrastructure works. The Valencia Parliament (Cortes valencianas) has started a legislative procedure to amend the LRAU and to bring it in line with the Directives in question.

The Commission notes that the Spanish authorities have not complied with the warning and that the draft legislation communicated to the Commission is not enough to put an end to the infringement in several respects. In particular, there is no provision in the draft legislation for a suitable solution for the matter of the transition period applicable to the LRAU.

Spain - Provisions on employment stability that apply to the Autonomous Community of Madrid

The Commission has decided to refer Spain to the European Court of Justice over Decree 213/1998 of the Autonomous Community of Madrid which obliges contracting authorities within the Autonomous Community to include, except in special circumstances, one or more criteria relating to the stability of employment in the tenderer's workforce. These criteria will be used to determine the economically most advantageous tender.

The Commission's Interpretative Communication of 28 November 2001 on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement discusses the possibilities offered by Community law to integrate social considerations into procurement procedures. The Court of Justice further clarified those possibilities in its judgment of 17 September 2002 *Concordia Bus Finland* (case C-513/99). The public procurement directives adopted on 31 March 2004 consolidate and supplement the legal context. According to this framework, award criteria that integrate social and environmental considerations must fulfil certain requirements including a link to the subject-matter of the specific contract in question.

The Commission takes the view that some of the criteria in Decree 213/1998 do not meet these requirements. In particular, the Decree makes these award criteria mandatory for contracting authorities within the Autonomous Community, regardless of any link with the subject-matter of specific contracts. The Commission also takes the view that some of the criteria in the Decree are selection criteria and should therefore not be used to award the contract.

Spain – Follow-up to the judgment of the Court of Justice of 13 January 2005

The Commission has decided to send a letter of formal notice to Spain under Article 228 of the EC Treaty. In its judgment of 13 January 2005 (case C-84/03), the Court of Justice ruled that the Kingdom of Spain had failed to comply with its obligations under Directives 93/36/EEC and 93/37/EEC (public supply contracts and public works contracts, respectively) concerning the notions of awarding authority, inter-administration cooperation agreements and use of negotiated procedures in cases not covered by the Directives in question. In order to implement this ruling, Spain approved on 11 March 2005 Royal Decree (Real Decreto-ley) No 5/2005 providing urgent reform to stimulate productivity and improve public contracts.

The Commission nevertheless takes the view that this Royal Decree has not fully met the obligations placed on the Kingdom of Spain by the ruling mentioned above, inasmuch as the scope of the Royal Decree does not coincide with the scope of the relevant provisions of Directives 93/36/EEC and 93/37/EEC.

Italy - Purchase of light helicopters; review procedures relating to the award of public contracts; award of public works contracts relating to the maintenance and construction of council houses

The Commission has decided to refer Italy to the European Court of Justice for infringement of EU public procurement law on public procurement in the following three cases.

The first case concerns a decree issued by the Minister of the Interior on 11 July 2003 permitting the purchase of light helicopters for the Police and the National Fire Brigade without applying the tendering rules set out in Directive 93/36/EEC on public supply contracts. The Commission considers that Italy has not demonstrated that any of the strict conditions allowing derogations, and in particular those concerning contracts requiring special security measures and secret contracts, is met in this case. Therefore, it is the Commission's opinion that this decree constitutes an infringement of the Directive 93/36/EEC.

The second case concerns the review procedures relating to the award of public contracts. The Italian remedies system does not provide for a reasonable period between the notification of the award decision and the conclusion of the contract. The Commission considers a standstill period to be necessary to ensure that the award decision can be suspended and annulled at a stage where the infringement can still be rectified. Moreover, Italian law does not empower the review bodies to take interim measures against a decision of a contracting authority independently of any prior action, as required by the Court of Justice case law.

The third case concerns the procedure followed by *Azienda Casa Emilia Romagna of Reggio Emilia* for the award of public works contracts relating to the maintenance and construction of council houses. The Commission considers that the tendering rules laid down in Directive 93/37/EEC on public works contracts were not complied with and that, as a consequence, there was insufficient competition among bidders.

Sweden - Exclusion of a consultancy from services contracts for Swedish nuclear operators

The Commission has decided to issue a reasoned opinion against Sweden concerning a decision by several nuclear operators to exclude a consultancy from their services contracts. The nuclear operators are contracting entities in the meaning of Council Directive 93/38 and thus bound to apply its rules when awarding contracts.

The consultancy has however been excluded from the services contracts of the nuclear operators without receiving the rules and criteria applied for selection of candidates to their contracts. According to the Directive these rules should be made available to interested suppliers. The Swedish authorities have not acknowledged the infringement.

If the national authorities do not give a satisfactory reply to the reasoned opinion within two months, indicating that the consultancy is no longer excluded without valid justification from the contracts of the nuclear operators, the Commission may refer the matter to the Court of Justice.

The latest information on infringement proceedings concerning all Member States is available at:
http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/05/949

Brussels, 15 July 2005

Public procurement: infringement procedures against Germany, Spain, Greece, Italy, Portugal and France

The European Commission has taken action in ten cases against six Member States to correct breaches of EU public procurement law. In four of those cases, the Member State concerned has been referred to the European Court of Justice. In another four of those cases, the Commission has formally requested the Member State concerned to correct breaches of EU public procurement law. Requests of this kind take the form of "reasoned opinions", the second stage of the infringement procedure under Article 226 of the EC Treaty. If no satisfactory response is received within two months, the Commission may go to the Court. The other two cases concern non-compliance with previous European Court judgements. Details of the cases are as follows. Germany will be referred to the Court over a case concerning the transport of works of art for temporary exhibitions and will be sent a letter of formal notice asking it for full information on its execution of a 2005 European Court judgement on contracts for the transport of waste in the municipality of Munich. It will also be sent a reasoned opinion on contracts for sewage disposal services in Hamburg. In addition, a case concerning contracts for waste water disposal services in Hinte has been closed. Spain will be referred to the Court over the award of a concession for the construction, maintenance and exploitation of two connections of the A6 motorway. Greece will be referred to the Court over an award procedure for the construction of a thermoelectric plant in Lavrio and it will receive a reasoned opinion on a procedure launched by the Ministry of Agriculture for the award of 24 studies on the protection and management of public forests. Italy will be referred to the Court over the management of medical transport services in Tuscany and it will receive a reasoned opinion on its implementation of the Remedies Directive as interpreted by Court of Justice case law. In addition, the Commission has decided, under Article 228 of the EC Treaty, to send Portugal a further reasoned opinion requesting it to comply immediately with the 2004 judgment of the Court on its implementation of public procurement Directive 89/665/CEE. If Portugal does not comply, the Commission can ask the Court to impose daily fines. Finally, France has been sent a reasoned opinion on the purchase of helicopters by its Ministry of Defence.

The open and transparent tendering procedures required under EU law mean more competition, stronger safeguards against corruption, and better service and value for money for taxpayers.

Germany - transport of works of art, service contracts in Munich and Hamburg, closure of case concerning the award of a contract for sewage disposal services by the municipality of Hinte

The Commission has decided to bring Germany before the Court of Justice in a case concerning the transport of works of art for temporary exhibitions. Several German museums regularly award such service contracts to a limited number of specialised transport companies without conducting transparent award procedures. Germany maintains that since the contracts in question are below the threshold for the application of the EC procurement Directive they can be awarded without public advertising. This view is in contradiction with fundamental principles of the Internal Market. “Small” public contracts can be quite important for many enterprises in the Internal Market, in particular for SMEs. The ECJ has established that public authorities awarding such contracts have to ensure a sufficient degree of advertising, offering a fair chance to all potential bidders. Since the practice followed by the German museums does not provide for such advertising, the Commission has decided to refer the case to the Court.

The Commission has further decided to send a letter of formal notice to Germany, having observed that the German authorities failed to take the measures necessary to comply with the Court of Justice’s judgment of 18 November 2004 in case C-126/03 (Commission/Germany). In this judgment, the Court decided that the conclusion of a service contract for the transport of waste by the municipality of Munich without a competitive tendering procedure had infringed the rules of Directive 92/50/EEC. Since the German authorities did not take any active steps to bring the service contract to an end, the Commission has decided to launch the procedure to enforce the ECJ judgment.

The Commission is sending a reasoned opinion to the German authorities over a series of contracts for sewage disposal services concluded between Hamburger Stadtentwässerung (a body established by the City of Hamburg for the operation of its sewage system) and several municipalities situated around Hamburg. Germany argues that these contracts concern a cooperation between municipalities outside the scope of public procurement law. However, it results clearly from the public procurement Directives and from ECJ case-law that public contracts concluded between different public entities are not exempted from the Internal Market rules on public procurement. Such contracts have to be awarded in a transparent procedure, in order to ensure fair competition between the potential bidders active in the market.

Finally, the Commission has decided to close the case concerning the service contract between the municipality of Hinte and the Oldenburgisch-Ostfriesischer Wasserverband (OOWV, a regional water association organising water supply and sewage services). In 1999, the municipality of Hinte decided to become a member of OOWV, transferring its waste-water disposal services to the association. At the same time, a contract for waste-water disposal services was concluded between the municipality and OOWV. Since that contract had not been awarded in a competitive procedure, the Commission opened an infringement procedure and decided ultimately to refer the case to the Court of Justice (see IP/05/44). In April 2005, the contract between the municipality and OOWV was terminated. The municipality will remain a member of OOWV and OOWV will continue to perform the waste-water disposal services in Hinte. In fact, the contract consisted mainly of a restatement of the obligations following from the municipality’s membership in the association.

The termination of the contract made it clear that the responsibility for waste-water disposal services has been transferred from the municipality of Hinte to OOWV as a consequence of joining the association.

This means that OOWV was entrusted with the services through an act of internal organisation of public powers and not through a public contract. Therefore, there is no infringement of public procurement rules so that the case could be closed.

Spain – Concessions on the A6 motorway

The Commission has decided to bring Spain before the Court of Justice in connection with the award of a concession for the construction, maintenance and exploitation of two connections of the A6 motorway with Segovia and Ávila, and for the maintenance and exploitation of the Villalba-Adanero section of the same motorway. The Commission considers that the procedure for the award of this concession infringed Directive 93/37/EEC on public works contracts because the award of the concession included an additional package of infrastructures that were not called for in the concession notice or the tender documents. The extra infrastructure works include the construction of a new reversible lane (including a new tunnel) between San Rafael and El Valle de los Caídos, the construction of new lanes on two other sections – one of them toll-free – and the construction of a new tollgate area, as well as other improvements to an existing tunnel. The value of the additional package of infrastructure is more or less equivalent to the value of the works on the new sections to Segovia and Ávila, which were advertised in the concession notice. The Commission considers that tenderers were not treated equally because the awarding authority chose a bid that included the additional package of works, which had not been advertised. Furthermore, the Commission considers that the existence of two clauses in the tender documents – one asking tenderers to indicate in their bids their proposed traffic management measures, and an obligation to ensure that traffic volumes on the motorway do not exceed stated limits – cannot allow such a substantial enlargement of the subject of the concession, in relation to what was advertised in the concession notice.

Greece - award procedure for the project of a thermo-electric plant in Lavrio, award procedure launched by the Ministry of Agriculture for the protection of forest areas

The Commission has decided to refer Greece to the European Court of Justice concerning an award procedure for the construction of a thermoelectric plant in Lavrio, launched by the Hellenic Public Power Corporation (DEI). The Commission considers that the two companies that reached the last phase of the procedure (submission of financial bids) did not meet the conditions set out in the call for tenders, despite the fact that in the announcement of the call and the invitation to tender it was explicitly stated that any bid not meeting the specific requirements would be rejected. One of the companies concerned did not have the requisite experience, while the bid submitted by the second company, which was in the end awarded the contract, did not comply with one of the conditions concerning the long-term maintenance agreement. By accepting these two companies for the final stage of the procedure, and by awarding the contract to one of them, the DEI infringed Article 4(2) of Directive 93/38/EEC (excluded sectors), as well as the principles of the equal treatment of participants and of transparency set out in the ECJ's case law.

Failure to apply these principles may be unjust not only to the companies that take part in a given procedure, but also to those who might have participated if they had known that the contracting entity would not apply the terms it had itself set in the tender.

The Commission has also decided to send a reasoned opinion to Greece in relation to a procedure launched by the Ministry of Agriculture for the award of 24 studies on the protection and management of public forests.

The call for tenders mixes up the selection and the award criteria, which is contrary to Directive 92/50 (public service contracts), which foresees that the selection and the award phases should be distinct and based on different criteria (set out in the Directive itself). The award system used by the call for tenders was also contrary to the Directive, as it could lead to the contract being awarded to a participant not fulfilling the established award criterion.

Italy - management of medical transport services in Tuscany, implementation of the Remedies Directive as interpreted by Court of Justice case law

The Commission has decided to take Italy to the Court of Justice concerning the Region of Tuscany's award of concessions for the management of medical transport services in the region, such as ambulance services. The Commission considers that the agreements, whereby the Region directly gave the management of these services to several associations, may be classified as public service contracts under Community law and that, as a result, the direct award of these contracts to the associations in question, without applying the competitive procedures laid down in Directive 92/50/EEC, is in breach of the Directive.

The Commission has also addressed a reasoned opinion to Italy on the review procedures relating to the award of public contracts. The Commission considers that the Italian remedies system does not comply with the "Remedies" Directives on public procurement, as interpreted by the Court of Justice, in two respects. First, Italian law does not provide for a reasonable period between the notification of the award decision and the conclusion of the contract. This is necessary to ensure that this decision can be suspended and annulled at a stage where the infringement can still be rectified. Second, Italian law does not empower the review bodies to take interim measures against a decision of a contracting authority independently of any prior action.

Portugal – review procedures

The Commission has decided to address a reasoned opinion to Portugal after finding that, by the deadline for replying to the letter of formal notice, the Portuguese authorities had still not adopted the measures required for the implementation of the Court of Justice judgment of 14 October 2004 (Commission versus Portugal, case C-275/03) and for the proper transposition of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

In its judgment, the Court of Justice of the European Communities ruled that, contrary to the provisions of the Directive on review procedures, Portuguese law makes the award of damages for violations of Community rules on public contracts subject to the production of evidence by the aggrieved parties that the State or legal persons under public law were at fault in committing the illegal acts.

The difficulty of producing such evidence may in practice result in review procedures for the award of damages being slow and very probably ineffective.

France – purchase of helicopters for civilian use

The Commission has decided to address a reasoned opinion to France under Article 226 of the EC Treaty. In this reasoned opinion the Commission takes the view that the contract for the purchase of eight helicopters by the Gendarmerie Nationale in 1998 was awarded in breach of the rules on invitations to tender laid down by Directive 93/36/EEC (public supply contracts).

The Commission considers that while the lack of a suitable price made it possible to declare the original invitation to tender inconclusive, this did not permit the public purchaser (in this instance, the French Ministry of Defence) to make use thereafter of a negotiated procedure to purchase the eight helicopters. The French authorities should in this case have announced a new invitation to tender.

The latest information on infringement proceedings concerning all Member States is available at:
http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/05/855

Brussels, 6 July 2005

Public procurement: Commission acts on Greek legislation excluding certain companies from public contracts

The European Commission has decided to ask Greece for its observations on the compatibility with EU law of Greek national law (3021/2002) preventing companies "interconnected" with Greek mass media businesses from obtaining public contracts. The Commission's request takes the form of a letter of formal notice, the first stage of the infringement procedure under Article 226 of the EC Treaty.

EU public procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe. EU public procurement markets are worth over €1 500 billion, more than 16% of total EU GDP. The existing EU public procurement Directives have increased cross-border competition in procurement markets and reduced by around 30% the prices paid by public authorities for goods and services, according to a European Commission working document (see IP/04/149).

Greece – law 3021/2002 on the mass media

After the suspension of law 3310/2005 on the same subject (see IP/05/356, IP/05/492), the previously existing law (3021/2002) came back into force in Greece. The Commission has sent a letter of formal notice asking the Greek Government for its observations on the compatibility with Community law of the national provisions banning the award of public contracts to companies "interconnected" with Greek mass media companies.

Law 3021/2002, implementing Article 14(9) of the Greek Constitution, prevents companies interconnected with Greek mass media businesses from participating in public procurement proceedings. The Commission considers that this is contrary to secondary Community law (the Directives on public procurement), in that it lays down exclusion criteria that are not provided for in the Directives, and does not respect the equal treatment of participants. It is also contrary to primary Community law (the EC Treaty), in that it lays down measures that impede, or render less attractive, the exercise of almost all the fundamental freedoms acknowledged by the EC Treaty.

Given that the law in question is already producing its effects, the Commission has given the Greek Government 15 days to reply and reserves the right to ask the Court, if it brings the matter before it, to lay down the requisite interim measures, i.e. the suspension of the application of law 3021/2002.

Following the Commission decision, the Greek authorities have communicated new information to the Commission services, showing that concrete measures are being taken by the Greek government to ensure that the law in question will not produce any effects. The Commission services are in the process of analysing these communications, which will have a bearing on the further development of the procedure in question.

For further details on European public procurement policy and infringement procedures under way, see:

http://europa.eu.int/comm/internal_market/publicprocurement/index_en.htm

The latest information on infringement proceedings concerning all Member States is available at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/05/492

Brussels, 27 April 2005

Public procurement: Commission takes further action on Greek legislation excluding certain companies from public contracts

Following a letter of formal notice sent to Greece on 23 March 2005 and the reply from the Greek national authorities received on 7 April, the European Commission has decided to formally request Greece to change its law 3310/2005 which prevents companies "interconnected" with Greek mass media businesses from participating in procedures for the award of public contracts. The Commission considers that this law breaches the Community directives on public procurement and the principal of equal treatment of the participants, as well as the exercise of almost all the fundamental freedoms acknowledged by the EC Treaty. The Commission's request takes the form of a 'reasoned opinion', the second stage of the infringement procedure under Article 226 of the EC Treaty. In the absence of a satisfactory response within three weeks, the Commission may refer Greece to the European Court of Justice.

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Greece – law on the mass media

Law 3310/2005 implementing Article 14(9) of the Greek Constitution prevents companies interconnected with Greek mass media businesses from participating in public procurement proceedings. The Commission considers that this is contrary to secondary Community law (the Directives on public procurement), in that it lays down exclusion criteria that are not provided for in the Directives, and does not respect the equal treatment of participants. It is also contrary to primary Community law (the EC Treaty), in that it lays down measures that impede, or render less attractive, the exercise of almost all the fundamental freedoms acknowledged by the EC Treaty.

Given that the law in question is already producing its effects, the Commission has given the Greek Government three weeks to reply and reserves the right to ask the Court, if it brings the matter before it to lay down the requisite interim measures, i.e.d the suspension of the application of law 3310/2005 .

The Commission is prepared to work together with the Greek authorities and to examine proposed solutions.

For further details on European public procurement policy and infringement procedures under way, see:

http://www.europa.eu.int/comm/internal_market/publicprocurement/index_en.htm

The latest information on infringement proceedings concerning all Member States is available at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/05/356

Brussels, 22 March 2004

Public procurement: Commission acts on Greek legislation excluding certain companies from public contracts

The European Commission has decided to ask Greece for its observations on the compatibility with EU law of Greek national law preventing companies "interconnected" with Greek mass media businesses from obtaining public contracts. The Commission's request takes the form of a letter of formal notice, the first stage of the infringement procedure under Article 226 of the EC Treaty.

EU public procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe. EU public procurement markets are worth over €1 500 billion, more than 16% of total EU GDP. The existing EU public procurement Directives have increased cross-border competition in procurement markets and reduced by around 30% the prices paid by public authorities for goods and services, according to a European Commission working document (see IP/04/149).

Greece – law on the mass media

The Commission has sent a letter of formal notice asking the Greek Government for its observations on the compatibility with Community law of the national provisions banning the award of public contracts to companies "interconnected" with Greek mass-media companies.

Article 14(9) of the Greek Constitution and the implementing law (3310/2005) declare a virtually total and absolute incompatibility between any activity or shareholding above a certain level in mass-media companies and the performance of public contracts. The Commission considers that this is contrary to both secondary Community law (the Directives on public procurement), in that it lays down exclusion criteria that are not provided for in the Directives, and primary Community law (the EC Treaty), in that it lays down measures that impede, or render less attractive, the exercise of almost all the fundamental freedoms acknowledged by the EC Treaty.

Given that the law in question is already producing its effects, the Commission has given the Greek Government two weeks to reply and reserves the right to ask the Court, if it brings the matter before it, to suspend the measure in question – particularly the application of law 3310/2005 – and to lay down the requisite interim measures.

The Commission is prepared to work together with the Greek authorities to render the legislation compatible with European law.

For further details on European public procurement policy and infringement procedures under way, see:

http://www.europa.eu.int/comm/internal_market/publicprocurement/index_en.htm

The latest information on infringement proceedings concerning all Member States is available at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/05/314

Brussels, 16 March 2005

Public procurement: Commission acts to enforce EU law in Spain, UK, Portugal and Italy

The European Commission has decided to ask Spain for its observations on the compatibility with EU law of the procedure used in the architecture competition organised for the development of the Santa Catalina isthmus in Las Palmas, Gran Canaria. A similar letter has been sent to the UK over the way contracts relating to the design and construction of the new Scottish Parliament building at Holyrood were awarded. Meanwhile, the Commission is asking Portugal to comply with an October 2004 judgment by the European Court of Justice requiring it to apply correctly EU law on appeal procedures for bidders who believe they have been unjustly treated in tendering procedures for works and supply contracts. The Commission has decided to refer Italy to the Court over contracts for hydraulic works in the municipality of Stintino (Sassari, Sardinia).

EU public procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe. EU public procurement markets are worth over €1 500 billion, more than 16% of total EU GDP. The existing EU public procurement Directives have increased cross-border competition in procurement markets and reduced by around 30% the prices paid by public authorities for goods and services, according to a European Commission working document (see IP/04/149).

Spain - development of the Santa Catalina isthmus in Las Palmas

The Commission has sent a letter of formal notice for infringement of Directives 92/50/EEC and 89/665/EEC in connection with the architectural design competition for the development of the Santa Catalina isthmus in Las Palmas organised in 2004 by the *Comisión Mixta Puerto-Ciudad de Las Palmas de Gran Canaria* [Las Palmas joint port and local-authority board].

The Commission considers that the award procedure for this competition was not in line with Directive 92/50/EEC, since it was not published in the Official Journal of the EU. Moreover, the architects directly invited by the contracting authority were selected on the basis of unknown criteria that were not published in the tender documents or the invitation to tender. Finally, the proposals by each candidate were not presented or evaluated by the selection board anonymously, given that the competition rules provided for an oral presentation of each proposal by each candidate and exhibition to the public before the board made its decision.

The Commission also considers that Spain's system of interim measures did not make it possible to suspend the award procedure. The Spanish court took three and a half months to reject the request for suspension submitted by the complainant (the rejection decision was made on the same day as the selection board's decision).

It also rejected the highly urgent (*provisionalísima*) request for suspension on the grounds that there were no circumstances warranting special urgency (such circumstances are hardly ever admitted by the Spanish courts in connection with public procurement), which is contrary to the purpose and the urgency requirements of Directive 89/665/EEC.

United Kingdom – Scottish Parliament building at Holyrood

The Commission has decided to send a letter of formal notice to the United Kingdom over the way contracts relating to the design and construction of the new Scottish Parliament building at Holyrood were awarded.

In particular, the Commission is concerned at the way the United Kingdom authorities, through the Scottish Office, conducted a tender procedure to appoint the architect for the design of the new Scottish Parliament building. The Commission believes this tender procedure violated EU rules on public procurement and notably did not respect the principles of equal treatment and transparency. The UK authorities are now invited to submit their observations to the Commission.

The Commission also is concerned at the way the United Kingdom authorities conducted a tender procedure to appoint the construction manager for the new Scottish Parliament building. This issue is currently subject of private litigation before the Court of Session in Scotland. The Commission will follow the proceedings before the Court closely and with interest.

The Commission welcomes the initiative of the Scottish Executive to develop an action plan aimed at improving the application of EU procurement rules in Scotland. The open and transparent tendering procedures required under EU law mean more competition and better value for money for taxpayers. The Commission looks forward to receiving more information on how this action plan will be implemented.

Portugal – appeal procedures

The Commission has decided to send a letter of formal notice to Portugal, having observed that the Portuguese authorities have failed to adopt the measures necessary to comply with the Court of Justice's judgment of 14 October 2004 in case C-275/03 (Commission/Portugal) within the three-month deadline and to correctly implement Council Directive 89/665/EEC on the application of review procedures to the award of public supply and public works contracts.

In its judgment, the Court of Justice ruled that, contrary to what is laid down in the Directive on review procedures, Portuguese law makes the award of damages for violations of Community rules on public contracts subject to the production of evidence by the aggrieved parties that the State or legal persons under public law were at fault in committing the illegal acts.

The difficulty of producing such evidence may in practice result in review procedures for the award of damages being slow and very probably ineffective.

Italy – hydraulic works in Stintino, Sardinia

The Commission has decided to bring Italy before the Court of Justice in connection with the award of a contract for a series of hydraulic works in the municipality of Stintino (Sassari). A negotiated contract was concluded in 1991 for these works and was followed by eleven further agreements, most recently in 2001. The Commission considers that the direct award of this contract without prior competition constitutes an infringement of Directive 71/305/EEC, which was applicable at the time of the original contract.

For further details on European public procurement policy and infringement procedures under way, see:

http://www.europa.eu.int/comm/internal_market/publicprocurement/index_en.htm

The latest information on infringement proceedings concerning all Member States is available at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

Four further Commission decisions on public procurement infringement cases in Germany and Italy

The Commission has decided to send reasoned opinions in the following four cases. This is the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply to these reasoned opinions, the Commission may refer the matter to the Court of Justice.

Germany

The Zweckverband Abfalldeponie Friesland/Wittmund in Lower Saxony awarded public service contracts for **the operation of a waste disposal site** to a private waste disposal company without conducting a proper contract award procedure or publishing a European-wide call for tenders.

The Abfallwirtschaft Kreis Aachen und Stadt Aachen GmbH/AWA Entsorgung GmbH (AWA) awarded **waste disposal services** for the city and the district of Aachen (in 1997) and for the district of Düren (in 2003) to the MVA Weisweiler Gmbh & Co. KG, a mixed public-private undertaking, without carrying out award procedures or publishing European-wide contract notices.

In 2000, the city of Delmenhorst concluded a contract concerning the **collection of waste, the cleaning of public streets and the operation of waste receiving centres** with the Abfallwirtschaft Delmenhorst GmbH (ADG), a mixed public-private undertaking. No European-wide tender procedure was carried out.

The Commission considers that all of the above are breaches of EU procurement law.

Italy

The Commission also considers that the direct award, without a public announcement allowing others to bid, by the municipality of Caserta of a contract for the **management of traffic fines**, is in breach of the principle of non-discrimination contained in the above body of law.

IP/05/44

Brussels, 14 January 2005

Public procurement: Commission acts to enforce EU law in Germany, Greece, Spain, Italy, Austria, Portugal and Finland

The European Commission has decided in twenty cases against seven Member States either to refer those Member States to the European Court of Justice or to formally request them to correct breaches of EU public procurement law. Requests of this kind take the form of "reasoned opinions", the second stage of the infringement procedure under Article 226 of the EC Treaty. If no satisfactory response is received within two months, the Commission may go to the Court. Germany will be referred to the Court over the award by the municipality of Hinte of a concession for waste water disposal services and will receive reasoned opinions on the transport of works of art and on various service contracts or concessions in Hinte, Eisenhüttenstadt, the Rhein-Neckar district, various districts in Lower Saxony, Brandenburg and Oestrich-Winkel. The Commission has decided to refer Greece to the Court over several contracts to provide technical assistance to farmers and to send it a reasoned opinion on irregularities in the tender procedure for the construction of a thermoelectric plant in Lavrio. Spain will be referred to the Court over inadequate review procedures for unsuccessful bidders to challenge contract awards. It will receive a reasoned opinion on the exclusion in Spanish law of certain contracting entities from the list of those subject to the requirements of the EU Directive on service procurement. The Commission will meanwhile refer Italy to the Court over national rules allowing procurement contracts to be renewed without competition and over waste treatment services in Sicily. It will send Italy reasoned opinions on a motorway concession for a route serving Montichiari airport, contracts to supply ambulance services in Tuscany, and on a decree allowing the authorities to buy police and fire brigade helicopters without a competitive tendering procedure. Austria will receive a reasoned opinion on a waste disposal contract in Villach. Portugal will be referred to the Court over the non-conformity of its national law with EU provisions on procurement in the water, energy, transport and telecommunications sectors. The Commission has issued a reasoned opinion against Finland over awarding a contract for government officials' air-travel services using discriminatory criteria. Finally, a case against the UK over its failure to apply EU procurement rules to providers of social housing will be closed now that the UK has agreed to comply with the Commission's position.

The open and transparent tendering procedures required under EU law mean more competition, stronger safeguards against corruption, and better service and value for money for taxpayers.

Germany – transport of works of art and service contracts/concessions in Hinte, Eisenhüttenstadt, Rhein-Neckar Kreis, Lower Saxony, Brandenburg and Oestrich-Winkel

The Commission has decided to pursue seven infringement cases against Germany over the award of service contracts and concessions without competition.

In December 1999 the **municipality of Hinte** in Lower Saxony awarded a service concession to the Oldenburgisch-Ostfriesischer Wasserverband for the provision of **waste water disposal services**. No transparent award procedure was carried out as required under EU law as interpreted by the Court of Justice (C-324/98, Telaustria). Germany argued that the municipality of Hinte had not procured a service on the market but rather that the service had been transferred between public bodies, which, it maintained, are not covered by the EU rules on public procurement. The Commission does not accept this view, since the ECJ has established that contracts concluded between public bodies are covered by the obligations of EU law. Thus, EU law was broken by the award of the service concession and the Commission has therefore decided to refer the case to the Court of Justice.

Reasoned opinions are being sent to the German authorities in six other cases.

Several German museums regularly award service contracts for the **transport of works of art** for temporary exhibitions to specifically qualified transport companies without carrying out transparent award procedures. Germany claims that the transparency obligation is reduced in these cases, which it argues – because of their low contract values – are not covered by the EC procurement Directive. Furthermore, Germany maintains that direct awards are objectively justified because of the quality requirements for these services and the need to comply with conditions stipulated by lenders of the works of art. However, as a developed market for the transport of works of art exists in Europe, the Commission considers that the non-application of internal market rules is not justified in this field.

In November 2000, the Stadtwerke Eisenhüttenstadt GmbH awarded a service concession for the provision of **broadband cable services in Eisenhüttenstadt**. No transparent award procedure was carried out. Germany argues that the contract concluded concerns only the privatisation of the Telekommunikationsgesellschaft Eisenhüttenstadt mbH. However, the opinion of the Commission is based on the fact that, with the contract, specific rights and obligations relating to the service were assigned to the private service provider and thus principles of EU law on the freedom of establishment and the freedom of services have been breached.

In 2002, the Abfallverwertungsgesellschaft des Rhein-Neckar Kreises mbH (AVR) awarded a contract for **waste disposal services in the Rhein-Neckar Kreis** to the AVR Service GmbH, of which it owns 51% of the shares. Germany claims that the award is not subject to public procurement law, in accordance with ECJ case law in the "Teckal" case (C-107/98), which establishes that EU procurement laws do not apply when contracts are awarded to an "in-house" entity within the authority awarding the contracts. However, the Commission has concluded that the "in-house" criteria were not met in this case and that there was therefore a breach of the provisions of Directive 92/50/EEC on the award of public service contracts.

In 1995, the German **Landkreise (districts) of Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade,** all in the Federal State of Lower Saxony, awarded a service contract for **waste disposal services** to be provided until the year 2019 directly to Stadtreinigung Hamburg. Germany argues that the contract concerns cooperation between municipalities outside the scope of the public procurement Directives. As the ECJ has ruled that contracts between public bodies fall under EU law, the Commission concludes that Directive 92/50/EEC was infringed.

The **Federal State of Brandenburg** set up four external platforms for its policy to support its foreign economic relations. In this context, four contracts for **consultancy services, public relations services and advertising services** were directly awarded in 2001 without procurement procedures. The German authorities claim that the contracts are not covered by EU procurement obligations. However, the Commission considers that the contracts concern services provided for remuneration and fall under the scope of Directive 92/50/EEC.

In 2003, the **City of Oestrich-Winkel** awarded a service contract for **planning services** directly without any form of advertising. The contract was below the threshold value above which 92/50/EEC applies, but services below that threshold nevertheless have to be awarded in compliance with the principles of the EC Treaty. The German authorities acknowledge that, but argue that the award procedure was sufficiently transparent. The Commission disagrees with this view. As the service contract was directly awarded without any form of advertising or publicity, the principles stemming from the EC Treaty were clearly breached.

Greece – technical assistance for farmers and construction of the Lavrio thermoelectric plant

The Commission has decided to refer Greece to the Court of Justice over irregularities in the award of several contracts to provide technical assistance to Greek farmers. To help farmers benefit from certain European Union support under the Common Agricultural Policy, the Greek Government signed technical assistance contracts with specialised firms every year, on the basis of a competitive procedure. However, in 2001 it departed from that approach and directly awarded contracts for the management of a framework programme and for the detailed implementation of that programme, without following the procedures for notification and competitive tendering required by Directive 92/50/EEC.

The Commission does not accept the Greek authorities' argument that despite their disagreement with the Commission, they have in practice complied with the reasoned opinion sent in December 2003 (see IP/03/1763) by having subjected the contracts to competition in line with the Directive and through the Secretary-General of the Agriculture Ministry issuing a circular. According to the information available to the Commission, the alleged opening up to competition of the contracts in question since 2003 is no more than theoretical as, through the application of various mechanisms, the same association of farmers has been awarded the contracts. The Commission considers in addition that there is a continued risk of similar infringements occurring in future and that the Secretary-General's circular did not, as drafted, allow the infringement to be corrected and could even have led to a repetition of it.

The Hellenic Public Power Corporation (DEI) launched a call for tenders for the construction of a thermoelectric plant in Lavrio.

The Commission considers that the two companies that reached the last phase of the procedure (submission of financial bids) did not meet the conditions set out in the call for tenders, despite the fact that in the announcement of the call and the invitation to tender it was explicitly stated that any bid not meeting the specific requirements would be rejected.

One of the companies concerned did not have the requisite experience, while the bid submitted by the second company, which was in the end awarded the contract, did not comply with one of the conditions concerning the long-term maintenance agreement. By accepting these two companies for the final stage of the procedure, and by awarding the contract to one of them, the DEI infringed Article 4§2 of Directive 93/38/EEC (excluded sectors), as well as the principles of the equal treatment of participants and of transparency set out in the ECJ's case law. Failure to apply these principles may be unjust not only to the companies that take part in a given procedure, but also to those who might have participated if they had known that the contracting entity would not apply the terms it had itself set in the tender.

Spain – inadequate review procedures and exclusion of certain bodies from the concept of contracting authority

The Commission has decided to bring Spain before the Court of Justice in connection with a case of incorrect implementation of Directive 89/665/EEC on the application of **review procedures** to the award of public supply and public works contracts. The Commission considers that Spanish law is not in line with the Directive on the grounds that by allowing the award to coincide with the conclusion of the contract it denies unsuccessful tenderers the possibility of challenging, in good time, the validity of the award decision and taking legal action against it at a stage when infringements can still be rectified. The Commission considers that allowing reasonable time for unsuccessful tenderers to challenge the award decision would be the solution that would, in legal terms, best meet the requirement of the Directive on review procedures as interpreted in ECJ case law. In addition, Spanish law stipulates that, if the cancellation of a contract could seriously affect the public service, it may be decided that the provisions of the contract can continue to apply on the same terms after its cancellation until urgent measures had been taken in order to prevent an undermining of the public interest. The Commission considers that making a declaration of invalidity subject to an exception for the protection of the public service could also render the provisions of Directive 89/665/EEC ineffective, since, under Spanish law, the scope is very broad, covering, in addition to cases of (automatic) absolute invalidity of decisions, the pure and simple cancellation of illegal decisions.

The Commission has also decided to send Spain a reasoned opinion on incorrect implementation of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts. The Commission considers that Spanish law[1], even after an amendment in 2003, does not correctly implement **the concept of bodies governed by public law** within the meaning of the Directive, since it excludes certain bodies governed by private law, such as foundations, from the definition and hence from the scope of the Directive.

[1] The amendment of Article 2(1) of the Law on contracts concluded by government bodies", approved by Article 67 of Law 62/2003.

Italy: renewal of contracts without competition, waste treatment in Sicily, police and fire brigade helicopters, motorway concession in Lombardy, ambulance services in Tuscany

The Commission has decided to bring an action against Italy before the European Court of Justice for infringement of Community law on public procurement if the Italian Parliament, before which the question is currently pending, fails, within three months, to withdraw the provision set out in Article 44 of Law 724/1994 (in conjunction with Article 6 of Law 573/1993), which has already, in December 2003, been the subject of a reasoned opinion addressed to the Italian Government (IP/03/1763). The Commission considered that this provision was contrary to the abovementioned Community rules to the extent that it authorises contracting authorities in Italy to **renew a public supply or service contract** without any tendering procedure.

Following a reasoned opinion sent to the Italian authorities in July 2004 (IP/04/951), the Commission also intends to bring Italy before the Court of Justice for infringement of Directive 92/50/EEC on public procurement in the choice, by the competent authorities, of operators to provide the **service of processing all the urban waste produced in Sicily by converting it into electricity.** This contract has been awarded for a period of twenty years. Even though the awarding authority published a notice in the Official Journal of the EU, this did not contain the information required under the Community directives with a view to enabling potential candidates to take part in the tendering procedure.

The Commission has sent Italy a reasoned opinion on a decree issued by the Minister of the Interior on 11 July 2003 permitting the purchase of **light helicopters for the Police and the National Fire Brigade** without applying the tendering rules set out in Directive 93/36/EEC on public supply contracts. The Commission considers that this decree constitutes an infringement of that Directive, since Italy has not demonstrated that one of the strict conditions for derogations, and in particular the one concerning contracts the execution of which must be accompanied by special security measures, is met in this case. The Commission has already decided to bring Italy before the Court of Justice in two other cases also concerning the procedures applied by the Italian Government for the purchase of helicopters for civil use, the first being in connection with a Government Order authorising the Italian body responsible for the surveillance of woodland (*Corpo forestale dello Stato*) to purchase helicopters without competition (see IP/03/1037). The second case concerns the Italian Government's practice of awarding contracts for the purchase of helicopters for its main public services directly to the company Agusta (IP/04/875).

The Commission has also addressed a reasoned opinion to Italy on the direct award, without prior competition at Community level, of the construction and operation of the **motorway linking the Ospitaletto toll-area (A4), the new Poncarale toll-area (A21) and Montichiari Airport in Lombardy**. The Commission considers that this direct award constitutes a infringement of Directive 93/37/EEC, which stipulates that contracting authorities wishing to conclude a public-works concession contract must announce their intention by means of a notice published in the Official Journal of the European Union. The Commission also considers that the justifications adduced by Italy for the legality of this direct award are not tenable.

A third reasoned opinion has been sent to Italy for infringement of the rules on the award of public service contracts set out in Directive 92/50/EEC on the occasion of the award, by **Tuscany**, of a contract for transport services in connection with healthcare on the regional territory (essentially **ambulance services**) – more specifically, the conclusion, between the regional authorities and several consortia in 1999, 2003 and 2004, of agreements on these services without applying the tendering procedures provided for under Community law on public procurement.

Austria - waste disposal

In 2001, the **City of Villach** concluded a **waste disposal service contract** for a minimum period of 15 years after selecting a service provider from a limited number of companies operating in Austria that already had an establishment in the Austrian State of Carinthia. The Austrian authorities claim that the contract concerns a service concession and does therefore not fall under the scope of the specific rules on public service contracts set out in Directive 92/50/EEC. However, the Commission concludes that the contract is covered by Directive 92/50/EEC and should have been advertised in accordance with the rules applying to public service contracts. But even if it did qualify as a service concession, the selection procedure applied by the City of Villach would breach the general principles of the EC Treaty, and in particular the principle of non-discrimination on grounds of nationality. A reasoned opinion has therefore been sent.

Portugal – non-conformity of national law in the water, energy, transport and telecommunications sectors

The Commission has decided to bring two cases of incorrect implementation by Portugal of Directives 93/38/EEC and 92/13/EEC before the Court of Justice. The first of these Directives concerns the **coordination of procurement procedures in the water, energy, transport and telecommunications sectors**, while the second is aimed at ensuring effective application of the first by providing suppliers, entrepreneurs and service providers with effective and rapid **remedies** in the event infringement of Community law in that field or national rules implementing that law.

The Commission considers that Portuguese law is not in conformity with Community legislation, particularly as regards its scope and application thresholds, deadlines for receipt of bids, competition and abnormally low bids.

Finland – air-travel services for government officials

The Commission has decided to issue a reasoned opinion against Finland concerning a decision by the Ministry of Finance to **award a framework contract for air-travel services for government officials using discriminatory award criteria** and thus infringing the public services Directive 92/50/EC. The Ministry of Finance had awarded the contract on the basis of non-published criteria, compared ticket prices that were not based on equal or similar terms, and included a destination among the routes to be served that was already reserved for a certain Finnish air-line company thus making it impossible for others to tender for this route. The estimated value of the contract was € 30 million. The Finnish authorities have not acknowledged the infringement.

If the national authorities do not give a satisfactory reply to the reasoned opinion within two months, indicating a change in their pattern of procurement for such contracts in the future, the Commission may refer the matter to the Court of Justice.

UK - closure of a case concerning Registered Social Landlords

The Commission has decided to close infringement proceedings against the United Kingdom following a change of position on the part of the United Kingdom Government concerning Registered Social Landlords. Registered Social Landlords are providers of social housing in the United Kingdom.

The Commission had opened infringement proceedings in December 2001 over the failure of the United Kingdom to accept that Registered Social Landlords are bodies governed by public law and must comply with the requirements of the EU public procurement Directives. In December 2003, this culminated in the Commission's announcement that it would commence proceedings in the European Court of Justice against the United Kingdom. The Court of Justice had already ruled on housing associations before in its "HLM" judgment (case C-237/99) against France.

In September 2004, the United Kingdom Government decided to change its position and publicly accepted that the Commission is correct in its view that Registered Social Landlords are bodies governed by public law for the purposes of EU procurement law and therefore must comply with the public procurement Directives where these apply. The United Kingdom government furthermore prepared guidance for Registered Social Landlords on the application of the Directives.

In view of the public acknowledgement by the United Kingdom Government, the Commission sees no need to continue its proceedings before the Court of Justice and has decided to close the case.

The latest information on infringement procedures against any Member State can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/04/1294

Brussels, 25th October 2004

Public procurement: Commission acts to enforce EU law in Germany, France, Denmark, Italy and the Netherlands

The European Commission has decided to refer Germany to the European Court of Justice over its non-compliance with a previous Court judgement requiring it to rectify the illegal award of contracts for waste water collection in Bockhorn and for waste disposal in Braunschweig (both in Lower Saxony). The Commission has requested the Court to impose daily fines of €31,680 and €126,720 respectively. The Commission has also decided to refer France to the Court concerning the incompatibility of its town planning code with EU public procurement law. The Commission has decided to send a formal request to Denmark to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be put right. It is also formally asking Italy to rectify the award without competition of contracts for a series of hydraulic projects in Stintino, Sardinia. The Netherlands is being asked to rectify the extension without competition of a contract for the supply of road safety barriers. The Commission requests will take the form of reasoned opinions, which are the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply to these reasoned opinions, the Commission may refer the matter to the Court of Justice. Finally, after examining new national legislation, the Commission has decided to close an infringement procedure against Italy over the procedures used to select the operators of local public services.

The open and transparent procedures for invitations to tender required by Community law on public contracts mean more competition and better guarantees against corruption, as well as a better service to taxpayers and a better use of public money. A study published in February 2004 (see IP/04/149) has shown that the application of the Directives has reduced by about 30% the prices paid by awarding authorities for works, supplies and services. Also in February, the EU adopted a legislative package intended to clarify, modernise and simplify the Directives in order to achieve even greater savings (see IP/04/150).

Germany – waste disposal and waste water collection

On 10 April 2003, in joint cases C-20/01 and C-28/01, the Court of Justice ruled that Germany failed to fulfil its obligations under the services procurement Directive 92/50/EEC when local authorities in that country awarded without a competitive tendering process service contracts for waste disposal in **Braunschweig** (1995) and for waste water collection in **Bockhorn** (1996). Both these municipalities are in the State of Lower Saxony.

In March 2004 the Commission formally asked the national authorities to comply with the Court's judgement (IP/04/428). But while Germany has pledged to avoid similar breaches in future procurement procedures, it continues to claim that no steps are required concerning the specific contracts in Braunschweig and Bockhorn, as German civil law does not require ending them. However, the Court's judgement confirmed that the adverse effect on the freedom to provide services arising from a breach of Directive 92/50/EEC subsists throughout the entire length of the contracts concluded in breach of EU law. The contracts are due to last for a minimum of 30 years from when they entered into force.

The Commission has therefore decided to refer the case a second time to the Court of Justice. The Court of Justice may then impose a penalty payment on Germany.

The Commission has also decided to send a reasoned opinion to the German authorities concerning the award by the **city of Cologne** in May 1992 of a 33 year waste disposal **contract** to the Abfallentsorgungs- und Verwertungsgesellschaft Köln mbH (AVG), an entity 25% owned by a private undertaking. No transparent and competitive award procedure was carried out as required by EU law.

Germany argued that the contract award to the AVG was exempted from Community rules as the city of Cologne, with a 75 % share in the AVG, exercised a level of control over the AVG which constituted an "in-house" relationship. However, the Commission believes that the conditions required under the European Court's case law for an exemption from European procurement rules were not met, as the control over the AVG is not similar to that which the city of Cologne exercises over its own departments. Therefore the direct award of the contract, in breach of the general principles of the EC-treaty (freedom of services, freedom of establishment), does not appear to be justified.

Furthermore, in 1992-1993 the AVG awarded waste disposal service contracts directly to three undertakings which are mainly privately owned. As the AVG is to be considered a public contracting authority, these awards also violated Community law.

France - local development agreements

The Commission has referred France to the Court of Justice over the incompatibility of Article L.300-4 of the French town planning code with European law. This article allows agreements and appointment contracts for the follow-up of preliminary studies for local development projects to be concluded without being advertised and without competition. The Commission has received no reply to its reasoned opinion sent in February 2004 (IP/04/162).

France makes use of local development agreements primarily for projects such as the construction of public amenities to be handed over to the awarding authority and for buildings to be resold or rented, e.g. as part of the implementation of a town planning project and local housing policy or urban renewal.

The Commission considers that the main purpose of these agreements concerns works, which are then usually performed by a builder selected by the town-planner on behalf of the competent authorities. According to the Commission, to the extent that they involve amounts which are beyond the EU thresholds, these types of local development agreements must in principle be concluded in accordance with the advertising and competition rules laid down in Directive 93/37/EEC on public works contracts.

As for appointment contracts for preliminary studies needed to define the features of a development project, the Commission considers that, to the extent that they involve amounts which are beyond the EU thresholds, such contracts must be awarded in accordance with the advertising and competition rules laid down in Directive 92/50/EEC on public service contracts.

As for all other types of local development agreement, including those involving amounts which are below the EU thresholds, the Commission takes the view that, according to the Treaty as interpreted by the Court of Justice, they must be awarded with a proper degree of advertising for the benefit of all potential applicants (see Court of Justice judgement, Telaustria, Case C-324/98).

Denmark - Implementation of the Remedies Directive

The Commission has decided to send a reasoned opinion to Denmark over its failure to comply with the obligations of the "Remedies" Directive on public procurement. In its “Alcatel judgment” (Case C-81/98), the Court stipulated that Member States are required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the possible infringement can still be rectified.

The result of this judgment with regard to the relevant Danish law is that a reasonable period should be granted to unsuccessful tenderers once they have been notified of the decision awarding a contract, so as to allow them to possibly challenge such a decision before the contract is signed. However, under Danish law there is no obligation to allow such a period nor any other provision ensuring that, in all cases, public procurement decisions can be challenged before the relevant contracts y enter into force.

Reasoned opinions have already been sent this year to Belgium (IP/04/44), Ireland, the UK (IP/04/428), Spain, the Netherlands and Finland (IP/04/951) over non-compliance with the Remedies Directive.

Italy – hydraulic works in Stintino, Sardinia

The Commission has decided to send Italy a reasoned opinion over the award of a public works contract for a series of hydraulic projects in the borough of Stintino (Sassari). This contract was awarded by a negotiated procedure in 1991 and was then followed by eleven further agreements, the last in 2001, defining in detail the work to be done in order to fulfil the contract. The direct award of the contract, without competition, is a breach of Directive 71/305/EEC, which was the legislation applicable to public works contracts at the time the one in question was signed.

The Netherlands – supply of road safety barriers

The Commission has decided to send a reasoned opinion to the Netherlands over the extension without competition by the Rijkswaterstaat (the body which administers public works) of a contract for the supply of road safety barriers. The Rijkswaterstaat prolonged this contract for two years, in breach of Directive 93/36/EEC on the procurement of supplies, which requires such contracts to be opened up to competition rather than simply awarded by extending the contract of the incumbent. Although the Dutch authorities offered in early 2004 a commitment to rectify this situation, they have not yet done so.

Italy – closure of an infringement procedure over contracts for local public services

After examining the latest Italian legislation on local public services, passed in December 2003, the Commission has decided to close the infringement procedure it opened in 2000 over the non-compliance with EU public procurement law of the national procedures used to select the operators of such local public services.

The new law allows local public services to be organised in three ways: through private companies selected after a competitive procedure, through mixed public-private companies where the private partner is chosen after a tendering process in line with EU law, or through direct award of contracts to publicly owned companies so closely linked to the awarding authority that they cannot be considered as third parties in relation to that authority ("in-house" entities according to the case law of the European Court of Justice).

The Commission considers this law as an improvement on the previous framework, which explicitly provided for local public service contracts to be awarded without competition and without meeting the specific and exceptional conditions which can allow, under EU law, such direct awards.

The Commission intends to follow very closely the implementation of the reform, given that its scope of application is very broad and that further Court judgements are soon expected, notably on the definition of the "in-house" relationships, which could have a significant impact on the way the new Italian legislation is to be applied if it is to remain in conformity with EU law. The Commission therefore reserves the right to intervene at a later stage, if specific cases of non-compliance at the implementation level arise.

The latest information on infringement procedures against any Member State can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/04/1210

Brussels, 13 October 2004

Public procurement: Commission examines discriminatory specifications in supply contracts for computers in four Member States

The European Commission has decided to formally ask France, the Netherlands, Finland and Sweden for information on certain invitations to tender launched by authorities in those countries for the supply of computer equipment. The Commission wonders whether it is compatible with the public procurement Directives to require the procurement of Intel microprocessors or microprocessors using a specific clock rate. Reference to a specific brand would, in the Commission's view, constitute a violation of Directive 93/36/EEC on public supply contracts, while merely specifying a clock rate – which is insufficient for assessing the performance of a computer – would be contrary to Article 28 of the EC Treaty, which prohibits any barriers to intra-Community trade. The Commission's requests are in the form of letters of formal notice, the first stage of the infringement procedure under Article 226 of the EC Treaty. The Member States in question will have two months to reply. If the Commission is not satisfied with the replies and finds that European law has indeed been infringed, it may formally ask these Member States to rectify the irregularities in the award of these contracts. If the Member States fail to bring these contracts into line, the Commission may bring the cases before the Court of Justice.

The Commission has decided to send letters of formal notice to France, Finland, the Netherlands and Sweden on the grounds that there is reason to believe that authorities in those countries describe the technical characteristics of the computers they wish to acquire in a discriminatory fashion. Three variants have been identified in the invitations to tender in question: requirements to supply "Intel" microprocessors, "Intel or equivalent" microprocessors, or microprocessors using a specific clock rate. Under European law on public procurement, a brand may be specified only if it is otherwise impossible to describe the product sufficiently precisely and intelligibly. There are, however, ways of describing microprocessors and particularly the performance required. For example, there are various "benchmarks" for this purpose. Merely specifying a clock rate is not sufficient for assessing the performance of a computer.

France

A dozen or so invitations to tender have been launched by local authorities or public bodies in France for the supply of microcomputers, servers or workstations with Intel (or equivalent) microprocessors or microprocessors with a clock rate above a specified minimum (which would favour Intel microprocessors).

Netherlands

An invitation to tender for the supply of computers, notebooks and monitors, together with the provision of associated services has been launched by the Municipality of Amsterdam, and an invitation to tender for the supply of computer hardware together with associated services has been launched by the IGEA group (a consortium of contracting authorities). In both cases, “Intel or equivalent” microprocessors are specified. The Amsterdam invitation to tender also calls for microprocessors using a specific clock rate.

Finland

The Universities of Jyväskylä and Tampere and Häme Polytechnic have published three separate invitations to tender for the supply of computers. Each contains technical specifications stipulating that the computers must be equipped with Intel (or equivalent) microprocessors.

Sweden

The Municipality of Filipstad and Chalmers University of Technology have published three separate invitations to tender for the supply of computers. Both specify that the equipment supplied must be fitted with Intel Pentium microprocessors. The national police authority [*Rikspolisstyrelsen*] has published an invitation to tender for the supply of portable computers, specifying that they must be equipped with Intel Centrino or equivalent microprocessors. The Uppsala regional authority has published an invitation to tender for the supply of computers, specifying that they must be equipped with a microprocessor using a specific clock rate.

The Commission sent letters of formal notice on similar cases to Italy and Germany at the beginning of this year.

IP/04/951

Brussels, 19th July 2004

Public procurement – Commission acts to enforce EU law in Italy, the Netherlands, Spain, Finland and Denmark

The European Commission has decided to bring Italy before the European Court of Justice over certain provisions of its national legislation governing public work contracts. The Netherlands will be brought before the Court over contracts for the renovation of the city centre of Hoogezand-Sappemeer. The Commission has also formally asked Italy to rectify breaches of European law in the award of contracts for waste management in Sicily and has asked Spain, the Netherlands and Finland to introduce effective procedures to allow tenderers to challenge the decisions of awarding authorities before it is too late to change such decisions, in line with the Public Procurement Remedies Directive. Denmark has been requested to rectify ministerial guidelines which wrongly interpret Directive 92/50/EEC on the procurement of services as not requiring competition where contracts for accounting and auditing services in connection with trials for financial crimes are concerned. The Commission's requests take the form of reasoned opinions, the second stage of the infringement procedure under Article 226 of the EC Treaty. In the absence of a satisfactory response to a reasoned opinion, the Commission may refer the Member State concerned to the European Court of Justice.

EU public procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe. EU public procurement markets are worth over €1 500 billion, over 16% of total EU GDP.

The existing EU public procurement Directives have increased cross-border competition in procurement markets and reduced by around 30% the prices paid by public authorities for goods and services, according to a European Commission working document (see IP/04/149). The European Parliament and Council of Ministers adopted in February a new legislative package modernising and simplifying procurement procedures which should further boost cross-border competition (see IP/04/150).

Italy – framework law on public works

The Commission has decided to bring Italy before the European Court of Justice over certain provisions of its framework law on public works, No 109/94, as last amended by Law No. 166/2002. A reasoned opinion was sent to the Italian authorities in October 2003 (see IP/03/1415).

The procedure is designed to bring about legislative amendments which will bring this framework law into line with the Directives on public contracts and therefore more fully to open those contracts to intra-Community competition. In particular, the Commission's action is designed:

- to avoid situations where national rules on the scope of the Directive on public works contracts which are not in conformity with Community law result in non-publication at Community level of public contracts which should be published in accordance with the "supplies" and "services" Directives, whose application thresholds are much lower than that laid down in the "works" Directive";
- to ensure that the rules of competition of Community Directives on public contracts are applied in all cases or, where they are not applicable, to ensure that the obligation to issue notification of the contract is applied in accordance with the general principle of transparency. This applies, for example, to work performed by way of payment in kind for planning permission and engineering, architectural and project assessment services falling below the thresholds of the Community Directives, and to management services and technical inspection services (*"collaudo")*;
- to avoid situations where national rules such as that on the right of pre-emption (*"prelazione"*) of the promoter within the framework of project-financing procedures constitute discrimination against non-nationals who bid for public contracts.

The Netherlands – renovation of Hoogezand-Sappemeer

The Commission has decided to refer the Netherlands to the Court of Justice concerning works contracts relating to the renovation of the city centre of Hoogezand-Sappemeer. The Commission sent a reasoned opinion, to which the Dutch authorities did not reply satisfactorily, in December 2003 (see IP/03/1763). The municipality of Hoogezand-Sappemeer signed an agreement giving a particular company the exclusive right to carry out several types of work and then awarded it several contracts without competition. The Commission considers that such direct awards constitute a violation of EU public procurement law, even in cases where the value of the contract does not reach the threshold for the application of the Public Works Directive 93/37/EEC (€5 million). Even if that threshold is not reached, the principles of the EC Treaty require an adequate degree of advertising to enable different businesses to compete.

Italy – waste management in Sicily

The Commission has decided to send a reasoned opinion to Italy concerning the way in which the competent Italian authorities have chosen operators to handle the processing of urban waste produced over the entire territory of Sicily over a period of 20 years. The President of the Region of Sicily, in his capacity as Government Commissioner, launched an invitation to tender in 2002 to select the operators in question, but did not comply with the advertising requirements laid down concerning the award of public services contracts by Directive 92/50/CEE, which is applicable in this particular case. Even though the awarding authority published a notice in the Official Journal of the European Union, that notice did not contain the information which is required under the Community Directives with a view to enabling economic operators who could be interested to take part in the invitation to tender.

Spain, the Netherlands and Finland - review procedures for tenderers

The Commission has sent reasoned opinions to Spain, the Netherlands and Finland requesting them to comply with the obligations of the "Remedies" Directive 89/665/EEC on public procurement. In its “Alcatel” judgment (Case C-81/98), the European Court of Justice stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified. This should allow an aggrieved tenderer to have a contracting authority’s decision suspended by way of interim measures and set aside, notwithstanding the possibility once the contract has been concluded of obtaining an award of damages. In the Commission’s view, neither Spanish, Dutch nor Finnish legislation currently complies with these requirements. In the Netherlands and Finland the law does not require a clear separation between the decision awarding a public contract and the conclusion of the contract. In Spain, despite separation, there is no mandatory standstill period between the award and the conclusion of the contract. In all three cases, there is consequently no guarantee of a sufficient interval between the award decision and the conclusion of the contract to allow a decision to be rectified in time.

Denmark - accounting services

Denmark has issued ministerial guidelines which interpret the Directive on the procurement of services (92/50/EEC) as providing a complete exemption from requirements to put services out to tender, where contracts for accounting and auditing services linked to criminal trials on financial matters are concerned. The Commission considers that the ministerial guidelines are disproportionate in the sense that less restrictive measures could be applied on a case by case basis to ensure the necessary level of confidentiality and secrecy without exempting such services completely from the scope of the Directive. The Commission therefore considers the Danish guidelines not to be in accordance with current EU law and has sent a reasoned opinion asking the Danish Government to amend its guidelines in this respect.

The latest information on infringement procedures against any Member State can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/04/875

Brussels, 8th July 2004

Public procurement: Commission decides to refer Italy to Court over supply of helicopters

The European Commission has decided to refer Italy to the European Court of Justice because of the Italian Government's longstanding policy of awarding contracts, directly and without competition, to the Italian company Agusta, for the supply of helicopters for civilian use by various public services. The Commission considers that such direct awards of contracts are in violation of the EU Directive on the procurement of supplies (93/36/EEC). Although the Directive does allow direct award of contracts, without the publication of a tender notice, in certain specific circumstances, none of these conditions are met in the case of these helicopter supply contracts.

The open and transparent procedures for invitations to tender required by Community law on public contracts mean more competition and better guarantees against corruption, as well as a better service to taxpayers and a better use of public money. A recent study (see IP/04/149) has shown that the application of the Directives has reduced by about 30% the prices paid by awarding authorities for works, supplies and services. In February 2004, the EU adopted a legislative package to clarify, modernise and simplify the Directives in order to achieve even greater savings (see IP/04/150).

The Commission has decided to take Italy to the Court over procedures used by the Government to buy helicopters for civilian use. This follows the failure of the Italian authorities to change these procedures, despite a request to do so in a reasoned opinion sent in February 2004 (IP/04/162).

The Italian Government has a longstanding practice of awarding contracts for the supply of these helicopters to the Italian company Agusta, without any form of competition. The helicopters involved are used by certain public services, including the forestry department ("Corpo Forestale dello Stato"), financial police ("Guardia di Finanza"), fire services ("Vigili del Fuoco"), police and security forces ("Polizia di Stato" and "Carabinieri"), coastguard ("Guardia Costiera") and the civil defence department ("Dipartimento della Protezione Civile").

Under Article 2 of the Directive, the Directive does not apply when "contracts which are declared secret or when the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State's security so requires". However, Italy has not demonstrated that these grounds are met in the case of the supply of these helicopters.

The Commission has already referred Italy to the Court of Justice in connection with a government order authorising one of the services mentioned - "Corpo Forestale dello Stato" - to purchase helicopters without any form of competition (see IP/03/1037).

The case in question at the moment, on the other hand, concerns the general practice followed by the Italian Government for the purchase of all helicopters for civilian use by the services concerned.

The latest information on infringement procedures against any Member State can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/04/428

Brussels, 31st March 2004

Public procurement: Commission requests six Member States to rectify violations of EU rules

The European Commission has decided to formally request six Member States to put right a total of nine infringements of EU public procurement law. It is asking Italy to ensure fair competition, open to bidders from across the EU, for the award of contracts to build high-speed railway lines. Greece is being requested to comply with the public procurement Directives in awarding contracts for the printing and publication of school text books and Portugal to implement correctly EU law on procurement in the water, energy, transport and telecommunications sectors. The Commission has also decided to ask Ireland and the UK to introduce procedures to allow tenderers to challenge the decisions of awarding authorities before it is too late to change such decisions, in line with the Public Procurement Remedies Directive. In Lower Saxony, meanwhile, a contract for waste water disposal in Hinte was awarded without competition and Germany is being requested to rectify this. These formal requests take the form of 'reasoned opinions', the second stage of infringement procedures under Article 226 of the EC Treaty. In the absence of a satisfactory response, the Commission may refer the Member States in question to the European Court of Justice. In two further cases involving Germany, the Commission, under Article 228 of the Treaty, is asking the national authorities to apply decisions already taken by the Court over the illegal award of contracts for waste water collection in Bockhorn and for waste disposal in Braunschweig (both also in Lower Saxony). If Germany does not comply, the Commission may ask the Court to impose a daily fine.

EU public procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe. EU public procurement markets are worth over €1 500 billion, over 16% of total EU GDP. The existing EU public procurement Directives have increased cross-border competition in procurement markets and reduced by around 30% the prices paid by public authorities for goods and services, according to a European Commission working document (see IP/04/149). The European Parliament and Council of Ministers adopted in February a new legislative package modernising and simplifying procurement procedures which should further boost cross-border competition (see IP/04/150).

Italy - high-speed railway lines

The Commission has decided to send Italy a reasoned opinion concerning the procedures used by its national railway administration, Ferrovie dello Stato (FS), to award the company TAV contracts for the construction of high-speed railway lines. In 1991, FS decided to contract TAV to build these lines in accordance with criteria to be set out in a performance agreement, which stipulated that TAV had to use general contractors to be chosen among Italy's leading industrial groupings.

After considering the arguments put forward by the Italian authorities, the Commission took the view that this provision effectively reserved the contracts for the lines in question for Italian companies, in breach of the principles of freedom of establishment and freedom to provide services enshrined in Articles 43 and 49 of the EC Treaty. The Commission's action under this procedure is primarily aimed at opening up to EU-wide competition work on lines (particularly those between Milan and Verona and Milan and Genoa) whose construction phase has not yet commenced.

Greece - printing and publication of schoolbooks

The Commission is sending a reasoned opinion to Greece for non-compliance with Directive 92/50 (public service contracts) in relation to the printing and publications of schoolbooks in Greece.

The Organisation for the Publication of Schoolbooks co-operates with approximately 80-90 relevant companies, based in the region of Attika, to which it awards the publication and printing of the schoolbooks every year, without launching a tender, on the basis of the companies' personnel, equipment and productivity.

The Greek authorities argue that there are time-constraints as the books need to be ready for the beginning of every school year. Although the Directive (Article 11 (3) (d)) allows agreements to be negotiated directly with suppliers without publishing a general invitation to tender in justifiable cases of extreme urgency, the Commission does not consider that these conditions are met in this case. First, there is no evidence that these time-constraints are tight enough to prevent adhering to even the reduced time limits for accelerated restricted procedures provided for in Article 20 of the Directive. Furthermore, the reasons of urgency invoked by the Greek authorities are not brought about by events unforeseeable by the contracting authorities or by events which are not within the latter's control, as the Directive would require if the circumstances were to be considered of extreme urgency. After all, the school year begins every year, on a date set by the Greek authorities themselves. Therefore, the approximate number of books to be published and edited every year, as well as the expected delivery date, are known beforehand by the contracting authority.

Portugal - water, energy, transport and telecommunications

The Commission has decided to send Portugal two reasoned opinions for incorrect implementation of Directive 93/38/EEC, coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, and of Directive 92/13/EEC, aimed at guaranteeing the effective implementation of the previous Directive by ensuring that effective and rapid remedies are available to suppliers, contractors and service providers in the event of infringement of the relevant EU law or national rules implementing that law.

The Commission takes the view that the Portuguese legislation does not comply with EU law, particularly in relation to the scope and application thresholds of the Directive, time limits for receipt of tenders, design competitions and abnormally low tenders.

Ireland and UK -review procedures for unsuccessful tenderers

The Commission has decided to issue reasoned opinions against Ireland and the UK owing to their failure to comply with the obligations of the "Remedies" Directive 89/665/EEC on public procurement. In its “Alcatel” judgment (Case C-81/98), the European Court of Justice stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified. This should allow an aggrieved tenderer to have a contracting authority’s decision suspended by way of interim measures and set aside, notwithstanding the possibility once the contract has been concluded of obtaining an award of damages.

In the Commission’s view, neither Irish nor UK legislation currently complies in full with these requirements. The UK authorities are proposing amendments to their current remedies system, but the Commission does not consider these sufficient to comply with the Alcatel judgement.

Germany - waste and waste water disposal

The Commission is sending three reasoned opinions to the German authorities over the award without competition of contracts for the disposal of waste and waste water.

In the first two cases, the Court of Justice has already ruled against Germany on 10 April 2003 (joint cases C-20/01 and C-28/01). The Commission is now asking the national authorities to comply with this judgement, failing which it can ask the Court to impose a daily fine.

The Court ruled that the Federal Republic of Germany had failed to fulfil its obligations under the services procurement Directive (92/50/EEC) in two cases of procurement by local communities in the German State of Lower Saxony. In 1996, the City of Braunschweig awarded a contract for waste disposal by direct negotiations with contractors without prior publication of a contract notice. In 1998, the Municipality of Bockhorn did not invite tenders for the award of the contract for the collection of its waste water. The contracts have been concluded for durations of a minimum of 30 years.

The Commission sent a letter of formal notice to Germany in October 2003 asking it to provide information on the measures it had taken to comply with the Court’s judgement. However, the German authorities replied by simply repeating previous arguments which the Court had not accepted. Its judgement established that the breach of procurement law continues throughout the period of the contracts awarded illegally. As the current contracts will continue to produce effects for decades, the Commission considers that it is not sufficient to avoid breaches in future procurement procedures. To comply with the judgement, measures to end the actual infringements are required.

Finally, in December 1999 the municipality of Hinte, also in Lower Saxony, awarded a service concession to the Oldenburgisch Ostfriesischen Wasserverband for the provision of waste water disposal services. No transparent award procedure was carried out as required under EU law as interpreted by the Court of Justice (C-324/98, Teleaustria).

Germany argued that the municipality was justifiably assuming that its decision was in compliance with EU law because at the time of that decision it could not have been aware of the developments in the Court of Justice's case law. However, the Commission does not accept this view, because an interpretation of EU law by the Court does not mean that the provision which it interpreted had a different substance before the Court's decision. Thus, EU law was broken by the award of the service concession.

Up-to-date information on all infringement procedures against Member States can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/04/162

Brussels, 4 February 2004

Public procurement: Commission acts to enforce European law in France and Italy

The European Commission has decided to take France to the European Court of Justice for non-compliance of its public procurement code with the Directives on public contracts and with the EC Treaty. The Commission has also decided to make a formal request to the French authorities to make a provision of the French town planning code compatible with European law. This provision allows local development agreements to be concluded without being advertised and without competition. In addition, the Commission will make a formal request to Italy to end its practice of awarding an Italian company directly without competition contracts for helicopters to be used by certain police and security services. The Commission requests will take the form of reasoned opinions, which are the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply to these reasoned opinions, the Commission may refer the matter to the Court of Justice.

The open and transparent procedures for invitations to tender required by Community law on public contracts mean more competition and better guarantees against corruption, as well as a better service to taxpayers and a better use of public money. A recent study (see IP/04/149) has shown that the application of the Directives has reduced by about 30% the prices paid by awarding authorities for works, supplies and services. Recently, the EU finally adopted a legislative package intended to clarify, modernise and simplify the Directives in order to achieve even greater savings (see IP/04/150).

France: public procurement code

The Commission has decided to take France to the Court of Justice for the non-compliance of its public procurement code with the Directives on public contracts and with the EC Treaty. The Commission found that the new code adopted on 7 January 2004 did not take into account the 11 complaints which the Commission had made in its reasoned opinion of 23 October 2002 regarding the earlier version of the code dated 7 March 2001 (see IP/02/1507).

Firstly, the new code, like the March 2001 version, provides "simplified" procedures for certain service contracts listed in Annex B of Directive 92/50/EEC. These are primarily legal services, social and health services, recreational, cultural and sporting services, education services and vocational training and placement services.

For these services, the public authorities are not required by the French code to ensure a proper degree of advertising, which according to the Telaustria judgement by the Court of Justice (Case C-324/98) is in fact absolutely necessary for the award of a contract to comply with the principle of transparency required by the Treaty.

Secondly, the code continues to exclude loan contracts from advertising and competition requirements, whereas the Commission considers that generally contracts concerning loans or other financial commitments are covered by Annex IA of Directive 92/50/EEC (public service contracts) and Annex XVIA of Directive 93/38/EEC (public contracts in the water, energy, transport and telecommunications sectors) and are thus subject to the requirements of transparency laid down by the Directives.

Lastly, the Commission considers that the new code continues to infringe the Directives on public contracts with regard to the minimum number of participants to be invited in a restricted procedure (i.e. not open to every tenderer wishing to submit a bid). Indeed, according to the case law of the Court of Justice, even if there is no range laid down in the contract notice published in the Official Journal of the European Union, the minimum number of applicants invited to tender should not be less than five (see judgement, Commission v France, Case C-225/98). The code in fact applies this minimum number only if a range has been indicated in the contract notice.

France: local development agreements

The Commission has sent the French authorities a reasoned opinion in connection with the incompatibility of Article L.300-4 of the French town planning code with European law. This article allows local development agreements and appointment contracts for the follow-up of preliminary studies for a development project to be concluded without being advertised and without competition.

France makes use of local development agreements primarily for global projects including the construction of public amenities to be handed over to the awarding authority and for buildings to be resold or rented, e.g. as part of the implementation of a town planning project and local housing policy or urban renewal.

The Commission considers that the main purpose of these agreements concerns works, even if they are not actually performed by the planner but by a builder selected by the planner. These types of local development agreements must in principle be concluded in accordance with the advertising and competition rules laid down in Directive 93/37/EEC on public works contracts.

When these local development agreements are concluded with a restricted category of public or semi-public bodies defined in Article L.300-4 of the town planning code (e.g. semi-public companies), these bodies may also be given the right to perform the procedures for the expropriation – decided by the State – of the land to be developed. In this case, the Commission feels that granting this right to "public" planners, when there is nothing to prevent it from being granted to private individuals, does not provide grounds for exemption from the rules of the EC Treaty. Indeed, the application of this right is not an activity involving the exercise of official authority, as referred to in Article 45 of the EC Treaty.

Other types of local development agreement may refer to the management of economic activities or the development of recreation and tourism, in which case the Commission takes the view that they must be regarded in the same light as service concessions, which according to the Treaty must be awarded with a proper degree of advertising for the benefit of all potential applicants (see Court of Justice judgement, Telaustria, Case C-324/98).

As for appointment contracts for preliminary studies needed to define the features of a development project, the Commission considers that such contracts must be awarded in accordance with the advertising and competition rules laid down in Directive 92/50/EEC on public service contracts.

Purchase by mutual agreement of helicopters for civilian use in Italy

The Commission has decided to send Italy a reasoned opinion on the procedures followed by the Government in connection with the purchase of helicopters for civilian use. The Italian Government has for a long time followed a practice of awarding to an Italian manufacturer, directly and without any kind of competition, contracts for helicopters to be used by certain public services, and especially by the forestry department ("Corpo Forestale dello Stato"), financial police ("Guardia di Finanza"), fire services ("Vigili del Fuoco"), police and security forces ("Polizia di Stato" and "Carabinieri"), coastguard ("Guardia Costiera") and the civil defence department ("Dipartimento della Protezione Civile").

The Commission feels that this practice is contrary to the Directive on public supply contracts (93/36/EEC), since none of the strict conditions governing the possibility of using a negotiated procedure without prior publication of a contract notice is met in this instance.

It also feels that Italy has in no way shown that the practice in question is justified on the basis of Article 2 of Directive 93/36/EEC, which states that the Directive does not apply to "contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State's security so requires".

The Commission has already referred Italy to the Court of Justice in connection with a government order authorising one of the services mentioned - "Corpo Forestale dello Stato" – to purchase helicopters without any form of competition (see IP/03/1037). The case in question at the moment, on the other hand, concerns the general practice followed by the Italian Government for the purchase of all helicopters for civilian use by the services concerned.

For recent general information on infringements concerning the Member States, please refer to the following website:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/04/44

Brussels, 14th January 2004

Public procurement: Commission calls on Belgium to set up effective review procedures for unsuccessful tenderers

The European Commission has decided to formally request that Belgium introduce public procurement procedures to allow tenderers to challenge the decisions of awarding authorities before it is too late to change such decisions. The request takes the form of a reasoned opinion, the second stage of the infringement procedure under Article 226 of the EC Treaty. In the absence of a satisfactory response within two months, the Commission may decide to refer Belgium to the Court of Justice.

The Commission has decided to issue a reasoned opinion against Belgium owing to its failure to comply with the obligations of the "Remedies" Directive on public procurement. In its Alcatel judgment (Case C-81/98), the Court stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified.

The result of this judgment with regard to the applicable Belgian law is that a reasonable period must be allowed between unsuccessful tenderers being notified of the decision awarding a contract and the signing of the contract. However, under Belgian law there is no obligation to allow such a period.

Up-to-date information on all infringement procedures against Member States can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/03/1763

Brussels, 18 December 2003

Public procurement: Commission acts to ensure six Member States apply EU rules

The European Commission has decided to act in thirteen cases to enforce EU law on public procurement. It has decided to refer Italy to the European Court of Justice over four cases involving the award of contracts to operate state-owned betting establishments, to build two motorways and to manage computer services for the city authorities in Mantova. The Commission will refer the UK to the Court over the non-application of public procurement rules by providers of social housing. Austria will be brought before the Court over a contract for the collection and treatment of waste in the municipality of Mödling and Finland over the procurement without competition of kitchen equipment for government buildings. The Commission has also decided to formally ask Greece to rectify breaches of EU law linked to the supply of trains for the Athens Metro, technical assistance to farmers and consultancy services for the construction of a water purification plant. Greece is also being asked to complete writing into national law the 2001 Directive on the use of standard forms for calls for tender. The Commission is requesting Italy to modify a national law allowing contracting authorities to extend existing procurement contracts without competition. Finally, the Commission is asking the Netherlands to rectify irregularities in the award of contracts to renovate the city centre of Hoogezand-Sappemeer. These formal requests take the form of 'reasoned opinions', the second stage of infringement procedures under Article 226 of the EC Treaty. In the absence of a satisfactory response, the Commission may refer the Member States in question to the European Court of Justice.

EU public-procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe.

Representatives of the European Parliament and Council agreed on 2 December – on the basis of a proposal submitted by the Commission in May 2000 - on a legislative package simplifying and modernising EU public procurement law (see IP/03/1649). The Commission hopes that this package will be formally adopted early in 2004. The Commission will shortly be publishing a report setting out the potential of more open procurement to boost the EU economy. Public procurement represents at least 14 % of EU GDP.

Italy – sports betting

The Commission decided to bring a case before the Court of Justice against Italy concerning the award of service concessions for sports betting operations. The Commission has found that Italy failed to comply with the general principle of transparency under the EC Treaty and the resulting publicity requirement when, without any tendering procedure, it renewed until 2006 with the former concessionaires some three hundred concessions for the management of horserace betting.

Italy - construction of two motorways

The Commission will also refer Italy to the Court in two cases concerning the award by ANAS, a body governed by public law, of contracts for the construction and management of two motorways, the Valtrompia and "Pedemontana Veneta Ovest" routes, without any prior invitation to tender at Community level. The Public Works Directive (93/37/EEC) stipulates that when the value of the work is at least € 5 million contracting authorities are required to publish a contract notice in the Official Journal of the European Union.

Italy – IT services in Mantova

Italy is also to be brought before the Court with regard to the award by the municipality of Mantova of the management of a series of IT services. At the end of 1997, the management of these services was entrusted by negotiated procedure to the public limited company ASI, in which at the time the same municipality of Mantova had a majority interest. According to the Court's case law, application of the tendering procedures provided for in the Directives can be waived only in cases where the contractor, even if formally separate from the contracting authority, is not essentially independent of it as regards decision-making. The Commission considers that the sole fact that a contracting authority has a majority holding in a company's capital is not sufficient to deny that company's to decision-making independence and can thus not justify the failure to apply Community rules.

Italy – renewal of contracts without tendering

In addition, the Commission has decided to send a reasoned opinion asking Italy to repeal Article 44 of Law 724/1994, which allows contracting authorities in Italy to renew a public supply or service contract when it expires with the same contractor without applying the tendering rules laid down in the public-procurement Directives.

UK – registered social landlords

The Commission has decided to refer the UK to the Court because "registered social landlords", the main providers of social housing in the UK, do not apply EU public procurement directives. These Directives impose strict procedural and other requirements on "bodies governed by public law" so as to ensure that their procurement of goods, works and services is transparent and non-discriminatory. The Commission considers that the relationship between registered social landlords and the Housing Corporation, a public body sponsored by the central government Department for Transport, Local Government and the Regions, is such that they should be treated as bodies governed by public law and thus comply with the public procurement Directives.

Austria – waste services in Mödling

The Commission will refer Austria to the Court over the award of a contract for the collection and treatment of waste in the municipality of Mödling. The contract was awarded on 15 September 1999 for an unlimited period directly to a company which was previously established and fully owned by the municipality of Mödling. However, in parallel with the award of the service contract, the municipality sold 49% of the company's shares to a private undertaking.

The Austrian authorities have argued that the Court's case law on “in-house” awards applies in this case. That case law stipulates that the award to entities over which a contracting authority exercises control similar to that over its own internal departments does not fall under European public procurement law. The Commission considers that the municipality of Mödling does not exercise such control over the said company, of which it owns only 51% of the shares. Therefore, the municipality of Mödling should have put the contract out to tender in accordance with the Directive on the public procurement of services (92/50/EEC).

Finland – kitchen equipment for government buildings

The Finnish contracting authority in charge of government real estate, Senaatti-kiinteistöt, awarded a contract for the supply of kitchen equipment worth 1 050 000 Finnish marks (€ 176 000) without advertising it. Finland has argued that the sum is below the threshold of application of the public-procurement Directives. However, the Court's case law confirms that a contracting authority in such cases must ensure an adequate degree of advertising, sufficient to ensure competition and to avoid discrimination on the grounds of nationality. The Commission will now take the case to the Court.

Greece – metro trains

On 26 July 2002 *Attiko Metro AE* (the Athens metro company, a public entity) signed a contract with Hanhwa Koros for the supply of four trains for a dual-voltage network, and the transformation of three trains from single voltage to dual voltage. Hanhwa Koros had already been awarded a contract for the supply of 17 single-voltage trains. The July 2002 contract was the subject of an option clause in that earlier contract, which was neither evaluated nor awarded during the first procedure. The Commission believes that the award of the new contract without competition breaches the EU Directive on the procurement of supplies (93/36/EEC). It has therefore decided to send Greece a reasoned opinion.

The Greek authorities have not provided evidence to show that the contractor in question is the sole manufacturer or supplier of the items concerned, which would be one possible ground for exemption from the rules in the Directive. Neither can they justify the absence of competition on the basis of urgency arising from unforeseen circumstances connected with the 2004 Olympic Games. The fact that the Games would be held in Athens has been known for many years, and the contracting authority should have scheduled the work accordingly. Besides, the inclusion of an option clause in the original tender for dual-voltage trains to be used on the suburban track suggests that the contracting authority considered such a development likely.

The new contract cannot be considered as a partial renewal of the existing supply contract – which would be another potential basis for exemption - because the dual-voltage trains are different from the single-voltage ones.

Finally, problems regarding different spare parts and the need for additional training and for more personnel, do not constitute disproportionate technical difficulties within the meaning of the Directive.

Greece – technical assistance for farmers

The Commission also decided to send Greece a reasoned opinion with regard to contracts for technical assistance to farmers. To help farmers take full advantage of certain Community aid measures under the common agricultural policy, the Greek Government used to conclude technical assistance contracts each year with specialist firms for each region, following suitable tendering procedures. In 2001, contrary to the approach followed previously, a framework programme was drawn up and the implementing contracts were awarded by negotiation.

The Commission considers that all the implementing contracts fulfil the same purpose and therefore have to be considered together, which means that they exceed the threshold in the Directive on public service contracts (92/50/EEC) and thus come within its scope. The detailed advertising and tendering procedures laid down in the Directive should therefore apply. Lastly, the argument put forward by the Greek authorities that only the chosen contractors had the technical capacity to carry out the contracts was at odds with the facts, since up to 2001 these contracts were subject to tender and they would be again from 2003 onwards.

Greece – technical consultant for the construction of a waste-water treatment plant

A reasoned opinion is also to be sent to Greece with regard to a call for tenders issued by the Ministry of Public Works to recruit a technical consultant in connection with the construction of a waste-water treatment plant on the island of Psitallia. The award criteria related to tenderers' economic, financial and technical capacities and their experience. However, according to Directive 92/50, these aspects must be part of the selection criteria, and the Directive stipulates that the evaluation of bids must be divided into two distinct phases, first the selection phase and then the award phase. The function of the selection criteria – including the above-mentioned capacities – is basically to allow the contracting authority to establish a list of tenderers capable of carrying out the work concerned, whereas the award criteria are used for assessing tenderers' bids and awarding the contract.

Greece – use of standard forms

Furthermore, Greece has not notified the Commission of the transposition into national law, as regards supplies and the special sectors, of the Commission Directive of September 2001 (see IP/01/1271) on the use of standard forms for public- procurement notices. The Commission has therefore decided to send a reasoned opinion asking Greece to transpose the Directive. The compulsory use of these forms improves the quality of the notices published, which promotes open markets, efficiency and transparency and facilitates the award of contracts electronically. In particular, using these forms makes it easier for potential suppliers to use automatic search tools to find the contract notices that interest them. For contracting authorities the standard forms reduce the work and costs associated with complying with the European rules on public procurementworks.

Netherlands – renovation of Hoogezand-Sappemeer

The Commission has decided to send the Netherlands a reasoned opinion asking it to rectify breaches of EU law over works contracts for renovating the city centre of Hoogezand-Sappemeer. The local authority signed an agreement giving a particular company the exclusive right to carry out several types of work and then awarded it several contracts without competition. The Commission considers that such direct awards constitute a violation of the Public Works Directive (93/37/EEC), if the threshold for application of this Directive is reached, in terms of the value of the contracts concerned. Even if that threshold is not reached, the EC Treaty requires, in order to comply with the principles of equality of treatment and of non-discrimination, an adequate degree of advertising to enable different businesses to compete.

The latest information on infringement procedures against any Member State can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/03/1415

Brussels, 20th October 2003

Public procurement: Commission acts against Ireland, Italy and Germany; closes infringement cases against Greece and Luxembourg

The European Commission has decided to refer Ireland to the European Court of Justice over the renewal, without opening to competition, of existing contractual arrangements for the provision of ambulance services to Dublin City Council. The Commission has also decided to formally ask Italy to modify its framework law on public works to ensure compliance with EU public procurement rules and to put right breaches of those rules in the award of contracts to build and manage gas distribution networks in Apulia. The Commission's request will take the form of a reasoned opinion, the second stage of the infringement procedure under Article 226 of the EC Treaty. In the absence of a satisfactory response to the reasoned opinion, the Commission may refer Italy to the European Court of Justice. The Commission has also decided to ask Germany to comply fully with an existing European Court of Justice judgment requiring it to remedy breaches of the Public Procurement Directives in the award of long-term contracts for waste disposal in Brunswick and for the collection of waste water in Bockhorn. The Commission has closed an infringement case against Greece, which has now changed a law that in effect prevented EU companies whose previous work had mainly been done outside the EU from bidding for public works contracts. It has also closed a case against Luxembourg, which has now brought into line with EU law its national rules on appeals for companies whose bids for public contracts have been rejected.

EU law on public procurement aims to ensure that all European companies have a fair chance to bid for public contracts. The open and transparent tendering procedures required under EU law mean more competition, stronger safeguards against corruption and better service and value for money for taxpayers.

Ireland - provision of ambulance services

Ireland has not complied with a reasoned opinion sent to it over the renewal of the contract for Dublin City Council (formerly Dublin Corporation Fire Brigade) to provide emergency ambulance services to the Eastern Regional Health Authority (see IP/03/266). The Commission will now take the case to the European Court of Justice.

The case is not specifically covered by the detailed procedural requirements for the advertising and award of contracts laid down in Directive 92/50/EEC on the public procurement of services. However, it is covered by the general provisions of that Directive, by general EU law obligations such as non-discrimination, equal treatment and transparency and by the principles covering the free movement of services laid down in the Treaty.

The Commission therefore considers that, in line with those obligations, the Irish authorities should have ensured, for the benefit of any potential tenderer, a degree of advertising necessary and sufficient to ensure competition.

Italy: framework law on public works

The Commission has decided to send Italy a reasoned opinion concerning certain provisions of the framework law on public works, No. 109/94, as last amended by Law No. 166/2002.

The Commission wants Italy to amend its legislation to bring this framework law into line with the Directives on public contracts and therefore make those contracts open to intra-EU competition. In particular, the Commission's action is designed:

- to avoid situations where national rules on the scope of the Directive on public work contracts which are not in conformity with EU law result in public contracts not being published at EU level in accordance with the "supplies" and "services" Directives, whose application thresholds are much lower than those in the "works" Directive;
- to ensure that the competition rules of EU Directives on public contracts are applied in all cases or, where they are not applicable, to ensure that the contract is sufficiently advertised in accordance with the general principle of transparency. This applies, for example, to work performed by way of payment for planning permission and engineering, architectural and project assessment services falling below the thresholds of the EU Directives, and to management services and technical inspection services (*"collaudo"*);
- to avoid situations where national rules such as that on the right of pre-emption (*"prelazione"*) of the promoter within the framework of project-financing procedures discriminate against non-nationals who bid for public contracts.

Italy - gas distribution in Apulia

The Commission has also decided to send a reasoned opinion to the Italian authorities concerning their methods of awarding contracts for the construction and management of gas distribution networks by the eight municipalities constituting the catchment areas known as "Puglia 25" and "Puglia 29" (including San Giovanni Rotondo, San Nicandro Garganico and San Marco in Lamis).

From 1991, these eight municipalities awarded contracts for the construction and management of the networks to one company via a negotiated procedure, without putting the contracts out to tender at EU level.

The Directive on public works contracts (93/37/EEC) states that contracting authorities wishing to award a public works contract (if the value of the contract is €5 million or more) must publish a notice in the Official Journal of the European Union. The same rules are provided for in Directive 89/440/EEC.

The Commission considers that, as the above-mentioned Directives do not lay down exemptions for the award of a public works contract via a negotiated procedure, the aforementioned contract awards should have been awarded via competitive tender.

Germany – waste disposal and waste water collection in Lower Saxony

On 10 April 2003, the European Court of Justice ruled in joint cases C-20/01 and C-28/01 that the Federal Republic of Germany had failed to fulfil its obligations under Directive 92/50/EEC in two cases of service procurement by local authorities in the German State of Lower Saxony. In 1996, the City of Brunswick awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice. In 1998, the Municipality of Bockhorn did not invite tenders for the award of the contract for the collection of its waste water. The contracts have been signed for a minimum of 30 years.

The Commission asked the German Government to provide information on the measures it had taken to comply with the judgment of the Court. However, the German Government simply replied by repeating its previous arguments, namely that it had always acknowledged the violations and had taken all necessary measures to avoid their repetition in the future.

The Court established in its judgment that the violation of procurement law continues throughout the execution period of the contracts awarded in breach of the Directive. As the present contracts will be in effect for decades, the Commission considers that it is not sufficient to avoid future violations. Measures to end the current infringements are required. Consequently, the Commission has decided to send a letter of formal notice. If the German authorities still do not comply, the Commission can ask the Court to impose a daily fine.

Greece - public works contracts

Presidential Decree 334/2000 (OJ 279, 21.12.2000) imposed restrictions on the building firms which could take part in procedures for the award of public contracts. In the absence of official national registers of contractors, the Decree only allowed companies to produce references to similar works constructed in their country of origin and other EU or EEA Member States.

The Commission considered that this provision infringed Directive 93/37/EEC, because it constituted, without any technical justification, discrimination against tenderers who had carried out works outside EU and EEA territory, who were consequently automatically eliminated from procedures for the award of public contracts in Greece.

Following the Commission's intervention, the Greek authorities acknowledged the illegal nature of the disputed provision and, on 9 December 2002, communicated the regulatory text (Article 2 of Presidential Decree 336/2002, published in the Official Journal of the Hellenic Republic, vol. I, No. 281, 20.11.2002) which amends the disputed provision by allowing companies or physical persons from EU or EEA Member States in which official registers of contractors are not held, to take part in competitions for the construction of works similar to those that they have already built, irrespective of where such works are located.

Luxembourg - appeals

The Luxembourg legislation, insofar as it stipulated that the award involved an amount which was sufficient to justify a competitive procedure, did not allow a meaningful appeal against a decision (that is to say, at a stage where infringements could still be corrected by starting the procedure again, i.e. prior to the contract being signed).

In these circumstances, the Commission considered this legislation to be contrary to Directive 89/665/EEC as interpreted by the Court of Justice in the "Alcatel" judgment of 28 October 1999, which requires the Member States, as part of the award procedure, to enable tenderers to apply for cancellation of a decision. Accordingly, the Commission sent a letter of formal notice in October 2002.

By adopting the Grand-Ducal Regulation of 7 July 2003, the Luxembourg authorities have ended the infringement. Article 90 of the Grand-Ducal Regulation introduces a 15-day period between notification (to the unsuccessful tenderers) of the contracting authority's decision and signature of the contract.

IP/03/1104

Brussels, 24th July 2003

Public procurement: Commission requests Germany and Ireland to rectify breaches of EU law in awarding contracts

The European Commission has decided to request formally Germany and Ireland to comply with EU public procurement law. In Germany, the city authorities of Freiburg awarded a contract for the supply of heating to private company partly owned by the municipality, without a Europe-wide tender procedure. In Ireland the Irish Forestry Board awarded, without competition, contracts for the aerial fertilisation of forests by helicopter. The Commission's purpose is to safeguard competition at European level in accordance with the EU public procurement laws that all Member States have undertaken to apply. When a major public contract is awarded without giving all potential tenderers an opportunity to offer their services, companies are unfairly deprived of a potential outlet. Furthermore, the procuring authorities and thus taxpayers are liable to receive lower quality and/or more expensive services than they could have obtained through prior competitive tendering by a number of suppliers. The Commission's requests take the form of reasoned opinions, the second stage in the infringement procedure laid down in Article 226 of the EC Treaty. If the Member States concerned do not take satisfactory steps to comply within two months of receiving the reasoned opinion, the Commission may decide to take the matter to the Court of Justice.

Germany - supply of heating in Freiburg

In 2001, the city of Freiburg awarded a 15-year contract worth €3.7 million to a private company, of which it owns 32%, for the supply of heating. No Europe-wide tender procedure was carried out as required by the Directive on public procurement of supplies (93/36/EEC).

Germany has acknowledged the breach of EU law. However, it claimed that the case constitutes an exceptional misinterpretation of the European Court of Justice's case law on “in-house” awards. The city authority believed that the contract would not require a tender as it was awarded to an entity controlled similarly to the authority's own internal departments. The city authority has awarded several other contracts since the one in question, in accordance with the procedures required by EU law.

However, the Commission's view is that the breach of EU law is continuing and will do so until the end of the contract in 2016, unless steps are taken to remedy it. The fact that the city of Freiburg has fulfilled its obligations in other procurement activities does not mean Germany has remedied the breach. Consequently, the Commission has decided to send a reasoned opinion to the German authorities.

Ireland - aerial fertilisation of forests

The Commission has also decided to send a reasoned opinion to the Irish authorities asking them to put right non-compliance with EU public procurement rules in the award, without competition, by the Irish Forestry Board of contracts for the aerial fertilisation of forests by helicopter.

The Irish authorities classify the Irish Forestry Board as a private entity not subject to the public procurement rules, despite the fact that it has the important role of maintaining national forests and assisting the development of the forestry industry.

However, the Commission takes the view that the Board is a body governed by public law, as defined in Article 1 b) of the Directive on the public procurement of services (92/50/EEC), and therefore subject to EU procurement rules. A previous judgement of the European Court of Justice (17th December 1998, case C-353/96) already classified the Irish Forestry Board as a contracting authority.

As a result, the Commission's considers that, even if the specific contracts in question are not covered by the detailed procedural requirements for the advertising and award of contracts laid down in Directive 92/50/EEC, they do fall under the general provisions of that Directive and under EU Treaty principles. The contracts should therefore have been adequately advertised.

Recent general information on infringements concerning all Member States may be consulted at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/03/1037

Brussels, 17 July 2003

Public procurement: Commission acts against six Member States

The European Commission has decided to act in eight cases to enforce EU law on public procurement, which aims to ensure that all European companies have a fair chance to bid for public contracts. The open and transparent tendering processes required under EU law mean more competition, stronger safeguards against corruption and better service and value for money for taxpayers. The Commission has decided to refer Ireland, Italy and Germany to the Court of Justice concerning respectively the extension without competition of a contract with the Irish national post office for providing social welfare payments, the purchase without competition of helicopters by the Italian forestry authority and failure to apply EU rules to a waste disposal contract in the German district of Friesland. The Commission has also sent formal requests to change their practices to Greece, Italy, the Netherlands and Sweden because various public procurement contracts have been awarded in ways that do not comply with the EU Treaty and/or with the Public Procurement Directives. These formal requests take the form of so-called 'reasoned opinions', the second stage of infringement procedures under Article 226 of the EC Treaty. In the absence of a satisfactory response to these 'reasoned opinions', the Commission may refer the Member States in question to the European Court of Justice. The Commission has also closed a case against Belgium, as the Walloon region has rescinded its former requirement that stone used in works contracts should be of Belgian origin.

Ireland - contract with An Post for social welfare payment services

The Commission has decided to refer Ireland to the European Court of Justice over the extension, without competition, of the contractual arrangements with An Post (the national Post Office) for the provision of social welfare payment services.

The Commission sent a reasoned opinion, to which the Irish authorities did not reply satisfactorily, in December 2002 (see IP/03/266). The case is not specifically covered by the detailed procedural requirements for the advertising and award of contracts laid down in the Directive on the public procurement of services (92/50/EEC). However, it is covered by the general provisions of that Directive, by general EU law obligations such as non-discrimination, equal treatment and transparency and by the principles covering the free movement of services laid down in the Treaty.

The Irish authorities concerned should therefore have ensured, for the benefit of any potential tenderer, a degree of advertising necessary and sufficient to ensure competition.

The precise scope and form of the advertising required depends on the nature of the services in question and the extent to which the contract is of interest to purely regional, national or EU-wide potential providers of the service. The contract to An Post, for example, amounts to around €40 million and could have interested a number of suppliers outside Ireland. Advertising would therefore have to be more than simply national.

Italy - purchase of helicopters for fire-fighting

Following a reasoned opinion sent in March 2003 (see IP/03/486), the Commission has decided to bring an action against Italy before the Court of Justice. According to an Order or the President of the Council of Ministers dated 24 July 2002 the Italian body responsible for the surveillance of woodland (*Corpo forestale dello Stato*) is authorised to purchase the most suitable aircraft for its purposes by means of a direct agreement procedure outside the competition rules laid down in the Community Directives on public contracts.

As the Court of Justice has repeatedly pointed out, the provisions which, under the Directive on public supply contracts (93/36/EEC), authorise derogations from the competition requirement must be interpreted strictly. It is for the contracting authority wishing to make use of them to demonstrate the existence circumstances that justify these derogations - for example, reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question. According to the Commission, there are no such circumstances in the present case.

Germany - waste disposal in the district of Friesland

The Commission is referring Germany to the Court of Justice in connection with a waste disposal contract awarded by the district of Friesland without the required Europe-wide tendering procedure as provided for in the Directive on the award of public service contracts (92/50/EEC). The contract was awarded in 1994, for the period 1995-2004 and for a value of DM 29 million (€ 14.83 million).

Germany admitted the breach of Community law in answer to the letter of formal notice sent by the Commission in July 2000. However, it argued that an early termination of the contract was impossible without claims for damages and that the contract will not be extended beyond the closing date originally provided for. Future services will be awarded in compliance with Community law.

However, this has not remedied the existing violation of EU law as the contract remains in force until the end of 2004. Furthermore, similar cases continue to occur in Germany. The Commission is currently at an early stage of assessing a similar case in the district of Friesland, where the same contracting authority is concerned.

Greece - supply of automatic weather stations

The Commission has decided to send Greece a reasoned opinion on the award by the airforce of a contract for the supply of 14 automatic weather stations without publication of a notice in the Official Journal (OJ) of the EU. Since the contract exceeds the threshold laid down in the Directive on public supply contracts (93/36/EEC), a notice should have been published in the OJ.

The Commission considers that the contract cannot be covered by the exception provided for in the case of the supply of certain equipment in the field of defence, since the supplies in question are not primarily destined for military use.

These weather stations should permit the modernisation of the system used by the National Meteorological Agency and will principally be used for the Olympic Games, and subsequently by the Agency to meet the needs of civil, and possibly military, aviation.

Nor does it seem possible to invoke another exception in connection with reasons of extreme urgency brought about by events unforeseeable by the contracting authorities. The need to have operational weather stations for the 2004 Olympic Games cannot be regarded as an unforeseeable event. Finally, the need would not appear to be so urgent that the deadlines required under the open and restricted procedures could not be respected.

Italy - construction and management of motorways

The Commission has decided to send Italy a reasoned opinion on the award procedures applied for the construction and management of the Valtrompia and the "Pedemontana Veneta Ovest" motorways.

The competent authority in Italy for the granting of national-level motorway concessions (ANAS - a body governed by public law) awarded a concession for the construction and management of the motorways in question by means of a direct agreement without prior competition at Community level.

Under the Directive on the coordination of public works contracts (93/37/EEC), contracting authorities wishing to award a concession for public works must, if the value of the works is € 5 million or more, announce their intention by means of a notice to be published in the Official Journal of the European Union.

Netherlands - supply of household refuse containers in Assen

The Commission has decided to send the Netherlands a reasoned opinion on the contracts for the supply of household refuse containers. The Assen local authority awarded these contracts to a supplier under a direct agreement.

The Directive on public supply contracts (Directive 93/36/EEC) does not apply to these contracts, as the amounts involved where below the threshold for the application of that Directive. The Commission considers, however, that the fact of awarding these contracts directly to a supplier without competition constitutes a violation of the general principle of the EC Treaty concerning equality of treatment deriving from the principle of non-discrimination on grounds of nationality. There should have been an adequate degree of advertising in order to enable different businesses to compete so that the contract could be awarded to the tenderer submitting the best bid, this guaranteeing that public money is well spent.

Sweden – framework contract for public works in Eskilstuna

The Commission has decided to issue a reasoned opinion against Sweden concerning a decision by the municipality of Eskilstuna to award a framework contract covering several works worth at least €19.6 million without applying the tendering rules in the Directive on the procurement of public works (93/37/EEC).

Although the Swedish authorities have acknowledged the infringement and announced that some of the works have already been finished, the Commission considers that the works as a whole are still on-going and has decided to issue this reasoned opinion.

If the works Directive is not properly applied, there is a risk that EU companies will be deprived of a fair chance to bid and the public entity in question, and thus the taxpayer, may pay a higher price than necessary for the works.

Belgium - Belgian bluestone [*pierres bleues*]

The specifications for the works contracts awarded in Wallonia specified that all quarrying of bluestone would have to take place in Belgium. Prescription of origin is prohibited in principle under European law. The Commission sent a letter of formal notice dated 16 October 2002, and the specifications will henceforth state that equivalent natural stone from other countries will also be acceptable. The Commission has therefore decided to close the case.

The latest information on infringement procedures against any Member State can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/03/601

Brussels, 30th April 2003

Public procurement: Commission gives green light to Thessaloniki metro contract

On the basis of the information at its disposal, the European Commission has decided, after a thorough investigation, that there is no indication that the contract for the construction of a metro system in Thessaloniki, Greece breaches EU public procurement law. In the Commission's view, the contract does not breach the principle of equal treatment for all bidders, does not depart unacceptably from the original tender documents and is a legitimate concession contract where the holder of the concession bears part of the risk. The contract was awarded in 1999 to a consortium known as the Thessaloniki Metro Joint Venture Company. The total cost of the project is estimated at more than €700 million. The Commission's decision takes account of a January 2003 preliminary ruling by the European Court of Justice on a case (C-57/01) referred by a Greek court on some aspects of the Thessaloniki metro contract. The decision relates only to public procurement law and is without prejudice to other aspects of EU law. In particular, the Greek authorities will now need to submit their financial arrangements for clearance under EC Treaty state aid rules.

The principal grounds for the Commission's decision are as follows.

Firstly, the Commission considers that the principle of equal treatment of all bidders is not infringed by the contract. Any successful bidder for the contract could have negotiated the final contract on similar terms, without incompatibility with the tender documents, which left a wide margin for interpretation with regard to clauses that could be negotiated by the preferred bidder.

Secondly, the Commission's view is that the concession holder - Thessaloniki Metro - will bear risk. For example, its income from the project remains uncertain. It is therefore appropriate, in the Commission's view, for the contract to be defined as a concession contract, rather than a public works contract, which would be subject to tougher procurement rules.

Thirdly, the Commission considers that the fact that, in the final version of the contract, the defined depth of the tunnels is different from that set out in the tender documents does not constitute an unacceptable modification given that the tender documents specifically foresaw the possibility of such amendments.

Fourthly, following verifications made with the Greek authorities and on the basis of the available documentation, the Commission considers that the financial guarantees submitted by Thessaloniki Metro were adequate in the light of EU public procurement rules.

Up-to-date information on all infringement proceedings against Member States can be found at the following address:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/03/486

Brussels, 3rd April 2003

Public procurement: the European Commission calls on Austria and Italy to comply with Community law

The European Commission has decided to send Italy a reasoned opinion formally requesting it to comply with Community law with regard to the purchase of helicopters intended for fighting forest fires and to the renewal of the concession for the distribution of gas in the municipality of Naples. It has decided to send a similar request to Austria with regard to the collection and processing of waste in the town of Mödling. The Commission's purpose is to safeguard competition at European level with regard to the publication and award of these three contracts, in accordance with the Community law that all Member States have undertaken to apply. When a major public contract is awarded without giving all potential tenderers an opportunity to offer their services, companies in the Community are unfairly deprived of a potential outlet. Furthermore, the procuring authorities – and thus taxpayers – are liable to enjoy less favourable economic conditions than they could have obtained through prior competitive tendering by a number of suppliers. The Commission's requests are in the form of reasoned opinions, the second stage in the infringement procedure laid down in Article 226 of the EC Treaty. If the authorities of the Member States concerned do not take satisfactory steps to comply within two months of receiving the reasoned opinion, the Commission may decide to take the matter to the Court of Justice.

Italy – purchase of helicopters for firefighting in Italy

An order by the Italian Prime Minister dated 24 July 2002 laid down that the Italian organisation responsible for monitoring forests ('Corpo forestale dello Stato') was authorised to purchase the aircraft most suitable for carrying out its duties by a negotiated procedure outside the rules on competitive tendering laid down in the Community Directives on public procurement.

Under the Directive on public supply contracts (93/36/EEC), exemptions from the tendering obligations are allowed only under strictly defined conditions. These conditions include in particular extreme urgency resulting from events that the awarding authority could not foresee and for which it is not responsible, making it impossible to meet the deadlines involved in a tendering procedure preceded by the publication of a contract notice.

However, as the Court of Justice has pointed out on a number of occasions, the provisions allowing such exemptions must be interpreted strictly, and it is up to the awarding authority intending to make use of them to prove that there are justifying circumstances. In the Commission's view there are no such circumstances in the present case.

Firstly, the Commission considers that the need to increase the number of the aircraft concerned cannot be regarded as a circumstance that the Italian authorities could not have foreseen, given that forest fires are unfortunately a common, endemic phenomenon during the summer in Italy and provision had been made for a substantial increase in airborne firefighting equipment as long ago as 1998, in other words all of four and a half years before the adoption of the above-mentioned order. Nor has the Italian Government shown that there was any exceptional, unforeseeable increase in the number of fires in the 2002 summer season.

Secondly, if the purchase of the aircraft, although planned well in advance, was not completed in time to cope with the fire hazard in the 2002 summer season, this seems to be attributable solely to the choice made by the administration, which suspended, and then cancelled, the award procedures launched in 2000 for the purchase of 49 helicopters for firefighting, despite the fact that the competent national courts had recognised the procedures' legality.

Italy – distribution of gas in the municipality of Naples

The Commission has also sent Italy a reasoned opinion because of a breach of the principle of non-discrimination on grounds of nationality provided for in Articles 43 and 49 of the Treaty as regards the freedom of establishment and the freedom to provide services, in connection with the renewal of the concession for the distribution of gas in the municipality of Naples.

At present, gas is distributed in Naples by the company known as 'Napoletanagas', on the basis of an agreement that expires in 2005. In 2000 the municipal authorities in Naples decided to extend this concession for a period of thirty years, or for any shorter period that may be laid down by Italian legislation.

In any event, in terms of Community law, when a concession of this type expires the national authorities are not allowed to extend it for the benefit of the same operator. They must organise a competitive tendering procedure, in order to allow any service provider in the European Union who could carry out the activity in question to put in a bid.

Austria: collection and treatment of waste

The Commission has asked Austria to rectify the breach of EU law that the Commission believes occurred when, four months after setting up a fully-owned company specifically aimed to provide waste disposal services ("AbfallGmbH"), the local authority in the town of Mödling sold a large part (49%) of that company to the private sector. The Commission believes the town thereby in effect awarded a contract for the collection and treatment of waste without carrying out a procurement procedure, contrary to the provisions of the Directive on the public procurement of services (92/50/EEC).

The case law of the European Court of Justice sets out as one of the criteria for exemption from the public procurement rules the existence of an in-house relationship. In other words a public authority can, without a competitive procedure, allocate the provision of goods or services to an organisation over which it exercises control similar to that which it has over its own departments.

However, in the Commission's view, that criterion is not met in this case, as the local authority does not exercise such control over the now partly privatised "AbfallGmbH" and as there is substantial evidence that the local authority intended to take a private partner on board from the very start. Therefore the waste treatment service should have been publicly tendered for from the outset.

The effect of the lack of transparency in the award of this contract is that not all interested and qualified companies could submit their offers and therefore the town of Mödling could not choose the offer representing the best value for money. Such behaviour restricts competition, distorts the market concerned and can cost taxpayers money unnecessarily.

Information on infringements of EU law concerning all Member States is available on the Europa website:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/03/266

Brussels, 20th February 2003

Public procurement: Commission acts against seven Member States

The European Commission has decided to act in ten cases to enforce EU law on public procurement, which aims to ensure that all European companies have a fair chance to bid for public contracts. The open and transparent tendering processes required under EU law mean more competition, stronger safeguards against corruption and better service and value for money for taxpayers. The Commission has decided to refer France, Portugal, Spain and Germany to the Court of Justice concerning respectively French legislation on public procurement for major construction projects, Portugal's failure to implement correctly the Directive on remedies for tenderers who consider that they have not been fairly treated in tendering processes, Spain's failure to ensure the rules are applied properly for the procurement of health services and two cases in Germany where waste management contracts were awarded without EU-wide tendering. The Commission has also sent formal requests to change their practices to Ireland, Italy and Finland because public procurement contracts have been awarded in ways that do not comply with the EU Treaty and/or with the Public Procurement Directives. These formal requests take the form of so-called 'reasoned opinions', the second stage of infringement procedures. In the absence of a satisfactory response to these 'reasoned opinions', the Commission may refer the Member States in question to the European Court of Justice.

France – law on major construction projects

Under a French law (Loi M.O.P) frequently applied to **major construction projects**, only enterprises included in a pre-established list are eligible to take on the roles of deputy controller of works and of operation control. In the Commission's view, this restriction on open tendering and competition violates both the 1992 Directive on the public procurement of services (92/50/EC) and EU Treaty rules on non-discrimination. The French authorities recognised in their response to the Commission's reasoned opinion sent in June 2002 that operation control indeed falls under the scope of the Directive, but continue to maintain that the function of deputy controller of works does not. The Commission has therefore referred the case to the Court.

Portugal – implementation of remedies Directive

The Portuguese law implementing Directive 89/665 on **remedies for tenderers** who demonstrate that their bids have been unfairly rejected does not, in the Commission's view, fully meet the provision in the Directive requiring that the "decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible".

For damages to be awarded, the current law - Decreto 48 051 – still requires rejected tenderers to prove that there was wilful wrongdoing by the contracting officer(s), even if a violation of EU public procurement law is established by the court. This entails lengthy proceedings and, because such evidence is very difficult to provide, actions for damages are seldom effective. In the absence of a satisfactory response to a 'reasoned opinion', the Commission has decided to refer the case to the Court.

Germany – waste management in Munich and Coesfeld

The Commission is referring Germany to the Court over two instances where waste management contracts were awarded without the required Europe-wide tendering procedure. In 1998, the **city of Munich** won a tender for the treatment of waste in the Donauwald area of Bavaria for 25 years. Subsequently, without a tender procedure, it subcontracted part of these services, for **transport of waste,** to a private undertaking. In the view of the Commission, as a contracting authority in terms of EU procurement law, the city of Munich cannot, as the German authorities have argued, claim that it acted outside its own field of public responsibilities when contracting these services and therefore like any private contractor should have been able to select its subcontractors freely. If it could do that, it would be in a position to compete unfairly with the private sector by using its privileged situation in Munich where it can operate in its public domain without competition. The Commission maintains its position that the contract should have been tendered.

Meanwhile, in the region of **Coesfeld**, **two waste disposal contracts** for amounts of DM 14.6 million (€ 7.5 million) and DM 4.1 million (€ 2.1 million) respectively were concluded in 1997 for the period until 31 December 2003 without carrying out a Europe-wide tender procedure. Germany has promised to ensure that in future cases of this sort, EU law is respected. However, this has not remedied the existing violation of EU law as the contracts in question remain in force until the end of 2003. Furthermore, similar cases continue to occur in Germany and two cases are currently subject to a pending decision of the Court of Justice on the same legal issues (see IP/00/777).

Spain – health services

In Spain, the Instituto Nacional de Salud (national health service) imposed discriminatory conditions on bidders for contracts to provide **respiratory therapy** in patients' homes. For example, tenderers were required to have some offices already open in the regions where the services were to be supplied. In evaluating bids, the authorities took into account the existence of additional offices in those regions, ownership of other existing operations in Spain and previous provision of the service under contract. The Commission considers that these conditions discriminate against non-Spanish suppliers and restrict the freedom to provide services and the freedom of enterprises to base themselves wherever in the EU they choose. It has therefore decided to refer Spain to the Court.

Ireland – welfare payments and ambulance services

In Ireland, the Government extended without competition contractual arrangements for the **provision of social welfare payment services** by An Post (the national Post Office). In a separate case, existing arrangements for Dublin City Council (former Dublin Corporation Fire Brigade) **to provide emergency ambulance services** to the Eastern Regional Health Authority were also not subject to competition.

These cases are not specifically covered by the detailed procedural requirements for the advertising and award of contracts laid down in the Directive on the public procurement of services (92/50/EEC). However, the Commission considers both cases are covered by the general provisions of that Directive, by general EU law obligations such as non-discrimination, equal treatment and transparency and by the principles covering the free movement of services laid down in the Treaty.

The Commission's view is that in both cases, the Irish authorities concerned should have ensured, for the benefit of any potential tenderer, a degree of advertising necessary and sufficient to ensure competition. The precise scope and form of the advertising required depends on the nature of the services in question and the extent to which the contract is of interest to purely regional, national or EU-wide potential providers of the service. The contract to An Post, for example, amounts to around €40 million and would have interested a number of suppliers outside Ireland. Therefore, advertising would have to be more than simply national. The Commission has sent Ireland reasoned opinions on both cases.

Italy – Olbia road tunnel and road design in Calabria

In Italy**,** ANAS, the public body responsible for managing the national road network, in 1992 awarded without a tender process the contract to build **a tunnel in the port of Olbia in Sardinia**, thus contravening the Directive on public works procurement (93/37/EEC). The contract was given to a company which was already undertaking other work at the port. The Italian authorities argue that for technical reasons the contract could not have been awarded to anyone else. However, under the Directive the onus is on the relevant authorities to prove this and the Commission does not consider that they have done so and has sent Italy a reasoned opinion.

The Commission has sent another reasoned opinion to **Italy** concerning contracts awarded by ANAS, this time in violation of the Directive on the public procurement of services (92/50/EEC). In 1999 ANAS awarded **six contracts for design work for a major road in Calabria (the N106)**, after launching a call for tender on the same day and without publication in the EU's Official Journal. None of these contracts taken alone was for a sufficient sum to reach the threshold above which the Directive applies. However, taken together they do exceed that threshold and the Directive states that in certain circumstances - including design work of this sort - when contracting authorities divide work into several different contracts, it is the total value of those contracts which determines whether the Directive applies. The Commission considers that ANAS should therefore have awarded the contracts after publication in the Official Journal and after allowing an appropriate time for responses, thus allowing service providers from other Member States to tender on an equitable basis.

Finland – kitchen equipment

The Finnish contracting authority in charge of government real estate, Senaatti-kiinteistöt, awarded a contract for **kitchen equipment** worth 1.050.000 Finnish marks (€176.000) without advertising it. The sum involved is below the threshold above which the full procedural requirements of the public procurement Directives apply. However, the case law of the European Court of Justice confirms that the contracting authority in such cases must ensure a degree of advertising sufficient to ensure competition, to avoid discrimination on the grounds of nationality and to allow the impartiality of procurement procedures to be reviewed. The Commission has therefore sent Finland a reasoned opinion.

Recent general information on infringements concerning all Member States may be consulted at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/02/1581

Brussels, 30th October 2002

Public procurement: Commission requests Germany, Italy and Sweden to rectify breaches of EU law in awarding contracts

The European Commission has sent formal requests to Germany, Italy and Sweden to rectify irregularities in the award of certain public contracts for the purchase of services. In Germany, contracts were awarded in three regions without the open tendering procedures required by the EC Treaty and the public procurement Directives, which aim to open up public procurement to competition. These contracts were for waste disposal in the Landkreis Friesland, sewage water treatment and energy supply in Jever and for the development and marketing of a new services park in the city of Limburg. In Italy, the Piedmont region awarded a contract for technical assistance in the management of European funds according to criteria incompatible with the Directives. In Sweden, a contract for bus transport services was also awarded according to inappropriate criteria. When a major public contract is awarded without all eligible European tenderers having a chance to bid and/or awarded according to inappropriate criteria, European enterprises are deprived of their right to compete equitably for the contract concerned and safeguards against corruption are weakened. Moreover, the authorities awarding the contract - and therefore the taxpayer - may receive a worse or more expensive service than might have been provided had the correct procedures been applied. These formal requests to Germany, Italy and Sweden take the form of so-called "reasoned opinions", the second stage of infringement procedures under Article 226 of the EC Treaty. If the Member States do not comply within two months, the Commission may refer the cases to the Court of Justice.

Germany – waste disposal in Landkreis Friesland

On 1 January 1995 the Landkreis Friesland signed a 10 year contract worth €29 million for the provision of waste disposal services, without carrying out an open and competitive public procurement procedure at EU level, as required by Article 8 of Directive 92/50/EEC on the public procurement of services.

In view of the fact that no tender notice was published in relation to this contract, that no competition took place on the market and that as a consequence potential competitors in the Internal Market were excluded, the contracting authority could not decide to award the contract on the basis of the best value for money.

In answer to a letter of formal notice sent by the Commission in September 2000, the German authorities admitted the breach of EU law, announced that the contract in question would be terminated at the earliest possible date at the end of 2004 and that any new contract would be put out for public tender according to the public procurement rules in force.

However, the Commission concluded that because the contract in question would remain in force until 2004, the measures the German authorities promised to take would not suffice to rectify the infringement.

Germany - sewage water treatment and gas and electricity supply in Jever

The Commission considers that the city of Jever breached EU law in awarding two contracts, one for the treatment of sewage water and the other for the supply of gas and electricity, without undertaking a public tendering process as required by the public procurement Directives (Directive 92/50/EEC on the procurement of services and Directive 93/36/EEC on the procurement of supplies).

In response to the Commission's letter of formal notice sent in September 2000, the German authorities admitted the infringement and announced that a solution complying with the public procurement rules would be found for the water treatment contract at the earliest beginning of 2002 and that the existing electricity and gas contract would be terminated as of 31 December 2001 and a correct procurement procedure organised for the new contract.

However, the authorities concerned took no concrete steps with regard to the water treatment contract and subsequently stated that the electricity and gas contract would run until the end of 2003. As a result, the breaches of EU law have so far continued.

Germany – Limburg project development services contract linked with real estate activities

In 2001 the city of Limburg awarded a contract for the planning and development of municipally owned premises near the city's main railway station for a new "services park" and for the marketing and the sale of these premises. This contract, which amounts to €190,000 plus a success fee of 10% of the price of sold premises, was awarded without carrying out a public procurement procedure.

The German authorities have informed the Commission that in their view the contract in question does not fall under the European procurement rules since the services concerned are outside the scope of application of Directive 92/50/EEC on the procurement of services.

However, after detailed analysis of the contract, the Commission considers that the services to be provided belong to those categories of services listed in Directive 92/50/EEC and are therefore subject to the detailed procedural rules of the Directive. A call for tender should therefore have been published.

Italy - Piedmont region technical assistance contract for managing European funds

The Piedmont region of Italy in July 2001 awarded a contract for technical assistance in the management of European funds, according to criteria incompatible with Directive 92/50/EEC on the public procurement of services.

In line with the Directive, the contracting authority awarded the contract on the basis of what it considered the economically most advantageous tender. However, one of the criteria used in making this assessment was an evaluation of the composition of the working group proposed by the tenderer to manage the work concerned. The use of such a criterion at this stage of the tendering process breaches article 36 of the Directive.

Bidders who have failed to demonstrate that they have the necessary abilities and capacities to provide the service should be eliminated from the selection process at an earlier stage. The ability or the capacity of the service providers and their personnel should then play no role in the evaluation of the quality and pricing of tenders. The award of the contract to the most economically advantageous tender should be based exclusively on an assessment of the value of the tenders.

Sweden – bus transport services

Kalmar Länstrafik AB, an entity in charge of organising regional bus transport services in the Kalmar regional jurisdiction in Sweden, in December 2000 awarded contracts for bus transport services on the basis of a misapplication of EU public procurement law. The total amount of the contracts is estimated at € 189.5 million Swedish Kroner (approximately € 20.75 million).

As in the Italian case referred to above, some of the award criteria used breached the provisions of EU public procurement law (in this case Directive 93/38/EEC for utilities entities) in that they related to the characteristics of the tenderer as such and not to the service provided.

Case-law of the European Court of Justice has consistently confirmed that selection of those candidates among the bidders who have the abilities and capacity to provide the service required on the one hand and the evaluation of their tenders on the other, are two different operations that may take place simultaneously but are governed by different rules.

Recent general information on infringements concerning all Member States may be consulted at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/02/1509

Brussels, 17th October 2002

Sports betting in Italy: Commission requests competition in the award of concessions

The European Commission has decided to make a formal request to Italy to comply with Community law when awarding concessions for sports betting operations. At present, share-capital companies listed on EU regulated markets are excluded from obtaining such concessions, and the Commission does not consider such an exclusion to be a necessary part of the effort to combat fraud and other crimes. What is more, Italy has renewed around three hundred horse-race betting concessions without issuing a call for competition. When a major public concession is awarded without the contract being opened up to all potential European tenderers (as required by the EC Treaty and the public procurement Directives), European enterprises are unfairly deprived of their right to submit a bid. Moreover, the public authorities awarding the concession - and in this case the punters too - run the risk of receiving a service of a lower quality than might have been provided by a tenderer who has been improperly excluded from the award procedure. The Commission's request takes the form of a reasoned opinion, which is the second stage in the infringement procedure under Article 226 of the EC Treaty. If the Italian authorities do not comply within two months of receiving the reasoned opinion, the Commission may decide to refer the matter to the Court of Justice.

Although the Italian Government is pursuing a legitimate objective, namely to rule out the risk of concession holders becoming involved in fraudulent or other criminal activities, the Commission takes the view that excluding share-capital companies listed on the regulated markets of the EU from obtaining concessions for sports betting operations is not a proportionate measure.

The Commission feels that corporate integrity can be verified by obtaining relevant information on the representatives and principal shareholders of these companies. The present exclusion is thus in breach of the EC Treaty rules on freedom to provide services and freedom of establishment (Articles 49 and 43).

The Commission further finds that Italy has failed to comply with both the general principle of transparency enshrined in the EC Treaty and the associated publication requirement established in the case-law of the Court of Justice. The renewal - up to 1 January 2006 - of around three hundred concessions for horse-race betting operations discriminated in favour of existing concession holders, with no call for competition being issued.

Recent general information on infringements concerning all Member States may be consulted at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/02/1507

Brussels, 17th October 2002

Public procurement: the Commission asks France to amend its new public procurement code

The European Commission has decided to ask France to amend several provisions in its new public procurement Code[1] with a view to bringing it in line with the EU's public procurement Directives and the EC Treaty. When a public contract is awarded without a procedure which is transparent and in compliance with the principles required by the European legislation which all the Member States have pledged to observe, firms in Europe can be unfairly deprived of their right to submit a bid. Furthermore, the public authorities awarding the contract - and thus in this instance the French taxpayer - are liable to pay a higher price than necessary for the services, supplies or works covered by the contract or to receive service of poorer quality than could have been provided by a tenderer who has been improperly excluded. The Commission request takes the form of a reasoned opinion, which is the second stage of the infringement procedure laid down by Article 226 of the EC Treaty. If the French authorities do not comply within two months after receiving the reasoned opinion, the Commission may decide to refer the matter to the Court of Justice.

The Commission's main objections are as follows:

Non-discrimination and equality of treatment in the case of purchases not subject to the public procurement Directives

The provisions of the French Code applicable both to contracts below the thresholds and to contracts referred to in Annex IB to Directive No 92/50/EEC ("services") do not comply with EU law in that the methods for awarding these various contracts are not subject to any specific procedure. Indeed, even if they are not subject to the detailed requirements concerning advertising and putting out to tender which stem from the Community Directives on public procurement, it is nevertheless true that compliance with the principles laid down by the Court of Justice means that such contracts must be awarded in accordance with the fundamental rules of the EC Treaty, i.e. non-discrimination and transparency, the latter being ensured by a proper degree of advertising.

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1 Décret No 2001-210 of 7 March 2001 introducing a public procurement code.

Loans and financial commitments

The Directives on public service contracts and on contracts in the water, energy, transport and telecommunications sectors (92/50/EEC and 93/38/EEC) stipulate that some contracts in connection with the "issue, sale, purchase or transfer of securities or other financial instruments" are excluded by the Directives. It is nevertheless the Commission's view that contracts for the purpose of "loans or financial commitments" and in particular loan contracts without the issue of securities and not contracted with central banks are not covered by these exclusions. Contrary to what is stipulated in the French code, the provisions concerning advertising and putting out to tender laid down in the public procurement Directives must apply to these contracts.

Appointment contracts

Appointment contracts are concluded between public authorities in France and those responsible for undertaking specific tasks. However, when these contracts are or become subject in fact to remuneration, and can thus be recategorised in accordance with the Community Directives as public works, supply or service contracts, they must comply with the obligations contained in the Directives. However, there is no provision in the French legislation for the application of these obligations. Another reasoned opinion (see IP/02/1165) had already been sent to France concerning a particular type of appointment contract (those coming under the law on the control of public works).

Improper application of thresholds for contracts

The thresholds to be applied in the case of the central authorities do not comply in the French code with those laid down in the Directive on public service contracts (92/50/EEC). The thresholds in Directive 92/50/EEC are in fact €130,000 excluding taxes for central government authorities and €200,000 excluding taxes for other awarding authorities. But by fixing a uniform threshold of €200,000 for these contracts, Article 74.3 of the French code transposing the legislation exempts from the obligations of advertising and putting out to tender contracts of a value of €130, 000 or more offered by the government authorities.

Negotiated procedures not covered by the Directives

The French Code allows contracts to be awarded by negotiated procedure without prior publication of a notice (i.e. without prior advertising and invitation to tender) in two cases where such a procedure is not authorised by the Directives, namely:

- if a contractor fails to comply with his contractual obligations and must be replaced;
- in the case of supplementary contracts following an initial works supervision contract.

Evidence of tenderers' compliance with the law

The Code's provisions on the methods available to tenderers from other Member States to show that they have lawfully complied with obligations with regard to tax and social contributions do not comply with European law either. According to the Directives, tenderers from other Member States must have the option of providing such evidence by alternative means (e.g. sworn statement) to those used in France. At the moment, France allows this option to firms established in non-member countries but not to those established in the European Union.

Minimum number of participants in restricted procedures

The Code's provisions on the minimum number of participants to be invited in connection with a restricted procedure do not comply with the public procurement Directives, which state that the number must be at least five.

Prior information and variants

The Code's provisions on prior information and variants reveal incorrect transposition of the provisions contained in the public procurement Directives. According to the Directives, the awarding authorities in fact have the option of shortening the normal time laid down by the Directives between the publication of a notice and the receipt of bids. But this requires, among other things, that the following condition be met: the same concrete information contained in the notice must already have appeared in the prior information notice. This condition is not required by the French legislation.

In addition, with regard to variants, the code's provisions do not include the obligation contained in the Community public procurement Directives whereby awarding authorities must state in the notice if variants are not authorised.

Background

The Commission sent France last March a letter of formal notice concerning the compliance of several provisions in the new French public procurement code with Community law. The French authorities replied in July and contested the Commission's interpretation.

After considering the arguments, the Commission decided to issue a reasoned opinion. The Commission reiterates its arguments to the effect that several articles in the French public procurement Code do not comply either with the obligations laid down by the Community public procurement Directives or with the rules of the EC Treaty (Article 49).

A proposal for a revised legislative package on public contracts, presented by the Commission, is currently being considered by the European Parliament and the Council (see IP/02/1391). The aim of the proposal is to modernise and simplify current legislation without amending the basic principles applying to aspects of the French legislation which in the Commission's view do not comply with European law.

The latest information on infringement proceedings against the Member States may be found at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/02/1154

Brussels, 25 July 2002

Public procurement: the Commission is initiating infringement proceedings against Spain over a concession on the A6 motorway

The Commission has decided to ask Spain formally to amend the granting of an administrative concession for the construction, maintenance and exploitation of two connections of the A6 motorway with Segovia and Ávila, and for the maintenance and exploitation of the Villalba-Adanero section of the same motorway. The concession awarded contains major features which did not appear in the relevant call for tenders. The formal request is in the form of a reasoned opinion, the second stage in the infringement procedure pursuant to Article 226 of the Treaty. Spain has two months after receipt of the reasoned opinion to provide a response. If there is no response, or it is unsatisfactory, the Commission may decide to refer the case to the European Court of Justice.

The call for tenders related exclusively to the work and services set out above. However, when the concession was awarded, a further package of infrastructure works for a sum more or less equivalent to that of the work on the two sections which were the subject of the call for tenders was also awarded.

This additional package was not provided for in the concession notice or the administrative specifications. The extra infrastructure works concern, in particular, the construction of a new reversible lane (including a new tunnel) between San Rafael and El Valle de los Caídos, the construction of new lanes on two other sections - one of them toll-free - and the construction of a new tollgate area, as well as other works.

Subsequent to the despatch of a letter of formal notice from the Commission (the first stage in infringement proceedings), the Spanish authorities replied in a letter of 27 June 2001, in which they affirmed, in particular, that the changes made when awarding the concession were based on two clauses in the specifications which lay down that tenderers must indicate in their bids the measures to be taken for the overall management of the traffic in the area concerned by the construction of the new stretches.

The Commission, however, considers that the aforementioned clauses cannot themselves allow a substantial change in the subject of the concession - particularly as these clauses always refer to the area concerned by the construction of the two new sections. What is more, nothing in the specifications led one to conclude that tenderers could submit proposals relating to work other than the two sections referred to.

Potential tenderers could have thus been led not to submit bids, and the principles of transparency and equality were infringed. The Commission has therefore decided to send a reasoned opinion.

Information on current infringement proceedings against all Member States is available on the Europa website at:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

IP/01/1364

Brussels, 4th October 2001

Public procurement: Commission pursues infringement proceedings against Italy and Greece

The European Commission has decided to send formal requests to Italy and Greece to comply with Community legislation on open and competitive public procurement. Both countries have failed to ensure the proper application of the Directive on public procurement of services (92/50/EEC). The Italian contract concerns a computerised accounting system in the public health sector in Frosinone, and the Greek contract an urban development programme for the city of Serres. In both cases, the procurement authorities failed to publish calls for tender in the Official Journal of the European Communities. The formal requests take the form of so-called "reasoned opinions" (second stage of the infringement procedure under Article 226 of the EC Treaty). In the absence of a satisfactory response on the part of the Member States concerned within two months from receipt of the reasoned opinion, the Commission may decide to refer the cases to the Court of Justice.

Italy - public health services in Frosinone

The case against Italy concerns the procedures followed for the procurement of public service contracts to set up and manage a computerised accounting system for'Azienda Sanitaria Locale', an administrative body charged with the management of the public health service in Frosinone, Italy. Although the total value of the project exceeded the threshold value of the Directive (€200,000), the authority did not publish any call for tender in the Official Journal of the European Communities. While individual parts of the contract were lower than the threshold value, the Commission considers that it was against the rules of the Directive to split the project in this way.

Greece - improvement programme for the city of Serres

The case in Greece concerns the award by the Municipality of Serres, without a prior call for tenders, of a contract for the "Urban Improvement" of the city. Normally a contract for urban development has to be tendered out in accordance with the rules of the services procurement Directive. However, the detailed rules of the Directive do not apply to the award of contracts that qualify as "Research and Development" contracts. Greece maintains that the contract in was indeed for R&D, the Commission considers that the contract constitutes a specialised and innovative urbanistic study that should have been awarded through an appropriate call for tenders.

IP/01/1271

Brussels, 17th September 2001

Public procurement: Standard forms to improve contract notices

The European Commission has adopted a Directive imposing, from 1st May 2002, the use of standard forms in contract notices published in the EU's Official Journal in accordance with the EU's Directives requiring open and competitive public procurement procedures. The mandatory use of these forms will improve the quality of published notices, thus favouring openness, efficiency and transparency, and facilitate electronic procurement. In particular, use of these forms will make it easier for potential suppliers to use automatic search tools to find procurement notices of most interest and relevance to them. Moreover, for purchasing entities, the standard forms will simplify and cut the cost of compliance with EU procurement rules. European public procurement markets are together worth more than €1,000 billion every year across the EU.

Internal Market Commissioner Frits Bolkestein said "This is a practical measure that will help both purchasers and potential suppliers, thereby improving the efficiency of European public procurement markets".

The EU's public procurement Directives require open, transparent and competitive procedures to be followed by contracting entities and authorities for the procurement of goods and services and construction works. Notices concerning contracts falling within the scope of the Directives must be published in the Official Journal of the European Communities. To this end, the Directives include "model notices". As things stand at present, however, notices are frequently incomplete and contain errors.

Moreover, there is a need to adapt the model notices to take account of technical progress, particularly the possibility of using electronic means for sending the notices to the Official Journal of the European Communities as developed and tested in the framework of the Commission's project to promote public procurement using electronic means (Système d'Information sur les Marchés Publics - SIMAP). This measure will indeed facilitate the development of electronic procurement, within the framework of the *e*-Europe initiative.

The SIMAP on-line notification system, already operational and available to all potential contracting authorities, offers the possibility of taking full advantage of the standard forms for drafting, validating and despatching notices for publication in the Official Journal to the EU's Publications Office. The compulsory use of the forms will help to ensure interoperability of the electronic applications used or being developed in Europe.

Background

A first voluntary standardisation of the data which has to be published, applying only to supplies and works contracts, was introduced by a Commission Recommendation (91/561/CEE) adopted on 24 October 1991 and a Communication of 30 December 1992. The Commission recommended the optional use of some “standard models” of contract notices for supplies and works contracts.

In a second phase, standard forms have been designed and developed in close co-operation with Member States since 1994. The Commission has adopted this new Directive imposing the use of standard forms using powers delegated to it by the public procurement Directives for revising, inter alia, “the conditions for the drawing up, transmission, receipt, translation, collection and distribution of the notices”. The Directive has already been endorsed by two committees comprising Member State representatives, namely the Advisory Committee for Public Contracts and the Advisory Committee on Telecommunications Procurement.

The standard forms include all the provisions applicable to the content of notices under Community law and their substitution for the current model notices will not modify in any way the information contained in the notices. Standard forms contain, in addition to the headings which strictly correspond to the applicable provisions of the public procurement Directives as lastly modified by the GPA (Government Procurement Agreement signed within the framework of the World Trade Organisation - WTO), mandatory headings derived from the regulations on Community funds.

The full text of the Commission Directive, including the standard forms, is available on the SIMAP website at: http://simap.eu.int.

IP/01/1152

Brussels, 31st July 2001

Public procurement – Commission pursues infringement proceedings against Spain, France, Germany, Italy and Austria

The European Commission has decided to refer Spain to the EU's Court of Justice. The case against Spain concerns incorrect implementation of the Directives on public supply and works contracts (93/36/EEC & 93/37/EEC). The Commission has also decided to send formal requests to Germany, France, Italy and Austria to ensure the correct application of EU public procurement rules. The cases concern waste treatment in the Donau Wald area (Germany), a sewage plant in Le Mans (France), planning of school buildings in Genoa (Italy), the supply of operating tables for Ivrea Hospital (Italy) and the incorrect implementation of the remedies Directives (Austria). These formal requests take the form of so-called 'reasoned opinions', the second stage of infringement proceedings under Article 226 of the EC Treaty. In the absence of satisfactory replies from these Member States within two months following receipt of the reasoned opinions, the Commission may decide to refer the cases to the European Court of Justice. In addition, the Commission has decided to send two requests for information to France in the form of letters of formal notice, the first stage of Article 226 infringement proceedings. These two cases concern management contracts for public works and the terms and conditions for concluding local urban development agreements

Spain – award procedures for public supply contracts

The Commission has decided to refer Spain to the Court of Justice concerning the incorrect implementation into Spanish law of Directives 93/36/EEC and 93/37/EEC, concerning the award of supply and works contracts. Spanish law '13/1995' ("*Contratos de las Administraciones Públicas")* implements into Spanish law the public procurement Directives on supply contracts (93/36/EEC), works contracts , (93/37/EEC) and service contracts (92/50/EEC) (). However, the Commission considers that this law, which has since been modified and recast (12 May 2000), includes some aspects which are incompatible with European Union law, in particular with regard to the notion of a "body governed by public law", as used in the EU's public procurement Directives.

Under the aforementioned Spanish law, private law companies would, under no circumstances, be subject to the public procurement rules (except for the principles of publicity and competition), even if they satisfied the definition of a "body governed by public law" contained in the Directives (in particular the requirement to have been created to pursue activities in the public interest other than those of an industrial or commercial nature). The Commission also objects to the intended scope of application of the law (collaboration agreements are excluded), two of the conditions which must be met before a negotiated procedure without prior publication and prior information notices can be used.

Germany – waste treatment in Donau Wald

In February 1998 the City of Munich won a public contract for the treatment of waste in the Donau Wald area of Bavaria, following submission of a successful bid to a public call for tender. In carrying out this contract, however, the City of Munich decided not to transport the waste itself but to award a contract for this service to a private company for a period of 25 years without a public call for tender. As a contracting authority in terms of EC public procurement law, the City of Munich was obliged to put this service out to tender. Since the City of Munich failed to publish this contract, there was no open European wide competition for this public service contract. The Federal Government has acknowledged the infringement but, despite this, the City of Munich continues to operate the contract and exclude further competition.

France - Le Mans sewage plant

Following irregularities in the preparation of several calls for tender launched by the local authority of Le Mans, the total value of which is close to €2 million, the Commission will send a reasoned opinion to the French Authorities. These calls for tender concerned the provision of certain services at the *Chauvinière* sewage treatment plant. During the first call for tender the contracting authority did not respect the obligation, under the services procurement Directive (92/50/EEC,Article 27§2), to ensure real competition in the tendering procedure. It accepted only three candidates for consideration, whilst the Directive and relevant Court case law require that the number of candidates cannot be less than five. Moreover, a second contract was awarded to the holder of the first above-mentioned contract, without application of a competitive procedure or prior publication, thereby violating the rules of the same Directive. Lastly, a contract notice concerning a third call for tenders indicates confusion on the part of the contracting authority between the selection criteria and criteria for awarding the contract. This contract was also awarded to the existing tender holder.

Italy - school buildings in Genoa

The municipality of Genoa failed to publish at EU level an invitation to tender for the preliminary, definitive and executive planning of works to be carried out to school buildings. Under the Directive on public procurement of services (92/50/EEC), tenders for public services worth more than €200,000 must be published in the EU's Official Journal.

The Italian authorities argue that in this particular case, the Directive is not applicable because the tender concerns various tasks which are independent from one another and do not exceed the threshold of €200,000 on an individual basis.

The Commission does not accept this argument because the Directive specifically foresees that services cannot be divided with the intention of avoiding application of the threshold and lays down that, in case of contracts divided into lots, the values of the lots have to be cumulated when calculating this value. Consequently, and considering the homogeneity of the services to be provided and the unity of the tendering procedure, the Commission considers that the invitation to tender should nevertheless have been published at EU level.

Italy – operating tables for Ivrea Hospital

This case concerns a decision to award a contract for the supply of operating tables to the hospital of Ivrea under a negotiated procedure without first publishing an invitation to tender. The Commission believes that the negotiated procedure used, whereby the contracting authorities consulted contractors of their choice and negotiated the terms of the contract with one or more of them, was not justified in this case according to the rules on the public procurement of supplies under Directive 93/36/EEC. The Directive establishes strict rules to ensure that public contracts are awarded only after an open and transparent tender process. The Directive does provide for negotiated procedures without prior publication of a notice, but only in very specific circumstances and in this case the Commission does not believe that such a procedure was justified.

Austria – incorrect implementation of remedies Directives

The Commission believes that Austria has incorrectly implemented the so-called Remedies Directives, 89/665/EEC and 92/13/EEC, particularly with regard to the decision of the EU's Court of Justice in the "Alcatel" case (28 October 1999, ECR 1999, I-7671). These Directives require Member States to put in place the means to ensure rapid and effective redress for suppliers to prevent and correct possible violations of European Union rules on public procurement.

The Commission's services carried out an extensive analysis of the review procedures and the instruments that were set up to guarantee an effective, efficient and independent review system of the national procurement decisions. It concluded that a number of provisions of the Remedies Directives 89/665/EEC and 92/13/EEC were wrongly implemented or not implemented into the nine procurement laws of the Austrian Länder. For example, the procurement law of the Tirol and Burgenland Land fails to provide, in the case of a review procedure, that the contracting authority is not authorised to award the contract during a certain period. If, on the other hand, the authority awards a contract before the review procedure has been completed, the contract becomes null and void.

The Commission criticises Austria for the fact that the decision of the Court of Justice in the "Alcatel" case has not been implemented by all Austrian Länder. Salzburg, Steiermark, Kärnten, Niederösterreich and Tirol have not yet adopted a provision that guarantees that the award decision can be the subject of a review procedure before the competent review bodies.

France - management contracts for public works

The Commission is concerned that France may have failed to ensure that competitive tendering procedures are applied to management contracts for public works. The French law of 12 July 1985, concerning the management and supervision of public works and its relations to legislation on the management and supervision of private construction work is frequently applied to the construction of large scale works. The law stipulates that the assignment of management and construction supervision is exclusively restricted to legal entities under French law.
The Commission disagrees and considers that these tasks constitute services contracts within the meaning of Directive 92/50/EEC and therefore have to be assigned in accordance with the publicity and competition obligations set out in this Directive. The Commission has therefore sent the French authorities a formal request for information on this issue.

France – town planning rules

In response to a formal complaint, the Commission has decided to send a formal request for information to the French Authorities concerning the terms and conditions for concluding local development agreements ("*conventions d'aménagement*"), as set out in article L300-4 of the French Town Planning Code. France uses these agreements for all major local development projects such as implementing urban development projects, the definition of local housing policy, or for the organisation and stimulation of local economic development. But the local development agreement, as it currently exists in French law, provides no framework for the procedure of granting these agreements and exempts this type of agreement from any publicity or competition requirements, both at the national level and at the European Union level.

The Commission considers that these agreements may fall within the European Union definition of a "concession" in which case they should be subject either to the relevant provisions of the works procurement Directive (93/37/EEC) or, when they are concerned with provision of services, to the relevant provisions of the EC Treaty (in particular Article 49). Moreover, when a local authority decides to apply a local development agreement to an urban planning or land development project and decides to assume the economic risks associated with the project by guaranteeing to cover any losses, the Commission considers that the agreement may have to be classified under European Union law as a public works contract and therefore subject to the relevant provisions of Directive 93/37/EEC.

Limiting the work on preparatory studies (provision of services), prior to drawing up a local development agreement, to a restricted category of public or semi-public bodies under French law, without ensuring competition, appears to be contrary to the rules of the services procurement Directive (92/50/EEC), as well as the principle of freedom to provide services as described in Article 49 of the EC Treaty.

The Commission clarified how European Union law should be applied to concessions in an interpretative Communication of 14 April 2000 (see IP/00/436).

IP/01/1140

Brussels, 31th July 2001

Public procurement – Commission decides to request France to respect Court ruling on redress Directive

The European Commission has decided to send a formal request to France to conform to a May 1999 ruling by the Court that it should implement fully and correctly the Directive on redress procedures for suppliers that feel they have been unfairly excluded from a procurement process in the water, energy, transport and telecommunications sectors. The request takes the form of a so-called "reasoned opinion" under infringement procedures for failure to respect a Court ruling (Article 228). In the absence of a satisfactory response within two months to the reasoned opinion, the Commission may decide to refer France back to the Court and to request the Court to impose daily fines on France until it does implement the Directive properly.

Directive 92/13/EEC requires Member States to put in place the means to ensure rapid and effective redress for suppliers to prevent and correct possible violations of Community rules on public procurement in the water, energy, transport and telecommunications sectors. It was due to be implemented no later than 1 January 1993.

France has still not complied with a 19 May 1999 judgement of the Court of Justice (Case C-225/97) concerning incomplete implementation into French law of Directive 92/13/EEC. In its ruling, the Court condemned France for its incomplete implementation of the above-mentioned Directive and, more particularly, the absence of national measures to implement Chapters 2 and 4 of the Directive relating to the certification and conciliation mechanisms. Since the Commission has received no notification from France that it is has now conformed to the judgement of the Court, the Commission has decided to send a reasoned opinion on the basis of Article 228 of the EC Treaty.

IP/01/511

Brussels, 5 April 2001

Public procurement: Commission pursues infringement proceedings against Italy, Greece and Germany

The European Commission has decided to refer Italy to the Court of Justice concerning the incorrect implementation of the Directive on public procurement of services (92/50/EEC). The Commission has also decided to send four reasoned opinions (second stage of the infringement procedure laid down in Article 226 of the EC Treaty) to Italy, Greece and Germany for non-compliance with Community law on public procurement concerning the printing of documents for the Municipality of Rome, the repair and cleaning of electricity generating stations in the north of Greece, the collection of household refuse in the municipality of Coesfeld in Germany and the purchase of rubber protection pads for the tracks of military vehicles by the German Federal Office for military technology. In the absence of a satisfactory response by the Member State concerned in the two months following notification of the reasoned opinion, the Commission may refer the matter to the Court of Justice.

Italy - public procurement of architectural services

The Commission has decided to refer Italy to the Court of Justice for its incorrect implementation of Directive 92/50/EEC on public procurement of services. The Commission has raised three objections in relation to a decree of 27 February 1997 (the "Karrer decree") establishing provisions for determining the economically most advantageous tender for the award of architectural and engineering services and other technical services. Firstly, and contrary to the requirement of the Directive, the Commission was not notified about the decree. Secondly, the criteria for awarding a contract indicated in the decree include criteria that should be considered at the previous stage in the procedure, i.e. the selection of service providers. This is contrary to the provisions of the Directive. Thirdly, the decree allows the committee responsible for assessing tenders to define subsidiary award criteria after the specifications have been prepared; this infringes not only the provisions of the Directive but also the principle of transparency that must be observed throughout the procedure.

Italy - printing of documents for the Municipality of Rome

The Commission has decided to send Italy a reasoned opinion for infringing the freedom to provide services in the European Union and Directive 92/50/EEC on public procurement services. The matter refers to a contract awarded by the Municipality of Rome for the printing of publications.

The Commission considers that the procedure followed by the Municipality of Rome is tainted by several infringements of Community law. On the one hand, the notice published in the Official Journal of the European Communities contained inadequate information and referred to a notice previously published in the Italian Official Journal, which is contrary to the Directive in question.

In addition, the notice published in the Italian Official Journal required documents issued by a foreign authority and submitted for admittance to the procedure to be legalised by the Italian authorities; this is an infringement of the principle of mutual recognition. Lastly, the invitation to tender and the specifications required the successful tenderer to establish an operational structure in the Lazio Region, which is an infringement of the freedom to provide services.

Greece - repair and cleaning of electricity generating stations

The Commission has decided to send Greece a reasoned opinion concerning the signing by the DEH public power corporation of framework contracts for the repair, renovation and cleaning of steam-powered electricity generating stations in the north of Greece. The Commission considers that the conditions of the invitation that the DEH sent to firms that might be interested in the framework contracts were such that they restricted the contract to local firms and were also discriminatory and contrary to the freedom to provide services.

Germany - collection of household refuse in Coesfeld

This case, which was brought to the Commission's attention by a complaint, concerns the contracts for the collection of household refuse in several municipalities in the district of Coesfeld (North Rhine-Westphalia). These contracts were awarded to local firms without an invitation to tender at Community level by means of a notice in the Official Journal of the European Communities, as required by Directive 92/50/EEC on public procurement of services. In spite of an earlier letter of formal notice that the Commission sent to the German authorities, these municipalities are still applying the contracts that were signed after being awarded in infringement of Community law on public procurement.

Germany - rubber protection pads for military vehicles

The German Federal Office for military technology and public contracts regularly awards supply contracts for the purchase of rubber protection pads designed to reduce the noise produced by tracked military vehicles (e.g. tanks) and to prevent damage to roads to a group of suppliers without an invitation to tender at Community level by means of publication of a notice in the Official Journal of the European Communities. The Federal Office, which obtains in this way about a million pads a year, refers to Article 296 of the EC Treaty, which states that the provisions of the Treaty do not apply to the production of or trade in arms, munitions and war material. The Office concludes from this that these contracts are not subject to the Community Directives on public procurement. The Commission's view is that since these pads are used in peacetime for non-military purposes they cannot be regarded as war material. These contracts are thus subject to the Community rules on public procurement.

IP/01/299

Brussels, 2nd March 2001

Public procurement: Commission pursues infringement cases against UK, Germany, Belgium, Spain and Ireland

The European Commission has decided to refer the United Kingdom to the Court of Justice for failing to implement correctly two EU public procurement Directives concerning the water, energy, transport and telecommunications sectors. The Commission has also decided to send a formal request to Spain (in the form of a so-called reasoned opinion, the second stage of infringement procedures under Article 226 of the EC Treaty) to bring its national legislation into line with the requirements of the public procurement Directives concerning public works and supplies. Finally, the Commission has decided to send formal requests (again in the form of reasoned opinions) to Germany, Belgium and Ireland to ensure that EU Directives on open and competitive public procurement are complied with for the award of contracts concerning the construction of a sewage plant in Mainburg (Germany), involving public works contractors not registered in Belgium, an architectural competition in Brussels, housing projects on the site of a former military hospital in Brussels and the construction of a civic centre in Blanchardstown (Ireland). Member States have two months after receipt of a reasoned opinion to provide a response. If there is no response, or it is unsatisfactory, the Commission may decide to refer the case to the European Court of Justice.

United Kingdom - non-implementation of the 'Utilities Directive'

The European Commission has decided to refer the United Kingdom to the European Court of Justice for failure to implement the provisions of Directive 98/4/EC. Directive 98/4/EC of 16 February 1998 amends Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ("the Utilities Directive") so as to take account of the Government Procurement Agreement concluded during the multilateral Uruguay Round Negotiations (1986-1994). The Directive requires Member States to implement its provisions into national law no later than 16 February 1999.

United Kingdom - non-implementation of the 'Utilities Remedies Directive'

The Commission has decided to refer the United Kingdom to the Court for failure to implement correctly into national law certain provisions of Directive 92/13/EEC, which requires Member States to ensure that companies can obtain redress if they consider that they have been illegally excluded from a public procurement contract in the so-called 'utilities sectors' (i.e. water, energy, transport and telecommunications).

In particular, the Commission considers that the UK has failed to ensure that a so-called 'attestation system' is available to entities awarding procurement contracts in the 'utilities sectors'. The purpose of this system is to allow utilities covered by the Directive to receive an attestation confirming, where appropriate, that their procedures and practices are in conformity with Community law covering the award of contracts by companies operating in the 'utilities sectors'.

In its ruling of 19 May 1999 (C-225/97, Commission v France), the Court of Justice confirmed that implementation by the Member States of the Directive's provisions on attestation is mandatory. There is therefore an obligation on all Member States to take appropriate measures to implement the Directive's provisions on attestation into national law. Under Article 13 of the Directive, Member States should have transposed the Directive's provisions on attestation into national law by 1 January 1993.

Spain – implementation of the public works and supplies Directives

The European Commission has requested Spain to implement correctly into Spanish law the provisions of the Directives on the public procurement of supplies and public works (93/36/EEC and 93/37/EEC respectively). Although Spain amended its legislation implementing the two Directives (Law 13/95) with Law 53/99, the Commission still considers that the definition of bodies governed by public law is incompatible with the Directives so that a number of entities that should be subject to the Directives' requirements are not under Spanish law.

Germany – City of Mainburg

The problem concerns a procurement procedure for engineering design services for the renovation of a sewage plant in the City of Mainburg (Hallertau). Under the public procurement of services Directive (92/50/EEC), a contracting authority may, exceptionally, award a public service contract by the so-called negotiated procedure with prior publication when the nature of the service required is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the most economically advantageous tender, as is the case for open or restricted tenders. The burden of proof to justify the award of a contract under a negotiated procedure lies with the contracting party and in this case the Commission does not believe the German authorities have proved the existence of exceptional circumstances. The use of negotiated procedures for the award of engineering services in Germany is widespread so that this case has broader implications.

Belgium – recognition of public works contractors

There is a horizontal problem in Belgium concerning the recognition of public works contractors certified in other Member States. The Directive on public procurement of works (93/37/EEC) provides that a contractor who is registered in the official list of recognised contractors in one Member State should be presumed to be capable of carrying out that same work in another Member State.

However, Belgian legislation (arrêté royal of 26.9.91 and arrêté ministeriel of 27.9.98) provides that a public works contract may only be awarded to a contractor not on a list of recognised contractors in Belgium once the competent Minister has decided, on the request of the contract awarder and on advice of a special commission, that all conditions for recognition or the requirements for equivalence of recognition in another Member State are fulfilled. Since the legislation does not provide for a standstill of the procedure pending the decision on the recognition of each candidate bidder not certified in Belgium and since this recognition procedure is lengthy, it can encourage a contracting authority to choose a candidate that is already registered on the Belgian official list of recognised contractors and thus discriminate against non-recognised contractors or contractors who are registered on the official list of recognised contractors in other Member States. The Commission considers that this practice in Belgium not only violates the public works Directive but also EC Treaty rules on the freedom to provide services (Article 49). Previous Belgian legislation on certification of contractors was already condemned by the Court of Justice on 9 July 1987 (joined cases 27/86, 28/86 and 29/86).

Belgium – architectural competition

The problem concerns an international architectural competition for the design of the area of Brussels where many of the EU institutions are situated. The Commission considers the procedures laid down by the Directive on procurement of services (92/50/EEC) were not complied with. In particular, the Commission considers that the jury assessing the bids violated the Directive's rules concerning independence, the bidders' identity was revealed and the weighting of the criteria for evaluating the bids was not respected.

Belgium – housing projects in Brussels

The case concerns a series of housing construction projects for the 'Société de développement régional de Bruxelles' (SDRB) on the site of a former military hospital in the Ixelles commune. The Commission considers that the rules laid down in the EU Directive on public procurement of works were not respected. For example, the contract notice was misleading as regards the availability of subsidies.

Ireland - civic centre in Blanchardstown

The problem concerns the award of contracts for the construction of a civic centre in Blanchardstown in breach of the Directive on public procurement of works (93/37/EEC). In particular, the contracting authority (Fingal County Council) used a number of selection criteria which are not among the authorised criteria listed in the Directive (Article 27).

IP/00/881

Brussels, 28 July 2000

Public procurement: Commission refers Austria, France and Germany to Court for failure to implement Directives

The European Commission has decided to refer Austria, France and Germany to the European Court of Justice for failing to notify the Commission of measures taken to implement into national law amendments to the public procurement Directives to take account of the Government Procurement Agreement reached in the framework of the World Trade Organisation.

Austria

Austria has failed to notify all necessary measures to implement Directive 97/52/CEE, which amends the Directives on public procurement of works, supplies and services to take account of the Government Procurement Agreement (GPA) reached in the framework of the World Trade Organisation. The implementation deadline for the Directive was 13th October 1998. Nor has Austria notified all necessary measures to implement Directive 98/4/EC, which amends the rules for public procurement in the water, energy, transport and telecommunications sectors, also to take account of the GPA. The implementation deadline for the Directive was 16th February 1999. The Austrian authorities notified the Commission in June 1999 that both Directives had been implemented at federal level. In August of the same year, further notifications followed concerning implementation of the two Directives in the Land Vienna, in January 2000 for the Tyrol and in June 2000 for Carinthia. However, despite assurances from the Austrian authorities of plans to implement both Directives in the remaining Austrian regions, no relevant legislation has been notified to the Commission.

Germany and France

In the case of Germany and France, the Commission has decided to refer both of them to the European Court of Justice for failure to notify measures to implement Directive 98/4/EC. This Directive amends the rules for public procurement in the water, energy, transport and telecommunications sectors to take account of the GPA.

IP/00/869

Brussels, 27 July 2000

Commission acts against UK, Germany and Belgium on public procurement rules

The European Commission has decided to send "reasoned opinions" to the UK and to Germany and to refer Belgium to the European Court of Justice and incorrect application of the EU public procurement Directives. They lay down strict rules for the award of public contracts, including the obligation to follow open and competitive tendering procedures. In Belgium, the Flemish Regional Executive failed to publish an invitation to tender for an aerial survey of the Belgian coast. In two separate UK cases, contracts have been awarded by negotiated procedures in circumstances where the Commission considers that the conditions required by the Directives were not met. The German case concerns a contract awarded by the Region of Baden Württemberg for the construction of a police station complex in Singen without the publication at the EU level of an invitation to tender.

United Kingdom – provision of community facilities in Ipswich

The Commission has decided to send a reasoned opinion to the United Kingdom concerning a decision to award a contract for the provision of infrastructure, community and other social facilities for a new neighbourhood in the Borough of Ipswich, under a negotiated procedure. The Commission believes that a negotiated procedure, whereby the contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them, was not justified in this case according to the rules on the public procurement of construction works (Directive 93/37/EEC). The Directive establishes strict rules to ensure that public contracts are awarded only after an open and transparent tender process. The Directive does provide for negotiated procedures but only in very specific circumstances and in this case the Commission does not believe the procedure was justified.

United Kingdom – re-development of Pimlico School, London

The Commission has decided to send a reasoned opinion to the United Kingdom concerning the award of a contract to re-develop Pimlico School in Westminster, London. As in the case above, the contracting authorities used a negotiated procedure and the Commission, as in the case above, does not believe that this procedure was justified by the circumstances. The Commission therefore considers that the UK has infringed the terms of the procurement of construction works Directive.

Germany – police station complex in Singen, Baden-Württemberg

Following a complaint, the Commission has decided to send a reasoned opinion to Germany concerning the failure of the Land of Baden-Württemberg to publish at the EU level an invitation to tender for the construction of a police station complex in Singen. The works contract was awarded to a company that is 100% owned by the City of Singen. This company is to carry out the construction work on a site which the company owns itself, but according to precise instructions from the Land. The company will then sell the completed buildings to the Land.

The Directive on public procurement of construction works (93/37/EEC) does not apply to the simple acquisition by a public contracting authority of an existing building. However, since the building in question is being constructed in order to meet the requirements of the public contracting authority and given that the authority has already committed itself in writing to acquiring the building when it is completed, the Commission considers that this constitutes a works contract, and as such falls within the scope of the works procurement Directive and should have been put out to tender.

Belgium – aerial surveys

The Commission has decided to refer Belgium to the European Court of Justice for failure to apply the rules relating to the public procurement of services as laid down in Directive 92/50/CEE. Under this Directive, tenders for public services worth more than 200,000 euros must be published in the EU's Official Journal. But in this case, the contracting authority, the Flemish Regional Executive, did not publish a tender for a contract to conduct aerial surveys of the Belgian coast, although it was worth considerably more than the 200,000 euro threshold. Instead, the contract in question was directly negotiated with a Flemish company for a period of six years and subsequently extended to nine years.

The Belgian authorities argue that in this particular case, the Directive is not applicable because the task is highly specific and because national security is at stake, which means that there is only one company to which it can be awarded. They also maintain that the provision of aerial photography services are excluded from the obligation to publish a tender. The Commission does not accept these arguments because, as long as a contractor agrees to be bound by professional confidentiality, the military certificate necessary for aerial photographic observation of the coast may be awarded to a non-Belgian company. The Belgian authorities have failed to convince the Commission that there is only one company capable of doing the job. Moreover, in the Commission's view, the aerial photographic services required fall under the category of "surface surveillance services and the provision of geographic maps" that, according to the Directive, should be subject to open and competitive tender procedures.

IP/00/238

Brussels, 9 March 2000

Public procurement: infringement procedures against Luxembourg, United Kingdom, France and Spain

The European Commission has decided to continue seven separate infringement procedures against France, the United Kingdom, Luxembourg and Spain for failure to implement or incorrect application of EU rules on open and competitive public procurement procedures. The infringements concern failure to implement Directives on public procurement in the water, energy, transport and communications sectors (France and UK) and on procurement of services, supplies and public works (France and Luxembourg), construction work on an experimental penitentiary centre in Segovia (Spain), standard contract documents used in Spain which violate the works procurement Directive and procedures followed to select a firm to construct a sewage treatment plant at Maxéville near Nancy in France. In the case of the reasoned opinions, the second stage of the infringement procedure laid down in Article 226 of the Treaty, if the Member State concerned does not respond satisfactorily within two months of receipt, the Commission may decide to bring the case before the Court of Justice.

France/UK – Procurement in the water, energy, transport and telecommunications sectors

The Commission has decided to take France to the European Court of Justice and to send a reasoned opinion to the UK because neither country has implemented Directive 98/4/CE. This legislation adapts existing Directives relating to public procurement in the water, energy, transport and communications sectors to bring them into line with international agreements on public procurement (the Government Procurement Agreement - GPA) concluded within the framework of the World Trade Organisation. The deadline for implementation of this Directive was 16 February 1999.

France/Luxembourg – Procurement of services, supplies and works

The Commission has decided to take France to the European Court of Justice and to send a reasoned opinion to Luxembourg for failing to implement into national law Directive 97/52/EEC of 13 October 1997. This legislation amends Directives 92/50/EEC, 93/36/EEC, and 93/37/EEC, which concern respectively the procurement of services, supplies and works, so as to adapt them to the provisions of the Government Procurement Agreement - GPA) concluded within the framework of the World Trade Organisation. The deadline for implementation of the Directive was 13 October 1998.

Spain - Construction work at Segovia educational penitentiary centre

The Commission has referred Spain case to the Court of Justice concerning incorrect procedures followed during selection of a firm to carry out construction work at an experimental penitentiary centre in Segovia. In particular, the call for tenders was published in the national press but not in the EC Official Journal and violated the Directive on public works (93/37/EEC). The Spanish authorities maintain that the Directive does not apply to the "Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios" (S.E.I.E.P.S.A.) on the grounds that it is a public commercial company governed by private law. However, the Commission considers that S.E.I.E.P.S.A. is a contracting authority within the meaning of the Directive, in particular because the company has been established for the specific purpose of meeting public interest needs, and so is not a conventional industrial or commercial firm.

Spain - Tendering procedures for public works contracts

The Commission has decided to send a reasoned opinion to Spain in relation to the tendering procedures used for public works contracts. The problem concerns the standard contract documents drawn up by the Spanish authorities for use by procurement bodies which in several key respects do not follow the rules (e.g. as regards selection criteria) that are laid down in the Directive on works procurement (93/37/EEC).

France – Construction of the Maxéville/Nancy sewage treatment plant

The Commission has decided to refer France to the Court concerning the procedures followed by the greater Nancy area authorities to select a firm to construct a sewage treatment plant at Maxéville. The Commission considers that the French authorities have violated the Directive on procurement of public works (93/37/EEC) and EC Treaty rules on the freedom to provide services (Article 49, ex 59). The contract was attributed following a restricted procedure (i.e. a limited number of firms were invited to tender). However, contrary to the requirements of the Directive, the contracting entity did not publish beforehand an indicative notice of the contracts it was intending to award. Moreover, in the call for expressions of interest, the contracting authority specified that those submitting bids had to be registered with the French national order of architects, thereby discriminating against potential bids from suppliers established in other Member States. This discrimination violates not only the public works Directive, but also EC Treaty rules on the freedom to provide services. Another problem with the procedures followed was that only four firms were invited to tender, whereas the Directive requires a minimum number of five bidders so as to try to ensure genuine competition between bidders.

IP/00/23

Brussels, 13 January 2000

Public procurement: Commission pursues infringement procedures against Germany, Austria and Italy

The European Commission is pursuing eleven separate infringement procedures against Germany, Austria and Italy for failure to respect Internal Market rules requiring Member States to ensure public procurement contracts are awarded under open and competitive conditions. It has decided to refer Germany and Italy to the Court of Justice for failure to implement Directive 97/52/EC on public procurement of works, supplies and services, to refer Germany to the Court concerning a contract for construction of a waste disposal plant in Flörsheim and to refer Italy to the Court concerning waste processing in Lombardy. The Commission has also decided to send reasoned opinions to Germany, Austria and Italy because they have failed to implement Directive 98/4/EC on public procurement in the water, energy, transport and telecommunications sectors, to Italy concerning the supply of services to the Treasury and to Germany concerning waste disposal problems in Braunschweig and Bockhorn and supplies to the Federal Office for military technology and procurement. In the case of the reasoned opinions, the Commission may refer the cases to the Court if the Member States concerned do not give a satisfactory response within two months.

Germany and Italy – works, supplies and services Directive

The Commission has decided to refer Germany and Italy to the Court for failing to implement Directive 97/52/EC, which amends the Directives on public procurement of works, supplies and services to take account of the Government Procurement Agreement reached in the framework of the World Trade Organisation. The implementation deadline was 13th October 1998. Following receipt of a reasoned opinion in August of this year, the German authorities said they would implement the the Directive during the second half of 1999, but the Commission has still not been informed of any steps yet taken to do so. Italy has notified the Commission of national laws implementing the Directive as regards the provision of supplies but not as regards public services or public works.

Germany – Flörsheim waste disposal unit

The problem concerns the award, by the municipality of Flörsheim of a contract for planning the construction of a waste disposal unit. The contract was awarded under an accelerated procedure although the conditions specified by the Directive on public procurement of services (92/50/EC) for the use of this procedure were not fulfilled.

The Directive's requirement that the criteria for awarding the contract should be published was not respected either. The Commission does not regard the German authorities' explanations as satisfactory and so has decided to refer the case to the Court.

Italy - waste processing contracts in Lombardy

The problem concerns a law applicable in the Lombardy region (N° 21 of 1.7.93) which allows contracts for treatment works and the treatment/recycling of urban waste to be awarded to public or private bodies without open and competitive procurement procedures. The Commission considers that this procedure violates Directive 93/37/EEC, which stipulates that public works contracts must be published and put out to tender. In the absence of a satisfactory response from the Italian authorities, the Commission has decided to refer the case to the Court of Justice.

Germany, Austria and Italy - water, energy, transport and telecommunications

The Commission has decided to send reasoned opinions to Germany, Austria and Italy for failing to implement Directive 98/4/EC, which amends the Directive applying public procurement rules to the water, energy, transport and telecommunications sectors (93/38/EEC). In particular, the amendment takes account of the Government Procurement Agreement reached in the framework of the World Trade Organisation. The Directive should have been implemented into national law by 16th February 1999. To date, neither the authorities in Germany (despite notice that they intended to put implementing measures in place in the second half of 1999), Austria, nor Italy, have notified the Commission that they have done so.

Italy – technical assistance for the Treasury Ministry

The Commission has decided to send a reasoned opinion to Italy concerning a contract awarded by the Italian Treasury and Economic Planning Ministry for the provision of administrative and technical assistance to help in the drawing up of regional aid. The Commission considers that the Directive on public procurement of services (92/50/EEC) has been violated in three respects. First, the contract was awarded using an accelerated negotiated procedure whereas the conditions stipulated in the Directive for such a procedure were not fulfilled. Second, companies bidding were obliged to have a specific legal form (SA or Srl). Third, tenders more than 30% above or 25% below the average of all tenders submitted were automatically excluded from consideration.

Germany – Braunschweig waste incineration contract

The Commission has decided to send Germany a reasoned opinion concerning the procedures followed by the town of Braunschweig when it awarded a 30 year contract for waste incineration to the BKB Kohlebergwerke company. The Commission considers that these procedures were in contravention of the Directive on public procurement of services (92/50/EEC). In particular, the contract was awarded under a negotiated procedure without prior publication of a notice despite the fact that the conditions for the use of such a procedure were not fulfilled.

Germany – waste water disposal in Bockhorn

Another case where the Commission has decided to send Germany a reasoned opinion concerns a 30 year contract awarded by the town of Bockhorn to the power company EWE for wastewater disposal. The contract was awarded without any invitation to tender, in violation of the Directive on public procurement of services (92/50/EEC), which covers sewerage collection and purification. The Federal Government authorities have admitted the infringement but the contract is still in force.

Germany – supplies to the Federal Office for military procurement

The Commission has also decided to send a reasoned opinion to Germany about a contract for the supply of static converters (to transform alternating current to direct current and vice versa) to the 'Bundesamt fur Wehrtechnik und Beschaffung' (Federal Office for military technology and procurement). The Commission considers that the conditions under which the contract was awarded violated the Directive on public procurement of supplies (93/36/EEC) for two reasons. First, the contract was awarded by use of an accelerated procedure without the specific conditions foreseen by the Directive being fulfilled. Second, the contract notices specified that the static converters had to be manufactured by a specific company without allowing equivalent equipment to be offered.

The German authorities tried to justify the use of the accelerated procedure and the references to a particular supplier by the fact that the product must meet specific military requirements. However, according to the case law from the European Court of Justice, these arguments would only be justified if the German authorities could prove that a particular specified firm was the *only* supplier, rather than just the *most efficient* supplier, and that it was "absolutely essential" for the contract to be awarded to a specific supplier in order to meet the technical specifications. The Commission has not been satisfied by the arguments put forward by the German authorities so far.

Public Procurement

Studies and Reports

- European Union rules deliver big savings for taxpayers; scope for more gains (03.02.2004)
  - Commission's report on the economic effects of public procurement
  - Press release
- Eurostat
- Organisation for Economic Co-operation and Development
- World Trade Organisation/Government Procurement Agreement - Reports
- "The Single Market Review: Public Procurement" (1996)

Contacts

Last update on 11-05-2005

A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future

03/02/2004

EXECUTIVE SUMMARY

Economic reforms pay off. This working document presents evidence of the positive impact of Internal Market rules on the performance of public procurement markets over the past ten years. Indicators show positive developments in market transparency, increased cross border competition and price savings derived from the implementation of public procurement directives.

Public procurement directives have effectively increased transparency. The number of invitations to tender and contract award notices published both doubled between 1995 and 2002. However, only 16% of the estimated public procurement is published. Transparency rates vary between Member States and for different government levels and sectors.

New data suggest that previous studies may have underestimated the actual dimension of cross-border procurement. In a sample of firms involved in procurement activities, 46% carried out some type of cross-border procurement. However, direct cross-border procurement remains low, accounting for just 3% of the total number of bids submitted by the sample firms. The rate of indirect cross-border public procurement is higher, with 30% of the bids in the sample being made by foreign firms using local subsidiaries.

It is important to note that domestic firms and foreign subsidiaries have similar rates of success when bidding for contracts in the country where they are located (30 and 35% respectively). This confirms the importance in Europe of bidding for contracts through subsidiaries.

The new evidence also suggests that public procurement prices paid by public authorities are lower when the directives are applied. Although price dispersion for homogenous products remains quite large, the application of procurement rules appears to reduce prices by around 30%. Case studies of "typical" public procurement goods show that in general, the directives helped to increase intra EU competition. Import and export prices of these goods converged over time. For instance, in the case of small iron and steel rails export price dispersion dropped from around 21% in 1988-92 to 7% in 1998-2002. However further savings are still possible (for the six case studies considered, the equivalent of almost 12% of the value of intra-EU trade in these goods could still have been saved in 1998-2002).

Given the economic importance of public procurement markets the importance of these improvements is clear. In 2002 the total EU procurement market was worth €1.5 trillion or over 16% of EU GDP. Further improvements would contribute to increase efficiency in public spending and budget deficit control.

In conclusion, there is overwhelming evidence that the current directives have actively contributed to reform in the public procurement markets. Remaining concerns about the significant costs of complying with procurement rules are addressed by the new legislative package and e-procurement offers new possibilities for cost reductions. Further performance improvements will be possible if these measures are effectively implemented.

INTRODUCTION

Public authorities are significant market players as buyers of goods and services. Before the creation of the Internal Market, national, regional and local authorities favoured domestic suppliers. This was not only incompatible with the Treaty provisions requiring the creation of a single Internal Market but also had negative macro and microeconomic implications for the European economy.

- As recently recalled in the report on the quality of public finances[1], competitive public procurement practices are essential for efficiency in public spending. Competitive, transparent procurement markets help public authorities acquire cheaper, better quality goods and services at lower costs. As a result both the value of taxpayers' money and the allocation of resources are improved.

- Open, non-discriminatory and transparent procedures can also help boost the competitiveness of firms operating in public procurement markets. Only firms confronted by foreign competitors at home will be able to perform efficiently and compete successfully in foreign markets and withstand foreign competition at home.

Over the years public procurement directives have been progressively implemented[2] but the monitoring of public procurement markets presents multiple difficulties. Nevertheless, "ad hoc" studies conducted in 1996 and 1999 together with the Cardiff reports on economic reform between 1999 and 2002 presented regularly updated indicators[3].

In this working document an account of the performance of public procurement markets is given using new indicators. This new evidence suggests that legislative changes introduced in public procurement markets over the last ten years have had their intended effect in increasing transparency and competition. In particular, quantitative information is presented on areas where it has been particularly scarce in the past such as price levels and cross-border procurement activities. The purpose of this document is to analyse and investigate the impact that existing economic reforms have had on the Internal Market. The document does not put forward any political initiatives, but concentrates instead on presenting results which, as will be seen, clearly show that economic reforms work, providing significant savings for the public purse.[4]

This new information is particularly useful on the occasion of the adoption of the new legislative package up-dating, streamlining and improving the existing directives. Prompt

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[1] COM(2003) 283 final Communication from the Commission to the Council and the European Parliament - Public finances in EMU - 2003 (21.05.2003).
[2] Directives 92/50, 93/36, 93/37, 93/38 as amended by 97/52 and 98/4.
[3] Euro-Strategy consultants Application of Measurements for the Effective Functioning of the Single Market in the area of public procurement, 1999 and The Single Market Review, Sub-series III: Dismantling of Barriers, Volume II: Public Procurement, 1997 and http://europa.eu.int/comm/internal_market/en/update/economicreform/index.htm.
[4] For general policy considerations see the Internal Market strategy 2003-2006 COM(2003) 238 final and the Integrated Competitiveness strategy COM(2003) 704 final.

and appropriate implementation by Member States of the new legislative package will simplify procedures and cut administrative costs, building on the existing improvements and in turn further increasing transparency and competition and reducing costs and remaining inefficiencies in the public sector.

The document examines the expected impact of measures aimed at increasing competition in public procurement markets in their logical sequence. After a short section on the quantitative importance of public procurement in the EU, section three presents indicators showing the evolution of transparency in European procurement markets. Section four presents evidence suggesting that increased transparency has been followed by increased cross-border competition. Indirect cross-border procurement through subsidiaries appears more extensive and important than previously thought, suggesting that earlier figures on the importance of the EU's overall cross-border procurement activities were underestimated. However, more direct cross-border procurement is still possible. Section five presents evidence suggesting that, thanks to the directives on transparency and cross-border competition, public authorities are actually paying lower prices. The final section before the conclusion discusses additional dimensions of market performance including specific impacts on Small and Medium Enterprises (SMEs), environmental and social issues and transaction costs.

THE IMPORTANCE OF PUBLIC PROCUREMENT

According to Commission estimates, total public procurement amounted to €1500 billion in 2002 accounting for 16.3 % of the Union's GDP. For the last eight years this share has remained stable. The importance of total public procurement by Member State varies significantly: from 11.9% of GDP in Italy to 21.5% in the Netherlands[5].

Not all public procurement is subject to the obligations established by EU directives. Some activities (e.g. the purchase of warlike material for the defence sector) are excluded and purchases below thresholds only need to meet the general rules of the Treaty, not the publication requirements included in the directives. Estimating the percentage of total public procurement subject to publication procedures is very difficult. However, only 16% of public procurement is published (see Table 2 on page 8). Thus, transparency still needs to increase in the future in order to improve market performance in public procurement markets.

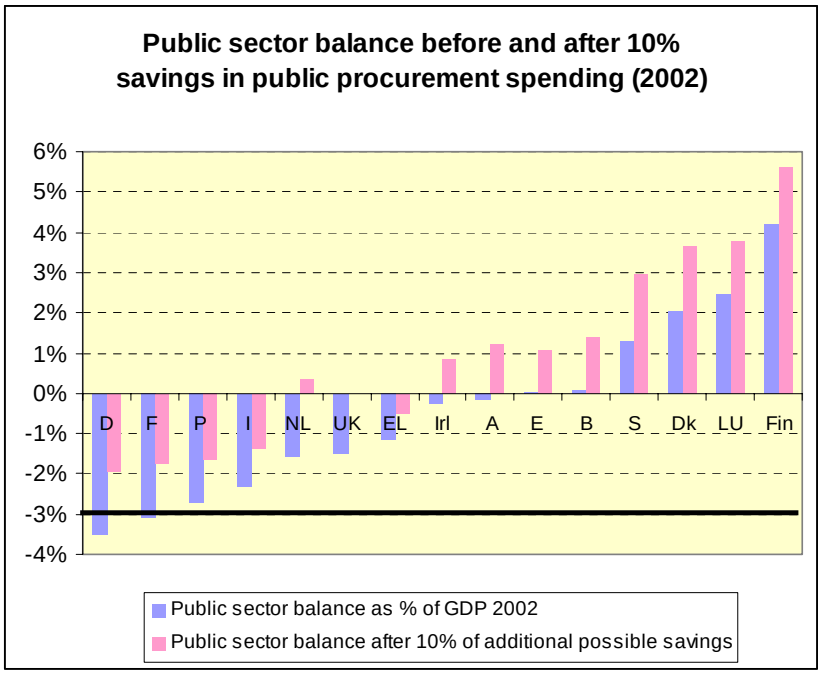
[5] Estimates of the total importance of public procurement for OECD economies and for the EU vary depending on the methodology used for their calculation and on the definition of public procurement used. A survey published by the OECD in 2001 (OECD, *Government procurement: A synthesis Report*, 2001) estimated government procurement for central, local and social entities at 9.24 % of GDP for the EU and 9.17% for OECD countries. If defence expenditure is deducted, the percentage is 8.03% for the EU and 7.57% for OECD countries.

Table 1	Total Procurement as a Percentage of GDP							
	1995	1996	1997	1998	1999	2000	2001	2002
Belgium	14,38	14,61	14,35	14,37	14,69	14,75	14,91	15,22
Denmark	16,27	16,26	16,51	16,94	17,26	17,39	18,40	18,76
Germany	17,98	17,99	17,45	17,19	17,15	16,99	17,01	17,03
Greece	13,62	12,92	12,69	13,00	12,71	13,55	12,98	12,62
Spain	13,84	12,81	12,76	12,97	12,94	12,73	12,75	13,02
France	17,26	17,32	17,26	16,49	16,35	16,52	16,35	16,62
Ireland	13,54	12,87	12,11	11,95	12,05	12,23	13,25	13,30
Italy	12,58	12,17	12,00	12,12	12,25	12,37	12,69	11,88
Luxembourg	15,49	16,01	14,89	14,43	14,38	13,11	14,25	15,48
Netherlands	20,84	20,51	20,27	20,12	20,21	20,12	20,68	21,46
Austria	18,36	18,15	17,70	17,69	17,77	17,05	16,22	16,46
Portugal	14,14	14,56	14,57	13,85	14,29	13,98	13,91	13,26
Finland	16,25	16,70	16,57	15,96	16,06	15,37	15,72	16,45
Sweden	22,14	20,97	19,99	20,48	20,27	19,40	20,01	20,49
UK	21,68	20,58	18,24	17,79	17,84	17,46	17,89	18,42
EU 15	**17,26**	**16,89**	**16,33**	**16,10**	**16,13**	**16,02**	**16,18**	**16,30**

Source: Internal Market Directorate General

Figure 1

It is important to have an idea of the magnitude of the potential savings that may result from improvements to the public procurement market. For example, if we assume that Member States could save 10% of their public procurement expenditure and look at the impact of these savings on the magnitude of government budget balances, we can see that these hypothetical savings would have a non-negligible impact, as shown in Figure 1[6].



Source: Internal Market Directorate General

[6] These figures are given to show the importance of public procurement in terms of size as compared to public deficits. The 10% figure, as will be shown later in the paper, is conservative, being well below the potential savings that recent studies suggest are possible. This figure has been applied on a country by country basis to the estimated public procurement expenditure which is currently not fully transparent. The purpose of this example is purely illustrative and is not meant to have any implications for public finance or budget policy issues.

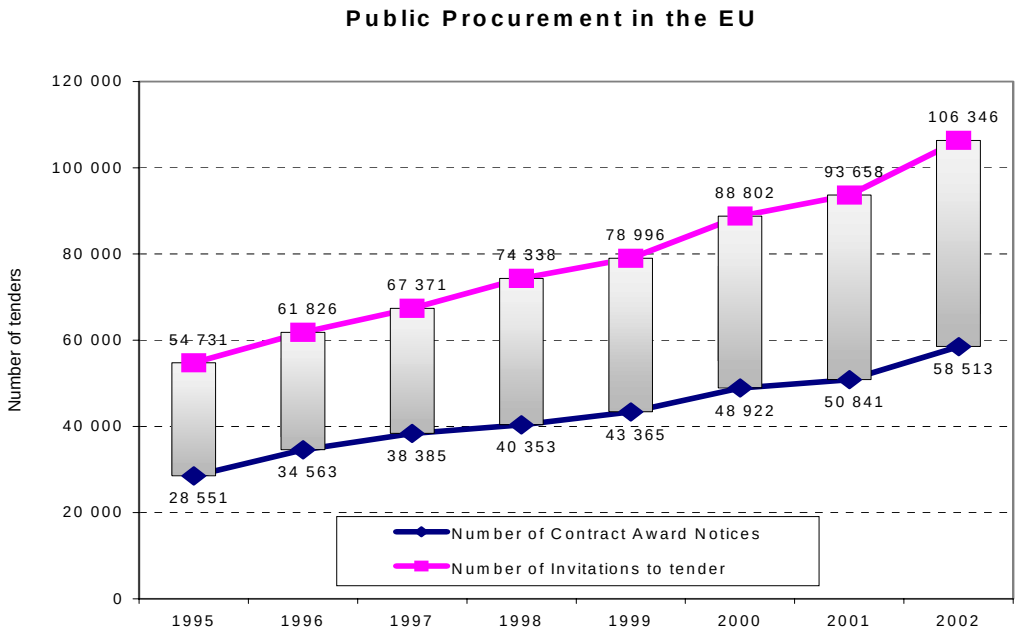
The results are quite remarkable: three countries would turn their budget deficits into surpluses and no euro zone Member State would run a public sector deficit that breaks the 3% limit.

INCREASING TRANSPARENCY IN PUBLIC PROCUREMENT MARKETS TO FOSTER COMPETITION

Transparent and predictable procurement procedures improve economic efficiency by promoting competition amongst domestic and foreign suppliers. They can also contribute to fostering private investment by lowering risk because transparency and predictability of market mechanisms are crucial factors influencing business decisions on how and where to invest and generate value added.

Transparency also enhances the competitiveness of local producers by establishing a market-launch base which is especially good for SMEs. Stronger competition brings down costs, improves quality and delivery terms and fosters the introduction of innovations. Conversely, in procurement environments closed to competition and dominated by vested interests, economic incentives disappear, "dominant" local players are relaxed about minimising costs and prices rise above competitive market clearing levels. Such local producers have no incentive to strive for a competitive edge and compete for contracts abroad.

Figure 2



Source: Internal Market Directorate General MAPP Database

EU public procurement directives give a prominent role to transparency, considering it fundamental to the elimination of distortions and discrimination in these markets. They require that invitations to tender with an expected contract value above established thresholds are published in the Official Journal.

Figure 2 clearly demonstrates the relationship between the introduction of EU directives and increased transparency in EU procurement markets. Between 1995 and 2002, the number of invitations to tender published in the Official Journal as required by the directives has almost doubled, while the estimated size of procurement markets has increased around 30%. The number of notices published has been growing at an annual rate close to 10%. In 2002, the number of invitations to tender published was 15% higher than the previous year.

Another important element of transparency is the publication of the final outcome of public procurement procedures. In a competitive environment, free of collusive practices, competitors can monitor the results of tendering processes and improve their future bids. This too puts downward pressure on prices over time. The number of contract award notices published in the Official Journal has been growing steadily in recent years. Although the number of contract award notices is around half the number of invitations to tender, it more than doubled between 1995 and 2002.

In 2002, 38% of contract award notices published in the Official Journal corresponded to supplies contracts, 37% were for services and public works accounted for only 19%. Local authorities published over 36,000 of the total 58,513 contract award notices. Central governments and utilities published over eight and six thousand respectively.

There is great variation in transparency rates[7] across countries, government levels and sectors. Transparency rates are significantly affected by differences in public institutions' and governments' administrative and organisational characteristics. For instance, increasing administrative decentralisation tends to produce more frequent and disaggregated tendering, which, in principle would tend to reduce the average value of each purchase. This might increase the share of public procurement falling below the thresholds and therefore not needing publication. However other factors linked to administrative practices and/or habits also play a part, and they could offset or reinforce this trend. Therefore a higher degree of administrative decentralisation is not necessarily more or less compatible with high levels of transparency – other government and administrative practices should also be taken into consideration.

As can be seen from Table 2, Greece, Spain and the UK have the highest transparency rates with 46, 24 and 21% of their public procurement published as a percentage of the estimated total procurement value (2002 figures). At the other end of the scale are Germany, the Netherlands and Luxembourg. Whilst some Member States appear to have more transparent markets than others, a high rate of transparency does not necessarily indicate that a Member State is consistently publishing at a high level. For example, this

[7] Transparency is defined here as the value of procurement published in the Official Journal as a percentage of estimated total public procurement.

measure is highly influenced by large fluctuations in a country's government spending – large public works projects (e. g. bridges, motorways, airports) can significantly increase the transparency rate for the years affected.

The average estimated share of the total procurement value actually published is 16.2%, equivalent to 2.6% of EU GDP. Although this rate has increased over the last ten years, further improvements are necessary.

Table 2 **Transparency Rates by Member State (%)**

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

Source: Internal Market Directorate General

CROSS-BORDER PROCUREMENT: A MORE DETAILED PICTURE

Fostering cross-border activity in public procurement markets is a major challenge for Internal Market rules. Increased transparency would be pointless if it failed to make procurement markets more contestable especially by increasing the number of foreign bidders. Eliminating any kind of domestic bias and discrimination in favour of domestic producers and opening up markets to foreign firms is essential to foster more cross-border procurement activities. Ensuring similar chances of success to foreign and domestic bidders is the ultimate test of a level playing field.

Cross-border procurement can take place in different ways. Direct cross-border procurement occurs when firms operating from their home market bid and win contracts for invitations to tender launched in another Member State. Indirect cross-border activities arise when firms bid for contracts through subsidiaries**,** i.e. when their foreign affiliates bid for tenders launched by authorities of a country different from the home country where the firm has its headquarters or where the parent company is located.

Until now, procurement indicators to measure cross-border activity have been inadequate. Information collected from the Multidimensional public procurement data base (MAPP), built up using data from the Tenders Electronic Daily database (TED)[8], indicated very weak direct cross-border procurement activity (around 1,5%). A survey conducted in 1999 indicated that in approximately 10% of total procurement there was some form of indirect cross-border procurement.

Table 3	**Previous Measurements of Cross-border Public Procurement**		
Sources	Direct cross-border procurement	Indirect cross-border procurement	Methodology – measurement
Eurostrategy Consultants 1999.	1.8%	8.5%	Survey of 2000 firms. Estimated import penetration in public sector consumption (data for 1998)
Single Market Review 1997	3%	7%	Survey – Estimated import penetration (data for 1994)

In a recent study[9], over 1500 firms actively involved in procurement were asked about the domestic or cross-border nature of their activities. These firms were asked if they only submitted proposals to public institutions in the country where they were located or if they also put in bids abroad. In the latter case, they were asked to say if they made bids abroad directly (without any sort of intermediary) or only through a subsidiary[10] or via both (i.e. with a subsidiary and directly)[11].

This gives the categories defined in Table 4. Cross-border activity occurs in the following cases:

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[8] All public tenders exceeding specific contract values must be published in the Supplement to the Official Journal of the European Union. Since July 1998, the printed edition of the Official Journal S is no longer available. It is now available exclusively in electronic format and is accessible on the internet by accessing the 'TED' tender database ('TED internet application', 'TED' = Tenders Electronic Daily).

[9] COWI. "Monitoring Public Procurement in the European Union using Firm Panel Data". Lot 1. Final report July 2003. This study is based on questionnaires addressed to a sample of firms from Austria (60 firms), Belgium (60 firms), Denmark (60 firms), France (360 firms), Germany (450 firms), Ireland (40 firms), Spain (120 firms) and the UK (360 firms). The targeted sample of firms was drawn from nine economic areas corresponding to Common Procurement Vocabulary sectors 24 (chemicals), (29 (machinery), 30 (office equipment), 33 (medical products), 34 (motor vehicles), 50 (motor repair), 45 (construction), 74 (business services) and 90 (sewage). These sectors account for 66% of all published tenders.

[10] Firms were asked to identify themselves as "**domestic**" or "**subsidiary**" firms. Firms are identified as "**domestic**" if they are located in the country where their headquarters is based. "**Subsidiaries**" are firms located in a country different from where their headquarters or parent companies are based.

[11] A few firms answered saying that they only bidded abroad.

- first, whenever a subsidiary bids or is awarded a contract. This may occur in the country where the subsidiary is located, or in any other Member State. All such activities are considered indirect cross-border procurement;

- secondly, a procurement activity is considered to be cross-border if a firm that is not a subsidiary bids or is awarded a contract in a country other than the one in which it is based. In this case, cross border procurement may occur either directly - the firm bids from its home base - or indirectly - through a subsidiary located abroad.[12]

This allows the measurement of cross-border activity in terms of the number of firms bidding at home or abroad; the number of proposals made by domestic or by foreign firms; and the success rate of firms bidding in their own country of origin or abroad.

Table 4 Cross-border Public Procurement Activities of Firms Included in Study Sample

	Number of answers to this question from firms in the sample[13]	Number of proposals	Average number of proposals per firm	Share of total proposals
Firms submitting proposals to public institutions in the country where they are located only				
Proposals to home country by domestic firms	416	49 498	119	40%
Proposals to home country by foreign owned subsidiaries	98	13 984	143	11%
Firms submitting proposals to public institutions in the country where they are located AND/OR in other EU Member States DIRECTLY AND/OR through a SUBSIDIARY				
Proposals to home country by domestic firms	213	32 438	152	26%
Proposals to home country by foreign owned subsidiary firms	67	15 762	235	13%
Proposals to other EU Member States directly	207	4 155	20	3%
Proposals to other EU Member States through subsidiary	162	7 345	45	6%
Total		123 182		

Source: Internal Market Directorate General using COWI data

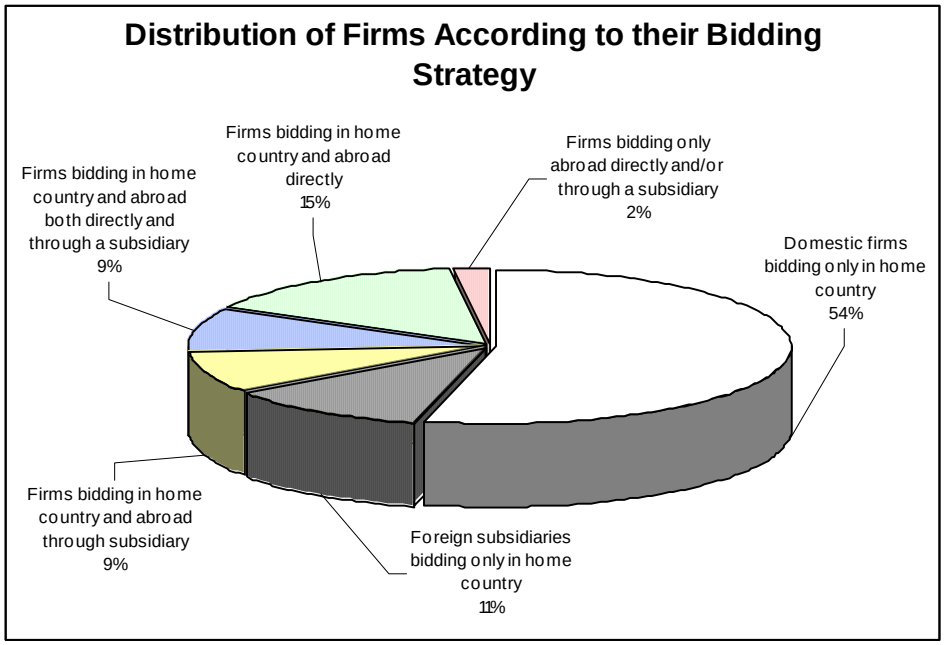
[12] Notice that we call home country the country where a firm is located, be it a subsidiary or not. This should be distinguished from the home base of the firm that is the country where the headquarters of the firm is located.

[13] The figures in this column relate to the number of times that a firm has submitted a proposal within a given category. So, if a firm has submitted more than one proposal it appears the corresponding number of times, making the total of this column greater than the number of firms who answered this question.

i. There are a considerable number of firms involved in cross-border procurement

Approximately 54% of all the firms in the sample are domestic firms bidding exclusively for contracts in their home country. This means that 46% of all firms in the sample carry out some sort of cross-border procurement activity, generally involving the use of a subsidiary. Only 15% of firms bid both at home and abroad directly. The relative extent of cross-border procurement, as reflected by the number of firms included in this sample, seems greater than suggested by the few previous surveys available until now. However, the number of firms involved exclusively in cross-border procurement is relatively low.

Figure 3



Source: Internal Market Directorate General using COWI data

Bidding abroad through subsidiaries is clearly a dominant strategy. Having a physical presence in the target market or access to some local expertise or inputs may be a necessity or an advantage if a firm wants access to public procurement markets. This would partially explain the high occurrence of this strategy. However, in so far as this is not the case, these figures would indicate that there is still considerable scope for the development of direct cross-border procurement.

The intensity of cross-border procurement is similar across sectors except for medical products and motor vehicles. International procurement activities in medical products are much more frequent than in other sectors and much less frequent in motor vehicles: 67% of firms in this sector bid for contracts in their base market only.

Across countries there are also some differences too, but they should be interpreted with caution. Table 5 shows that Spanish firms are more reluctant to bid abroad than the sample average. The share of foreign subsidiaries operating in the UK (19%) and France (16%) only is higher than average (11%), whilst in Germany it is relatively low (6%).

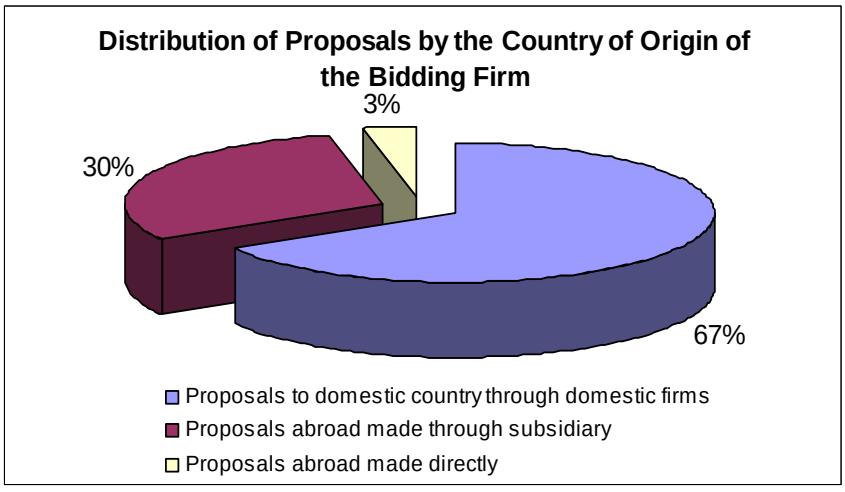
Table 5 Firms Submitting Proposals to Public Institutions - Compared across Countries			
	In the Home Country		In other EU Member States
	Domestic firms	Foreign owned subsidiary firms	Both domestic and foreign owned firms bidding both at home and abroad directly and/or through a subsidiary
Austria	54%	2%	44%
Belgium	19%	12%	70%
Denmark	58%	6%	36%
France	56%	16%	29%
Germany	51%	6%	43%
Ireland	-	-	-
Spain	75%	11%	14%
UK	51%	19%	30%
Total	**54%**	**11%**	**35%**

Source: COWI Report

ii. Most proposals are still coming from domestic firms, but indirect bidding is significant

Most (67%) of the total number of bids submitted by firms in the sample are proposals submitted by "national" firms in their own home countries, 30% are proposals from subsidiaries in other countries and only 3% are direct cross-border procurement. Compared to the previous figures, these show greater "home bias", but they still reflect higher levels of cross-border procurement than previously recorded. This confirms the real importance in Europe of bidding for contracts through subsidiaries.

Figure 4



Source: Internal Market Directorate General using COWI data

Further confirmation of this phenomenon is provided by the high bidding frequency of subsidiaries compared to domestic firms. On average, subsidiaries presented one and a

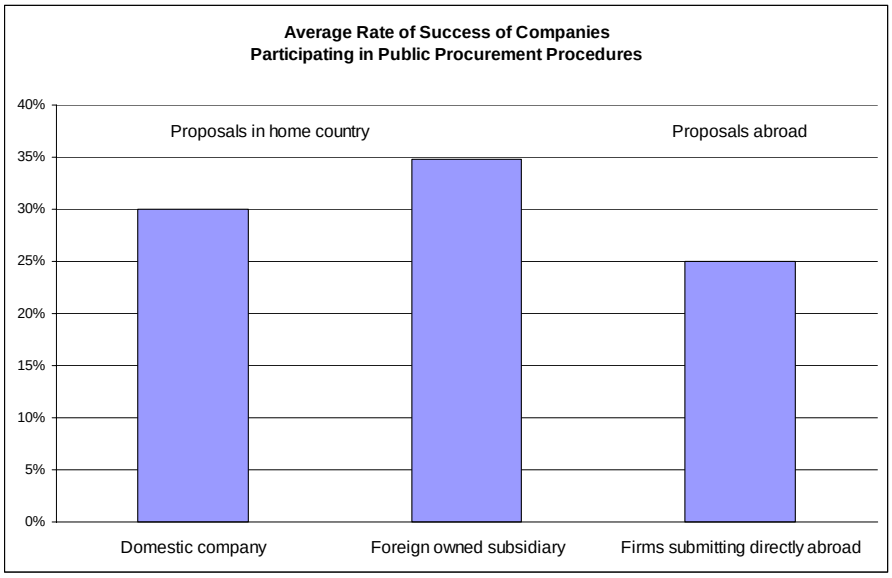
half times as many proposals as domestic firms. However, when direct cross-border procurement is included, the bidding average of firms operating across borders drops significantly to around one third of the number of proposals submitted by domestic firms.

iii. There are minor differences in the success rates of domestic and foreign firms

A main objective of public procurement policy makers is to ensure a level playing field where bids from domestic and foreign firms have similar chances of success. Firms were asked to report the number of cases when they were awarded contracts after bidding. Dividing that number by the number of proposals submitted by each firm allows the calculation of the "average rate of success" for a given firm.[14]

The "average" rate of success in each category shows clearly that cross-border public procurement operations are not necessarily confronted with lower chances of success. Foreign subsidiaries bidding in the country where they are located tend to have a slightly higher rate of success than domestic firms bidding for contracts in their own home country. However, the rate of success is clearly lower for proposals submitted in a country different to the home base of the bidder. Once again, direct cross-border procurement seems to be at a disadvantage.

Figure 5



Source: Internal Market Directorate General using COWI data

All in all, these figures seem to suggest that public procurement markets are relatively open to foreign competition, especially from subsidiary firms located in countries launching invitations to tender. However, direct cross-border procurement from the home base of foreign companies is far less frequent.

[14] We then calculate the mean of those averages for each category of firms.

THE IMPACT OF PUBLIC PROCUREMENT RULES ON PRICES

The ultimate test of the effectiveness of public procurement legislation is the impact on prices actually paid for goods and services by public procurement authorities. If transparency and competition in the bidding process are increased but this does not result in lower prices and more value for money, discrimination may have been eliminated but the social benefits from more and fairer competition are insignificant.

Measuring the impact on prices of procurement rules is difficult[15]. Results from two exercises looking at the issue[16] are presented here. In both cases, the results seem to suggest that application of the procurement directives effectively reduces prices.

i. The application of procurement directives effectively reduced the prices of goods and services purchased by a sample of 1000 public authorities

In an exercise commissioned by the Internal Market Directorate General, 1000 contract awarding authorities were asked about the prices actually paid in 2002 for a list of carefully defined goods, services and works[17]. In practice, it was difficult to collect information about cases when EU procurement rules were effectively applied[18]. Therefore, it was decided that procurement directives would be considered to have been applied in those cases where an invitation to tender was published and at least one bidder replied. Equally, it was decided that they were not applied when there was a direct allocation of the contract without any tendering process.

A first look shows significant variation in the prices paid for the same products in different purchases by different authorities. For instance, in Figure 6, for the office supplies group of goods, 95% of prices vary from 0.5 to 5 times the EU average price. For services such as cleaning, the variation is also quite significant. Even for highly homogeneous products like fuel, the range of variation is quite large[19]. To what extent can the application of procurement directives explain these differences? And are prices effectively lower when the directives are applied?

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[15] It requires collecting information on similar prices of goods actually paid by authorities (i.e. not simple catalogue prices) for comparable goods and services.

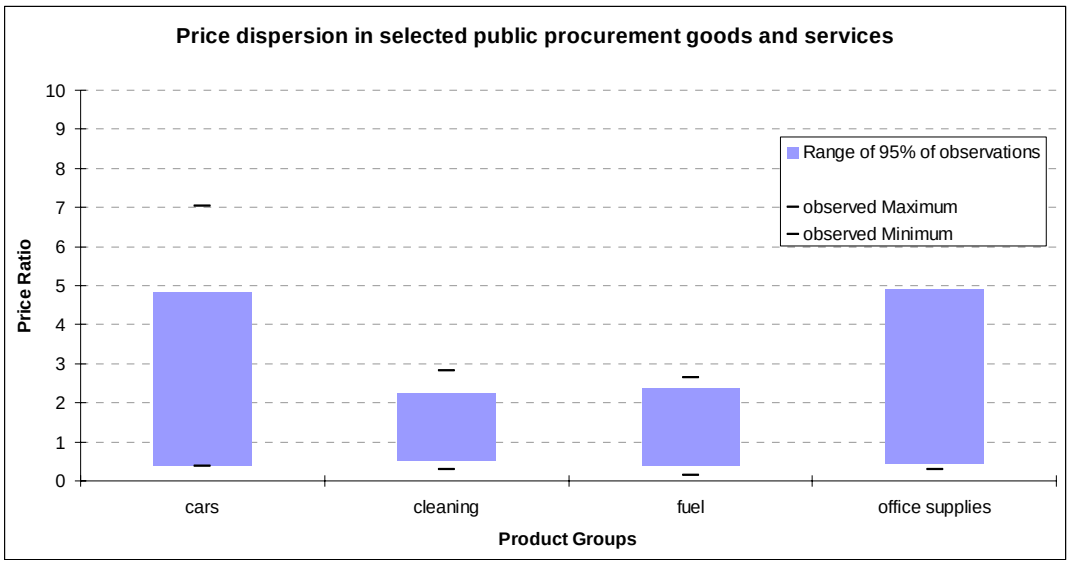
[16] The first one is based on a survey of approximately 1000 procurement authorities who were asked about the prices actually paid excluding VAT for a list of goods and services. The second one is based on intra EU trade in relatively homogeneous "typical" public procurement goods.

[17] COWI. "Monitoring Public Procurement in the European Union using Public Authorities Panel Data" Lot 2, Final report July 2003. The goods were carefully selected to avoid distortions in the measurement for prices due to qualitative differences. In addition, a quality variable was introduced to double check for quality differences.

[18] In order to isolate the impact of the application of Internal Market procurement rules, authorities were asked to indicate when EU procurement rules were applied and when national rules or no rules were applied. Respondents had difficulties in identifying exactly which rules were applied in each case. In practice, invitations to tender are always subject to compliance with national rules, whether the coordinating provisions of the Directives apply or not.

[19] It should be noted that price variation is observed not just across but also within countries.

Figure 6



Source: Internal Market Directorate General using COWI data

A first simple comparison of the means of price observations collected in this survey shows that the prices effectively paid in purchases where procurement rules were not applied were approximately 34% higher than prices when the rules are applied. This difference is statistically significant.

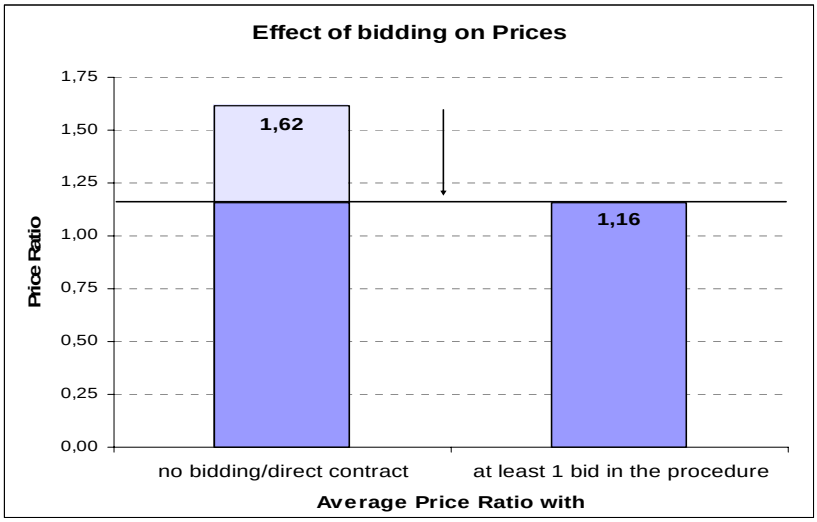
However this first evidence is not sufficient to conclude the positive impact of the procurement rules on prices. Other characteristics of the purchase have to be taken into account because they may have an influence on the price. For example, it is logical to assume that purchases of large quantities of goods lead to discounts or scale effects which may reduce the price paid per unit. Since the application of directives is compulsory for purchases above a given threshold, the lower price may be due to the larger average size of purchases when the directives are applied and not necessarily to more competition resulting from the application of the directives. Thus, a simple comparison of average unit prices may not be enough to conclude that the directives have had a positive impact on prices.

Econometric techniques have been used to control for possible interference from other factors. Several exercises conducted to isolate the impact of the application of public procurement directives suggest that the application of these rules by authorities in the sample has effectively reduced the price they paid. In addition, these exercises suggest that the price paid when the directives are not applied is around 40%[20] higher than when they are (see Figure 7). This result is statistically significant and controls for the impact of the quantity ordered and other factors. This means that even taking into account

[20] Depending on the calculation the prices paid without the directives are 40% higher than when the directives are applied (1.62/1.16); alternatively it can be said that the reduction due to the application of the directives is almost 30% (subtract 1.62 from 1.16 and divide the result by 1.62).

differences in the order of magnitude of the purchase, open competitive bidding for public procurement as required by the directives is, as expected, an effective cost-cutting measure.[21] Quantity also has the positive impact expected: public institutions which ordered an amount 25% larger than the average paid on average approximately 7% less per unit.

Figure 7



Source: Internal Market Directorate General using COWI data

The COWI study also includes an econometric exercise to identify the explanatory factors behind the differences in prices paid in procurement purchases within the same country[22]. The study concludes that:

- once again, prices are lower in those cases where there are one or more tenders than in those cases where there is a direct purchase;
- there seems to be a U-shape relationship between the prices paid and the level of government: local and national institutions pay relatively higher prices than regional authorities;
- the level of professionalism and the organisation of the purchases have an important influence on the prices that public institutions pay for goods and services. Public institutions with a purchasing department that centrally organises the public procurement for the institution pay on average slightly lower prices;

[21] The impact of having more than one bid on price reductions appears particularly significant in the acquisition of goods. Some country differences also appear to be significant in some econometric specifications, but this may be due to country specific factors not linked to differences in the application of procurement rules.

[22] The results reported above correlate number of bids, quantity and other possible explanatory variables with the dispersion in procurement prices with respect to the EU average price for each good and service. The COWI price dispersion is measured with respect to the national average price.

- firm size and the domestic or foreign nationality of the firm to which the contract is awarded do not seem to have any significant effect on the price actually paid.

A corollary: changing the thresholds

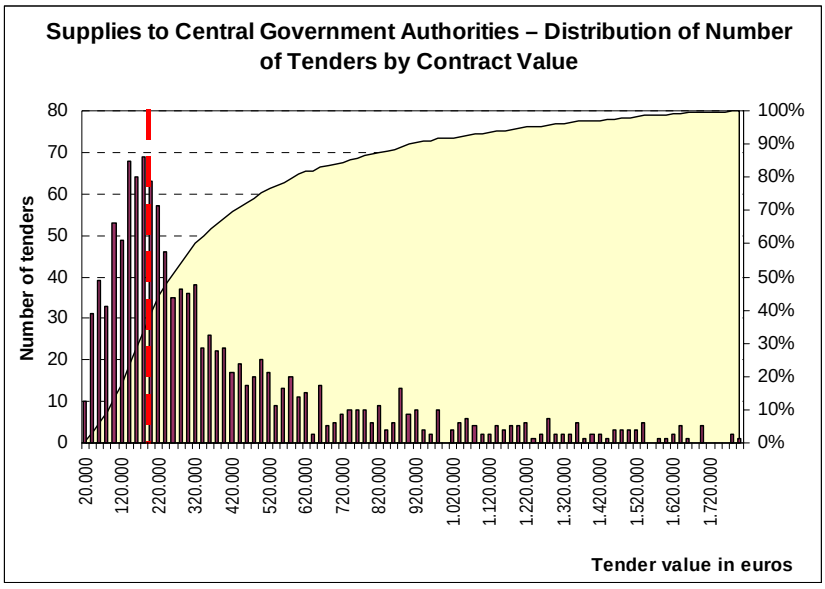
One of the features of the public procurement directives is that their application is compulsory when public authorities launch invitations to tender for contracts with an expected value above pre-established thresholds. Since 2004, these thresholds range between approximately €150.000 for public supplies and service contracts and roughly €6.000.000 for works. There are various justifications for the thresholds:

- first, procurement procedures entail compliance and administrative costs for the public institutions and tendering costs for the bidding firms. If the value of the contract is relatively low for the type of purchase in question, it is assumed that the potential benefits from greater competition do not compensate for those costs;

- in addition, increased transparency in procurement markets may not result in greater cross-border competition if the value of the contract does not make it worthwhile for foreign firms to tender and cover the additional costs that cross-border provision necessarily implies.

It has been argued that the current thresholds should be raised. Evidence presented above suggests that this will result in higher procurement prices especially if their mere existence has a significant effect on the procurement behaviour of public institutions launching invitations to tender. If public authorities do tend to organise tendering in ways that avoid the application of EU procurement rules, it seems unwise to increase thresholds as the 40% price mark-up could be applied to a large number of purchases.

Figure 8



Source: Internal Market Directorate General

Figure 8 shows that the threshold has an influence on the distribution of invitations to tender by value or size. Administrations and institutions tend to comply with the directives by concentrating a large number of purchases just below the threshold for each kind of operation and thereby avoiding procedural costs and publication. This suggests that if thresholds are raised less invitations to tender would be published and the prices paid by authorities for goods and services may be higher than necessary.

In addition the new legislative package and other Community initiatives in this area for the introduction of electronic procurement are intended to reduce compliance costs. In this context, claims to raise thresholds are hard to justify.

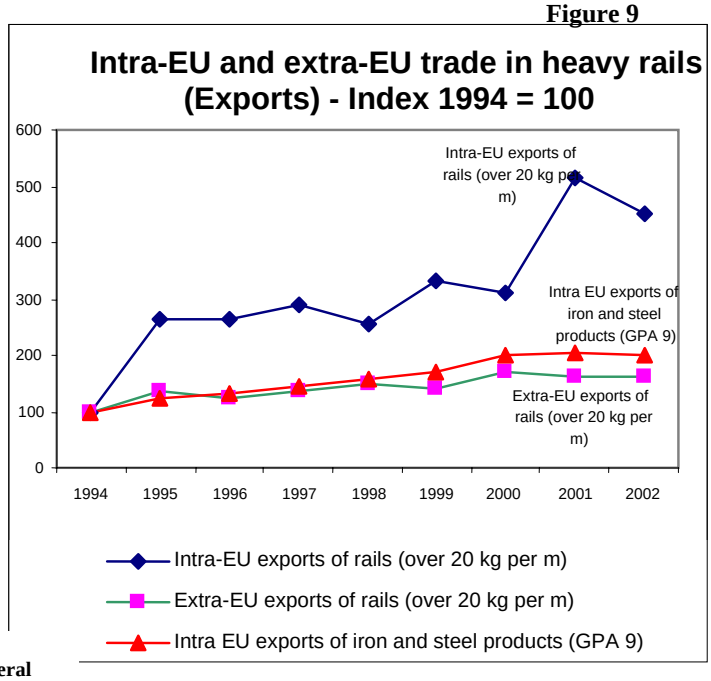
ii. Evidence shows that the export price of comparable procurement goods converged after the introduction of procurement directives

Analysis has also been undertaken of intra EU trade flows for seven goods that can be considered as "typical" public procurement goods, i.e. goods that are mainly purchased by public authorities. Relatively homogeneous goods were selected in order to facilitate price comparisons. These goods are preparations for X-ray examinations, iron or steel railway rails, smaller rails for trams, iron and steel seamless pipes of a kind used for oil or gas pipelines, fire fighting vehicles, railway tank wagons and syringes for medical usage.[23]

Apart from one case (syringes), the progressive introduction of directives since the mid 1990s seems to have had a similar effect on these goods. The graphs below illustrate the results for iron or steel railway rails (heavy rails).

Figure 9

- Although trade has varied depending on the evolution of sector specific factors, in general, intra-EU trade for these goods seems to have expanded relatively faster than extra-EU trade for the same product category and trade for related goods that are largely traded between private parties only. This would seem to suggest that the introduction of the procurement directives has contributed to foster trade in these products among Member States. effectivelv



Source: Internal Market Directorate General

[23] The analysis has been carried out using EUROSTAT COMEXT data for eight digit product categories CN 30063000, CN 73021031, CN 73021039, CN 73041090, CN 87053000, CN 86061000 and CN 90183110.

opening those markets to competition within the EU.

- Export and import prices[24] for these goods have converged over time eliminating price differences. In the case of heavy rails, this convergence has been fairly steady – from over 15% in 1988-92 to 12% in 1998-2002.[25] For small rails the price convergence was more pronounced – from 21% in 1988-92 to 7% in 1998-2002. This suggests that, at least for these products, the introduction of the directives has been followed by progressive cross-border market integration in these mainly public procurement markets.

Figure 10

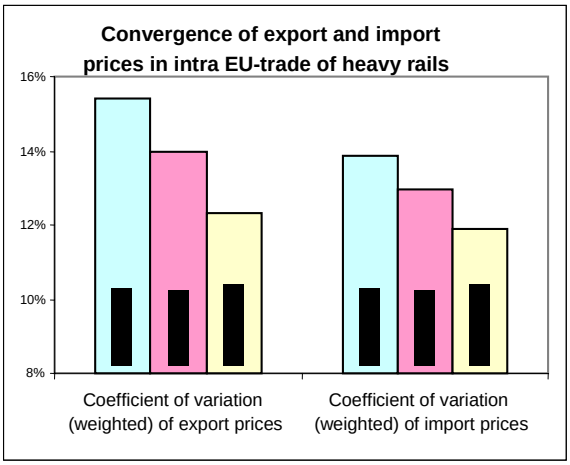
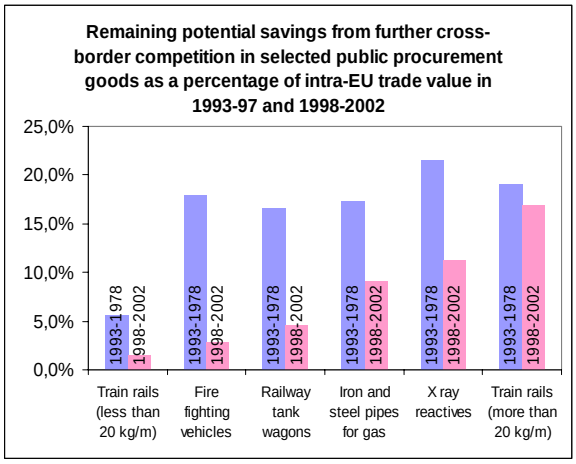


Figure 11



Source: Internal Market Directorate General

- In spite of this price convergence, the analysis of trade flows suggests that there are still further possibilities for savings in these markets. Figure 11 shows the potential savings as a percentage of the actual value of imports that could have been achieved if trade had occurred at the second lowest export price instead of the actual export price. For just these six goods, this could have accounted for almost 12% of the total value of intra-EU trade in these goods in 1998-2002 (over 400 million euros).
- Potential savings are much lower now than before the introduction of the directives and this is further evidence of their positive impact on the performance

[24] Actually, these are export and import unit values.

[25] Both weighted and unweighted coefficients of variation have been calculated to take into account the relative importance of exports to different EU destination from each Member State. The results hold with very minor variations in both cases. Bilateral differences in export and import unit prices have been calculated and they suggest that the possibilities for cross-country price discrimination have been reduced. Given that these are relatively homogenous goods, these results can hardly be explained by increased homogeneity in the composition of exports and imports.

of these markets. Nevertheless, the remaining potential savings are still quite important.

OTHER DIMENSIONS OF MARKET PERFORMANCE

The Commission also considers other dimensions of the performance of public procurement markets. These include access to these markets by SMEs; the consideration of environmental and social issues; and transaction costs.

i. Public procurement and SMEs

Most public procurement contracts are awarded to SMEs. Two recent Commission studies with different objectives and methodologies show similar results in this regard. A study conducted for the Enterprise Directorate General using TED-MAPP data shows that approximated 78% of the successful enterprises awarded contracts in 2001 were SMEs[26]. A study for the Internal Market Directorate General shows that the SMEs have a significantly higher success rate than large enterprises.

However, it is difficult to assess market performance in this area. Some may argue that although SMEs win a higher share of all public procurement contracts awarded, these firms represent a still higher share of the total number of firms in the market. Others may argue that although SMES represent 99.8% of the total number of firms in the Union, by the nature of their activities, they tend to be less active in procurement activities than in the economy as a whole.

For these reasons, it is more useful to present additional factual information on the situation of SMEs in public procurement markets here rather than to try and issue an overall assessment.

- Although the overall success rate of SMEs is higher, their chances of success in cross-border procurement are much lower. SMEs acting as subsidiaries of foreign firms still have a high rate of success but the difference with respect to large enterprises is not very significant in statistical terms. In the case of direct cross-border procurement it is not significant.

- Sectoral differences have an important influence on the access of SMEs to procurement contracts. They are particularly well represented in the construction sector and less so in the business services sector.

- As one would have expected, SMEs have relatively easier access to contracts with local authorities.

[26] European Commission "SMEs access to public procurement", Brussels 2003, published on the website http://europa.eu.int/comm/enterprise/entrepreneurship/craft/index.htm

ii. Environmental[27] and social issues

Environmental and social issues have been the subject of increasing attention in the context of public procurement rules. In 2002, two Communications provided detailed information on the views held by the Commission on the consideration that should be given to these important issues.

The recent studies commissioned by the Internal Market Directorate General[28] on the performance of public procurement markets shed additional light on these matters.

- First, firms included in the sample report that they find environmental clauses in the public tenders to which they submit proposals approximately 40% of the time. There are no perceptible differences across countries and this frequency does not seem to be affected by the application of EU directives.

- In addition, the analysis of prices reported by public authorities seems to suggest that introducing environmental clauses does not increase the prices actually paid for the supplies, services or works.

- Firms report that social clauses are less frequently found in tenders (around 20%). However, they are more frequently found in Denmark, especially when EU directives are applied.

- There is some evidence suggesting that the introduction of social clauses results in slightly higher prices actually paid by authorities.

iii. Transaction costs in public procurement markets remain significant

The above discusses the different sources of benefits found in public procurement markets as a result of the directives. However, any evaluation of market performance must also take into account the costs of operating in these markets for firms and authorities. There are costs associated with making procurement markets more transparent and competitive. Transaction cost minimisation is essential to ensure good market performance.

The two studies[28] recently carried out for the Internal Market Directorate General of the European Commission include comments from firms and authorities. These comments reflect concern for the relatively significant costs incurred by both firms and authorities in complying with procurement rules.

Although some firms reported an improvement in transparency in public procurement, many considered that their chances were still not equal when bidding from abroad. All firms emphasised that formal procurement procedures were costly due to the paperwork

[27] For additional information see the study commissioned by the Environment Directorate General to ICLEI "State of Play of Green Public Procurement in the European Union", Final report, Freiburg, July 2003, published on the website www.iclei.org/ecoprocura/network.
[28] See footnotes 9 and 17.

required when submitting a tender. In particular, they complained about the amount of non-bid related information required by the authorities.

There are some nuances on the comments depending on their nationality. German and Austrian firms were particularly negative. They complained about excessively strict specifications that effectively excluded some competitors from the process. They also argued that the importance given to price may be disproportionate and that in the long run, the cheapest bid could be more expensive for the purchasing institution, especially with regard to technical products.

British, Austrian and German firms were more aware of EU directives regulating procurement markets. British firms usually commented positively on environmental clauses, while firms from other countries had mixed views. Only Spanish firms complained about payment delays.

Comments varied significantly across firms of different size. Firms with 50 or more workers felt that electronic media and e-procurement were the solution to the heavy procedural costs involved in bidding. Very small firms did not mention electronic solutions as a way out of the problems they faced in these markets.

Authorities also found procurement procedures too complicated and relatively inflexible, particularly as regards price negotiations. Spanish authorities were relatively more positive towards EU procurement rules. Although some firms openly acknowledged that rules were "necessary in order to prevent manipulation and corruption", many considered that excessive procedural requirements resulted in "competitive formalism".

Some firms mentioned that the existence of different directives for different types of procurement activities (works, supplies, services) complicated tendering processes. They welcomed proposed changes in the new procurement legislation package.

Authorities in several member states also pointed out that the new legislative package was likely to contribute to solving many of the problems raised by firms and authorities in the surveys. The significant procedural simplifications that it will bring about and the important effort to consolidate rules should result in lower costs and cuts in red-tape.

In addition, Community efforts to improve the use of e-procurement in line with Internal Market rules should result in further cost reductions to firms and authorities. E-procurement can increase transparency and procedural efficiency without prejudice to competition. This should allow for easier cost comparisons and examination of tenders.

However, the costs associated with the introduction of e-procurement should not be underestimated either for firms or authorities. In particular, the up-front costs of shifting to an electronic procurement system may become an obstacle for smaller firms. Moreover, it is necessary to ensure that national uncoordinated e-procurement solutions do not "fragment" the market.

For these reasons, in 2004 the Commission will present an Action plan for the introduction of coordinated e-procurement in the EU aimed at reducing procurement costs and contributing to further integration in procurement markets.

Sector-specific measures: the case of the Healthcare sector

Sector-specific measures can contribute to improvements in the performance of some procurement markets. A recent paper by the CEN presents an analysis of the potential for savings and improved productivity in the use of resources in public tendering in the field of EU healthcare expenditure. This is the result of a workshop on hospital procurement and e-commerce for the Healthcare sector in January 2002.

EU Member States spend between 5% and 10% of GDP on healthcare. In absolute terms, this spending has been increasing for many years and all Member States are experiencing growing pressure on their health services. This trend is likely to continue in the future due to: demographic developments; the population's growing expectations of the quality of healthcare; and the complexity of new medical technology.

Although standardisation for purchasing and logistics systems across Europe could contribute to better control pricing and quality in all aspects of the purchasing cycle, it is only realistic to focus on a few processes within the cycle. Public tendering processes across Europe have much in common, as illustrated by the experiences of the European Generic Article Register project (EGAR) over the last year and a half. Tendering utilises significant resources and the project found the lack of standards to be universal[29].

The potential for savings and improved productivity in the use of resources for public tendering is great. The EGAR project found that in Norway, the use of a generic register improved the tendering process and communications between purchasers and suppliers significantly. Lack of standards such as correct article descriptions and information, created a significant and often unnecessary workload for trading partners. Within the tendering processes significant benefits were obtained through the use of more automated tender solutions based on generic standards. Based on experience from Norway EGAR benefits should include:

- *workload reduction of more than 50% in creating and evaluating tenders;*
- *quicker responses to suppliers and shorter contract negotiations;*
- *price reductions between 10 and 25 % depending on product areas;*
- *more accurate basis for ordering systems;*
- *one generic number and article description relating to one or more actual articles from one or more suppliers;*
- *improved statistics based on the generic article level;*
- *significantly reduced transaction costs;*
- *greater compliance with EU rules by public purchasers; and*
- *a more open environment and improved interaction between hospital buying departments and suppliers due to the standardisation at generic level.*

[29] In a sense but on a different scale, the common procurement vocabulary (CPV) has the same purpose of reducing costs by standardising the nomenclature.

CONCLUSIONS

There is overwhelming evidence showing that the procurement directives have contributed to increased transparency in public procurement markets. The new evidence, based on a sample of firms and public authorities, suggests that increased transparency has effectively resulted in more cross-border competition, price convergence and lower prices for goods and services purchased by public authorities.

Therefore, it seems reasonable to conclude that when effectively implemented the current legislative public procurement package actually contributed to reform the public procurement environment.

Most importantly, this evidence shows that economic reforms work and pay off. It is important to show this in a clear and thorough manner at a time when new economic reform proposals are being discussed.

Of course, problems remain and the new legislative package should reduce transaction costs. E-procurement offers new possibilities for cost reductions. If promptly adopted and effectively implemented by Member States, these measures will contribute to improve still further the performance of our public procurement markets.

IP/04/149

Brussels, 3rd February 2004

Public procurement: EU rules deliver big savings for taxpayers; scope for more gains

The existing EU public procurement Directives have increased cross-border competition in procurement markets and reduced by around 30% the prices paid by public authorities for goods and services, according to a European Commission working document. There remains potential for significant further opening up of procurement markets and therefore for further gains for taxpayers in terms of value for money and strengthening defences against corruption and favouritism. In a market worth over €1 500 billion, i.e. over 16% of total EU GDP, the consequence of such improvements could be enormous. The legislative package, now approved by both the European Parliament and the EU's Council of Ministers (see IP/04/150), modernises and simplifies procurement procedures, for example by facilitating electronic procurement. Its rapid implementation should iron out many remaining difficulties identified by contractors and contracting authorities and further boost cross-border competition.

Internal Market Commissioner Frits Bolkestein said: "This study provides conclusive further evidence that EU laws opening up procurement markets across borders have cut waste by slashing the prices central, regional and local governments pay for works, supplies and services. But there is plenty of scope for making public procurement markets even more efficient. Seizing this opportunity is crucial to Europe's competitiveness, to giving taxpayers high quality and good value for money and to creating new opportunities for EU businesses. The adoption of the legislative package after extensive negotiations is just the beginning: Member States now need to put it quickly into practice."

The existing public procurement Directives, some of which date back to the 1970s, have not only improved competition and transparency, but also increased cross border activity by requiring invitations to tender and contract award notices above a certain value – ranging from approximately €150 000 for supplies and services to nearly €6 000 000 for works - to be published in the EU Official Journal. Between 1995 and 2002 the number of invitations to tender published almost doubled, from under 55 000 to over 106 000.Award notices published increased from about 28 500 per annum to about 58 500.

The application of the Directives appears to reduce prices paid by national, regional and local authorities for supplies, works and services by around 30%, even after allowing for separate reductions to unit prices caused simply by economies of scale affecting the type of bigger contract covered by the Directives.

Case studies of "typical" public procurement goods[1] show that in general, the Directives have helped to increase intra EU competition and that the prices paid by public authorities for goods traded between Member States have converged downwards over time. For instance, in the case of small iron and steel rails traded between EU countries, export price dispersion dropped from around 21% in 1988-92 to just over 7% in 1998-2002.

The six case studies also show that further savings equivalent to almost 12% of the value of intra-EU trade in the goods concerned could have been made in 1998-2002 if prices had converged to an extent that might realistically be expected in a fully open market without border or barriers. The economic significance of such price reductions across all procurement markets, which are worth €1 500 billion or 16.3% of EU GDP, would be huge.

To put this into perspective, if the performance of EU public procurement markets could be improved, increasing competition and reducing prices paid by public authorities for goods and services by 10% - which seems an entirely plausible objective in the light of the evidence in the report - no Member State's budget deficit would exceed 3% of GDP.

Transparency has undoubtedly improved as a result of the existing public procurement Directives – for example the percentage of public procurement invitations to tender almost doubled from 1995 to 2002 (see above). However, there is still room for improvement – at present only 16% of estimated public procurement is published in the Official Journal and transparency rates vary between Member States and for different levels of government and sectors.

New data suggest that previous studies may have underestimated the full extent of cross-border procurement. In a sample of companies involved in procurement activities, 46% of firms carried out some type of cross-border procurement. Direct cross-border procurement remains low, accounting for just 3% of the total number of bids submitted by the sample firms. On the other hand, the rate of indirect cross-border public procurement – e.g. bids won by foreign firms through their local subsidiaries - is higher, accounting for 30% of the total bids included in the sample. Equally importantly, it appears that domestic firms and foreign subsidiaries are playing on a level field – both have similar rates of success in bidding for contracts.

The full report, including statistical graphs, is available at:

http://www.europa.eu.int/comm/internal_market/en/publproc/general/index.htm

[1] preparations for X-ray examinations, iron or steel railway rails, smaller rails for trams, iron and steel seamless pipes of a kind used for oil or gas pipelines, fire fighting vehicles, railway tank wagons and syringes for medical usage.

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The Single Market Review Series

Subseries III - Dismantling of Barriers:

PUBLIC PROCUREMENT

Summary

By: Euro Strategy Consultants

July 1996

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1. Executive summary

1.1. Introduction

1.1.1. Background

The Single European Market (SEM) was conceived in the first half of the 1980s to combat the economic threat to Europe posed by the US and Japanese in high technology and by the newly industrialising countries (NICs) in assembly industries.

The Commission's 1985 White Paper, "Completing the Internal Market" focused the attention of Member States on the formal and informal barriers to intra-EU trade, the removal of which would create the environment for the development of European industries capable of competing in global markets. The 1987 Single European Act established a legislative programme of some 300 directives designed to remove these barriers, which were classified under three headings:

a. Physical Barriers, associated with frontier inspections;
b. Technical Barriers, causing legal and regulatory obstacles;
c. Fiscal Barriers, epitomised by differences in indirect taxes and excise duties.

After adjustments, the SEM programme comprised of 282 directives designed to create:

a. A New Community Standards Policy;

b. A Common Market for Services;
c. Conditions for Industrial Co-operation;
d. A Single Public Procurement Market;
e. Plant and Animal Health Controls.

The directives are either horizontal (industry independent) or vertical (industry specific) of nature. Examples of the former include the removal of border controls and the harmonisation of indirect taxation, and of the latter, mutual recognition in the pharmaceuticals industry.

The 1988 Cecchini Report provided the economic justification for completing the internal market and highlighted the interdependence of its various 'components'. At a conference on public procurement immediately preceding the report's press launch in London in January 1988, Lord Cockfield, the then vice-president of the Commission responsible for the internal market programme, described:

a. the aim of the SEM as "to create the environment in which European business can flourish";
b. the opening-up of public procurement as one of the cornerstones of the SEM programme, without which the internal market would not be complete.

The removal of the formal and informal barriers to intra-EU trade is clearly the most important factor in creating "the environment in which business can flourish". The economic impact will be the extent to which the wealth generating sectors of the economy have taken advantage of the 'new business environment'.

1.1.2. Public procurement before the Single Market

The Cecchini report described public sector markets in the EC12 as closed and generally uncompetitive, with:

a. widely different design standards in certain key high technology sectors, for example, defence, power generation, telecommunications and railways, making intra-EC trade costly;

b. governments promoting competition between alternative national suppliers, reflected in sub-optimal - globally uncompetitive - businesses;
c. distorted markets due to government subsidies;
d. R&D effort dissipated - where in the USA and Japan there were 3-5 major (global) companies in a sector, in Europe there were often 15-20 sub-optimal players;
e. little incentive to invest in new technology to confront the competition from non-EC firms;
f. a lack of product specialisation, such that even large EC firms had uneconomically wide product ranges and uneconomic production runs.

Although EC directives on public procurement have been in force since 1971 for works and 1977 for supplies, prior to the SEM legislation, transparency and fairness in terms of equal opportunity to submit offers and win contracts was strictly limited, with non-domestic suppliers almost completely excluded from national markets.

In addition to deliberately ignoring the existence of the legislation and favouring national suppliers as a matter of official policy, purchasing entities circumvented the rules by a range of measures, for example:

a. splitting contracts into lots to avoid the publications thresholds;
b. specifying national technical standards and proprietary products, which favoured the domestic supplier;
c. requiring special financial or technical capacities of foreign suppliers;
d. allowing inadequate response times for first-time bidders;
e. classifying contracts as 'continuations' or 'emergencies' to take advantage of the Directives' exclusions and, in defence procurement, as 'warlike' regardless of the function of the supply.

1.1.3. Ex-ante hypothesis

The legislation's aims

Between 1988 and 1993, a family of directives was adopted by the Council of Ministers defining the scope

of public procurement and regulating the ways in which public and other covered purchasing entities procure works, supplies and services. The aim of the legislation was to provide a framework for, and climate of, openness and fairness. The expectation - and desire - was that this would lead to:

a. increased competition between European companies;
b. improved industrial efficiency and competitiveness of European companies in global markets;
c. reduced public sector/utilities purchasing costs.

Measures of success

The success of the SEM in public procurement should be measured by the extent to which:

a. public entities and utilities are open (transparent) in informing potential suppliers of:
    i. a commercial opportunity
    ii. the criteria by which their offers will be judged
    iii. the results of the competition;
b. public entities and utilities are fair in awarding contracts in terms of:
    i. specifying objective award criteria which do not provide any potential supplier with an unfair technical or commercial advantage;
    ii. assessing tenders objectively in accordance with these criteria;
c. supplying industries have adapted to meet the challenge of the new purchasing environment in terms of:
    i. (i) responding to extra-national opportunities
    ii. (ii) restructuring to improve competitiveness and, generally, take advantage of trade liberalisation afforded by the SEM;
d. the public sector and utilities have experienced a reduction in purchasing costs.

(a) and (b) and are concerned with measuring the extent to which the directives and national transposing legislation are flawed in respect of:

a. requiring entities covered to be open (transparent) and fair in their tendering process;

b. providing a climate encouraging compliance by those entities covered.

(c) and (d) and measure the supply and demand-side response to the new purchasing environment created and to other drivers of change, including the SEM per se, economic performance, privatisation, globalisation of key industries, mergers and acquisitions, information technology, telecommunications, ...

Economic impact

In 1987 it was assumed that liberalisation of public procurement in Member States would result in:

a. increased competition for public contracts with the most competitive suppliers winning;
b. a reduction in prices paid by public bodies for works, supplies and services.

The introduction of new competitive suppliers into previously closed markets was forecast to result in:

a. a convergence of prices paid by the public sector to those of the most competitive suppliers - the (short-term) price effect;
b. rationalisation of production to achieve a better utilisation of resources to fund price reductions - (medium-term) competition effect;
c. reorganisation of certain strategic industries along pan-European lines via joint ventures, mergers and acquisitions, and alliances to create global players capable of benefiting from the SEM and competing with the US and Japanese giants - (long-term) restructuring effect.

The public sector would benefit from all three effects through being able to procure the economically most advantageous works, supplies and services. Within the private sector, there would be a redistribution of market shares and a more efficient use of productive resources, which in the short-term would lead to employment reductions amongst uncompetitive players.

Overall, the EU would benefit from the creation of strong European companies in strategic industries capable of competing with US and Japanese players in world markets.

Key considerations

The opening up of EU public procurement markets should be viewed as a necessary but not sufficient condition for achieving the SEM's economic aims. In this context, the legislation should be seen as a catalyst, designed to create the environment in which the desired change could and would occur.

In assessing the SEM in public procurement, it is important to understand that the legislation places no obligation on:

a. the entities covered to be efficient purchasers;
b. suppliers to respond to business opportunities in other Member States of the European Union.

A lack or limited achievement of these two outcomes should not automatically be construed as an indicator of failure of the legislation. The legislation could be achieving its aims of openness and fairness but its desired impact on purchasers and suppliers may not have been achieved due to:

a. the shortness of timescale between the directives coming into force and the timing of the mid-term assessment;
b. a lack of suppliers' awareness/understanding of the new EU purchasing environment;
c. supply-side scepticism of the fairness of the award process in other Member States;
d. inadequate supply-side knowledge of demand-side requirements in other Member States;
e. limited incentive and skills at the level of purchasing officers to correctly define award criteria which will result in the selection of the 'economically most advantageous' supplier.

1.2. Study approach

1.2.1. Key principles

The study's overall approach was driven by the limited availability of reliable and complete statistical data on the public procurement market.

As a result, considerable importance was placed on two pieces of primary research:

a. a survey of suppliers to the public sector/utilities, which was structured to allow inferences to be made about the *total* supply-side population;
b. a survey of a cross-section of purchasers subject to the directives.

Since the study considered the public procurement market from all key perspectives using a wide range of sources (in addition to the primary research), it has been possible to take into account the results of a number of qualitative, quantitative and quali-quantitative analyses to arrive at an assessment of the impact of the legislation which is:

1. consistent;
2. plausible;
3. coherent.

In some areas it has not been feasible to arrive at a definitive quantitative assessment due to a lack of

suitable data (at a sufficient level of detail), or the existence of contradictory information/analyses. In such instances, arguments and hypotheses have been developed by working from first principles to arrive at a reasoned (quali-quantitative) conclusion.

The study also focused on procurement-sensitive products and sectors on the basis that, if change had occurred, it would have been in these areas.

A final, and key, consideration has been the fact that no one individual analysis holds the answer to whether the public procurement legislation has achieved its aims. It is only the combination of the results of all individual analyses (which themselves reflect a range of information sources) that can provide this overall assessment. Consequently - in common with the main report - each section in this executive summary analyses a key issue(s) in isolation of other sections/analyses, with section 1.9. drawing them together to arrive at an assessment of the legislation's impact.

An overview of the executive summary's structure (which mirrors that of the main report) is shown in Table 1.1. together with the primary information sources.

Table 1.1. Executive summary structure and key sources overview

Measure/Output	Primary sources/inputs	Section
Public Procurement in 1987	Cost of Non-Europe in public procurement and other European Commission studies	1.3.
	National accounts	
Legal Measures Review	Member State and European public procurement law experts	1.4.1.-1.4.5.
	European Commission - DG XV/B	
Public Procurement Market Contours in 1994	National accounts Demand-side survey results (for utilities)	1.5.1.-1.5.2

	Member State statistical returns	
	EAP database	
	European Commission public procurement studies	
	Tenders Electronic Daily (TED) database	
	Member State officials responsible for public procurement	
	Office of Publications	
Market Perceptions	Survey of 1 608 EU15 suppliers to the public sector/utilities	1.6.1.-1.6.2.
	Survey of 698 EU15 central and sub-central government bodies and utilities	
Economic Analysis	COMEXT, Eurostat trade statistics	1.7.1.-1.7.4.
	DEBA, Eurostat production and employment statistics	
	Enterprises in Europe, Eurostat	
	Supply-side survey	
	Eurostat price survey indices	
	European Commission procurement and Single Market studies	
	EuroStrategy Consultants price survey	
Case Studies	Industry interviews	1.8.1.-1.8.6.
	COMEXT, Eurostat trade statistics	
	DEBA, Eurostat production and employment statistics	
	Industry publications	
	Company accounts	

1.2.2. Data commentary

This section provides an overview of the main data problems encountered, and the approaches employed to overcome them.

Public procurement in 1987

The prime data source for the description of the public procurement markets in 1987 was the Cecchini study on 'The Cost of Non-Europe in Public Sector Procurement'. Market size statistics from the Cecchini study were supplemented by data from the Commission's 1992 study on 'The implications of opening up public procurement in the excluded sectors in Greece, Italy, Portugal and Spain'.

The following public entities and 'products' covered in the Cecchini study are not covered by today's directives:

- nationally-owned civil airlines and their purchases;
- fuel used for power generation (coal, gas, nuclear material);
- 'warlike' materials (nuclear missiles, ships, aircraft, tanks, guns, ammunition, ...).

To ensure comparison between 1987 and today, the market size statistics in the Cecchini report were adjusted to reflect the differences in coverage.

Public procurement market in 1994 - market size

Since no reliable data exist on the size of the EU15 public procurement market in 1994, estimates of the market size were made using a combination of a top-down and bottom-up analysis in each Member State.

Estimates of government procurement of works, goods and services were, therefore, based on the top-down analysis, which used national accounts on general government spending and summed entries under the following line headings:

- purchases of goods and services;
- gross fixed capital formation.

This total was adjusted to remove defence spending on 'warlike' materials (art. 223 materials), which are not covered by the Directives. These 'warlike' estimates were derived from national accounts statistics on defence spending and estimates of the share of 'warlike' materials from 'The Costs of Non-Europe in Defence Procurement' study.

The demand-side survey results proved an inadequate base for making reliable bottom-up central and sub-central government estimates, due to:

- an overall response rate of 62%, less than the required 90-95%;
- low response rates for some Member States, particularly in France, Germany and Spain;
- some responses missing estimates of total procurement, reflecting:
    - confidentiality considerations;
    - problems obtaining information from different (autonomous) departments;
- some respondents returning only above threshold procurement values, as they did not consider below threshold procurement of any interest to the Commission study.

Estimates of utilities procurement were based on a combination of top-down and bottom-up analysis results. It was possible to use Utilities' returns from the demand-side survey for making bottom-up estimates, since:

- compared to the public sector, far fewer entities accounted for a large share of total utilities procurement;
- responses were obtained from around 90% of all European utilities operating in the key sectors of

power, gas, coal, oil and gas exploration/extraction, rail transport and telecommunications;
- completed questionnaires were returned via their European associations (which were briefed separately on the scope and objectives of the survey), ensuring standardised information covering their total annual procurement;
- a large number of entities are separate companies (either state- or privately-) owned, operating as 'private sector' businesses and, therefore, more likely to have a comprehensive view of their total purchases and annual capital expenditure.

Public procurement market in 1994 - market size by contract type

The market breakdown by contract type (works, supplies and services) was based on:

- the EC-US procurement study for central and sub-central government, under the assumption that the 1994 breakdown was not significantly different from that in 1993;
- the demand-side survey results for utilities.

Public procurement market in 1994 - market size by entity type

Primary data sources for the breakdown of the market by principal entity type were:

- the OECD national accounts for central and sub-central government;
- the bottom-up analysis of utilities procurement using the demand-side survey results.

Where possible, the breakdowns provided by the OECD national accounts were cross-referenced with the results from the EC-US procurement study.

Public procurement market in 1994 - above and below threshold procurement

The only available data sources on the split between above and below threshold procurement were:

- Member State returns to the Commission;

- the EC-US procurement study.

In the 1987 report, the concept of above and below threshold procurement was not considered. The Cecchini report focused on 'contract purchasing', concluding that entities were splitting contracts into lots to avoid the then Directives' thresholds, which led to the introduction of rules on aggregation. There was no ex-ante expectation of the percentage of total procurement which would, as a result, be above threshold (and therefore covered by the Directives), although it is understood that a level of at least 50% was considered most likely.

The complexity and sensitivity of this issue is demonstrated by the:

- significant differences between the estimates from these two data sources;
- lack of any other reliable statistics.

Given this, we have deliberately avoided making any additional estimates, but have instead highlighted a number of key issues and put forward hypotheses, which are further developed in the final impact assessment.

Number of contracting entities

A characteristic of the public sector and, to a lesser extent, utilities markets has been the lack of a comprehensive description (single database) of the number of entities covered by the directives which are capable of letting above-threshold contracts, where a 'contract' is defined in the context of the aggregation rules.

The study's analysis makes use of the EAP database, for which information has been collected in a systematic and consistent manner across the 12 Member States. Information for Austria, Finland and Sweden was obtained via their national procurement representatives.

Publication in the Official Journal

Prime data sources were:

- the TED database archives for the years 1993 to 1995;
- statistics published by the Office for Official Publications of the European Communities for the years prior to 1993.

Analysis of the publishing entities focused on:

- central government (including TED categories 'central government' and 'armed forces');
- sub-central government (TED category 'local authorities');
- utilities (TED category 'water, energy, transport and telecommunications sectors').

Demand-side survey

Some 698 purchasing entities were targeted by the survey, covering:

- central government ministries;
- sub-central government bodies, including:
    i. regional and local government bodies
    ii. uniformed services (fire and police)
    iii. purchaμsing consortia
    iv. health bodies;
- utilities:
    i. water
    ii. energy (covering coal, and oil and gas exploration and extraction, electricity and gas generation and distribution)
    iii. transport (covering airports, ports, rail and urban transport)
    iv. telecommunications.

Table 1.2. Member State and entity type responses

	Central Government	Sub-central Government	Utilities	Total
B/L	9	13	10	32
D	2	18	7	27
DK	22	22	10	54
E	2	23	*21	46
F	1	41	7	49
GR	0	2	*0	2
I	6	42	9	57
IRL	6	9	7	22
NL	5	27	9	41
P	3	10	*5	18
UK	9	53	25	87
A	4	6	10	20
S	3	12	7	22
SF	10	8	7	25
Total	**82**	**286**	**134**	**502**

Note: Since utilities in Greece, Spain and Portugal(*) were not subject to the utilities directive at the time of the survey, the questionnaire asked them for their experiences since 1990 and their intentions post-transposition (rather than pre and post-directive) as for the other Member States.

The survey sample was drawn on a constrained pareto basis (see Annex I.1.5.1.). The approach was to target purchasers representing 80% of procurement at each level of government and utility type in each Member State. Hence for any Member State, the survey targeted:

- central government ministries representing an estimated 80% of central government procurement, covering in the main ministries responsible for:
    - defence;
    - public works;
    - transport;
    - education;
    - interior/home office;
    - health;
    - post and telecommunications;
- purchasing entities at a regional level accounting for an estimated 80% of total regional procurement in the regions representing 80% of national GDP;
- bodies representative of total local government procurement within sub-regions representing 80% of GDP or population of the regions described at ;
- the largest utilities representing 70-80% of procurement in the each of the sub-sectors as defined in annexes I to X of the Utilities Directive.

As a result, the survey covered a wide range of:

- entity sizes - ranging from large spending central government ministries, such as the Ministry of Defence, to local authorities and local fire services and, in a number of cases, independent purchasing units within local bodies;
- purchasers focusing on works, supplies and services.

The survey's results have been used as indicators of changes, employing a combination of direct comparisons (pre and post-Directive experience) and scoring systems. Although responses in some areas were disappointing, the quality and number of responses overall were sufficient to be considered reliable and indicative for qualitative inferences to be drawn, particularly since the results were consistent:

- within and between Member States;
- with those from the supply-side survey;

- with implicit expectations based on previous studies in this area.

The results were also considered of particular value since, despite gaps, only those with responsibility for procurement can really know:

- what has happened in practice;
- their experiences and views of the legislation.

The information obtained from returned questionnaires was also supplemented and corroborated by:

- interviews with some 80 entities which were re-contacted to clarify their responses;
- a number of written submissions from entities (including some which declined to complete the questionnaire) and, in the case of utilities, their representative bodies which took up the questionnaire's invitation to provide additional comments.

Supply-side survey

Our approach was to:

- focus our sample on the procurement sensitive supplying sectors (see Annex I.1.3.3.), accounting for some 62% of the value of procurement;
- ensure that the large Member States and major supplying sectors had adequate representation for the purposes of making inferences about the total population.

Quota samples were drawn on a 4:1 basis from TED and Kompass and other business directories to ensure representation of all Member States and procurement sensitive sectors. Random samples were drawn in each cell (Member State and supplying sector). In total 6 000 companies were drawn from:

- published CANs in 1994 and 1995;
- Kompass and other business directories.

This approach yielded an effective sample of 1 608 companies, which was representative of the size of firms selling to the public sector/utilities within the quotas.

The central selection criterion for firms surveyed was that they should, at a minimum, be selling to the public sector and/or utilities in their own Member State, and survey respondents were managers with specific responsibility for public sector/utilities markets.

Table 1.3. Member State and sectoral coverage

	315	**316**	**33**	**341/2**	**344**	**351**	**362**	**37**	**453**	**471/2**	**502**	**83**	**Total**
D	15	9	24	21	20	20	11	11	10	11	24	24	200
F	19	9	24	20	20	20	9	11	11	10	23	24	200
I	19	5	24	22	22	19	10	10	7	8	29	22	197
UK	25	10	27	22	23	15	7	7	12	4	24	25	*211
E	14	8	18	14	15	14	8	8	10	8	18	18	153
B/L	8	4	13	10	10	11	5	5	5	5	12	12	100
NL	10	4	12	10	9	10	5	4	6	4	12	12	98
DK	6	3	9	6	6	5	3	3	3	3	9	9	65
P	5	5	7	6	8	5	3	3	2	1	9	7	61
IRL	4	3	6	5	5	4	3	4	3	3	6	7	53
GR	4	4	3	6	6	3	1	4	4	2	6	7	50
A	11	4	12	8	10	8	5	6	6	5	13	12	100
S	6	4	9	6	6	5	4	4	4	4	9	9	70
SF	4	3	6	6	5	3	3	3	2	3	6	6	50

	150	75	194	162	165	142	77	83	85	71	200	194	1608

Note: UK figures do not total to 211 since, due to a computer error, NACE identifying codes for 14 records were lost

Trade flows analysis

The trade flow analysis was based on data collected from COMEXT Database, Eurostat 1995 covering the EC12 Member States as reporting countries.

Problems with the data were identified in the form of substantial discrepancies between the import figures recorded by an importing country and the export data of the relevant exporting country, which, according to Eurostat, was due to exports, in certain cases:

- not being recorded in the imports of the trading partner because on arrival at their destination they were placed under a transit procedure or in a customs warehouse;
- being recorded in the imports of the importing Member States with a different value, not only because of the rule "exports-f.o.b., imports-c.i.f.", but above all as a result of special situations such as trade between associated companies with revaluing of imports, inclusion or exclusion of monetary compensatory amounts on agricultural products, and declaration of the value to be used for calculating VAT as the statistical value;
- being recorded in the imports of the trading partner:
    i. during a later period (affects the overall figures and the figures by type of goods);
    ii. under a different statistical heading (affects the figures by type by type of goods);
- being recorded in the trading partner's imports according to different methods:
    i. (i) because not all the cases in which the Regulation may apply have been settled (ships' store, postal consignments, confidential data, aircraft maintenance, etc.);
    ii. because it was impossible to eliminate all the errors in data returns or in the processing and forwarding of results;
    iii. because there were still a certain number of fraudulent declarations.

For the purpose of consistency, we have used EC12 exports data to measure intra-EC imports on the basis that total intra-EC exports in a sector equal total intra-EC imports.

Analysis at the intra-EC level covers the period 1988-1992, since:

- at the time of writing, 1995 product level trade data were not available;
- the introduction of a new intra-EC data collection system in 1993 (Intrastat System) has made 1993 figures unreliable and 1994 figures not comparable with pre-1993 statistics.

Even if 1995 data were available, an extended coverage to 1994 and 1995 would not be valid since:

- the proportion of the unexplained variation associated with the trend analysis was generally of the order of 30%;
- any new trend based on two points (1994 and 1995) would have no meaning.

Public sector import penetration

In general, there is no systematic recording or analysis of the national origin of purchases by entities despite the existence of reporting requirements for public sector bodies and the utilities as laid down in the current Directives. Although some Member States have submitted returns to the Commission on their procurement, the required level of detail is not available, since:

- the coverage of the reporting requirements varies between the Directives in terms of above and below threshold purchases. For example, utilities are only required to report below threshold procurement;
- only a small number of Member States has provided returns to the Commission;
- returns are generally only available for central government bodies;
- individual Member State returns are inconsistent in terms of segmentation and level of detail provided, and therefore not comparable;
- the available Member State returns provide only an insight into direct purchases of foreign origin,

and provide no information on indirect purchases.

In addition, taking into account the problems concerning the application of aggregation rules, the definition of discrete operating units, etc., it is not surprising that the Member State returns with respect to above threshold purchases vary from 16% to 93% coverage. This combined with the lack of necessary detail calls into question their reliability.

Therefore, no consistent data exist on the value of purchases from foreign suppliers nor of purchases of foreign origin from domestic suppliers. To provide this detailed information at a sufficient level of detail for 1994 would require the entities participating in the demand-side survey to undertake a significant amount of work at an individual contract level, which was not feasible within the scope of this study.

Since no data exist or are collectable on imports into the public sector below central government level and into the utilities in individual Member States, it was not possible to use demand-side data to make sound estimates of import penetration by supplying sector or in total for each Member State.

A more reliable source of information is private sector companies supplying the public sector or utilities, since they keep detailed records of their exports and imports. In general, this information is published in their annual reports at regional level permitting identification of exports to the (rest of the) EU and third countries.

The supply-side survey provides the following (high quality) data on a representative sample of 1 608 suppliers to the public sector, broken down by Member State, supplying sector and company size:

- total turnover;
- % of turnover supplied to the domestic public sector;
- % of turnover exported to the public sector in other EU Member States;
- % of domestic public sector sales imported.

Using the supply-side sample data (where possible, cross-referenced with the Member State returns), estimates of intra-EU direct and total indirect import penetration by supplying sector and Member State

were made, based on the following assumptions:

- the value of intra-EU public sector exports in a sector is equal to that of intra-EU public sector imports;
- the total value of sales to the public sector in the EU provides a good estimate of the value of EU public sector consumption.

The estimates of third country direct import penetration for central government as contained in Member State returns have been used to estimate direct extra-EU public sector import penetration. The problems described above with differences in coverage and level of detail of the Member State returns are of less importance when estimating direct extra-EU import penetration, since overall levels of direct extra-EU imports into the public sector are reported to be very low and, therefore, any inaccuracies will have little impact on the total estimates.

Price disparities

Considerable difficulties were encountered in obtaining reliable price data, since this information is, understandably, highly sensitive. As a result, it was necessary to obtain price data from a range of sources:

- The Cost of Non-Europe in Public Sector Procurement report (1987);
- The Implications of Opening up Public Procurement in Greece, Italy, Portugal and Spain report (1990);
- Eurostat;
- price data created by DRI McGraw Hill for a study undertaken for the European Commission on price convergence (1995).

Despite the limited availability of price data, comparisons of prices between Member States and over time (1987-1994) are considered reliable indicators of price differences for the same or similar products within the EU, since:

- data sources are not significantly different, due to:

    - all data referring to prices paid by purchasers
    - the Cecchini 1987 and DRI McGraw Hill figures all being based on Eurostat data;
- any changes in product over time, which happen universally or only in one country, are irrelevant. What matters is purchaser behaviour. For example, in a case study interview it emerged that one utility in one Member State had purchased a technologically advanced product in another Member State at a third of the domestic price. Despite this all other utilities in the first Member State continued to buy the outdated technology domestically at the higher price;
- there is a value in showing price data for the individual years to identify the level and nature of price disparities between Member State.

Since the price information was inclusive of taxes, an adjustment was made by removing value-added taxes (VAT) under the assumption that equipment goods are subject to the standard rate of VAT in all Member States.

Supply-side structure and case studies

The principal sources used for the collection of data on production, employment and industry specialisation were:

a. Eurostat 1994-1995;
b. DEBA, Industry and Database estimates, 1994-1995;
c. Basic statistics of the Community, Eurostat 1995, 1993;
d. industry publications;
e. Panorama of EU industry, 1995-96;
f. company accounts.

The analysis covered the 1987-1994 period, where possible.

1.3. Public procurement in 1987 (Chapter 4)

The public procurement market in 1987 is estimated at ECU 476 billion, equivalent to almost 12% of EU15's GDP. This estimate was arrived at by adjusting the original Cecchini estimate of 15% of GDP for the coverage of the current (Single Market) Directives on public procurement.

Table 1.4. Macro-economic importance of public purchasing in 1987 (ECU bn)

	GDP1	Total Government Expenditure2	Total Public Procurement3	Government Expenditure/GDP	Public Procurement/GDP
Belgium	121.1	71.5	15.4	59.1%	12.7%
Denmark	88.8	49.5	10.3	55.7%	11.6%
France	770.2	398.2	88.3	51.7%	11.5%
Germany	960.8	450.4	94.8	46.9%	9.9%
Greece	40.1	19.1	6.3	47.7%	15.7%
Ireland	26.2	13.4	3.0	51.3%	11.5%
Italy	658.2	330.6	68.4	50.2%	10.4%
Luxembourg	5.3	2.9	0.6	54.1%	11.3%

Netherlands	188.7	112.2	21.9	59.5%	11.6%
Portugal	31.8	13.7	4.6	43.1%	14.5%
Spain	254.2	103.7	26.4	40.8%	10.4%
UK	599.3	244.5	98.9	40.8%	16.5%
EU12	3744.7	1809.8	438.9	48.3%	11.7%
Austria	101.8	53.6	11.9	52.7%	11.7%
Finland	77.3	35.4	9.0	45.8%	11.6%
Sweden	139.4	83.1	16.3	59.6%	11.7%
EU15	4063.2	1981.9	476.1	48.8%	11.7%

Sources:

1. *Eurostat*
2. *General Government Receipts, Expenditure and Gross Debt, European Commission, DG II*
3. *B, D, F, I and UK: Cost of Non-Europe in Public Sector Procurement, European Commission, 1988*
   E, GR, P: Opening up public procurement in the Excluded Sectors, European Commission, 1992
   Other countries: EuroStrategy Consultants Estimates (see Annex I.1.)

The five large Member States accounted for almost 80% of the EU15 public procurement market in 1987.

In 1987 the EC12 public procurement markets were characterised by nationalistic purchasing, lack of transparency, wide price variances for similar products and negligible cross-border trade.

1.4. Legal measures review (Chapters 5-9)

1.4.1. Background

As a result of the findings of the 1987 Cost of Non-Europe study, a number of amendments were made to the original Works and Supplies Directives (adopted in 1971 and 1977 respectively) to improve their effectiveness by closing 'loopholes' which had been used by purchasing entities to circumvent the directives' aims.

The scope of the public procurement rules was also subsequently extended to embrace:

- utilities;
- services (purchased by both the public sector and utilities);
- a system of remedies (to ensure suppliers had a rapid and effective system of obtaining redress in instances when they have been treated unfairly).

As well as intra-EU legislation, a number of international agreements giving third country firms and products access to public and utilities procurement have been concluded, the principal of which are:

- the European Economic Area Agreement;
- The World Trade Organisation Agreement on Government Procurement (GPA);
- bi-lateral agreements with the United States;
- Association Agreements with central and eastern Europe.

In view of these amendments and extensions in scope, a coherent and comprehensive legal framework should have ensured that:

- the possibilities for non-compliance were limited;
- suppliers would have available effective systems of redress within Member States.

1.4.2. Community legislative framework (Chapter 6)

In many important areas the legislation's requirements are not clear, including, in particular:

- boundaries between works and supply/services contracts;
- operation of the "aggregation rules" (both regarding which products or services should be aggregated, and the treatment of discrete operating units within the same entity);
- use of "framework agreements" in the public sector;
- permissible criteria for shortlisting in the public sector;
- extent to which renewals, extensions or amendments to existing contractual agreements constitute new contracts;
- extent to which alterations to bids are permitted in open and restricted procedures.

These problems have been perpetuated in national transposing legislation, which has, in general, not provided any interpretation of the directives.

The directives also contain a number of drafting errors, inconsistencies and omissions, some minor, some more serious.

As at the end of 1995, no European Union guide to the interpretation of the directives existed.

1.4.3. National transposition (Chapter 7)

As at 31 December 1995:

- the European legal framework had not been fully transposed, with a number of key gaps where Member States had failed to introduce national transposing measures, particularly in relation to the public services directive 92/50 (Austria, Belgium, France, Greece and Austria) and utilities services directive 93/38 (Austria, Belgium, Germany, France, Luxembourg and the UK);
- numerous examples of late transposition for all directives; during this period the directives (with the exception of those on remedies) were effective by "direct effect";
- a number of Member States where national transposition was late, but where instructions, such as circulars/administrative orders were in place requiring contracting entities to comply with directives,

particularly in relation to the public works directive 89/440 (Denmark, Ireland, The Netherlands and the UK), and public supplies directive 88/295 (Denmark, Ireland and the UK).

Against this background, the European Commission is currently pursuing a number of Member States for failure to transpose and incorrect transposition of the directives.

There is considerable variance between the date of entry into force of the Directives in Member States, with, for example, directives only having come into force in Austria, Finland and Sweden in 1994 (under the EEA agreement, now superseded by their membership of the EU from 1 January, 1995), and the utilities directives yet to come into force in Greece, Portugal and Spain.

Whilst the public procurement Directives in force had not been transposed into national law in all Member States, where transposition *had* taken place, it was largely effective in legal terms.

1.4.4. Remedies and enforcement (Chapter 8)

In most Member States there are two principal problems hindering effective relief (under the remedies directives):

- the inability to obtain remedies with sufficient rapidity;
- a lack of clarity in the manner in which damages are calculated or can be obtained.

At the Member State level, there is a range of institutions dealing with public procurement, none of which appears to police and actively enforce the legislation.

At a Community level, enforcement is limited to the Commission which, under the general provisions of the Treaty of Rome, pursues infringements of its own initiative, including proceedings relating to incorrect and/or late Member State transposition, or actions brought to its attention by an aggrieved party.

1.4.5. Measures affecting third country access (Chapter 9)

The EU public procurement markets are open to a number of non-EU countries enjoying the benefits of multilateral and bilateral agreements. The most important is the WTO agreement on government procurement (GPA), but the scope of agreements is far from universal, with derogations in relation to all sectors and third countries.

1.5. Public procurement market contours in 1994 (Chapters 10-11)

1.5.1. Market size (Chapter 10)

The estimated size of the EU15 public procurement market in 1994 based on a combination of top-down and bottom-up analysis is ECU 721 billion (11.2% of EU15 GDP). As a share of GDP, this represents a reduction in most Member States, which is compensated by a significant increase in Germany due to reunification.

Figure 1.1. Procurement as a share of GDP in 1987 and 1994

Note 1994 figures are based on mean values
Sources: Table 4.2. and 10.1.

The overall decrease in size of the public procurement market is likely to reflect the general decrease in public expenditure as a result of Member State policies to reduce budget deficits.

In terms of procurement by entity type, sub-central government entities accounted for almost half of total EU15 public procurement in 1994, followed by central government (29%) and utilities (24%). Individual Member States showed significant variances due to institutional differences in public sector structure, and the impact of austerity budgets. Compared to 1987, sub-central government procurement had increased, whereas central government and utilities purchasing had decreased slightly, reflecting:

- decentralisation in purchasing from central to regional and local government;

- privatisation of utilities.

In terms of procurement by contract type, supplies contracts accounted for nearly 40% of total purchasing in 1994, with the remainder split equally between works and services. Compared to 1987, no significant shift in this breakdown had occurred.

Estimates of above threshold procurement based on Member State returns for central government and the EC-US procurement study range from 25% to 60% of total EU15 procurement. National estimates vary from 16% in Denmark to 93% in France.

The key determinant of above threshold purchasing for supplies and services is the definition of 'like' products or services for the purposes of aggregation. If, under the Supplies Directive 'like products' are defined at the level of 'vehicles', 'stationery', 'IT hardware', etc. and, under the Services Directive at the level described in Annex A, it is inconceivable that central government purchasing entities spend less than approximately ECU 130 000 annually under each of these general headings. Therefore, these estimates are likely to understate the level of above threshold purchasing, other than for France, which reported 93% of total government purchasing above threshold.

The estimated total number of entities covered by the legislation and capable of letting contracts above threshold was around 111 000 in 1995, half of which was sub-central government entities.

1.5.2. Publication in the Official Journal (Chapter 11)

There has been a significant overall increase in the total number of notices published in the Official Journal since 1987. However, Member State increases varied from 200% to 900%.

The number of notices for supplies and works contracts in the nine Member States subject to the supplies and works directives since 1989 is still growing substantially.

There is a low level of compliance with the requirement to publish contract award notices (CANs) with,

on average, only one CAN for every two tender notices.

Sub-central government accounted for the majority of notices published in 1995, although there were differences between Member States, reflecting roles and responsibilities.

In general, central government bodies complied with the directives' requirements in relation to use of procedures, with the exception of Italy, where accelerated restricted was used for over 60% of tenders. A number of Member States also made considerable use of the negotiated procedure.

In general, sub-central government bodies complied with the directives' requirements in relation to use of procedures, with the exception of Italy, where accelerated restricted was used for some 38% of tenders. Noticeably high use of the negotiated procedure was also made in several other Member States.

In general, utilities predominantly used the negotiated and restricted procedures, although a number did make significant use of the open procedure.

In 1995, between 15 000 and 18 500 entities published notices in the Official Journal, with sub-central bodies making up about 75% of the total.

1.6. Market perceptions (Chapters 12-13)

1.6.1. Demand-side survey results (Chapter 12)

Despite expected differences between Member States, types of purchasers and types of procurement, a number of consistent messages emerged from the survey.

At a global level the survey showed that the legislation has had a significant impact, but that whilst there have been a number of benefits, these are currently seen by purchasers to be outweighed by associated 'costs'.

The legislation has resulted in increased openness, with most respondents reporting having published more notices and now using the Official Journal.

The survey's results indicated that:

- without the legislation, there would have been a more restrictive approach to purchasing;
- there are still high levels of non-compliance, with sub-central government entities, in particular, considered only to be starting to fulfil the directives' requirements.

Whilst there were indications of continued non-compliance with the legislation's requirements, there were

also entities which had been genuinely disappointed by the supply-side's response (to notices published in the Official Journal).

In general, whilst purchasing entities had a reasonable 'feel' for their domestic suppliers, their knowledge in relation to non-domestic suppliers, was very low, implying that, for most, any increases in non-domestic penetration have been minimal. This was confirmed by entities which were able to provide such information.

In relation to sub-central government's experiences, a number of entities in some of the largest Member States:

- expressed disappointment at the lack of response to notices published;
- reported that, despite the directives having been in force for almost seven years in relation to supplies, only recently had there been evidence of (any) new suppliers responding to calls for competition;
- awareness of the rules at this level is still low. (The structure of sub-central government in Member States is likely to exacerbate non-publication, particularly where procurement is devolved to (small) independent units, whose procurement is not aggregated).

The 'cost' element of the legislation was most associated with:

- more complex procurement;
- more time-consuming procurement.

This 'cost' element of the legislation was exacerbated by generally perceived increases in both the total number of firms, and the number of non-domestic firms, submitting tenders not having, in general, been translated into changes in supplier bases, with:

a. only a minority of entities reporting real benefits - primarily lower contract prices. Even in such instances, this perception was based on 'exceptional' cases, such as:
    i. two instances where, in a strategic area, an innovative technical solution from a new

non-domestic supplier resulted in savings of 50%

ii. purchase of railway rolling stock from a previously unknown EU supplier as the direct result of a notice placed in the Official Journal;

b. the legislation's impact on any changes in supplier behaviour, such as improved service, perceived as minimal.

The lack of lower prices indicated that, despite an increase in new firms submitting tenders, they were:

- either not competitive, or not competing on price;
- pricing to national markets (minimising any cost saving potential for the purchaser);
- not selling across border (exporting direct) - the price reduction examples quoted above were, significantly, from suppliers selling direct from another Member State;
- not stimulating competition (for the above and other reasons, such as domestic supplier apathy, lack of awareness and lack of concern).

An additional key finding not specifically covered by the survey, but consistently raised by entities which submitted additional comments, was the threat of legal action by suppliers. As a consequence of this and the legislation's lack of clarity, entities have adopted a literal (and defensive) approach to implementation of the rules. However, by applying the directives' requirements 'to the letter' rather than their 'spirit' in relation to, for example, supplier qualification:

- administrative costs have increased;
- potential new suppliers are (seen to be) deterred by the costs of completing extensive qualification documentation.

With the exception of some entities with a focus on works procurement, 'economically most advantageous' was the preferred award criterion for all types of entity in all Member States. However, the nature of award criteria used indicated that, despite claiming to be awarding on the basis of 'economically most advantageous', in most cases, purchasers chose on the basis of lowest price

1.6.2. Supply-side survey results (Chapter 13)

Across all Member States, and within most sectors, there were a significant number of non-domestic subsidiaries selling to the public sector/utilities.

Overall, 41% of all firms surveyed had obtained information from the OJ and TED, although there were differences between Member States. A significantly higher percentage of large firms (69%) obtained information from the OJ and TED than medium-sized (53%) and small (34%) companies.

As a result of opportunities identified from the OJ and TED, 13% of all firms surveyed had won additional domestic business, and some 4% of all firms surveyed had won additional business in other EU Member States.

Large firms had been most successful in winning additional new business in both domestic and non-domestic markets as a result of opportunities identified in the OJ and TED. However, those small and medium-sized firms which had used the OJ and TED, were as successful as large companies in winning business in domestic markets.

The OJ and TED were seen in a positive fashion by those firms which had obtained information from them, with over 80% intending/expecting to submit at least as many tenders in response to notices in the future for both domestic and non-domestic markets.

In terms of domestic business, of the firms which had obtained information from the OJ and TED:

- almost half had identified additional domestic business opportunities;
- response rates to new opportunities were very high, with over 90% having submitted tenders, more than 70% of those submitting having won business as a result, and success generally size and sector independent.

In domestic markets, price was the major reason given by firms for failing to win additional business from

opportunities identified in the OJ and TED.

In terms of non-domestic business:

- a significantly higher percentage of firms reading the OJ/TED sell to other EU Member States than those not reading the OJ/TED, with the higher percentage readership of the OJ and TED in a Member State, the higher the percentage of firms selling to other EU Member States.
- a significantly higher percentage of larger companies had won new business than medium-sized and small companies.

Response rates for non-domestic opportunities were high, with over 80% of those which had identified new opportunities having submitted tenders. Of these, 44% had subsequently won business.

Firms successful in non-domestic markets attributed their success to a range of factors. Whilst price was important, equal importance was attached to service, quality and technical innovation indicated.

Most firms considered the cost of submitting tenders for non-domestic business to be greater than for domestic business. Marketing and bid preparation itself were the most important additional costs.

Of those firms which reported using the OJ and TED, some 67% (32% of all firms interviewed) considered the information contained in notices adequate for business purposes. At a general level, the quality of information provided was seen to be lacking, since:

- 9% of all firms interviewed had *tried* to sell to other EU Member States, but were not now doing so;
- of the 58% of firms which had not tried to sell to other EU Member States, the principal reasons given were difficulty in identifying opportunities (13%) and the complexity of administrative procedures (10%).

Overall, 36% of all firms surveyed had noticed an increase in non-domestic firms competing for, and winning, business from their own public sector and utilities customers.

This perception was supported by other survey results, principally that:

- 31% of all firms surveyed were currently selling to public sector/utilities customers in other EU Member States;
- 21% of all firms surveyed were selling through offices/companies based in other Member States (although clearly there is a degree of overlap, and the extent to which firms actually know whether competitors in their own markets are non-domestic subsidiaries is debatable).

1.7. Economic analysis (Chapters 14-16)

1.7.1. Trade flows (Chapter 14)

In terms of the strategic products analysed, which are primarily bought by the public sector, there has been an overall increase in trade at both intra and extra-EC level, with the exception of locomotives and goods wagons. Extra-EC trade balances have been improving over the period 1988-1992 with a particularly sharp rise in exports for transformers, x-ray apparatus, and telephonic and telegraphic switching apparatus.

For these products, Germany, France and, to a lesser extent, the UK showed the largest increases in both intra-EC and extra-EC trade.

Regarding the shopping list products which are both bought by the public and private sectors, there has generally been a larger increase in trade at both intra-EC and extra-EC levels than for the strategic public sector purchases. Computers and network servers represented the only exception within the overall trend of increasing trade, whereas uniforms showed a particularly sharp increase in extra-EC imports, mainly from low wage countries.

Generally, the United Kingdom and Italy have benefited most, while Germany and France experienced smaller increases.

1.7.2. Public sector import penetration

In 1994, an estimated 96 - 98% of total EU public sector purchases was procured from domestic suppliers. When indirect foreign purchases are included, i.e. purchases via domestic suppliers such as subsidiaries, agents or importers, an estimated 7 - 13% of total European public sector purchases was of a non-domestic origin.

Of the direct imports into the public sector, other European suppliers accounted for an estimated 2-3% of total EU public sector purchases in 1994. Third country suppliers accounted for less than 0.5%.

The level of public sector import penetration showed large variations between the 'procurement sensitive' sectors. In general, public sector purchases which are complex and have a relatively high technology content, such as medical equipment, railway rolling stock and office machinery, showed a high level of cross-border trade.

Figure 1.2. Direct and indirect public sector import penetration by supplying sector (1994)

Note: Figures are based on the mean of the upper and lower estimates
Source: Supply-side survey questions 26, 27 and 28 (see Annex I.1.6 and I.3)
Member States' statistical reports, DG XV, 1995

At an individual Member State level, the larger Member States showed lower levels of public sector import penetration than the smaller Member States.

Compared to 1987 public sector import penetration increased from 6% to an estimated average of 10% in 1994.

1.7.3. Price disparities (Chapter 15)

Overall, there is no conclusive evidence of price convergence between Member States for products bought by the public sector. There are some exceptions for certain products where a degree of price convergence has occurred between 1987 and 1994, such as cardiac monitors, buses and office machinery, which are generally purchased directly from the manufacturer.

Since no clear price convergence has been identified, it can be assumed that the competition effect predicted by the Cecchini report in relation to the opening of public procurement has not yet materialised. Therefore, any price changes observed within a Member State can only be attributed to factors other than the Single Market in public procurement.

Despite the continued existence of price differences in 1994, the relative position of Member States in terms of absolute prices has changed between 1987 and 1994 for certain products, which can be partly explained by:

- exchange rate movements;
- differences in inflation rates.

Regarding price disparities for comparable products bought primarily by the private sector, no clear price convergence was observed between 1985 and 1993, except for transport equipment, such as motor vehicles and bikes, ships, and aircraft.

1.7.4. Supply-side structure (Chapter 16)

In all industries, there has been a significant reduction in employment.

In 'commodity' areas, there has been a redistribution of market shares between Member States, resulting in changes in specialisation.

For strategic industries, significant restructuring has resulted in increased supplier concentration and the creation of global players in the telecommunications, railway rolling stock and power generation sectors.

1.8. Case studies (Chapters 17-22)

1.8.1. Telecommunications equipment (Chapter 17)

The EU telecommunications equipment market has undergone fundamental change since 1987:

- the supply-side has been restructured and is today dominated by three economically strong and technologically advanced European groups;
- equipment prices have come down by 20-30% in nominal terms;
- market leaders - Alcatel, Siemens and Ericsson - have transferred production to other Member States to ensure access to local (public sector) markets;
- indirect import penetration has risen significantly, largely in components;
- the EU's trade surplus with the rest of the world has been growing steadily since 1987, reflecting the industry's competitiveness on the world stage

The main drivers of change have been the globalisation of the market for telecommunications services, which has been the motor of liberalisation. Service providers - the entities covered by the utilities directive - have responded by demanding the best technical solutions.

Although much of the ex-ante hypothesis has been achieved, the role of the utilities directive, which came into force in January 1993 in most Member States, has been strictly limited.

Liberalisation of network services in January 1998 will accelerate the changes already in progress and likely to contribute to the achievement of a competitive and fair 'public procurement' market almost overnight.

1.8.2. Railway rolling stock (Chapter 18)

On the demand side, governments are being pressurised to liberalise previously heavily subsidised

national markets and increase the operational independence of network operators. Similarly, deregulation, privatisation and separation of network management from the provision of services is creating competition between service providers, further weakening the links between purchasers and traditional suppliers. As a result, the concentration of supply has reduced in the majority of Member States.

Since 1987, these developments are considered to have resulted in price reductions of the order of 20% to 30%.

On the supply side, over-capacity due to reduced public sector expenditure and the high cost of R&D has resulted in a radical process of rationalisation since 1987, significantly increasing supplier concentration. The industry is now dominated by three major players - Adtranz, GEC-Alsthom and Siemens, all having a strong presence in other Member States.

The public procurement legislation has had little impact on the competitiveness of the industry as the varied technical standards employed by national railways provide an inherent advantage to traditional suppliers which were either involved in their development, or have prior experience of them.

Only in the market for *new* urban/mass transit systems has the increased transparency caused by the directives been considered a key factor in opening up the markets to competition.

1.8.3. Power generating equipment (Chapter 19)

The electricity generation industry is moving, via a process of liberalisation and privatisation, towards greater private sector involvement and more market driven behaviour. Together with the impact of the recession, general reductions in infrastructure investment, over-capacity and increased competition from North American suppliers, have caused equipment prices to fall between 30% and 40% since 1990.

The public procurement legislation has acted as an accelerator to these changes, but despite its existence, some markets have been slow to liberalise. While technical harmonisation has increased cross-border trade, the industry is still hampered by internal and external barriers such as enlarged testing requirements

and certification activities

The supply-side has begun to restructure in response to these changes, with manufacturers trying to enter national markets, either through consortia or acquisition, but significant adjustment has not yet taken place. However, over the next 18 months, a number of manufacturers are predicting large job losses

1.8.4. Consulting engineering (Chapter 20)

In 1987, the engineering consultancy market was generally fragmented on both the supply and demand-side. This has not changed significantly, although a dramatic reduction in demand has reduced prices and increased the intensity of competition. This effect, however, has taken place nationally, with cross border EU activity remaining low (3% to 4% of revenue), despite the continued success of European consultancies outside Europe.

There is a trend towards large companies becoming larger and seeking to use strategic partnerships and consortia as a means of developing intra-European business. Presently, however, the positions of the leading consultancies in the UK, Germany and the Netherlands have not altered markedly because of continued barriers to intra-EU trade, including differences in fee regulations and necessary qualifications.

1.8.5. Uniforms (Chapter 21)

The public procurement legislation has played a role in opening up previously closed markets, but other factors, such as a decline in demand, have been as important.

The experience of major suppliers indicates that:

a. the potential for purchasers to continue to discriminate against new suppliers, even when complying with the legislation, is considerable;
b. non-compliance, in particular by splitting contracts (failing to aggregate), is still widespread, especially in smaller (sub-central) purchasers.

The benefits of increased cross-border trade have only been realised by the industry's largest players. There is a strong perception, even among larger suppliers that have been successful in selling across borders, that key markets are still closed to non-domestic suppliers.

SMEs have continued to focus on local and regional markets since they:

a. lack the resource to compete for non-domestic business;
b. do not consider other markets to be truly open and fair.

In addition, the legislation is seen to have complicated the tendering process with additional bureaucracy in relation to, for example, (pre-)qualification particularly burdensome for SMEs.

There is an apparent contradiction between the continued closed nature of regional and local markets, with purchasers still to showing a national preference, and reported reductions in prices. It appears, however, that, in common with several other case study sectors, purchasers have used the legislation as a means of driving down prices whilst keeping the same suppliers.

1.8.6. Construction (Chapter 22)

The overall impact of the Single European Market and public procurement legislation on the EU civil engineering market has been minimal in comparison with the changes brought about by declining demand due to reduced public finance for infrastructure investments. The result has been a dramatic rise in competition with prices falling throughout Europe.

The majority of large civil engineering contracts, however, continue to be won by national suppliers, although in a small number of cases, non-national suppliers are being used to drive down prices of traditional suppliers. What success there has been in developing intra-EU trade is due to smaller specialist sub-contractors which have exported their know-how throughout Europe.

The supply-side continues to be dominated by a small number of large national contractors in France,

Germany and the UK. The level of concentration has increased slightly due to the recession, forcing further mergers and acquisitions at national as well as at international level.

The existing market structure will not remain static indefinitely, and the most likely competitive response will be an upsurge in mergers and acquisitions, particularly among the leading French and German players, as they seek to restructure and rationalise their operations, eliminate competition and penetrate non-national markets through cross-border ownership.

1.9. Impact assessment (Chapter 23)

1.9.1. Direct impacts - openness

Use of the Official Journal

In general, the Official Journal has been a very valuable source of information, for those who read it. It is regarded as the single point of focus for business in the public sector, either domestically or in other Member States, in particular by those suppliers which are committed to entering new markets. This was illustrated by the supply-side survey, which found that:

- an estimated 41% of suppliers to the public sector obtain information from the Official Journal. However, SMEs have only a 30% readership, suggesting that larger companies are the main beneficiaries of this information;
- an estimated 14 - 20% of all suppliers to the public sector had identified additional opportunities in their domestic markets, and an estimated 9 - 13% in other EU markets;
- over two-thirds of Official Journal readers considered information provided in notices to be adequate for business purposes.

These findings were supported by results from the demand-side survey, where the majority of purchasers reported their only change in publication media to be the Official Journal. This implies that there has been

an increase in access to opportunities within a Member State and in other EU Member States, since, previously, public sector calls for competition were only published locally and nationally, not internationally, whilst utilities, in general, did not publish at all.

Therefore, if suppliers did not know about opportunities before legislation came into force, without the Official Journal, they would probably still be unaware of them today. In this respect, the Directives have created, in the form of the Official Journal, greater openness and consistency in relation to public sector opportunities.

However, there is a lack of knowledge amongst potential suppliers on the extent of information on public sector opportunities available in the Official Journal due to:

- limited promotion of the Official Journal at Member State level;
- relatively high subscription fees for the Official Journal and the TED database, especially for SMEs.

It can also be inferred that, based on the results of the demand-side survey and the previous analysis, it is SMEs which have benefited the least from the legislation since:

- smaller contracts are still let locally to broadly the same suppliers without publication in the Official Journal (as they are not being aggregated);
- a smaller proportion of SMEs use the Official Journal.

Numbers of entities publishing in relation to the coverage of the directives

As a result of the procurement legislation, there has been an increase in the number of entities publishing, reflecting:

- implementation of the Utilities Directives;
- as indicated by the demand-side survey, entities, particularly sub-central government bodies, only recently starting to fulfil the Directives' publishing requirements.

However, the number of entities which are covered and should be publishing does not correspond with the actual number of entities publishing. This is illustrated by the significant differences between the number of entities in the EAP-database (>100 000) and the number that had published in 1995 (>15 000).

Overall, an estimated 14% of the total number of entities covered by the legislation is actually publishing in the Official Journal.

Reasons for non-publication by entities reflect a varied understanding of the Directives' requirements, for example:

- a contract based approach to purchasing, resulting from a misinterpretation of the aggregation rules;
- different definitions for discrete operating units;
- misunderstanding of coverage leading to non-compliance.

In addition, non-publication is exacerbated by:

- the absence of active policing and enforcement of the Directives' requirements at Member State level;
- inefficient national legal systems of redress;
- suppliers' reluctance to 'prosecute' potential customers;
- lack of awareness of the legislation's requirements by suppliers, particularly SMEs.

Extent of publication of notices in relation to the coverage of the directives

The implementation of legislation has resulted in a significant increase in the total number of notices published in the Official Journal from around 12 000 in 1987 to over 95 000 in 1995, reflecting:

- the entry into force of the Utilities and Services Directives on 1 January 1993;
- the overall increase in awareness of the Directives, as reported in the demand-side survey, resulting in both more entities publishing and more notices being published per entity.

The impact of the implementation of the Utilities and Services Directives is vividly illustrated by the step change in the number of:

- notices published by the utilities, from 0% in 1992 to 14.7% of all notices published in 1995;
- services notices published, from 11.3% of all notices published by central and sub-central government in 1993 to 28% of total number of notices in 1995.

However, there is still under-publication of tender notices as illustrated by:

- entities not publishing, due to the varied understanding of the Directives' requirements;
- the continuing increase in number of supplies notices being published by public sector entities despite legislation having been in force since 1989;
- for every two tender notices only one CAN being published (itself an indicator of openness);
- the reported differences in above threshold procurement, with central government in some Member States claiming above threshold procurement at a mere 16%. This is inconceivable in terms of the size of aggregated budgets on supplies and services, even taking into account the existence of discrete operating units.

These views are supported by a recent study for the Commission on EC-US procurement, which showed that in one of the EU's largest Member States:

- almost 10% of towns with more than 100 000 inhabitants did not report any procurement in 1993;
- 28% of towns of 10 000-50 000 inhabitants, and over 30% of towns of 50 000 - 100 000 reported no contracts.

It was concluded to be inconceivable that these entities did not have any purchases covered by the Directives. Likewise, a Commission analysis highlighted considerable variation between notice publication by similar-sized (major) sub-central government bodies with similar responsibilities in other Member States.

The overall conclusion is that significant under-publication in the Official Journal exists as a result of:

- varied interpretations of:
  - a contract;
  - a discrete operating unit;
  - the definition of 'products/services with *similar* characteristics' under the aggregation rules;
- in some cases, non-compliance.

In addition, from a demand-side perspective, there is a perceived lack of incentive to publish due to:

- difficulties in understanding some key elements of the Directives (and, consequently, national transpositions);
- little supplier response when tender notices are published;
- no active policing or enforcement.

This is creating a 'self-fulfilling prophecy', reflecting attitudes and actions of not only the demand-side but also of the supply-side, as will be shown in the downstream impact assessment.

Use of procedures

A direct impact of the legislation has been, that when entities are publishing a call for competition, they are, in general, complying in terms of the type of procedure used, with:

- central and sub-central government primarily using the open and restricted procedures;
- utilities primarily using the negotiated and restricted procedures.

The scope of openness is only limited in relation to the use of qualification systems and negotiated procedures, since:

- opportunities are not required to be made public. Even when the supplier is on an approved list,

there is no obligation to notify every supplier of the opportunity;
- the level of information required to be accepted on a qualification list can be used to deter new suppliers (albeit unintentionally).

Similarly, although compliant, the publication of indicative notices or notices of existence of qualification systems on an annual basis means suppliers which either miss the announcement or do not obtain information from the Official Journal/TED will not respond or be aware.

In general, there is a preference by purchasers to use restricted procedures to avoid the higher costs associated with the administrative implications of using the open procedure.

1.9.2. Direct impacts - fairness

Selection of award criteria and their application

Regarding the application of award criteria, a distinction has to be made between the tendering procedure chosen, with:

- for the open procedure, only contract award criteria being applied;
- for the restricted and negotiated procedures, three types of criteria being applied:
    - pre-qualification;
    - short-listing;
    - award.

In general, the pre-qualification stage can cut out competition by setting criteria which prevent potential suppliers from submitting tenders. In addition, assuming the awarding authority sets objective pre-qualification criteria, there appears to be no objective basis for selecting a sub-set of pre-qualified suppliers to tender. The absence of any permissible criteria for short-listing, increases the scope for misuse and favouring of traditional suppliers.

The vast majority of awarding authorities claim to award contracts on the basis of the 'most economically advantageous tender', which requires the purchaser to select the overall best tender according to a combination of objective award criteria. Under normal circumstances the award criteria should be prioritised, implying the existence of a weighting system.

In practice, purchasers:

- find it difficult to measure some of their stated award criteria, such as quality;
- often create a short-list of tenders based on all criteria other than price, then choose the cheapest;
- invariably, select on price.

As a result, suppliers often submit tenders on one basis, and are evaluated on another.

Both the surveys and the in-depth interviews confirmed that:

- price is often the sole decision criterion (without weighting being applied);
- purchasing authorities often introduce competition and award an occasional contract to a new supplier to force traditional players to reduce prices, even though they would have won under the strict application of 'most economically advantageous'.

Redress

In all regulated environments there is always a degree of unfairness. This can be minimised by having:

- clear and unambiguous rules;
- effective policing;
- efficient enforcement.

Regarding clarity, important areas of the Directives have been identified as unclear, notably:

- boundaries between works and supply/contracts;
- application of the 'aggregation rules', both regarding the level at which products or services should be aggregated and the treatment of discrete operating units within the same entity;
- use of 'framework agreements' in the public sector;
- permissible criteria for shortlisting in the public sector;
- the extent to which renewals, extensions or amendment to existing contractual agreements constitute new contracts;
- the extent to which alterations to bids are permitted in open and restricted procedures;
- rules on criteria and evidence for assessing qualification in the utilities sector applying to qualification systems in some circumstance but not in others, without any apparent justification.

In general, there is no active policing of compliance at Member State level.

Regarding enforcement, there is no provision for Member States to enforce compliance. Enforcement is restricted to suppliers instituting an action against a purchasing authority under the legal remedies legislation in a particular case. However, with the exception of Denmark and Sweden, the efficiency and effectiveness of national arrangements in relation to remedies are considered to be inadequate, due to:

- an inability to obtain remedies with sufficient rapidity;
- a lack of clarity in the manner in which damages are calculated and obtained.

1.9.3. Downstream impacts - competition

Supplier response

Based on the supply-side survey results, an estimated:

- 14-20% of all suppliers to the public sector have identified additional opportunities in their *domestic* markets from notices published in the Official Journal, with 9-13% of all suppliers to the public

sector winning new business as a result;
- 9-13% of all suppliers to the public sector had identified additional opportunities in *other EU Member States* from notices published in the Official Journal, with 3-4% winning additional business as a result.

In both cases, this level of success is directly attributable to the Directives' requirement to publish notices in the Official Journal, and their impact on the purchasing procedures and attitudes of public sector entities.

Although firms of all sizes have been successful in winning additional business using the Official Journal, the weighting has been in favour of large companies, particularly for non-domestic business, reflecting their:

- higher readership of the Official Journal, 69% of all large companies compared to 53% for medium-sized and 34% for SMEs;
- greater presence in non-domestic markets.

These changes on the supply-side are corroborated by the views of purchasers that there had been:

some increase in non-domestic suppliers tendering for opportunities;

some change in the mix of their supplier bases, predominantly large and multi-national companies, particularly amongst utilities and sub-central government.

Import penetration

Public sector purchases of non-domestic origin moved from an estimated 6% in 1987 to 10% of total public sector purchases in 1994, of which:

- *direct* imports increased from 1.4% to 3%;
- *indirect* imports increased from 4.5% to 7%.

This was consistent with the estimated increase in the number of suppliers to the public sector winning new additional business in other EU Member States.

In general, the demand-side did not perceive any change in nationality of their supplier base, which reflects:

- the small and uneven nature of the increase in direct public sector import penetration;
- the majority of the increase in public sector import penetration being purchased from a 'domestic' supplier (including subsidiaries of foreign companies) which imported the procurement.

When considering public sector purchases in terms of 'commodity' products, which are low-tech standard purchases (office furniture, paper, stationery, ...), and of high cost strategic products, it is in the area of 'commodity' purchases where there has been a general significant increase in intra-EU trade. This was reflected in the rise in public sector indirect import penetration.

For example, in paper there has been a significant increase in intra-EU trade, which is consistent with a high level of (18%) indirect public sector imports. This is supported by the reported lack of success in winning new direct business in other Member States by paper suppliers to the public sector (see Table 1.5.).

Table 1.5. Supplier response and public sector import penetration

Sector/Product	NACE	% OJ readership1	% which won new domestic	% which won new other-EU	Public sector import penetration-(%)4 1994	
			business2	business3	direct	indirect
Low-tech products						
office furniture	316	34	9	2	5	8

uniforms	453	47	12	4	3	13
printing and paper	471/2	26	6	0	<1	17-19
High-tech products with common tech. specs.						
office machinery	33	45	17	3	4	22-29
motor vehicles	351	41	12	3	3-4	16-19
medical equip.	37	26	10	2	5-6	19-21
High-tech products with different tech. specs.						
boilers	315	31	12	4	4	9-10
power generating equip.	341/2	42	10	4	6-7	11-14
telecommunications equip.	344	42	13	7	6-8	18-22
railway rolling stock	362	49	12	10	10-11	19-21
Works						
Construction/civil eng.	502	44	11	4	3	4-7
Services						
Consulting engineering	83	52	22	4	1	5-6
EU average		41	9-13	3-4	2-4	5-9

Sources:

1. % of suppliers to the public sector using the OJ and TED (Figure 13.2)
2. % of suppliers to the public sector winning additional domestic business (Figure 13.12)

3. % of suppliers to the public sector winning additional business in other EU Member States (Figure 13.23)
4. Table I.1.31.

Since both public and private sectors procure these commodity products from the same intermediate local suppliers, by inference, public sector import penetration equals private sector import penetration.

With respect to purchases of strategic products, in general this area of procurement has experienced increases in intra-EU and extra-EU trade, albeit at a somewhat lower level than the corresponding changes in trade for 'commodity' purchases. However, their level of direct purchases from non-domestic suppliers is, today, more important than for that of 'commodity' purchases. This is supported by the supply-side survey where suppliers of strategic products, such as railway rolling stock and telecommunications equipment, reported the highest levels of new additional business in other Member States.

In the areas of works and services, public sector import penetration is, in broad terms far lower, with any public sector trade, in the main, being related to a small number of large international construction projects and their closely related services, such as architecture and consulting engineering. The case studies indicated a perceived continued existence of barriers to trade in these areas, which, in essence, the public procurement legislation could not be expected to overcome.

Price convergence

Within a national market a company's competitiveness is determined by the efficiency of the use of labour and capital. The domestic price of a product is a function of the productivity and cost of labour, and the cost of bought-in goods and services, of which raw materials are generally the most important component.

Although a depreciating currency can make the country concerned export price competitive, this price advantage is usually eroded by higher inflation and lower productivity. The situation is further complicated when dealing with technologically complex products, where a price advantage may result from innovative design, such that competitors' products are technologically different though, possibly, functionally similar.

When considering price convergence, the following key factors should be taken into account:

- degree of imperfect competition - the demand and supply-side surveys indicate that a minority of purchasers and suppliers are aware of the opportunities in the market place;
- technical incompatibility - purchasing entities are restricted to existing, national suppliers or, when feasible, other EU suppliers incur additional costs to satisfy national technical requirements;
- technical/functional specifications - the use of technical rather than functional specifications mitigates against the use of innovative (often lower cost) solutions;
- supply chain structure - the nature of national supply chain structures often restricts price savings to intermediaries rather than end-purchasers;
- exchange rates - exchange rate movements create artificial price advantages of a temporary or permanent nature and result in a climate of commercial uncertainty.

Within the EU the above factors, particularly imperfect competition throughout the EU, have individually and collectively contributed to a situation in which there has been no observable price convergence.

Regarding commodity products, the dominant factor has been the supply-chain structure where these products are almost exclusively purchased locally from national (private sector) suppliers. These suppliers are normally intermediaries, which source their purchases internationally on (ex-factory) price - as illustrated by the increases in trade since 1987 - and sell at national price levels. This also reflects the completion of the Single Market programme.

In general, these observations are consistent with the high levels of indirect import penetration for commodity products, as illustrated by filing cabinets being 36% more expensive in the UK than the cheapest Member State, and yet the UK being the largest exporter of filing cabinets to the rest of Europe in 1994, reflecting the change in the terms of trade due to exchange rate movements.

In addition, there is little competition in these products with minimal tendering resulting from misinterpretation of the aggregation rules, whereby the focus is on contracts rather than aggregated annual expenditure. This might also explain the lack of price convergence and the high levels of price disparities

in these areas.

Regarding strategic products, they are considered to fall into two categories:

- those with common technical specifications, such as medical equipment, vehicles and office machinery;
- those with significantly different technical requirements due to incompatibility of systems between Member States, as illustrated by differences in national railway, and power distribution systems.

Although there have been recession-induced price reductions for strategic purchases, no real price convergence has occurred, with the exception of cardiac monitors, buses and office machinery, which can be explained by:

- their relatively more transparent markets with few European players;
- the products requiring little to no adaptation for different EU markets.

The fact that there has been no price convergence for the other strategic products reflects:

- their being 'bespoke' of nature and manufactured to satisfy widely differing national technical standards;
- supplier strategies of having a local presence (as generally preferred by the purchasers) resulting in a national cost base and pricing to national markets.

This is supported by the fact that for these strategic purchases, direct public sector import penetration is low compared to indirect imports.

Rationalisation and restructuring

In all procurement sensitive sectors there has been significant supply-side rationalisation, reflected in reduced employment and productivity improvements.

Table 1.6. Economic indicators

Sector/Product	Public Sector Import penetration (%)1 1994		Price convergence	Trade change	Production %change	Employment change
	direct	indirect	1987-932	1988-923	1988-924	1988-925
Low-tech products						
office furniture	5	8	N	++	+2.3	+1
uniforms	3	13	n/a	++	+1.2	-17
printing and paper	<1	17-19	N	+	+3.5	-3
High-tech products common tech. specs.						
motor vehicles	3-4	16-19	N/S*	++	+0.1	-18
office machinery	4	22-29	S	++	+6.5	-13
medical equip.	5-6	19-21	N/S**	++	n/a	n/a
High-tech products different tech. specs.						
telecommunications equip.***	6-8	18-22	N	+	-1.5	-18
power generating equip.***	6-7	11-14	N	++	+2.7	-19
power distribution equip.***	6-7	11-14	N	++	+2.7	-19

railway rolling stock***	10-11	19-21	N/S	++	+6.6	-5
boilers	4	9-10	N	-		-9
Works						
Construction/civil eng.	3	4-7	n/a	+	+1.2	+7
Services						
Consulting engineering	1	5-6	n/a	+	-	n/a

Notes: N=none, S=some, n/a=not available, ++= strong increase, +=increase, -=decrease

- buses
- * cardiac monitors
- ** Single Market (public sector) induced restructured industries

Sources:

1. Table I.1.31.
2. Tables 15.5. and 15.7.
3. Tables 14.1. - 14.20.
4. Tables 16.1. - 16.10. and 22.1.
5. Tables 16.1. - 16.10.

In the 'commodity' areas, despite significant recession induced price reductions in national markets, any change cannot be attributed to the procurement legislation since:

- there has been no price convergence, reflecting the supply-chain structure (purchasing from national wholesalers) and the bulk of the public sector imports being indirect;
- there has been significant non-publication both in terms of number of entities publishing (an estimated 14% of the potential published) and the underpublication of above threshold procurement

(as illustrated by the example of the typical sub-central government entity which published an estimated 25-30% of their purchasing of works and supplies).

In the strategic areas, there has not only been a recession induced reduction in employment, but also a (public sector) market-induced restructuring, which has resulted in:

- the creation of a small number of global players in telecommunications, power generation equipment and railway rolling stock;
- significantly increased intra and extra-EU trade, the bulk of which has been in indirect imports reflecting the strategies of these global players to have local manufacturing (assembly) capabilities in key European markets

no apparent price convergence, largely reflecting the additional costs associated with:

- complying with national technical standards
- the use of local production facilities;
- the general resistance of public bodies in certain Member States to innovative technology. For example, in one of the large Member States with in excess of 10 purchasing entities in a sector, only one had purchased a high cost strategic product based on a new and proven technology from another large Member State at a third of the national price level.

Despite the lack of price convergence, since 1990 suppliers in high cost strategic product areas have been forced by public purchasers to reduce their prices by 20-40%, reflecting the recession and squeeze on public spending. According to interviews with market leaders, the public sector has used the procurement legislation to bring down national price levels in national markets by threatening traditional suppliers that they would award contracts to new, lower priced competitors. In practice, there have been occasional contracts awarded to non-domestic players, resulting in lower prices but no appreciable change in market shares.

1.9.4. Downstream impacts - public sector cost benefit analysis

For strategic products with common technical specifications, the identified price convergence between 1987 and 1994, implies the achievement of savings in the less competitive Member States. Particularly in the telecommunications area, the in-depth interviews showed that the public sector has enjoyed significant technology-related savings, reflecting the liberalisation of the European telecommunications market.

Elsewhere in the strategic areas, the absence of price convergence implies that any national price savings can only be attributed to the recession.

The introduction of the public procurement legislation has caused some purchasers to put more calls for competition in the Official Journal, particularly in the area of 'commodity' products. This has resulted in 9-13% of all suppliers to the public sector, winning at least one new contract, which would not have been identified otherwise. Since both demand- and supply-side confirmed that contracts in these areas are in the main awarded on the basis of price, this implies that the public sector has experienced some price savings due to application of the legislation.

This conclusion is consistent with the demand-side survey results where a minority of the central and sub-central government claimed some degree of price savings due to opening their procurement markets.

There are two principal sources of price savings in terms of increased direct competition from:

- domestic suppliers;
- other EU suppliers.

Although there were a number of central and sub-central government bodies reporting price savings resulting from the implementation of the public procurement legislation, this was the exception rather than the rule.

In terms of direct competition from other EU suppliers, estimated total intra-EU direct import penetration rose from 1.4% in 1987 to 3% in 1994 - an increase of 1.6% - which due to its low weighting in total public sector purchasing could not have resulted in significant price savings.

Similarly, there is a consensus of opinion of those surveyed in the demand-side survey that the application of the legislation has created additional administration costs.

As the Utilities Directive has only been in force for the majority of Member States since January 1993 (for supplies and works) and the Services Directive for the public sector since July 1993 and for utilities since July 1994 (in most Member States), it could be argued that, realistically, the timescales are too short to expect the legislation to have fully achieved its objectives. Since the public sector Supplies and Works Directives have been in force since January 1989 and July 1990 respectively in the majority of Member States - a period of some 6 to 7 years - it would be reasonable to expect a high degree of compliance with the legislation, a necessary condition for achieving the downstream gains. However, there is a combination of related demand-side (chapter 12), supply-side (chapters 13 and 17 to 22) and legal factors (chapters 5 to 9) which have hampered the achievement of these gains.

Overall, it is important to note that, as a consequence of the implementation of the public procurement legislation:

- there have been instances where purchasing entities have achieved considerable savings on individual procurements, which, coupled with the continued existence of substantial intra-EU price differences, support the hypothesis that there is potential for significant public sector savings;
- when new suppliers responded positively to public sector opportunities, a high proportion was successful, implying that the purchasing entity had benefited from a ***more*** 'economically advantageous' offer.

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2004

13.12.2004 Thresholds

25.10.2004 Commission acts to enforce EU law in Germany, France, Denmark, Italy and the Netherlands

13.10.2004 Commission examines discriminatory specifications in supply contracts for computers in four Member States

08.10.2004 Consultation - The consultation on Electronic Public Procurement (id 334) will be extended until the 15.11.2004

04.10.2004 Contributions - Green Paper on Public Private Partnership

23.09.2004 Consultation - Green Paper on Defence Procurement

13.09.2004 Commission consults on how Europe can make the most of electronic procurement

08.07.2004 Commission decides to refer Italy to Court over supply of helicopters

15.06.2004 WTO Government Procurement Agreement extended to the enlarged EU

17.05.2004 Speech of Mr. Bolkestein - Public Private Partnerships and concessions

04.05.2004 Green Paper and public consultation on Public Private Partnerships

14.04.2004 Consultation with the contracting authorities prior to revision of the "remedies" Directives in the field of public procurement

31.03.2004 Commission requests six Member States to rectify violations of EU rules

11.03.2004 Directives on review procedures: results of the consultations

04.02.2004 Commission acts to enforce European law in France and Italy

Commission extends the on-line consultation on the operation of remedies in the area of public procurement until 29 February 2004

03.02.2004 Commission welcomes adoption of modernising legislation

European Union rules deliver big savings for taxpayers; scope for more gains

2003

03.12.2003 Commission welcomes conciliation agreement on simplified and modernised legislation

02.12.2003 Agreement on public procurement directives

27.10.2003 Commission consults on how rejected bidders can challenge decisions

24.07.2003 Commission requests Germany and Ireland to rectify breaches of EU law in awarding contracts (24.07.2003)

23.01.2003 **Public works contracts**: a national law may prohibit a change in the composition of a consortium after submission of tenders

2002

30.09.2002 Council agreement is a step towards making utilities procurement more transparent

25.09.2002 Commission welcomes approval of CPV (Common Procurement Vocabulary) system to help companies seeking public contracts

25.07.2002 The Commission initiates infringement proceedings against Spain over a concession on the A6 motorway

07.03.2002 Commission grants Austria exemption for oil and gas extraction

2001

16.10.2001 Commission issues guidelines for taking social considerations into account

05.07.2001 Commission issues guidelines for environment-friendly procurement

2000

20.07.2000 Commission refers United Kingdom to Court

13.07.2000 Commission decides to refer Germany to Court of Justice

10.05.2000 Commission proposes to simplify and modernise the legal framework

04.05.2000 Commission confirms EU rules apply to concessions to run public services

1999

25.02.1999 Commission launches consultation round on concessions

1997

29.10.1997 Commission stresses urgent requirement to implement Remedies Directives properly in Germany

1996

03.09.1996 Commission publishes Common Procurement Vocabulary for contracts

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Last update on 26-10-2005

CJE/03/5
23 January 2003

Judgment of the Court of Justice in Case C-57/01

Makedoniko Metro v Elliniko Dimosio

Public works contracts: a national law may prohibit a change in the composition of a consortium after submission of tenders

The effective and rapid review procedures prescribed by Community law must be available to a consortium which has been excluded from the award procedure

The Greek State issued an international invitation to tender for the planning, construction, self-financing and operation of the Thessaloniki underground railway, with a budget of GRD 65 000 000 000, and opted to use a form of restricted procedure.

On conclusion of the phase for preselecting candidates, eight consortia, including Makedoniko Metro and the Thessaloniki Metro consortium, were authorised to submit tenders.

The contract notices stated that a preselected consortium could be enlarged by the addition of new members during the pre-tender stage, but only up to the deadline for submission of tenders.

When the candidates were pre-selected, the members of Makedoniko Metro were Mikhaniki, Eddi-Stra-Edilizia Stradale SpA, Fidel SpA and Teknocenter-Centro Servizi Administrativi Srl. During the second stage of the procedure (submission of tenders) and up to the time when it was appointed provisional contractor, the Makedoniki Metro consortium also included AEG Westinghouse Transport Systems GmbH.

Its composition then proceeded to change again (and also included German and Belgian companies).

Since Makedoniko Metro had departed substantially from the requirements laid down for the contract, the Minister for the Environment, Regional Development and Public Works terminated the negotiations between the Greek State and Makedoniko Metro and invited the competing tenderer Thessaloniki Metro to enter into negotiations with it.

The Administrative Court of Appeal, Athens, in an action by Makedoniko Metro for compensation for damage suffered pursuant to the Minister's decision, has referred a question to the Court of Justice for a preliminary ruling.

The main question for the Court is whether national rules prohibiting a change, after submission of tenders, in the composition of a consortium taking part in the procedure for the award of a public works contract are permissible under the 1993 directive on the coordination of procedures for the award of public works contracts.

The Court starts by observing that **the directive in question does not contain specific requirements** concerning the composition of such consortia. Any such rules are thus a matter for the Member States and consequently the directive **does not preclude national rules prohibiting a change in the composition of a consortium** which occurs **after submission of tenders**.

Second, the national court asks the Court of Justice whether and to what extent the 1989 directive on the coordination of provisions relating to the application of review procedures to the award of public contracts gives such a consortium rights of recourse.

Directive 89/665 requires Member States to ensure that decisions taken by contracting authorities in the course of procedures for the award of public contracts **may be reviewed effectively and as rapidly as possible** and that the review procedures **are available** at least to **any person having or having had an interest in obtaining a particular public supply or works contract and who has been or risks being harmed by an alleged infringement.**

The Court has replied that it follows from general principles of Community law – including the principle of equal treatment in particular – that, in so far as a contracting authority's decision adversely affects the rights conferred on a consortium by Community law, the consortium must be able to avail itself of the review procedures provided for by the Community legislation and therefore in this case by the 1989 directive.

In the case referred to the Court, **it is for the court making the reference** to establish whether Makedoniko Metro can be regarded, including with its new membership, as having or having had an interest in obtaining the contract at issue in the main proceedings and as having been harmed by the Minister's decision.

For further information, please contact Mr Chris Fretwell,
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IP/02/1391

Brussels, 30th September 2002

Public procurement: Council agreement is a step towards making utilities procurement more transparent

The European Commission has welcomed the Council's adoption of a political agreement on the proposed Directive to simplify and modernise existing legislation on public procurement in the water, energy and transport sectors (the so-called "Utilities Directive"). The proposed Utilities Directive is part of a legislative package to bring EU public procurement rules up to date (see IP/00/461) with a changing economic environment. Once definitively adopted, the new rules will improve transparency in the award process, enhance clarity in the criteria determining the award of the contract and the selection of tenderers and facilitate electronic tendering. The Council already came to a political agreement last May on the other part of the legislative package, covering rules for the procurement of works, supplies and services in sectors other than water, energy and transport (see MEMO/02/99). The Council is due to adopt formal Common Positions on both proposals in the coming weeks, after which the proposals will return to the Parliament for their second reading.

Internal Market Commissioner Frits Bolkestein said "I am very pleased that the Council has now reached agreement on both the proposed Directives in the public procurement package the Commission put forward in 2000. Ensuring suppliers have access to open, pan-European procurement markets is vital to achieving the EU's objective of becoming the most competitive economy in the world by 2010, given that these markets account for around 14% of the Union's GDP. Open and competitive procurement markets mean better value for taxpayers, access to a pan-European market for suppliers and safeguards against corruption".

The newly agreed rules would apply when operators in the water, energy, transport and postal sectors award contracts. In the energy sector this could, for instance, cover contracts awarded for the construction of gas pipelines, in the transport sector to purchases of cleaning services for buses and in the water sector to the purchase of water pipes by water companies. The political agreement also allows Member States to apply the rules of the Directive to the postal sector.

The text just agreed by the Council aims to ensure that private companies are subject to the rules of the Directive only where the special or exclusive rights given to them by Member States are such that they enjoy privileges that are comparable to those of public undertakings. It also allows Member States to decide that other categories of private companies – such as those having the right to place network equipment under the public highway or the right to use a procedure for the expropriation or use of property - must apply the same or similar procedures when procuring goods, services or works.

IP/02/1368

Brussels, 25th September 2002

Public procurement: Commission welcomes approval new classification system to help companies seeking public contracts

The European Commission has welcomed the European Parliament's approval of an EU Regulation establishing a single classification system, the Common Procurement Vocabulary (CPV), for public procurement in the EU. The use of a single procurement vocabulary by all public authorities will help to ensure that the subject matter of contracts can be easily identified, allow automatic translation of tender notices into all official EU languages and boost openness and transparency in European public procurement, a market worth over €1,000 billion annually across the EU. Using the CPV will help potential suppliers to identify and select suitable procurement opportunities in any of the Member States and favour electronic public procurement applications. The Regulation, proposed by the Commission in August 2001 (see IP/01/1189), is now adopted and will enter into force in 2003, twelve months after its formal signature by the Presidents of the Parliament and Council, later this autumn. A substantial revision of existing CPV terminology will be published soon. Use of the CPV will only become mandatory once the proposed Public Procurement Directives (see MEMO/02/99 and IP/00/461), presently under discussion in the Parliament and Council, enter into force. It will then replace the four different nomenclatures currently in use. Unlike EU Directives, Regulations are directly applicable in the Member States without having to be implemented through national law.

Internal Market Commissioner, Frits Bolkestein, said: "I am very pleased that our proposal for a single classification system has been adopted. This will make a real difference for suppliers. They will now be able to easily find and understand public contract opportunities across the EU, no matter what language the tender notice is originally written in. By increasing competition and efficiency it will also help contracting authorities and the taxpayer to get better value for public money. The new classification will reduce errors, simplify procedures and make it easier to compare markets across the EU. I am grateful to the Parliament, the Council and all the private and public sector organisations we consulted in preparing the Regulation."

The CVP is already used in all public procurement notices published in the EU's Official Journal. Once the Parliament and the Council have adopted the two proposals presented by the Commission in May 2000 to simplify and modernise existing Public Procurement Directives, it will become compulsory for all contracting authorities as well. Not only will this help suppliers to identify opportunities, it will also make it easier for contracting authorities to fulfil their obligations to provide statistical information to governments and to the Commission.

The CPV will contribute to the development of electronic public procurement, in line with the *e*-Europe (see IP/00/514 and IP/02/768) and *e*-Commission initiatives, by making it possible to process published data electronically. That will mean information can be made available more quickly and more efficiently.

At international level, the CPV will allow for better comparability of data with the other nomenclatures used in the signatory states to the Government Procurement Agreement.

The CPV will not be set in stone. Like any nomenclature, it will have to be updated to follow market trends. To make sure users' requirements are met, updates to the CPV will be based on their suggestions. The Regulation itself is accompanied by two annexes, the first a substantial revision of existing CPV terminology and the second a table showing how the terms used correspond with those under the four former nomenclatures. Those annexes will be published shortly.

Background

Previous Community law on public procurement procedures refers to four different nomenclatures: CPA (Classification statistique des Produits associée aux Activités), NACE (Nomenclature des Activités économiques dans la Communauté Européenne), CPC Prov. (Central Product Classification) and CN (Combined Nomenclature).

This Regulation replacing these with the CPV, making it the only system to be used across the EU, is part of a package of measures proposed by the Commission in 2000 to simplify and modernise the public procurement Directives (see IP/00/461).

In May 2002, the Council reached political agreement on the proposed amendments to the Directive covering public supplies contracts, public works contracts and public services contracts. The other proposed amendments concern procurement in the water, energy and transport sectors. The Barcelona European Council repeated its call to the European Parliament and the Council for an early adoption of the whole legislative package on public procurement. Once the new rules enter into force, use of the CPV will become mandatory for all contracting authorities covered by the Directives.

IP/02/375

Brussels, 7th March 2002

Public procurement: Commission grants Austria exemption for oil and gas extraction

The European Commission has decided to agree to Austria's request for an exemption for oil and gas exploration and production from the Directive establishing procedures to be followed for public procurement of works, supplies or services in the energy, water, transport and telecommunications sectors (Directive 93/38/EEC). The decision follows a detailed analysis by the Commission and consultations with the Member States. The effect of the decision is that Austrian contracting entities that explore for or extract oil or gas in Austria need no longer apply the detailed procedural rules of the Directive when awarding contracts. They will, however, continue to be obliged to apply the principles of non-discrimination, transparency and competitive procurement, as well as to meet certain statistical obligations.

The two principal requirements for an exemption to be granted are set out in Article 3 of Directive 93/38/EEC.

The first concerns the conditions under which licenses or authorisations to explore for or extract oil or gas are granted. This requirement may be met through the correct implementation and application of Directive 94/22/EC on the granting and using of authorisations for the prospection, exploration and production of hydrocarbons.

The second requirement is the observance of the principles of non-discrimination, transparency and competitive procurement in connection with the award of contracts.

The Commission concluded that Austria fulfilled both requirements and therefore brought the matter before the Advisory Committee of the Member States, which issued a favourable opinion. The Commission has duly adopted the decision, under the condition that Austria notifies it of any relevant laws, regulations or administrative provisions.

Similar exemptions were granted by the Commission to the Netherlands (1993) and the UK (temporarily in1993 and indefinitely in1997).

The decision will be published in the EU's Official Journal.

IP/97/928

Brussels, October 29,1997

Public procurement: Commission stresses urgent requirement to implement Remedies Directives properly in Germany

Proper implementation in Germany of the so-called public procurement 'Remedies' Directives is an urgent requirement, said today single market Commissioner Mario Monti. A ruling by the Court of Justice on 17 September 1997 in the Dorsch case (C-54/96) does not render superfluous legislation to implement the Directives properly in Germany, and infringement proceedings opened in 1995 will be pursued until the existing German legislation on procurement redress is amended to the Commission's satisfaction.

The Directives, one concerning remedies as regards works, supplies and services procurement (89/665) and the other remedies for procurement in the water, energy, transport and telecommunications sectors (92/13), should have been implemented by the Member States no later than December 1991 and July 1992 respectively. The Directives require Member States to ensure that rapid and effective remedies are easily accessible to firms or persons who may have suffered injury as a result of an alleged violation of EU rules on open and competitive procurement procedures. Although Germany adopted legislation to implement the Directives in 1994, the Commission considers that the arrangements set up by this legislation do not ensure rapid and effective remedies as required by the Directives.

"Proper implementation of these Directives in Germany, already long overdue, is crucial both for German firms and for firms from other Member States," according to Single Market Commissioner Mario MONTI. "Without proper implementation of these Directives into national law, firms bidding for public procurement contracts in Germany will continue to lack adequate rights to fair treatment and clearly defined, effective means of challenging unfair treatment. This is why we have infringement proceedings pending against Germany for failure to implement these Directives properly."

The Commission is pleased to note that a draft law to ensure proper implementation of these two Directives is now in the final stages of the legislative process. However, some people have suggested that the Court of Justice ruling of 17 September in the Dorsch case means that the current legislation implementing the two Directives in Germany is already satisfactory.

This suggestion is very misleading in the Commission's view. The Court's Dorsch ruling stated that the Federal Supervisory Committee (Vergabeüberwachungsausschuss des Bundes), the body which referred the question to the Court of Justice, constituted a national court or tribunal entitled to refer questions under Article 177 of the EC Treaty. However, the Court's ruling (paragraph 22) also stated clearly that this issue of entitlement to refer a question to the Court was a separate and distinct issue from whether the body in question fulfilled the requirements of the Remedies Directives, which was **not** dealt with by the Dorsch ruling. The Commission's view that these Directives require further legislation to ensure their proper implementation in Germany is therefore not affected by the Dorsch ruling.

"Public procurement represents 12% of EU GDP, so that open and competitive procurement constitutes a vital part of the Single Market. This was most recently recognised in the Action Plan for the Single Market endorsed by the Amsterdam European Council. Moreover, public procurement will be the subject of a special report published with the first Single Market Scoreboard in mid-November. Germany's delays in implementing EU rules on open and competitive procurement have been highly damaging to the Single Market, as the German economy accounts for over 28% of EU GDP."

"I am pleased that the German Government is now taking the public procurement issue seriously. In particular, I note with great satisfaction that legislation has now been adopted in Germany to apply the Directives on applying open and competitive procedures to procurement in the services, supplies and utilities sectors (Directives 92/50, 93/36 and 93/38 respectively), and that this legislation is due to be applied in Germany from 1 November. I also sincerely hope that the unacceptable situation concerning remedies will come to an end very soon. However, until such time as the Remedies Directives are implemented in Germany to the total satisfaction of the Commission, we will pursue our infringement proceedings."

PUBLIC PROCUREMENT: COMMISSION PUBLISHES COMMC PROCUREMENT VOCABULARY FORCONTRACTS

Reference: IP/96/815 Date: 03/09/1996

HTML: EN FR DE
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DOC:

A Recommendation urging public authorities and economic operators t Common Procurement Vocabulary (CPV) when drafting public procurement has been adopted by the European Commission on the initiative of Market Commissioner Mario MONTI(1). The CPV, which attributs a ni code to some 6,000 terms commonly used in the procurement process, h published today (3 September) in all 11 official EU-languages Supplement to the EC Official Journal in order to make the vocabular known.

Publication of procurement notices in the Supplement to the EC Journal in all 11 Community languages is an obligation for all prc contracts falling within the scope of the EC Directives on open, competitive public procurement practices. Publication of these nc crucial to ensuring would-be tenderers are aware of prc opportunities in all Member States and so ensures the opening-up c procurement markets. Use of the standard terms in the CPV will easier for potential suppliers of goods and services to understand notices and to identify the type of procurement contracts in which interested. The CPV will also facilitate fast and accurate transl contract notices for publication in the EC Official Journal, and easier to establish procurement statistics. The CPV will therefore transparency and efficiency of public procurement markets in the Union.

Use of the CPV is of particular relevance to identifying opportunities through the Tenders Electronic Daily (TED) database, contract notices published in the EC Official Journal are available The CPV will also facilitate the use of information technology to m procurement process more efficient, notably in the framework Commission's SIMAP project (see IP(95)1066).

The CPV is an adaptation of the CPA (Classification of Products by A nomenclature established by Council Regulation 3696/93/EEC, specifically focused at the procurement process whereas the CPA is a statistical nomenclature. The CPV supercedes the General Publi Nomenclature introduced by Commission Recommendation 91/561/EEC.

(1) The OJ reference are as follows:
- for the Recommendation: L 222, 3.9.96
- for the Communication: C225, 3.9.96
- for the complete list of CPV codes and the invita comment: S169, 3.9.96

Procurement entitites and economic operators have been consulted on and are invited to make proposals to the Commission to further impr CPV, which will be revised on a regular basis.

CPV data on SIMAP Homepage

All language versions of the Common Procurement Vocabulary can be SIMAP's Homepage on the Internet. The SIMAP Homepage can be cons

the following address: http: //194.78.31.74:8087/.

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Infringements Archive

Overall view of infringement proceedings and the implementation of Community Directives

09.09.1999	Commission sends reasoned opinions to United Kingdom and France
09.08.1999	Public contracts: infringement procedures against Germany, France, United Kingdom, Italy, Greece, Austria and Spain
18.01.1999	Public contracts: infringement procedures against France, Italy, the Netherlands, Greece and Portugal
31.07.1998	Proceedings initiated against Italy in three cases of infringement
03.07.1998	Infringement proceedings against France, Germany, Austria, Greece and Italy
24.06.1998	Commission proposes financial penalties against Greece and opens new proceedings against Italy
16.04.1998	Barriers to trade: infringement proceedings against Greece, France and Sweden
08.04.1998	The Commission decides to close the infringement procedure against France concerning the World Cup stadium
06.04.1998	Infringement proceedings against France and Italy
07.01.1998	Infringement proceedings against Greece and Spain for non-transposal of directives
19.12.1997	Infringement proceedings against the United Kingdom, Austria, Germany and Portugal
18.12.1997	Infringement proceedings initiated against France, Italy, Germany and Spain
22.07.1997	Infringement procedures against France, Italy, Spain and Austria
26.06.1997	Commission decides to refer France to Court of Justice over football World Cup

	stadium
22.01.1997	Commission sends reasoned opinion to France on World Cup stadium
01.08.1996	Infringement procedures against France, Germany, Italy, the United Kingdom, Ireland, Belgium and Portugal
12.07.1996	Commission decides to initiate proceedings against Belgium, Ireland and Italy

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Last update on 11-05-2005

IP/99/664

Brussels, 9 September 1999

Public procurement: Commission sends reasoned opinions to United Kingdom and France

The European Commission has sent reasoned opinions to the United Kingdom (UK) and France concerning potential violations of Single Market rules requiring Member States to ensure public procurement contracts are awarded under open and competitive conditions and to remove obstacles to the free movement of goods and services. The problem concerns a framework for the definition of a radio communications system for the police (overall contract value estimated at some £1.5 to 2 billion), and in particular a question of principle, namely the UK's insistence that contracting authorities should not be required to consider products or services that are equivalent to products or services manufactured in accordance with the European standards referred to in the tender documents. The French case concerns the award of a contract for the construction of a sewage treatment plant in the Nancy area without prior publication of an indicative notice of the contracts it intended to award.

The reasoned opinions constitute the second stage of formal infringement procedures under Article 226 (ex 169) of the EC Treaty. In the absence of a satisfactory response from the Member States concerned within two months of receipt of the reasoned opinions, the Commission may decide to refer the cases to the European Court of Justice.

United Kingdom - radio communications system for the police

The Commission has sent a reasoned opinion to the UK because it considers that a framework arrangement for a Public Safety Communications Project for the police and rescue services launched by the UK Home Office violates a provision of the Directive on public procurement of services (92/50/EEC) and EC Treaty rules on the free movement of goods (Article 28, ex-30). This provision is also present in substantially the same terms in Directives on public procurement of supplies (93/36/EEC) and works (93/37/EEC) and in the Directive on procurement in the water, energy, transport and telecommunications sectors (93/38/EEC). The contract in question was awarded by way of a negotiated procedure. The award covers an initial phase (carrying out a project definition study - PDS), to be followed by one or more contracts for the provision of telecommunications services for police and/or rescue services over a 15 year period. One or more contracts may also be awarded for the supply of the necessary equipment, for instance terminals. The characteristics of the equipment and services to be procured are specified by reference to the TETRA European technical standard for mobile radio services.

The problem is that the UK interprets the public procurement Directives in such a way that contracting authorities would not be obliged to verify whether products or services, which are not manufactured according to the European standards specified in the tender documents, are nevertheless equivalent. Instead, contracting authorities would be allowed to reject products or services which were genuinely equivalent simply because they were not manufactured in accordance with the relevant European standard. The Commission, on the other hand, maintains that the public procurement Directives require reference to European standards where they exist, so as to ensure that technical specifications are defined by reference to standards which are common, transparent and publicly available (in all languages). Reference to such European standards should, however, simply offer a common yardstick against which the solutions proposed by suppliers can be measured. If contracting authorities refuse to examine whether or not the products or services offered are genuinely equivalent to products or services manufactured in accordance with the European standards, this constitutes a violation of the public procurement Directives and of EC Treaty rules on the free movement of goods.

France – construction of the Maxéville/Nancy sewage treatment plant

The Commission has sent France a reasoned opinion concerning the procedures followed by the greater Nancy area authorities to select a firm to construct a sewage treatment plant at Maxéville. The Commission considers that the French authorities have violated the Directive on procurement of public works (93/37/EEC) and EC Treaty rules on the freedom to provide services (Article 49, ex 59). The contract was attributed following a restricted procedure (i.e. a limited number of firms were invited to tender). However, contrary to the requirements of the Directive, the contracting entity did not publish beforehand an indicative notice of the contracts it was intending to award. Moreover, in the call for expressions of interest, the contracting authority specified that those submitting bids had to be registered with the French national order of architects, thereby discriminating against potential bids from suppliers established in other Member States. This discrimination violates not only the public works Directive, but also EC Treaty rules on the freedom to provide services. Another problem with the procedures followed was that only four firms were invited to tender, whereas the Directive requires a minimum number of five bidders so as to try to ensure genuine competition between bidders.

IP/99/624

Brussels, 9 August 1999

Public contracts: infringement procedures against Germany, France, United Kingdom, Italy, Greece, Austria and Spain

The European Commission has decided to send eleven reasoned opinions for violation of the Community rules stipulating that public contracts must be published and put up for tender. Four reasoned opinions (second stage in infringement proceedings under Article 226 of the Treaty) have been sent to France, Greece, Germany and Austria for failure to notify the measures necessary to implement the Directive 97/52/EC adapting the previous Directives for the award of public service contracts, public supply contracts and public works contracts to the Government Procurement Agreement (GPA) signed at Marrakech in 1994. The other reasoned opinions concern: in Germany, a negotiated procedure for a contract with the hospital of the University of Würzburg; in the United Kingdom, the publication of a White Paper ("Setting New Standards: a strategy for Government Procurement") which could lead public purchasers to commit infringements against the public procurement rules; in Italy, the award without a public tender procedure of a contract by SACE of banking services and by the municipality of Ravenna of a service contract for the Museum in Classe; in Greece, the use of a restricted procedure for the award of a supply contract by the Ministry for Development; in Austria the construction and the financing of a by-pass in the City of Linz without applying prior public procurement procedure; in Spain, works for an experimental penitentiary centre in Segovia without a public tender. In the absence of a satisfactory response within two months of receipt by the Member State concerned, the Commission may decide to refer the cases to the European Court of Justice.

France, Greece, Germany and Austria - failure to notify national measures to implement Directive 97/52/EC

The European Commission has decided to send a reasoned opinion to France, Greece, the Federal Republic of Germany and Austria for failing to transpose into national law Directive 97/52/EEC amending the Directives concerning the co-ordination of procedures for the award of public service contracts, public supply contracts and public works contracts.

Directive 97/52/EEC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the co-ordination of procedures for the award of public service contracts, public supply contracts and public works contracts adapts the abovementioned directives to the Government Procurement Agreement (GPA), which is a part of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994). In Article 4(1) of Directive 97/52/EEC it is stated that the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 13 October 1998.

Germany - University of Würzburg.

The procurement procedure concerning the hospital of the Julius-Maximilian-University of Würzburg was brought to the attention of the Commission by a complaint. In September 1997 a contract for the planning, extension and refurbishment of the old dental clinic and another contract for the construction of operational units of the hospital of the University of Würzburg was published in the Supplement to the Official Journal. The contract notice referred under point 14 to a “negotiated procedure with prior publication in accordance with Article 11(2) of Council Directive 92/50/EEC”.

The negotiated procedure is an exceptional procedure and therefore only applicable in certain limited cases. The Commission is of the opinion that the conditions of the provisions to award the contract under the negotiated procedure have not been fulfilled. The German authorities have not proved the existence of exceptional circumstances justifying a negotiated procedure with prior publication.

United Kingdom: minimum number of candidates to be invited to participate in a restricted procedure

The Commission has decided to issue a reasoned opinion to the United Kingdom in relation to an official White Paper ("Setting New Standards: a strategy for Government Procurement"), which contains advice capable of being construed in such a way as to lead public purchasers to commit infringements against the public procurement rules.

The point at issue is that the advice appears to indicate that the number of candidates to be invited to participate in a restricted procedure may always and in all circumstances be set as low as three participants, irrespective of the fact that under the public procurement rules, in certain circumstances, at least five candidates must be invited.

Italy: Public procurement of banking services (cash-flow management) for the S.A.C.E.

The Commission has decided to send the Italian Government a reasoned opinion for violation of the provisions of Directive 92/50/EEC, and in particular Article 11 thereof. This reasoned opinion concerns the award of a banking services contract for cash-flow management for the S.A.C.E. (*Special Department for Export Credit Insurance*) to the San Paolo Banking Institute in Turin at the beginning of 1997.

The failure to implement this provision results from the fact that the S.A.C.E., a body governed by public law and, as such, obliged to observe the directives on public procurement, awarded the contract to the San Paolo Banking Institute in Turin without going through any public procedure.

The Commission found that none of the conditions laid down in Article 11(3) of Directive 92/50/EEC which permit the use of the negotiated procedure without prior publication of a tender notice had been fulfilled in this case.

Italy: public procurement of design services for the Classe Archeological Museum by the municipality of Ravenna

The Commission has decided to send the Italian Government a reasoned opinion for infringement of the provisions of Directive 92/50/EEC, and in particular Article 11 thereof. This reasoned opinion relates to the award by negotiated procedure, without prior publication of a tender notice, of design services for the Classe Archeological Museum by the of Ravenna.

The infringement results from the fact that the municipality of Ravenna awarded the contract following a negotiated procedure, without prior publication and without an invitation to tender, despite the fact that the conditions laid down in Article 11 of Directive 92/50/EEC, which are the only ones justifying the use of the negotiated procedure, were not met.

Greece: contract for the supply of operational leather belts with accessories by the Ministry for Development.

The Commission has decided to send the Hellenic Republic a reasoned opinion relating to the procedure for the award of a contract for the supply of operational leather belts with accessories by the Ministry for Development.

The Commission's objections are based on the incorrect use by the Hellenic Republic of the accelerated restricted procedure and deficiencies in the publication of the tender notice in the OJEC, as well as the confusion of selection and award criteria.

The Commission considers that the awarding authority has infringed the provisions of Articles 11 and 12 of Directive 93/36/EEC by having recourse to the accelerated restricted procedure in a case where the conditions for the use of this procedure were not fulfilled. The Commission also takes the view that Article 9(4) of Directive 93/36/EEC has been infringed because publication of the tender notice in the OJEC was incomplete, inasmuch as it did not give reasons for the use of the accelerated procedure.

Austria: construction of a by-pass in the City of Linz

The contract for the construction of a by-pass of Linz was brought to the attention of the Commission by a complaint. The city of Linz concluded two contracts, one with a local bank for the financing and a second with a subsidiary undertaking of the local bank for the construction of this by-pass, without a prior public procurement procedure.

The Commission takes the view that the abovementioned contracts are public works contracts as defined in Article 1(a) of Directive 93/37/EEC and that the City of Linz is a contracting authority under the terms of Article 1(b) of the same Directive. On the basis of these considerations the contracts for the financing and construction of the by-pass of Linz should have been awarded via a procurement procedure.

Spain - works at the experimental penitentiary centre in Segovia

The call for tenders to carry out works at the experimental penitentiary centre in Segovia, published in the national press but not in the OJEC, was launched in violation of the provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. The Spanish authorities contest the application of this Directive to the "Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios" on the grounds that it is a public commercial company governed by private law. The fact remains that the S.E.I.E.P.S.A. is a contracting authority within the meaning of the Directive, inasmuch as it fulfils the conditions of Article 1 thereof, in particular the condition that it has been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

IP/99/16

Brussels, 18 January 1999

Public contracts: infringement procedures against France, Italy, the Netherlands, Greece and Portugal

The European Commission has decided to bring proceedings before the Court of Justice against France and Italy, and to issue reasoned opinions against Italy, the Netherlands, Greece and Portugal, for infringement of the Community rules stipulating that public contracts must be published and put up for tender. The infringements concern subsidised housing in France, the integrated computerised system of the general national accounts department and the court of auditors in Italy, radiographic equipment in Italy, safety barriers for roads in the Netherlands, and the failure to transpose the public contracts Directives in the water, energy, transport and telecommunications sectors in Greece and Portugal. In the case of the reasoned opinions (the second stage in infringement proceedings under Article 169 of the EC Treaty), if the Member States fail to give a satisfactory reply within two months of receiving them, the Commission is entitled to refer the matter to the Court of Justice. These cases have been investigated in response to complaints lodged with the Commission by firms adversely affected by contract award decisions or as part of the regular checks carried out by the Commission to ensure that Community Directives are correctly transposed into national law.

France - subsidised housing

The Commission has decided to bring proceedings before the Court of Justice against France on the grounds that several subsidised housing bodies have launched a number of invitations to tender for construction work without first publishing them in the Official Journal of the European Communities, as stipulated in the Directive on public works contracts (93/37/EEC). On the basis of the concept of "public body" established by the Court in its case law, the Commission considers that these bodies are awarding authorities within the meaning of the above-mentioned Directive and are consequently subject to the rules of that Directive, particularly as regards publication.

Italy - integrated computerised system for the general national accounts department

The Commission has decided to bring proceedings before the Court of Justice against Italy for infringement of the Directive on public service contracts (92/50/EEC), and in particular Article 11 thereof, on the grounds that the contracts for the maintenance, management and development of the integrated computerised system for the general national accounts department/Ministry of the Treasury ('Ragioneria Generale dello Stato') and the Court of Auditors, originally concluded in 1987 and 1988, have been renewed with the same company on several occasions without competition. Decree Law No 414 of 19 November 1997 authorised the negotiated procedure for a further period of eighteen months. However, the circumstances specified in Directive 92/50/EEC did not obtain (for example, after publication of a contract notice, when prior pricing is not possible or when the specifications cannot be established precisely), and it is only under such circumstances that a negotiated procedure may be justified. Italy's reply to the reasoned opinion of 11 June 1998 was not satisfactory.

Italy - radiographic equipment

The Commission has decided to issue a reasoned opinion against Italy for infringement of the Directive on public supply contracts (93/36/EEC) in connection with the contract for the supply of sterile sutures for operating theatres, radiographic equipment and developing fluids awarded by a Rome hospital (Azienda "Complesso ospedaliero San Filippo Neri"), on the grounds that the contract was awarded by accelerated restricted procedure although the conditions set out in the Directive for use of the accelerated procedure were not fulfilled, since supply of these products should have been possible simply by launching the procedure well before the previous contract expired, on the basis of expected consumption. The previous contract had also been the subject of an infringement procedure, since it had been concluded following a negotiated procedure in infringement of Directive 93/36/EEC and its performance should not have been completed.

The Netherlands – safety barriers for roads

The Commission has decided to send a reasoned opinion to the Netherlands for misapplication of the Directives on public supply and works contracts (93/36/EEC and 93/37/EEC) in a case involving the purchase of safety barriers for roads. The Commission also thinks the Netherlands has infringed the rules of the EC Treaty on obstacles to the free movement of goods (Article 30). The reasoned opinion concerns the methods used for purchasing safety barriers by the ministry department responsible for road maintenance, which buys exclusively from a single supplier without putting the contract up for competition by publishing notices in the Official Journal of the European Communities. This supplier also has a monopoly on supplying safety barriers in connection with works contracts awarded by the ministry department.

Greece and Portugal – failure to transpose Directives in the water, energy, transport and telecommunications sectors

The Commission has decided two issue two reasoned opinions against Greece and two against Portugal on the grounds that these two Member States have failed to transpose the Directives on public contracts in the water, energy, transport and telecommunications sectors (93/38/EEC) and Directive on review procedures in the same sectors (92/13/EEC). Directive 93/38/EEC entered into force on 1 January 1998 in Greece and Portugal (compared with 1 January 1997 in Spain and 1 January 1993 in the other Member States). Directive 92/13/EEC entered into force on 30 June 1998 in Greece and Portugal, compared with 30 June 1995 in Spain and 1 January 1993 in the other Member States.

IP/98/743

Brussels, 31 July 1998

Public procurement: proceedings initiated against Italy in three cases of infringement

The Commission has decided to deliver three reasoned opinions (second stage in the infringement procedure under Article 169 of the EC Treaty) to Italy on the grounds of infringement of the Community rules on open and competitive public procurement. The infringements concern Italian legislation on the award of tenders for architectural services, a law of the Lombard Region on public works (the establishment of facilities for the treatment of urban waste) and the provision of IT services for the association of local authorities of Valli del Taro e del Ceno. If the Italian authorities fail to provide an appropriate response within a period of two months from receipt of the reasoned opinions, the Commission may bring the matter before the European Court of Justice.

Contracts for architectural services - Karrer Decree

The Commission has decided to deliver a reasoned opinion to Italy for improper transposition of Directive 92/50/EEC on the award of public service contracts. It has raised the three objections set out below concerning Order No 116 of the Prime Minister of 27 February 1997, which establishes rules for determining the economicall y most advantageous tender in the award of contracts for achitectural, engineering and other technical services.

(a) Order No 116 was not notified, so that Italy has infringed the obligation in Directive 92/50/EEC under which Member States must communicate to the Commission the main provisions of national law which they adopt in the field governed by the Directive.

(b) It has included in the criteria for assessing tenders at the award stage (i.e. the criteria for determining the economically most advantageous tender) criteria referred to in Directive 92/50/EEC for the selection stage. Examples are quality certification and the other factors fixed by the contracting authority to establish that a tenderer is particularly qualified to provide the service in question, which can be taken into consideration at the selection stage but not at the award stage.

(c) Order No 116 allows the committee assessing the tenders to determine subsidiary award criteria after drawing up the specifications, which is contrary to the principle of transparency established by Directive 92/50/EEC. Since this a general measure, it cannot ensure that the subsidiary criteria only constitute refinements of the criteria set out in the specifications and that the final determination of all factors used in the assessment is systematically effected after transmission of the specifications.

Lombardy - public works

The Commission has decided to deliver a reasoned opinion to Italy for infringing Directive 93/37/EEC concerning public works contracts through Lombard Regional Law No 21 of 1 July 1993. Under that Law, public works concessions can be awarded without fulfilling the advertising requirements laid down in the Directive; public works contracts may also be awarded on the basis of negotiated procedures without prior publication of a contract notice although the conditions in the Directive have not been fulfilled. Those provisions of the Law have already been relied upon, for example, in awarding a public works concession for establishing waste-disposal facilities in Monza although the rules on advertising were not complied with.

IT services for the association of local authorities of Valli del Taro e del Ceno

The third reasoned opinion which the Commission has decided to deliver to Italy concerns an infringement of Directive 92/50/EEC on the award of public service contracts. The Commission's objection relates to the award of a contract for work on the design and establishment of a territorial tax system for the local authorities of Valli del Taro e del Ceno to a company on the basis of the negotiated procedure without prior publication of a contract notice although the conditions in the Directive were not fulfilled.

IP/98/618

Brussels, 3 July 1998

Public procurement: infringement proceedings against France, Germany, Austria, Greece and Italy

The European Commission has decided to bring actions before the Court of Justice against France, Germany and Austria and to send reasoned opinions (the second stage of infringement proceedings under Article 169 of the EC Treaty) to Greece and Italy (three cases) for breaches of the Community rules on the opening-up of public procurement, which require in particular that public contracts be put up for competitive tender. The infringements concern the construction of an automatic light rail transit system in the city of Rennes in France, the supply of mail sorting equipment to DBP Postdienst in Germany, incomplete transposal of the Directives in Austria, supplies for public hospitals in Greece, supplies of oil for food aid (Italy), town planning services for the municipality of Jesolo in Italy, and municipal waste collection services at Assemini in Italy. Where a Member State to which a reasoned opinion has been addressed fails to give a satisfactory reply within two months of receiving it, the Commission is entitled to refer the matter to the Court of Justice. These cases have been investigated in response to complaints lodged with the Commission by firms adversely affected by contract award decisions or as part of the regular checks carried out by the Commission to ensure that Community directives are correctly transposed into national law.

France - automatic light rail transit system for the city of Rennes

The Commission has decided to bring an action before the Court of Justice against France for failing to comply with Directive 93/38/EEC on procurement in the water, energy, transport and telecommunications sectors when awarding the main supply contract for an automatic light rail transit system in Rennes. It has taken this decision because the explanations given by the French authorities concerning the conditions under which the contract was awarded, in response to an informal request for information made in January 1997, a letter of formal notice issued on 17 June 1997 and a reasoned opinion delivered on 5 March 1998 (see IP/97/1162), were not satisfactory.

Notwithstanding the French authorities' explanations, the Commission takes the view that no award of the contract at issue took place before the entry into force of Directive 93/38/EEC and that the award of the contract by direct agreement on 22 November 1996, after the previous procedure conducted between 1989 and 1993 had been abandoned in 1995, was incompatible with the Directive, although the contract lay fully within its scope.

Neither are there any technical reasons justifying the failure to open up the contract to competition. Lastly, the Commission is challenging the contracting entity's use of the possibility, provided for in the French public procurement code, of exempting itself from the normal competitive tendering rules on the grounds that it had already carried out major investment. Such a circumstance is not one of the exceptions allowed by Directive 93/38/EEC. Since the French authorities have not taken appropriate measures to remedy this situation within the time-limit laid down in the reasoned opinion, the Commission has decided to refer the matter to the Court of Justice.

Germany – mail sorting equipment

The Commission has decided to bring an action before the Court of Justice against Germany for failing to fulfil its obligations under Directive 77/62/EEC on public supply contracts. In 1993 DBP Postdienst put out to tender a contract for the supply of mail sorting equipment under the negotiated procedure, although the conditions for the use of that procedure were not met; it also set a shorter deadline for participation than that stipulated by the Directive, failed to adhere to the minimum requirements laid down in its tender specifications and failed to indicate the contract award criteria. In 1996 the German Government informed the Commission that Postdienst had been privatised and that proceedings were under way in a national administrative court to determine whether the new company, PostAG, had to apply the public procurement rules. Since no hearing has been announced as part of those proceedings, the Commission has decided to bring the matter before the Court of Justice.

Austria – transposal of the Directives

The Commission has decided to initiate proceedings in the Court of Justice against Austria for failing to transpose all the Directives on public procurement. Directives 92/50/EEC, 93/36/EEC and 93/38/EEC on public service contracts, on public works contracts and on procurement in the water, energy, transport and telecommunications sectors, and Directive 92/13/EEC on remedies to be introduced by the Member States for procurement in the water, energy, transport and telecommunications sectors should have been transposed into national law by 1 July 1994. Although the Commission has received transposal measures from the Federal Government and most of the *Länder*, the texts for the *Länder* of Niederösterreich (Lower Austria) and Steiermark (Styria) have still not been notified.

Greece – supplies for public hospitals

The Commission has decided to address a reasoned opinion to Greece, which has not replied to the letter of formal notice it issued on 16 February 1998 concerning the obligation on firms supplying public hospitals to submit invoices relating to previous contracts they have concluded with private hospitals in Greece and in other Member States.

The aim pursued by the Greek authorities through this obligation, which is imposed by Article 19 of Law No 2303/95, is apparently to combat agreements between suppliers on the prices they tender for contracts awarded by public hospitals and thereby to ensure genuine, healthy competition in the sector.

Although such an aim is perfectly legitimate and is in line with the spirit of the Directive on public supply contracts (93/36/EEC), the Commission has misgivings about the methods adopted by the Greek authorities for achieving it and about the conditions in which the obligation is applied in practice. The possibility of excluding supplies originating in other Member States from a contract award procedure on the grounds that they are being offered at a higher price than that at which they were sold in another Member State furthermore constitutes, in the Commission's view, a restriction on the free movement of goods in breach of the Treaty (Article 30).

Italy – supplies of oil for food aid

The Commission has decided to send Italy a reasoned opinion for breaching the EC Treaty rules on the free movement of goods (Article 30 *et seq.*) and services (Article 59 *et seq.*) and the Directive on public supply contracts (93/36/EEC) in connection with public contracts awarded by the AIMA (a public enterprise which intervenes on the agricultural market) to obtain supplies of food products for donation to countries in difficulty as part of the Italian Government's food aid initiatives.

The infringement stems from the fact that the notices and the letters of invitation to tender for these contracts require the products to be loaded and shipped from an Italian port and also stipulate that, even if the contract is awarded to the lowest bid, the contracting authority is nevertheless entitled to ask the successful bidder to improve his offer in line with market conditions. The requirement that the goods be shipped from an Italian port prevents the use of goods originating in other Member States and is therefore incompatible with the rules of the EC Treaty on the free movement of goods; it also prevents tenderers using carriers operating ships from ports elsewhere in the Community and is consequently also contrary to the provisions on the freedom to provide services.

Lastly, the possibility of negotiating with tenderers after the contract has been awarded is a serious violation of Directive 93/36/EEC, under which the negotiated procedure may be used only in specific cases. Negotiating after a contract award is also contrary to the principle of equal treatment, which the Court of Justice has recognised as one of the foundations of the Directives on public procurement, as well as the principles of transparency and legal certainty.

Italy – town planning services for the municipality of Jesolo

The Commission has decided to address a reasoned opinion to Italy for breaching the Directive on public service contracts (92/50/EEC) and the Treaty rules on the freedom to provide services (Article 59). The infringement concerns a public contract awarded by the municipality of Jesolo for the preparation of a preliminary draft of the general regulating plan (PRG): the contract was awarded by negotiated procedure with prior publication of a notice; the tender notice allowed only architects and engineers to participate in the procedure; and the award criteria included assessment of the professional calibre and organisation of the team.

The Italian authorities have argued that the use of the negotiated procedure with publication of a contract notice was justified under Directive 92/50/EEC, which allows that procedure to be used "when the nature of the services to be procured, in particular in the case of intellectual services and services falling within category 6 of Annex I A, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures". The Commission does not share this interpretation, because the impossibility of establishing contract specifications must be construed strictly.

The clause reserving the contract exclusively for architects and engineers constitutes an unjustified restriction of competition and is incompatible with Directive 92/50/EEC. Neither does it appear to meet the criterion of proportionality, because it excludes from the award procedure professionals (e.g. town planners) who could be equally well qualified to provide the services covered by the contract, i.e. the preparation of a preliminary planning instrument. Consequently, this condition is not objectively justified and is contrary to Article 59 of the Treaty.

As regards the inclusion in the award criteria of an assessment of the professional calibre and organisation of the team, Directive 92/50/EEC allows such criteria to be taken into account only during the selection of tenderers and not in the contract award phase.

Italy – municipal waste collection at Assemini (Cagliari)

The Commission has decided to send Italy a reasoned opinion for breaching the Directive on public service contracts (92/50/EEC) and the Treaty rules on the freedom to provide services (Article 59) in connection with a public contract awarded by the Assemini town council for municipal waste collection services. The infringement stems from the fact that the contract was awarded by accelerated restricted procedure and that the contract notice included, among the minimum qualifying conditions, membership of the Italian national register of firms providing waste treatment services.

The Commission takes the view that there was no urgency rendering impracticable compliance with the normal time-limits laid down for restricted procedures, in other words that the conditions in which the Directive allows recourse to the accelerated restricted procedure were not met in this case. Limiting the right to bid to firms on the national register is contrary to the principle of the freedom to provide services enshrined in Article 59 *et seq.* of the EC Treaty: making participation in a service contract in one Member State by an enterprise established in another Member State conditional on membership of the first country's national register would remove all practical effectiveness from Article 59 of the Treaty, the purpose of which is precisely to eliminate restrictions on the freedom to provide services of persons who are not established in the Member State where the service is to be provided.

IP/98/559

Brussels, 24 June 1998

Public procurement: Commission proposes financial penalties against Greece and opens new proceedings against Italy

The European Commission has decided to refer Greece to the Court of Justice and request the Court to impose financial penalties for not respecting a 1996 Court ruling condemning Greece for failure to implement in national law the Directive on public procurement of services (Directive 92/50/EEC). The Commission has decided to propose financial penalties on Greece of ECU 39,975 per day, in line with the seriousness and duration of the infringement and with the need to achieve a deterrent effect. The Commission has also decided to open new infringement proceedings against Italy, under Article 171 of the Treaty, for not respecting a 1997 Court ruling condemning Italy for failure to implement in national law the Directive on public procurement of supplies (Directive 93/36/EEC).

Greece - Directive on procurement of services

The Directive on public procurement of services (92/50/EEC) establishes rules requiring open and competitive procedures to be followed for the procurement of services. Although the Directive required Member States to implement its provisions in national law no later than 1 July 1993, Greece has still not done so. The Court of Justice condemned Greece in a ruling handed down on 2 May 1996 for failing to fulfil its obligations to implement the Directive. Greece failed to respond to either the letter of formal notice or the reasoned opinion sent by the Commission under infringement procedures foreseen by Article 171 of the Treaty (see IP/98/6).

Italy – Directive on procurement of supplies

Italy has still not fully implemented the supplies Directive (93/36/EEC), which requires contracts for the public procurement of supplies to be subject to open and competitive procedures. The deadline for entry into force of the Directive's provisions was 14 June 1994. Moreover, the Court of Justice condemned Italy in its ruling of 17 July 1997 for failure to fulfil its obligations to implement the Directive. Despite this, the Italian authorities have still not adopted the legislative decree necessary to apply the Directive's provisions. The Commission has therefore decided to send Italy a letter of formal notice under infringement procedures foreseen by Article 171 of the Treaty for failure to take measures to respect the July 1997 Court ruling. In the absence of an appropriate response by the Italian authorities, the Commission may continue Article 171 infringement procedures, ultimately leading to a referral back to the Court of Justice with a request for financial penalties.

IP/98/361

Brussels, 16 April 1998

Barriers to trade: infringement proceedings against Greece, France and Sweden

Following complaints, the European Commission has decided to bring an action against Greece before the Court of Justice and to send reasoned opinions (second stage of the infringement proceedings under Article 169 of the Treaty establishing the European Community) to France (two cases) and Sweden for impeding the free movement of goods in contravention of the Treaty establishing the European Community (Article 30). The barriers concern petroleum products (Greece), foodstuffs produced using enzyme preparations (France), disposable barbecues (France) and pressure vessels (Sweden). In the absence of any satisfactory reply being given to the reasoned opinions within two months of the relevant Member States' receiving them, the Commission can bring the matter before the Court of Justice.

Greece - barriers to the import of petroleum products

The Commission has decided to bring an action against Greece before the Court of Justice on the basis of certain aspects of its legislation on the stocking, transport and distribution of petroleum products which contravene the provisions of the EU Treaty relating to the free movement of goods (Article 30). In Greece, the obligation to maintain stocks laid down by Directive 68/414/EEC applies to companies marketing petroleum products. However, Greek law provides that if such companies do not have sufficient storage capacity to comply with this obligation, it can be met by refineries established in Greece with which supply contracts have been signed. In practice, this leads marketing companies to sign supply contracts with the refineries. Moreover, Greek law requires retailers to transport fuel to points of sale using lorries belonging either to the marketing companies or to public transport companies. For the retailers, this requirement means additional costs and delivery times which affect prices and the quantities sold. Finally, the effect of the legislation is that retailers cannot directly import petroleum products.

In their reply to the reasoned opinion, which the Commission received on 23 September 1997, the Greek authorities maintained their view that these provisions did not constitute an obstacle to the free movement of petroleum products. However, the Commission believes that these provisions together ultimately favour refineries established in Greece and are likely to restrict imports of petroleum products from other Member States. The Commission has therefore decided to bring the matter before the Court of Justice.

France - foodstuffs using enzyme preparations

The Commission has decided to send a reasoned opinion to France because its legislation contains provisions which constitute a barrier to the free movement of foodstuffs produced using enzyme preparations. The rules concerned lay down a prior authorisation procedure even for products which have been legally produced and/or marketed in other Member States. In its present form, this procedure is disproportionate to the protection of the public interest (public health, consumer protection) and therefore constitutes an obstacle to the free movement of goods which is contrary to Articles 30 and 36 of the Treaty of Rome.

France - disposable barbecues

The total ban on sales in France of disposable barbecues, despite their being legally produced and/or marketed in other Member States of the European Union, is contrary to Articles 30 and 36 of the EU Treaty because it is disproportionate to the objectives of consumer protection and environmental protection given as justification. The Commission believes that there are less trade-restrictive measures which ensure the desired levels of protection. Therefore, following discussions between the Commission and the French authorities, the product was adapted in order to reinforce consumer safety and information. Despite these changes, the product still cannot be sold. The Commission has therefore decided to send a reasoned opinion to France.

Sweden - pressure vessels

The Commission has decided to send a reasoned opinion to the Swedish Government for refusing to allow pressure vessels legally produced and marketed in Germany to be marketed in Sweden without the applicant having to adapt them. The Commission received a complaint pointing out that the technical requirements applicable in Sweden prevented pressure vessels being accepted unless their design had been modified. The competent authority's refusal to approve the pressure vessels concerned unless the applicant modified them constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EC Treaty, unless this measure can be considered justified and proportionate to all essential requirements accepted pursuant to Article 36 and the case-law of the Court, such as public security. The Swedish authorities have not demonstrated to the Commission that their refusal is justified and proportionate to all essential requirements.

IP/98/345

Brussels, 8 April 1998

The Commission decides to close the infringement procedure against France concerning the World Cup stadium

The European Commission has decided to close the infringement procedure concerning the construction works of the 'Stade de France'. The French authorities have now formally recognised the infringment. In addition, the complainant has obtained satisfaction and has withdrawn his complaint.

« I am satisfied with the conclusion of this case» commented Mario Monti, Commissioner for the single Market. « This particular case proves that the action of the Commission aiming for the respect of Community provisions as regards public procurement contracts is useful and effective, even when construction works are already finished. The French authorities have formally recognised the infringement notified by the Commission, and the plaintiff has withdrawn his complaint. I hope that in the future no similar cases will occur. ».

After having received an answer to the formal letter of notice from the French authorities on 14 March 1996, the Commission asked for additional information in August 1996. The explanations provided by the French government during various meetings in 1996 moderated the complainant's objections in connection to the attribution of the contract, without denying the Commission's principal objections who sent out a reasoned opinion on 14 April 1997, with a two-month deadline for a reply. In the absence of a satisfactory answer, it decided in June 1997 to refer this case to the Court of Justice. Following this decision, new contacts were established between the Commission and the French authorities. These contacts initially made it possible to give satisfaction to the plaintiff, who withdrew his complaint in November 1997. Moreover, the French authorities adopted an amendment to the contract which eliminated the local preference clause, which had been criticised by the Commission.

Finally, in a letter dated 23 March 1998, the French Minister for European Affairs formally recognised the existence of the infringement and agreed to commit himself to the respect of the application of Community provisions for further public procurement contracts within the framework of this project.

Taking into account the favourable elements raised by the Commission in the development of this case, the closing of this infringement procedure has been possible.

IP/98/329

Brussels, 6 April 1998

Public procurement: infringement proceedings against France and Italy

The European Commission has decided to send France and Italy reasoned opinions (the second stage of infringement proceedings under Article 169 of the EU Treaty) for breaches of the Community rules opening up public service contracts to competition. The infringements concern various architectural competitions organised by the General Council of the French department of Réunion and contracts for the maintenance, management and development of the integrated computer system of the General State Accounting Department and the Court of Auditors in Italy. In the absence of a satisfactory response from the Member State concerned within a period of two months following receipt of a reasoned opinion, the Commission may bring the matter before the European Court of Justice. These cases have been investigated in response to complaints sent to the Commission by firms whose interests have been harmed by contract award decisions.

France - architectural competitions organised by the General Council of Réunion

After securing the cancellation of several architectural competitions involving serious irregularities in an earlier case in 1995, the Commission has received a fresh complaint concerning various architectural competitions organised by the General Council of the French department of Réunion. In general terms, the contracting authority appears to have departed from the principle of equality of treatment between candidates laid down in Article 3(2) of Directive 92/50/EEC on public service contracts. The two winners of the four contested competitions have links with one of the members of the jury, in breach of Article 13(6) of the Directive, which stipulates that the jury must be independent (one of them is even an *ex officio* member of the jury). The contracting authority for the most recent competition rejected certain candidates on the ground that they had not been selected in earlier procedures, which contravenes the requirement laid down in Article 13(5) of the Directive that selection criteria must be clear and laid down beforehand. One of the projects selected was incompatible with the land-use plan, which was subsequently revised in breach of the principle of equal treatment.

Not satisfied with the explanations given by the French authorities in response to its initial request for information, the Commission sent them a letter of formal notice on 17 September 1997.

After examining their reply dated 5 December 1997, it decided to issue a reasoned opinion for infringement of Directive 92/50/EEC, in which it calls on the French authorities to terminate the award procedures in question and to take the necessary steps to ensure that architectural competitions in Réunion are genuinely opened up to competition. If the French authorities failed to take this action, the Commission could bring the matter before the Court of Justice.

Italy - IT services for the General State Accounting Department

The Commission has decided to send Italy a reasoned opinion for infringement of Directive 92/50/EEC on public service contracts, and in particular Article 11 thereof, in respect of contracts for the maintenance, management and development of the integrated computer system of the Treasury Ministry's General State Accounting Department ('Ragioneria generale dello Stato') and the Court of Auditors.

The infringement results from the fact that these contracts, which were originally concluded in 1987 and 1988, have been renewed several times with the same company (owned by the Treasury Ministry), without any call for competition, although the conditions laid down by Article 11 of Directive 92/50/EEC, the only conditions that can justify using the negotiated procedure, were not met. It is also a consequence of the adoption of legislative decree No 414/97 of 19 November 1997, which allows contracts to be awarded by direct agreement for a period of more than 18 months. The decree also reserves certain IT activities (to be specified in a decree to be adopted by the Treasury Ministry) for the State, which will perform them via a company all of whose capital will be directly or indirectly in State hands. The Italian authorities' reply to the letter of formal notice transmitted on 7 August 1997 was not satisfactory.

IP/98/6

Brussels, 7 January 1998

Public procurement: infringement proceedings against Greece and Spain for non-transposal of directives

The European Commission has decided to institute infringement proceedings against Greece and Spain for failing to notify it of measures to transpose into national law certain directives relating to public procurement. As regards Greece, the Commission has decided to issue a reasoned opinion (the second stage of infringement proceedings under Article 171 of the EC Treaty) for failure to comply with the judgment of 2 May 1996 by the Court of Justice on the non-transposal into national law of Directive 92/50/EEC on the procedures for the award of public service contracts. As regards Spain, the Commission has decided to issue a reasoned opinion under Article 169 of the EC Treaty because Spain has still not transposed Directive 93/38/EEC on the award of public contracts in the water, energy, transport and telecommunications sectors.

Greece - Directive on public service contracts

Under Article 171 of the EC Treaty, the Commission calls on Greece to take all the necessary measures to comply with the reasoned opinion and to forward to it the texts adopted with a view to incorporating the Directive on public service contracts into national law. The Directive should have been transposed by 1 July 1993 at the latest. If Greece does not respond in a satisfactory manner within two months of receiving the reasoned opinion, the Commission may decide to bring the matter before the Court of Justice for the second time, with the request that the Court impose financial penalties commensurate with the seriousness and duration of the infringement and with the need to achieve a deterrent effect.

Spain - Directive concerning excluded sectors

In its reasoned opinion, the Commission requests that Spain notify it of the measures taken to transpose into national law the Directive under which public supply, works and service contracts in the water, energy, transport and telecommunications sectors have to be opened up to competitive tendering (93/38/EEC). For the majority of the Member States, the deadline for transposing this Directive was 1 July 1994, but Spain was granted an extension of two and a half years, until 1 January 1997. Despite this derogation, Spain has still not adopted measures implementing this important Directive at national level. In the absence of a satisfactory response from Spain within a period of not more than two months following receipt of the reasoned opinion, the Commission may bring the case before the Court of Justice.

IP/97/1178

Brussels, 19 December 1997

Public procurement: infringement proceedings against the United Kingdom, Austria, Germany and Portugal

The European Commission has decided to refer the United Kingdom and Portugal (three cases) to the Court of Justice and to send reasoned opinions (the second stage of infringement proceedings under Article 169 of the EC Treaty) to Austria, Germany and Portugal (two cases) for breaches of European Union (EU) rules on open and competitive public procurement contracts. In the absence of a satisfactory reply within two months of receipt of a reasoned opinion by a Member State, the Commission is entitled to refer the matter to the Court of Justice. These cases stem from complaints lodged with the Commission by firms which have suffered loss as a result of contract award decisions and also from checks which the Commission regularly makes on the conformity of national measures to implement EU Directives.

“The application of public procurement legislation still leaves a great deal to be desired, as was highlighted in the recent business survey we published to accompany the Single Market Scoreboard", commented Single Market Commissioner Mario Monti. "This is why proposals to improve the opening up of public procurement markets, worth 11.5% of GDP in the EU, will be featured in a Communication early in 1998, in accordance with the Action Plan for the Single Market endorsed by the Amsterdam and Luxembourg European Councils. In the meantime, I will continue to pursue infringement proceedings against any Member State which fails to apply the public procurement Directives correctly.”

United Kingdom - improper use of framework contract arrangements

The Commission has decided to refer the United Kingdom to the Court of Justice concerning the use of "framework arrangements" by the Department of Environment (Northern Ireland) for procuring architectural, engineering and other construction-related services. Under this procedure, a tender notice is published in the EC Official Journal indicating a general category of services to be provided rather than giving details of a specific contract. Once a list of approved suppliers has been established by this procedure, entities may choose suppliers from the list without going through a new competitive procedure for each individual contract. The case raises an important question of principle, namely the use by contracting entities of such framework contract arrangements for the procurement of services, supplies and works. The Directive on procurement of works, supplies, services and in the water, energy, transport and telecommunications sectors (93/38/EEC) explicitly provides for the use of such framework contracts. However, the use of such framework contracts is not authorised by the public procurement rules applicable in all other sectors to public service, supplies and works contracts (Directives 92/50/EEC, 93/36/EEC and 93/37/EEC respectively).

The UK authorities' reply, received on 29.7.1997, to the reasoned opinion sent by the Commission on 2.5.1997 was unsatisfactory, in the Commission's view.

Austria - qualification procedure for potential bidders

The Commission has decided to send a reasoned opinion to Austria because of the requirement imposed on EU companies to submit to a qualification procedure to prove their professional capacities before they can bid for a public procurement contract in Austria. Such a qualification procedure violates not only the Directives on public procurement of works, supplies, services (including procurement in the water, energy, transport and telecommunications sectors), but also EC Treaty rules on the freedom to provide services (Article 59). The requirement is laid down specifically in the public procurement legislation of the Land of Vienna and is in practice applied throughout Austria by the Order of Trades (Gewerbeordnung). This Order stipulates that before EU companies can provide a service in Austria, they have to request from the Austrian authorities a declaration that they have the qualifications necessary to be able to provide a service. According to the EU public procurement Directives, contracting authorities cannot, in general, require EU companies to justify their qualifications in the country of the contracting authority and can only request proof delivered in companies' country of origin of the necessary qualifications.

Germany - failure to recognise validity of non-German technical specifications

The Commission has decided to send a reasoned opinion to Germany concerning repeated discrimination against imported products when public procurement contracts are awarded by the Länder authorities. Such discrimination contravenes EC Treaty rules on the free movement of goods (Article 30) according to the case law of the Court of Justice (Dundalk ruling, 22 September 1988) and must be eliminated. The Commission has therefore decided to request the German authorities to require that calls for tender feature a mutual recognition clause. Such a clause would ensure that products from other Member States would not be discriminated against on the grounds that they were manufactured according to national technical specifications other than German specifications.

Portugal - incorrect implementation of Supplies Directive

The Commission has decided to refer Portugal to the Court of Justice concerning its failure to implement fully and correctly the Directive on public supply contracts (93/36). Decree-Law 55/95, the instrument of implementation notified by the Portuguese authorities, applies parts of the Directive but does not implement it in full. In particular:

* it provides for the possibility of price negotiation in restricted procedures
* it does not oblige contracting authorities to publish contract notices in the EC's Official Journal or indicate clearly which contracts are subject to that obligation – namely those exceeding the relevant threshold
* it indicates that deadlines for the presentation of applications or tenders count from the date of publication of the notice in the Portuguese Official Journal rather than the EC Official Journal
* the distinction between the selection and the award phase is not clear.

Following the dispatch of a reasoned opinion on 7 July 1997, the Commission's services reached an informal agreement at technical level with representatives from the competent Portuguese services on suggested comprehensive amendments to Decree-law 55/95. However, there has so far been no concrete follow-up to this agreement in the sense that the amendments have not been formally adopted.

Portugal - incorrect implementation of the Public Works Directive

The Commission considers that the implementation in Portugal of Directive 93/37 on public works contracts by means of Decree-Laws 405/93, 101/95 and "*portaria*" 428/95 is in some respects incorrect and/or incomplete. It has therefore decided to refer Portugal to the Court of Justice on the following grounds:

* the definitions of public works contract, contracting authority and public works concession are incorrect
* the contracting authority is free to negotiate changes of tenders offered by the winning bidder
* the thresholds triggering advertisement in the EC Official Journal and the entity to whom contracting authorities have to send their draft notices are not specified
* the implementation of the provisions on selection criteria renders them unworkable or unduly discriminatory against bidders not established in Portugal
* the imposition of a Portuguese licence on all companies wishing to tender for contracts under the thresholds is contrary to EC Treaty rules on freedom to provide services (Article 59).

Following the dispatch of a reasoned opinion on 7 July 1997, the Commission's services reached an informal agreement at technical level with representatives of the competent Portuguese authorities on suggested comprehensive amendments to Decree-law 405/93. However, the Portuguese authorities have still not implemented the required amendments.

Portugal - incorrect implementation of the Remedies Directive

The Commission has decided to refer Portugal to the Court of Justice because it considers that the implementation of the Directive on remedies for bidders who consider they have been unfairly excluded from a public procurement contract (89/665) by the general system of administrative law in Portugal is incorrect and/or incomplete. The main reasons for the Commission's dissatisfaction are the following:

* only acts which finally close the award procedure may be subject to a court challenge
* the possibility of obtaining interim measures to suspend an award procedure is subject to too stringent conditions and is anyway dependant on the filing of an action for annulment of the act
* there is no provision for remedies against acts taken by private law contracting authorities falling under the definition of "body governed by public law"
* in some situations, contracting authorities themselves are the only valid bodies to which appeals for remedies can be addressed.

Following the dispatch of a reasoned opinion on 7 July 1997, the Commission's services welcomed some of the improvements suggested by representatives of the competent Portuguese services. Nevertheless, the suggested changes fail to address all the Commission's concerns.

Portugal - works on the Lisbon internal ring road ("CRIL")

The Commission has decided to send Portugal a reasoned opinion for the excessive amount of additional works that were awarded to the same contractor in connection with road works on the Lisbon internal ring ("CRIL"), which was constructed between 1990 and 1995. Indeed, the amount of additional works awarded to the same contractor for unforeseen circumstances far exceeded the limit of 50% of the initial contract value imposed by the public procurement Directives. The Portuguese authorities' replied to a letter of formal notice (first stage of the formal infringement procedure) sent on 15 May 1997 but failed to address the Commission's concerns.

Portugal - incorrect implementation of Services Directive

The Commission has decided to send a reasoned opinion to Portugal concerning its failure to implement fully and correctly the Directive on procurement of services (92/50/EEC). The instrument notified by the Portuguese Authorities, Decree-Law 55/95 fails to implement the Directive in full. In particular:

* it provides for the possibility of price negotiation in restricted procedures
* it does not oblige contracting authorities to publish contract notices in the EC's Official Journal or indicate clearly which contracts are subject to that obligation – namely those exceeding the relevant threshold
* it does not clearly indicate which services are covered by the Directive's obligations
* it indicates that deadlines for the presentation of applications or tenders count from the date of publication of the notice in the Portuguese Official Journal rather than the EC Official Journal
* the distinction between the selection and the award phase is not clear.

Following the dispatch of a letter of formal notice on 7 July 1997, the Commission's services reached an informal agreement at technical level with representatives from the competent Portuguese services on suggestions for comprehensive amendments to Decree-law 55/95. However, there has so far been no concrete follow-up to this agreement in the sense that the amendments have not been formally adopted.

IP/97/1162

Brussels, 18 December 1997

Public procurement: infringement proceedings initiated against France, Italy, Germany and Spain

The Commission has decided to deliver reasoned opinions (second stage of the infringement proceedings provided for in Article 169 of the EC Treaty) to France, Italy (two cases), Spain and Germany for infringing the Community rules requiring public contracts to be opened up to competition. The infringements involve a planned automatic light rail transit system in the city of Rennes in France, urban waste collection in Naples, the conversion, operation and maintenance of heating installations in a number of buildings belonging to the Rome municipal authorities, the management of a waste disposal site at Flörsheim/Wicker in Germany, and a study for a road in Gran Canaria. If the Member States in question fail to provide satisfactory replies within two months of receiving the reasoned opinions, the Commission may refer the matters to the Court of Justice. These cases stem from complaints lodged with the Commission by firms adversely affected by decisions to award contracts and from the regular checks carried out by the Commission to ensure that Community directives are correctly transposed into national law.

France - planned automatic light rail transit system for the city of Rennes

The Commission has decided to deliver a reasoned opinion to France concerning the negotiated award to a French group of the main supply contract for the planned automatic light rail transit system in Rennes. It has taken this decision after asking the French authorities in January for more details about the conditions under which the contract was awarded, after sending them a letter of formal notice on 17 June and after examining their replies of August and November.

Notwithstanding the French authorities' explanations, the Commission considers that no award of the contract at issue took place before the entry into force of the Directive on procurement procedures in the water, energy, transport and telecommunications sectors (93/38/EEC) and that the award of the negotiated contract on 22 November 1996, after the previous procedure conducted between 1989 and 1993 had been abandoned in 1995, is covered by the Directive in question. Furthermore, there are no technical reasons to justify the failure to open up the contract to competition.

Finally, the Commission disputes the contracting entity's use of the possibility, provided for in the French public procurement code, of exempting itself from the normal competition rules on the grounds that it had already carried out major investment. Such justification is not covered by the derogations provided for in Directive 93/38/EEC. The Commission is requesting the French authorities to take appropriate measures to remedy this situation and may decide to refer the matter to the Court of Justice if such measures are not adopted.

Italy - collection of urban waste in Naples

The Commission has decided to deliver a reasoned opinion to Italy in connection with a public contract awarded by the Naples municipal authorities for the collection of urban waste, which is not consistent with the Directive on public service contracts (92/50/EEC) in a number of respects. Firstly, one of the conditions of participation in the contract was registration with the Italian Chamber of Commerce, Industry and Crafts; firms established in other Member States were not permitted to produce equivalent documentary evidence. Secondly, the deadline for submission of tenders was less than the minimum 40 days from the dispatch of the letter of invitation to tender, and that letter did not contain the tender specifications. Thirdly, firms were requested in the letter of invitation to tender to submit documents relating to legal, technical, economic and financial capacity. Those documents included a certificate issued by a "Cancelleria del Tribunale", and firms established in other Member States were not permitted to submit equivalent documents. Finally, quality certification under standard EN 29000 was also required, without firms being able to submit alternative evidence of equivalent quality assurance measures.

Italy - conversion and maintenance of heating installations in buildings in Rome

The Commission has decided to deliver a reasoned opinion to Italy for infringing the Directive on public works contracts (71/305/EEC, as amended by 89/440/EEC) and for failing to observe the principle of equality of treatment. The non-compliance alleged by the Commission involves a public contract awarded by the Rome municipal authorities for the conversion, operation and maintenance of heating installations in a number of their buildings.

The non-compliance stems from the fact that the main terms of the tenders, such as prices and deadlines, were renegotiated after they had been received and opened. The contracting authority thus made *de facto* use of a negotiated procedure in violation of the provisions of the Directive on public works contracts. Furthermore, in the tender assessment phase, the principle of equality of treatment recognised by the Court of Justice as the basis of the public procurement Directives was not observed, because not all the tenderers had the same opportunity to formulate their tenders: only the tenderer which had submitted the tender which, following reformulation, had been selected by the contracting authority was invited to indicate whether it accepted the changes made.

Germany - management of a waste disposal site at Flörsheim/Wicker

The Commission has decided to deliver a reasoned opinion to Germany concerning the award of the contract for the management of a waste disposal site at Flörsheim/Wicker. It considers that the award of the contract has infringed the Directive on public service contracts (92/50/EEC), for three reasons. Firstly, the criteria governing the award of the contract were not set out either in the contract notice or in the tender specifications. Secondly, the contracting authority used an accelerated procedure without valid justification for doing so. Thirdly, local firms were placed in a *de facto* favourable position in that preference was given to firms which already had experience of working for the local authorities in question.

Spain - study for a road on Gran Canaria

The Commission has decided to deliver a reasoned opinion to Spain in connection with a public service contract put out to tender by the Regional Ministry for Public Works, Housing and Water in the Canary Islands for a study concerning the Agaete - San Nicolás de Tolentino - Mogán road on the island of Gran Canaria. The Commission has a number of objections to the invitation to tender: the use of a mathematical formula which distorted the concept of the "economically most advantageous tender" and penalised tenders considered to be abnormally low; the *a posteriori* breakdown of the price criterion into subcriteria which had not been previously detailed either in the administrative specifications or in the contract notice; the use of criteria for selecting competitors as award criteria and the fact that these criteria were also contrary to the principles of non-discrimination, equality of treatment and freedom to supply services.

IP/97/671

Brussels, 22 July 1997

Public procurement: infringement procedures against France, Italy, Spain and Austria

The European Commission has decided to refer France to the Court of Justice (two cases) and to send reasoned opinions (second stage of formal infringement procedures under Article 169 of the EC Treaty) against France, Italy, Spain and Austria for violations of Community rules on open and competitive public procurement contracts. In the absence of a satisfactory response within two months following reception by the Member State in question of a reasoned opinion, the Commission may refer the case to the Court of Justice. These cases result from complaints addressed to the Commission by firms which have suffered loss as a result of contract award decisions and from the regular checks the Commission carries out to verify the conformity of national measures to implement Community Directives.

France - *'plan lycée'* of the Nord-Pas de Calais Region and Nord *département*

The Commission has decided to refer France to the Court of Justice for violations of the public works Directive (71/305/EEC, as amended by the Directives 89/440 and 93/37/EEC) arising from the public contracts for the construction of school buildings in the Nord-Pas de Calais Region. The French authorities answered neither the various letters of formal notice concerning the *'plan lycée'*, nor the reasoned opinion notified on 7 April 1997. The Commission has already referred France to the Court of Justice concerning the construction of a *'lycée'* in Wingles, part of the same region (see IP/95/1399).

The Commission has serious doubts concerning the *'plan lycée'* launched by the region, worth 1,400 million French Francs. The contract notices quote purely French standards without mentioning the equivalence of other Member States' standards and confuse the various criteria envisaged at the time of the procedure.

In particular, an additional criterion relating to employment, which is discriminatory according to the case law of the Court of Justice, has been included in an inter-ministerial circular not communicated to the Commission. Moreover, the French authorities have refused to forward to the Commission the documents requested in connection with these procedures, which do not respect the obligation to ensure competition. The Commission questions the systematic application of this additional criterion to all school building contracts in the Nord Region and *département* from 1993 to 1995.

France - electricity supply infrastructure in the Vendée

The Commission has decided to refer France to the Court of Justice concerning violations by the *'syndicat départemental d'électrification de la Vendée'* of the consolidated utilities Directive (93/38/EEC), on public procurement in the water, energy, transport and telecommunications sectors. The Commission decided to refer the case to the Court because it considers unsatisfactory the French authorities' response to its reasoned opinion of 7 April 1997.

The contracting entity divided up its three-year work programme, worth approximately 600 million French Francs, so as to publish in the EC Official Journal only some of the contract notices published at the national level. The programme was split on a geographical basis, with the threshold provided for by the Directive 93/38/EEC applied separately in each individual area covered by the authority, and then on a technical basis by separating electricity supply and street lighting work. The Commission also considers that the contracting entity did not separate the various procedures as required by Directive 93/38/EEC (Article 1 items 5) and 7)), by concluding a framework agreement rather than the restricted procedure originally specified. The contracting entity finally awarded the contracts to local companies without publishing the award notices required by the public procurement Directives.

France - supplies of water pipes

The Commission has decided to send France a reasoned opinion concerning the procedures followed for the procurement by various local authorities of supplies of water pipes. These procedures violate not only the utilities Directives (90/531 and 93/38/EEC), on public procurement in the water, energy, transport and telecommunications sectors, but also EC Treaty rules on the free movement of goods (Article 30). The French authorities' response to the letter of formal notice on this case is considered by the Commission to be unsatisfactory. When local authorities or contracting entities in the water sector award contracts for supplies of water pipes in ductile cast iron, the complainant, the company Biwater, has suffered systematic discrimination in favour of his French competitor. The contracts in question give rise to numerous problems of discrimination from the point of view of Article 30 of the Treaty and of the utilities Directive, which is applicable to the drinking water and water treatment sectors.

In addition, one of the cases has brought to light certain deficiencies in the way France applies the Directive on **remedies** in the water, energy, transport and telecommunications sectors (92/13/EEC), to which the French authorities offered no satisfactory solution. The Commission has requested the French authorities to take general measures to put an end to these discriminations and could decide to refer France to the Court of Justice if these measures are not adopted.

Italy - the Messina straits bridge

The Commission has decided to send a reasoned opinion to Italy concerning the concession for the design, construction and management of the future bridge over the Messina straits. The Commission considers the terms of this concession break EC Treaty rules on the freedom of establishment and the freedom to provide services (Articles 52 and 59).

The infringement stems from the requirement laid down in Law N° 1158a of 17.12.71 for the concessionaire to be a company owned 100% by public authorities or Italian firms. This requirement, which has been applied in practice, constitutes a violation of Articles 52 and 59 of the EC treaty, insofar as it excludes any non-Italian public or private body from obtaining the concession or being a shareholder in the concessionaire.

Spain - cleaning services for the National Library

The Commission has decided to send a reasoned opinion to Spain concerning a public procurement contract to supply cleaning services for the National Library. Spain replied to the letter of formal notice notified by the Commission on 12 February 1997, but after the deadline. Moreover, the reply was not satisfactory.

The call for tenders launched by the Ministry of Culture gives rise to several objections, namely :

- the deadline for receipt of tenders was less than the minimum 52 day period required for open procedures by the Directive on public service contracts (92/50/EEC)

- the selection criteria applied to bidders were also used as attribution criteria, and moreover one of these criteria was disproportionate and contrary to the principles of equal treatment and of free competition and

- the experience requirements exceeded what is allowed by the Directive.

Austria - electronic system for recording ecological points (ecopoints)

The Commission has decided to send a reasoned opinion to Austria concerning the attribution of a public supply contract for an electronic system for recording ecological points for lorries (ecopoints). The Commission considers that Austria violated the Directive on public supply contracts (93/36/EEC) because the contract was awarded to a tender which was not read at the time of the official opening of tenders. Moreover, the award took into account a total discount which was not read either when the tenders were opened. Finally, the tender selected was not in conformity with the technical requirements of the contract specifications, which included “environmental compatibility” among the attribution criteria. Ecological criteria can be taken into consideration only if they confer a real advantage in meeting the stated requirements and allow an objective evaluation of the relative quality of tenders for a specific contract.

While examining this specific case, it came to the Commission's attention that the Austrian federal law on public procurement contracts does not afford any possibility to challenge decisions on attribution of contracts before **national remedies procedures**, in violation of the public procurement remedies Directive (89/665/EEC).

The Commission considers that the Austrian authorities' answer of 7 May 1997 to the letter of formal notice was neither satisfactory nor complete.

IP/97/565

Brussels, 26 June 1997

Public procurement: Commission decides to refer France to Court of Justice over football World Cup stadium

The Commission has decided to refer France to the Court of Justice for violation of the Directive on public procurement of construction works (93/37/EEC) in its award of the public works contract for the construction of the 'Stade de France' at Saint Denis in the suburbs of Paris, which is intended for use during the football world cup competition in 1998. The objections raised by the Commission concern the clarification of the contract as a concession to operate the stadium and the failure to observe the principle of equal treatment, on account of the selected bid being amended during the course of the procedure.

Firstly, the Commission considers that the contracting authority did not observe the procedures outlined in the tender documents, while allowing the tenderer whose offer was selected to modify the contents of its offer substantially during the course of the procedure.

"The contracting authority's attitude contradicts the fundamental principle of equal treatment on which the EU's public procurement rules are based. The equal treatment principle is essential for ensuring contracts are awarded transparently and objectively and for maintaining legal certainty for tenderers", confirmed Single Market Commissioner Mario MONTI. "Moreover, the case clearly shows that the complainants were unable in practice to pursue the procedures that should be available under the EU remedies Directive (89/665/EEC) as a result of the obstacles placed in their way by the contracting authority and the adoption of a law specifically aimed at validating the procedures followed during the award and amendment of this contract", he added.

Secondly, the classification of the contract as a concession to operate the stadium facility, rather than a contract to construct the stadium, is questionable because the final contract has had the operating aspects removed, so that it is effectively a contract for the subsidised construction of the stadium, despite the fact that the rules for awarding the tender, as laid down by the French authorities when the procedure was initiated, prohibit the granting of any operating subsidies.

The final contract also provides for the granting to the winning tenderer of sizeable construction contracts and the awarding of a percentage of related construction contracts to local companies, in breach of EC Treaty rules on the free movement of goods (Article 30) and freedom to provide services within the Single Market (Article 59), not to mention the Directive on public procurement of construction works (93/37/EEC).

After receiving an answer from the French authorities on 14 March 1996 to its letter of formal notice, the Commission asked for additional information in August 1996. The explanations provided by the French Government in a series of meetings during the course of 1996 went some way towards answering the objections of the complainant concerning the awarding phase for the contract, but did not meet the main objections of the Commission. The Commission therefore sent a reasoned opinion to the French authorities on 14 April 1997 (see IP/97/33), with a request for them to reply within two months following receipt.

In the absence of a satisfactory response to that reasoned opinion, the Commission has decided to bring this matter before the Court of Justice.

IP/97/33

Brussels, 22 January 1997

Public procurement: Commission sends reasoned opinion to France on World Cup stadium

The Commission has just decided to send a reasoned opinion to France for incorrect application of Community rules on public procurement contracts as regards the construction of the 'Stade de France' at Saint Denis on the outskirts of Paris for the 1998 football World Cup. The objections raised by the Commission concern the qualification of the contract as a concession to operate the stadium and the failure to observe the principle of equal treatment, because the selected offer was amended during the course of the procedure. In the absence of a satisfactory response within two months following receipt of the reasoned opinion (second stage of the infringement procedure under Article 169 of the EC Treaty), the Commission could refer France to the Court of Justice.

"Compliance with Community rules on public procurement contracts is of fundamental importance for the proper functioning of the Single Market", stated Single Market Commissioner Mario Monti. "The Commission must fulfil its duty to pursue such an infringement of Community law, and so must act as it already has in numerous similar cases in other Member States. The violations in this specific case are clear and the Paris Administrative Court itself, on 2 July 1996, was in favour of the complainant and cancelled the decision of the Prime Minister to award the contract", concluded Mr Monti.

The main issue challenged by the Commission concerns the qualification of the contract as a concession to operate the stadium facility, rather than a contract to construct the stadium. The contracting authority sought to conclude a concession contract, i.e. a contract comprising mainly provisions concerning the operating conditions of the stadium by the concessionnaire. But the offer finally selected and the contract concluded contain provisions eliminating operating risks for the concessionnaire. Therefore the final contract covers primarily the construction as such of the stadium and has to be regarded as a construction contract.

Secondly, the contracting authority did not observe the procedures outlined in the tender documents, while allowing the tenderer whose offer was selected to modify the contents of its offer substantially during the course of the procedure. The principle of equal treatment of tenderers was not respected therefore and the contract was not awarded on the basis of the attribution criteria provided for in the tender documents.

Finally, the contract provides for the granting to the winning tenderer, without any open competition, of significant complementary construction contracts. The contract also provides for a percentage of related construction and service contracts to be reserved for local companies in violation of EC Treaty rules on the freedom to provide services (Article 59), as well as the Directives on public procurement of services (92/50/EEC) and construction works (93/37/EEC).

After receiving an answer from the French authorities on 14 March 1996 to its letter of formal notice (first stage of the infringement procedure), the Commission asked for additional information in August 1996. This additional information has been provided by the French Government, but was not sufficient to meet the principal objections raised by the Commission.

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Number of Pages:	1
Number of Words:	491 (approx.)
Number of Characters:	2.799 (approx.)

PUBLIC PROCUREMENT: INFRINGEMENT PROCEDURES AGAINST FRANCE, GERMANY, ITALY,THE UNITED KINGDOM, IRELAND, BELGIUM AND PORTUGAL

Reference: IP/96/761 Date: 01/08/1996

HTML: EN FR
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The Commission decided to send reasoned opinions (second stage of the infringement procedure provided for in Article 169 of EC Treaty) against France (3 cases), Germany, Italy (2 cases), the United Kingdom, Ireland (3 cases), Belgium and Portugal for violations of the Community rules on open and competitive procurement contracts. In the absence of a satisfactory response within 40 working days following reception by the Member State in question of a reasoned opinion, the Commission could refer the cases to the Court of Justice. These cases result from the complaints addressed to the Commission by companies whose interests have been harmed by procurement decisions and from the checks which the Commission carries out regularly to verify the quality of national measures transposing Community Directives. The 21-22 June Florence European Council asked Member States to accelerate the full application of public procurement Directives in order to promote economic growth and employment.

"I am particularly disappointed by persistent problems in the field of public procurement, which is of crucial importance to the Single Market as a whole", commented Single Market Commissioner Mario MONTI. "After all, public procurement of works, supplies and services amounted to no less than 11.5% of Community GDP in 1994 (ECU 721 billion), equivalent to the Belgian, Danish and Spanish economies put together. Public procurement Directives offer the authorities and companies concerned the freedom to make their procurement choices on the basis of commercial criteria, free of political or other interference. These Directives therefore enable procurement entities to benefit from wider choice and better value for money, the

advantages of which can be passed on to taxpayers and consumers of public services. At the same time, EC procurement rules should allow suppliers and service providers to enjoy all the advantages of a Single Market (including access to new commercial opportunities, economies of scale and greater international competitiveness). Member States recognised the value of a Single Market for procurement when they adopted the comprehensive range of fair and clearly-defined Community rules that now exists. But despite all the advantages, old habits die hard, and all too often public procurement markets continue to be shielded from competition."

France - electrification of the Vendée region

The Commission has decided to send a reasoned opinion to France concerning the procedures followed for awarding public works contracts for electrification in the Vendée département. The Commission considers that the procedures followed violate the consolidated utilities Directive (93/38/EEC), on public procurement in the water, energy, transport and telecommunications sectors. In particular, the contracting entity grouping divided up its work programme in such a way as to publish in the EC Official Journal only some of the contracts published at the national level, and then awarded the contracts to local companies. The French authorities' answer to a letter of formal notice (first stage of the infringement procedure provided for in Article 169 of the EC Treaty) sent on 17 January 1996 was judged unsatisfactory by the Commission.

France - lycée plan of the Nord/Pas de Calais region

In the absence of any reply to its various letters of formal notice, the Commission has decided to send a reasoned opinion to France concerning public works contracts for school buildings of the Nord/Pas de Calais region and of the Nord département. In particular, the Commission has serious doubts concerning the plan lycée launched by the region worth 1.4 billion French Francs, which does not comply with the public works Directive (71/305/EEC, as amended by Directives 89/440/EEC and 93/37/EEC).

The contract notices quote purely French standards, without mentioning the equivalence of other Member States' standards, and confuse the various criteria envisaged at the time of the procedure. In particular, an additional criterion relating to employment has been included in an interministerial circular not communicated to the Commission, which is discriminatory on the basis of the case law of the Court of Justice. The Commission questions the systematic application of this criterion to all school building contracts in the Nord/Pas de Calais region and the Nord département from 1993 to 1995.

Moreover, the French authorities have refused to forward to the Commission the documents requested in connection with these procedures, which do not respect the obligation to ensure competitive procedures. The Commission already decided in December 1995 to refer France to the Court of Justice in connection with the construction of the lycée at Wingles, in the same region

(see IP/95/1399).

France - subsidised housing organisations

In the absence of any reply to a letter of formal notice sent on 7 December 1995, the Commission has decided to send a reasoned opinion to France in connection with numerous cases of subsidised housing organisations' construction contracts not being published in the EC Official Journal. Although these entities fall within the scope of Community legislation, they systematically fail to respect their obligations under the public works procurement Directive (93/37/EEC) to publish contracts in the EC Official Journal.

Germany - tram cars in Hanover

The Commission has decided to send a reasoned opinion to Germany for failing to ensure a contract for the supply of trams cars in Hanover followed the procedures required by the utilities Directive 90/531/EEC (on public procurement in the water, energy, transport and telecommunications sectors). In particular, the Commission considers that the contract was not opened correctly to competition. The contracting entity, the Hanover city transport company (UESTRA), published a contract notice concerning qualification for the supply of only 40 tram cars, while the contract in fact required the delivery of 144 tram cars.

Italy - poor transposition of the public works Directive

The Commission has decided to send Italy a reasoned opinion concerning the incompatibility of certain provisions of its national legislation (framework law no109/94, as modified by law no216/95) with the public works Directive (93/37/EEC).

The Italian authorities adopted, on 11 February 1994, a framework law on public works contracts (law no109/94), amended by a law of 2 June 1995 (law no216/95). Certain provisions of the laws are not in conformity with Directive 93/37/EEC, namely the rules on advertising contracts, on access to contracts for non-Italian operators, on the automatic rejection of abnormally low offers and on acceleration of the appeal procedures.

No response was received from the Italian authorities to the letter of formal notice sent by the Commission on 10 April 1996.

Italy - digital mapping in Sardinia

The Commission has decided to send to Italy a reasoned opinion concerning the procedures followed for the award of a contract for digital mapping services in Sardinia. The Commission considers the procedure violated not only EC Treaty rules on the freedom to provide services (Article 59), but also the services procurement Directive (92/50/EEC).

The Sardegna region launched the public contracts in question by an accelerated restricted procedure without indicating any reason to justify recourse to such a procedure. Moreover, in order to participate in the procedure, candidates had to have a suitably-equipped workshop in Cagliari or in the vicinity, which constitutes both an obstacle to the freedom to provide services in violation of Article 59 of the EC Treaty and a breach of the provisions of the services procurement Directive concerning the selection criteria (Articles 29 and following). Another condition of admission to the procedure was connected with capacity to prove a very high turnover in relation to the value of the tender, in violation of the principle of proportionality as well as of Articles 31 and 32 of the Directive.

The Commission sent a letter of formal notice to the Italian authorities on 4 March 1996. The authorities' reply dated 3 April 1996 does not meet the objections raised by the Commission.

United Kingdom - services for the Audit Commission

The Commission has decided to send the United Kingdom a reasoned opinion because the Audit Commission, a body established pursuant to the Local Government Finance Act 1982, violated the Directive on public procurement of services (92/50/EEC) when it appointed external auditors to all local authorities in England and Wales for the years 1992 and 1993. The audit appointments in question are shared between the in-house District Audit Service (DAS), which carries out approximately 70% of the work, and independent United Kingdom accountancy firms which jointly cover the remaining 30%. For these external audit appointments, the Audit Commission does not publish any notices in the Official Journal of the European Communities, but appears to select from a closed list of firms. The infringement procedure concerns these external appointments.

The Audit Commission's published Annual Accounts 1993/1994 reveal that contracts worth a total sum of #13.961 million were entered into with private firms in the year 1992 and a further sum of #17.684 million in the year 1993. In the view of the Commission, the service contracts entered into by the Audit Commission are covered by the provisions of the services procurement Directive. The services procured by the Audit Commission fall within category 9 of Annex IA to the Directive (accounting, auditing and book-keeping services) and, pursuant to article 8, the award procedures for these contracts are therefore covered by the provisions of Title III to VI of the Directive.

Despite an earlier exchange of correspondence between the services of the Commission and the United Kingdom authorities, the Commission has received no response to a letter of formal notice sent to the United Kingdom on 21 November 1995.

Ireland - Directive on remedies in the utilities sectors

The Commission has decided to send Ireland a reasoned opinion following the Irish Government's failure to implement correctly some provisions of Directive 92/13/EEC on remedies in the utilities sectors (water, energy, transport and telecommunications). Member States were due to take the measures necessary to comply with this Directive before 1 January 1993. The Irish Government transposed the Directive by virtue of Statutory Instrument No 104 of 1993 on 21 April 1993. This text did not, however, provide for the setting up of an attestation system pursuant to Chapter 2 of the Directive, which, obliges each Member State to give contracting entities the possibility of having recourse to an attestation system in accordance with articles 4 to 7. The purpose of the attestation system is to provide for the procurement procedures and practices applied by contracting entities to be examined by independent persons with a views to establishing that they comply with Community law. Despite an earlier exchange of correspondence, no response has been received to a letter of formal notice sent to the Irish Government on 31 January 1996.

Ireland - supply of a geographical information system to Bord Gais Eireann

The Commission has decided to send Ireland a reasoned opinion in a case involving breaches of the utilities procurement Directive (90/531/EEC) by the Irish gas utility, Bord Gais Eireann. The infringement concerns the actions of Bord Gais Eireann during a negotiated procedure launched in January 1994 for the award of a contract for the supply of a geographical information system. The contract was to involve the supply of hardware, software and data conversion system. The Commission received an official complaint from a company which had unsuccessfully attempted to be represented among those invited to negotiate with Bord Gais Eireann.

The complainant company joined a consortium and submitted its bid in October 1994. According to the complaint, in September 1995, Bord Gais Eireann, having not yet awarded the contract, and in the course of continuing negotiations, requested of another of the consortium's members that it substitute another company of Bord Gais Eireann's own choice within the consortium in the place of the complainant. It is understood that this substitute was a company which had already submitted a bid as part of another consortium, whose bid had been rejected by Bord Gais Eireann on the basis of the price put forward. Such actions are contrary to the rules, in the Directive, governing the selection of candidates according to objective criteria, those permitting groupings of suppliers to be allowed to negotiate, and those setting out the only criteria which may be employed for the award of the contract, the identity of one of the consortium members not being among them.

The Irish authorities did not respond satisfactorily to the points raised by the Commission in a letter of formal notice sent on 1 February 1996.

Ireland - spreading of fertiliser by helicopter for the Irish Forestry Board

The Commission has decided to send Ireland a reasoned opinion because the

Irish Forestry Board ("Coillte Teoranta") has failed to fulfil its obligations under the services procurement Directive (92/50/EEC). Coillte Teoranta, a body created pursuant to the Forestry Act 1988, failed to apply the services Directive in relation to a call for tenders launched in April 1995 for the spreading of fertiliser by helicopter. The problem is, however, a more general one in that the Commission considers Coillte Teoranta as a contracting authority pursuant to the public procurement Directives. This classification of Coillte Teoranta is not accepted by the Irish authorities.

The reply received by the Commission to a letter of formal notice sent to the Irish Government on 21 March 1996 was not satisfactory.

Belgium - aerial survey of the coast

The Commission has decision to send a reasoned opinion to Belgium because a contract for an aerial survey of the Belgian coast was not open to competition in violation of the services procurement Directive (92/50/EEC). The Directive stipulates that all service contracts exceeding the threshold of ECU 200,000 have to be open to competition by means of a contract notice published in the Supplement of the EC Official Journal and according to precise rules of procedure.

Although the contract relating to the aerial survey exceeds the threshold in the Directive, the contracting authority, the executive of the Flemish Region, the contract did not opened to competition at the Community level and in particular no notice concerning the contract was published in the Supplement of the EC Official Journal. The contract was awarded to a Flemish company.

As the Commission regards the failure to publish a contract notice as a breach of the Directive, it asked in its letter of formal notice to the Belgian authorities of 27 December 1995, to have the attribution procedure suspended and for Community law to be applied. In their reply of 2 February 1996, the Belgian authorities stated that, as the contract had already been awarded, the contract could not be cancelled and, moreover, that the attribution of the contract by a negotiated procedure without preliminary publication of a contract notice was justified because there is only one company able to carry out the contract in question.

The Commission does not accept this view, because recourse to the negotiated procedure without preliminary publication, therefore without any publication at the Community level, is an exception to the rule that public procurement contracts have to be open to competition at the EC level. Under the terms of the Directive, a negotiated procedure without preliminary publication can only be used if very strict criteria (listed in the Directive) are met. On several occasions, the Court of Justice has ruled that if contracting authorities wish to award a contract by a negotiated procedure without preliminary publication, they have to provide the proof that all the conditions to resort to this procedure, conditions which have to be

interpreted strictly, are fulfilled.

As the Commission considers that the Belgian authorities did not provide the proof that all the conditions to resort to the negotiated procedure without preliminary publication were met, it has decided to send a reasoned opinion.

Portugal - poor transposition of the supplies Directive

The Commission decided to send a reasoned opinion to Portugal because it has failed to fulfil its obligations to transpose entirely and correctly the supplies procurement Directive (93/36/EEC). The transposition measure notified by the Portuguese authorities, decree law 55/95, does not comply with the Directive 93/36 because it:

(i) does not stipulate that session and installation operations are covered by the definition of supply contracts

(ii) excludes contracts with the contracting authorities from the established arrangements

(iii) allows the negotiation of prices in restricted procedures

(iv) does not compel contracting authorities to send their contract notices to the EC Publications Office for publication in the EC Official Journal and does not state clearly that contracts exceeding the appropriate threshold are subject to this obligation

(v) states that the deadlines for the presentation of applications or contract tenders run from the date of publication of the notice in the Portuguese Official Journal and not the EC Official Journal.

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INFRINGEMENT PROCEEDINGS: PUBLIC PROCUREMENT - COMMISSION DECIDES TOINITIATE PROCEEDINGS AGAINST BELGIUM, IRELAND AND ITALY

Reference: IP/96/641 Date: 12/07/1996

HTML: EN FR DE IT
PDF:
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The Commission has decided to pursue infringement proceedings under Article 169 of the EC Treaty against Belgium, Ireland and Italy for breaching the Community rules on open and competitive public contracts. These cases result from complaints made to the Commission by businesses whose interests have been harmed by decisions awarding contracts, and also from the checks which the Commission regularly carries out to verify the "quality" of the transposal of Community directives. In order to promote economic growth and employment, the European Council held in Florence on 21-22 June asked the Member States to speed up full implementation of the Public Procurement Directives.

Proceedings against Belgium - construction of new "Vlaamse Raad" building

The Commission has decided to initiate proceedings against Belgium in the Court of Justice because it considers that Belgium has breached Community law on public works contracts (Directive 93/37/EEC). In the case in point, the construction of the new building which is to house the "Vlaamse Raad" (Flemish Parliament) was not put out to tender in accordance with the rules laid down in the Directive.

This Directive stipulates that all works contracts exceeding the threshold of ECU 5 million must be put out to tender by means of a notice published in the Official Journal of the European Communities and in accordance with precise rules of procedure. Although the contracts relating to the construction of the new Vlaamse Raad exceed the threshold laid down in the

Directive, there was no invitation to tender at Community level and no contract notice was ever published in the Official Journal.

The Commission considers that the Vlaamse Raad is a contracting authority and is, therefore, obliged to comply with the Public Procurement Directives. Since it regarded the failure to publish a notice as a breach of the Directive, the Commission asked Belgium, firstly, in its letter of formal notice of 28 July 1994 and, subsequently, in its reasoned opinion of 16 November 1995 to suspend the award procedure and ensure that Community law is complied with.

Despite this request from the Commission the Vlaamse Raad refused to suspend the award procedure. Moreover, the Belgian Government took the view that, as a constitutionally independent national institution, a parliament is not obliged to apply the Community rules on the award of public works contracts. However, the Directive defines contracting authorities as "the state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law". The Commission considers that the definition makes no distinction based on the fact that the contracting authorities belong to or depend on a constitutional authority. On the contrary, the Commission believes that the Directive is applicable irrespective of the state body or local authority involved, even if it is a constitutionally independent institution or body.

The Commission bases its opinion on the judgment of the Court of Justice of 20 September 1988 (Case 31/87), in which the Court confirmed that the concept of the State within the meaning of the Directive on public works contracts must be interpreted in functional terms in order to avoid jeopardizing the aim of the Directive.

Proceedings against Ireland - fertilizer for the Irish Forestry Board

The Commission has decided to initiate proceedings in the Court of Justice against Ireland because the Irish Government has not responded to a reasoned opinion (see IP/95/795) and has not ensured that the Irish Forestry Board ("Coillte Teoranta") fulfils its obligations under the Directive on public supply contracts (93/36/EEC).

The infringement in question relates to an invitation to tender for fertilizer valued at around IRL 280 000, which Coillte Teoranta (a body set up under the Forestry Act 1988) issued in March 1994 without publishing a notice in the Supplement to the Official Journal of the EC. The case also involves a more general problem since the Irish authorities do not accept the definition of Coillte Teoranta as a contracting authority as defined in the Public Procurement Directives. However, the Commission considers, particularly on the basis of the Court of Justice's judgment in the Beentjes case (C-31/87), that Coillte Teoranta fully constitutes a contracting authority within the scope of the Public Procurement Directives.

Italy - reasoned opinion for incorrect implementation of the Directive on review procedures (water, energy, transport and telecommunications)

The Commission has decided to send the Italian Republic a reasoned opinion (second stage of the infringement procedure) because it has failed to fulfil its obligation to send notification of the national measures taken to implement the provisions on the conciliation procedure provided for in Directive 92/13/EEC on review procedures in relation to procurement by entities operating in the water, energy, transport and telecommunications sectors.

Chapter 4 of this Directive makes provision for a special conciliation procedure aimed at the amicable settlement of disputes between contracting entities and tenderers who consider that they have been harmed by a failure on the part of those entities to respect Community law. Article 13 obliges Member States to take the necessary measures to comply with the Directive by 1 January 1993 (with the exception of Spain, Greece and Portugal, which have a later deadline) and to inform the Commission accordingly.

Since the Italian Republic failed to meet the deadline for introducing the conciliation procedure, the Commission has sent the Italian authorities a letter of formal notice (first stage of the infringement procedure) requesting them to take the appropriate action. No answer has been received. If there is no satisfactory reply within 40 working days of receipt of the reasoned opinion, the Commission may refer the matter to the Court of Justice.

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IP/01/1271

Brussels, 17th September 2001

Public procurement: Standard forms to improve contract notices

The European Commission has adopted a Directive imposing, from 1st May 2002, the use of standard forms in contract notices published in the EU's Official Journal in accordance with the EU's Directives requiring open and competitive public procurement procedures. The mandatory use of these forms will improve the quality of published notices, thus favouring openness, efficiency and transparency, and facilitate electronic procurement. In particular, use of these forms will make it easier for potential suppliers to use automatic search tools to find procurement notices of most interest and relevance to them. Moreover, for purchasing entities, the standard forms will simplify and cut the cost of compliance with EU procurement rules. European public procurement markets are together worth more than 1,000 billion every year across the EU.

Internal Market Commissioner Frits Bolkestein said "This is a practical measure that will help both purchasers and potential suppliers, thereby improving the efficiency of European public procurement markets".

The EU's public procurement Directives require open, transparent and competitive procedures to be followed by contracting entities and authorities for the procurement of goods and services and construction works. Notices concerning contracts falling within the scope of the Directives must be published in the Official Journal of the European Communities. To this end, the Directives include "model notices". As things stand at present, however, notices are frequently incomplete and contain errors.

Moreover, there is a need to adapt the model notices to take account of technical progress, particularly the possibility of using electronic means for sending the notices to the Official Journal of the European Communities as developed and tested in the framework of the Commission's project to promote public procurement using electronic means (Système d'Information sur les Marchés Publics - SIMAP). This measure will indeed facilitate the development of electronic procurement, within the framework of the *e*-Europe initiative.

The SIMAP on-line notification system, already operational and available to all potential contracting authorities, offers the possibility of taking full advantage of the standard forms for drafting, validating and despatching notices for publication in the Official Journal to the EU's Publications Office. The compulsory use of the forms will help to ensure interoperability of the electronic applications used or being developed in Europe.

Background

A first voluntary standardisation of the data which has to be published, applying only to supplies and works contracts, was introduced by a Commission Recommendation (91/561/CEE) adopted on 24 October 1991 and a Communication of 30 December

1992. The Commission recommended the optional use of some “standard models” of contract notices for supplies and works contracts.

In a second phase, standard forms have been designed and developed in close co-operation with Member States since 1994. The Commission has adopted this new Directive imposing the use of standard forms using powers delegated to it by the public procurement Directives for revising, inter alia, “the conditions for the drawing up, transmission, receipt, translation, collection and distribution of the notices”. The Directive has already been endorsed by two committees comprising Member State representatives, namely the Advisory Committee for Public Contracts and the Advisory Committee on Telecommunications Procurement.

The standard forms include all the provisions applicable to the content of notices under Community law and their substitution for the current model notices will not modify in any way the information contained in the notices. Standard forms contain, in addition to the headings which strictly correspond to the applicable provisions of the public procurement Directives as lastly modified by the GPA (Government Procurement Agreement signed within the framework of the World Trade Organisation - WTO), mandatory headings derived from the regulations on Community funds.

The full text of the Commission Directive, including the standard forms, is available on the SIMAP website at: http://simap.eu.int.

Jonathan Todd : 02/299 41 07
Linda Cain : 02/299 90 19

IP/01/1189

Brussels, 6 August 2001

Public procurement: Commission proposes obligatory use of the "Common Procurement Vocabulary"

The European Commission has adopted a proposal for a Regulation of the European Parliament and of the Council which would establish the Common Procurement Vocabulary (CPV) as the only classification system used for public procurement in the EU. Currently it is just one of several nomenclatures available for use by public awarding authorities in the EU. The universal use of the CPV would help to ensure that the subject matter of contracts could be accurately identified allow automatic translation of tender notices into all official Community languages and play a decisive role in promoting openness and transparency in European public procurement, a market which amounts to well over 1,000 billion every year across the EU. Using the CPV allows, potential suppliers to easily identify and select those procurement opportunities which are of most interest to them in any of the Member States.

Internal Market Commissioner, Frits Bolkestein, said: "Adoption of theis proposal would be another important step towards opening up public procurement markets to greater transparency, competition and efficiency. Obligatory use of the CPV would help suppliers to easily find and understand public contract opportunities across the EU, no matter what language the original tender notice was written in. Replacing four different nomenclatures with one common vocabulary would reduce errors, simplify procedures and make easier the comparison of different markets across the world. The CPV has been developed as the result of an unprecedented consultation exercise with the private and the public sectors throughout the EU."

Currently Community law concerning public procurement procedures refers to four different nomenclatures: CPA (Classification statistique des Produits associée aux Activités), NACE (Nomenclature des Activités économiques dans la Communauté Européenne), CPC Prov. (Central Product Classification) and CN (Combined Nomenclature). This proposal to replace the four existing nomenclatures with the CPV, making it the only system to be used across the EU, forms part of a package of proposed measures designed to simplify and modernise the public procurement Directives (see IP/00/461). The public procurement Directives refer to the nomenclatures in three respects: the description in notices of the subject matter of contracts, statistical obligations and the definition of the scope. Referring to the CPV would have no impact on the scope of the Directives, nor on the distribution of the annexes. The CPV would also contribute to simplifying the implementation of statistical obligations, thereby facilitating the task of contracting authorities and national authorities. At the international level, it should also be noted that the CPV allows for better comparability of data with the other nomenclatures used in the signatory states to the Government Procurement Agreement.

This proposal aims to provide a legal basis specific to the CPV and organisation of future procedures to up-date it. As with any nomenclature, the CPV will have to follow market trends in order to meet its users' evolving requirements (contracting authorities, potential suppliers and their intermediaries). This updating process will be driven by suggestions and comments from the users of the CPV.

Moreover, the CPV will play an essential role in the development of electronic public procurement. It is a determining factor in achieving the commitments made within the framework of the *e*-Europe and *e*-Commission initiatives, since it offers the possibility of electronically processing published data, improving the quality of the information, the speed of its distribution, and therefore the efficiency of the publication system set up by the Directives.

The proposal includes the adoption of a new revision of the CPV (annex I), which already improves on the 1998 version in the light of experience gained in use of the CPV. The proposed modifications were subjected to a wide consultation of the national authorities in all Member States, advisory committees (CCMP, CCO), the relevant professional organisations, intermediaries (Euro Info Centres) and service providers. Moreover, a public consultation was ensured in the eleven official languages on the SIMAP Internet site (http://simap.eu.int). In order to facilitate the changeover to the CPV, the proposal includes, in a second annex, correspondence tables with the four nomenclatures used up to now.

This proposed Regulation is available on the Commission's website: http://simap.eu.int.

Background

In 1996, the Commission recommended (OJ L222, 03/09/96) the use of CPV for describing the subject matter of contracts in the notices published in the supplement of the Official Journal of the European Communities (see IP/96/815. Following the Green Paper published the same year (COM(96)583, 27/11/96 – see IP/96/1083), the Commission received a majority of contributions in favour of generalising the use of the CPV in contract notices, contributions the Commission echoed in its communication of 1998, "Public procurement in the European Union" (COM/98/143, 11/03/98 – see IP/98/233) .

Since 1996, the CPV has been used systematically in all notices published in the supplement of the Official Journal of the European Communities, in accordance with the Directives, for identifying the subject matter of contracts, as well as for automatic translation into other official Community languages. It has thus become the main way for potential suppliers to select and identify procurement opportunities.

Last year the Commission adopted a package of proposed amendments to simplify and modernise the Public Procurement Directives: one on co-ordination of procedures for the award of public supplies contracts, public works contracts and public services contracts (COM(2000)275, 30/08/00) and the other co-ordinating the procurement procedures of entities operating in the water, energy and transport sectors (COM(2000)276, 30/08/00).

See http://europa.eu.int/comm/internal_market/en/publproc/general/2k-461.htm for further information on the proposed "Legislative Package".

Jonathan Todd : 02/299 41 07
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IP/00/461

Brussels, 10 May 2000

Public procurement: Commission proposes to simplify and modernise the legal framework

The European Commission has adopted a package of amendments to simplify and modernise the public procurement Directives. These Directives impose competitive tendering for public contracts, transparency and equal treatment for all tenderers to ensure that the contract is awarded to the tender offering best value for money. Contracts for public works and for purchases of goods and services by public authorities and public utilities account for around 14% of the Union's GDP. The Lisbon European Council acknowledged the importance of this legislative package for the competitiveness of European companies, effective allocation of public resources, economic growth and job creation, and recommended its adoption and implementation by 2002.

Internal Market Commissioner Frits Bolkestein said: "Public procurement in the Union represents the equivalent of half the German economy, some 1 000 billion. This package of amendments to the existing rules will open up all the benefits of the Single Market to guarantee the competitiveness of companies, best value for money for taxpayers and improved quality of public services. These amendments will enable purchasers and suppliers to use computerised resources for all public procurement procedures and so derive maximum benefit from electronic commerce. The Commission has done its utmost to simplify these rules - the Council and the European Parliament should do as much."

The legislative package adopted today has two objectives. The first is to simplify and clarify the existing Community Directives, and the second is to adapt them to modern administrative needs in an economic environment that is changing as a result of things such as liberalisation of telecommunications or the transition to the new economy. With the object of enhancing transparency in the award process and of combating corruption and organised crime, the legislative package also includes measures designed to make for greater clarity in the criteria determining the award of the contract and the selection of tenderers.

Simplification: making the texts clearer and more comprehensible

Simplification is an essential feature of the legislative package. The aim is to make the Directives easier to understand for everybody who is involved in public procurement, either as a buyer or as a supplier. The following examples illustrate this simplification effort:

- The three old Directives, covering supplies, services and works, are to be consolidated and recast in a single coherent text, which should make it possible to reduce the number of articles by nearly a half.
- The new provisions are presented in a more user-friendly manner: they have been set out in such a way as to reflect the normal order of an award procedure.

- The new structure and the new provisions are designed to guide users through all the stages of the award procedure.
- The thresholds which determine the application of the new instruments are also to be simplified and will be expressed in euros instead of special drawing rights.

Modernisation and flexibility: award procedures adapted to the needs of a modern administration and the new economy

One of the recurring demands during the consultations conducted by the Commission in preparing the proposals it adopted today was the modernisation of award procedures to adapt them to the administrative requirements of the 21st century. The new proposals accordingly relax some of the provisions which were considered too inflexible to achieve the objective of best value for money. The following examples illustrate the adjustments proposed:

- For complex contracts, new procurement arrangements would allow a "dialogue" between awarding authorities and tenderers to determine the contract conditions; the new procedure would offer guarantees that the principles of transparency and equal treatment would not be adversely affected by this "dialogue".
- In order to enable administrations to benefit from economies of scale flowing from a long-term procurement policy and to guarantee security of supply and the necessary flexibility for recurring purchases, the new proposals are more flexible in the approach to standard-form contracts.
- Public-sector buyers would enjoy more flexibility in defining the purpose of the contract: under the new provisions public-sector purchasers could specify their requirements in terms of performance and not only in terms of standards.

Modernisation also means adjusting procedures to an economic environment that is changing. Although the present Directives were updated in the 1990s, they do date back to the 1970s. A response was therefore needed to changes resulting from things such as the information technology revolution or the liberalisation of telecommunications. The following examples illustrate this modernisation:

- The use of information technologies in public procurement is a vital factor in helping the public authorities to adapt to the changing environment and to make for more effective procurement. For this reason the legislative package is designed to encourage the public authorities to make greater use of electronic means, for instance by shortening the time taken to publish notices or the tendering period in certain circumstances.
- As a result of liberalisation and effective competition in telecommunications, the new provisions exclude this sector from the directive which used to apply to it.
- In anticipation of similar developments in other sectors, such as electricity or water, the legislative package provides a mechanism for excluding them once liberalisation and effective competition are a reality.

The Commission's proposals derive directly from the action plan it adopted in 1998 to redynamise European public procurement policy (see IP/98/233). This action plan was adopted after the Commission had conducted wide-ranging consultations of the principal political and economic actors which highlighted the need to simplify and clarify the present legal framework while maintaining its stable foundations.

Jonathan Todd : 299.41.07

Linda Cain : 299.90.19

23 April 1998

"III Report from the Commission concerning negotiations regarding access to third country public procurement markets in the fields covered by Directive 93/38 (the Utilities Directive)".

COM (1998) 203

This report describes the state of play as of 31 December 1997 regarding access for Community suppliers and service providers to third country markets in the fields covered by Directive 93/38/EEC of 14 June 1993, on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ("the Utilities Directive"). It is presented in accordance with Article 36 (6) and Article 37 (2) of that Directive.

On 3 March 1993, the Commission presented a first progress report on negotiations in the fields covered by Directive 90/531/EEC of 17 September 1990. This Directive has in the meantime been replaced by Directive 93/38/EEC of 14 June 1993 covering supplies and works contracts as well as services contracts. A second progress report was presented by the Commission on 7 September 1994. Since then, no other reports have been presented by the Commission due to the fact that no further multi- nor bilateral agreements were concluded during the period immediately following the conclusion of the Uruguay Round.

In 1996 and 1997 some progress has been made. Hence, the results obtained are presented in this report. However, in order to assess all the new (and prospective) implications of the negotiation processes, the Commission has preferred to present in this report not only the progress made, but also the general state of play in this field. This report therefore gives and, where necessary, up-dates information on the agreements which the Community has already signed with third countries and which cover procurement in the fields covered by the Directive, including the WTO Agreement on Government Procurement.

After a summary of the negotiations in section A of the report, section B deals with the agreements in force, presented by legal instrument. Section C then presents the results by sector. Negotiation processes concluded but not yet in force are described in part D. Part E provides information on barriers in the field of public procurement and proposed lines of action. The current bilateral or multilateral negotiations that the Commission is conducting or could conduct with third countries in the same fields are described in part F. Information is given in section G on how to find opportunities abroad, as well as on the rights from which European suppliers and service providers benefit. Finally, lists of all the relevant agreements and publication references are included in sections H and I.

Download full text

Rules and Guidelines

Background information

Communication on public procurement. Priorities for public procurement policy have been outlined in a Communication adopted on 11 March 1998 by the European Commission on the initiative of Single Market Commissioner Mario Monti.

The British Department of Trade and Industry gives background information about Tendering for Government Contracts in the United Kingdom and where to get further information.

The Central Unit on Procurement (HM Treasury) provides guidance produced by the British Treasury's Central Unit on Procurement on a wide range of procurement issues.

ToppLedarforum is a Swedish initiative to modernise the public administration through the use of IT. Some information is available in English

The Konkurrencestyrelsen (The Danish Competition Authority) provides information on EU procurement rules and on Decisions by the review Board for Tenders.
Mainly in Danish.

NOU (namnden for offentlig upphandling) is the Swedish National Board for Public Procurement and provides a brief description of the Swedish Public Procurement Act (LOU).

UK Treasury Task Force: Private Finance Projects Team

The Direction des Affaires Juridiques is in charge, among other things, of designing the French public procurement legal and technical framework, conducting economic analysis, and advising, informing and training public procurement stakeholders.

Kanzlei Rechtsanwalt Arnold Boesen: Vergabe-Info Online aus Bonn.This site provides a list of links which potential tenderers on the German procurement market may find useful. It is maintained by the Bonn-based specialized law firm Boeser. An English version is available as well as a world-wide list of procurement related links.

European Procurement legal framework

Commission directive on the mandatory use of standard forms for the publication of contract notices, 2001/78/EC, adopted on 13-09-2001 

Browse or download the public procurement directives

Thresholds value in your national currency

Guidance Notes

Browse or download the public procurement brochures

Browse or download the public procurement guidelines

Browse or download the practical guide on remedies

International Treaties

Browse or download the report concerning negociations regarding access to third country public procurement markets in the fields covered by directive 93/38

World Trade Organisation: Government Procurement Agreement (GPA).

Europe Agreements

EU - Mexico Free trade agreement

National legislation

Market Access Database - EU provides market access information in the broadest sense, including economic and regulatory information, tariff levels as well as analyses of trade issues from several countries around the world

Normativa sugli appalti - Italy

Procurement regulations - USA

Diário da República Electrónico - INCM Portugal

CODE DES MARCHÉS PUBLICS - France

Public procurement news

News

Commission directive on the mandatory use of standard forms for the publication of contract notices, 2001/78/EC, 13-09-2001 NEW!

Proposal for a regulation of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV), COM(2001)449, adopted by the European Commission on 3 August 2001

"Selling to the public sector in Europe": a guide for managers of SMEs willing to assess their company's ability to supply the public sector in Europe

Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement

- Full text of the communication adopted by the Commission on 4 July 2001.
  ES DA DE EL EN FR IT NL PT FI SV
- Press release ES DA DE EL EN FR IT NL PT FI SV

CPV: draft revision, February 2001

Public procurement: Commission proposes to simplify and modernise the legal framework ("legal package") 10 May 2000

- Proposal for a Directive of the European Parliament and of the Council on coordination of procedures for the award of public supply contracts, public service contracts and public works contracts , COM(2000)275 final/2.
  ES DA DE EL EN FR IT NL PT FI SV
- Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors , COM(2000)276 final/2.
  ES DA DE EL EN FR IT NL PT FI SV
- Press release DE EN FR

Follow up of the Commission Communication of public procurement in the EU

- Full text of the Commission interpretative communication on concessions under Community law , adopted 27 April 2000 and published in the JOCE on 29 April 2000 (C121, pg. 2)
  ES DA DE EL EN FR IT NL PT FI SV
- Press release DE EN FR

Values of thresholds under the directives on public procurement

Follow up of the Commission Communication on public procurement in the EU
10 May 1999

- Commission adopts a Communication on the exclusion of certain telecommunications services from the Utilities Directive 93/38/EEC ES DA DE EL EN FR IT NL PT FI SV

- Press release EN FR

Pilot project on public procurement concerning alternative ways of solving problems

Study into the feasibility of developing a standard / specification for a unified system for qualification of utilities

CPV/version of 98 - New version of CPV

Questionnaire on Electronic Procurement Pilots

Browse or download the report concerning negotiations regarding access to third country public procurement markets in the fields covered by directive 93/38

SIMAP newsletters

Newsletter 4 : June 1997
Newsletter 5 : July 1997
Newsletter 6 : December 1997
Newsletter 7 : April 1998

Events

Procurement/SIMAP Conferences

Other interesting events

Archive

Invitation to tender for a contract for legal and economic research and assistance work in the field of public contracts covering the Member States of the European Union (MARKT/2000/17/B)

"Follow up of the Commission Communication of public procurement in the EU."
25 February 1999

- Summary DE EN FR
- Full text of the Draft Commission interpretative communication on concessions under Community law on public contracts ES DA DE EL EN FR IT NL PT FI SV

Call for tenders XV / 99 / 17 / B
Call for tenders XV / 99 / 16 / B
Call for tenders XV / 98 / 22 / B
Call for tenders XV / 98 / 21 / B
Call for tenders XV / 98 / 19 / B
Call for tenders XV / 98 / 14 / B

SIMAP Generalisation call for tenders

Report on SIMAP workshop of 07/03/97

The debate and speeches of the conference "***Electronic Procurement and follow up to the Green Paper***".

Government Procurement Agreement: Directives on public services, suppliers, works contracts and "excluded" sectors amended

A Directive amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning, respectively, public service, supplies and works contracts (the "classic" Directives) and a Directive amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and energy sectors (the "excluded sectors" or "utilities" Directive) were formally adopted on 13 October 1997 and 16 February 1998. The new Directives(1) are a direct consequence of the Government Procurement Agreement (GPA), entered into force in the Community on 1 January 1996, after the Council Decision(2) of 22 December 1994 approving the agreements reached in the Uruguay Round multilateral negotiations. Member States must now adopt the measures necessary for the implementation of both Directives at the latest twelve months after the respective dates of the final, formal adoption. However, concerning Directive 98/4/EC only, Greece and Portugal have up to 24 months from that date to implement the new Directives in national law.

Within the Community, the GPA creates rights for suppliers, contractors and service providers established in the third countries which have signed the Agree-ment (Canada, South Korea, the USA, Israel, Japan, Liechtenstein, Norway, Singapore, Swit-zerland and Hong Kong). These rights derive exclusively from the GPA, not from the public procurement Directives. The Directives, therefore, do not give third country companies any rights, which they do not already have pursuant to the GPA (or other international agreements), nor do they deprive such companies of any rights.

The public procurement Directives, on the other hand, deal exclusively with the relations between the contracting entities of the European Union and companies established there. These relationships are, obviously, not amended by the GPA.

The Commission has, however, proposed a number of amendments to the Directives, the purpose of which is to take account of certain provisions of the GPA in order to:

- avoid any discrimination against Community firms and to grant them the same advantages as those enjoyed by third-country firms as a result of the GPA;

- to ensure coherence between the two legal systems, thus simplifying their application in practice, and
- to ensure that, within the Community, the principle of equal treatment in respect of public and private entities continues to be observed.

As the GPA is already in force, the new Directives changes nothing in the relations with third country companies. On the internal "front", the main changes(3) will be the following:

- a recital will state explicitly that the so-called "technical dialogue" may take place, provided this does not have the effect of precluding competition;
- the thresholds will now mirror those of the GPA, where this is applicable, and otherwise be maintained unaltered. The main changes regard service contracts awarded by central State authorities, since the threshold in respect of the services covered by the GPA will be lowered to currently 137, 537 ECU and an increase from 5 000 000 ECU to 5 150 548 ECU in the case of works contracts;
- slightly more information must be given to tenderers, whose bids have not been retained; In the case of Directive 93/38/EEC such an explicit provision on the matter is entirely new and it should be noted that this provision only applies to the sectors covered by the GPA (entities operating in the water, electricity, urban transport, ports and airports sectors);
- the provisions regarding shortening of deadlines following the publication of a pre-information notice are rendered more flexible, on the one hand, as the time limits may be shortened to at least 22 days. On the other hand, the conditions for so doing are rendered more precise, both regarding the information to be contained in the pre-information notices and the timing of its publication. These latter conditions will also apply to restricted procedures;
- an explicit provision is inserted to clarify that Member States may authorise "new" means - in particular electronic - of transmission of tenders and the minimum guarantees such means of transmission must warrant;

Amendments, which are specific to Directives 92/50/EEC, 93/36/EEC or 93/37/EEC:

- an explicit provision requiring contracting authorities to ensure that no discrimination takes place is inserted in Directive 93/36/EEC and 93/37/EEC;
- the list of central State authorities, which must apply the lower threshold for supplies and services contracts, is updated.

Amendments, which are specific to Directive 93/38/EEC:

- A new provision has been inserted to guarantee that requests to be qualified under a qualification scheme set up pursuant to Article 30 of the Directive may be lodged at any time. Where contracting entities use a notice on the existence of a qualification system as a call for competition in respect of a series of specific procurements, this does not mean that a last minute request for qualifications require an ongoing award procedure

to be postponed. The new provision simply means that the company requesting qualification will then be given the possibility, if qualified, to compete for subsequent contracts awarded under the qualification scheme.

Background information on the GPA

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▲ (1) Directive 97/52/EC of 13 October 1997 of the European Parliament and Council amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, published in the O.J.E.C. L 328/1 of 28.11.97. Directive 98/4/EC of 16 February 1998 of the European Parliament and Council amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport an telecommunicatios sectors.

▲ (2) Decision 94/800/EEC

▲ (3) It should be noted that, unless explicitly stated otherwise, all amendments to Directive 93/38/EEC will apply to all sectors covered by the Directive, whether or not these activities are equally covered by the GPA.

Date: March 1998
For further details: MARKT-B3@cec.eu.int

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[Update on the Single Market] - [Free Movement of People & Individual Rights] - [Free Movement of Goods] - [Services & Establishment] - [Financial Services] - [Company Law, Accounting & Auditing] - [Public Procurement] - [Media, Information Society & Data Protection] - [Intellectual & Industrial Property] - [Economic & Monetary Union] - [Infringements]

31987Y1231(01) Official Journal C 358 , 31/12/1987 p. 0001 - 0082 1

Information from the Commission - Guide to the Community rules on open government procurement

GUIDE TO THE COMMUNITY RULES ON OPEN GOVERNMENT PROCUREMENT (Provisional edition pending adoption of the new Council Directives) (87/C 358/01)

INTRODUCTION

The EC governments meeting in the European Council have recognized that the opening up of government procurement is a key component of the internal market programme aimed at turning the Community into a single large market by 1992.

The liberalization has rightly been accorded a high priority, for the economic and political case for throwing government contracts open to EC-wide competition is compelling. Yet this huge sector of the economy - estimated at an average of 9 % of national GDP if only contracts placed by central and local government are considered, and as much as 15 % of GDP if nationalized industries are included - has traditionally been dominated by 'buy-national' policies, sustained by short-term thinking and regional and social considerations.

Despite the liberalization objectives laid down in the Treaties and later in the general programmes for the abolition of restrictions on the right of non-nationals to set up in business in another Member State and to provide cross-frontier services, governments have continued to use public purchasing as an instrument of their economic policies and have kept much of their procurement closed to foreign competition. The economic cost of nationalistic government procurement policies is enormous, being estimated on average at around half of the entire Community budget. In the current economic climate, the Community cannot afford the luxury of such waste and to deny itself any longer the many benefits that will accrue from a genuine liberalization of this sector throughout the EC.

What are these benefits?

- First, the introduction of EC-wide competitive tendering for government procurement and construction contracts will greatly increase the opportunities of industry - manufacturers and construction contractors - to expand both on the Community and the home market. Expansion will enable economies of scale to be realized, thus reducing costs, while the spur of competition will stimulate efficiency. A considerable part of the resultant savings is likely to be put back into developing the businesses concerned through modernization of plant and infrastructure and research and development, leading to the creation of new jobs.

- Secondly, governments and the users of the services they provide will benefit from a wider choice of goods and services both in terms of quality and price. Substantial savings in government budgets will be possible and the general public's wants will be satisfield at lower cost.

As well as the direct benefits of allowing supply and demand to operate in these markets, the liberalization of public procurement will also have a profound effect on the structure of EC industry. At present, much of our industry, both in manufacturing and services, is handicapped by the smallness of its markets, which prevents firms becoming truly competitive at world level and facing the challenges posed by our major trading partners. In very many cases, the more or less systematic preference given in government purchasing and contracting to particular domestic firms has not paid off and has not produced anything like the benefits of which a continental-scale market similar to those of our trading partners such as the US is capable.

Another potential spin-off of the denationalization of procurement, besides the impetus it will give to the restructuring and modernization of our industry, is the leverage it will provide for pushing through Community policies on standards and mutual recognition of qualifications via the obligation on authorities to refer to European standards or harmonization documents in quoting their technical specifications.

In this way, it will contribute to breaking down technical barriers to trade in industrial products, which is one of the main objectives of the internal market programme.

In view of the importance of the liberalization of public procurement for achieving a genuine common market by 1992, the Commission, as promised in the internal market White Paper and recommended by the European Council, has looked into ways of radically improving the anachronistic situation in this sector, while at the same time contributing to other Community policies such as regional and social policy, the policy of encouraging small firms and promoting research and development, and competition policy.

The specific action on procurement is likely to be assisted by the new possibilities for cooperation between Community firms in this sector brought about by the changes in company law and taxation foreshadowed in the White Paper.

As far as the specific action on procurement is concerned, in late 1986 the Commission sent the Council proposals to amend the present legislation, the 1971 'Works' Directive on public-sector construction contracts and the 1977 'Supplies' Directive on government purchasing.

These first Directives were intended to harmonize tendering and award procedures and to provide common rules on technical specifications and the advertising of contracts. Yet despite some progress they have not matched up to expectations, because of improper transposition into national law in some cases and widespread abuse of exception clauses.

In the light of experience the Commission has therefore proposed amendments to the legislation which should greatly improve the level of compliance and enforcement and help ensure that government purchasing and the placing of government construction contracts is more open and affords equal opportunities to firms from other Member States.

It has also decided to set up an Advisory Committee on the Opening-up of Public Procurement to serve as a medium of constant and close communication between itself and business interests involved in government contracts.

In addition, the Commission has put forward a proposal to enable it to intervene directly in tendering or award procedures to prevent breaches of the Community rules and to afford suppliers and contractors rapid relief against illegal behaviour by authorities while the award procedure is still pending.

Proposals are also being prepared to extend the legislation to the sectors hitherto excluded, namely public energy, water, transport and telecommunications services. This extension will have a significant economic impact because it is mainly in these sectors that public purchasing is on a sufficiently large scale for liberalization to give a major boost to the international competitiveness of suppliers.

In telecommunications, the Community has since 1983 been pursuing a global policy, which has already seen the adoption by the Council of a Directive (86/361/EEC) on the mutual recognition by national type-approval authorities of the results of tests for conformity with common technical specifications for terminal equipment carried out by nationally approved testing laboratories, and of a Decision (87/95/EEC) requiring public authorities to refer to harmonized standards in their equipment tenders. In 1984 the Council also issued a recommendation providing for an experimental phase of opening up telecommunications procurement to suppliers in other countries. In a recent Green Paper on telecommunications the Commission has proposed pressing ahead with this liberalization process by gradually increasing the proportion of equipment purchases covered by the recommendation and if necessary converting the recommendation into a Directive. It has also proposed including in the 1986 Directive provision for mutual recognition of type-approval procedures for terminal equipment.

Finally, moves are planned in the near future to open up public procurement of services to EC-wide competition to a greater extent than is provided for in the present 'Works' and 'Supplies' Directives.

While this legislation is in the pipeline, it is important to make sure that the present Directives are correctly interpreted and properly applied. The Commission therefore intends to greatly tighten up its enforcement of the Community rules on open public-sector procurement. But to improve enforcement the Commission believes it is essential to increase public awareness: hence this Guide explaining the rules and how they are interpreted. The Guide will not answer every question or dispel every doubt that can arise in such a vast and complex subject as public purchasing and contracting. But it should be a useful aid to understanding the reasons behind the Community legislation and avoiding misinterpretation by national authorities.

This first edition of the Guide will be regularly updated and improved to take account of new legislation and users' comments, which the Commission welcomes.

TABLE OF CONTENTS

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SUMMARY

This Guide is divided into four parts:

- Part I summarizes Community law on the prohibition of measures having an effect equivalent to quantitative restrictions in intra-Community trade and of restrictions on the right of EC nationals to set up in business and to provide services in any Member State (the 'right of establishment' and 'freedom to provide services').

These are general rules, and consequently they must be observed even in the award of public procurement and construction contracts not subject to the specific rules for EC-wide competitive tendering for such contracts introduced by the Directives.

- Part II provides a detailed analysis of the 'Supplies' and 'Works' Directives and the special provisions for construction contracts involving the grant of a franchise to operate the completed works and for telecommunications procurement.

- Part III outlines the sanctions the Commission can impose for breach of the Community competitive tendering rules in public-sector procurement and construction and gives advice about filing complains

with the Commission and action in national courts.

- In Part IV, finally, attention is drawn to the requirement for compliance with the competitive tendering rules by promoters of projects receiving EC funding.

Annex I gives a preview of the further liberalization of public-sector procurement planned by 1992 and of the proposals the Commission is making to the Council for this purpose.

Annex II contains the various lists referred to in the Guide.

Annex III explains in more detail the prohibition of measures having equivalent effect to quantitative restrictions.

PART I

GENERAL RULES OF THE TREATIES AS THEY APPLY TO GOVERNMENT

PROCUREMENT AND CONSTRUCTION

I. Prohibition of measures having an effect equivalent to quantitative restrictions in intra-Community trade

1. In the EEC Treaty

Free trade in goods is one of the cornerstones of the common market.

A basic principle of free trade is the absence of quantitative restrictions (quotas) on imports or exports or of any measures having equivalent effect. In the EEC Treaty these are prohibited by Articles 30 et seq.

Articles 30 et seq. apply both to goods originating in the Member States and to goods previously imported from non-EC countries.

A measure having an effect (;) equivalent to a quantitative restriction means any measure, be it a law or regulation, an administrative practice, or an act of, or attributable to, a public authority, that is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

Such measures may discriminate between domestic and imported or exported products or they may apply to domestic and imported products alike.

A requirement for import or export licences is an example of a measure falling within the first category. There are a number of statutory exceptions to the prohibition of measures in this category, however, which are listed in Article 36.

(;) The concept of measures having equivalent effect to quantitative restrictions is explained more fully in Annex III to the Guide.

This allows Member States to maintain in force or introduce prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property, provided that the prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The second category, measures that are equally applicable to domestic and imported products, mainly comprises regulations prescribing technical requirements, quality standards, or testing and type-approval

procedures that have to be satisfied by any product, domestic or imported of a certain kind that is put on sale on the domestic market. The majority of such regulations are introduced for consumer protection, environmental or health and safety reasons. However, such regulations are contrary to Article 30 if their trade-restricting effect is disproportionate to the essential requirement of public interest which they are intended to safeguard. The general rule applicable to regulations on technical requirements is that of mutual recognition by Member States of each other's quality standards, composition rules, national testing and certification procedures, etc.

In future Community harmonization will normally only relate to features affecting essential requirements, where these can be established.

With the drive to create a unified market by 1992, it is important that no new barriers to trade in the Community should be introduced in the name of essential technical requirements.

The new Article 100A inserted into the Treaty by the Single European Act should considerably facilitate this task. It provides for the Commission's proposals for harmonization of health and safety, environmental protection and consumer protection legislation to be based on high standards (so that it will only in exceptional circumstances be possible to restrict products meeting the Community standards on the grounds of essential technical requirements not met by the products) and lays down a more flexible, and hence faster, procedure for adopting such proposals.

If, after the adoption of Community standards, a Member State wishes to insist on its own standards, on the grounds of major requirements covered by the Article 36 safeguard clause or relating to protection of the environment or working environment, it will have to justify such exceptional measures to the Commission or the European Court.

The ban on measures having an effect equivalent to quantitative restrictions on trade in goods has a particular

relevance for government procurement. How the rule applies in this area was explained by the Commission in a Directive (70/32/EEC) of 17 December 1969 (;).

It should be made clear that the Directive was issued to secure the abolition of such measures in the government procurement field that were in operation when the Treaty came into force. Since the end of the transitional period, the ban on such measures in public-sector purchasing has been directly applicable. For present purposes, therefore, the 1969 Directive only has the value of interpretative guidance.

The Directive applies to products supplied to the State, regional or local authorities and any other body governed by public law. The products covered are stated to include those supplied for carrying out or completing construction works, whether pursuant to the contract for the construction works or separately. To this extent, the prohibition of measures having an effect equivalent to quantitative restrictions on trade is seen to cover also public-sector construction contracts.

The Directive gives clear and practical guidance on the types of barriers in this sector that can be equivalent to quantitative restrictions.

Two main categories of measures are identified at a general level:

(a) those which totally or partially preclude the supply of imported products or make their supply more difficult or costly than that of domestic products; in other words, measures which, for example, explicitly or implicitly prevent the supply of foreign products, limit the quantities or qualities of them used, or make their acceptance subject to quality or technical requirements not demanded of domestic products;

(b) those which favour the supply of domestic products by reserving all or part of a given order

or market to products of domestic origin or grant domestic products or particular domestic suppliers preferential treatment, other than aid falling within Article 92 of the Treaty, subject to conditions or otherwise.

The Directive also gives examples of provisions that can have an effect equivalent to quantitative restrictions:

- Provisions that discriminate against imported products in the requirements for the lodging of security or deposits or

(;) OJ N° L 13, 19. 1. 1970, p. 1.

require the suppliers of imported products only to open a postal or bank account. Such provisions make the supply of imported products more difficult or costly than that of domestic products.

- Provisions making the supply of imported products conditional on the granting of reciprocity by the exporting Member State. These can include rules whereby imported products are only licensed for sale or granted the same favourable terms as domestic products if the importing Member State's products are accorded similar treatment in the exporting Member State.

- Technical requirements which, though equally applicable to domestic and imported products, have restrictive effects on trade.

Such requirements can relate to the quality, composition, mechanical, physical or chemical properties, or certification or testing of the products to be purchased by the procurement authority and may be based on general regulations or contract specifications. They come within the definition of measures having an effect equivalent to quantitative restrictions whenever they make the supply of imported products more difficult or costly than that of domestic products without this being justified by a legitimate requirement.

2. In the European Coal and Steel Community Treaty

Article 4 of the ECSC Treaty lists among the measures which the signatories recognize as incompatible with a common market for coal and steel and consequently undertake to abolish and prohibit in the Community 'quantitative restrictions on the movement of products'.

The second paragraph of Article 86 provides that 'Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4'.

Together, these provisions prohibit quantitative restrictions and measures having equivalent effect in trade in coal and steel products, in the same way as Articles 30 et seq. of the EEC Treaty.

They apply both to products originating in the Community and products originating in non-member countries in free circulation in the Community, as defined in the Common Customs Tariff.

3. In the Euratom Treaty

Article 93 of the Euratom Treaty similarly prohibits quantitative restrictions in intra-Community trade in nuclear materials of the types listed in Lists A1 and A2 of Annex IV to the Treaty and of those listed in List B of Annex IV that are subject to a common customs tariff and accompanied by a certificate issued by the Commission stating that they are intended to be used for nuclear purposes.

Like the corresponding provisions of the EEC Treaty, Article 93 is directly applicable.

II. Right of establishment

1. In the EEC Treaty

The economic and social integration of the Community requires not only free trade in goods but also free movement of persons. The Treaty therefore provides for the right of Community nationals to take up residence and employment and to set up in business in another Member State than their own, and to provide services in another Member State than their own without actually setting up there. The right of individuals and companies to set up in business in another Member State, the 'right of establishment', is regulated by Articles 52 et seq.

Under these provisions, Member States are obliged to allow individuals and companies from other Member States to establish and carry on a business or self-employed activities in their territory under the conditions laid down for their own nationals, subject to the Treaty's provisions on capital movements (;). The principle of equality of treatment with the Member States' own nationals applies, with one exception, to all forms of business and self-employment, including those involving the setting up of agencies, branches or subsidiaries and the formation and management of companies or firms.

The exception, in the first paragraph of Article 55, is for 'activities connected, even occasionally, with the exercise of official authority'. However, this exception is construed strictly. In Reyners v. Belgium the Court of Justice held that having regard to the fundamental character of freedom of establishment and the rule on national treatment in the system of the Treaty, the exceptions allowed by the first paragraph of Article 55 could not be given a scope that would exceed the objective for which this exemption clause was inserted. The purpose of Article 55 being to enable Member

(;) In Chapter 4 of Part Two, Title III, of the Treaty.

States to exclude non-nationals from taking up functions involving the exercise of official authority which were connected with one of the activities of self-employed persons provided for in Article 52, this need was fully satisfied when the exclusion of non-nationals was limited to those of the activities referred to in Article 52 which in themselves involved a direct and specific connection to the exercise of official authority (;).

The right of establishment is enjoyed both by individuals and by companies or firms having their registered office, central administration or principal place of business within the Community. 'Companies or firms' are defined as 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

The Treaty provided for the restrictions on establishment that were in operation when the Treaty came into force to be abolished during the transitional period and forbade the Member States to introduce new restrictions.

The prohibition of such restrictions applies both to direct and indirect discrimination.

Direct discrimination is involved where aliens have to comply with special rules or requirements not applicable to nationals. In 1962 the Council published a general programme for the abolition of restrictions on freedom of establishment that were in operation when the Treaty came into force, which gives a non-exhaustive list of such directly discriminatory provisions ($). This lists the following requirements or restrictions: official authorization, prior residence, special taxes or requirements for provision of security, restrictions on access to credit, exclusion from training or social security provision, prohibition from entering into or bidding for contracts, from being awarded official licences or franchises or from purchasing goods, borrowing, receiving State aid, suing or being sued, or joining trade or professional associations.'

Indirect discrimination is disguised behind provisions applicable to nationals and aliens alike which nevertheless do not ensure equal treatment. The general programme defined such indirect discrimination

as: 'any requirement imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, in respect of the taking up or pursuit of an activity as a self-employed person where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the taking up or pursuit of such activity by foreign nationals'.

The inclusion of indirect discrimination in the prohibition was confirmed by the European Court of Justice in Thieffry

(1) Case 2/74 (1974) ECR 631-5 (paragraphs 43, 44 and 54).

($) OJ No 2, 15. 1. 1962, p. 36/62 (English Special Edition, Second Series, January 1974, IX. Resolutions of the Council and of the Representatives of the Member States, p. 7).

v. Conseil de l'ordre des avocats à la Cour de Paris. There the Court held that it was necessary to eliminate not only overt discrimination, but also any form of disguised discrimination, such as was found in requirements which, although applicable irrespective of nationality, had the effect of exclusively or principally hindering the taking up or pursuit of such activity by foreign nationals (=).

The special treatment of aliens on grounds of public policy, public security or public health is excepted from the freedom of establishment rules, just as restrictions on trade may be.

The Court of Justice has established that since the end of the transitional period the rule that Member States must accord national treatment to other Member States' nationals wishing to set up in business in their territory has been directly applicable. This means that Member States cannot maintain or introduce restrictions on establishment in a particular sector on the ground that there has not been any Community-wide harmonization of the relevant provisions.

However, restrictions based on genuine differences in the qualifications the host Member State and the alien's Member State require for certain occupations do not infringe the principle of national treatment and are legitimate. To help remove such barriers, the Treaty provided for the issue of Directives for the mutual recognition of qualifications. It is usually also necessary to accompany mutual recognition Directives with Directives to coordinate national rules on access to and practice of the occupation.

2. In the European Coal and Steel Community Treaty

The ECSC Treaty has no provisions on the right of establishment. Articles 52 et seq. of the EEC Treaty are consequently applicable to the fields covered by the ECSC Treaty, as they do not conflict with provisions of that Treaty.

3. In the Euratom Treaty

Article 97 of the Euratom Treaty provides that no restrictions based on nationality may the applied to natural or legal persons, whether public or private, under the jurisdiction of a Member State, where they desire to participate in the construction of nuclear installations of a scientific of industrial nature in the Community.

This provision guarantees inter alia the right to set up and carry on a business in connection with the construction of such installations and is directly applicable. In so far as Articles 52 et seq. of the EEC Treaty do not conflict with provisions of the Euratom Treaty, they too are applicable in the nuclear field.

(=) Case 71/76 (1977) ECR 765 and 777 (paragraph 13).

III. Freedom to provide services

1. In the EEC Treaty

The EEC Treaty also guarantees the right of nationals of one Member State to provide services in another Member State without actually setting up in business there. The freedom of services enshrined in Articles 59 et seq. is, like the right of establishment, governed by the principle of national treatment: 'The person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals' (;).

As in the case of restrictions on establishment the Treaty required restrictions on freedom to provide services existing when the Treaty came into force to be abolished during the transitional period and forbade the introduction of new restrictions.

The basic difference between the right of establishment and free provision of services is that the former involves a permanent business establishment in the host country, whilst the latter involves only temporary residence in the other Member State where the service is provided.

The freedom to provide services covers the performance of services normally performed for gain in a Member State other than that of the provider of the services, where the services are not otherwise governed by the Treaty's provisions on freedom of movement for goods, capital and persons (in which case those special provisions are applicable). Services are stated to include activities of an industrial and commercial character and activities of craftsmen and the professions.

Transport services are excluded from the general freedom of services and governed exclusively by the rules on transport ($). There is also a special rule for banking and insurance services. These are to be liberalized in step with the progressive liberalization of capital movements.

The exceptions made in the establishment rules for activities connected with the exercise of official authority and for restrictions on grounds of public policy, public security and public health also apply to the provision of services.

Under the principle of national treatment all laws, regulations, administrative provisions and practices capable of restricting or impeding access to or the practice of

(;) Third paragraph of Article 60.

($) Part Two, Title IV, of the Treaty.

self-employed occupations in the services sector by other Member States' nationals or subjecting other Member States' nationals to different treatment from the Member State's

own nationals are prohibited. Differences of treatment need not be based on rules that overtly discriminate between nationals and aliens but on rules applicable to both.

As in the case of restrictions on establishment, reference to the Council's general programme for the removal of restrictions on cross-frontier provision of services in effect when the Treaty came into force (=) is instructive. This gives the following examples of the types of restrictions prohibited:

(a) Rules or practices applicable or applied solely to aliens which directly restrict their ability to provide services, such as those which prohibit aliens from providing the service, require aliens wishing to provide the service to have a special permit or to fulfil additional requirements, increase the cost of the service provided by aliens by levying special taxes on them or requiring them to lodge a deposit or provide security in the host country, or restrict aliens' access to supplies or distribution channels or increase the cost of such supplies or the use of distribution channels to aliens.

(b) Rules or practices applicable or applied solely to aliens which indirectly restrict their

ability to provide services by denying, restricting, or imposing special conditions on, rights normally exercised when services are provided, such as the capacity to enter into contracts such as contracts for work or service contracts, and to exercise the rights under such contracts, the right to bid for or participate as a main or subcontractor in contracts placed by government or other public authorities, the right to borrow or take up credit, eligibility for direct or indirect government aid, the right to sue or be sued and to obtain judicial or administrative review.

(c) Rules and practices which, though applicable irrespective of nationality, hinder particularly or exclusively aliens in providing services.

As in the case of the right of establishment, restrictions on the provision of services by aliens may be justified by differences in the qualifications the host Member State and the alien's Member State require for the occupation. To remove such barriers, Directives have been or are being issued on the

(=) OJ No 2, 15. 1. 1962, p. 32/62 (English Special Edition, Second Series, January 1974, IX. Resolutions of the Council and of the Representatives of the Member States, p. 3.).

mutual recognition of qualifications. Where the differences in training in the Member States require, the Directives also harmonize national training standards.

In 1971 the Council issued a Directive (71/304/EEC) specifically concerned with restrictions on freedom to provide services in connection with public-sector construction contracts and with the award of such contracts to contractors acting through agents or branches (;).

As in the case of the Commission Directive (70/32/EEC) on the abolition of restrictions on government procurement of goods, however, the Directive only applied to restrictions in effect when the Treaty came into force. For present purposes, with Articles 59 and 60 being directly applicable ($), the Directive is only of value as a source of interpretative guidance and for its definition of public works in Article 2, which is referred to in the currently applicable legislation governing the award of public-sector construction contracts (Council Directive 71/305/EEC of 26 July 1971), which will be discussed below.

The Directive required Member States to abolish restrictions of the types referred to in Title III of the Council's general programmes on the abolition of restrictions on establishment and provision of services which affected the right of non-nationals to bid for, have awarded to them, perform or participate in the performance of public works contracts on behalf of the State, regional or local authorities or other public bodies.

The restrictions to be abolished may be imposed by the State itself or by any public authority, as with the Directive on the abolition of restrictions on government procurement of goods.

The services covered by the Directive are those listed in Major Group 40 'Construction', of the nomenclature of industries in the European Communities (NICE), which is reproduced in an appendix to the Directive.

A list of typical restrictions, prohibited by Articles 59 et seq.,

on the right of non-nationals to provide services in connection with public-sector construction contracts is given

(;) OJ N° L 185, 16. 8. 1971, p. 1 (English Special Edition, 1971 (II), p. 678).

($) Case 33/74 Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (1974) ECR 1299.

in Directive 71/304/EEC (=). Three broad categories are distinguished:

(a) Restrictions that prevent aliens from providing services under the same conditions and with the same rights as nationals, and in particular laws, regulations and administrative provisions or practices that impose or permit discriminatory treatment of aliens by natural or legal persons who have been awarded a contract for the execution or management of works or a franchise for the operation of public services when they in their turn award contracts in respect of such works or services.

(b) Restrictions based on administrative practices that result in discriminatory treatment of aliens by comparison with nationals.

(c) Restrictions based on provisions which, though applicable irrespective of nationality, nonetheless particularly or exclusively hinder nationals of other Member States in practising particular occupations; discriminatory technical specifications not warranted by the subject matter of the contract are specifically referred to.

The Directive also refers to restrictions on credit, on government financial assistance or subsidies available for public works projects, and on supplies over which the State has control.

2. In the European Coal and Steel Community Treaty

Like the right of establishment, freedom of services is not regulated by the ECSC Treaty. Consequently, Articles 59 et seq. of the EEC Treaty are also applicable to the coal and steel industries, as the articles do not conflict with specific provisions of the ECSC Treaty.

3. In the Euratom Treaty

Article 97 of the Euratom Treaty banning discrimination based on nationality in connection with the construction of nuclear installations also applies to the provision of services in connection with such projects. In addition, Articles 59 et seq. of the EEC Treaty are applicable, in so far as they do not conflict with specific provisions of the Euratom Treaty.

(=) Article 3(1) of Directive 71/304/EEC.

PART II SPECIFIC COMMUNITY LEGISLATION ON GOVERNMENT PROCUREMENT AND CONSTRUCTION

I. Objectives and scope of the 'Supplies' and 'Works' Directives

1. Objectives

The creation of a common market for public-sector procurement and construction contracts was unlikely to come about entirely as a result of the obligations Member States had undertaken in the Treaties to remove restrictions on foreign goods, services and businesses, discussed above. It was still likely to be frustrated by differences in national regulations. Community legislation was necessary to make sure that government contracts were open to all nationalities on equal terms and to make tendering procedures more transparent so that compliance with the principles laid down in the Treaties could be monitored and enforced.

Therefore, to back up the prohibition of import restrictions resulting from discriminatory public purchasing and to make it easier for resident and non-resident foreign firms to compete for public-sector construction contracts and associated contracts for services, the Council issued two Directives to coordinate government procurement procedures: Directive 77/62/EEC of 21 December 1976 (;) on procurement of supplies and equipment (the 'Supplies' Directive) and Directive 71/305/EEC ($) on public works contracts (the 'Works' Directive).

The coordination was undertaken in separate pieces of legislation because of the different characteristics of the two types of contract. It is based on three main principles:

- Community-wide advertising of contracts so that firms in all Member-States have an opportunity of bidding for them.

- The banning of technical specifications liable to discriminate against potential foreign bidders.

- Application of objective criteria in tendering and award procedures.

The latter principle is ensured by the following requirements:

- Contracts are to be put out to open (open to all potential suppliers or contractors) or restricted (open only to selected potential suppliers or contractors) tender, at the choice of the authority placing the contract. Authorities may dispense with tendering only in specified exceptional circumstances.

(;) OJ N° L 13, 15. 1. 1977, p. 1.

($) OJ N° L 185, 16. 8. 1971, p. 5.

- Suppliers may only be excluded from bidding (in restricted tenders) or from final selection on certain specified qualitative criteria (=).

- Contracts may be awarded only on economic or technical criteria, namely either the lowest price or the economically most advantageous tender overall.

The Directives apply to all public-sector procurement and construction contracts subject to the EEC, ECSC and Euratom Treaties, except in certain excluded sectors.

The 'Supplies' Directive (77/62/EEC) was amended in 1980 to take account of the international agreement on government procurement negotiated in the Tokyo Round of trade liberalization talks in GATT, which committed the Community to granting suppliers and products from non-EC signatories of the GATT Agreement somewhat better access to certain types of EC Government procurement (notably purchasing by central government agencies and some defence procurement) than EC suppliers had under the 1977 Directive.

The amending Directive (80/767/EEC of 22 July 1980) (%) extended these terms to EC suppliers.

The basic provisions on public-sector procurement are still contained in the 1977 Directive, however.

2. Legal effect of the Directives

Article 189 of the EEC Treaty provides that Directives are binding on Member States as to the result to be achieved, but leave to the national authorities the choice of forms and methods.

Member States are obliged to transpose the provisions of Directives into their national laws.

(=) See Article 1 (c) of each of the Directives.

(%) OJ N° L 215, 18. 8. 1980, p. 1.

However, failure to do so does not make the Directives inapplicable.

According to the Court of Justice's case law on direct effect, once the time limit for transposing a Directive into national law has passed any provisions of the Directive that are capable of directly affecting the legal relationship between the Member State to which the Directive was addressed and private individuals can be enforced by such individuals in the courts of the Member State, and the Member State cannot avoid such enforcement on the ground that the formalities for incorporating the Directive into its national law have not been completed or that contrary provisions still exist in its national law.

To determine whether provisions are capable of having direct effect in this way, the Court has ruled that in each particular case the nature, background and wording of the provisions must be

considered.

This is generally the case where the provision imposes a clear, precise and unconditional obligation not leaving the Member State any discretion.

3. Arrangement of material

As noted above, the Community rules on public-sector procurement and construction contracts (the 'Supplies' and 'Works' Directives) are similar in content and in the interpretation to be given to their individual provisions. For the convenience of users, who might be interested only in one or the other type of business, however, the Guide will deal with the two directives in separate chapters. Each chapter will explain the provisions of the Directive and give other relevant information and interpretative guidance.

The choice of this arrangement inevitable involves a certain amount of repetition in the two chapters.

II. Government procurement: the 'Supplies' Directive 77/62/EEC, as amended by Directive 80/767/EEC

1. Scope of the Directive: 'public supply contracts'

The Directive is stated to apply to 'public supply contracts'. These are defined in Article 1 as contracts for pecuniary consideration concluded in writing between a supplier and a contracting authority (purchasing or procurement agency) for the supply of products. The contract may, in addition, cover siting and installation work.

Meaning of 'supplier'

Suppliers may be companies, firms or individuals or groups (consortia) of such. Groups may not be required to assume

any particular legal form in order to bid for a contract but may be required to do so by the contracting authority if they are awarded the contract and if a change to this form is necessary for satisfactory performance of the contract (;).

Meaning of 'contracting authority'

The 'contracting authorities' whose purchasing is covered by the Directive are the State, regional or local authorities and 'legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto', listed in Annex I to the Directive($).

Form of contracts

The Directive applies to any contract in writing on the supply of goods for pecuniary consideration to the contracting authority, including rental and leasing as well as sale.

Open or standing contracts between a purchasing entity and a supplier in which the purchasing entity undertakes to obtain at least part of its requirements over a certain period of time from the supplier and which stipulate many of the terms and conditions of sale though not the actual quantities or prices, are similar to contracts for a specific purchase. Such contracts come within the provisions of the Directive, and thus must be advertised, if the total value of the purchases over the past year exceeded the threshold and this situation is not expected to change significantly (=).

Borderline with 'Works' contracts

Supply contracts, according to the definition quoted above, may include siting and installation work, i.e. services necessary to make the products supplied operational.

A problem of distinguishing such contracts from public works contracts may arise in borderline cases, such as where construction materials are supplied for a construction project and the supplier

is also responsible for installing or incorporating them on site.

This question is decided, in line with the definition of

(;) Article 18.

($) See list in Table I of Annex II to the Guide.

(=) This solution was adopted at the 12th meeting of the Advisory Committee for Public Contracts on 17/18 May 1978.

procurement in the GATT code (Article 1(1)(a)) (;) by the relative values of the goods and services elements in the contract.

If the value of the goods to be supplied exceeds that of the services to be performed, then it is a supply contract. If, on the other hand, the services included in the contract are construction or civil engineering works of the types listed in Directive 71/304/EEC ($) and their value exceeds that of the goods, it is a public works contract.

2. Exclusions

Procurement falling below certain value thresholds, by certain public utilities and in certain other specified circumstances is excluded from the scope of the legislation. In case of doubt as to whether or not a contract is covered, it is strongly recommended that advice be sought from the Commission.

Value threshold

The threshold value from which a procurement contract becomes subject to the legislation is, in general, 200 000 ECU (European currency units) before VAT. All procurement contracts with an estimated value before VAT of 200 000 ECU or over are subject to the provisions of Directive 77/62/EEC.

Contracts awarded by the entities listed in Annex I to Directive 80/767/EEC (=) and, to the extent that rectifications, modifications or amendments have been made, their successor entities however, come within the scope of the legislation from a different threshold, which is determined by the GATT code and is adjusted each year in line with exchange rate variations. The special GATT threshold only applies to contracts for sale, and not to rental or leasing contracts (which are not covered by Directive 77/62/EEC).

Also, the authorities listed in Annex I to the 1980 Directive that operate in the field of defence are only subject to it when they purchase the products listed in Annex II to Directive 80/767/EEC(%).

(;) OJ N° L 71, 17. 3. 1980, p. 44.

($) See List in Table V of Annex II to the Guide.

(=) See List in Table II of Annex II to the Guide.

(%) See List in Table III of Annex II to the Guide.

The adjusted special threshold is published towards the end of each year in the 'C' (Information and Notices) series of the Official Journal of the European Communities (&).

The value thresholds in ECU for 1986 and 1987 are as follows (NB: all amounts before VAT):

>TABLE POSITION>

The national currency equivalents of the ECU thresholds are calculated at a fixed exchange rate, which is adjusted by the Commission at the end of October every two years to the average of the

daily values of the currency against the ECU over the preceding 12 months and published in the 'C' (Information and Notices) series of the Official Journal of the European Communities in November, with effect from the following 1 January (6).

The national currency equivalents of the thresholds applicable in 1987 are as follows:

>TABLE POSITION>

Calculation of contract value

The way in which the value of procurement contracts is calculated may obviously affect whether or not they exceed the threshold. To ensure that identical calculation methods are used throughout the Community and to prevent evasion of the procurement rules by artificially low valuations, the Directive lays down the following rules:

(5) For 1986 (OJ N° C 307, 28. 11. 1985, p. 2).

For 1987 (OJ N° C 300, 25. 11. 1986, p. 2).

(6) The 1986/87 rates were published in OJ N° C 307, 28. 11. 1985, p. 2.

- Where contracts cover regular supplies or are renewed within a given period, the total value of the supplies over the 12 months following the first supply or over the term of the contract, if more than 12 months, is to be taken.

- Where supplies of a certain type are purchased simultaneously in separate lots, the total estimated value of the lots is to be taken.

- It is prohibited to split up a purchase with the intention of evading the rules of the Directive.

In the case of rental and leasing contracts, the Commission has decided that the value over the following periods should be taken (1):

(a) In the case of fixed-term contracts, the total contract value during the year following its entry into force, or where its term exceeds 12 months, its total value.

(b) In the case of contracts concluded for an indefinite period, the monthly instalment under the contract multiplied by 48.

(c) If there is any doubt, the second basis of calculation is to be used, namely 48 months.

Public utilities

The contracting authorities to which the Community provisions on public supplies contracts apply have already been examined.

Directive 77/62/EEC excludes from its scope contracts awarded by 'bodies which administer transport services, ... production, distribution and transmission or transport services for water or energy and telecommunications services' (Article 2(2).

The Commission emphasizes that, qua exceptions from the rules of the Directive, these exclusions must be construed strictly.

In the transport sector the exception covers organizations actually undertaking the carriage of passengers or goods, but not, for example, those running ports or airports, which are covered by the Directive.

In the water and energy sectors, only services whose specific function is the production, transport or distribution of water

(1) This formula was approved by the Advisory Committee for Public Contracts at its 22nd meeting

on 22 November 1982 and officially communicated to the Member States by letter on 19 January 1983.

or energy are excepted. Thus, for example, a public hospital purchasing its own electricity generator or water-collection equipment would be covered by the Directive.

As far as water services are concerned, the exception only applies to services undertaking the collection, supply and distribution of drinking water, i.e. generally water that has been purified, for residential or industrial use. River management, irrigation, drainage and sewerage services are covered by the Directive.

Thus, it is the specific function of the service or organization that must be considered in determining whether the rules of the Directive apply.

Where an organization provides several services at once, for example a local authority combining the functions of sewage treatment and drinking-water supply, only contracts relating to the latter services are excepted.

In telecommunications, the Commission only regards as operators of telecommunications services excluded from the Directive those organizations whose main function is to provide a public telecommunication network (2). Hence, an organization setting up a telecommunications system to give early warning of earthquakes, volcanic activity, etc., would be covered by the Directive.

Of course, the Directive only applies to organizations awarding such contracts if they fall within the Directive's definition of contracting authority.

Exclusions

The Directive does not apply to public contracts awarded subject to different procedural rules under an international agreement between a Member State and one or more non-member countries and concerning supplies for the implementation or exploitation of a joint project (3) or under an international agreement on the stationing of troops.

(2) This interpretation was communicated to the Member States by letter of 30 June 1980 after the Advisory Committee for Public Contracts had been consulted on the matter at its 17th meeting of 22 May 1980.

(3) All such agreements must be communicated to the Commission.

Also excluded are contracts awarded under the particular mandatory procedure of an international organization (Article 3).

Defence procurement

The Community rules on government procurement have often not been properly applied to procurement by defence agencies. The Commission would stress that most procurement by such agencies is subject to the rules.

The only defence procurement contracts not subject to the rules are those concerning products for specifically military purposes, i.e. arms, munitions and war material, which are covered by Article 223 of the EEC Treaty. A list of these products was published in a Council Decision of 15 April 1958.

Products which, though on this list, are not for specifically military purposes, and products not on the list are subject to the Community procurement rules in Directive 77/62/EEC, as amended by Directive 80/767/EEC.

3. Advertising rules

All open and restricted tenders for contracts subject to the provisions of the Directives must

be advertised in the Supplement ('S' series) to the Official Journal of the European Communities, so that firms in all the Member States know of the contracts and have the necessary information to judge whether the contracts interest them.

However, tenders for contracts with a value ranging between the GATT threshold and the general 200 000 ECU threshold that are to be awarded by the entities listed in Annex I to Directive 80/767/EEC need not be advertised in the Official Journal if the GATT Agreement requires them to be advertised in another official (national) publication.

Nevertheless, although not under any obligation to do so, most Member States advertise such tenders in the Official Journal.

Layout of tender notices

In the notices advertising tenders, certain specified items of information must be included and must be presented in

accordance with the models in Annex III to Directive 77/62/EEC (1). The standard content and layout saves time and ensures that all tenders give the same amount of information.

Content of tender notices

The information that is mandatory in tender notices is listed in Articles 13, 14, 15 (d) and 25 (2) of the Directive.

In open tenders the notice must state at least the following:

(a)

the date on which the notice was sent for publication to the Office for Official Publications of the European Communities;

(b)

the tendering procedure;

(c)

the place of delivery, the nature and quantity of the goods to be supplied, and, if the contract is divided into several lots, whether suppliers may tender for some and/or all of the goods required;

(d)

any delivery date;

(e)

the address, telephone number and, where applicable, the telegraphic address and telex number of the authority placing the contract;

(f)

the address from which the tender documents may be obtained and the final date for requesting the documents; also the amount and terms of payment of any sum payable for the documents;

(g)

the closing date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be submitted;

(h)

the persons authorized to be present at the opening of tenders and the date, time and place of opening;

(i)

information about deposits and any other guarantees, whatever their form, that may be required by the contracting authority;

(j)

the main terms of financing and payment and/or references to the legislation in which these are laid down;

(k)

the legal form which a consortium of suppliers may be required to take if awarded the contract;

(l)

the evidence and formalities required by the contracting authority to show that the supplier meets the minimum financial and technical standards (2);

(1) See Table VIII in Annex II to the Guide.

(2) Evidence of the absence of any of the grounds of disqualification, and financial and technical capacity, as specified in Articles 20, 22 and 23 of the Directive (see following Section 5).

(m)

the length of time during which tenders must remain open for acceptance;

(n)

the criteria, other than lowest price, on which the contract is to be awarded, if not stated in the tender documents.

In restricted tenders, the notice must state at least the following:

(a)

the date on which the notice was sent for publication to the Office for Offical Publications of the European Communities;

(b)

the tendering procedure;

(c)

the place of delivery, the nature and quantity of the goods to be supplied, and, if the contract is divided into several lots, whether suppliers may tender for some and/or all of the goods required;

(d)

any delivery date;

(e)

the address, telephone number and, where applicable, the telegraphic address and telex number of the authority placing the contract;

(f)

the legal form which a consortium of suppliers may be required to take if awarded the contract;

(g)

the closing date for receipt of applications to tender, the address to which they must be sent and

the language or languages in which they must be submitted;

(h)

the final date on which invitations to tender will be issued by the contracting authority;

(i)

the information required, in the form of verifiable statements, in the application to tender in order to disclose any grounds for disqualification, and the evidence and formalities required by the contracting authority to show that the supplier meets the minimum financial and technical standards (1);

(j)

the criteria on which the contract is to be awarded, if these are not to be stated in the invitation to tender.

National advertising of tenders

So that suppliers throughout the Community can compete for tenders on equal terms, the Directive prescribes that the advertising of tenders in the official gazettes or press of the country of the procurement entity may not contain information other than that published in the Official Journal

(1) As specified in Articles 20, 22 and 23 of the Directive (see also below).

and that tenders may not be advertised nationally before the date of dispatch of the tender notice for EC-wide publication.

It should be stressed that date of dispatch means what it says: the date on which the tender notice is actually sent to the Official Publications Office, and not the date shown on the documentation sent for publication, which may be much earlier. To ensure that this rule is observed, the Directive requires procurement authorities to be able to supply evidence of the date of dispatch.

Specification of time limits

Another point that needs emphasizing in connection with tender notices is the specification of closing dates and other time limits. These should be indicated clearly in the notice. It should not be made more difficult for suppliers from other countries to find out when the time limit is than for domestic suppliers.

Thus, the Commission does not accept references to the date of publication of the notice in national or regional official gazettes, access to which is much more difficult for foreign firms.

Time limits must be expressed either as a certain number of days from the date of publication of the notice in the Supplement to the Official Journal or as a specific date. The minimum time limits to be allowed in notices are given below (Section 5).

EC-wide advertising

In practice, the responsibility for EC-wide advertising of tenders is shared between the procurement authorities and the Official Publications Office. The procurement entity must supply a notice in the standard form and as far as possible using modern transmission methods to facilitate rapid publication. Notices should be sent to:

Supplement to the Official Journal of the European Communities,

Office for Offical Publications of the European Communities,

2 rue Mercier,

L-2985 Luxembourg.

Tel. (352) 499 28 23 32.

Telex 1324 PUBOF LU or 2731 PUBOF LU.

Facsimile (352) 49 00 03 or (352) 49 57 19.

The Publications Office has notices translated into the other EC languages and undertakes to publish them within the following periods:

- nine days from dispatch of the notice for tenders subject to Directive 77/62/EEC,

- 12 days from dispatch of the notice for tenders subject to Directive 80/767/EEC,

- five days in accelerated procedures (restricted tenders only).

The Supplement to the Official Journal is obtainable in all Member States from the addresses listed in Table VI (1).

Other sources of information on tenders

All government tenders (procurement, construction and services) published in the Supplement to the Official Journal are also on the TED (Tenders Electronic Daily) computerized system, which is accessible through various host organizations.

For further information, contact:

Office for Official Publications of the European Comunities,

Sales Department,

L-2985 Luxembourg.

Tel. (352) 49 92 82 563.

Telex 1324 PUBOF LU.

Facsimile (352) 49 00 03.

Since October 1987 suppliers have also been able to obtain details of tenders from their local Euro-Info Centre, which stocks the Official Journal and is linked to the TED system (2). For further information contact:

Commission of the European Communities,

Smalls Firms Task Force,

200 rue de la Loi,

B-1049-Brussels.

Tel. (02) 236 16 76.

Telex 61655 BURAP B.

Facsimile 236 12 41.

4. Rules on technical specifications

Procurement entities are required to state in the general documentation on the tender, such as the tender notice and tender documents, and in the actual contract documents the technical specifications to be met by the product or products concerned.

Technical specifications are defined in Annex II to Directive 77/62/EEC as all the technical

requirements, relating, for

(1) See Annex II to the Guide.

(2) See list of the Euro-Info Centres currently operating or planned in Table VII of Annex II to the Guide.

example, to quality or performance, which objectively describe the product.

They include all the relevant mechanical, physical and chemical properties, classifications and standards, and testing, inspection and acceptance requirements for the products required or their constituent parts or materials.

The Directive's provisions on the standards that may be referred to as a means of defining technical specifications - i.e. in order of precedence, EC standards (in particular CEN and Cenelec, international standards, national standards and any other - must now be interpreted in the light of the European Court of Justice's case law on measures having an effect equivalent to quantitative restrictions. That is to say, if there are no EC standards, procurement authorities must consider products from other Member States manufactured to a different design but having equivalent performance on equal terms with products meeting national or other preferred standards.

As a general rule, any technical specification that has the effect of favouring or eliminating particular firms or products is prohibited. It is up to the procurement authority to show that such discriminatory specifications are justified.

When projects are put out to competitive tender or when bidders are invited to submit alternatives to the procurement authority's project, a supplier's tender may not be rejected solely on the ground that it has been prepared using different calculation methods from those normally used in the country of the procurement authority. However, tenderers must in that case include with their tenders all the evidence necessary for checking the project and supply the procurement authority with any clarifications it considers necessary.

5. Tendering procedures

Purchasing authorities have a choice between open tenders, whereby any interested supplier may immediately bid for the contract, or restricted tenders, whereby a selection is made from the suppliers who reply to the tender notice and the selected suppliers only are invited to bid.

An accelerated form of restricted tender with shorter than normal time limits is permitted in cases of urgency when observance of the normal time limits is impracticable. Procurement entities must be able to prove the need for urgency.

Exceptions

The requirement for contracts to be put out to competitive tender is waived in, and only in, the circumstances specified in Article 6 of Directive 77/62/EEC. In those circumstances the purchaser can negotiate directly with a given supplier or suppliers without prior advertisement. It is up to the purchasing entity to prove that the circumstances obtain. They are:

(a)

where no suitable supplier was found in a previous open or restricted tender because no or only irregular bids were received or because the bids submitted were unacceptable under national provisions that are consistent with the Community rules on public-sector procurement, provided that the original terms for the contract - for example, as regards financing, delivery dates and in particular the technical specifications of the products - are not substantially altered (otherwise, the whole procedure must be recommenced with a re-advertisement of the tender);

(b)

where, for technical or artistic reasons or because of the existence of exclusive rights, there is only one supplier in the Community able to supply the product;

(c)

where the product is manufactured purely for the purposes of research, experiment, study or development;

(d)

in cases of extreme urgency resulting from unforeseen circumstances not attributable to the action of the procurement authority, where the time limits laid down in tendering procedures cannot be observed;

(e)

for additional deliveries by the original supplier required either as part replacement of regular supplies or equipment, or to extend existing supplies or equipment, where a change of supplier would compel the contracting authority to purchase equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties of operation or maintenance;

(f)

for goods quoted and purchased on a commodity market in the Community (not applicable to purchases covered by Directive 80/767/EEC);

(g)

where supplies are classified as secret or where their delivery must be accompanied by special security measures under the law of the Member State of the purchasing authority, or where the protection of the basic interest of that State's security so requires.

In the abovementioned exceptional circumstances, the award of contracts is exempt from the competitive tendering rules but is subject to the rules on technical specifications.

Time limits

To ensure that all potentially interested suppliers in the Community have a chance of bidding or applying to bid before the closing date, the two Directives prescribe minimum time limits for the receipt of bids and applications to tender and maximum time limits for procurement authorities to provide documentation and information. The time limits vary depending on whether the contract is covered by Directive 77/62/EEC or 80/767/EEC.

Open tenders

(a) Closing date for receipt of tenders: at least:

- Directive 77/62/EEC: 36 days,

- Directive 80/767/EEC: 42 days,

from dispatch of the tender notice for publication in the Official Journal;

(b) time limit for sending tender documents and supporting documentation (if requested within the time limit): no more than four working days from receipt of the request;

(c) time limit for sending additional information concerning the tender documents (if requested within the time limit): no more than six days before the closing date for receipt of tenders.

Restricted tenders

(a) Closing date for receipt of applications to tender: at least:

- Directive 77/62/EEC: 21 days (in accelerated procedures, 12 days),

- Directive 80/767/EEC: 42 days (in accelerated procedures, 12 days),

from dispatch of the tender notice for publication in the Official Journal;

(b) time limit for sending additional information concerning the tender documents (if requested within the time limit): no more than six days (in accelerated procedures, four days) before the closing date for receipt of tenders;

(c) closing date for receipt of tenders: at least:

- Directive 77/62/EEC: 21 days (in accelerated procedures, 10 days),

- Directive 80/767/EEC: 30 days (in accelerated procedures, 10 days),

from the dispatch of the written invitations to tender.

Both in open and restricted tenders, the closing date for receipt of tenders must be appropriately extended if tenders

can only be prepared after a visit to the site or after on-the-spot inspection of documentation supporting the tender documents.

Invitations to tender

Invitations to tender issued to the suppliers selected from those who replied to a restricted tender notice must be sent to all the selected suppliers simultaneously and must be accompanied by the tender documents and any supporting documentation.

Invitations to tender must contain at least the following:

(a)

the address from which other relevant documentation may be obtained and the closing date for requesting the documentation, also the amount and terms of payment of any sum payable for the documentation;

(b)

the closing date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be submitted;

(c)

the persons authorized to be present at the opening of tenders and the date, time and place of opening;

(d)

information about deposits and any other guarantees, whatever their form, that may be required by the contracting authority;

(e)

the main terms of financing and payment and/or references to legislation in which these are laid down;

(f)

the length of time during which tenders must remain open for acceptance;

(g)

a reference to the tender notice published in the Official Journal;

(h)

any documents to be produced by the supplier to confirm the verifiable statements about his current standing and past record required under the terms of the tender notice in order to disclose any grounds for disqualification, or to supplement the evidence supplied under the terms of the tender notice that the supplier meets the minimum financial and technical standards;

(i)

the criteria on which the contract is to be awarded, if these were not stated in the tender notice.

Transmission of applications and invitations to tender

Applications and invitations to tender under restricted tender subject to the ordinary time limits may be sent by letter,

telegram, telex or facsimile. In the last three cases, however, they must be confirmed by letter.

In restricted tenders subject to the accelerated procedure, applications and invitations to tender must be sent by the most rapid means; only applications to tender must be confirmed by letter.

6. Method of calculating time limits

All time limits laid down in the Directives must be calculated by the method provided for in Council Regulation (EEC, Euratom) N° 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits (1).

Under these rules, periods expressed as a certain number of days from a certain event:

(a) run from the day following the day on which the event takes place;

(b) begin at 00h00 on the first day, as defined in (a), and end at 24h00 on the last day of the period;

(c) end, where the last day of the period falls on a public holiday, Saturday or Sunday and the period is not expressed in hours, at 24h00 on the following working day.

Periods expressed as ending at a certain time on a certain date, which are common for certain acts to be performed by suppliers, end at the time and date stated.

Periods include public holidays and weekends unless these are expressly excluded or the periods are expressed as a certain number of working days. Public holidays are all days designated as such in the Member State in which the relevant act has to be performed.

For further details, reference should be made to the text of the Regulation.

7. Criteria for disqualifying or eliminating applicants and bidders

If procurement agencies could disqualify or eliminate applicants to bid or bidders on arbitrary grounds, this could defeat the purpose of opening up public-sector procurement to Community-wide competition.

For this reason, the Directive specificies the only qualitative criteria on which applicants to bid or bidders may be

(1) See text in Table XI of Annex II to the Guide.

disqualified or eliminated and the evidence suppliers may be required to produce to show that they meet the criteria.

Grounds for disqualification

Article 20 of the Directive first lists all the circumstances relating to the suppliers which can be taken by the procurement authority as a ground for disqualifying the supplier from selection to bid or from consideration of his bid.

Any supplier may be immediately disqualified who:

(a)

is bankrupt or being wound up, has ceased or suspended trading, or is operating under court protection pending a settlement with creditors, or is in an analogous situation arising from national proceedings of a similar nature;

(b)

is the subject of proceedings for bankruptcy, winding-up or court protection pending a settlement with creditors, or national proceedings of a similar nature;

(c)

has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

(d)

can be shown by the contracting authority to have been guilty of grave professional misconduct;

(e)

has not fulfilled obligations relating to payment of social security contributions under the statutory provisions of his country of residence or of the country of the contracting authority;

(f)

has not fulfilled obligations relating to payment of taxes under the statutory provisions of his country of residence or the country of the contracting authority;

(g)

has been guilty of serious misrepresentation in supplying information about his current standing or past record or his financial or technical capacity.

In cases (d) and (g) the burden of proof is on the procurement authority. In the other cases it is for the applicant or bidder, if asked to do so in the tender notice, to show that he is not in any of the specified situations.

However, the evidence the procurement authority may require for this purpose is specified in the Article. It must accept as satisfactory evidence:

- for cases (a), (b) and (c), the judicial record on the supplier or an equivalent document issued by a judicial or administrative authority in the supplier's country of origin or residence showing that none of these cases applies,

- for cases (e) and (f), a certificate issued by the competent authority in the Member State concerned.

If such documents or certificates are not issued by the country in question or if they do not cover all the cases referred to in (a), (b) and (c), the supplier may instead produce an affidavit sworn before a judicial or administrative authority, notary or any other competent authority in the Member State concerned.

Instead of an affidavit, a solemn declaration may be provided.

Affidavits and solemn declarations must be authenticated by the competent authority or notary.

Registration

To prove their general commercial standing and fitness, suppliers may be required under Article 21 of the Directive to show that they are on an official register of business in their Member State of residence as required under that State's law. This of course means that a procurement authority may not make it a condition of acceptance of a supplier that he be on an official register in the authority's country.

Evidence of financial and technical capacity

Under Article 17 of the Directive, suppliers not disqualified on any of the grounds of general unsuitability specified in Article 20 may only be eliminated from the suppliers from whom those invited to bid are selected or whose bids are considered on one of two sets of criteria, namely financial and technical capacity.

Financial capacity

Under Article 22, evidence of the supplier's financial capacity may be provided, as a rule, by any of the following:

(a) appropriate statements from bankers;

(b) the company's balance sheets or extracts from them;

(c) a statement of the firm's total turnover, and its turnover from the products concerned by the tender, for the past three years.

However, a purchasing entity may require evidence other than the three items mentioned above, if such other evidence is objectively necessary to show that the supplier has the requisite financial capacity to perform the contract.

All evidence required of financial capacity must be stated in the tender notice under both open and restricted tenders and in the invitation to tender under restricted tenders.

If, for any valid reason, the supplier is unable to provide the evidence required in the tender notice or invitation to tender, the purchasing authority must allow the supplier to prove his financial capacity by any other document the authority considers appropriate.

Technical capacity

Article 23 contains an exhaustive list of the types of evidence that purchasing entities may require of supplier's technical capacity.

Depending on the nature, quantity and purpose of the products required, they may ask for:

(a)

a list of the supplier's main deliveries of the products over the past three years, stating their value, date, and the purchaser, whether public or private, and providing confirmation of the purchase by the public or private purchaser concerned or, in the case of a private purchaser, alternatively a statement to that effect by the supplier;

(b)

a description of the supplier's technical plant, quality control procedures and research and design facilities;

(c)

particulars of the technical resources (staff and facilities) the supplier can call upon, particularly for quality control, whether or not they belong to the firm;

(d)

samples, descriptions and/or photographs of the products, which the procurement entity may require to be authenticated;

(e)

certificates issued by an officially-recognized quality control or certification body stating that a clearly-identified product conforms to certain specifications or standards;

(f)

where the products required are complex or are required for a special purpose, an inspection by the national authorities of the procurement entity, or by the competent official body of the supplier's country of residence if it agrees to carry out the inspection on their behalf, of the supplier's production and, if necessary, design and research facilities and his quality control procedures.

The references required to prove technical capacities must appear in the contract notice both in the open and restricted procedures.

On the other hand under the abovementioned Article 23 the extent of the information required by the contracting authorities 'must be confined to the subject of the contract', that is, this information may only be required to the extent that it is necessary to assess whether the technical capacities of the suppliers are appropriate for the desired supplies.

Purchasing authorities must also take into account suppliers' legitimate interest in protecting their trade secrets.

Additional information

Suppliers may be asked to amplify or elucidate the evidence of general suitability and financial and technical capacity they have submitted to the procurement authority. However, any further information requested must be strictly confined to the matters listed in Articles 20 to 23.

8. Award criteria

The only criteria on which purchasing entities may award contracts are the lowest price and the economically most advantageous tender overall (Article 25 of the Directive).

The lowest price criterion does not raise problems of interpretation, for the prices quoted in the bids are simply compared and the contract awarded to the lowest bidder.

Some explanation is required of the second criterion, however. The question is what features of bids may be taken into consideration in determining which, on balance, is the best offer. The Directive states that purchasing entities may base themselves on 'various criteria according to the contract in question, e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales services and technical assistance'.

The list is not exhaustive, but it is clear from the examples given that only objective criteria may be used which are strictly relevant to the particular procurement decision and uniformly applicable to all bidders. Variation in the criteria is permitted to take account of the inherent characteristics of the goods to be purchased and the use for which the purchaser requires them.

All the criteria the purchasing authority intends to apply in determining the economically most advantageous offer must be stated in the tender notice or the tender documents. N° criterion not mentioned in the notice or tender documents may be used.

The Directive also provides that where possible the criteria should be listed in descending order of importance. Suppliers should not be left in the dark about how bids are going to be assessed.

Abnormally low tenders

If a bid appears to be abnormally low given the contract specifications, the procurement authority is entitled to check the costing of the bid before awarding the contract to the bidder. However, for this purpose it is obliged to give the bidder an opportunity of justifying the bid and if it considers any of his explanations unsatisfactory must tell him so. Otherwise, no bid may be rejected on this ground.

The right of procurement agencies to reject the bidder's explanation of his bid as unsatisfactory does not entitle them to presume this and to reject the bid without asking for explanations. The object of the provision, namely to protect bidders against arbitrary rejection of their bids by procurement authorities, would be defeated if the need to seek explanations from the tenderer of a suspiciously low bid were left to the discretion of the procurement authority (1).

(1) So held by the European Court of Justice in relation to the corresponding provision (Article 29(5) of the 'Works' Directive (Case 76/81 Transporoute v. Luxembourg Minister of Works (1982) ECR 417 at 428-9 (paragraph 17)).

As the procedure for checking bids that appear to be abnormally low is an essential safeguard for bidders and is therefore mandatory, there must be some means of monitoring its use. Consequently, the Commission considers that the communications the procurement authority has with the supplier for this purpose should be in writing (i.e. by exchanges of correspondence) or, if oral, recorded in writing (i.e. by keeping minutes of telephone conversations, meetings, etc., with copies naturally sent to the supplier). Monitoring of compliance with the procedure is only possible if there are written records.

It is also important to note that in evaluating whether or not a bid is abnormally low, purchasing entities must base themselves on the conditions in the bidder's country, having regard, of course, to any extra costs involved in supplying to another Community country. In particular, they may not discriminate against foreign bidders by referring only to conditions on their domestic market.

At all events, it is not permitted to reject as abnormally low a bid that has been properly costed according to conditions on the market of the supplier's country and meets the contract specifications.

Exception

The only exception from the rule that contracts must be awarded either to the lowest bidder or to the bid offering overall the economically most advantageous terms is where legislation in force when Directive 77/62/EEC was adopted provides for certain bidders to be given preference. However, this legislation must be compatible with the Treaty.

Preferences introduced for regional policy reasons have long posed a problem for the Community government procurement rules. The Commission will shortly redefine its position on this question in the light of the Single European Act.

III. Government construction contracts: the 'Works' Directive 71/305/EEC

1. Scope of the Directive: 'public works contracts'

The Directive is stated to apply to 'public works contracts'. These are defined in Article 1 as contracts for pecuniary consideration concluded in writing between a contractor and an authority awarding contracts and concerning one of the

activities in the construction sector listed in Major Group 40 of the 'nomenclature of industries

in the European Communities', reproduced in the Annex to Directive 71/304/EEC (1).

Meaning of 'contractor'

Contractors may be companies, firms or individuals or groups (consortia) of such. Groups may not be required to assume any particular legal form in order to bid for a contract, but may be required to do so if they are awarded the contract.

Meaning of 'authority awarding contracts'

The 'authorities' whose construction contracts are covered by the Directive are the State, regional or local authorities and 'legal persons governed by public law (or, in Member States where this concept is unknown, equivalent bodies)' (2) listed in Annex I to the Directive (3).

Form of contracts

The Directive requires merely that the contract be for pecuniary consideration and be drawn up in writing. Nothing is said as to its content.

There being no express restriction on the terms of the contract, the Directive covers the widest possible range of contracts a public authority can make with a private contractor for construction works. Thus, it includes, for example, contracts covering the planning and/or financing of a project as well as its execution.

How the project is financed is also irrelevant for the purposes of the Directive. It may be financed from the principal's own resources or borrowing by the principal, or the financing may be left to the contractor.

(1) See list in Table IV of Annex II to the Guide. In 1970 the NICE classification was revised and incorporated into the broader NACE (general industrial classification of economic activities within the European Communities) classification. In the NACE classification, Major Group 40 'Construction' of the NICE classification became Class 50 'Building and civil engineering'.

(2) Words in brackets inserted by the Treaty of Accession of Denmark, the United Kingdom and Ireland.

(3) See list in Table V of Annex II to the Guide.

2. Exclusions

Contracts falling below a certain value threshold, awarded by certain public utilities or in certain other specified circumstances, or involving certain specified forms of consideration, are excluded from the scope of the Directive.

These are dealt with in detail below. In case of doubt as to whether or not a contract is covered, advice should always be sought from the Commission

Value threshold

The threshold value from which a public works contract becomes subject to the Directive (78/669/EEC) of 2 August 1978 (1) amending the basic Directive to take account of the introduction of the European unit of account, which later became the ECU, is 1 000 000 ECU (European currency units) before VAT. All public works contracts with an estimated value of 1 000 000 ECU or over are subject to the provisions of the Directive, unless they fall within one of the excluded categories.

The national currency equivalents of the ECU threshold are calculated at a fixed exchange rate, which is adjusted by the Commission at the end of October every two years to the average of the daily values of the currency against the ECU over the preceding 12 months and published in the 'C' (Information and Notices) series of the Official Journal of the European Communtiesin November,

with effect from the following 1 January. The national currency equivalents of the threshold applicable in 1986/87 (2) are as follows:

>TABLE POSITION>

Calculation of contract value

The Directive lays down rules for calculating the value of contracts. First of all, the value taken must include, as well as

(1) OJ N° L 225, 16. 8. 1978, p. 41.

(2) The 1986/87 rates were published in OJ N° C 207, 28. 11. 1985, p. 2.

the value of the work contracted for, also the value of the supplies needed to carry out the work even if these are provided to the contractor by the principal.

The estimated value of work which the authority intends to have carried out later by the contractor awarded the current contract and which consist in a repetition of the work to be carried out under the current contract must also be included in the contract value (Article 9 (g)).

It is prohibited to split up contracts with the intention of evading the rules of the Directive (Article 7).

In practice, the Commission considers that no question of splitting to evade the rules can arise if the contract value is calculated to include all the work necessary to make the project operational, i.e. finished and ready for the use intended by the authority. This does not prevent award of the contract in lots, provided this is mentioned in the tender notice.

Public utilities

The Directive excludes from its scope contracts awarded by 'bodies. . . governed by public law... which administer transport services' or by the 'production, distribution, transmission or transportation services for water and energy' (Article 3 (4) and (5).

The Commission emphasizes that, qua exceptions, these provisions must be construed strictly.

In the transport sector, the exception covers organizations actually undertaking the carriage of passengers or goods, i.e. common carriers. Authorities operating facilities such as ports or airports are subject to the Directive.

In the water and energy sectors, only services whose specific function is the production, transport or distribution of water or energy are excepted. Thus, for example, an army barracks planning to build its own power plant or water pumping station would be covered. As far as water services are concerned, the exception only applies to services undertaking the collection, supply and distribution of drinking water, i.e. generally water that has been purified, for residential or industrial use. River management, irrigation, drainage and sewerage services are covered by the Directive. Thus, it is the

specific function of the service or organization that must be considered in determining whether the rules of the Directive apply.

Where an organization provides several services at once, for example a local authority combining the functions of sewage treatment and drinking water supply, only contracts relating to the latter service are excepted.

Of course, the Directive only applies to organizations awarding such contracts if they fall within the Directive's definition of 'authority awarding contracts'.

Contracts awarded under international agreements or under the specific procedure of an international organization

The Directive does not apply to contracts awarded by a Member State:

(a) under an international agreement with a non-EC country which contains different provisions for the award of contracts;

(b) to firms in non-EC countries under an international agreement which excludes EC firms;

(c) under the specific procedure of an international organization (Article 4).

Contracts in which the consideration consists in a franchise to operate the completed works ('concession contracts')

Nor do the provisions of the Directive apply to contracts which have all the features of a public works contract as described above but under which the consideration for the works consists in a franchise ('concession') to operate the completed works or in a franchise plus payment (1).

The Directive, however, requires that it should be stipulated in the terms of such contracts that the organization awarded the franchise ('concessionaire') must not discriminate on grounds of nationality when it itself awards contracts to third parties.

If the 'concessionaire' is itself a public authority covered by the Directive, the work it contracts out to third parties in connection with the project is subject to the full provisions of the Directive, with the exceptions noted above (Article 3 (1), (2) and (3)).

(1) In 1971 a declaration on the procedures to be followed in relation to such contracts was adopted by representatives of the Governments of the Member States meeting within the Council (OJ N° C 82, 16. 8. 1971, p. 13 - English Special Edition, Second Series, January 1974, IX. Resolutions of the Council and of the Representatives of the Member States, p. 55). Such contracts and subcontracting under them are dealt with in detail in Chapter IV.

3. Advertising rules

To open up public-sector construction contracts to effective competition from firms in other Member States of the Community, authorities are required to advertise the contracts in the Supplement to the Official Journal giving the basic information contractors need to be able to bid for contracts concluded in the Community.

Content of tender notices

In the notices advertising tenders for construction contracts, certain specified items of information must be included. These mandatory items are listed in Articles 16, 17, 18 (d) and 29 (2) of the Directive.

In open tenders (i.e. those whereby any interested contractor may immediately bid for the contract, as opposed to restricted tenders whereby a selection is made from the contractors who reply to the tender notice and the selected contractors only are invited to bid), the tender notice must state at least the following:

(a)

the date on which the tender notice was sent for publication to the Office for Official Publications of the European Communities;

(b)

the tendering procedure;

(c)

the site; the nature and extent of the work and the general nature of the project; if the contract is divided into several lots: the approximate size of the various lots and the possibility of tendering for one, for several, or for all of the lots; if the contract involves design as well as construction work, sufficient information about the project to enable contractors to understand the requirements and prepare a tender accordingly;

(d)

any time limit for the completion of the works;

(e)

the address of the body awarding the contract;

(f)

the address from which the tender documents and additional documentation may be obtained and the final date for requesting the documentation, also the amount and terms of payment of any sum payable for the documentation;

(g)

the closing date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be submitted;

(h)

the persons authorized to be present at the opening of tenders and the date, time and place of opening;

(i)

information about deposits and any other guarantees, whatever their form, that may be required by the authorities awarding the contract;

(j)

the main terms of financing and payment and/or references to the legislation in which these are laid down;

(k)

the legal form which a consortium of contractors will be required to take if awarded the contract;

(l)

the minimum financial and technical standards which the authority awarding the contract requires contractors to meet; these requirements may not be other than those specified in Articles 25 and 26;

(m)

the length of time during which tenders must remain open for acceptance;

(n)

the criteria on which the contract is to be awarded, including criteria other than lowest price if not stated in the tender documents;

In restricted tenders, the tender notice must state at least the following:

(a)

the date on which the notice was sent for publication to the Office for Official Publications of the European Communities;

(b)

the tendering procedure;

(c)

the site; the nature and extent of the work and the general nature of the project; if the contract is divided into several lots: the approximate size of the various lots and the possibility of tendering for one, for several, or for all of the lots; if the contract involves design as well as construction work, sufficient information about the project to enable contractors to understand the requirements and prepare a tender accordingly;

(d)

any time limit for the completion of the works;

(e)

the address of the body awarding the contract;

(f)

the legal form a consortium of contractors will be required to take if awarded the contract;

(g)

the closing date for receipt of applications to tender, the address to which they must be sent and the language or languages in which they must be submitted;

(h)

the final date on which invitations to tender will be issued by the authority awarding the contracts;

(i)

the information required, in the form of verifiable statements, in the application to tender in order to disclose any grounds for disqualification, and the minimum financial and technical standards which the authority awarding the contract requires of contractors;

(j)

the criteria on which the contract is to be awarded, if not to be stated in the invitation to tender.

Specification of time limits

Time limits should be clearly specified in tender notices, so that it is not more difficult for contractors from other countries to determine when the closing dates for submitting tenders, requesting documentation, etc., are than for contractors from the awarding authority's country.

Thus, the Commission does not accept references to the date of publication of the notice in national or regional official gazettes, access to which is much more difficult for foreign contractors. This would be contrary to the Member States' Treaty obligations not to impede firms from other Member States in providing services on their territory.

Time limits must be expressed either as a certain number of days from the date of publication of the notice in the Supplement to the Official Journal or as a specific date. The minimum time limits to be allowed in notices are given herein (Section 5).

Layout of tender notices

Tender notices sent for publication in the Official Journal must be set out as shown in the model notices for open and restricted public works tenders given in Annex I to Council Directive 72/277/EEC of 26 July 1972 (1) (2). This layout is obligatory because it facilitates rapid publication and ensures that all contracts, wherever in the Community the project is situated, are advertised in the same manner and in the same amount of detail.

Notices, while providing clear and complete information, should be concise. Directive 72/277/EEC limits them to a maximum length of one page of the Official Journal, or about 650 words.

National advertising of tenders

So that contractors throughout the Community can compete for contracts on equal terms, Directive 71/305/EEC prescribes that the advertising of tenders in the official gazette or press of the country of the authority awarding the contract may not contain information other than that published in the Official Journal and that the tenders may not be advertised nationally before the date of dispatch of the tender notice for EC-wide publication.

EC-wide advertising

In practice, the responsibility for EC-wide advertising of tenders is shared between the authorities putting contracts out to tender and the Official Publications Office. The authority must supply a notice and must send it to the Publications Office by the most rapid means of transmission available so that publication is not delayed.

(1) OJ N° L 176, 3. 8. 1972, p. 12 (English Special Edition 1972 (III), December 1972, p. 823).

(2) The model notices are reproduced in Table IX of Annex II to the Guide.

Notices should be sent to:

Supplement to the Official Journal of the European Communities,

Office for Official Publications of the European Communities,

2 rue Mercier,

L-2985 Luxembourg.

Tel. (352) 499 28 23 32.

Telex 1324 PUBOF LU or 2731 PUBOF LU.

Facsimile (352) 49 00 03 or (352) 49 57 19.

The Publications Office has notices translated into the other Community languages and undertakes to publish them within nine days from the date of dispatch for publication. (Five days for accelerated procedures - only in restricted tenders.)

The Supplement to the Official Journal is obtainable in all Member States from the addresses listed in Table VI (3).

Other sources of information on tenders

All government tenders (procurement, construction and services) published in the Supplement to the Official Journal are also on the TED (Tenders Electronic Daily) computerized system, which is accessible through various host organizations.

For further information, contact:

Office for Official Publications of the European Communities,

Sales Department,

L-2985 LUXEMBOURG.

Tel. (352) 49 92 82 563.

Telex 1324 PUBOF LU.

Facsimile (352) 49 00 03.

Since October 1987 contractors have also been able to obtain details of tenders from their local Euro-Info Centre, which stocks the Official Journal and is linked to the TED system (4). For further information contact:

Commission of the European Communities,

Small Firms Task Force,

200 rue de la Loi,

B-1049-Brussels.

Tel. (02) 236 16 76.

Telex 61655 BURAP B.

Facsimile 236 12 41.

(3) See Annex II to the Guide.

(4) See list of Euro-Info Centres currently operating or planned in Table VII of Annex II to the Guide.

4. Rules on technical specifications

Authorities are required to state in the general documentation on the tender and in the actual contract documents the technical specifications for the work and a description of the testing, inspection, acceptance and calculation methods to be used.

Meaning of 'technical specifications'

Technical specifications are defined in Annex II to Directive 71/305/EEC as all the technical requirements objectively describing a job, material, product or supply suitable for the purpose for which it is required by the authority awarding the contract.

They include all the mechanical, physical and chemical properties, classifications and standards and testing, inspection and acceptance requirements for the works and the materials and parts used in their construction. They also include the methods or techniques of construction and any other technical requirements for the completed works or the materials and parts used in their construction that the authority awarding the contract may prescribe.

Prohibition of discriminatory specifications

Because of the importance of cross-frontier provision of services for unifying the common market, specifications that would have the effect of discriminating against contractors in other Member States are prohibited.

Thus, the Directive forbids specifications that mention products of a specific make or source or a particular process and thereby favour or eliminate certain firms, unless the specifications are justified by the subject of the contract. In particular, it is not permitted to refer to trademarks, patents or types, or to specific origins or makes unless the authority awarding the contract is unable to describe the subject of the contract using specifications that are sufficiently precise and intelligible to all interested parties without such references, in which case the references

must be accompanied by the words 'or equivalent'.

It is up to the authority using such specifications to show that they are justified.

Standards

The Directive permits technical specifications to be defined by reference to national standards. However, this provision must now be read, as far as product specifications are concerned, in the light of the development of the

Commission's policy and the European Court of Justice's case law on measures having an effect equivalent to quantitative restrictions. That is to say, if there are no EC standards, authorities must consider on equal terms with products meeting national or other preferred standards products from other Member States manufactured to a different design but having equivalent performance.

Costing of tenders

Finally, the Directive contains special provisions for cases where projects are put out to competitive tender or where bidders are invited to submit alternatives to the authority's project. In such cases a tender which meets the specifications set out in the tender documents may not be rejected solely on the ground that it has been prepared using different methods of costing work from those normally used in the country where the project is to be undertaken. However, tenderers must in that case include with their tenders all the evidence necessary for checking the project and supply the authority with any clarifications it considers necessary.

5. Tendering procedures

Authorities placing public works contracts have a choice between open tenders, whereby any interested contractor may immediately bid for the contract, or restricted tenders, whereby a selection is made from the contractors who reply to the tender notice and the selected contractors only are invited to bid.

An accelerated form of restricted tender with shorter than normal time limits is permitted in cases of urgency where observance of the normal time limits is impracticable. As this is an exception from the normal procedure which is likely to reduce the amount of competition for the contract, it should be construed strictly, i.e. reserved for cases where the authority awarding the contract can prove the objective need for urgency and the genuine impossibility of abiding by the normal time limits prescribed for this procedure.

Exceptions

The requirement for contracts to be put out to competitive tender is waived in, and only in, the circumstances specified in Article 9 of the Directive. In those circumstances the authority can negotiate directly with one or more contractors without prior advertisement.

The award of contracts in such circumstances is, however, still subject to the rules on technical specifications. The circumstances listed in Article 9 are:

(a)

where no suitable contractor was found in a previous open or restricted tender because no or only irregular bids were received or because the bids submitted were unacceptable under national provisions that are consistent with the directive's rules, provided that the original terms for the contract, as set out in the invitation to tender and the tender documents, are not substantially altered (otherwise, the contract must be re-advertised);

(b)

where, for technical or artistic reasons or because of the existence of exclusive rights, there is only one contractor in the Community able to carry out the work;

(c)

for works carried out for purposes of research, experiment, study or development;

(d)

in cases of extreme urgency resulting from unforeseen circumstances not attributable to the action of the authority placing the contract, where the time limits laid down in tendering procedures cannot be observed;

(e)

where the works are classified as secret or where their execution must be accompanied by special security measures under the law of the Member State of the authority awarding the contract, or where the protection of the basic interests of that State's security so requires;

(f)

for additional work not included in an earlier project or in the contract awarded for that project which has become necessary as a result of unforeseen circumstances for completing the work described in the earlier contract, where the additional work is to be done by the contractor awarded the earlier contract, and:

- the work cannot be separated technically or financially from the earlier project without great inconvenience to the authority, or

- though separable from the execution of the earlier project, is strictly necessary for its later stages.

The total value of the additional work may not, however, exceed 50 % of the value of the earlier contract;

(g)

for new work consisting in a repetition of work similar to that carried out under an earlier contract awarded to the same contractor by the same authority, provided that the work conforms to a basic project and the earlier contract for a similar project was awarded to the contractor after an open or restricted tender.

The possibility that this procedure might be used must be announced when the first project is put out to tender and the estimated value of the later projects must be included in the contract value taken for the purposes of determining whether the contract exceeds the value

threshold for application of the Directive. The procedure may only be applied during the three years following conclusion of the original contract;

(h)

in exceptional circumstances, where the nature of the works or the risks attaching to them make it impossible to estimate their total cost.

The Court of Justice has ruled that these exceptions from the rules of the Directive, rules which are intended to guarantee the possibility of effectively exercising the EC-wide right of establishment and freedom to provide services in connection with public-sector construction contracts, must be construed strictly and it is up to the person invoking them to prove that the exceptional circumstances referred to really exist (1).

Time limits

To ensure that all potentially interested contractors in the Community have a chance of bidding or applying to bid before the closing date, the Directive prescribes minimum time limits for the receipt of bids and applications to bid (authorities are, of course, free to allow longer periods) and maximum time limits for authorities to provide documentation and information. The time limits are:

Open tenders

(a) Closing date for receipt of tenders: at least 36 days from dispatch of the tender notice for publication in the Official Journal.

(b) Time limit for sending additional information concerning the tender documents (if requested in time): no more than six days before the closing date for receipt of tenders.

Restricted tenders

(a) Closing date for receipt of applications to tender: at least 21 days (in accelerated procedures, 12 days) from dispatch of the tender notice for publication in the Official Journal.

(b) Time limit for sending additional information concerning the tender documents (if requested in time): no more than six days (in accelerated procedures, four days) before the closing date for receipt of tenders.

(1) Case 199/85 Commission v. Italy (paragraph 14), judgment given on 10 March 1987, not yet reported.

(c) Closing date for receipt of tenders: at least 21 days (in accelerated procedures, 10 days) from dispatch of the written invitation to tender.

Both in open and in non-accelerated restricted tenders, the closing date for receipt of tenders must be appropriately extended if tenders can only be prepared after a visit to the site or after inspection of documentation supporting the tender documents.

Invitations to tender

Invitations to tender issued to the contractors selected from those who replied to a restricted tender notice must be sent to all the selected contractors simultaneously and must state at least the following:

(a)

the address from which the tender documents and any additional documentation may be obtained and the final date for requesting the documentation, also the amount and terms of payment of any sum payable for the documentation;

(b)

the closing date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be submitted;

(c)

information about deposits and any other guarantees that may be required by the authority awarding the contract, whatever their form;

(d)

the main terms of financing and payment and/or references to legislation in which these are laid down;

(e)

a reference to the tender notice published in the Official Journal;

(f)

any documents to be produced by the contractor either to confirm the verifiable statements about his current standing and past record required under the terms of the tender notice in order to disclose any grounds for disqualification or to supplement the evidence supplied under the terms of the tender notice that the contractor meets the minimum financial and technical standards;

(g)

the criteria on which the contract is to be awarded, if these were not stated in the tender notice.

Transmission of applications and invitations to tender

The Directive allows applications and invitations to tender for contracts advertised under the accelerated procedure for restricted tenders to be sent by telegram, telex or telephone as well as by letter, because of the urgency. However, telegrams, telexes and telephone calls must be confirmed by letter.

6. Method of calculating time limits

The closing dates for the receipt of bids and applications to bid must be calculated by the method provided for in Council Regulation (EEC, Euratom) N° 1182/71 of 3 June 1971 defining the rules applicable to periods, dates and time limits (1).

Under these rules, periods expressed as a certain number of days from a certain event:

(a) run from the day following the day on which the event takes place;

(b) begin at 00h00 on the first day, as defined in (a), and end at 24h00 on the last day of the period;

(c) end, if the last day of the period falls on a public holiday or a Saturday or Sunday, and the period is not expressed in hours, at 24h00 on the following working day.

Periods expressed as ending at a certain time on a certain date, which are common for certain acts to be performed by contractors, end at the time and date stated.

Periods include public holidays and weekends unless these are expressly excluded or the periods are expressed as a certain number of working days. Public holidays are all days designated as such in the Member State in which the relevant act has to be performed.

For further details, reference is made to the text of the Regulation.

7. Criteria for disqualifying or eliminating applicants and bidders

To open up the EC public-sector construction market to competition, the coordinated tendering procedures had to include safeguards against the arbitrary selection of contractors on discriminatory criteria.

For this reason, the Directive (Chapter 1 of Title IV) specifies the only qualitative criteria on which applicants to bid or bidders may be disqualified or eliminated and the evidence contractors may be required to produce to show that they meet the criteria. Contractors may be disqualified on certain grounds pertaining to their solvency, record and integrity and may be eliminated on the grounds of insufficient financial or technical capacity to undertake the work.

Grounds for disqualification

Article 23 of the Directive first lists all the circumstances relating to the solvency, record and integrity of contractors

(1) See text in Table XI in Annex II to the Guide.

which can be taken by the authority awarding the contract as a ground for disqualifying the contractor from selection to bid or from consideration of his bid. Any contractor may be immediately disqualified who:

(a)

is bankrupt or being wound up, has ceased trading, or is operating under court protection pending a settlement with creditors, or is in an analogous situation arising from national proceedings of a similar nature;

(b)

is the subject of proceedings for bankruptcy, winding-up or court protection pending a settlement with creditors, or national proceedings of a similar nature;

(c)

has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

(d)

can be shown by the authority awarding the contract to have been guilty of grave professional misconduct;

(e)

has not fulfilled obligations relating to payment of social security contributions under the statutory provisions of his country of residence or of the country of the authority awarding the contract;

(f)

has not fulfilled obligations relating to payment of taxes under the statutory provisions of his country of residence or of the country of the authority awarding the contract;

(g)

has been guilty of serious misrepresentation in supplying information about his current standing or past record or his financial or technical capacity.

In cases (d) and (g) the burden of proof is on the authority awarding the contract. In other cases it is for the contractor, if asked to do so in the tender notice, to show that he is not in any of the specified situations.

However, the evidence an authority may require for this purpose is not left entirely to its discretion. The Article provides that it must accept as satisfactory evidence:

- for cases (a), (b) and (c), the judicial record on the contractor or an equivalent document issued by a judicial or administrative authority in the contractor's country of origin or residence,

- for cases (e) and (f), a certificate issued by the competent authority in the Member State concerned.

If such documents or certificates are not issued by the country in question, the contractor may instead produce an affidavit

sworn before a judicial or administrative authority, a notary or a competent professional body in his country of origin or residence, or, in Member States where there is no provision for declarations on oath, a solemn declaration (1).

Registration

To prove their general commercial standing and fitness, contractors may be required under Article 24 of the Directive to show that they are on an official register of businesses in their Member State of residence as required under that State's law. Greek contractors may be asked to produce a statement sworn before a notary that they are public works contractors (2). Authorities may not require a contractor to be on the official register in their own country, as this would clearly impede freedom to provide cross-frontier services.

Evidence of financial and technical capacity

Under Article 20 of the Directive, contractors not disqualified on any for the grounds of general unsuitability specified in Article 23 may only be eliminated from the contractors from whom those invited to bid are selected or whose bids are considered on one of two sets of criteria, namely financial or technical capacity. These criteria are listed in Articles 25 to 28 of the Directive.

In the first place, it must be noted that the requirements of contracting authorities to determine the capacity of enterprises to carry out the intended works may only refer to the economic, financial and technical capacity of candidates or tenderers.

Financial capacity

Pursuant to Article 25, evidence of the contractor's financial capacity may be provided, as a rule, by any of the following:

(a) appropriate statements from bankers;

(b) the company's balance sheets or extracts from them, where company law in the contractor's country of residence requires publication of balance sheets;

(c) a statement of the firm's total turnover, and its turnover from construction work, for the past three years.

(1) Provision for solemn declarations instead of affidavits inserted in Article 23 by the Treaty of Accession of Denmark, the United Kingdom and Ireland.

(2) Provision inserted by the Treaty of Accession of Greece.

However, the authority may require evidence other than the three items mentioned above, if such other evidence is objectively necessary to show that the contractor has the requisite financial or technical capacity to undertake the work.

All evidence required of financial capacity must be stated in the tender notice under both open and restricted tenders and in the invitation to tender under restricted tenders.

If, for any valid reason, the contractor is unable to provide the evidence required in the tender notice or invitation to tender, the authority must allow the contractor to prove his financial capacity by any other document the authority considers appropriate.

Technical capacity

Article 26 contains an exhaustive list of the types of evidence that authorities awarding contracts may require of contractors' technical capacity.

They may ask for:

(a) the professional qualifications of the contractor and/or his senior employees, in particular those to be in charge of the works;

(b) a list of works carried out over the past five years supported by certificates of satisfactory

completion of the most important works and stating the value, date and site of the works and whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the certificates should be sent by the competent national authority to the authority awarding contracts direct;

(c) particulars of the tools, plant and equipment the contractor will have for carrying out the work;

(d) particulars of the firm's average annual workforce and the number of managerial staff for the past three years;

(e) particulars of the technical resources (staff and facilities) the contractor can call upon for carrying out the work, whether or not they belong to the firm.

As in the case of financial capacity, authorities are required to state the evidence they require of contractors' technical capacity in the tender notice or the invitation to tender.

Additional information

Authorities may not later require evidence on other matters not mentioned in the tender notice or invitation to tender, because this could detract from the transparency of the selection process.

Pursuant to Article 27, the may only require contractors to amplify or elucidate the evidence of general suitability and financial and technical capacity already submitted, within the limits set by Articles 23 to 26.

Official lists of approved contractors

Article 28 of the Directive contains special provisions on the official lists of approved contractors maintained in some Member States and on the value of listing as evidence of suitability vis-à-vis authorities awarding contracts in other Member States.

Contractors on such lists in their Member State of residence may claim the listing as alternative evidence of fulfilment of certain of the qualitative criteria referred to in Articles 23 to 26.

To do so, they must submit to the authority awarding the contract a certificate of registration on the approved list issued by the appropriate authority, indicating the particulars on which evidence was required in order to gain registration and their classification on the list.

Under Article 28 (3), a certificate of registration must be accepted by authorities awarding contracts in other Member States as a presumption of the contractor's suitability for works covered by this classification in lieu of the evidence referred to in Articles 23 (a) to (d) and (g), 24, 25 (b) and (c) and 36 (b) and (d), but not in lieu of that referred to in Articles 25 (a) and 26 (a), (c) and (e).

The Directive further provides that facts established by registration may not be questioned. However, with regard to payment of social security contributions, an additional certificate may be required each time the contractor bids for a contract.

In other words, registration on an approved list is only conclusive of those objective facts on which evidence had to be submitted in order to gain registration.

Except as regards those facts which may not be challenged, the contractor may, however, be required by the authority to provide further information on the matters for which a certificate of registration must be accepted in lieu of other evidence, in order to assess his suitability for particular work.

Evidence on the other matters on which an authority is entitled to require evidence under the Directive and which are not covered by the presumption created by registration must be submitted by the contractor

in the normal way.

8. Award criteria

The only criteria on which authorities may award contracts are the lowest price and the economically most advantageous tender overall (Article 29 of the Directive).

- The lowest price criterion does not raise problems of interpretation, for the prices quoted in the bids are simply compared and the contract awarded to the lowest bidder.

- Some explanation is required of the second criterion, however. The question is what features of bids may be taken into consideration in determining which, on balance, is the best offer.

The Directive states that authorities may base themselves on 'various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit'.

The list is not exhaustive, but it is clear from the examples given that only objective criteria may be used which are strictly relevant to the particular project and uniformly applicable to all bidders. Variation in the criteria is permitted to take account of the inherent characteristics of different works and the purpose for which they are required.

All the criteria the authority intends to apply in determining the economically most advantageous offer must be stated in the tender notice or the tender documents. N° criterion not mentioned in the notice or tender documents may be used.

The Directive also provides that where possible the criteria should be listed in descending order of importance.

While in some cases it may be difficult to rank the criteria in this way, in others one criterion will clearly be uppermost. For example, in a bridge construction project the ranking of the criteria might well be:

1. technical merit (stability, resistance to subsidence, elasticity, etc.);
2. cost;
3. aesthetic merit.

If two tenders for this project were equal on technical merit, the cheaper of the two would be preferred. If they were equal on technical merit and cost, the choice would go to the more aesthetically pleasing design.

Authorities should specify this ranking of criteria wherever possible so that contractors know on what basis their bids are to be assessed.

The Directive's requirements for specifying the criteria on which contracts are to be awarded can be summarized as follows:

- open tenders:

(a) lowest price: in tender notice;

(b) economically most advantageous tender and individual criteria to be used in determining it: in tender notice or tender documents;

- restricted procedures:

(a) lowest price: in tender notice or invitation to tender;

(b) economically most advantageous tender: in tender notice or invitation to tender;

(c) individual criteria to be used in determining economically most advantageous tender: in tender

notice or tender documents.

Abnormally low tenders

If a bid appears to be abnormally low given the contract specifications, the authority awarding the contract is entitled to check the costing of the bid, before awarding the contract to the bidder. However, for this purpose it is obliged to give the bidder an opportunity of justifying the bid and, if it considers any of his explanations unsatisfactory, to tell him so. Otherwise, no bid may be rejected on this ground. The Court of Justice upheld this requirement in Transporoute v. Luxembourg Minister of Public Works, where it said that the right expressly given to the authorities awarding contracts by this provision (Article 29 (5)) to reject the bidder's explanations of his bid as unsatisfactory does not entitle them to presume this and to reject the bid without asking for

explanations. The object of the provision, namely to protect bidders against arbitrary rejection of their bids by authorities, would be defeated if the need to seek explanations from the tenderer of a suspiciously low bid were left to the authority's discretion (1).

As the procedure for checking bids that appear to be abnormally low is an essential safeguad for bidders and is therefore mandatory, there must be some means of monitoring its use. Consequently, the Commission considers that the communications the authority placing the contract has with the contractor for this purpose should be in writing (i.e. by exchanges of correspondence) or, if oral, recorded in writing (i.e. by keeping minutes of telephone conversations, meetings, etc., with copies naturally sent to the supplier). Monitoring of compliance with the procedure is only possible if there are written records.

It is also important to note that in evaluating whether or not a bid is abnormally low, authorities must base themselves on the conditions in the bidder's country, having regard of course to any extra costs involved in supplying to another Community country. In particular, they may not discriminate against foreign bidders by referring only to conditions on their domestic market.

At all events, it is not permitted to reject as abnormally low a bid that has been properly costed according to conditions on the market of the contractor's country and meets the contract specifications.

Exception

The only exception from the rule that contracts must be awarded either to the lowest bidder or to the bidder offering overall the economically most advantageous terms is where legislation provides for certain bidders to be given preference by way of aid. However, this legislation must be compatible with the Treaty, in particular the state aid rules of Articles 92 et seq.

Preferences introduced for regional policy reasons have long posed a problem for the Community rules on public-sector construction contracts. The Commission will shortly redefine its position on this question in the light of the Single European Act.

(1) Case 76/81 (1982) ECR 417 at 428-9 (paragraph 17).

IV. Public works contracts in which the consideration consists in a franchise to operate the completed works ('concession contracts') and subcontracting under such contracts

Public-sector construction contracts under which the contractor's consideration consists wholly or partly in a franchise ('concession') to operate the completed works are, as noted in Chapter III, excluded from the normal Community rules on the award of public works contracts by Article 3 of the 'Works' Directive 71/305/EEC. However, the work done under such contracts is not entirely outside the scope of the Directive: authorities are required to stipulate in their contract with the organization awarded the franchise ('concessionnaire') that it must not discriminate on grounds

of nationality when it itself awards contracts to third parties. Also, if the 'concessionnaire' is itself a public authority covered by the Directive, the work it contracts out to third parties is subject to the full provisions of the Directive.

Although 'concession contracts' are to this extent not subject to the formal Community rules on public-sector contracts laid down in the Directive, the Member States have agreed to abide voluntarily by certain tendering procedures for such contracts and related subcontracts. This voluntary code of practice was adopted in a declaration by representatives of the Member States meeting within the Council in 1971 (2).

1. Principal contracts

The declaration provides that authorities wishing to award a contract for works with an estimated total value exceeding 1 000 000 ECU in return for a franchise to operate the works afterwards are required to advertise the contract in the Official Journal.

The tender notice must:

(a) describe the subject of the contract in sufficient detail to enable potentially interested contractors to make a valid assessment;

(b) list the personal, technical and financial conditions to be fulfilled by applicants;

(c) state the main criteria on which the contract is to be awarded; and

(d) give the closing date for submission of tenders.

The closing date for submission of tenders may not be less than 35 days from the date of dispatch of the notice for publication in the Official Journal.

(2) OJ N° C 82, 16. 8. 1971, p. 13 (English Special Edition, Second Series, January 1974, IX. Resolutions of the Council and of the Representatives of the Member States, p. 55).

The notice will be published not later than 10 days after the date of dispatch.

2. Subcontracts

The declaration also provides that it should be stipulated in the principal contract that the contractor ('concessionnaire') must subcontract out a certain percentage of the work to third parties and must advertise such subcontracts.

'Third parties', for this purpose, do not include members of the consortium to which the principal contract is awarded or 'associated or affiliated companies', which are defined as companies holding a controlling intrest in the company, or in one of the consortium of companies, to which the principal contract is awarded or companies a controlling interest in which is held by the company, or by one of the consortium of companies, to which the principal contract is awarded.

Regarding the percentage of work that must be subcontracted out, the Declaration provides that the authority awarding the principal contract must:

(a) either require the concessionnaire(s) to subcontract to third parties at least 30 % of the total value of the work provided for by the principal contract, although allowing them to subcontract a higher percentage if they wish;

(b) or ask bidders to specify in their tenders the percentage they will subcontract out.

In both cases the authority awarding the contract must take the percentage of subcontracting as a positive factor in the choice of concessionnaire.

Regarding the advertising of subconstracts, the authority awarding the principal contract must

stipulate the following:

Tenders for subcontracts for work worth 1 000 000 ECU or over must be advertised in the Official Journal. The tender notice to be placed in the Official Journal must be sent to the Official Publications Office and must be set out according to the model appended as Annex II to Directive 72/277/EEC (1). It will be published within 10 days from the date of dispatch.

The tender notice must include at least the following information:

vii(i) the date on which the tender notice was sent for publication to the Official Publications Office;

(1) See Table X of Annex II to the Guide.

vi(ii) the place, nature and extent of the work and the general nature of the project;

v(iii) the time limit for completion of the work;

ii(iv) information about any financial guarantees that may be required;

iii(v) the closing date for receipt of tenders;

ii(vi) the address from which documents on the work required such as plans, quantities, tender documents, etc., may be obtained;

i(vii) the address to which the tenders must be sent;

(viii) the documents to be enclosed with the tender as evidence of the technical and financial qualifications of the contractor;

ii(ix) the criteria on which the contract is to be awarded.

The closing date for the receipt of bids may not be less than 35 days from the date on which the tender notice was sent to the Publications Office.

National advertising of tenders may not contain information other than that published in the Official Journal.

The criteria on which contracts are awarded must be either:

(a) the lowest bidder; or

(b) the economically most advantageous tender on the basis of the criteria stated in the tender documentation.

V. Telecommunications

1. General policy

The European Community is progressively implementing a global policy in the field of telecommunications. One important aspect of this policy is the achievement of a Community-wide homogeneous market for telecommunications equipment and services.

Since 1983, the Commission has been actively developing this policy by action on standardization and by specific measures to open up the market for procurement by network operators.

The policy on standardization, which is being conducted with the assistance of a Working Party of Senior officials on Telecommunications and in collaboration with the European Conference of Postal and Telecommunications Administrations (CEPT), is aiming at production of common technical specifications for telecommunications terminals. In this field the Council of Ministers has adopted:

- Directive 86/361/EEC (1), which provides for mutual recognition of conformity test results,

and

- Decision 87/95/EEC (2), which among other things requires public authorities to refer to harmonized standards in equipment tenders.

The specific measure on market opening agreed upon by the Council is:

- Recommendation 84/550/EEC (3), which established a first experimental phase of opening up access to public telecommunications contracts.

Directive 86/361/EEC and Recommendation 84/550/EEC are presented below in greater detail.

2. Council Directive 86/361/EEC

The Directive provides for the mutual recognition, by designated national type-approval authorities, of the result of tests for conformity with common technical specifications for mass-produced terminal equipment for connection to public telecommunications networks. The tests are to be carried out by nationally approved testing laboratories, which have been accredited in accordance with an agreed scheme within the Community.

Successful testing will result in a certificate of conformity (accompanied by the test results) being issued to the laboratory's client, which he may use in any type-approval application in other Community countries without the need for further testing.

An annual programme of standardization work is to be agreed with CEPT and common conformity specifications (known as Normes Européennes de Télécommunications - NETs) produced. NETs are adopted in CEPT and published in the Official Journal.

NETs must take account of essential requirements of the safety of users and network operators' employees, the protection of the public networks from harm, and in justified cases of the inter-operability of terminal equipment. It is recognized that in this task the historical features of existing national networks and the national provisions for the use of radio frequencies must be respected.

Telecommunications administrators are required to use NETs in their procurement of terminals, unless the

(1) OJ N° L 217, 5. 8. 1986, p. 21.

(2) OJ N° L 36, 7. 2. 1987, p. 31 (this Decision also concerns information technologies).

(3) OJ N° L 298, 16. 11. 1984, p. 51.

equipment must conform to a pre-NET specification in order to replace existing equipment or serve in a transitional situation between two systems. If terminal equipment conforming to a NET is not economically available in a specific national situation, a temporary reduction in the requirements may be claimed.

In the event of a Member State discovering that a NET fails to meet the essential requirements it is supposed to cover, or that there are shortcomings in this application, it may suspend recognition of the certificate of conformity.

Detailed procedures which must be strictly adhered to are included for involving the Commission and other Member States when any country exercises the waiver, reduced requirement, and suspension rights mentioned above.

Discussions with the Member States in the Working Party of Senior Officials on Telecommunications and the new CEPT Telecommunications Recommendations Applications Committee (TRAC) resulted in an urgent work programme being set up involving:

(a) NETs 1-3 applicable to all terminals requiring access to circuit-switched, packet-switched, and ISDN public networts (X21, X25, ISDN basic);

(b) a compendium of national requirements for PSTN access (with little harmonization - nominally NET 4);

(c) NETs 5-9 covering digital telephony, analogue modems, Group 3 facsimile, Telex and ISDN Terminal Adaptors;

(d) safety being covered by joint CEPT/Cenelec (European Committee for Electrotechnical Standardization) activity targeted at a European standard.

The Directive came into force on 24 July 1987. The work on the abovementioned NETs and on selection of accredited testing laboratories was geared to this date.

3. Recommendation 84/550/EEC

The peculiarities of the telecommunications equipment sector led the Community to exclude telecommunications from the public procurement rules under Directive 77/62/EEC. Because of the importance of opening up the market in this field, a special measure has now been taken to promote liberalization of this market, namely Recommendation 84/550/EEC.

In the recommendation, the Council calls on the

Governments of the Member States to ensure that their telecommunications administrations provide opportunities for suppliers in the other Community countries, following

their usual procedure and on a non-discriminatory basis, to tender for:

1. all new telematic terminals and all conventional terminals for which there are common type-approval specifications;

2. all other types of equipment (switching and transmission equipment and conventional terminal equipment for which there are no common type-approval specifications) for at least 10 % by value of their annual orders.

The Member States' Governments report to the Commission at the end of each six-month period on the measures taken by telecommunications administrations to implement this policy and their practical effects. These data, and all matters relating to the application of the recommendation, are regularly discussed by the Working Party of Senior Officials on Telecommunications.

As a result of the recommendation, network operators advertised 168 tenders for equipment in the Supplement to the Official Journal in 1986. The recommendation is having an increasing impact and it is planned to strengthen the measure as part of the process of removing the remaining internal barriers to trade in the EC by 1992.

PART III

SANCTIONS AND MEANS OF REDRESS IF THE COMMUNITY RULES ARE BROKEN

Anyone who believes that a Member State or public authority has breached its obligations under the Community rules on public-sector procurement and construction contracts discussed in Parts I and II of this Guide - or under other Community rules that may apply to public-sector procurement and construction - may complain to the Commission. The address for lodging complaints is:

Commission of the European Communities,

Directorate-General for the Internal Market and Industrial Affairs,

200 rue de la Loi,

B-1049 Brussels.

Telex 21877 COMEU B.

Facsimile 00 32 2 235 0126.

Complaints may also be submitted to the nearest Euro-Info Centre, which will forward them to the Commission (;).

There is no specific form in which complaints should be submitted, but it is essential to give the Commission full details of the complaint and all the evidence the complainant has (such as, for example, the precise references of legislation that is believed to violate the rules, the name of the authority alleged to have done so, details of the contract concerned and its value, the national advertising of the contract, the precise terms of the tender notice, tender documents or any other document or requirement considered to be in breach or other alleged infringement).

Full specification and documentation of the allegations by the complainant is very important. The Commission can

(;) See list of currently operating or planned Euro-Info Centres in Table VII of Annex II to the Guide.

then investigate the case quickly without having to ask for further information from the national authorities, and if the complaint is sustained it can take action against the Member State in time for this to be of some practical use to the complainant.

It is also vital that the complaint should be made as soon as the complainant becomes aware of the alleged breach. Speed is especially important where the award procedure is still in progress because the Commission might then be able to act before the contract is awarded.

The Commission would underline that, if the complainant so wishes, it will keep his identity secret when it addresses the responsible national authorities.

The action the Commission can and must take when it finds that a Member State or a public authority for which the State is responsible has breached EC rules is laid down in Article 169 of the EEC Treaty, Article 88 of the European Coal and Steel Community Treaty and Article 141 of the Euratom Treaty.

The procedure under the EEC and Euratom Treaties, which is the same, is a three-stage process:

- Once the Commission has evidence confirming that a Member State has infringed its obligations under the Treaty, it writes a formal letter to the Member State asking it to answer the charges of infringement by a certain date.

- If by that date the Member State does not either take remedial action or refute the charges by showing that the action challenged by the Commission is in fact consistent

with Community law, the Commission serves a 'reasoned opinion' on it ordering it to take remedial action by a certain date.

- If the Member State does not comply by that date, the Commission brings the case before the Court of Justice. In appropriate cases, the Commission can also apply to the Court for an injunction, for example to suspend award of the contract.

Under the European Coal and Steel Community Treaty, the Commission's action against a Member

State that it has found to be breaking Treaty rules has immediate and direct effects on the Member State which it does not have under the EEC and Euratom Treaties. Here, after giving the Member State an opportunity to answer the charges, the Commission takes a decision, which by virtue of the second paragraph of Article 14 of the ECSC Treaty is binding.

The decision formally records the infringement and allows the Member State some time to comply. It is up to the Member State to appeal to the Court of Justice if it wishes.

The fact that Community procedures exist to establish infringements does not, however, prevent those concerned from bringing proceedings themselves in national courts to defend their individual rights under Community law.

Indeed there are three good reasons why they should do so. First, concurrent action at Community and national level can only improve the general level of enforcement and compliance.

Secondly, as infringements of the competitive tendering rules tend to occur before contracts are awarded and the award process is quite short, action through national courts or national extra-judicial channels may serve the complainants' immediate purposes better because it is quicker and, unlike a complaint to the Commission, can be specifically directed at the authority awarding the contract.

Also, damages can be awarded in some Member States' courts.

PART IV

COMPETITIVE TENDERING FOR EC-FUNDED PROJECTS

Close attention is paid to compliance with the Community rules on EC-wide competitive tendering when projects are granted EC funding.

Such funding - whether grants from the Regional or Social Funds, the Agricultural 'Guidance' Fund, the Transport Infrastructure Fund or under Integrated Mediterranean Programmes, or loans from Euratom or European Coal and Steel Community resources, from the New Community Instrument or from the European Investment Bank(;) - is conditional on the promoter's compliance with the EC competitive tendering rules under Directives 77/62/EEC and 71/305/EEC, where they are applicable, and with the general prohibitions of measures having an effect equivalent to quantitative restrictions in intra-Community trade and of restrictions on the EC-wide right of EC nationals to set up in business and provide services, on which the Directives are based.

(;) As far as the EIB is concerned, its Board of Governors on 4 June 1984 endorsed a recommendation by its Board of Directors to follow this policy in EIB lending.

It is emphasized that the promoter's obligations do not end with the advertising of tenders in the Official Journal. As shown in the detailed discussion of the Directives in Part II of the Guide, they extend right through to the selection of the successful bidder and the signing of contracts.

Hence, the Commission will not restrict its scrutiny to examination of those applications for funding which it receives but will also monitor compliance with the tendering rules both when reviewing the progress reports on projects and programmes and when checking individual awards of contracts.

In the sectors still excluded from the Directives, the Commission is at present trying to persuade Member States to open up more of their procurement to competition from firms in other EC countries. The European Investment Bank also recommends its clients to consider the benefits of international competitive tendering for projects in these sectors.

ANNEX I

PROPOSALS FOR FURTHER LIBERALIZATION OF GOVERNMENT PROCUREMENT AND CONSTRUCTION BY 1992

In the 1985 White Paper setting out the Commission's programme for removing the remaining internal barriers within the common market by 1992, which was later endorsed by the Community Heads of State and Government, the Commission announced its intention of making proposals which would progressively throw open all public procurement and construction contracts to EC-wide competition. This liberalization was regarded as an essential part of the internal market integration programme.

The Commission identified the following priorities in the White Paper:

- improvement of the 'Supplies' and 'Works' Directives, the EC legislation on competitive tendering for public-sector procurement and construction contracts, to make tendering and award procedures more transparent and open contracts up to greater competition,

- stricter policing of compliance with the legislation,

- extension of the directives to the excluded sectors (energy, transport, water and - in the case of the 'Supplies' Directive - telecommunications, with appropriate allowance for the fact that these sectors are in mixed public and private ownership,

- further liberalization of public procurement of services beyond that already provided for in the 'Supplies' and 'Works' Directives.

Better access to public procurement for small firms is also one of the objectives of the action programme for small and medium-sized enterprises which the Council adopted on 3 November 1986.

In 1986 and 1987 the Commission sent the Council proposals to amend the 'Supplies' and 'Works' Directives.

The main amendments proposed to the 'Supplies' Directive are as follows:

- The definition of the types of contracts covered is widened and the method of calculating the value of contracts for the purposes of applying the threshold clarified.

- The definition of the excluded sectors is improved to avoid too wide an interpretation.

- Open tenders, which offer the widest possible access to contracts, are now the rule, and the use of restricted tenders has to be justified.

- The extent of the present exceptions from the competitive tendering rules is reduced. In some of the exceptional circumstances in which the advertising requirement was previously waived, a new procedure, called the negotiated procedure, is now required, in which the planned purchase is advertised and some of the suppliers who reply are selected, on the basis of the criteria laid down in the Directive, to negotiate with the procurement entity. In the other exceptional circumstances, negotation with a single supplier is still possible, though the conditions are tightened up.

- Procurement authorities are deterred from discriminating against foreign suppliers in restricted, negotiated and single tender procedures by being required to produce a written report justifying use of the procedure and giving details of the outcome.

- The transparency and competitiveness of procurement decisions is enhanced by inter alia:

- introduction of advance advertising of authorities' annual procurement programmes and their timetable,

- the obligations to publish a notice giving details of the outcome of the procurement decision.

- The chances of suppliers who face extra difficulties because of distance are improved by a lengthening of the minimum time limits procurement authorities must allow for the submission of bids or applications to bid. These longer time limits will also apply to procurement covered by Directive 80/767/EEC.

- The rules on technical specifications have been brought into line with the new policy on standards.

The proposal to amend the 'Works' Directive required a more extensive revision of the Directive because of several complicating factors.

For this reason only the main proposed innovations are listed here:

- The present single value threshold from which contracts become subject to all the rules of the Directive is replaced by two thresholds. Contracts exceeding the higher threshold (which is higher than the present one) are subject to all the rules of the Directive including EC-wide advertising. Those above the lower threshold (lower than the present one) do not need to be advertised throughout the EC but are otherwise subject to the rules.

A two-part threshold had become necessary for two reasons:

(a) The cost of construction works has increased since the Directive was issued and contractors, except those close to the border, are only interested in work in other Member States if the contract is big enough to make the logistics of the operation economic.

(b) On the other hand, firms in other Member States, especially small to medium-sized ones, may be interested in the smaller contracts, so their interests need to be safeguarded. The legal guarantees provided by the present Directive in relation to the smaller contracts are therefore maintained and even extended, but Community-wide advertising has been dropped as unneccessary because these firms have traditionally found out about such contracts through other channels.

- The scope of the Directive is extended by:

(a) a wider definition of the entities awarding contracts that are subject to the Directive;

(b) inclusion of contracts awarded by entities not coming within the definition but financed from public funds;

(c) a restriction of the exemption for the water, energy and transport sectors to works requiring specialist contractors for technical reasons specific to the sector;

(d) the same restriction of the exceptional circumstances in which the competitive tendering rules are waived as in the 'Supplies' Directive.

- The rules for restricted tenders are tightened up to counter abuses involving the use of a numerus clausus. Entities awarding contracts are obliged to invite tenders from a certain number of contractors within a prescribed range (e.g. between five and eight), to state this range in the tender notice and to select domestic and foreign contractors to bid in proportion to the number of domestic and foreign firms replying to the tender notice.

- It is made easier for contractors to bid for contracts by:

(a) introduction of advance advertising of construction projects to be put out to tender;

(b) a lengthening of the minimum time limits authorities must allow for bids and applications to bid and a doubling of most of the extended time limits if the authority has not advertised the project in advance.

- Entities awarding contracts are required to ask bidders to state what proportion of the work

will be subcontracted, in order to increase transparency about the division of the work between principal contractors and small to medium-sized firms.

- The transparency of tendering and award procedures is enhanced by provisions requiring authorities to:

(a) explain why they have rejected a contractor's bid or application if the contractor asks them to;

(b) make a report on each award decision and supply it to the Commission on request;

(c) publish a notice on the outcome of each award decision.

- The rules on technical specifications have been brought into line with developments in European and international standardization practice.

In July 1987 the Commission also sent the Council a proposal for a Directive to improve the means of redress available to firms injured by breaches of the Community rules on open public procurement and construction contracting.

The rationale of the proposal are the facts:

(a) that violations of Community rules occur before a contract is awarded and that as the periods involved in the award process are very short, machinery must be made available to deal with violations promptly while their effects are still reversible;

(b) that the means of redress available vary in different Member States, leading to different standards of protection of injured parties;

(c) that the sanctions the Commission can impose for breaches of the public procurement and works Directives do not take effect immediately and in most cases would come too late to provide suitable relief.

The proposed Directive would therefore provide machinery for stricter control of public procurement and contract award decisions both nationally and by the Commission.

The proposals are that:

- in all Member States suppliers and contractors be provided with effective means of relief through administrative channels and/or the courts against illegal behaviour by procurement or contracting authorities at all stages of the award process and be able to obtain damages for injury resulting from such breaches.

For this purpose the administrative bodies and/or the courts would have to have the power to order award proceedings or execution of an award decision already taken to be suspended;

- the Commission should be able to intervene in national administrative or court proceedings to assert the Community interest and enforce compliance with the Community rules immediately;

- acting on a complaint or on its own initiative, the Commission should be able in urgent cases and where a clear infringement has been committed to order a procurement or contracting authority to suspend award proceedings for a limited period in order to prevent irreparable injury.

ANNEX II TABLES I TO XI

TABLE I

LIST OF LEGAL PERSONS GOVERNED BY PUBLIC LAW AND BODIES CORRESPONDING THERETO REFERRED TO IN DIRECTIVE 77/62/EEC

IIVI. In all Member States:

associations governed by public law or bodies corresponding thereto formed by regional or local authorities, e.g. 'associations de communes', 'syndicats de communes', 'Gemeindeverbaende', etc.

IVII. In Germany:

the 'bundesunmittelbaren Koerperschaften, Anstalten und Stiftungen des oeffentlichen Rechts'; the 'landesunmittelbaren Koerperschaften, Anstalten und Stiftungen des oeffentlichen Rechts' subject to State budgetary supervision.

VIII. In Belgium:

- 'le Fonds des Routes 1955-1969' - 'het Wegenfonds',

- 'la Régie des Voies Aériennes' - 'de Regie der luchtwegen',

- public social assistance centres,

- church councils,

- 'l'Office Régulateur de la Navigation Intérieure' - 'de Dienst voor regeling van den binnenvaart',

- 'la Régie des services frigorifiques de l'Etat belge' - 'de Regie der Belgische Rijkskoel- en Vriesdiensten'.

IIIV. In Denmark:

'andre forvaltningssubjekter'.

IIIV. In France:

- administrative public bodies at national, regional, departmental and local levels,

- universities, public scientific and cultural bodies and other establishments as defined by the Law setting out guidelines for Higher Education N° 68-978 of 12 November 1968

IIVI. In Ireland:

other public authorities whose public supply contracts are subject to control by the State.

IVII. In Italy:

- State universities, State university institutes, consortia for university development works,

- higher scientific and cultural institutes, astronomical, astrophysical, geophysical or vulcanological observatories,

- the 'Enti di riforma fondiaria',

- welfare and benevolent institutes of all kinds.

VIII. In Luxembourg:

public bodies subject to control by the Government, by an association of municipal corporations or by a municipal corporation.

IIIX. In the Netherlands:

- the 'Waterschappen',

- the 'instellingen van wetenschappelijk onderwijs vermeld in Article 15 van de Wet op het Wetenschappelijk Onderwijs (1960)', the 'academische ziekenhuizen'.

- the 'Nederlandse Centrale Organisatie voor toegepast natuurwetenschappelijk Onderzoek (TNO)',

and its dependent organizations.

IIIX. In the United Kingdom:

- Education Authorities,
- Fire Authorities,
- National Health Service Authorities,
- Police Authorities,
- Commission for the New Towns,
- New Towns Corporations,
- Scottish Special Housing Association,
- Northern Ireland Housing Executive.

IIXI. In Greece:

other legal persons governed by public law whose public supply contracts are subject to State control.

IXII. In Spain:

other legal persons subject to public rules for the award of contracts.

XIII. In Portugal:

legal persons governed by public law whose public supply contracts are subject to State control.

TABLE II LIST OF ENTITIES TREATED AS CONTRACTING AUTHORITIES FOR THE PURPOSES OF DIRECTIVE 80/767/EEC AT THE TIME OF ADOPTION OF THIS DIRECTIVE

Belgium

I. MINISTERIAL DEPARTMENTS

1. Services du premier ministre

Diensten van de Eerste Minister

2. Ministère des affaires économiques

Ministerie van Economische Zaken

3. Ministère des affaires étrangères, du commerce extérieur et de la coopération au développement

Ministerie van Buitenlandse Zaken, van Buitenlandse Handel en van Ontwikkelingssamenwerking

4. Ministère de l'agriculture

Ministerie van Landbouw

5. Ministère des classes moyennes

Ministerie van de Middenstand

6. Ministère des communications

Ministerie van Verkeerswezen

7. Ministère de la défense nationale

Ministerie van Landsverdediging

8. Ministère de l'éducation nationale et de la culture

Ministerie van Nationale Opvoeding en Cultuur

9. Ministère de l'emploi et du travail

Ministerie van Tewerkstelling en Arbeid

10. Ministère des finances

Ministerie van Financien

11. Ministère de l'intérieur

Ministerie van Binnenlandse Zaken

12. Ministère de la justice

Ministerie van Justitie

13. Ministère de la prévoyance sociale

Ministerie van Sociale Voorzorg

14. Ministère de la santé publique et de l'environnement

Ministerie van Volksgezondheid en Leefmilieu

15. Ministère des travaux publics

- Fonds des routes

- Fonds des bâtiments

Ministerie van Openbare Werken

- Wegenfonds

- Gebouwenfonds

16. Régie des postes (1)

Regie der Posterijen (1)

II. LIST OF MINISTRIES AND STATE DEPARTMENTS WHOSE PURCHASING IS EFFECTED THROUGH THE ENTITIES LISTED AT I

Premier ministre

Eerste Minister

Vice-premier ministre et ministre de la fonction publique

Vice-Eerste Minister en Minister van Openbaar Ambt

Vice-premier ministre et ministre de la défense nationale

Vice-Eerste Minister en Minister van Landsverdediging

Ministre de la justice

Minister van Justitie

Ministre des affaires étrangères

Minister van Buitenlandse Zaken

Ministre des affaires économiques

Minister van Economische Zaken

Ministre de la prévoyance sociale et secrétaire d'Etat aux affaires sociales, adjoint au ministre des affaires wallonnes

Minister van Sociale Voorzorg en Staatssecretaris voor Sociale Zaken, toegevoegd aan de Minister voor Waalse Aangelegenheden

Ministre des communications

Minister van Verkeerswezen

Ministre de l'éducation nationale (néerlandaise)

Minister van Nationale Opvoeding (Nederlands)

Ministre de l'agriculture et des classes moyennes

Minister van Landbouw en Middenstand

Ministre de la culture néerlandaise et ministre des affaires flamandes

Minister van de Nederlandse Cultuur en Minister voor Vlaamse Aangelegenheden

Ministre de l'éducation nationale (française)

Minister van Nationale Opvoeding (Frans)

(1) Postal business only.

Ministre de la santé publique et de l'environnement

Minister van Volksgezondheid en Leefmilieu

Ministre des finances

Minister van Financien

Ministre du commerce extérieur

Minister van Buitenlandse Handel

Ministre de la coopération au développement

Minister van Ontwikkelingssamenwerking

Ministre des postes, télégraphes et téléphones et ministre des affaires bruxelloises (1)

Minister van Posterijen, Telegrafie en Telefonie en Minister voor Brusselse Aangelegenheden (1)

Ministre des pensions

Minister van Pensioenen

Ministre de l'emploi et du travail

Minister van Tewerkstelling en Arbeid

Ministre de l'intérieur

Minister van Binnenlandse Zaken

Ministre de la politique scientifique

Minister van Wetenschapsbeleid

Ministre de la culture française

Minister van Franse Cultuur

Ministre des travaux publics et ministre des affaires wallonnes

Minister van Openbare Werken en Minister voor Waalse Aangelegenheden

Secrétaire d'Etat à l'économie régionale, adjoint au ministre des affaires wallonnes

Staatssecretaris voor de regionale economie, toegevoegd aan de Minister voor Waalse Angelegenheden

Secrétaire d'Etat au budget, adjoint au premier ministre, et secrétaire d'Etat à l'économie régionale, adjoint au ministre des affaires flamandes

Staatssecretaris voor de begroting, toegevoegd aan de Eerste Minister en Staatssecretaris voor de Regionale Economie, toegevoegd aan de Minister voor Vlaamse Aangelegenheden

Secrétaire d'Etat à la réforme des institutions, adjoint au premier ministre

Staatssecretaris voor Institutionele Hervormingen, toegevoegd aan de Erste Minister

Secrétaire d'Etat à la culture française, adjoint au ministre de la culture française

Staatssecretaris voor Franse Cultuur, toegevoegd aan de Minister voor Franse Cultuur

Secrétaire d'Etat aux affaires économiques, adjoint au ministre des affaires économiques, et

Staatssecretaris voor Economische Zaken, toegevoegd aan de Minister voor Economische Zaken en

secrétaire d'Etat aux affaires sociales, adjoint au ministre des affaires flamandes

Staatssecretaris voor Sociale Zaken, toegevoegd aan de Minister voor Vlaamse Aangelegenheden

Secrétaire d'Etat à la réforme des institutions, adjoint au vice-premier ministre

Staatssecretaris voor Institutionele Hervormingen, toegevoegd aan de Vice-Eerste Minister

Secrétaire d'Etat à la culture néerlandaise, adjoint au ministre de la culture néerlandaise, et

Staatssecretaris voor Nederlandse Cultuur, toegevoegd aan de Minister voor Nederlandse Cultuur en

secrétaire d'Etat aux affaires sociales, adjoint au ministre des affaires bruxelloises

Staatssecretaris voor Sociale Zaken, toegevoegd aan de Minister voor Brusselse Aangelegenheden

III. GOVERNMENT INSTITUTIONS

1. Régie des services frigorifiques de l'Etat belge

Regie der Belgische Rijkskoel- en Vriesdiensten

2. Fonds général des bâtiments scolaires de l'Etat

Gebouwenfonds voor de Rijksscholen

3. Fonds de construction d'institutions hospitalières et médico-

sociales

Fonds voor de bouw van ziekenhuizen en medisch-sociale inrichtingen

4. Institut national du logement

Nationaal Instituut voor de huisvesting

5. Société nationale terrienne

Nationale landmaatschappij

6. Office national de sécurité sociale

Rijksdienst voor sociale zekerheid

7. Institut national d'assurances sociales pour travailleurs indépendants

Rijksinstituut voor de sociale verzekeringen der zelfstandigen

8. Institut national d'assurance maladie-invalidité

Rijksinstitut voor ziekte- en invaliditeitsverzekering

9. Caisse nationale des pensions de retraite et de survie

Rijkskas voor de rust- en overlevingspensioenen

(1) Postal business only.

10. Office national des pensions pour travailleurs salariés

Rijksdienst voor werknemerspensioenen

11. Caisse auxiliaire d'assurance maladie-invalidité

Hulpkas voor ziekte- en invaliditeitsverzekering

12. Fonds des maladies professionelles

Fonds voor de beroepsziekten

13. Caisse nationale de crédit professionnel

Nationale Kas voor beroepskrediet

14. Caisse générale d'épargne et de retraite

Algemene Spaar- en lijfrentekas

15. Office national des débouchés agricoles et horticoles

Nationale Dienst voor afzet van land- en tuinbouwprodukten

16. Office national du lait et de ses dérivés

Nationale Zuiveldienst

17. Office national de l'emploi

Rijksdienst voor arbeidsvoorziening

Denmark

DANISH GOVERNMENT PROCUREMENT ENTITIES

1. Statsministeriet

2. Arbejdsministeriet

- fire direktorater og institutioner

3. Udenrigsministeriet

- to departementer

4. Boligministeriet
- ét direktorat
5. Finansministeriet
(tre departementer)
- Direktoratet for statens indkoeb
- tre andre institutioner
6. Ministeriet for skatter og afgifter
(to departementer)
- frem direktorater og institutioner
7. Fiskeriministeriet
- fire institutioner
8. Handels- og industriministeriet
- Forsoegsstationen Risoe
- 20 direktorater og institutioner
9. Indenrigsministeriet
- Statens Seruminstitut
- Civilforsvarsstyrelsen
- tre andre direktorater og institutioner
10. Justitsministeriet
- Rigspolitichefen
- tre andre direktorater og institutioner
11. Kirkeministeriet
12. Landbrugsministeriet
- 19 direktorater og institutioner
13. Ministeriet for forureningsbekaempelse
- fem direktorater
14. Ministeriet for Groenland
- Den kgl. groenlandske Handel (1)
- Groenlands tekniske Organisation
- to andre institutioner
15. Ministeriet for kulturelle anliggender
- to direktorater og adskillige statsejede museer og hoejere uddannelsesinstitutioner
16. Socialministeriet
- fem direktorater

17. Undervisnigsministeriet

- Rigshospitalet

- seks direktorater

- 11 universiteter og andre hoejere laereanstalter

18. OEkonomiministeriet

(3 departementer)

19. Ministeriet for offentlige arbejder (2)

- Statshavne og statslufthavne

- fire direktorater og adskillige institutioner

20. Forsvarsministeriet

(1) Products for resale or for use in the production of goods for sale are not included.

(2) With the exception of Danish State Railways. Ministry of Posts and Telecommunications, postal business only.

France

LIST OF ENTITIES

(1) Main purchasing entities

A. General budget

Premier ministre

Ministre délégué auprès du premier ministre, chargé de la condition féminine

Ministre de la justice

Ministre de la santé et de la famille

Ministre de l'intérieur

Ministre des affaires étrangères

Ministre de la défense

Ministre du travail et de la participation

Ministre de la coopération

Ministre de l'économie

Ministre du budget

Ministre de l'environnement et du cadre de vie

Ministre de l'éducation

Ministre des universités

Ministre de l'agriculture

Ministre de l'industrie

Ministre des transport

Ministre du commerce et de l'artisanat

Ministre du commerce extérieur

Ministre de la jeunesse, des sports et des loisirs

Ministre de la culture et de la communication

Secrétaire d'Etat aux postes et télécommunications (;)

Secrétaire d'Etat aux anciens combattants

Secrétaire d'Etat auprès du premier ministre

Secrétaire d'Etat auprès du premier ministre (relations avec de Parlement)

Secrétaire d'Etat auprès du premier ministre (recherche)

Secrétaire d'Etat auprès du garde des Sceaux, ministre de la justice

Secrétaire d'Etat auprès du ministre de la santé et de la famille

Secrétaire d'Etat auprès du ministre de l'intérieur (départements et territoires d'outre-mer)

Secrétaire d'Etat auprès du ministre de l'intérieur (collectivités locales)

Secrétaire d'Etat auprès du ministre des affaires étrangères

Secrétaire d'Etat auprès du ministre du travail et de la participation (formation professionnelle)

Secrétaire d'Etat auprès du ministre du travail et de la participation (travailleurs manuels et immigrés)

Secrétaire d'Etat du ministre du travail et de la participation (emploi féminin)

(1) Postal business only.

Secrétaire d'Etat auprès du ministre de l'environnement et du cadre de vie (logement)

Secrétaire d'Etat auprès du ministre de l'environnement et du cadre de vie (environnement)

Secrétaire d'Etat auprès du ministre de l'éducation

Secrétaire d'Etat auprès du ministre de l'agriculture

Secrétaire d'Etat auprès du ministre de l'industrie (petite et moyenne industrie)

B. Budget Annex

In particular:

- Imprimerie nationale

C. Special Treasury accounts

In particular:

- Fonds forestier national
- Soutien financier de l'industrie cinématographique
- Fonds spécial d'investissement routier
- Fonds national d'aménagement foncier et d'urbanisme
- Union des groupements d'achats publics (UGAP)

(2) National administrative public bodies

Académie de France à Rome

Académie de marine

Académie des sciences d'outre-mer

Agence centrale des organismes de sécurité sociale (ACOSS)

Agences financières de bassins

Agence nationale pour l'amélioration des conditions de travail (ANACT)

Agence nationale pour l'amélioration de l'habitat (ANAH)

Agence nationale pour l'emploi (ANPE)

Agence nationale pour l'indemnisation des Français d'outre-mer (ANIFOM)

Assemblée permanente des chambres d'agriculture (APCA)

Bibliothèque nationale

Bibliothèque nationale et universitaire de Strasbourg

Bureau d'études des postes et télécommunications d'outre-mer (BEPTOM)

Caisse d'aide à l'équipement des collectivités locales (CAEC)

Caisse autonome de la reconstruction

Caisse des dépôts et consignations

Caisse nationale des allocations familiales (CNAF)

Caisse nationale des autoroutes (CNA)

Caisse nationale d'assurance-maladie des travailleurs salariés (CNAM)

Caisse nationale d'assurance-vieillesse des travailleurs salariés (CNAVTS)

Caisse nationale militaire de sécurité sociale (CNMSS)

Caisse nationale des monuments historiques et des sites

Caisse nationale des télécommunications (;)

Caisse du prèts aux organismes HLM

Casa de Velasquez

(1) Postal business only.

Centre d'enseignement zootechnique de Rambouillet

Centre d'études du milieu et de pédagogie appliquée du ministère de l'agriculture

Centre d'études supérieurs de sécurité sociale

Centres de formation professionnelle agricole

Centre national d'art et de culture Georges Pompidou

Centre national de la cinématographie française

Centre national d'études et de formation pour l'enfance inadaptée

Centre national d'études et d'experimentation du machinisme agricole

Centre national d'études et de formation pour l'adaptation scolaire et l'éducation spécialisée (CNEFASES)

Centre national de formation et de perfectionnement des professeurs d'enseignement ménager et ménager agricole

Centre national des lettres

Centre national de documentation pédagogique

Centre national des oeuvres universitaires et scolaires (CNOUS)

Centre national d'ophtalmologie des Quinze-Vingts

Centre national de préparation au professorat de travaux manuels éducatifs et d'enseignement ménager

Centre national de la promotion rurale de Marmilhat

Centre national de la recherche scientifique (CNRS)

Centres pédagogiques régionaux

Centres régionaux d'éducation populaire

Centres régionaux d'éducation physique et sportive (CREPS)

Centres régionaux des oeuvres universitaires (CROUS)

Centres régionaux de la propriété forestière

Centre de sécurité sociale des travailleurs migrants

Centres universitaires

Chancelleries des universités

Collèges

Collèges agricoles

Commission des operations de Bourse

Conseil supérieur de la pêche

Conservatoire de l'espace littoral et des rivages lacustres

Conservatoire national des arts et métiers

Conservatoire national supérieur de musique

Conservatoire national supérieur d'art dramatique

Domaine de Pompadour

Ecole centrale - Lyon

Ecole centrale des arts et manufactures

Ecole française d'archéologie d'Athènes

Ecole française d'Extrême-Orient

Ecole française de Rome

Ecole des hautes études en sciences sociales

Ecole nationale d'administration

Ecole nationale de l'aviation civile (ENAC)

Ecole nationale des Chartes

Ecole nationale d'équitation
Ecole nationale féminine d'agronomie de Marmilhat (Puy-de-Dôme)
Ecole nationale féminine d'agronomie de Toulouse (Hte-Garonne)
Ecole nationale du génie rural et des eaux et forêts (ENGREF)
Ecoles nationales de l'industrie laitière
Ecoles nationales d'ingénieurs
Ecole nationale d'ingénieurs des industries des techniques agricoles et alimentaires
Ecoles nationales d'ingénieurs des travaux agricoles
Ecole nationale des ingénieurs des travaux ruraux et techniques sanitaires
Ecole nationale des ingénieurs des travaux des eaux et forêts (ENITEF)
Ecole nationale de la magistrature
Ecoles nationales de la marine marchande
Ecole nationale de la santé publique (ENSP)
Ecole nationale de ski et d'alpinisme
Ecole nationale supérieure agronomique - Montpellier
Ecole nationale supérieure agronomique - Rennes
Ecole nationale supérieure des arts décoratifs
Ecole nationale supérieure des arts et industries - Strasbourg
Ecole nationale supérieure des arts et industries textiles - Roubaix
Ecole nationale supérieure d'arts et métiers
Ecole nationale supérieure des beaux-arts
Ecole nationale supérieur des bibliothécaires
Ecole nationale supérieure de céramique industrielle - Sèvres
Ecole nationale supérieure de l'électronique et de ses applications (ENSEA)
Ecole nationale supérieure d'horticulture
Ecole nationale supérieure des industries agricoles alimentaires
Ecole nationale supérieure du paysage
Ecole nationale supérieure des sciences agronomiques appliquées (ENSSAA)
Ecoles nationales veterinaires
Ecoles nationales de perfectionnement
Ecoles nationales de premier degré
Ecole nationale de voirie
Ecoles normales d'instituteurs et d'institutrices
Ecoles normales nationales d'apprentissage

Ecole normales supérieures
Ecole polytechnique
Ecole de sylviculture - Crogny (Aube)
Ecole technique professionnelle agricole et forestière de Meymac (Corrèze)
Ecole de viticulture et d'oenologie de la Tour Blanche (Gironde)
Ecole de viticulture - Avize (Marne)
Etablissement national de convalescentes du Vésinet (ENCV)
Etablissement national de convalescents de Saint-Maurice
Etablissement national des invalides de la marine (ENIM)
Etablissement national de Koenigs Warter
Fondation Carnegie
Fondation Singer-Polignac
Fonds d'action sociale pour les travailleurs migrants
Hôpital-hospice national Dufresne-Sommeiller
Institut d'élevage et de médicine vétérinaires des pays tropicaux (IEMVPT)
Institut français d'archéologie orientale du Caire
Institut géographique national
Institut industriel du Nord
Institut international d'administration publique (IIAP)
Institut national agronomique de Paris-Grignon
Institut national des appellations d'origine des vins et eaux-de-vie (INAOVEV)
Institut national d'astronomie et de géophysique (INAG)
Institut national de la consommation (INC)
Institut national d'éducation populaire (INEP)
Institut national d'études démographiques (INED)
Institut national des jeunes aveugles - Paris
Institut national des jeunes sourdes - Bordeaux
Institut national des jeunes sourds - Chambéry
Institut national des jeunes sourds - Metz
Institut national des jeunes sourds - Paris
Institut national de physique nucléaire et de physique des particules (I.N2.P3)
Institut national de promotion supérieur agricole
Institut national de la propriété industrielle
Institut national de la recherche agronomique (INRA)

Institut national de recherche pédagogique (INRP)
Institut national de la santé et de la recherche médicale (INSERM)
Institut national des sports
Instituts nationaux polytechniques
Instituts nationaux des sciences appliquées
Institut national supérieur de chimie industrielle de Rouen
Institut de recherches d'informatique et d'automatique (IRIA)
Institut de recherche des transports (IRT)
Instituts régionaux d'administration
Institut scientifique et technique des pêches maritimes (ISTPM)
Institut supérieur des matériaux et de la construction mécanique de Saint-Ouen
Lycées agricoles
Lycées classiques et modernes
Lycées d'enseignement professionnel
Lycées techniques
Musée de l'armée
Musée Gustave Moreau
Musée de la marine
Musée national J. J. Henner
Musée national de la légion d'honneur
Musée postal
Muséum national d'histoire naturelle
Musée Auguste Rodin
Observatoire de Paris
Office de coopération et d'accueil universitaire
Office français de protection des réfugiés et rapariés
Office national des anciens combattants
Office national de la chasse
Office national d'information sur les enseignements et les professions (ONISEP)
Office national d'immigration (ONI)
Office de la recherche scientifique et technique d'outre-mer (ORSTOM)
Office universitaire et culturel français pour l'Algérie
Palais de la découverte
Parcs nationaux

Réunion des musées nationaux

Service national des examens du permis de conduire

Syndicat des transport parisiens

Thermes nationaux - Aix-les-Bains

Universités

Federal Republic of Germany

LIST OF CENTRAL PURCHASING ENTITIES

1. Auswaertiges Amt
2. Bundesministerium fuer Arbeit und Sozialordnung
3. Bundesministerium fuer Bildung und Wissenschaft
4. Bundesministerium fuer Ernaehrung, Landwirtschaft und Forsten
5. Bundesministerium der Finanzen
6. Bundesministerium fuer Forschung und Technologie
7. Bundesministerium fuer Innerdeutsche Beziehungen
8. Bundesministerium des Inneren (nur Zivilgueter)
9. Bundesministerium fuer Jugend, Familie und Gesundheit
10. Bundesministerium der Justiz
11. Bundesministerium fuer Raumordnung, Bauwesen und Staedtebau
12. Bundesministerium fuer das Post- und Fernmeldewesen (;)

(1) Postal business only.

13. Bundesministerium fuer Wirtschaft
14. Bundesministerium fuer wirtschaftliche Zusammenarbeit
15. Bundesministerium der Verteidigung

Note

According to existing national obligations, the entities contained in this list shall, in conformity with special procedures, award contracts in certain regions which, as a consequence of the division of Germany, are confronted with economic disadvantages.

The same applies to the awarding of contracts to remove the difficulties of certain groups caused by the last war.

Ireland

1. MAIN PURCHASING ENTITIES

(a) Office of Public Works

(b) Stationery Office

2. OTHER DEPARTMENTS

President's Establishment

Office of the Houses of the Oireachtas (Parliament)
Department of the Taoiseach (Prime Minister)
General Statistics Office
Department of Finance
Office of the Comptroller and Auditor-General
Office of the Revenue Commissioners
State Laboratory
Office of the Attorney-General
Office of the Director of Public Prosecutions
Valuation Office
Ordnance Survey
Department of the Public Service
Civil Service Commission
Department of Economic Planning and Development
Department of Justice
Land Registry
Charitable Donations and Bequests Office
Department of the Environment
Department of Education
National Gallery of Ireland
Department of the Gaeltacht (Irish-speaking areas)
Department of Agriculture
Department of Fisheries and Forestry
Department of Labour
Department of Industry, Commerce and Energy
Department of Tourism and Transport
Department of Foreign Affairs
Department of Social Welfare
Department of Health
Department of Defence
Department of Posts and Telegraphs (;)
Italy
PURCHASING ENTITIES
1. Ministero del tesoro ($)

2. Ministero delle finanze (=)
3. Ministero di grazia e giustizia
4. Ministero degli affari esteri
5. Ministero della pubblica istruzione
6. Ministero dell'interno
7. Ministero dei lavori pubblici
8. Ministero dell'agricoltura e delle foreste
9. Ministero dell'industria, del commercio e dell'artigianato
10. Ministero del lavoro e della previdenza sociale
11. Ministero della sanità
12. Ministero per i beni culturali e ambientali
13. Ministero della difesa
14. Ministero del bilancio e della programmazione economica
15. Ministero delle partecipazioni statali
16. Ministero del turismo e dello spettacolo
17. Ministero del commercio con l'estero
18. Ministero delle poste e delle telecommunicazioni (;)

Luxembourg

LIST OF CENTRAL PURCHASING ENTITIES FALLING WITHIN THE SCOPE OF THE DIRECTIVE

1. Ministère d'Etat: service central des imprimés et des fournitures de l'Etat
2. Ministère de l'agriculture: administration des services techniques de l'agriculture
3. Ministère de l'éducation nationale: écoles d'enseignement secondaire, d'enseignement moyen, d'enseignement professionnel

(1) Postal business only.

($) Acting as the general purchasing entity for most of the other Ministries or entities.

(=) Not including purchases made by the tobacco and salt monopolies.

4. Ministère de la famille et de la solidarite sociale: maisons de retraite
5. Ministère de la force publique: armée - gendarmerie - police
6. Ministère de la justice: établissements pénitentiaires
7. Ministère de la santé publique: Mondorf-Etat, hôpital neuropsychiatrique
8. Ministère des travaux publics: bâtiments publies - ponts et chaussées
9. Ministère des finances: postes et télécommunications (;)
10. Ministère des transports et de l'énergie: centrales électriques de la haute et basse Sûre
11. Ministère de l'environnement: commissariat général à la protection des eaux

Netherlands

LIST OF ENTITIES

A. Ministries and central governmental bodies

1. Ministerie van Algemene Zaken
2. Ministerie van Buitenlandse Zaken
3. Ministerie van Justitie
4. Ministerie van Binnenlandse Zaken
5. Ministerie van Defensie
6. Ministerie van Financien
7. Ministerie van Economische Zaken
8. Ministerie van Onderwijs en Wetenschap
9. Ministerie van Volkshuisvesting en Ruimtelijke Ordening
10. Ministerie van Verkeer en Waterstaat (;), met inbegrip van post, telefoon en telegrafie
11. Ministerie van Landbouw en Visserij
12. Ministerie van Sociale Zaken
13. Ministerie van Cultuur, Recratie en Maatschappelijk Werk
14. Ministerie van Volksgezondheid en Milieuhygiene
15. Ministerie van Ontwikkelingssamenwerking
16. Ministerie van Wetenschapsbeleid
17. Kabinet van Nederlandse-Antilliaanse Zaken
18. Hoge Colleges van Staat

B. Central procurement offices

Entities listed above in A generally make their own specific purchases; other general purchases are effected through the entities listed below:

1. Rijksinkoopbureau
2. Directoraat-generaal voor de Waterstaat
3. Dienst van de Kwartiermeester-generaal
4. Directie Materieel Koninklijke Luchtmacht
5. Hoofd afdeling Materieel Koninklijke Marine

(1) Postal business only.

6. Staatsdrukkerij en Uitgeverijbedrijf
7. Staatsbedrijf der Posterijen, Telegrafie en Telefonie, Centrale Afdeling Inkoop en Materieel controle (;)
8. Rijksautomobielcentrale
9. Rijkskantoormachinecentrale
10. Staatsbosbeheer

11. Rijksdienst Ijsselmeerpolders

United Kingdom

LIST OF ENTITIES

Board of Inland Revenue

British Museum

British Museum (Natural History)

Cabinet Office

Central Office of Information

Charity Commission

Civil Service Department

Ancient Monuments (Scotland) Commission

Ancient Monuments (Wales) Commission

Boundary Commission for England and Wales

Boundary Commission for Northern Ireland

Central Computer Agency

Chessington Computer Centre

Civil Service Catering Organization

Civil Service College

Civil Service Commission

Civil Service Pay Research Unit

Historical Manuscripts Commission

Historical Monuments (England) Commission

Medical Advisory Service

Museum and Galleries Standing Commission

Office of the Parliamentary Counsel

Review Board for Government Contracts

Royal Commission on Criminal Procedure

Royal Commission on Environmental Pollution

Royal Commission on Gambling

Royal Commission on Legal Services (England, Wales and Northern Ireland)

Royal Commission on Legal Services (Scotland)

Royal Fine Art Commission (England)

Royal Fine Art Commission (Scotland)

(1) Postal business only.

Crown Estate Office (Vote-borne, services only)
Crown Office, Scotland
Customs and Excise Department
Department for National Savings
Department of Agriculture and Fisheries for Scotland
Artifical Insemination Service
Crofters Commission
Red Deer Commission
Royal Botanic Garden, Edinburgh etc.
Department of Education and Science
University Grants Committee
Department of Employment
Duchess of Gloucester House
Employment Appeal Tribunal
Industrial Tribunals
Office of Manpower Economics
Royal Commission on the Distribution of Income and Wealth
Department of Energy
Department of Health and Social Security
Attendance Allowance Board
Central Council for Education and Training in Social Work
Council for the Education and Training of Health Visitors
Dental Estimates Board
Joint Board of Clinical Nursing Studies
Medical and Dental Referee Service
Medical Boards and Examining Medical Officers (War Pensions)
National Health Service
National Health Service Authorities
National Insurance Commissioners
Occupational Pensions Board
Prescription Pricing Authority
Public Health Laboratory Service Board
Supplementary Benefits Appeal Tribunals
Supplementary Benefits Commission

Department of Industry
Computer-Aided Design Centre
Laboratory of the Government Chemist
National Engineering Laboratory
National Maritime Institute
National Physical Laboratory
Warren Spring Laboratory
Department of Prices and Consumer Protection
Domestic Coal Consumers' Council
Electricity Consultative Councils for England and Wales
Gas Consumers' Councils
Metrication Board
Monopolies and Mergers Commission
Department of the Environment
British Urban Development Services Unit
Building Research Establishment
Commons Commissioners - (except payment of rates)
Countryside Commission
Directorate of Estate Management Overseas
Fire Research Station/Boreham Wood
Hydraulics Research Station
Local Valuation Panels
Location of Offices Bureau
Property Services Agency
Rent Control Tribunals and Rent Assessment Panels and Committees
Department of the Government Actuary
Department of the Registers of Scotland
Department of Trade
Coastguard Services
British Export Marketing Centre, Tokyo
Market Entry Guarantee Scheme
Patent Office
Department of Transport
Road Construction Units and Sub-Units

Transport and Road Research Laboratory
Transport Tribunal - (except payment of rates)
Transport Users Consultative Committees - (except payment of rates)
Director of Public Prosecutions
Exchequer and Audit Department
Exchequer Office Scotland
Export Credits Guarantee Department
Foreign and Commonwealth Office
Government Communications Headquarters
Middle East Centre for Arab Studies
Wiston House Conference and European Discussion Centre
Home Office
Gaming Board for Great Britain
Immigration Appeals Tribunal
Inspectors of Constabulary
Parole Board and Local Review Committees
House of Commons
House of Lords
Imperial War Museum
Intervention Board for Agricultural Produce
Legal Aid Funds
Lord Chancellor's Department
Council on Tribunals
County Courts
Courts Martial Appeal Court
Crown Courts
Judge Advocate-General and Judge Advocate of the Fleet
Lands Tribunal
Law Commission
Pensions Appeal Tribunals
Supreme Court
Ministry of Agriculture, Fisheries and Food
Advisory Services
Agricultural Development and Advisory Service

Agricultural Dwelling House Advisory Committees
Agricultural Land Tribunals
Agricultural Wages Board and Committees
Artificial Insemination Research Centres
Central Council for Agricultural and Horticultural Cooperation
Plant Pathology Laboratory
Plant Variety Rights Office
Royal Botanic Gardens, Kew
Ministry of Defence
Procurement Executive
Meteorological Office
Ministry of Overseas Development
Centre of Overseas Pest Research
Directorate of Overseas Surveys
Land Resources Division
Tropical Products Institute
National Debt Office and Pensions Commutation Board
National Gallery
National Galleries of Scotland
National Library of Scotland
National Maritime Museum
National Museum of Antiquities of Scotland
National Portrait Gallery
Northern Ireland Government Departments and Public Authorities
Department of the Civil Service
Department of Agriculture
Department of Commerce
Department of Education
Department of the Environment
Department of Finance
Department of Health and Social Services
Department of Manpower Services
Nothern Ireland Police Authority
Northern Ireland Office

Coroners Courts
County Courts
Crown Solicitor's Office
Department of the Director of Public Prosecutions
Enforcement of Judgements Office
Forensic Science Service
Magistrates Courts
Pensions Appeal Tribunals
Probation Service
Registration of Electors and Conduct of Elections
State Pathologist Service
Supreme Court of Judicature and Court of Criminal Appeal of Northern Ireland
Office of Fair Trading
Office of Population Censuses and Surveys
National Health Service Central Register
Office of the Parliamentary Commissioner for Administration and
Health Service Commissioners
Paymaster General's Office
Postal Business of the Post Office
Privy Council Office
Public Record Office
Public Trustee Office
Public Works Loan Commission
Queen's and Lord Treasurer's Remembrancer
Crown Office
Department of Procurators Fiscal
Lords Advocate's Department
Lands Tribunal
Registrar-General's Office, Scotland
National Health Service Central Register
Registry of Friendly Societies
Royal Commission, etc. (see references under Civil Service Department)
Commission on the Constitution
Royal Commission on the National Health Service

Royal Commission on Gambling
Royal Hospital, Chelsea
Royal Mint
Royal Scottish Museum
Science Museum
Scottish Courts Administration
Court of Session
Court of Justiciary
Accountant of Court's Office
Sheriff Courts
Scottish Land Court
Scottish Law Commission
Pensions Appeal Tribunals
Scottish Development Department
Local Government Reorganization Commissions etc.
Rent Assessment Panel and Committees, etc.
Scottish Economic Planning Department
Scottish Electricity Consultative Councils
Scottish Education Department
Royal Scottish Museum
Scottish Home and Health Department
Common Services Agency
Council for the Education and Training of Health Visitors
Fire Service Training School
Inspectors of Constabulary
Local Health Councils
Mental Welfare Commission for Scotland
National Health Service
National Health Service authorities
Parole Board for Scotland and Local Review Committees
Planning Council
Scottish Antibody Production Unit
Scottish Crime Squad
Scottish Criminal Record Office

Scottish Council for Post-Graduate Medical Education and Training

Scottish Police College

Scottish Land Court

Scottish Office

Scottish Record Office

Stationery Office

Tate Gallery

Treasury

Exchequer Office, Scotland

National Economic Development Council

Rating of Government Property Department

Treasury Solicitor's Department

Department of the Director of Public Prosecutions

Law Officer's Department

Department of the Procurator-General and Treasury Solicitor

Victoria and Albert Museum

Wallace Collection

Welsh Office

Central Council for Education and Training in Social Work

Commons Commissioners

Council for the Education and Training of Health Visitors

Dental Estimates Board

Local Government Boundary Commission

Local Valuation Panels and Courts

National Health Service

National Health Service authorities

Public Health Laboratory Service Board

Rent Control Tribunals and Rent Assessment Panels and Committees

TABLE III LIST OF PRODUCTS PURCHASED BY CONTRACTING AUTHORITIES IN THE FIELD OF DEFENCE THAT ARE COVERED BY DIRECTIVE 80/767/EEC

NB: This product classification is currently being reviewed to adapt it to the new combined nomenclature of goods enacted by Council Regulation (EEC) N° 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ N° L 256, 7. 9. 1987), which enters into force on 1 January 1988.

The revised list will have to be approved under the procedure provided in the GATT procurement code.

The Directive will then be amended to introduce the revised list.

Chapter 25:

Salt; sulphur; earths and stone; plastering materials, lime and cement

Chapter 26:

Metallic ores, slag and ash

Chapter 27:

Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes

except:

ex 27.10: special engine fuels

Chapter 28:

Inorganic chemicals; organic and inorganic compounds of precious metals, of rare-earth metals, of radio-active elements and of isotopes

except:

ex 28.09: explosives

ex 28.13: explosives

ex 28.14: tear gas

ex 28.28: explosives

ex 28.32: explosives

ex 28.39: explosives

ex 28.50: toxic products

ex 28.51: toxic products

ex 28.54: explosives

Chapter 29:

Organic chemicals

except:

ex 29.03: explosives

ex 29.04: explosives

ex 29.07: explosives

ex 29.08: explosives

ex 29.11: explosives

ex 29.12: explosives

ex 29.13: toxic products

ex 29.14: toxic products

ex 29.15: toxic products

ex 29.21: toxic products

ex 29.22: toxic products

ex 29.23: toxic products

ex 29.26: explosives

ex 29.27: toxic products

ex 29.29: explosives

Chapter 30:

Pharmaceutical products

Chapter 31:

Fertilizers

Chapter 32:

Tanning and dyeing extracts; tannins and their derivatives; dyes, colours, paints and varnishes; putty, fillers and stoppings; inks

Chapter 33:

Essential oils and resinoids; perfumery, cosmetic or toilet preparations

Chapter 34:

Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing and scouring preparations, candles and similar articles, modelling pastes and 'dental waxes'

Chapter 35:

Albuminoidal substances; glues; enzymes

Chapter 37:

Photographic and cinematographic goods

Chapter 38:

Miscellaneous chemical products

except:

ex 38.19: toxic products

Chapter 39:

Artificial resins and plastic materials, cellulose esters and ethers; articles thereof

except:

ex 39.03: explosives

Chapter 40:

Rubber, synthetic rubber, factice, and articles thereof

except:

ex 40.11: bullet-proof tyres

Chapter 41:

Raw hides and skins (other than furskins) and leather

Chapter 42:

Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silk-worm gut)

Chapter 43:

Furskins and artificial fur; manufactures thereof

Chapter 44:

Wood and articles of wood; wood charcoal

Chapter 45:

Cork and articles of cork

Chapter 46:

Manufactures of straw of esparto and of other plaiting materials; basketware and wickerwork

Chapter 47:

Paper-making material

Chapter 48:

Paper and paperboard; articles of paper pulp, of paper or of paperboard

Chapter 49:

Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans

Chapter 65:

Headgear and parts thereof

Chapter 66:

Umbrellas, sunshades, walking-sticks, whips, riding-crops and parts thereof

Chapter 67:

Prepared feathers and down and articles made of feathers or of down; artificial flowers; articles of human hair

Chapter 68:

Articles of stone, of plaster, of cement, of asbestos, of mica and of similar materials

Chapter 69:

Ceramic products

Chapter 70:

Glass and glassware

Chapter 71:

Pearls, precious and semi-precious stones, precious metals, rolled precious metals, and articles

thereof; imitation jewellery

Chapter 73:

Iron and steel and articles thereof

Chapter 74:

Copper and articles thereof

Chapter 75:

Nickel and articles thereof

Chapter 76:

Aluminium and articles thereof

Chapter 77:

Magnesium and beryllium and articles thereof

Chapter 78:

Lead and articles thereof

Chapter 79:

Zinc and articles thereof

Chapter 80:

Tin and articles thereof

Chapter 81:

Other base metals employed in metallurgy and articles thereof

Chapter 82:

Tools, implements, cutlery, spoons and forks, of base metal; parts thereof

except:

ex 82.05: tools

ex 82.07: tools, parts

Chapter 83:

Miscellaneous articles of base metal

Chapter 84:

Boilers, machinery and mechanical appliances; parts thereof

except:

ex 84.06: engines

ex 84.08: other engines

ex 84.45: machinery

ex 84.53: automatic data-processing machines

ex 84.55: parts of machines under heading N° 84.53

ex 84.59: nuclear reactors

Chapter 85:

Electrical machinery and equipment; parts thereof

except:

ex 85.13: telecommunication equipment

ex 85.15: transmission apparatus

Chapter 86:

Railway and tramway locomotives, rolling-stock and parts thereof; railway and tramway tracks fixtures and fittings; traffic signalling equipment of all kinds (not electrically powered)

except:

ex 86.02: armoured locomotives, electric

ex 86.03: other armoured locomotives

ex 86.05: armoured wagons

ex 86.06: repair wagons

ex 86.07: wagons

Chapter 87:

Vehicles, other than railway or tramway or tramway rolling-stock, and parts thereof

except:

ex 87.08: tanks and other armoured vehicles

ex 87.01: tractors

ex 87.02: military vehicles

ex 87.03: breakdown lorries

ex 87.09: motorcycles

ex 87.14: trailers

Chapter 89:

Ships, boats and floating structures

except:

ex 89.01 A: warships

Chapter 90:

Optical, photographic, cinematographic, measuring, checking, precision, medical and surgical instruments and apparatus; parts thereof

except:

ex 90.05: binoculars

ex 90.13: miscellaneous instruments, lasers

ex 90.14: telemeters

ex 90.28: electrical and electronic measuring instruments

ex 90.11: microscopes

ex 90.17: medical instruments

ex 90.18: mechano-therapy appliances

ex 90.19: orthopaedic appliances

ex 90.20: X-ray apparatus

Chapter 91:

Clocks and watches and parts thereof

Chapter 92:

Musical instruments; sound recorders or reproducers; television image and sound recorders or reproducers; parts and acccessories of such articles

Chapter 94:

Furniture and parts thereof; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings

except:

ex 94.01 A: aircraft seats

Chapter 95:

Articles and manufactures of carving or moulding material

Chapter 96:

Brooms, brushes, powder-puffs and sieves

Chapter 98:

Miscellaneous manufactured articles

TABLE IV

LIST OF ACTIVITIES THAT MAY FORM THE SUBJECT OF PUBLIC WORKS CONTRACTS WITHIN THE MEANING OF DIRECTIVE 71/304/EEC

as set out in the nomenclature of industries in the European Communities

(NICE)

Major

Group

Group

40

CONSTRUCTION

400

Construction (non-specialised); demolition

400.1

Non-specialised construction

400.2

Demolition

Major

Group

Group

40

(cont'd)

401

Construction of buildings (dwellings or other)

401.1

General building work

401.2

Roofing

401.3

Construction of chimneys and furnaces

401.4

Weatherproofing

401.5

Re-dressing and maintenance of facades

401.6

Scaffolding

401.7

Other building activities (including structural work)

402

Civil engineering; building of roads, bridges, railways, etc.

402.1

General civil engineering

402.2

Earth-moving work above ground

402.3

Building of engineering structures on land (above or below ground)

402.4

Building of inland waterway and maritime engineering structures

402.5

Highway construction (including airport and runway construction)

402.6

Specialist activities in other fields of civil engineering (including installation of roads signs and signals and seamarks, installation of mains and pipelines for gas, water and hydrocarbons, and installation of electric power transmission and telecommunication lines)

403

Installation work

403.1

General installation

403.2

Services (gas, water and sanitary equipment installation)

403.3

Heating and ventilation installation (installation of central-heating, air-conditioning, and ventilation plant)

403.4

Heat, sound and vibration insulation

403.5

Installation of electricity

403.6

Installation of aerials, lightning conductors, telephones, etc.

404

Decorating and finishing

404.1

General decorating and finishing

404.2

Plastering

404.3

Woodwork, with particular reference to installation of wooden fittings (including laying of wooden floors)

404.4

Painting and glazing, wallpapering

404.5

Application of facings and coverings for floors and walls (fixing of tiles, other floor coverings and adhesive finishings)

404.6

Miscellaneous finishing work (including installation of stoves and fireplaces, etc.)

>TABLE POSITION>

TABLE V

LIST OF CORPORATE BODIES GOVERNED BY PUBLIC LAW OR EQUIVALENT ENTITIES TREATED AS AUTHORITIES FOR THE PURPOSES OF DIRECTIVE 71/305/EEC

XIII.

In all Member States:

Associations governed by public law formed by regional or local authorities, e.g., associations de communes, syndicats de communes, Gemeindeverbaende etc.

XIII.

In Belgium:

- le Fonds des routes,

- het Wegenfonds,

- la Régie des voies aériennes,

- de Regie der luchtwegen,

- public assistance commissions,

- structures of the Church,

- l'Office régulateur de la navigation

intérieure,

- de Dienst voor regeling van de binnenvaart,

- la Régie des services frigorifiques de

l'Etat belge,

- de Regie der Belgische Rijkskoel- en vries-

diensten.

XIII.

In Germany:

the bundesunmittelbare Koerperschaften, Anstalten und Stiftungen des oeffentlichen Rechts.

IIIV.

In France:

- other administrative public bodies at national, departmental and local levels.

IIIV.

In Italy:

- state universities, state university institutes, consortia for university development works,

- higher scientific and cultural institutes, astronomical, astrophysical, geophysical and vulcanological observatories,

- the Enti di riforma fondiaria,

- relief and charity organisations.

IIVI.

In Luxembourg:

- social insurance offices,

- other public administrative bodies.

IVII.

In the Netherlands:

- the Waterschappen,

- the Rijskuniversiteiten, the Academische Ziekenhuizen, the Gemeentelijke Universiteit van Amsterdam, the Rooms-Katholieke Universiteit von Nijmegen, the Vrije Universiteit van Amsterdam, the Technische Hogescholen,

- the Nederlandse Centrale Organisatie voor toegepast natuurwetenschappelijk onderzoek (TNO) and its dependent organisations.

VIII.

In the United Kingdom:

- local authorities,

- new towns' cooperations,

- Commission for the New Towns,

- Scottish Special Housing Association,

- Nothern Ireland Housing Executive.

IIIX.

In Denmark:

- andre forvaltningssubjekter.

IIIX.

In Ireland:

- other public authorities whose public works contracts are subject to control by the State.

IIXI.

In Greece:

other legal persons governed by public law whose public works contracts are subject to control by the State.

IXII.

In Spain:

other corporate bodies subject to public rules for the award of contracts.

XIII.

In Portugal:

other corporate bodies governed by public law subject to a procedure for the award of contracts.

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TABLE VII LIST OF EC BUSINESS INFORMATION CENTRES CURRENTLY OPERATING OR PLANNED

>TABLE POSITION>

TABLE VIII MODEL NOTICES OF SUPPLY CONTRACTS

A. Open procedures

1. The name, address, telephone number and, where applicable, telegraphic address and telex number of the contracting authority (Article 13 (e)):

2. The award procedure chosen (Article 13 (b)):

3. (a) The place of delivery (Article 13 (c)):

(b) The nature and quantity of goods to be supplied (Article 13 (c)):

(c) Whether suppliers can tender for some and/or all of the goods required (Article 13 (c)):

4. Any time limit for delivery (Article 13 (d)):

5. (a) Name and address of the service from which the relevant documents may be requested (Article 13 (f)):

(b) The final date for making such request (Article 13 (f)):

(c) Where applicable, the amount and terms of payment of any sum payable for such documents (Article 13 (f)):

6. (a) The final date for receipt of tenders (Article 13 (g)):

(b) The address to which they must be sent (Article 13 (g)):

(c) The language or languages in which they must be drawn up (Article 13 (g)):

7. (a) The persons authorized to be present at the opening of tenders (Article 13 (h)):

(b) The date, time and place of this opening (Article 13 (h)):

8. Any deposits and guarantees required (Article 13 (i)):

9. The main terms concerning financing and payment and/or references to the provisions regulating these (Article 13 (j)):

10. Where applicable, the legal form to be taken by the grouping of suppliers winning the contract (Article 13 (k)):

11. The information and formalities necessary for an appraisal of the minimum economic and technical standards required of the supplier (Article 13 (l)):

12. The period during which the tenderer is bound to keep open his tender (Article 13 (m)):

13. The criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents (Article 25):

14. Other information:

15. The date of dispatch of the notice (Article 13 (a)):

B. Restricted procedures

1. The name, address, telephone number and, where applicable, telegraphic address and telex number of the contracting authority (Article 14 (a)):

2. The award procedure chosen (Article 14 (a)):

3. (a) The place of delivery (Article 14 (a)):

(b) The nature and quantity of goods to be supplied (Article 14 (a)):

(c) Whether suppliers can tender for some and/or all of the goods required (Article 14 (a)):

4. Any time limit for delivery (Article 14 (a)):

5. Where applicable, the legal form to be assumed by the grouping of suppliers winning the contract (Article 14 (a)):

6. (a) The final date for the receipt of requests to participate (Article 14 (b)):

(b) The address to which they must be sent (Article 14 (b)):

(c) The language or languages in which they must be drawn up (Article 14 (b)):

7. The final date for the dispatch of invitations to tender (Article 14 (c)):

8. Information concerning the supplier's personal position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him (Article 14 (d)):

9. The criteria for the award of the contract if these are not stated in the invitation to tender (Article 15 (d)):

10. Other information:

11. The date of dispatch of the notice (Article 14 (a)):

TABLE IX

MODEL NOTICES OF PUBLIC WORKS CONTRACTS

A. Open procedures

1. Name and address of the authority awarding the contract (Article 16 (e)) (;):

2. The award procedure chosen (Article 16 (b)):

3. (a) The site (Article 16 (e)):

(b) The nature and extent of the services to be provided and the general nature of the work (Article 16 (c)):

(c) If the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several, or for all of the lots (Article 16 (c)):

(d) Information relating to the purpose of the contract if the contract entails the drawing up of projects (Article 16 (c)):

4. Any time limit for the completion of the works (Article 16 (d)):

5. (a) Name and address of the service from which the contract documents and additional documents may be requested (Article 16 (f)):

(b) The final date for making such request (Article 16 (f)):

(c) Where applicable, the amount and terms of payment of any sum payable for such documents (Article

16 (f)):

6. (a) The final date for receipt of tenders (Article 16 (g)):

(b) The address to which they must be sent (Article 16 (g)):

(c) The language or languages in which they must be drawn up (Article 16 (g)):

7. (a) The persons authorized to be present at the opening of tenders (Article 16 (h)):

(b) The date, time and place of this opening (Article 16 (h)):

8. Any deposits and guarantees required (Article 16 (i)):

9. The main procedure for financing and payment and/or references to the instruments regulating these (Article 16 (j)):

(;) The Articles in brackets refer to Council Directive N° 71/305/EEC of 26. 7. 1971 (OJ N° L 185, 16. 8. 1971, p. 5).

10. Where applicable, the specific legal form which must be assumed by the group of contractors to whom the contract is awarded (Article 16 (k)) (;):

11. The minimum economic and technical standards required of the contractors (Article 16 (l)):

12. Period during which the tenderer is bound to keep open his tender (Article 16 (m)):

13. Criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents (Article 29):

14. Other information:

15. The date of dispatch of the notice (Article 16 (a)):

B. Restricted procedures

1. Name and address of the authority awarding the contract (Article 17 (a)) (;):

2. The award procedure chosen (Article 17 (a)):

3. (a) The site (Article 17 (a)):

(b) The nature and extent of the services to be provided and the general nature of the work (Article 17 (a)):

(c) If the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several, or for all of the lots (Article 17 (a)):

(d) Information relating to the purpose of the contract if the contract entails the drawing up of projects (Article 17 (a)):

4. Any time limit for the completion of the works (Article 17 (a)):

5. Where applicable, the specific legal form which must be assumed by the group of contractors to whom the contract is awarded (Article 17 (a)):

6. (a) The final date for the receipt of requests to participate (Article 17 (b)):

(b) The address to which they must be sent (Article 17 (b)):

(c) The language or languages in which they must be drawn up (Article 17 (b)):

7. The final date for the dispatch of invitations to tender (Article 17 (c)):

8. Information concerning the contractor's personal position, and the minimum economic and technical

standards required of him (Article 17 (d)):

9. The criteria for the award of the contract if these are not stated in the invitation to tender (Article 18 (d)):

10. Other information:

11. The date of dispatch of the notice (Article 17 (a)):

TABLE X MODEL NOTICES OF SUBCONTRACTS

1. (a) The site (N° ii) ($):

(b) The nature and extent of the service to be provided and the general nature of the work (N° ii):

2. Any time limit for the completion of the works (N° iii):

(;) The Articles in brackets refer to Council Directive N° 71/305/EEC of 26. 7. 1971 (OJ N° L 185, 16. 8. 1971, p. 5).

($) The numbers quoted refer to the Declaration of the Representatives of the Governments of the Member States meeting within the Council concerning procedures to be followed in the field of public works concessions - II subcontracts, 2, rules on publication (OJ N° C 82, 16. 8. 1971, p. 14).

3. Name and address of the service from which the contract documents and additional documents may be requested (N° vi):

4. (a) The final date for receipt of tenders (N° v):

(b) The address to which they must be sent (N° vii):

(c) The language or languages in which they must be drawn up:

5. Any deposit and guarantees required (N° iv):

6. The economic and technical standards required of the contractor (N° viii):

7. The criteria for the award of the contract (last paragraph of N° II.2):

8. Other information:

9. The date of dispatch of the notice (N° i):

TABLE XI COUNCIL REGULATION DETERMINING THE RULES APPLICABLE TO PERIODS, DATES AND TIME LIMITS

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (;),

Whereas numerous acts of the Council and of the Commission determine periods, dates or time limits and employ the terms 'working days' or 'public holidays';

Whereas it is necessary to establish uniform general rules on the subject;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules;

Whereas, to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods, dates and time limits;

Whereas no authority to establish such rules is provided for in the Treaties,

HAS ADOPTED THIS REGULATION:

Article 1

Save as otherwise provided, this Regulation shall apply to acts of the Council or Commission which have been or will be

(;) OJ N° C 51, 29. 4. 1970, p. 25.

passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.

CHAPTER I

Periods

Article 2

1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.

To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the Official Journal of the European Communities the lists transmitted by the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of the Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question.

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4:

(a) a period expressed in hours shall start at the beginning of the first hour and shall end with

the expiry of the last hour of the period;

(b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;

(c) a period expressed in weeks, months or years shall start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;

(d) if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having 30 days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

This provision shall not apply to periods calculated retroactively from a given date or event.

5. Any period of two days or more shall include at least two working days.

CHAPTER II

Dates and time limits

Article 4

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5,

apply to the times and periods of entry into force, taking effect, application, expiry of validity, termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts.

2. Entry into force, taking effect or application of acts of the Council or Commission - or of provisions of such acts - fixed at a given date shall occur at the beginning of the first hour of the day falling on the date.

This provision shall also apply when entry into force, taking effect or application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

3. Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission - or of any provisions of such acts - fixed at a given date shall occur on the expiry of the last hour of the day falling on the date.

This provision shall also apply when expiry of validity, termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment.

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date, it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date.

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place.

Article 6

This Regulation shall enter into force on 1 July 1971.

ANNEX III THE PROHIBITION OF 'MEASURES HAVING EQUIVALENT EFFECT' TO QUANTITATIVE RESTRICTIONS ON TRADE IN ARTICLE 30 OF THE EEC TREATY

To help ensure free trade in goods within the European Community, the EEC Treaty (Articles 30 et seq.) prohibits quantitative restrictions on imports and exports within the Community and 'all measures having equivalent effect'.

The prohibition applies both to goods originating in Member States and to goods imported from non-member countries which are 'in free circulation in Member States'. Imported goods are in free circulation if import formalities have been complied with and any customs duties or changes having equivalent effect that are payable have been levied in the Member State of importation and if they have not benefited from a total or partial reimbursement of such duties or charges (1).

'Goods' are any products that have a monetary value and, as such, can be the subject of commercial transactions, regardless of their nature, characteristics or intended use (2).

Articles 30 et seq. do not apply to products covered by the European Coal and Steel Community and Euratom Treaties, as Article 232 of the EEC Treaty provides that the provisions of that Treaty do not prejudice those of the ECSC and Euratom Treaties. However, the ECSC and Euratom Treaties have similar provisions prohibiting quantitative restrictions and measures having equivalent effect.

As to the type of measures prohibited, the term 'quantitative restrictions', a synonym for import or export quotas, is self-explanatory. It has been further defined as unilateral measures by Member States amounting to a total or partial restraint of imports, exports or goods in transit within the Community (3). 'Measures having equivalent effect', on the other hand, is a catch-all phrase and has required considerable interpretation, both by the Commission and in a long line of judgments by the European Court of Justice.

These have provided guidance on the meaning of both 'measures' and 'measures having equivalent effect to quantitative restrictions'.

On the first aspect, Commission Directive 70/50/EEC of 22 December 1969 (4) on the abolition of measures having an effect equivalent to quantitative restrictions on imports

(1) Articles 9 (2) and 10 (1) of the EEC Treaty.

(2) Judgment of the European Court of Justice in Case 7/68 Commission v. Italy (1968) ECR 423 at 428-9.

(3) Judgment of the European Court of Justice in Case 2/73 Geddo v. Ente Nazionale Risi (1973) ECR 865 at 879.

(4) OJ N° L 13, 19. 1. 1970, p. 29 (English Special Edition 1970 (I), p. 17).

which were in operation on the date of entry into force of the EEC Treaty defined 'measures' as laws and regulations, administrative practices, and any acts of public authorities, including recommendations.

'Administrative practices' were further defined as any habitual conduct of a public authority and 'recommendations' as any acts of a public authority which, while not legally binding on the addressees, cause them to pursue a certain conduct. As the definition indicates, 'measures' include not only positive acts, but also omissions, i.e. the failure or neglect of a public authority to use its powers to prevent restrictions on trade in goods between Member States.

The Directive also made it clear that any public authority can be the author of 'measures'. In other words, the prohibition under Articles 30 et seq. applies not only to measures emanating from the State in the narrow sense of the central legislative, executive/administrative and judicial authority, but to measures by any of the multitude of other entities, commonly called public authorities, which, though leading a legally separate existence have such close links to the state that they can be regarded as part of its organization and as exercising powers delegated by the central authority.

The second term of the expression, 'having an effect equivalent to quantitative restrictions', indicates that, like quantitative restrictions, the measure must act as a total or partial restraint on imports or exports.

The effect of these restrictions, as indicated above, is to prohibit, in whole or in part, the imports or exports which could have been realized in their absence.

To have this effect, they need not prevent trade entirely, but only impede it.

Thus, in Directive 70/50/EEC the Commission defined such measures, with particular reference to those which formally discriminate between domestic and imported products, as those which either preclude importation or make it more difficult or costly than the marketing of equivalent domestic products. Similarly, in the Geddo judgment (5) the Court, after defining quantitative restrictions, stated that measures

(5) Judgment of the European Court of Justice in Case 2/73 Geddo v. Ente Nazionale Risi (1973) ECR 865 at 879.

having equivalent effect could take the form not only of outright prohibitions, but also of obstacles having the same effect, whatever their name or mode of operation.

Furthermore, it is not necessary for a measure actually to have restricted intra-Community trade; it only needs to be 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' (1).

This definition gives the prohibition of measures having equivalent effect a very wide scope. To specify all the possible types of measures caught by it would require a detailed analysis of all the cases the Commission and the Court have decided over the years.

For the purpose of this Guide, the following general classification will suffice. The prohibition of measures having an effect equivalent to quantitative restrictions covers measures which:

- subject the importation or marketing of imported products or the exportation of domestic products to conditions that are only applicable to imports or exports and make the importation or marketing of imported products or the exportation of domestic products impossible or more difficult or costly than the marketing of domestic products or sale on the domestic market,

- subject imports or exports to conditions that are different from those applicable to domestic products or marketing on the domestic market and thereby have a similar discriminatory effect on the importation or marketing of imported products, or of products imported through some channels rather than others, or on the exportation of domestic products,

- favour domestic products or grant them preferential treatment, other than aid, whether or not subject to conditions, or

- though equally applicable to domestic and imported products, have a restrictive effect on imports not justified by the requirement the measure is intended to serve.

The last category includes many of the regulations introduced by Member States in various fields for consumer protection, environmental and health and safety reasons. Such regulations generally prescribe technical requirements or quality standards that have to be met by any product, domestic or imported, of a certain kind that is put on sale on the domestic market, thereby effectively preventing the marketing, and hence importation, of products not meeting the prescribed requirements or standards. At first sight, such regulations do not appear to fall within the definition of measures having an effect equivalent to quantitative restrictions, as they apply equally to domestic and imported products and the exclusion of imports is merely an incidental result of the general and mandatory nature of such regulations, as of all law.

(1) Judgment of the European Court of Justice in Case 8/74 Procureur du Roi v. Dassonville (1974) ECR 837 at 852.

Yet it is possible for such regulations to restrict trade in a similar way to a quantitative restriction, by making imports impossible or more difficult or costly than the marketing of domestic products, without this being necessary to attain the objective of the regulations.

The Commission provided some initial illumination on this matter in Directive 70/50/EEC, when it classed as measures having equivalent effect to quantitative restrictions measures governing the marketing of products and dealing, in particular, with their shape, size, weight, composition, presentation, identification or packaging, which though equally applicable to domestic and imported products had a restrictive effect on the free movement of goods that exceeded the effects inherent in the regulation of commerce. This was the case, in particular, where:

- the restrictive effects on the free movement of goods were out of proportion to their purpose,

- the same objective could be attained by other means that were less of a hindrance to trade.

The 1979 Cassis de Dijon judgment of the European Court (2) gave a whole new impetus and direction to the policy on trade barriers caused by divergent national technical regulations and standards. It established, first of all, that in the absence of Community rules on the production or marketing of a product, Member States were free to regulate all matters relating to the production or marketing of the product on their respective territories. It then, however, laid down the principle that any product lawfully produced and marketable in one Member State should be able to be imported and marketed in any other Member State. Products should be considered lawfully produced and marketable if they conformed to the legislation or traditional or established production or distribution practices of the Member State of manufacture. Obstacles to movement within the Community resulting from disparities between national regulations were only acceptable in so far as the national provisions were necessary, i.e. appropriate and not excessive, to satisfy 'essential requirements' relating,

for example, to the enforcement of tax legislation, health and safety, fair trading or consumer protection, and were thus an essential safeguard of the public interest such as to take precedence over the requirements of free movement of goods, which was one of the fundamental rules of the Community.

Consequently, a Member State cannot prohibit the sale of a product lawfully produced and marketable in another Member State simply because the product does not meet its own quality specifications or technical standards. If the

(2) Case 120/78 REWE v. Bundesmonopolverwaltung fuer Branntwein (1979) ECR 649 at 662 and 664.

different specifications or standards to which the product has been manufactured attain the requirements served by the importing country's standards to an equivalent degree, then the product may not be denied entry.

On this analysis, which the Court has confirmed in all its subsequent judgments, the general rule is that Member States are obliged to admit on to their markets products that have been manufactured in other Member States to different technical requirements. Only if the importing Member State can prove that the different design of the products means that they do not reach standards equivalent to its own may it refuse entry to the products.

The later judgments of the Court have established how this rule applies to specific situations. For example, Member States may not duplicate tests or checks already carried out in the country of manufacture but must recognize the manufacturing country's test certificates. Nor may they require inspections of products manufactured in other Member States before being marketed unless the products pose a serious and definite danger to health or safety.

The rule has been taken up in the Commission's new policy towards technical barriers caused by divergent national product specifications and standards announced in its White Paper setting out a programme for removing the remaining internal barriers within the common market by 1992. This policy is that whenever EC harmonization of technical specifications and standards is not considered essential (1) for health and safety, consumer protection or the environment, or for industrial reasons, the principle of mutual recognition by Member States of each other's quality standards and composition requirements, etc., and each other's testing and certification procedures, will apply.

A number of statutory exceptions to the prohibition of restrictions on intra-Community trade contained in Articles 30 to 34 are made by Article 36. This provides that Member States may maintain in force or introduce 'prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

(1) In cases where EC harmonization is necessary, the harmonization will be confined to the essential requirements, leaving the framing of the actual technical standards to the European standardization institutes.

The Court of Justice and the Commission have consistently regarded this safeguard clause as applying also to measures having an effect equivalent to quantitative restrictions.

A quantitative restriction or a measure having equivalent effect is only covered by Article 36 if the following conditions are fulfilled:

(a) The measure must be justified on one of the stated grounds of exception. That is to say, there must be a causal link between it and the objective sought, it must be a sufficient and necessary condition of protection of the national interest, and the objective must not be attainable by

other means less restrictive of intra-Community trade.

(b) The objective must strictly fall within one of the grounds of exception. That is to say, these are to be taken as justifying interference in trade only in limited exceptional circumstances and may not be given a broad interpretation.

(c) The measure must not be a means of arbitrary discrimination or a disguised restriction on intra-Community trade. That is to say, it may not be applied solely to imported or exported products unless there is similar provision for domestic products, and may not be intended to protect a domestic industry or disadvantage the industry of another Member State.

The same criteria apply in assessing whether a product may be refused entry on the ground that it does not meet an 'essential requirement' within the meaning of the Cassis de Dijon judgment.

However, whereas the grounds listed in Article 36 may be invoked in defence of measures that discriminate between imported and domestic products, 'essential requirements' may be asserted only where the measures apply to domestic and imported products alike.

The Treaty also makes provision for exceptions from the free trade rules in specific cases, under appropriate Community supervision. It would take too long to go into all of these here, but one important exception that should be mentioned is the right of Member States to take measures departing from the Treaty, including Articles 30 to 34, in relation to the production of or trade in arms, munitions and war materials, where such measures are necessary to protect its essential security interests and do not adversely affect competitive conditions in the common market for products not intended for specifically military purposes (2). In 1958 the Council drew up a list of the products for which Member States may invoke this safeguard clause.

(2) Article 223(1)(b) of the EEC Treaty.

GUIDE TO THE COMMUNITY RULES ON OPEN GOVERNMENT PROCUREMENT (Provisional edition pending adoption of the new Council Directives) (87/C 358/01)

INTRODUCTION

The EC governments meeting in the European Council have recognized that the opening up of government procurement is a key component of the internal market programme aimed at turning the Community into a single large market by 1992.

The liberalization has rightly been accorded a high priority, for the economic and political case for throwing government contracts open to EC-wide competition is compelling. Yet this huge sector of the economy - estimated at an average of 9 % of national GDP if only contracts placed by central and local government are considered, and as much as 15 % of GDP if nationalized industries are included - has traditionally been dominated by 'buy-national' policies, sustained by short-term thinking and regional and social considerations.

Despite the liberalization objectives laid down in the Treaties and later in the general programmes for the abolition of restrictions on the right of non-nationals to set up in business in another Member State and to provide cross-frontier services, governments have continued to use public purchasing as an instrument of their economic policies and have kept much of their procurement closed to foreign competition. The economic cost of nationalistic government procurement policies is enormous, being estimated on average at around half of the entire Community budget. In the current economic climate, the Community cannot afford the luxury of such waste and to deny itself any longer the many benefits that will accrue from a genuine liberalization of this sector throughout the EC.

What are these benefits?

- First, the introduction of EC-wide competitive tendering for government procurement and construction

contracts will greatly increase the opportunities of industry - manufacturers and construction contractors - to expand both on the Community and the home market. Expansion will enable economies of scale to be realized, thus reducing costs, while the spur of competition will stimulate efficiency. A considerable part of the resultant savings is likely to be put back into developing the businesses concerned through modernization of plant and infrastructure and research and development, leading to the creation of new jobs.

- Secondly, governments and the users of the services they provide will benefit from a wider choice of goods and services both in terms of quality and price. Substantial savings in government budgets will be possible and the general public's wants will be satisfield at lower cost.

As well as the direct benefits of allowing supply and demand to operate in these markets, the liberalization of public procurement will also have a profound effect on the structure of EC industry. At present, much of our industry, both in manufacturing and services, is handicapped by the smallness of its markets, which prevents firms becoming truly competitive at world level and facing the challenges posed by our major trading partners. In very many cases, the more or less systematic preference given in government purchasing and contracting to particular domestic firms has not paid off and has not produced anything like the benefits of which a continental-scale market similar to those of our trading partners such as the US is capable.

Another potential spin-off of the denationalization of procurement, besides the impetus it will give to the restructuring and modernization of our industry, is the leverage it will provide for pushing through Community policies on standards and mutual recognition of qualifications via the obligation on authorities to refer to European standards or harmonization documents in quoting their technical specifications.

In this way, it will contribute to breaking down technical barriers to trade in industrial products, which is one of the main objectives of the internal market programme.

In view of the importance of the liberalization of public procurement for achieving a genuine common market by 1992, the Commission, as promised in the internal market White Paper and recommended by the European Council, has looked into ways of radically improving the anachronistic situation in this sector, while at the same time contributing to other Community policies such as regional and social policy, the policy of encouraging small firms and promoting research and development, and competition policy.

The specific action on procurement is likely to be assisted by the new possibilities for cooperation between Community firms in this sector brought about by the changes in company law and taxation foreshadowed in the White Paper.

As far as the specific action on procurement is concerned, in late 1986 the Commission sent the Council proposals to amend the present legislation, the 1971 'Works' Directive on public-sector construction contracts and the 1977 'Supplies' Directive on government purchasing.

These first Directives were intended to harmonize tendering and award procedures and to provide common rules on technical specifications and the advertising of contracts. Yet despite some progress they have not matched up to expectations, because of improper transposition into national law in some cases and widespread abuse of exception clauses.

In the light of experience the Commission has therefore proposed amendments to the legislation which should greatly improve the level of compliance and enforcement and help ensure that government purchasing and the placing of government construction contracts is more open and affords equal opportunities to firms from other Member States.

It has also decided to set up an Advisory Committee on the Opening-up of Public Procurement to

serve as a medium of constant and close communication between itself and business interests involved in government contracts.

In addition, the Commission has put forward a proposal to enable it to intervene directly in tendering or award procedures to prevent breaches of the Community rules and to afford suppliers and contractors rapid relief against illegal behaviour by authorities while the award procedure is still pending.

Proposals are also being prepared to extend the legislation to the sectors hitherto excluded, namely public energy, water, transport and telecommunications services. This extension will have a significant economic impact because it is mainly in these sectors that public purchasing is on a sufficiently large scale for liberalization to give a major boost to the international competitiveness of suppliers.

In telecommunications, the Community has since 1983 been pursuing a global policy, which has already seen the adoption by the Council of a Directive (86/361/EEC) on the mutual recognition by national type-approval authorities of the results of tests for conformity with common technical specifications for terminal equipment carried out by nationally approved testing laboratories, and of a Decision (87/95/EEC) requiring public authorities to refer to harmonized standards in their equipment tenders. In 1984 the Council also issued a recommendation providing for an experimental phase of opening up telecommunications procurement to suppliers in other countries. In a recent Green Paper on telecommunications the Commission has proposed pressing ahead with this liberalization process by gradually increasing the proportion of equipment purchases covered by the recommendation and if necessary converting the recommendation into a Directive. It has also proposed including in the 1986 Directive provision for mutual recognition of type-approval procedures for terminal equipment.

Finally, moves are planned in the near future to open up public procurement of services to EC-wide competition to a greater extent than is provided for in the present 'Works' and 'Supplies' Directives.

While this legislation is in the pipeline, it is important to make sure that the present Directives are correctly interpreted and properly applied. The Commission therefore intends to greatly tighten up its enforcement of the Community rules on open public-sector procurement. But to improve enforcement the Commission believes it is essential to increase public awareness: hence this Guide explaining the rules and how they are interpreted. The Guide will not answer every question or dispel every doubt that can arise in such a vast and complex subject as public purchasing and contracting. But it should be a useful aid to understanding the reasons behind the Community legislation and avoiding misinterpretation by national authorities.

This first edition of the Guide will be regularly updated and improved to take account of new legislation and users' comments, which the Commission welcomes.

TABLE OF CONTENTS

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SUMMARY

This Guide is divided into four parts:

- Part I summarizes Community law on the prohibition of measures having an effect equivalent to quantitative restrictions in intra-Community trade and of restrictions on the right of EC nationals to set up in business and to provide services in any Member State (the 'right of establishment' and 'freedom to provide services').

These are general rules, and consequently they must be observed even in the award of public procurement and construction contracts not subject to the specific rules for EC-wide competitive tendering for such contracts introduced by the Directives.

- Part II provides a detailed analysis of the 'Supplies' and 'Works' Directives and the special provisions for construction contracts involving the grant of a franchise to operate the completed works and for telecommunications procurement.

- Part III outlines the sanctions the Commission can impose for breach of the Community competitive tendering rules in public-sector procurement and construction and gives advice about filing complains with the Commission and action in national courts.

- In Part IV, finally, attention is drawn to the requirement for compliance with the competitive tendering rules by promoters of projects receiving EC funding.

Annex I gives a preview of the further liberalization of public-sector procurement planned by 1992 and of the proposals the Commission is making to the Council for this purpose.

Annex II contains the various lists referred to in the Guide.

Annex III explains in more detail the prohibition of measures having equivalent effect to quantitative restrictions.

PART I

GENERAL RULES OF THE TREATIES AS THEY APPLY TO GOVERNMENT PROCUREMENT AND CONSTRUCTION

I. Prohibition of measures having an effect equivalent to quantitative restrictions in intra-Community trade

1. In the EEC Treaty

Free trade in goods is one of the cornerstones of the common market.

A basic principle of free trade is the absence of quantitative restrictions (quotas) on imports or exports or of any measures having equivalent effect. In the EEC Treaty these are prohibited by Articles 30 et seq.

Articles 30 et seq. apply both to goods originating in the Member States and to goods previously imported from non-EC countries.

A measure having an effect (;) equivalent to a quantitative restriction means any measure, be it a law or regulation, an administrative practice, or an act of, or attributable to, a public authority, that is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

Such measures may discriminate between domestic and imported or exported products or they may apply to domestic and imported products alike.

A requirement for import or export licences is an example of a measure falling within the first category. There are a number of statutory exceptions to the prohibition of measures in this category, however, which are listed in Article 36.

(;) The concept of measures having equivalent effect to quantitative restrictions is explained more fully in Annex III to the Guide.

This allows Member States to maintain in force or introduce prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property, provided that the prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The second category, measures that are equally applicable to domestic and imported products, mainly comprises regulations prescribing technical requirements, quality standards, or testing and type-approval procedures that have to be satisfied by any product, domestic or imported of a certain kind that is put on sale on the domestic market. The majority of such regulations are introduced for consumer protection, environmental or health and safety reasons. However, such regulations are contrary to Article 30 if their trade-restricting effect is disproportionate to the essential requirement of public interest which they are intended to safeguard. The general rule applicable to regulations on technical requirements is that of mutual recognition by Member States of each other's quality standards, composition rules, national testing and certification procedures, etc.

In future Community harmonization will normally only relate to features affecting essential requirements, where these can be established.

With the drive to create a unified market by 1992, it is important that no new barriers to trade in the Community should be introduced in the name of essential technical requirements.

The new Article 100A inserted into the Treaty by the Single European Act should considerably facilitate this task. It provides for the Commission's proposals for harmonization of health and safety, environmental protection and consumer protection legislation to be based on high standards (so that it will only in exceptional circumstances be possible to restrict products meeting the Community standards on the grounds of essential technical requirements not met by the products) and lays down a more flexible, and hence faster, procedure for adopting such proposals.

If, after the adoption of Community standards, a Member State wishes to insist on its own standards, on the grounds of major requirements covered by the Article 36 safeguard clause or relating to protection of the environment or working environment, it will have to justify such exceptional measures to the Commission or the European Court.

The ban on measures having an effect equivalent to quantitative restrictions on trade in goods has a particular

relevance for government procurement. How the rule applies in this area was explained by the Commission in a Directive (70/32/EEC) of 17 December 1969 (;).

It should be made clear that the Directive was issued to secure the abolition of such measures in the government procurement field that were in operation when the Treaty came into force. Since the end of the transitional period, the ban on such measures in public-sector purchasing has been directly applicable. For present purposes, therefore, the 1969 Directive only has the value of interpretative guidance.

The Directive applies to products supplied to the State, regional or local authorities and any other body governed by public law. The products covered are stated to include those supplied for carrying out or completing construction works, whether pursuant to the contract for the construction works or separately. To this extent, the prohibition of measures having an effect equivalent to quantitative restrictions on trade is seen to cover also public-sector construction contracts.

The Directive gives clear and practical guidance on the types of barriers in this sector that can be equivalent to quantitative restrictions.

Two main categories of measures are identified at a general level:

(a) those which totally or partially preclude the supply of imported products or make their supply more difficult or costly than that of domestic products; in other words, measures which, for example, explicitly or implicitly prevent the supply of foreign products, limit the quantities or qualities of them used, or make their acceptance subject to quality or technical requirements not demanded of domestic products;

(b) those which favour the supply of domestic products by reserving all or part of a given order or market to products of domestic origin or grant domestic products or particular domestic suppliers preferential treatment, other than aid falling within Article 92 of the Treaty, subject to conditions or otherwise.

The Directive also gives examples of provisions that can have an effect equivalent to quantitative restrictions:

- Provisions that discriminate against imported products in the requirements for the lodging of security or deposits or

(;) OJ N° L 13, 19. 1. 1970, p. 1.

require the suppliers of imported products only to open a postal or bank account. Such provisions make the supply of imported products more difficult or costly than that of domestic products.

- Provisions making the supply of imported products conditional on the granting of reciprocity by the exporting Member State. These can include rules whereby imported products are only licensed for sale or granted the same favourable terms as domestic products if the importing Member State's products are accorded similar treatment in the exporting Member State.

- Technical requirements which, though equally applicable to domestic and imported products, have restrictive effects on trade.

Such requirements can relate to the quality, composition, mechanical, physical or chemical properties, or certification or testing of the products to be purchased by the procurement authority and may be based on general regulations or contract specifications. They come within the definition of measures having an effect equivalent to quantitative restrictions whenever they make the supply of imported products more difficult or costly than that of domestic products without this being justified by a legitimate requirement.

2. In the European Coal and Steel Community Treaty

Article 4 of the ECSC Treaty lists among the measures which the signatories recognize as incompatible with a common market for coal and steel and consequently undertake to abolish and prohibit in the Community 'quantitative restrictions on the movement of products'.

The second paragraph of Article 86 provides that 'Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4'.

Together, these provisions prohibit quantitative restrictions and measures having equivalent effect in trade in coal and steel products, in the same way as Articles 30 et seq. of the EEC Treaty.

They apply both to products originating in the Community and products originating in non-member countries in free circulation in the Community, as defined in the Common Customs Tariff.

3. In the Euratom Treaty

Article 93 of the Euratom Treaty similarly prohibits quantitative restrictions in intra-Community trade in nuclear materials of the types listed in Lists A1 and A2 of Annex IV to the Treaty and of those listed in List B of Annex IV that are subject to a common customs tariff and accompanied by a certificate issued by the Commission stating that they are intended to be used for nuclear purposes.

Like the corresponding provisions of the EEC Treaty, Article 93 is directly applicable.

II. Right of establishment

1. In the EEC Treaty

The economic and social integration of the Community requires not only free trade in goods but also free movement of persons. The Treaty therefore provides for the right of Community nationals to take up residence and employment and to set up in business in another Member State than their own, and to provide services in another Member State than their own without actually setting up there. The right of individuals and companies to set up in business in another Member State, the 'right of establishment', is regulated by Articles 52 et seq.

Under these provisions, Member States are obliged to allow individuals and companies from other Member States to establish and carry on a business or self-employed activities in their territory under the conditions laid down for their own nationals, subject to the Treaty's provisions on capital movements (;). The principle of equality of treatment with the Member States' own nationals applies, with one exception, to all forms of business and self-employment, including those involving the setting up of agencies, branches or subsidiaries and the formation and management of companies or firms.

The exception, in the first paragraph of Article 55, is for 'activities connected, even occasionally, with the exercise of official authority'. However, this exception is construed strictly. In Reyners v. Belgium the Court of Justice held that having regard to the fundamental character of freedom of establishment and the rule on national treatment in the system of the Treaty, the exceptions allowed by the first paragraph of Article 55 could not be given a scope that would exceed the objective for which this exemption clause was inserted. The purpose of Article 55 being to enable Member

(;) In Chapter 4 of Part Two, Title III, of the Treaty.

States to exclude non-nationals from taking up functions involving the exercise of official authority which were connected with one of the activities of self-employed persons provided for in Article 52, this need was fully satisfied when the exclusion of non-nationals was limited to those of the activities referred to in Article 52 which in themselves involved a direct and specific connection

to the exercise of official authority (;).

The right of establishment is enjoyed both by individuals and by companies or firms having their registered office, central administration or principal place of business within the Community. 'Companies or firms' are defined as 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

The Treaty provided for the restrictions on establishment that were in operation when the Treaty came into force to be abolished during the transitional period and forbade the Member States to introduce new restrictions.

The prohibition of such restrictions applies both to direct and indirect discrimination.

Direct discrimination is involved where aliens have to comply with special rules or requirements not applicable to nationals. In 1962 the Council published a general programme for the abolition of restrictions on freedom of establishment that were in operation when the Treaty came into force, which gives a non-exhaustive list of such directly discriminatory provisions ($). This lists the following requirements or restrictions: official authorization, prior residence, special taxes or requirements for provision of security, restrictions on access to credit, exclusion from training or social security provision, prohibition from entering into or bidding for contracts, from being awarded official licences or franchises or from purchasing goods, borrowing, receiving State aid, suing or being sued, or joining trade or professional associations.'

Indirect discrimination is disguised behind provisions applicable to nationals and aliens alike which nevertheless do not ensure equal treatment. The general programme defined such indirect discrimination as: 'any requirement imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, in respect of the taking up or pursuit of an activity as a self-employed person where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the taking up or pursuit of such activity by foreign nationals'.

The inclusion of indirect discrimination in the prohibition was confirmed by the European Court of Justice in Thieffry

(1) Case 2/74 (1974) ECR 631-5 (paragraphs 43, 44 and 54).

($) OJ No 2, 15. 1. 1962, p. 36/62 (English Special Edition, Second Series, January 1974, IX. Resolutions of the Council and of the Representatives of the Member States, p. 7).

v. Conseil de l'ordre des avocats à la Cour de Paris. There the Court held that it was necessary to eliminate not only overt discrimination, but also any form of disguised discrimination, such as was found in requirements which, although applicable irrespective of nationality, had the effect of exclusively or principally hindering the taking up or pursuit of such activity by foreign nationals (=).

The special treatment of aliens on grounds of public policy, public security or public health is excepted from the freedom of establishment rules, just as restrictions on trade may be.

The Court of Justice has established that since the end of the transitional period the rule that Member States must accord national treatment to other Member States' nationals wishing to set up in business in their territory has been directly applicable. This means that Member States cannot maintain or introduce restrictions on establishment in a particular sector on the ground that there has not been any Community-wide harmonization of the relevant provisions.

However, restrictions based on genuine differences in the qualifications the host Member State

and the alien's Member State require for certain occupations do not infringe the principle of national treatment and are legitimate. To help remove such barriers, the Treaty provided for the issue of Directives for the mutual recognition of qualifications. It is usually also necessary to accompany mutual recognition Directives with Directives to coordinate national rules on access to and practice of the occupation.

2. In the European Coal and Steel Community Treaty

The ECSC Treaty has no provisions on the right of establishment. Articles 52 et seq. of the EEC Treaty are consequently applicable to the fields covered by the ECSC Treaty, as they do not conflict with provisions of that Treaty.

3. In the Euratom Treaty

Article 97 of the Euratom Treaty provides that no restrictions based on nationality may the applied to natural or legal persons, whether public or private, under the jurisdiction of a Member State, where they desire to participate in the construction of nuclear installations of a scientific of industrial nature in the Community.

This provision guarantees inter alia the right to set up and carry on a business in connection with the construction of such installations and is directly applicable. In so far as Articles 52 et seq. of the EEC Treaty do not conflict with provisions of the Euratom Treaty, they too are applicable in the nuclear field.

(=) Case 71/76 (1977) ECR 765 and 777 (paragraph 13).

III. Freedom to provide services

1. In the EEC Treaty

The EEC Treaty also guarantees the right of nationals of one Member State to provide services in another Member State without actually setting up in business there. The freedom of services enshrined in Articles 59 et seq. is, like the right of establishment, governed by the principle of national treatment: 'The person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals' (;).

As in the case of restrictions on establishment the Treaty required restrictions on freedom to provide services existing when the Treaty came into force to be abolished during the transitional period and forbade the introduction of new restrictions.

The basic difference between the right of establishment and free provision of services is that the former involves a permanent business establishment in the host country, whilst the latter involves only temporary residence in the other Member State where the service is provided.

The freedom to provide services covers the performance of services normally performed for gain in a Member State other than that of the provider of the services, where the services are not otherwise governed by the Treaty's provisions on freedom of movement for goods, capital and persons (in which case those special provisions are applicable). Services are stated to include activities of an industrial and commercial character and activities of craftsmen and the professions.

Transport services are excluded from the general freedom of services and governed exclusively by the rules on transport ($). There is also a special rule for banking and insurance services. These are to be liberalized in step with the progressive liberalization of capital movements.

The exceptions made in the establishment rules for activities connected with the exercise of official authority and for restrictions on grounds of public policy, public security and public health also

apply to the provision of services.

Under the principle of national treatment all laws, regulations, administrative provisions and practices capable of restricting or impeding access to or the practice of

(;) Third paragraph of Article 60.

($) Part Two, Title IV, of the Treaty.

self-employed occupations in the services sector by other Member States' nationals or subjecting other Member States' nationals to different treatment from the Member State's

own nationals are prohibited. Differences of treatment need not be based on rules that overtly discriminate between nationals and aliens but on rules applicable to both.

As in the case of restrictions on establishment, reference to the Council's general programme for the removal of restrictions on cross-frontier provision of services in effect when the Treaty came into force (=) is instructive. This gives the following examples of the types of restrictions prohibited:

(a) Rules or practices applicable or applied solely to aliens which directly restrict their ability to provide services, such as those which prohibit aliens from providing the service, require aliens wishing to provide the service to have a special permit or to fulfil additional requirements, increase the cost of the service provided by aliens by levying special taxes on them or requiring them to lodge a deposit or provide security in the host country, or restrict aliens' access to supplies or distribution channels or increase the cost of such supplies or the use of distribution channels to aliens.

(b) Rules or practices applicable or applied solely to aliens which indirectly restrict their ability to provide services by denying, restricting, or imposing special conditions on, rights normally exercised when services are provided, such as the capacity to enter into contracts such as contracts for work or service contracts, and to exercise the rights under such contracts, the right to bid for or participate as a main or subcontractor in contracts placed by government or other public authorities, the right to borrow or take up credit, eligibility for direct or indirect government aid, the right to sue or be sued and to obtain judicial or administrative review.

(c) Rules and practices which, though applicable irrespective of nationality, hinder particularly or exclusively aliens in providing services.

As in the case of the right of establishment, restrictions on the provision of services by aliens may be justified by differences in the qualifications the host Member State and the alien's Member State require for the occupation. To remove such barriers, Directives have been or are being issued on the

(=) OJ No 2, 15. 1. 1962, p. 32/62 (English Special Edition, Second Series, January 1974, IX. Resolutions of the Council and of the Representatives of the Member States, p. 3.).

mutual recognition of qualifications. Where the differences in training in the Member States require, the Directives also harmonize national training standards.

In 1971 the Council issued a Directive (71/304/EEC) specifically concerned with restrictions on freedom to provide services in connection with public-sector construction contracts and with the award of such contracts to contractors acting through agents or branches (;).

As in the case of the Commission Directive (70/32/EEC) on the abolition of restrictions on government procurement of goods, however, the Directive only applied to restrictions in effect when the Treaty came into force. For present purposes, with Articles 59 and 60 being directly applicable ($), the

Directive is only of value as a source of interpretative guidance and for its definition of public works in Article 2, which is referred to in the currently applicable legislation governing the award of public-sector construction contracts (Council Directive 71/305/EEC of 26 July 1971), which will be discussed below.

The Directive required Member States to abolish restrictions of the types referred to in Title III of the Council's general programmes on the abolition of restrictions on establishment and provision of services which affected the right of non-nationals to bid for, have awarded to them, perform or participate in the performance of public works contracts on behalf of the State, regional or local authorities or other public bodies.

The restrictions to be abolished may be imposed by the State itself or by any public authority, as with the Directive on the abolition of restrictions on government procurement of goods.

The services covered by the Directive are those listed in Major Group 40 'Construction', of the nomenclature of industries in the European Communities (NICE), which is reproduced in an appendix to the Directive.

A list of typical restrictions, prohibited by Articles 59 et seq.,

on the right of non-nationals to provide services in connection with public-sector construction contracts is given

(;) OJ N° L 185, 16. 8. 1971, p. 1 (English Special Edition, 1971 (II), p. 678).

($) Case 33/74 Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (1974) ECR 1299.

in Directive 71/304/EEC (=). Three broad categories are distinguished:

(a) Restrictions that prevent aliens from providing services under the same conditions and with the same rights as nationals, and in particular laws, regulations and administrative provisions or practices that impose or permit discriminatory treatment of aliens by natural or legal persons who have been awarded a contract for the execution or management of works or a franchise for the operation of public services when they in their turn award contracts in respect of such works or services.

(b) Restrictions based on administrative practices that result in discriminatory treatment of aliens by comparison with nationals.

(c) Restrictions based on provisions which, though applicable irrespective of nationality, nonetheless particularly or exclusively hinder nationals of other Member States in practising particular occupations; discriminatory technical specifications not warranted by the subject matter of the contract are specifically referred to.

The Directive also refers to restrictions on credit, on government financial assistance or subsidies available for public works projects, and on supplies over which the State has control.

2. In the European Coal and Steel Community Treaty

Like the right of establishment, freedom of services is not regulated by the ECSC Treaty. Consequently, Articles 59 et seq. of the EEC Treaty are also applicable to the coal and steel industries, as the articles do not conflict with specific provisions of the ECSC Treaty.

3. In the Euratom Treaty

Article 97 of the Euratom Treaty banning discrimination based on nationality in connection with the construction of nuclear installations also applies to the provision of services in connection

with such projects. In addition, Articles 59 et seq. of the EEC Treaty are applicable, in so far as they do not conflict with specific provisions of the Euratom Treaty.

(=) Article 3(1) of Directive 71/304/EEC.

PART II SPECIFIC COMMUNITY LEGISLATION ON GOVERNMENT PROCUREMENT AND CONSTRUCTION

I. Objectives and scope of the 'Supplies' and 'Works' Directives

1. Objectives

The creation of a common market for public-sector procurement and construction contracts was unlikely to come about entirely as a result of the obligations Member States had undertaken in the Treaties to remove restrictions on foreign goods, services and businesses, discussed above. It was still likely to be frustrated by differences in national regulations. Community legislation was necessary to make sure that government contracts were open to all nationalities on equal terms and to make tendering procedures more transparent so that compliance with the principles laid down in the Treaties could be monitored and enforced.

Therefore, to back up the prohibition of import restrictions resulting from discriminatory public purchasing and to make it easier for resident and non-resident foreign firms to compete for public-sector construction contracts and associated contracts for services, the Council issued two Directives to coordinate government procurement procedures: Directive 77/62/EEC of 21 December 1976 (;) on procurement of supplies and equipment (the 'Supplies' Directive) and Directive 71/305/EEC ($) on public works contracts (the 'Works' Directive).

The coordination was undertaken in separate pieces of legislation because of the different characteristics of the two types of contract. It is based on three main principles:

- Community-wide advertising of contracts so that firms in all Member-States have an opportunity of bidding for them.

- The banning of technical specifications liable to discriminate against potential foreign bidders.

- Application of objective criteria in tendering and award procedures.

The latter principle is ensured by the following requirements:

- Contracts are to be put out to open (open to all potential suppliers or contractors) or restricted (open only to selected potential suppliers or contractors) tender, at the choice of the authority placing the contract. Authorities may dispense with tendering only in specified exceptional circumstances.

(;) OJ N° L 13, 15. 1. 1977, p. 1.

($) OJ N° L 185, 16. 8. 1971, p. 5.

- Suppliers may only be excluded from bidding (in restricted tenders) or from final selection on certain specified qualitative criteria (=).

- Contracts may be awarded only on economic or technical criteria, namely either the lowest price or the economically most advantageous tender overall.

The Directives apply to all public-sector procurement and construction contracts subject to the EEC, ECSC and Euratom Treaties, except in certain excluded sectors.

The 'Supplies' Directive (77/62/EEC) was amended in 1980 to take account of the international agreement on government procurement negotiated in the Tokyo Round of trade liberalization talks in GATT, which committed the Community to granting suppliers and products from non-EC signatories

of the GATT Agreement somewhat better access to certain types of EC Government procurement (notably purchasing by central government agencies and some defence procurement) than EC suppliers had under the 1977 Directive.

The amending Directive (80/767/EEC of 22 July 1980) (%) extended these terms to EC suppliers.

The basic provisions on public-sector procurement are still contained in the 1977 Directive, however.

2. Legal effect of the Directives

Article 189 of the EEC Treaty provides that Directives are binding on Member States as to the result to be achieved, but leave to the national authorities the choice of forms and methods.

Member States are obliged to transpose the provisions of Directives into their national laws.

(=) See Article 1 (c) of each of the Directives.

(%) OJ N° L 215, 18. 8. 1980, p. 1.

However, failure to do so does not make the Directives inapplicable.

According to the Court of Justice's case law on direct effect, once the time limit for transposing a Directive into national law has passed any provisions of the Directive that are capable of directly affecting the legal relationship between the Member State to which the Directive was addressed and private individuals can be enforced by such individuals in the courts of the Member State, and the Member State cannot avoid such enforcement on the ground that the formalities for incorporating the Directive into its national law have not been completed or that contrary provisions still exist in its national law.

To determine whether provisions are capable of having direct effect in this way, the Court has ruled that in each particular case the nature, background and wording of the provisions must be considered.

This is generally the case where the provision imposes a clear, precise and unconditional obligation not leaving the Member State any discretion.

3. Arrangement of material

As noted above, the Community rules on public-sector procurement and construction contracts (the 'Supplies' and 'Works' Directives) are similar in content and in the interpretation to be given to their individual provisions. For the convenience of users, who might be interested only in one or the other type of business, however, the Guide will deal with the two directives in separate chapters. Each chapter will explain the provisions of the Directive and give other relevant information and interpretative guidance.

The choice of this arrangement inevitable involves a certain amount of repetition in the two chapters.

II. Government procurement: the 'Supplies' Directive 77/62/EEC, as amended by Directive 80/767/EEC

1. Scope of the Directive: 'public supply contracts'

The Directive is stated to apply to 'public supply contracts'. These are defined in Article 1 as contracts for pecuniary consideration concluded in writing between a supplier and a contracting authority (purchasing or procurement agency) for the supply of products. The contract may, in addition, cover siting and installation work.

Meaning of 'supplier'

Suppliers may be companies, firms or individuals or groups (consortia) of such. Groups may not be required to assume

any particular legal form in order to bid for a contract but may be required to do so by the contracting authority if they are awarded the contract and if a change to this form is necessary for satisfactory performance of the contract (;).

Meaning of 'contracting authority'

The 'contracting authorities' whose purchasing is covered by the Directive are the State, regional or local authorities and 'legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto', listed in Annex I to the Directive($).

Form of contracts

The Directive applies to any contract in writing on the supply of goods for pecuniary consideration to the contracting authority, including rental and leasing as well as sale.

Open or standing contracts between a purchasing entity and a supplier in which the purchasing entity undertakes to obtain at least part of its requirements over a certain period of time from the supplier and which stipulate many of the terms and conditions of sale though not the actual quantities or prices, are similar to contracts for a specific purchase. Such contracts come within the provisions of the Directive, and thus must be advertised, if the total value of the purchases over the past year exceeded the threshold and this situation is not expected to change significantly (=).

Borderline with 'Works' contracts

Supply contracts, according to the definition quoted above, may include siting and installation work, i.e. services necessary to make the products supplied operational.

A problem of distinguishing such contracts from public works contracts may arise in borderline cases, such as where construction materials are supplied for a construction project and the supplier is also responsible for installing or incorporating them on site.

This question is decided, in line with the definition of

(;) Article 18.

($) See list in Table I of Annex II to the Guide.

(=) This solution was adopted at the 12th meeting of the Advisory Committee for Public Contracts on 17/18 May 1978.

procurement in the GATT code (Article 1(1)(a)) (;) by the relative values of the goods and services elements in the contract.

If the value of the goods to be supplied exceeds that of the services to be performed, then it is a supply contract. If, on the other hand, the services included in the contract are construction or civil engineering works of the types listed in Directive 71/304/EEC ($) and their value exceeds that of the goods, it is a public works contract.

2. Exclusions

Procurement falling below certain value thresholds, by certain public utilities and in certain other specified circumstances is excluded from the scope of the legislation. In case of doubt as to whether or not a contract is covered, it is strongly recommended that advice be sought from the Commission.

Value threshold

The threshold value from which a procurement contract becomes subject to the legislation is, in general, 200 000 ECU (European currency units) before VAT. All procurement contracts with an

estimated value before VAT of 200 000 ECU or over are subject to the provisions of Directive 77/62/EEC.

Contracts awarded by the entities listed in Annex I to Directive 80/767/EEC (=) and, to the extent that rectifications, modifications or amendments have been made, their successor entities however, come within the scope of the legislation from a different threshold, which is determined by the GATT code and is adjusted each year in line with exchange rate variations. The special GATT threshold only applies to contracts for sale, and not to rental or leasing contracts (which are not covered by Directive 77/62/EEC).

Also, the authorities listed in Annex I to the 1980 Directive that operate in the field of defence are only subject to it when they purchase the products listed in Annex II to Directive 80/767/EEC(%).

(;) OJ N° L 71, 17. 3. 1980, p. 44.

($) See List in Table V of Annex II to the Guide.

(=) See List in Table II of Annex II to the Guide.

(%) See List in Table III of Annex II to the Guide.

The adjusted special threshold is published towards the end of each year in the 'C' (Information and Notices) series of the Official Journal of the European Communities (&).

The value thresholds in ECU for 1986 and 1987 are as follows (NB: all amounts before VAT):

>TABLE POSITION>

The national currency equivalents of the ECU thresholds are calculated at a fixed exchange rate, which is adjusted by the Commission at the end of October every two years to the average of the daily values of the currency against the ECU over the preceding 12 months and published in the 'C' (Information and Notices) series of the Official Journal of the European Communities in November, with effect from the following 1 January (6).

The national currency equivalents of the thresholds applicable in 1987 are as follows:

>TABLE POSITION>

Calculation of contract value

The way in which the value of procurement contracts is calculated may obviously affect whether or not they exceed the threshold. To ensure that identical calculation methods are used throughout the Community and to prevent evasion of the procurement rules by artificially low valuations, the Directive lays down the following rules:

(5) For 1986 (OJ N° C 307, 28. 11. 1985, p. 2).

For 1987 (OJ N° C 300, 25. 11. 1986, p. 2).

(6) The 1986/87 rates were published in OJ N° C 307, 28. 11. 1985, p. 2.

- Where contracts cover regular supplies or are renewed within a given period, the total value of the supplies over the 12 months following the first supply or over the term of the contract, if more than 12 months, is to be taken.

- Where supplies of a certain type are purchased simultaneously in separate lots, the total estimated value of the lots is to be taken.

- It is prohibited to split up a purchase with the intention of evading the rules of the Directive.

In the case of rental and leasing contracts, the Commission has decided that the value over the following periods should be taken (1):

(a) In the case of fixed-term contracts, the total contract value during the year following its entry into force, or where its term exceeds 12 months, its total value.

(b) In the case of contracts concluded for an indefinite period, the monthly instalment under the contract multiplied by 48.

(c) If there is any doubt, the second basis of calculation is to be used, namely 48 months.

Public utilities

The contracting authorities to which the Community provisions on public supplies contracts apply have already been examined.

Directive 77/62/EEC excludes from its scope contracts awarded by 'bodies which administer transport services, ... production, distribution and transmission or transport services for water or energy and telecommunications services' (Article 2(2).

The Commission emphasizes that, qua exceptions from the rules of the Directive, these exclusions must be construed strictly.

In the transport sector the exception covers organizations actually undertaking the carriage of passengers or goods, but not, for example, those running ports or airports, which are covered by the Directive.

In the water and energy sectors, only services whose specific function is the production, transport or distribution of water

(1) This formula was approved by the Advisory Committee for Public Contracts at its 22nd meeting on 22 November 1982 and officially communicated to the Member States by letter on 19 January 1983.

or energy are excepted. Thus, for example, a public hospital purchasing its own electricity generator or water-collection equipment would be covered by the Directive.

As far as water services are concerned, the exception only applies to services undertaking the collection, supply and distribution of drinking water, i.e. generally water that has been purified, for residential or industrial use. River management, irrigation, drainage and sewerage services are covered by the Directive.

Thus, it is the specific function of the service or organization that must be considered in determining whether the rules of the Directive apply.

Where an organization provides several services at once, for example a local authority combining the functions of sewage treatment and drinking-water supply, only contracts relating to the latter services are excepted.

In telecommunications, the Commission only regards as operators of telecommunications services excluded from the Directive those organizations whose main function is to provide a public telecommunication network (2). Hence, an organization setting up a telecommunications system to give early warning of earthquakes, volcanic activity, etc., would be covered by the Directive.

Of course, the Directive only applies to organizations awarding such contracts if they fall within the Directive's definition of contracting authority.

Exclusions

The Directive does not apply to public contracts awarded subject to different procedural rules under an international agreement between a Member State and one or more non-member countries and concerning supplies for the implementation or exploitation of a joint project (3) or under an international

agreement on the stationing of troops.

(2) This interpretation was communicated to the Member States by letter of 30 June 1980 after the Advisory Committee for Public Contracts had been consulted on the matter at its 17th meeting of 22 May 1980.

(3) All such agreements must be communicated to the Commission.

Also excluded are contracts awarded under the particular mandatory procedure of an international organization (Article 3).

Defence procurement

The Community rules on government procurement have often not been properly applied to procurement by defence agencies. The Commission would stress that most procurement by such agencies is subject to the rules.

The only defence procurement contracts not subject to the rules are those concerning products for specifically military purposes, i.e. arms, munitions and war material, which are covered by Article 223 of the EEC Treaty. A list of these products was published in a Council Decision of 15 April 1958.

Products which, though on this list, are not for specifically military purposes, and products not on the list are subject to the Community procurement rules in Directive 77/62/EEC, as amended by Directive 80/767/EEC.

3. Advertising rules

All open and restricted tenders for contracts subject to the provisions of the Directives must be advertised in the Supplement ('S' series) to the Official Journal of the European Communities, so that firms in all the Member States know of the contracts and have the necessary information to judge whether the contracts interest them.

However, tenders for contracts with a value ranging between the GATT threshold and the general 200 000 ECU threshold that are to be awarded by the entities listed in Annex I to Directive 80/767/EEC need not be advertised in the Official Journal if the GATT Agreement requires them to be advertised in another official (national) publication.

Nevertheless, although not under any obligation to do so, most Member States advertise such tenders in the Official Journal.

Layout of tender notices

In the notices advertising tenders, certain specified items of information must be included and must be presented in

accordance with the models in Annex III to Directive 77/62/EEC (1). The standard content and layout saves time and ensures that all tenders give the same amount of information.

Content of tender notices

The information that is mandatory in tender notices is listed in Articles 13, 14, 15 (d) and 25 (2) of the Directive.

In open tenders the notice must state at least the following:

(a)

the date on which the notice was sent for publication to the Office for Official Publications of the European Communities;

(b)

the tendering procedure;

(c)

the place of delivery, the nature and quantity of the goods to be supplied, and, if the contract is divided into several lots, whether suppliers may tender for some and/or all of the goods required;

(d)

any delivery date;

(e)

the address, telephone number and, where applicable, the telegraphic address and telex number of the authority placing the contract;

(f)

the address from which the tender documents may be obtained and the final date for requesting the documents; also the amount and terms of payment of any sum payable for the documents;

(g)

the closing date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be submitted;

(h)

the persons authorized to be present at the opening of tenders and the date, time and place of opening;

(i)

information about deposits and any other guarantees, whatever their form, that may be required by the contracting authority;

(j)

the main terms of financing and payment and/or references to the legislation in which these are laid down;

(k)

the legal form which a consortium of suppliers may be required to take if awarded the contract;

(l)

the evidence and formalities required by the contracting authority to show that the supplier meets the minimum financial and technical standards (2);

(1) See Table VIII in Annex II to the Guide.

(2) Evidence of the absence of any of the grounds of disqualification, and financial and technical capacity, as specified in Articles 20, 22 and 23 of the Directive (see following Section 5).

(m)

the length of time during which tenders must remain open for acceptance;

(n)

the criteria, other than lowest price, on which the contract is to be awarded, if not stated in the tender documents.

In restricted tenders, the notice must state at least the following:

(a)

the date on which the notice was sent for publication to the Office for Offical Publications of the European Communities;

(b)

the tendering procedure;

(c)

the place of delivery, the nature and quantity of the goods to be supplied, and, if the contract is divided into several lots, whether suppliers may tender for some and/or all of the goods required;

(d)

any delivery date;

(e)

the address, telephone number and, where applicable, the telegraphic address and telex number of the authority placing the contract;

(f)

the legal form which a consortium of suppliers may be required to take if awarded the contract;

(g)

the closing date for receipt of applications to tender, the address to which they must be sent and the language or languages in which they must be submitted;

(h)

the final date on which invitations to tender will be issued by the contracting authority;

(i)

the information required, in the form of verifiable statements, in the application to tender in order to disclose any grounds for disqualification, and the evidence and formalities required by the contracting authority to show that the supplier meets the minimum financial and technical standards (1);

(j)

the criteria on which the contract is to be awarded, if these are not to be stated in the invitation to tender.

National advertising of tenders

So that suppliers throughout the Community can compete for tenders on equal terms, the Directive prescribes that the advertising of tenders in the official gazettes or press of the country of the procurement entity may not contain information other than that published in the Official Journal

(1) As specified in Articles 20, 22 and 23 of the Directive (see also below).

and that tenders may not be advertised nationally before the date of dispatch of the tender notice for EC-wide publication.

It should be stressed that date of dispatch means what it says: the date on which the tender notice is actually sent to the Official Publications Office, and not the date shown on the documentation

sent for publication, which may be much earlier. To ensure that this rule is observed, the Directive requires procurement authorities to be able to supply evidence of the date of dispatch.

Specification of time limits

Another point that needs emphasizing in connection with tender notices is the specification of closing dates and other time limits. These should be indicated clearly in the notice. It should not be made more difficult for suppliers from other countries to find out when the time limit is than for domestic suppliers.

Thus, the Commission does not accept references to the date of publication of the notice in national or regional official gazettes, access to which is much more difficult for foreign firms.

Time limits must be expressed either as a certain number of days from the date of publication of the notice in the Supplement to the Official Journal or as a specific date. The minimum time limits to be allowed in notices are given below (Section 5).

EC-wide advertising

In practice, the responsibility for EC-wide advertising of tenders is shared between the procurement authorities and the Official Publications Office. The procurement entity must supply a notice in the standard form and as far as possible using modern transmission methods to facilitate rapid publication. Notices should be sent to:

Supplement to the Official Journal of the European Communities,

Office for Offical Publications of the European Communities,

2 rue Mercier,

L-2985 Luxembourg.

Tel. (352) 499 28 23 32.

Telex 1324 PUBOF LU or 2731 PUBOF LU.

Facsimile (352) 49 00 03 or (352) 49 57 19.

The Publications Office has notices translated into the other EC languages and undertakes to publish them within the following periods:

- nine days from dispatch of the notice for tenders subject to Directive 77/62/EEC,

- 12 days from dispatch of the notice for tenders subject to Directive 80/767/EEC,

- five days in accelerated procedures (restricted tenders only).

The Supplement to the Official Journal is obtainable in all Member States from the addresses listed in Table VI (1).

Other sources of information on tenders

All government tenders (procurement, construction and services) published in the Supplement to the Official Journal are also on the TED (Tenders Electronic Daily) computerized system, which is accessible through various host organizations.

For further information, contact:

Office for Official Publications of the European Comunities,

Sales Department,

L-2985 Luxembourg.

Tel. (352) 49 92 82 563.

Telex 1324 PUBOF LU.

Facsimile (352) 49 00 03.

Since October 1987 suppliers have also been able to obtain details of tenders from their local Euro-Info Centre, which stocks the Official Journal and is linked to the TED system (2). For further information contact:

Commission of the European Communities,

Smalls Firms Task Force,

200 rue de la Loi,

B-1049-Brussels.

Tel. (02) 236 16 76.

Telex 61655 BURAP B.

Facsimile 236 12 41.

4. Rules on technical specifications

Procurement entities are required to state in the general documentation on the tender, such as the tender notice and tender documents, and in the actual contract documents the technical specifications to be met by the product or products concerned.

Technical specifications are defined in Annex II to Directive 77/62/EEC as all the technical requirements, relating, for

(1) See Annex II to the Guide.

(2) See list of the Euro-Info Centres currently operating or planned in Table VII of Annex II to the Guide.

example, to quality or performance, which objectively describe the product.

They include all the relevant mechanical, physical and chemical properties, classifications and standards, and testing, inspection and acceptance requirements for the products required or their constituent parts or materials.

The Directive's provisions on the standards that may be referred to as a means of defining technical specifications - i.e. in order of precedence, EC standards (in particular CEN and Cenelec, international standards, national standards and any other - must now be interpreted in the light of the European Court of Justice's case law on measures having an effect equivalent to quantitative restrictions. That is to say, if there are no EC standards, procurement authorities must consider products from other Member States manufactured to a different design but having equivalent performance on equal terms with products meeting national or other preferred standards.

As a general rule, any technical specification that has the effect of favouring or eliminating particular firms or products is prohibited. It is up to the procurement authority to show that such discriminatory specifications are justified.

When projects are put out to competitive tender or when bidders are invited to submit alternatives to the procurement authority's project, a supplier's tender may not be rejected solely on the ground that it has been prepared using different calculation methods from those normally used in the country of the procurement authority. However, tenderers must in that case include with their tenders all

the evidence necessary for checking the project and supply the procurement authority with any clarifications it considers necessary.

5. Tendering procedures

Purchasing authorities have a choice between open tenders, whereby any interested supplier may immediately bid for the contract, or restricted tenders, whereby a selection is made from the suppliers who reply to the tender notice and the selected suppliers only are invited to bid.

An accelerated form of restricted tender with shorter than normal time limits is permitted in cases of urgency when observance of the normal time limits is impracticable. Procurement entities must be able to prove the need for urgency.

Exceptions

The requirement for contracts to be put out to competitive tender is waived in, and only in, the circumstances specified in Article 6 of Directive 77/62/EEC. In those circumstances the purchaser can negotiate directly with a given supplier or suppliers without prior advertisement. It is up to the purchasing entity to prove that the circumstances obtain. They are:

(a)

where no suitable supplier was found in a previous open or restricted tender because no or only irregular bids were received or because the bids submitted were unacceptable under national provisions that are consistent with the Community rules on public-sector procurement, provided that the original terms for the contract - for example, as regards financing, delivery dates and in particular the technical specifications of the products - are not substantially altered (otherwise, the whole procedure must be recommenced with a re-advertisement of the tender);

(b)

where, for technical or artistic reasons or because of the existence of exclusive rights, there is only one supplier in the Community able to supply the product;

(c)

where the product is manufactured purely for the purposes of research, experiment, study or development;

(d)

in cases of extreme urgency resulting from unforeseen circumstances not attributable to the action of the procurement authority, where the time limits laid down in tendering procedures cannot be observed;

(e)

for additional deliveries by the original supplier required either as part replacement of regular supplies or equipment, or to extend existing supplies or equipment, where a change of supplier would compel the contracting authority to purchase equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties of operation or maintenance;

(f)

for goods quoted and purchased on a commodity market in the Community (not applicable to purchases covered by Directive 80/767/EEC);

(g)

where supplies are classified as secret or where their delivery must be accompanied by special security

measures under the law of the Member State of the purchasing authority, or where the protection of the basic interest of that State's security so requires.

In the abovementioned exceptional circumstances, the award of contracts is exempt from the competitive tendering rules but is subject to the rules on technical specifications.

Time limits

To ensure that all potentially interested suppliers in the Community have a chance of bidding or applying to bid before the closing date, the two Directives prescribe minimum time limits for the receipt of bids and applications to tender and maximum time limits for procurement authorities to provide documentation and information. The time limits vary depending on whether the contract is covered by Directive 77/62/EEC or 80/767/EEC.

Open tenders

(a) Closing date for receipt of tenders: at least:

- Directive 77/62/EEC: 36 days,

- Directive 80/767/EEC: 42 days,

from dispatch of the tender notice for publication in the Official Journal;

(b) time limit for sending tender documents and supporting documentation (if requested within the time limit): no more than four working days from receipt of the request;

(c) time limit for sending additional information concerning the tender documents (if requested within the time limit): no more than six days before the closing date for receipt of tenders.

Restricted tenders

(a) Closing date for receipt of applications to tender: at least:

- Directive 77/62/EEC: 21 days (in accelerated procedures, 12 days),

- Directive 80/767/EEC: 42 days (in accelerated procedures, 12 days),

from dispatch of the tender notice for publication in the Official Journal;

(b) time limit for sending additional information concerning the tender documents (if requested within the time limit): no more than six days (in accelerated procedures, four days) before the closing date for receipt of tenders;

(c) closing date for receipt of tenders: at least:

- Directive 77/62/EEC: 21 days (in accelerated procedures, 10 days),

- Directive 80/767/EEC: 30 days (in accelerated procedures, 10 days),

from the dispatch of the written invitations to tender.

Both in open and restricted tenders, the closing date for receipt of tenders must be appropriately extended if tenders

can only be prepared after a visit to the site or after on-the-spot inspection of documentation supporting the tender documents.

Invitations to tender

Invitations to tender issued to the suppliers selected from those who replied to a restricted tender notice must be sent to all the selected suppliers simultaneously and must be accompanied by the tender documents and any supporting documentation.

Invitations to tender must contain at least the following:

(a)

the address from which other relevant documentation may be obtained and the closing date for requesting the documentation, also the amount and terms of payment of any sum payable for the documentation;

(b)

the closing date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be submitted;

(c)

the persons authorized to be present at the opening of tenders and the date, time and place of opening;

(d)

information about deposits and any other guarantees, whatever their form, that may be required by the contracting authority;

(e)

the main terms of financing and payment and/or references to legislation in which these are laid down;

(f)

the length of time during which tenders must remain open for acceptance;

(g)

a reference to the tender notice published in the Official Journal;

(h)

any documents to be produced by the supplier to confirm the verifiable statements about his current standing and past record required under the terms of the tender notice in order to disclose any grounds for disqualification, or to supplement the evidence supplied under the terms of the tender notice that the supplier meets the minimum financial and technical standards;

(i)

the criteria on which the contract is to be awarded, if these were not stated in the tender notice.

Transmission of applications and invitations to tender

Applications and invitations to tender under restricted tender subject to the ordinary time limits may be sent by letter,

telegram, telex or facsimile. In the last three cases, however, they must be confirmed by letter.

In restricted tenders subject to the accelerated procedure, applications and invitations to tender must be sent by the most rapid means; only applications to tender must be confirmed by letter.

6. Method of calculating time limits

All time limits laid down in the Directives must be calculated by the method provided for in Council Regulation (EEC, Euratom) N° 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits (1).

Under these rules, periods expressed as a certain number of days from a certain event:

(a) run from the day following the day on which the event takes place;

(b) begin at 00h00 on the first day, as defined in (a), and end at 24h00 on the last day of the period;

(c) end, where the last day of the period falls on a public holiday, Saturday or Sunday and the period is not expressed in hours, at 24h00 on the following working day.

Periods expressed as ending at a certain time on a certain date, which are common for certain acts to be performed by suppliers, end at the time and date stated.

Periods include public holidays and weekends unless these are expressly excluded or the periods are expressed as a certain number of working days. Public holidays are all days designated as such in the Member State in which the relevant act has to be performed.

For further details, reference should be made to the text of the Regulation.

7. Criteria for disqualifying or eliminating applicants and bidders

If procurement agencies could disqualify or eliminate applicants to bid or bidders on arbitrary grounds, this could defeat the purpose of opening up public-sector procurement to Community-wide competition.

For this reason, the Directive specificies the only qualitative criteria on which applicants to bid or bidders may be

(1) See text in Table XI of Annex II to the Guide.

disqualified or eliminated and the evidence suppliers may be required to produce to show that they meet the criteria.

Grounds for disqualification

Article 20 of the Directive first lists all the circumstances relating to the suppliers which can be taken by the procurement authority as a ground for disqualifying the supplier from selection to bid or from consideration of his bid.

Any supplier may be immediately disqualified who:

(a)

is bankrupt or being wound up, has ceased or suspended trading, or is operating under court protection pending a settlement with creditors, or is in an analogous situation arising from national proceedings of a similar nature;

(b)

is the subject of proceedings for bankruptcy, winding-up or court protection pending a settlement with creditors, or national proceedings of a similar nature;

(c)

has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

(d)

can be shown by the contracting authority to have been guilty of grave professional misconduct;

(e)

has not fulfilled obligations relating to payment of social security contributions under the statutory provisions of his country of residence or of the country of the contracting authority;

(f)

has not fulfilled obligations relating to payment of taxes under the statutory provisions of his country of residence or the country of the contracting authority;

(g)

has been guilty of serious misrepresentation in supplying information about his current standing or past record or his financial or technical capacity.

In cases (d) and (g) the burden of proof is on the procurement authority. In the other cases it is for the applicant or bidder, if asked to do so in the tender notice, to show that he is not in any of the specified situations.

However, the evidence the procurement authority may require for this purpose is specified in the Article. It must accept as satisfactory evidence:

- for cases (a), (b) and (c), the judicial record on the supplier or an equivalent document issued by a judicial or administrative authority in the supplier's country of origin or residence showing that none of these cases applies,

- for cases (e) and (f), a certificate issued by the competent authority in the Member State concerned.

If such documents or certificates are not issued by the country in question or if they do not cover all the cases referred to in (a), (b) and (c), the supplier may instead produce an affidavit sworn before a judicial or administrative authority, notary or any other competent authority in the Member State concerned.

Instead of an affidavit, a solemn declaration may be provided.

Affidavits and solemn declarations must be authenticated by the competent authority or notary.

Registration

To prove their general commercial standing and fitness, suppliers may be required under Article 21 of the Directive to show that they are on an official register of business in their Member State of residence as required under that State's law. This of course means that a procurement authority may not make it a condition of acceptance of a supplier that he be on an official register in the authority's country.

Evidence of financial and technical capacity

Under Article 17 of the Directive, suppliers not disqualified on any of the grounds of general unsuitability specified in Article 20 may only be eliminated from the suppliers from whom those invited to bid are selected or whose bids are considered on one of two sets of criteria, namely financial and technical capacity.

Financial capacity

Under Article 22, evidence of the supplier's financial capacity may be provided, as a rule, by any of the following:

(a) appropriate statements from bankers;

(b) the company's balance sheets or extracts from them;

(c) a statement of the firm's total turnover, and its turnover from the products concerned by the tender, for the past three years.

However, a purchasing entity may require evidence other than the three items mentioned above, if

such other evidence is objectively necessary to show that the supplier has the requisite financial capacity to perform the contract.

All evidence required of financial capacity must be stated in the tender notice under both open and restricted tenders and in the invitation to tender under restricted tenders.

If, for any valid reason, the supplier is unable to provide the evidence required in the tender notice or invitation to tender, the purchasing authority must allow the supplier to prove his financial capacity by any other document the authority considers appropriate.

Technical capacity

Article 23 contains an exhaustive list of the types of evidence that purchasing entities may require of supplier's technical capacity.

Depending on the nature, quantity and purpose of the products required, they may ask for:

(a)

a list of the supplier's main deliveries of the products over the past three years, stating their value, date, and the purchaser, whether public or private, and providing confirmation of the purchase by the public or private purchaser concerned or, in the case of a private purchaser, alternatively a statement to that effect by the supplier;

(b)

a description of the supplier's technical plant, quality control procedures and research and design facilities;

(c)

particulars of the technical resources (staff and facilities) the supplier can call upon, particularly for quality control, whether or not they belong to the firm;

(d)

samples, descriptions and/or photographs of the products, which the procurement entity may require to be authenticated;

(e)

certificates issued by an officially-recognized quality control or certification body stating that a clearly-identified product conforms to certain specifications or standards;

(f)

where the products required are complex or are required for a special purpose, an inspection by the national authorities of the procurement entity, or by the competent official body of the supplier's country of residence if it agrees to carry out the inspection on their behalf, of the supplier's production and, if necessary, design and research facilities and his quality control procedures.

The references required to prove technical capacities must appear in the contract notice both in the open and restricted procedures.

On the other hand under the abovementioned Article 23 the extent of the information required by the contracting authorities 'must be confined to the subject of the contract', that is, this information may only be required to the extent that it is necessary to assess whether the technical capacities of the suppliers are appropriate for the desired supplies.

Purchasing authorities must also take into account suppliers' legitimate interest in protecting

their trade secrets.

Additional information

Suppliers may be asked to amplify or elucidate the evidence of general suitability and financial and technical capacity they have submitted to the procurement authority. However, any further information requested must be strictly confined to the matters listed in Articles 20 to 23.

8. Award criteria

The only criteria on which purchasing entities may award contracts are the lowest price and the economically most advantageous tender overall (Article 25 of the Directive).

The lowest price criterion does not raise problems of interpretation, for the prices quoted in the bids are simply compared and the contract awarded to the lowest bidder.

Some explanation is required of the second criterion, however. The question is what features of bids may be taken into consideration in determining which, on balance, is the best offer. The Directive states that purchasing entities may base themselves on 'various criteria according to the contract in question, e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales services and technical assistance'.

The list is not exhaustive, but it is clear from the examples given that only objective criteria may be used which are strictly relevant to the particular procurement decision and uniformly applicable to all bidders. Variation in the criteria is permitted to take account of the inherent characteristics of the goods to be purchased and the use for which the purchaser requires them.

All the criteria the purchasing authority intends to apply in determining the economically most advantageous offer must be stated in the tender notice or the tender documents. N° criterion not mentioned in the notice or tender documents may be used.

The Directive also provides that where possible the criteria should be listed in descending order of importance. Suppliers should not be left in the dark about how bids are going to be assessed.

Abnormally low tenders

If a bid appears to be abnormally low given the contract specifications, the procurement authority is entitled to check the costing of the bid before awarding the contract to the bidder. However, for this purpose it is obliged to give the bidder an opportunity of justifying the bid and if it considers any of his explanations unsatisfactory must tell him so. Otherwise, no bid may be rejected on this ground.

The right of procurement agencies to reject the bidder's explanation of his bid as unsatisfactory does not entitle them to presume this and to reject the bid without asking for explanations. The object of the provision, namely to protect bidders against arbitrary rejection of their bids by procurement authorities, would be defeated if the need to seek explanations from the tenderer of a suspiciously low bid were left to the discretion of the procurement authority (1).

(1) So held by the European Court of Justice in relation to the corresponding provision (Article 29(5) of the 'Works' Directive (Case 76/81 Transporoute v. Luxembourg Minister of Works (1982) ECR 417 at 428-9 (paragraph 17)).

As the procedure for checking bids that appear to be abnormally low is an essential safeguard for bidders and is therefore mandatory, there must be some means of monitoring its use. Consequently, the Commission considers that the communications the procurement authority has with the supplier for this purpose should be in writing (i.e. by exchanges of correspondence) or, if oral, recorded in writing (i.e. by keeping minutes of telephone conversations, meetings, etc., with copies naturally

sent to the supplier). Monitoring of compliance with the procedure is only possible if there are written records.

It is also important to note that in evaluating whether or not a bid is abnormally low, purchasing entities must base themselves on the conditions in the bidder's country, having regard, of course, to any extra costs involved in supplying to another Community country. In particular, they may not discriminate against foreign bidders by referring only to conditions on their domestic market.

At all events, it is not permitted to reject as abnormally low a bid that has been properly costed according to conditions on the market of the supplier's country and meets the contract specifications.

Exception

The only exception from the rule that contracts must be awarded either to the lowest bidder or to the bid offering overall the economically most advantageous terms is where legislation in force when Directive 77/62/EEC was adopted provides for certain bidders to be given preference. However, this legislation must be compatible with the Treaty.

Preferences introduced for regional policy reasons have long posed a problem for the Community government procurement rules. The Commission will shortly redefine its position on this question in the light of the Single European Act.

III. Government construction contracts: the 'Works' Directive 71/305/EEC

1. Scope of the Directive: 'public works contracts'

The Directive is stated to apply to 'public works contracts'. These are defined in Article 1 as contracts for pecuniary consideration concluded in writing between a contractor and an authority awarding contracts and concerning one of the

activities in the construction sector listed in Major Group 40 of the 'nomenclature of industries in the European Communities', reproduced in the Annex to Directive 71/304/EEC (1).

Meaning of 'contractor'

Contractors may be companies, firms or individuals or groups (consortia) of such. Groups may not be required to assume any particular legal form in order to bid for a contract, but may be required to do so if they are awarded the contract.

Meaning of 'authority awarding contracts'

The 'authorities' whose construction contracts are covered by the Directive are the State, regional or local authorities and 'legal persons governed by public law (or, in Member States where this concept is unknown, equivalent bodies)' (2) listed in Annex I to the Directive (3).

Form of contracts

The Directive requires merely that the contract be for pecuniary consideration and be drawn up in writing. Nothing is said as to its content.

There being no express restriction on the terms of the contract, the Directive covers the widest possible range of contracts a public authority can make with a private contractor for construction works. Thus, it includes, for example, contracts covering the planning and/or financing of a project as well as its execution.

How the project is financed is also irrelevant for the purposes of the Directive. It may be financed from the principal's own resources or borrowing by the principal, or the financing may be left to the contractor.

(1) See list in Table IV of Annex II to the Guide. In 1970 the NICE classification was revised and incorporated into the broader NACE (general industrial classification of economic activities within the European Communities) classification. In the NACE classification, Major Group 40 'Construction' of the NICE classification became Class 50 'Building and civil engineering'.

(2) Words in brackets inserted by the Treaty of Accession of Denmark, the United Kingdom and Ireland.

(3) See list in Table V of Annex II to the Guide.

2. Exclusions

Contracts falling below a certain value threshold, awarded by certain public utilities or in certain other specified circumstances, or involving certain specified forms of consideration, are excluded from the scope of the Directive.

These are dealt with in detail below. In case of doubt as to whether or not a contract is covered, advice should always be sought from the Commission

Value threshold

The threshold value from which a public works contract becomes subject to the Directive (78/669/EEC) of 2 August 1978 (1) amending the basic Directive to take account of the introduction of the European unit of account, which later became the ECU, is 1 000 000 ECU (European currency units) before VAT. All public works contracts with an estimated value of 1 000 000 ECU or over are subject to the provisions of the Directive, unless they fall within one of the excluded categories.

The national currency equivalents of the ECU threshold are calculated at a fixed exchange rate, which is adjusted by the Commission at the end of October every two years to the average of the daily values of the currency against the ECU over the preceding 12 months and published in the 'C' (Information and Notices) series of the Official Journal of the European Communtiesin November, with effect from the following 1 January. The national currency equivalents of the threshold applicable in 1986/87 (2) are as follows:

>TABLE POSITION>

Calculation of contract value

The Directive lays down rules for calculating the value of contracts. First of all, the value taken must include, as well as

(1) OJ N° L 225, 16. 8. 1978, p. 41.

(2) The 1986/87 rates were published in OJ N° C 207, 28. 11. 1985, p. 2.

the value of the work contracted for, also the value of the supplies needed to carry out the work even if these are provided to the contractor by the principal.

The estimated value of work which the authority intends to have carried out later by the contractor awarded the current contract and which consist in a repetition of the work to be carried out under the current contract must also be included in the contract value (Article 9 (g)).

It is prohibited to split up contracts with the intention of evading the rules of the Directive (Article 7).

In practice, the Commission considers that no question of splitting to evade the rules can arise if the contract value is calculated to include all the work necessary to make the project operational, i.e. finished and ready for the use intended by the authority. This does not prevent award of the contract in lots, provided this is mentioned in the tender notice.

Public utilities

The Directive excludes from its scope contracts awarded by 'bodies. . . governed by public law... which administer transport services' or by the 'production, distribution, transmission or transportation services for water and energy' (Article 3 (4) and (5).

The Commission emphasizes that, qua exceptions, these provisions must be construed strictly.

In the transport sector, the exception covers organizations actually undertaking the carriage of passengers or goods, i.e. common carriers. Authorities operating facilities such as ports or airports are subject to the Directive.

In the water and energy sectors, only services whose specific function is the production, transport or distribution of water or energy are excepted. Thus, for example, an army barracks planning to build its own power plant or water pumping station would be covered. As far as water services are concerned, the exception only applies to services undertaking the collection, supply and distribution of drinking water, i.e. generally water that has been purified, for residential or industrial use. River management, irrigation, drainage and sewerage services are covered by the Directive. Thus, it is the

specific function of the service or organization that must be considered in determining whether the rules of the Directive apply.

Where an organization provides several services at once, for example a local authority combining the functions of sewage treatment and drinking water supply, only contracts relating to the latter service are excepted.

Of course, the Directive only applies to organizations awarding such contracts if they fall within the Directive's definition of 'authority awarding contracts'.

Contracts awarded under international agreements or under the specific procedure of an international organization

The Directive does not apply to contracts awarded by a Member State:

(a) under an international agreement with a non-EC country which contains different provisions for the award of contracts;

(b) to firms in non-EC countries under an international agreement which excludes EC firms;

(c) under the specific procedure of an international organization (Article 4).

Contracts in which the consideration consists in a franchise to operate the completed works ('concession contracts')

Nor do the provisions of the Directive apply to contracts which have all the features of a public works contract as described above but under which the consideration for the works consists in a franchise ('concession') to operate the completed works or in a franchise plus payment (1).

The Directive, however, requires that it should be stipulated in the terms of such contracts that the organization awarded the franchise ('concessionaire') must not discriminate on grounds of nationality when it itself awards contracts to third parties.

If the 'concessionaire' is itself a public authority covered by the Directive, the work it contracts out to third parties in connection with the project is subject to the full provisions of the Directive, with the exceptions noted above (Article 3 (1), (2) and (3)).

(1) In 1971 a declaration on the procedures to be followed in relation to such contracts was adopted by representatives of the Governments of the Member States meeting within the Council (OJ

N° C 82, 16. 8. 1971, p. 13 - English Special Edition, Second Series, January 1974, IX. Resolutions of the Council and of the Representatives of the Member States, p. 55). Such contracts and subcontracting under them are dealt with in detail in Chapter IV.

3. Advertising rules

To open up public-sector construction contracts to effective competition from firms in other Member States of the Community, authorities are required to advertise the contracts in the Supplement to the Official Journal giving the basic information contractors need to be able to bid for contracts concluded in the Community.

Content of tender notices

In the notices advertising tenders for construction contracts, certain specified items of information must be included. These mandatory items are listed in Articles 16, 17, 18 (d) and 29 (2) of the Directive.

In open tenders (i.e. those whereby any interested contractor may immediately bid for the contract, as opposed to restricted tenders whereby a selection is made from the contractors who reply to the tender notice and the selected contractors only are invited to bid), the tender notice must state at least the following:

(a)

the date on which the tender notice was sent for publication to the Office for Official Publications of the European Communities;

(b)

the tendering procedure;

(c)

the site; the nature and extent of the work and the general nature of the project; if the contract is divided into several lots: the approximate size of the various lots and the possibility of tendering for one, for several, or for all of the lots; if the contract involves design as well as construction work, sufficient information about the project to enable contractors to understand the requirements and prepare a tender accordingly;

(d)

any time limit for the completion of the works;

(e)

the address of the body awarding the contract;

(f)

the address from which the tender documents and additional documentation may be obtained and the final date for requesting the documentation, also the amount and terms of payment of any sum payable for the documentation;

(g)

the closing date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be submitted;

(h)

the persons authorized to be present at the opening of tenders and the date, time and place of opening;

(i)

information about deposits and any other guarantees, whatever their form, that may be required by the authorities awarding the contract;

(j)

the main terms of financing and payment and/or references to the legislation in which these are laid down;

(k)

the legal form which a consortium of contractors will be required to take if awarded the contract;

(l)

the minimum financial and technical standards which the authority awarding the contract requires contractors to meet; these requirements may not be other than those specified in Articles 25 and 26;

(m)

the length of time during which tenders must remain open for acceptance;

(n)

the criteria on which the contract is to be awarded, including criteria other than lowest price if not stated in the tender documents;

In restricted tenders, the tender notice must state at least the following:

(a)

the date on which the notice was sent for publication to the Office for Official Publications of the European Communities;

(b)

the tendering procedure;

(c)

the site; the nature and extent of the work and the general nature of the project; if the contract is divided into several lots: the approximate size of the various lots and the possibility of tendering for one, for several, or for all of the lots; if the contract involves design as well as construction work, sufficient information about the project to enable contractors to understand the requirements and prepare a tender accordingly;

(d)

any time limit for the completion of the works;

(e)

the address of the body awarding the contract;

(f)

the legal form a consortium of contractors will be required to take if awarded the contract;

(g)

the closing date for receipt of applications to tender, the address to which they must be sent and the language or languages in which they must be submitted;

(h)

the final date on which invitations to tender will be issued by the authority awarding the contracts;

(i)

the information required, in the form of verifiable statements, in the application to tender in order to disclose any grounds for disqualification, and the minimum financial and technical standards which the authority awarding the contract requires of contractors;

(j)

the criteria on which the contract is to be awarded, if not to be stated in the invitation to tender.

Specification of time limits

Time limits should be clearly specified in tender notices, so that it is not more difficult for contractors from other countries to determine when the closing dates for submitting tenders, requesting documentation, etc., are than for contractors from the awarding authority's country.

Thus, the Commission does not accept references to the date of publication of the notice in national or regional official gazettes, access to which is much more difficult for foreign contractors. This would be contrary to the Member States' Treaty obligations not to impede firms from other Member States in providing services on their territory.

Time limits must be expressed either as a certain number of days from the date of publication of the notice in the Supplement to the Official Journal or as a specific date. The minimum time limits to be allowed in notices are given herein (Section 5).

Layout of tender notices

Tender notices sent for publication in the Official Journal must be set out as shown in the model notices for open and restricted public works tenders given in Annex I to Council Directive 72/277/EEC of 26 July 1972 (1) (2). This layout is obligatory because it facilitates rapid publication and ensures that all contracts, wherever in the Community the project is situated, are advertised in the same manner and in the same amount of detail.

Notices, while providing clear and complete information, should be concise. Directive 72/277/EEC limits them to a maximum length of one page of the Official Journal, or about 650 words.

National advertising of tenders

So that contractors throughout the Community can compete for contracts on equal terms, Directive 71/305/EEC prescribes that the advertising of tenders in the official gazette or press of the country of the authority awarding the contract may not contain information other than that published in the Official Journal and that the tenders may not be advertised nationally before the date of dispatch of the tender notice for EC-wide publication.

EC-wide advertising

In practice, the responsibility for EC-wide advertising of tenders is shared between the authorities putting contracts out to tender and the Official Publications Office. The authority must supply a notice and must send it to the Publications Office by the most rapid means of transmission available so that publication is not delayed.

(1) OJ N° L 176, 3. 8. 1972, p. 12 (English Special Edition 1972 (III), December 1972, p. 823).

(2) The model notices are reproduced in Table IX of Annex II to the Guide.

Notices should be sent to:

Supplement to the Official Journal of the European Communities,

Office for Official Publications of the European Communities,

2 rue Mercier,

L-2985 Luxembourg.

Tel. (352) 499 28 23 32.

Telex 1324 PUBOF LU or 2731 PUBOF LU.

Facsimile (352) 49 00 03 or (352) 49 57 19.

The Publications Office has notices translated into the other Community languages and undertakes to publish them within nine days from the date of dispatch for publication. (Five days for accelerated procedures - only in restricted tenders.)

The Supplement to the Official Journal is obtainable in all Member States from the addresses listed in Table VI (3).

Other sources of information on tenders

All government tenders (procurement, construction and services) published in the Supplement to the Official Journal are also on the TED (Tenders Electronic Daily) computerized system, which is accessible through various host organizations.

For further information, contact:

Office for Official Publications of the European Communities,

Sales Department,

L-2985 LUXEMBOURG.

Tel. (352) 49 92 82 563.

Telex 1324 PUBOF LU.

Facsimile (352) 49 00 03.

Since October 1987 contractors have also been able to obtain details of tenders from their local Euro-Info Centre, which stocks the Official Journal and is linked to the TED system (4). For further information contact:

Commission of the European Communities,

Small Firms Task Force,

200 rue de la Loi,

B-1049-Brussels.

Tel. (02) 236 16 76.

Telex 61655 BURAP B.

Facsimile 236 12 41.

(3) See Annex II to the Guide.

(4) See list of Euro-Info Centres currently operating or planned in Table VII of Annex II to the Guide.

4. Rules on technical specifications

Authorities are required to state in the general documentation on the tender and in the actual contract documents the technical specifications for the work and a description of the testing, inspection, acceptance and calculation methods to be used.

Meaning of 'technical specifications'

Technical specifications are defined in Annex II to Directive 71/305/EEC as all the technical requirements objectively describing a job, material, product or supply suitable for the purpose for which it is required by the authority awarding the contract.

They include all the mechanical, physical and chemical properties, classifications and standards and testing, inspection and acceptance requirements for the works and the materials and parts used in their construction. They also include the methods or techniques of construction and any other technical requirements for the completed works or the materials and parts used in their construction that the authority awarding the contract may prescribe.

Prohibition of discriminatory specifications

Because of the importance of cross-frontier provision of services for unifying the common market, specifications that would have the effect of discriminating against contractors in other Member States are prohibited.

Thus, the Directive forbids specifications that mention products of a specific make or source or a particular process and thereby favour or eliminate certain firms, unless the specifications are justified by the subject of the contract. In particular, it is not permitted to refer to trademarks, patents or types, or to specific origins or makes unless the authority awarding the contract is unable to describe the subject of the contract using specifications that are sufficiently precise and intelligible to all interested parties without such references, in which case the references must be accompanied by the words 'or equivalent'.

It is up to the authority using such specifications to show that they are justified.

Standards

The Directive permits technical specifications to be defined by reference to national standards. However, this provision must now be read, as far as product specifications are concerned, in the light of the development of the

Commission's policy and the European Court of Justice's case law on measures having an effect equivalent to quantitative restrictions. That is to say, if there are no EC standards, authorities must consider on equal terms with products meeting national or other preferred standards products from other Member States manufactured to a different design but having equivalent performance.

Costing of tenders

Finally, the Directive contains special provisions for cases where projects are put out to competitive tender or where bidders are invited to submit alternatives to the authority's project. In such cases a tender which meets the specifications set out in the tender documents may not be rejected solely on the ground that it has been prepared using different methods of costing work from those normally used in the country where the project is to be undertaken. However, tenderers must in that case include with their tenders all the evidence necessary for checking the project and supply the authority with any clarifications it considers necessary.

5. Tendering procedures

Authorities placing public works contracts have a choice between open tenders, whereby any interested contractor may immediately bid for the contract, or restricted tenders, whereby a selection is made

from the contractors who reply to the tender notice and the selected contractors only are invited to bid.

An accelerated form of restricted tender with shorter than normal time limits is permitted in cases of urgency where observance of the normal time limits is impracticable. As this is an exception from the normal procedure which is likely to reduce the amount of competition for the contract, it should be construed strictly, i.e. reserved for cases where the authority awarding the contract can prove the objective need for urgency and the genuine impossibility of abiding by the normal time limits prescribed for this procedure.

Exceptions

The requirement for contracts to be put out to competitive tender is waived in, and only in, the circumstances specified in Article 9 of the Directive. In those circumstances the authority can negotiate directly with one or more contractors without prior advertisement.

The award of contracts in such circumstances is, however, still subject to the rules on technical specifications. The circumstances listed in Article 9 are:

(a)

where no suitable contractor was found in a previous open or restricted tender because no or only irregular bids were received or because the bids submitted were unacceptable under national provisions that are consistent with the directive's rules, provided that the original terms for the contract, as set out in the invitation to tender and the tender documents, are not substantially altered (otherwise, the contract must be re-advertised);

(b)

where, for technical or artistic reasons or because of the existence of exclusive rights, there is only one contractor in the Community able to carry out the work;

(c)

for works carried out for purposes of research, experiment, study or development;

(d)

in cases of extreme urgency resulting from unforeseen circumstances not attributable to the action of the authority placing the contract, where the time limits laid down in tendering procedures cannot be observed;

(e)

where the works are classified as secret or where their execution must be accompanied by special security measures under the law of the Member State of the authority awarding the contract, or where the protection of the basic interests of that State's security so requires;

(f)

for additional work not included in an earlier project or in the contract awarded for that project which has become necessary as a result of unforeseen circumstances for completing the work described in the earlier contract, where the additional work is to be done by the contractor awarded the earlier contract, and:

- the work cannot be separated technically or financially from the earlier project without great inconvenience to the authority, or

- though separable from the execution of the earlier project, is strictly necessary for its later

stages.

The total value of the additional work may not, however, exceed 50 % of the value of the earlier contract;

(g)

for new work consisting in a repetition of work similar to that carried out under an earlier contract awarded to the same contractor by the same authority, provided that the work conforms to a basic project and the earlier contract for a similar project was awarded to the contractor after an open or restricted tender.

The possibility that this procedure might be used must be announced when the first project is put out to tender and the estimated value of the later projects must be included in the contract value taken for the purposes of determining whether the contract exceeds the value

threshold for application of the Directive. The procedure may only be applied during the three years following conclusion of the original contract;

(h)

in exceptional circumstances, where the nature of the works or the risks attaching to them make it impossible to estimate their total cost.

The Court of Justice has ruled that these exceptions from the rules of the Directive, rules which are intended to guarantee the possibility of effectively exercising the EC-wide right of establishment and freedom to provide services in connection with public-sector construction contracts, must be construed strictly and it is up to the person invoking them to prove that the exceptional circumstances referred to really exist (1).

Time limits

To ensure that all potentially interested contractors in the Community have a chance of bidding or applying to bid before the closing date, the Directive prescribes minimum time limits for the receipt of bids and applications to bid (authorities are, of course, free to allow longer periods) and maximum time limits for authorities to provide documentation and information. The time limits are:

Open tenders

(a) Closing date for receipt of tenders: at least 36 days from dispatch of the tender notice for publication in the Official Journal.

(b) Time limit for sending additional information concerning the tender documents (if requested in time): no more than six days before the closing date for receipt of tenders.

Restricted tenders

(a) Closing date for receipt of applications to tender: at least 21 days (in accelerated procedures, 12 days) from dispatch of the tender notice for publication in the Official Journal.

(b) Time limit for sending additional information concerning the tender documents (if requested in time): no more than six days (in accelerated procedures, four days) before the closing date for receipt of tenders.

(1) Case 199/85 Commission v. Italy (paragraph 14), judgment given on 10 March 1987, not yet reported.

(c) Closing date for receipt of tenders: at least 21 days (in accelerated procedures, 10 days) from dispatch of the written invitation to tender.

Both in open and in non-accelerated restricted tenders, the closing date for receipt of tenders must be appropriately extended if tenders can only be prepared after a visit to the site or after inspection of documentation supporting the tender documents.

Invitations to tender

Invitations to tender issued to the contractors selected from those who replied to a restricted tender notice must be sent to all the selected contractors simultaneously and must state at least the following:

(a)

the address from which the tender documents and any additional documentation may be obtained and the final date for requesting the documentation, also the amount and terms of payment of any sum payable for the documentation;

(b)

the closing date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be submitted;

(c)

information about deposits and any other guarantees that may be required by the authority awarding the contract, whatever their form;

(d)

the main terms of financing and payment and/or references to legislation in which these are laid down;

(e)

a reference to the tender notice published in the Official Journal;

(f)

any documents to be produced by the contractor either to confirm the verifiable statements about his current standing and past record required under the terms of the tender notice in order to disclose any grounds for disqualification or to supplement the evidence supplied under the terms of the tender notice that the contractor meets the minimum financial and technical standards;

(g)

the criteria on which the contract is to be awarded, if these were not stated in the tender notice.

Transmission of applications and invitations to tender

The Directive allows applications and invitations to tender for contracts advertised under the accelerated procedure for restricted tenders to be sent by telegram, telex or telephone as well as by letter, because of the urgency. However, telegrams, telexes and telephone calls must be confirmed by letter.

6. Method of calculating time limits

The closing dates for the receipt of bids and applications to bid must be calculated by the method provided for in Council Regulation (EEC, Euratom) N° 1182/71 of 3 June 1971 defining the rules applicable to periods, dates and time limits (1).

Under these rules, periods expressed as a certain number of days from a certain event:

(a) run from the day following the day on which the event takes place;

(b) begin at 00h00 on the first day, as defined in (a), and end at 24h00 on the last day of the period;

(c) end, if the last day of the period falls on a public holiday or a Saturday or Sunday, and the period is not expressed in hours, at 24h00 on the following working day.

Periods expressed as ending at a certain time on a certain date, which are common for certain acts to be performed by contractors, end at the time and date stated.

Periods include public holidays and weekends unless these are expressly excluded or the periods are expressed as a certain number of working days. Public holidays are all days designated as such in the Member State in which the relevant act has to be performed.

For further details, reference is made to the text of the Regulation.

7. Criteria for disqualifying or eliminating applicants and bidders

To open up the EC public-sector construction market to competition, the coordinated tendering procedures had to include safeguards against the arbitrary selection of contractors on discriminatory criteria.

For this reason, the Directive (Chapter 1 of Title IV) specifies the only qualitative criteria on which applicants to bid or bidders may be disqualified or eliminated and the evidence contractors may be required to produce to show that they meet the criteria. Contractors may be disqualified on certain grounds pertaining to their solvency, record and integrity and may be eliminated on the grounds of insufficient financial or technical capacity to undertake the work.

Grounds for disqualification

Article 23 of the Directive first lists all the circumstances relating to the solvency, record and integrity of contractors

(1) See text in Table XI in Annex II to the Guide.

which can be taken by the authority awarding the contract as a ground for disqualifying the contractor from selection to bid or from consideration of his bid. Any contractor may be immediately disqualified who:

(a)

is bankrupt or being wound up, has ceased trading, or is operating under court protection pending a settlement with creditors, or is in an analogous situation arising from national proceedings of a similar nature;

(b)

is the subject of proceedings for bankruptcy, winding-up or court protection pending a settlement with creditors, or national proceedings of a similar nature;

(c)

has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

(d)

can be shown by the authority awarding the contract to have been guilty of grave professional misconduct;

(e)

has not fulfilled obligations relating to payment of social security contributions under the statutory

provisions of his country of residence or of the country of the authority awarding the contract;

(f)

has not fulfilled obligations relating to payment of taxes under the statutory provisions of his country of residence or of the country of the authority awarding the contract;

(g)

has been guilty of serious misrepresentation in supplying information about his current standing or past record or his financial or technical capacity.

In cases (d) and (g) the burden of proof is on the authority awarding the contract. In other cases it is for the contractor, if asked to do so in the tender notice, to show that he is not in any of the specified situations.

However, the evidence an authority may require for this purpose is not left entirely to its discretion. The Article provides that it must accept as satisfactory evidence:

- for cases (a), (b) and (c), the judicial record on the contractor or an equivalent document issued by a judicial or administrative authority in the contractor's country of origin or residence,

- for cases (e) and (f), a certificate issued by the competent authority in the Member State concerned.

If such documents or certificates are not issued by the country in question, the contractor may instead produce an affidavit

sworn before a judicial or administrative authority, a notary or a competent professional body in his country of origin or residence, or, in Member States where there is no provision for declarations on oath, a solemn declaration (1).

Registration

To prove their general commercial standing and fitness, contractors may be required under Article 24 of the Directive to show that they are on an official register of businesses in their Member State of residence as required under that State's law. Greek contractors may be asked to produce a statement sworn before a notary that they are public works contractors (2). Authorities may not require a contractor to be on the official register in their own country, as this would clearly impede freedom to provide cross-frontier services.

Evidence of financial and technical capacity

Under Article 20 of the Directive, contractors not disqualified on any for the grounds of general unsuitability specified in Article 23 may only be eliminated from the contractors from whom those invited to bid are selected or whose bids are considered on one of two sets of criteria, namely financial or technical capacity. These criteria are listed in Articles 25 to 28 of the Directive.

In the first place, it must be noted that the requirements of contracting authorities to determine the capacity of enterprises to carry out the intended works may only refer to the economic, financial and technical capacity of candidates or tenderers.

Financial capacity

Pursuant to Article 25, evidence of the contractor's financial capacity may be provided, as a rule, by any of the following:

(a) appropriate statements from bankers;

(b) the company's balance sheets or extracts from them, where company law in the contractor's country of residence requires publication of balance sheets;

(c) a statement of the firm's total turnover, and its turnover from construction work, for the past three years.

(1) Provision for solemn declarations instead of affidavits inserted in Article 23 by the Treaty of Accession of Denmark, the United Kingdom and Ireland.

(2) Provision inserted by the Treaty of Accession of Greece.

However, the authority may require evidence other than the three items mentioned above, if such other evidence is objectively necessary to show that the contractor has the requisite financial or technical capacity to undertake the work.

All evidence required of financial capacity must be stated in the tender notice under both open and restricted tenders and in the invitation to tender under restricted tenders.

If, for any valid reason, the contractor is unable to provide the evidence required in the tender notice or invitation to tender, the authority must allow the contractor to prove his financial capacity by any other document the authority considers appropriate.

Technical capacity

Article 26 contains an exhaustive list of the types of evidence that authorities awarding contracts may require of contractors' technical capacity.

They may ask for:

(a) the professional qualifications of the contractor and/or his senior employees, in particular those to be in charge of the works;

(b) a list of works carried out over the past five years supported by certificates of satisfactory completion of the most important works and stating the value, date and site of the works and whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the certificates should be sent by the competent national authority to the authority awarding contracts direct;

(c) particulars of the tools, plant and equipment the contractor will have for carrying out the work;

(d) particulars of the firm's average annual workforce and the number of managerial staff for the past three years;

(e) particulars of the technical resources (staff and facilities) the contractor can call upon for carrying out the work, whether or not they belong to the firm.

As in the case of financial capacity, authorities are required to state the evidence they require of contractors' technical capacity in the tender notice or the invitation to tender.

Additional information

Authorities may not later require evidence on other matters not mentioned in the tender notice or invitation to tender, because this could detract from the transparency of the selection process.

Pursuant to Article 27, the may only require contractors to amplify or elucidate the evidence of general suitability and financial and technical capacity already submitted, within the limits set by Articles 23 to 26.

Official lists of approved contractors

Article 28 of the Directive contains special provisions on the official lists of approved contractors maintained in some Member States and on the value of listing as evidence of suitability vis-à-vis

authorities awarding contracts in other Member States.

Contractors on such lists in their Member State of residence may claim the listing as alternative evidence of fulfilment of certain of the qualitative criteria referred to in Articles 23 to 26.

To do so, they must submit to the authority awarding the contract a certificate of registration on the approved list issued by the appropriate authority, indicating the particulars on which evidence was required in order to gain registration and their classification on the list.

Under Article 28 (3), a certificate of registration must be accepted by authorities awarding contracts in other Member States as a presumption of the contractor's suitability for works covered by this classification in lieu of the evidence referred to in Articles 23 (a) to (d) and (g), 24, 25 (b) and (c) and 36 (b) and (d), but not in lieu of that referred to in Articles 25 (a) and 26 (a), (c) and (e).

The Directive further provides that facts established by registration may not be questioned. However, with regard to payment of social security contributions, an additional certificate may be required each time the contractor bids for a contract.

In other words, registration on an approved list is only conclusive of those objective facts on which evidence had to be submitted in order to gain registration.

Except as regards those facts which may not be challenged, the contractor may, however, be required by the authority to provide further information on the matters for which a certificate of registration must be accepted in lieu of other evidence, in order to assess his suitability for particular work.

Evidence on the other matters on which an authority is entitled to require evidence under the Directive and which are not covered by the presumption created by registration must be submitted by the contractor in the normal way.

8. Award criteria

The only criteria on which authorities may award contracts are the lowest price and the economically most advantageous tender overall (Article 29 of the Directive).

- The lowest price criterion does not raise problems of interpretation, for the prices quoted in the bids are simply compared and the contract awarded to the lowest bidder.

- Some explanation is required of the second criterion, however. The question is what features of bids may be taken into consideration in determining which, on balance, is the best offer.

The Directive states that authorities may base themselves on 'various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit'.

The list is not exhaustive, but it is clear from the examples given that only objective criteria may be used which are strictly relevant to the particular project and uniformly applicable to all bidders. Variation in the criteria is permitted to take account of the inherent characteristics of different works and the purpose for which they are required.

All the criteria the authority intends to apply in determining the economically most advantageous offer must be stated in the tender notice or the tender documents. N° criterion not mentioned in the notice or tender documents may be used.

The Directive also provides that where possible the criteria should be listed in descending order of importance.

While in some cases it may be difficult to rank the criteria in this way, in others one criterion will clearly be uppermost. For example, in a bridge construction project the ranking of the criteria

might well be:

1. technical merit (stability, resistance to subsidence, elasticity, etc.);

2. cost;

3. aesthetic merit.

If two tenders for this project were equal on technical merit, the cheaper of the two would be preferred. If they were equal on technical merit and cost, the choice would go to the more aesthetically pleasing design.

Authorities should specify this ranking of criteria wherever possible so that contractors know on what basis their bids are to be assessed.

The Directive's requirements for specifying the criteria on which contracts are to be awarded can be summarized as follows:

- open tenders:

(a) lowest price: in tender notice;

(b) economically most advantageous tender and individual criteria to be used in determining it: in tender notice or tender documents;

- restricted procedures:

(a) lowest price: in tender notice or invitation to tender;

(b) economically most advantageous tender: in tender notice or invitation to tender;

(c) individual criteria to be used in determining economically most advantageous tender: in tender notice or tender documents.

Abnormally low tenders

If a bid appears to be abnormally low given the contract specifications, the authority awarding the contract is entitled to check the costing of the bid, before awarding the contract to the bidder. However, for this purpose it is obliged to give the bidder an opportunity of justifying the bid and, if it considers any of his explanations unsatisfactory, to tell him so. Otherwise, no bid may be rejected on this ground. The Court of Justice upheld this requirement in Transporoute v. Luxembourg Minister of Public Works, where it said that the right expressly given to the authorities awarding contracts by this provision (Article 29 (5)) to reject the bidder's explanations of his bid as unsatisfactory does not entitle them to presume this and to reject the bid without asking for

explanations. The object of the provision, namely to protect bidders against arbitrary rejection of their bids by authorities, would be defeated if the need to seek explanations from the tenderer of a suspiciously low bid were left to the authority's discretion (1).

As the procedure for checking bids that appear to be abnormally low is an essential safeguad for bidders and is therefore mandatory, there must be some means of monitoring its use. Consequently, the Commission considers that the communications the authority placing the contract has with the contractor for this purpose should be in writing (i.e. by exchanges of correspondence) or, if oral, recorded in writing (i.e. by keeping minutes of telephone conversations, meetings, etc., with copies naturally sent to the supplier). Monitoring of compliance with the procedure is only possible if there are written records.

It is also important to note that in evaluating whether or not a bid is abnormally low, authorities

must base themselves on the conditions in the bidder's country, having regard of course to any extra costs involved in supplying to another Community country. In particular, they may not discriminate against foreign bidders by referring only to conditions on their domestic market.

At all events, it is not permitted to reject as abnormally low a bid that has been properly costed according to conditions on the market of the contractor's country and meets the contract specifications.

Exception

The only exception from the rule that contracts must be awarded either to the lowest bidder or to the bidder offering overall the economically most advantageous terms is where legislation provides for certain bidders to be given preference by way of aid. However, this legislation must be compatible with the Treaty, in particular the state aid rules of Articles 92 et seq.

Preferences introduced for regional policy reasons have long posed a problem for the Community rules on public-sector construction contracts. The Commission will shortly redefine its position on this question in the light of the Single European Act.

(1) Case 76/81 (1982) ECR 417 at 428-9 (paragraph 17).

IV. Public works contracts in which the consideration consists in a franchise to operate the completed works ('concession contracts') and subcontracting under such contracts

Public-sector construction contracts under which the contractor's consideration consists wholly or partly in a franchise ('concession') to operate the completed works are, as noted in Chapter III, excluded from the normal Community rules on the award of public works contracts by Article 3 of the 'Works' Directive 71/305/EEC. However, the work done under such contracts is not entirely outside the scope of the Directive: authorities are required to stipulate in their contract with the organization awarded the franchise ('concessionnaire') that it must not discriminate on grounds of nationality when it itself awards contracts to third parties. Also, if the 'concessionnaire' is itself a public authority covered by the Directive, the work it contracts out to third parties is subject to the full provisions of the Directive.

Although 'concession contracts' are to this extent not subject to the formal Community rules on public-sector contracts laid down in the Directive, the Member States have agreed to abide voluntarily by certain tendering procedures for such contracts and related subcontracts. This voluntary code of practice was adopted in a declaration by representatives of the Member States meeting within the Council in 1971 (2).

1. Principal contracts

The declaration provides that authorities wishing to award a contract for works with an estimated total value exceeding 1 000 000 ECU in return for a franchise to operate the works afterwards are required to advertise the contract in the Official Journal.

The tender notice must:

(a) describe the subject of the contract in sufficient detail to enable potentially interested contractors to make a valid assessment;

(b) list the personal, technical and financial conditions to be fulfilled by applicants;

(c) state the main criteria on which the contract is to be awarded; and

(d) give the closing date for submission of tenders.

The closing date for submission of tenders may not be less than 35 days from the date of dispatch of the notice for publication in the Official Journal.

(2) OJ N° C 82, 16. 8. 1971, p. 13 (English Special Edition, Second Series, January 1974, IX. Resolutions of the Council and of the Representatives of the Member States, p. 55).

The notice will be published not later than 10 days after the date of dispatch.

2. Subcontracts

The declaration also provides that it should be stipulated in the principal contract that the contractor ('concessionnaire') must subcontract out a certain percentage of the work to third parties and must advertise such subcontracts.

'Third parties', for this purpose, do not include members of the consortium to which the principal contract is awarded or 'associated or affiliated companies', which are defined as companies holding a controlling intrest in the company, or in one of the consortium of companies, to which the principal contract is awarded or companies a controlling interest in which is held by the company, or by one of the consortium of companies, to which the principal contract is awarded.

Regarding the percentage of work that must be subcontracted out, the Declaration provides that the authority awarding the principal contract must:

(a) either require the concessionnaire(s) to subcontract to third parties at least 30 % of the total value of the work provided for by the principal contract, although allowing them to subcontract a higher percentage if they wish;

(b) or ask bidders to specify in their tenders the percentage they will subcontract out.

In both cases the authority awarding the contract must take the percentage of subcontracting as a positive factor in the choice of concessionnaire.

Regarding the advertising of subconstracts, the authority awarding the principal contract must stipulate the following:

Tenders for subcontracts for work worth 1 000 000 ECU or over must be advertised in the Official Journal. The tender notice to be placed in the Official Journal must be sent to the Official Publications Office and must be set out according to the model appended as Annex II to Directive 72/277/EEC (1). It will be published within 10 days from the date of dispatch.

The tender notice must include at least the following information:

vii(i) the date on which the tender notice was sent for publication to the Official Publications Office;

(1) See Table X of Annex II to the Guide.

vi(ii) the place, nature and extent of the work and the general nature of the project;

v(iii) the time limit for completion of the work;

ii(iv) information about any financial guarantees that may be required;

iii(v) the closing date for receipt of tenders;

ii(vi) the address from which documents on the work required such as plans, quantities, tender documents, etc., may be obtained;

i(vii) the address to which the tenders must be sent;

(viii) the documents to be enclosed with the tender as evidence of the technical and financial qualifications of the contractor;

ii(ix) the criteria on which the contract is to be awarded.

The closing date for the receipt of bids may not be less than 35 days from the date on which the tender notice was sent to the Publications Office.

National advertising of tenders may not contain information other than that published in the Official Journal.

The criteria on which contracts are awarded must be either:

(a) the lowest bidder; or

(b) the economically most advantageous tender on the basis of the criteria stated in the tender documentation.

V. Telecommunications

1. General policy

The European Community is progressively implementing a global policy in the field of telecommunications. One important aspect of this policy is the achievement of a Community-wide homogeneous market for telecommunications equipment and services.

Since 1983, the Commission has been actively developing this policy by action on standardization and by specific measures to open up the market for procurement by network operators.

The policy on standardization, which is being conducted with the assistance of a Working Party of Senior officials on Telecommunications and in collaboration with the European Conference of Postal and Telecommunications Administrations (CEPT), is aiming at production of common technical specifications for telecommunications terminals. In this field the Council of Ministers has adopted:

- Directive 86/361/EEC (1), which provides for mutual recognition of conformity test results, and

- Decision 87/95/EEC (2), which among other things requires public authorities to refer to harmonized standards in equipment tenders.

The specific measure on market opening agreed upon by the Council is:

- Recommendation 84/550/EEC (3), which established a first experimental phase of opening up access to public telecommunications contracts.

Directive 86/361/EEC and Recommendation 84/550/EEC are presented below in greater detail.

2. Council Directive 86/361/EEC

The Directive provides for the mutual recognition, by designated national type-approval authorities, of the result of tests for conformity with common technical specifications for mass-produced terminal equipment for connection to public telecommunications networks. The tests are to be carried out by nationally approved testing laboratories, which have been accredited in accordance with an agreed scheme within the Community.

Successful testing will result in a certificate of conformity (accompanied by the test results) being issued to the laboratory's client, which he may use in any type-approval application in other Community countries without the need for further testing.

An annual programme of standardization work is to be agreed with CEPT and common conformity specifications (known as Normes Européennes de Télécommunications - NETs) produced. NETs are adopted in CEPT and published in the Official Journal.

NETs must take account of essential requirements of the safety of users and network operators' employees, the protection of the public networks from harm, and in justified cases of the inter-operability

of terminal equipment. It is recognized that in this task the historical features of existing national networks and the national provisions for the use of radio frequencies must be respected.

Telecommunications administrators are required to use NETs in their procurement of terminals, unless the

(1) OJ N° L 217, 5. 8. 1986, p. 21.

(2) OJ N° L 36, 7. 2. 1987, p. 31 (this Decision also concerns information technologies).

(3) OJ N° L 298, 16. 11. 1984, p. 51.

equipment must conform to a pre-NET specification in order to replace existing equipment or serve in a transitional situation between two systems. If terminal equipment conforming to a NET is not economically available in a specific national situation, a temporary reduction in the requirements may be claimed.

In the event of a Member State discovering that a NET fails to meet the essential requirements it is supposed to cover, or that there are shortcomings in this application, it may suspend recognition of the certificate of conformity.

Detailed procedures which must be strictly adhered to are included for involving the Commission and other Member States when any country exercises the waiver, reduced requirement, and suspension rights mentioned above.

Discussions with the Member States in the Working Party of Senior Officials on Telecommunications and the new CEPT Telecommunications Recommendations Applications Committee (TRAC) resulted in an urgent work programme being set up involving:

(a) NETs 1-3 applicable to all terminals requiring access to circuit-switched, packet-switched, and ISDN public networts (X21, X25, ISDN basic);

(b) a compendium of national requirements for PSTN access (with little harmonization - nominally NET 4);

(c) NETs 5-9 covering digital telephony, analogue modems, Group 3 facsimile, Telex and ISDN Terminal Adaptors;

(d) safety being covered by joint CEPT/Cenelec (European Committee for Electrotechnical Standardization) activity targeted at a European standard.

The Directive came into force on 24 July 1987. The work on the abovementioned NETs and on selection of accredited testing laboratories was geared to this date.

3. Recommendation 84/550/EEC

The peculiarities of the telecommunications equipment sector led the Community to exclude telecommunications from the public procurement rules under Directive 77/62/EEC. Because of the importance of opening up the market in this field, a special measure has now been taken to promote liberalization of this market, namely Recommendation 84/550/EEC.

In the recommendation, the Council calls on the

Governments of the Member States to ensure that their telecommunications administrations provide opportunities for suppliers in the other Community countries, following

their usual procedure and on a non-discriminatory basis, to tender for:

1. all new telematic terminals and all conventional terminals for which there are common type-approval specifications;

2. all other types of equipment (switching and transmission equipment and conventional terminal equipment for which there are no common type-approval specifications) for at least 10 % by value of their annual orders.

The Member States' Governments report to the Commission at the end of each six-month period on the measures taken by telecommunications administrations to implement this policy and their practical effects. These data, and all matters relating to the application of the recommendation, are regularly discussed by the Working Party of Senior Officials on Telecommunications.

As a result of the recommendation, network operators advertised 168 tenders for equipment in the Supplement to the Official Journal in 1986. The recommendation is having an increasing impact and it is planned to strengthen the measure as part of the process of removing the remaining internal barriers to trade in the EC by 1992.

PART III

SANCTIONS AND MEANS OF REDRESS IF THE COMMUNITY RULES ARE BROKEN

Anyone who believes that a Member State or public authority has breached its obligations under the Community rules on public-sector procurement and construction contracts discussed in Parts I and II of this Guide - or under other Community rules that may apply to public-sector procurement and construction - may complain to the Commission. The address for lodging complaints is:

Commission of the European Communities,

Directorate-General for the Internal Market and Industrial Affairs,

200 rue de la Loi,

B-1049 Brussels.

Telex 21877 COMEU B.

Facsimile 00 32 2 235 0126.

Complaints may also be submitted to the nearest Euro-Info Centre, which will forward them to the Commission (;).

There is no specific form in which complaints should be submitted, but it is essential to give the Commission full details of the complaint and all the evidence the complainant has (such as, for example, the precise references of legislation that is believed to violate the rules, the name of the authority alleged to have done so, details of the contract concerned and its value, the national advertising of the contract, the precise terms of the tender notice, tender documents or any other document or requirement considered to be in breach or other alleged infringement).

Full specification and documentation of the allegations by the complainant is very important. The Commission can

(;) See list of currently operating or planned Euro-Info Centres in Table VII of Annex II to the Guide.

then investigate the case quickly without having to ask for further information from the national authorities, and if the complaint is sustained it can take action against the Member State in time for this to be of some practical use to the complainant.

It is also vital that the complaint should be made as soon as the complainant becomes aware of

the alleged breach. Speed is especially important where the award procedure is still in progress because the Commission might then be able to act before the contract is awarded.

The Commission would underline that, if the complainant so wishes, it will keep his identity secret when it addresses the responsible national authorities.

The action the Commission can and must take when it finds that a Member State or a public authority for which the State is responsible has breached EC rules is laid down in Article 169 of the EEC Treaty, Article 88 of the European Coal and Steel Community Treaty and Article 141 of the Euratom Treaty.

The procedure under the EEC and Euratom Treaties, which is the same, is a three-stage process:

- Once the Commission has evidence confirming that a Member State has infringed its obligations under the Treaty, it writes a formal letter to the Member State asking it to answer the charges of infringement by a certain date.

- If by that date the Member State does not either take remedial action or refute the charges by showing that the action challenged by the Commission is in fact consistent

with Community law, the Commission serves a 'reasoned opinion' on it ordering it to take remedial action by a certain date.

- If the Member State does not comply by that date, the Commission brings the case before the Court of Justice. In appropriate cases, the Commission can also apply to the Court for an injunction, for example to suspend award of the contract.

Under the European Coal and Steel Community Treaty, the Commission's action against a Member State that it has found to be breaking Treaty rules has immediate and direct effects on the Member State which it does not have under the EEC and Euratom Treaties. Here, after giving the Member State an opportunity to answer the charges, the Commission takes a decision, which by virtue of the second paragraph of Article 14 of the ECSC Treaty is binding.

The decision formally records the infringement and allows the Member State some time to comply. It is up to the Member State to appeal to the Court of Justice if it wishes.

The fact that Community procedures exist to establish infringements does not, however, prevent those concerned from bringing proceedings themselves in national courts to defend their individual rights under Community law.

Indeed there are three good reasons why they should do so. First, concurrent action at Community and national level can only improve the general level of enforcement and compliance.

Secondly, as infringements of the competitive tendering rules tend to occur before contracts are awarded and the award process is quite short, action through national courts or national extra-judicial channels may serve the complainants' immediate purposes better because it is quicker and, unlike a complaint to the Commission, can be specifically directed at the authority awarding the contract.

Also, damages can be awarded in some Member States' courts.

PART IV

COMPETITIVE TENDERING FOR EC-FUNDED PROJECTS

Close attention is paid to compliance with the Community rules on EC-wide competitive tendering when projects are granted EC funding.

Such funding - whether grants from the Regional or Social Funds, the Agricultural 'Guidance' Fund, the Transport Infrastructure Fund or under Integrated Mediterranean Programmes, or loans from Euratom or European Coal and Steel Community resources, from the New Community Instrument or from the European Investment Bank(;) - is conditional on the promoter's compliance with the EC competitive tendering rules under Directives 77/62/EEC and 71/305/EEC, where they are applicable, and with the general prohibitions of measures having an effect equivalent to quantitative restrictions in intra-Community trade and of restrictions on the EC-wide right of EC nationals to set up in business and provide services, on which the Directives are based.

(;) As far as the EIB is concerned, its Board of Governors on 4 June 1984 endorsed a recommendation by its Board of Directors to follow this policy in EIB lending.

It is emphasized that the promoter's obligations do not end with the advertising of tenders in the Official Journal. As shown in the detailed discussion of the Directives in Part II of the Guide, they extend right through to the selection of the successful bidder and the signing of contracts.

Hence, the Commission will not restrict its scrutiny to examination of those applications for funding which it receives but will also monitor compliance with the tendering rules both when reviewing the progress reports on projects and programmes and when checking individual awards of contracts.

In the sectors still excluded from the Directives, the Commission is at present trying to persuade Member States to open up more of their procurement to competition from firms in other EC countries. The European Investment Bank also recommends its clients to consider the benefits of international competitive tendering for projects in these sectors.

ANNEX I

PROPOSALS FOR FURTHER LIBERALIZATION OF GOVERNMENT PROCUREMENT AND CONSTRUCTION BY 1992

In the 1985 White Paper setting out the Commission's programme for removing the remaining internal barriers within the common market by 1992, which was later endorsed by the Community Heads of State and Government, the Commission announced its intention of making proposals which would progressively throw open all public procurement and construction contracts to EC-wide competition. This liberalization was regarded as an essential part of the internal market integration programme.

The Commission identified the following priorities in the White Paper:

- improvement of the 'Supplies' and 'Works' Directives, the EC legislation on competitive tendering for public-sector procurement and construction contracts, to make tendering and award procedures more transparent and open contracts up to greater competition,

- stricter policing of compliance with the legislation,

- extension of the directives to the excluded sectors (energy, transport, water and - in the case of the 'Supplies' Directive - telecommunications, with appropriate allowance for the fact that these sectors are in mixed public and private ownership,

- further liberalization of public procurement of services beyond that already provided for in the 'Supplies' and 'Works' Directives.

Better access to public procurement for small firms is also one of the objectives of the action programme for small and medium-sized enterprises which the Council adopted on 3 November 1986.

In 1986 and 1987 the Commission sent the Council proposals to amend the 'Supplies' and 'Works'

Directives.

The main amendments proposed to the 'Supplies' Directive are as follows:

- The definition of the types of contracts covered is widened and the method of calculating the value of contracts for the purposes of applying the threshold clarified.

- The definition of the excluded sectors is improved to avoid too wide an interpretation.

- Open tenders, which offer the widest possible access to contracts, are now the rule, and the use of restricted tenders has to be justified.

- The extent of the present exceptions from the competitive tendering rules is reduced. In some of the exceptional circumstances in which the advertising requirement was previously waived, a new procedure, called the negotiated procedure, is now required, in which the planned purchase is advertised and some of the suppliers who reply are selected, on the basis of the criteria laid down in the Directive, to negotiate with the procurement entity. In the other exceptional circumstances, negotation with a single supplier is still possible, though the conditions are tightened up.

- Procurement authorities are deterred from discriminating against foreign suppliers in restricted, negotiated and single tender procedures by being required to produce a written report justifying use of the procedure and giving details of the outcome.

- The transparency and competitiveness of procurement decisions is enhanced by inter alia:

- introduction of advance advertising of authorities' annual procurement programmes and their timetable,

- the obligations to publish a notice giving details of the outcome of the procurement decision.

- The chances of suppliers who face extra difficulties because of distance are improved by a lengthening of the minimum time limits procurement authorities must allow for the submission of bids or applications to bid. These longer time limits will also apply to procurement covered by Directive 80/767/EEC.

- The rules on technical specifications have been brought into line with the new policy on standards.

The proposal to amend the 'Works' Directive required a more extensive revision of the Directive because of several complicating factors.

For this reason only the main proposed innovations are listed here:

- The present single value threshold from which contracts become subject to all the rules of the Directive is replaced by two thresholds. Contracts exceeding the higher threshold (which is higher than the present one) are subject to all the rules of the Directive including EC-wide advertising. Those above the lower threshold (lower than the present one) do not need to be advertised throughout the EC but are otherwise subject to the rules.

A two-part threshold had become necessary for two reasons:

(a) The cost of construction works has increased since the Directive was issued and contractors, except those close to the border, are only interested in work in other Member States if the contract is big enough to make the logistics of the operation economic.

(b) On the other hand, firms in other Member States, especially small to medium-sized ones, may be interested in the smaller contracts, so their interests need to be safeguarded. The legal guarantees provided by the present Directive in relation to the smaller contracts are therefore maintained and even extended, but Community-wide advertising has been dropped as unneccessary because these firms have traditionally found out about such contracts through other channels.

- The scope of the Directive is extended by:

(a) a wider definition of the entities awarding contracts that are subject to the Directive;

(b) inclusion of contracts awarded by entities not coming within the definition but financed from public funds;

(c) a restriction of the exemption for the water, energy and transport sectors to works requiring specialist contractors for technical reasons specific to the sector;

(d) the same restriction of the exceptional circumstances in which the competitive tendering rules are waived as in the 'Supplies' Directive.

- The rules for restricted tenders are tightened up to counter abuses involving the use of a numerus clausus. Entities awarding contracts are obliged to invite tenders from a certain number of contractors within a prescribed range (e.g. between five and eight), to state this range in the tender notice and to select domestic and foreign contractors to bid in proportion to the number of domestic and foreign firms replying to the tender notice.

- It is made easier for contractors to bid for contracts by:

(a) introduction of advance advertising of construction projects to be put out to tender;

(b) a lengthening of the minimum time limits authorities must allow for bids and applications to bid and a doubling of most of the extended time limits if the authority has not advertised the project in advance.

- Entities awarding contracts are required to ask bidders to state what proportion of the work will be subcontracted, in order to increase transparency about the division of the work between principal contractors and small to medium-sized firms.

- The transparency of tendering and award procedures is enhanced by provisions requiring authorities to:

(a) explain why they have rejected a contractor's bid or application if the contractor asks them to;

(b) make a report on each award decision and supply it to the Commission on request;

(c) publish a notice on the outcome of each award decision.

- The rules on technical specifications have been brought into line with developments in European and international standardization practice.

In July 1987 the Commission also sent the Council a proposal for a Directive to improve the means of redress available to firms injured by breaches of the Community rules on open public procurement and construction contracting.

The rationale of the proposal are the facts:

(a) that violations of Community rules occur before a contract is awarded and that as the periods involved in the award process are very short, machinery must be made available to deal with violations promptly while their effects are still reversible;

(b) that the means of redress available vary in different Member States, leading to different standards of protection of injured parties;

(c) that the sanctions the Commission can impose for breaches of the public procurement and works Directives do not take effect immediately and in most cases would come too late to provide suitable relief.

The proposed Directive would therefore provide machinery for stricter control of public procurement

and contract award decisions both nationally and by the Commission.

The proposals are that:

- in all Member States suppliers and contractors be provided with effective means of relief through administrative channels and/or the courts against illegal behaviour by procurement or contracting authorities at all stages of the award process and be able to obtain damages for injury resulting from such breaches.

For this purpose the administrative bodies and/or the courts would have to have the power to order award proceedings or execution of an award decision already taken to be suspended;

- the Commission should be able to intervene in national administrative or court proceedings to assert the Community interest and enforce compliance with the Community rules immediately;

- acting on a complaint or on its own initiative, the Commission should be able in urgent cases and where a clear infringement has been committed to order a procurement or contracting authority to suspend award proceedings for a limited period in order to prevent irreparable injury.

ANNEX II TABLES I TO XI

TABLE I

LIST OF LEGAL PERSONS GOVERNED BY PUBLIC LAW AND BODIES CORRESPONDING THERETO REFERRED TO IN DIRECTIVE 77/62/EEC

IIVI. In all Member States:

associations governed by public law or bodies corresponding thereto formed by regional or local authorities, e.g. 'associations de communes', 'syndicats de communes', 'Gemeindeverbaende', etc.

IVII. In Germany:

the 'bundesunmittelbaren Koerperschaften, Anstalten und Stiftungen des oeffentlichen Rechts'; the 'landesunmittelbaren Koerperschaften, Anstalten und Stiftungen des oeffentlichen Rechts' subject to State budgetary supervision.

VIII. In Belgium:

- 'le Fonds des Routes 1955-1969' - 'het Wegenfonds',

- 'la Régie des Voies Aériennes' - 'de Regie der luchtwegen',

- public social assistance centres,

- church councils,

- 'l'Office Régulateur de la Navigation Intérieure' - 'de Dienst voor regeling van den binnenvaart',

- 'la Régie des services frigorifiques de l'Etat belge' - 'de Regie der Belgische Rijkskoel- en Vriesdiensten'.

IIIV. In Denmark:

'andre forvaltningssubjekter'.

IIIV. In France:

- administrative public bodies at national, regional, departmental and local levels,

- universities, public scientific and cultural bodies and other establishments as defined by the Law setting out guidelines for Higher Education N° 68-978 of 12 November 1968

IIVI. In Ireland:

other public authorities whose public supply contracts are subject to control by the State.

IVII. In Italy:

- State universities, State university institutes, consortia for university development works,

- higher scientific and cultural institutes, astronomical, astrophysical, geophysical or vulcanological observatories,

- the 'Enti di riforma fondiaria',

- welfare and benevolent institutes of all kinds.

VIII. In Luxembourg:

public bodies subject to control by the Government, by an association of municipal corporations or by a municipal corporation.

IIIX. In the Netherlands:

- the 'Waterschappen',

- the 'instellingen van wetenschappelijk onderwijs vermeld in Article 15 van de Wet op het Wetenschappelijk Onderwijs (1960)', the 'academische ziekenhuizen'.

- the 'Nederlandse Centrale Organisatie voor toegepast natuurwetenschappelijk Onderzoek (TNO)', and its dependent organizations.

IIIX. In the United Kingdom:

- Education Authorities,

- Fire Authorities,

- National Health Service Authorities,

- Police Authorities,

- Commission for the New Towns,

- New Towns Corporations,

- Scottish Special Housing Association,

- Northern Ireland Housing Executive.

IIXI. In Greece:

other legal persons governed by public law whose public supply contracts are subject to State control.

IXII. In Spain:

other legal persons subject to public rules for the award of contracts.

XIII. In Portugal:

legal persons governed by public law whose public supply contracts are subject to State control.

TABLE II LIST OF ENTITIES TREATED AS CONTRACTING AUTHORITIES FOR THE PURPOSES OF DIRECTIVE 80/767/EEC AT THE TIME OF ADOPTION OF THIS DIRECTIVE

Belgium

I. MINISTERIAL DEPARTMENTS

1. Services du premier ministre

Diensten van de Eerste Minister

2. Ministère des affaires économiques

Ministerie van Economische Zaken

3. Ministère des affaires étrangères, du commerce extérieur et de la coopération au développement

Ministerie van Buitenlandse Zaken, van Buitenlandse Handel en van Ontwikkelingssamenwerking

4. Ministère de l'agriculture

Ministerie van Landbouw

5. Ministère des classes moyennes

Ministerie van de Middenstand

6. Ministère des communications

Ministerie van Verkeerswezen

7. Ministère de la défense nationale

Ministerie van Landsverdediging

8. Ministère de l'éducation nationale et de la culture

Ministerie van Nationale Opvoeding en Cultuur

9. Ministère de l'emploi et du travail

Ministerie van Tewerkstelling en Arbeid

10. Ministère des finances

Ministerie van Financien

11. Ministère de l'intérieur

Ministerie van Binnenlandse Zaken

12. Ministère de la justice

Ministerie van Justitie

13. Ministère de la prévoyance sociale

Ministerie van Sociale Voorzorg

14. Ministère de la santé publique et de l'environnement

Ministerie van Volksgezondheid en Leefmilieu

15. Ministère des travaux publics

- Fonds des routes
- Fonds des bâtiments

Ministerie van Openbare Werken

- Wegenfonds
- Gebouwenfonds

16. Régie des postes (1)

Regie der Posterijen (1)

II. LIST OF MINISTRIES AND STATE DEPARTMENTS WHOSE PURCHASING IS EFFECTED THROUGH THE ENTITIES LISTED AT I

Premier ministre

Eerste Minister

Vice-premier ministre et ministre de la fonction publique

Vice-Eerste Minister en Minister van Openbaar Ambt

Vice-premier ministre et ministre de la défense nationale

Vice-Eerste Minister en Minister van Landsverdediging

Ministre de la justice

Minister van Justitie

Ministre des affaires étrangères

Minister van Buitenlandse Zaken

Ministre des affaires économiques

Minister van Economische Zaken

Ministre de la prévoyance sociale et secrétaire d'Etat aux affaires sociales, adjoint au ministre des affaires wallonnes

Minister van Sociale Voorzorg en Staatssecretaris voor Sociale Zaken, toegevoegd aan de Minister voor Waalse Aangelegenheden

Ministre des communications

Minister van Verkeerswezen

Ministre de l'éducation nationale (néerlandaise)

Minister van Nationale Opvoeding (Nederlands)

Ministre de l'agriculture et des classes moyennes

Minister van Landbouw en Middenstand

Ministre de la culture néerlandaise et ministre des affaires flamandes

Minister van de Nederlandse Cultuur en Minister voor Vlaamse Aangelegenheden

Ministre de l'éducation nationale (française)

Minister van Nationale Opvoeding (Frans)

(1) Postal business only.

Ministre de la santé publique et de l'environnement

Minister van Volksgezondheid en Leefmilieu

Ministre des finances

Minister van Financien

Ministre du commerce extérieur

Minister van Buitenlandse Handel

Ministre de la coopération au développement

Minister van Ontwikkelingssamenwerking

Ministre des postes, télégraphes et téléphones et ministre des affaires bruxelloises (1)

Minister van Posterijen, Telegrafie en Telefonie en Minister voor Brusselse Aangelegenheden (1)

Ministre des pensions

Minister van Pensioenen

Ministre de l'emploi et du travail

Minister van Tewerkstelling en Arbeid

Ministre de l'intérieur

Minister van Binnenlandse Zaken

Ministre de la politique scientifique

Minister van Wetenschapsbeleid

Ministre de la culture française

Minister van Franse Cultuur

Ministre des travaux publics et ministre des affaires wallonnes

Minister van Openbare Werken en Minister voor Waalse Aangelegenheden

Secrétaire d'Etat à l'économie régionale, adjoint au ministre des affaires wallonnes

Staatssecretaris voor de regionale economie, toegevoegd aan de Minister voor Waalse Angelegenheden

Secrétaire d'Etat au budget, adjoint au premier ministre, et secrétaire d'Etat à l'économie régionale, adjoint au ministre des affaires flamandes

Staatssecretaris voor de begroting, toegevoegd aan de Eerste Minister en Staatssecretaris voor de Regionale Economie, toegevoegd aan de Minister voor Vlaamse Aangelegenheden

Secrétaire d'Etat à la réforme des institutions, adjoint au premier ministre

Staatssecretaris voor Institutionele Hervormingen, toegevoegd aan de Erste Minister

Secrétaire d'Etat à la culture française, adjoint au ministre de la culture française

Staatssecretaris voor Franse Cultuur, toegevoegd aan de Minister voor Franse Cultuur

Secrétaire d'Etat aux affaires économiques, adjoint au ministre des affaires économiques, et

Staatssecretaris voor Economische Zaken, toegevoegd aan de Minister voor Economische Zaken en

secrétaire d'Etat aux affaires sociales, adjoint au ministre des affaires flamandes

Staatssecretaris voor Sociale Zaken, toegevoegd aan de Minister voor Vlaamse Aangelegenheden

Secrétaire d'Etat à la réforme des institutions, adjoint au vice-premier ministre

Staatssecretaris voor Institutionele Hervormingen, toegevoegd aan de Vice-Eerste Minister

Secrétaire d'Etat à la culture néerlandaise, adjoint au ministre de la culture néerlandaise, et
Staatssecretaris voor Nederlandse Cultuur, toegevoegd aan de Minister voor Nederlandse Cultuur en
secrétaire d'Etat aux affaires sociales, adjoint au ministre des affaires bruxelloises
Staatssecretaris voor Sociale Zaken, toegevoegd aan de Minister voor Brusselse Aangelegenheden

III. GOVERNMENT INSTITUTIONS

1. Régie des services frigorifiques de l'Etat belge
Regie der Belgische Rijkskoel- en Vriesdiensten
2. Fonds général des bâtiments scolaires de l'Etat
Gebouwenfonds voor de Rijksscholen
3. Fonds de construction d'institutions hospitalières et médico-sociales
Fonds voor de bouw van ziekenhuizen en medisch-sociale inrichtingen
4. Institut national du logement
Nationaal Instituut voor de huisvesting
5. Société nationale terrienne
Nationale landmaatschappij
6. Office national de sécurité sociale
Rijksdienst voor sociale zekerheid
7. Institut national d'assurances sociales pour travailleurs indépendants
Rijksinstituut voor de sociale verzekeringen der zelfstandigen
8. Institut national d'assurance maladie-invalidité
Rijksinstituut voor ziekte- en invaliditeitsverzekering
9. Caisse nationale des pensions de retraite et de survie
Rijkskas voor de rust- en overlevingspensioenen

(1) Postal business only.

10. Office national des pensions pour travailleurs salariés
Rijksdienst voor werknemerspensioenen
11. Caisse auxiliaire d'assurance maladie-invalidité
Hulpkas voor ziekte- en invaliditeitsverzekering
12. Fonds des maladies professionelles
Fonds voor de beroepsziekten
13. Caisse nationale de crédit professionnel
Nationale Kas voor beroepskrediet
14. Caisse générale d'épargne et de retraite

Algemene Spaar- en lijfrentekas

15. Office national des débouchés agricoles et horticoles

Nationale Dienst voor afzet van land- en tuinbouwprodukten

16. Office national du lait et de ses dérivés

Nationale Zuiveldienst

17. Office national de l'emploi

Rijksdienst voor arbeidsvoorziening

Denmark

DANISH GOVERNMENT PROCUREMENT ENTITIES

1. Statsministeriet

2. Arbejdsministeriet

- fire direktorater og institutioner

3. Udenrigsministeriet

- to departementer

4. Boligministeriet

- ét direktorat

5. Finansministeriet

(tre departementer)

- Direktoratet for statens indkoeb

- tre andre institutioner

6. Ministeriet for skatter og afgifter

(to departementer)

- frem direktorater og institutioner

7. Fiskeriministeriet

- fire institutioner

8. Handels- og industriministeriet

- Forsoegsstationen Risoe

- 20 direktorater og institutioner

9. Indenrigsministeriet

- Statens Seruminstitut

- Civilforsvarsstyrelsen

- tre andre direktorater og institutioner

10. Justitsministeriet

- Rigspolitichefen

- tre andre direktorater og institutioner

11. Kirkeministeriet

12. Landbrugsministeriet

- 19 direktorater og institutioner

13. Ministeriet for forureningsbekaempelse

- fem direktorater

14. Ministeriet for Groenland

- Den kgl. groenlandske Handel (1)

- Groenlands tekniske Organisation

- to andre institutioner

15. Ministeriet for kulturelle anliggender

- to direktorater og adskillige statsejede museer og hoejere uddannelsesinstitutioner

16. Socialministeriet

- fem direktorater

17. Undervisnigsministeriet

- Rigshospitalet

- seks direktorater

- 11 universiteter og andre hoejere laereanstalter

18. OEkonomiministeriet

(3 departementer)

19. Ministeriet for offentlige arbejder (2)

- Statshavne og statslufthavne

- fire direktorater og adskillige institutioner

20. Forsvarsministeriet

(1) Products for resale or for use in the production of goods for sale are not included.

(2) With the exception of Danish State Railways. Ministry of Posts and Telecommunications, postal business only.

France

LIST OF ENTITIES

(1) Main purchasing entities

A. General budget

Premier ministre

Ministre délégué auprès du premier ministre, chargé de la condition féminine

Ministre de la justice

Ministre de la santé et de la famille

Ministre de l'intérieur

Ministre des affaires étrangères

Ministre de la défense

Ministre du travail et de la participation

Ministre de la coopération

Ministre de l'économie

Ministre du budget

Ministre de l'environnement et du cadre de vie

Ministre de l'éducation

Ministre des universités

Ministre de l'agriculture

Ministre de l'industrie

Ministre des transport

Ministre du commerce et de l'artisanat

Ministre du commerce extérieur

Ministre de la jeunesse, des sports et des loisirs

Ministre de la culture et de la communication

Secrétaire d'Etat aux postes et télécommunications (;)

Secrétaire d'Etat aux anciens combattants

Secrétaire d'Etat auprès du premier ministre

Secrétaire d'Etat auprès du premier ministre (relations avec de Parlement)

Secrétaire d'Etat auprès du premier ministre (recherche)

Secrétaire d'Etat auprès du garde des Sceaux, ministre de la justice

Secrétaire d'Etat auprès du ministre de la santé et de la famille

Secrétaire d'Etat auprès du ministre de l'intérieur (départements et territoires d'outre-mer)

Secrétaire d'Etat auprès du ministre de l'intérieur (collectivités locales)

Secrétaire d'Etat auprès du ministre des affaires étrangères

Secrétaire d'Etat auprès du ministre du travail et de la participation (formation professionnelle)

Secrétaire d'Etat auprès du ministre du travail et de la participation (travailleurs manuels et immigrés)

Secrétaire d'Etat du ministre du travail et de la participation (emploi féminin)

(1) Postal business only.

Secrétaire d'Etat auprès du ministre de l'environnement et du cadre de vie (logement)

Secrétaire d'Etat auprès du ministre de l'environnement et du cadre de vie (environnement)

Secrétaire d'Etat auprès du ministre de l'éducation

Secrétaire d'Etat auprès du ministre de l'agriculture

Secrétaire d'Etat auprès du ministre de l'industrie (petite et moyenne industrie)

B. Budget Annex

In particular:

- Imprimerie nationale

C. Special Treasury accounts

In particular:

- Fonds forestier national
- Soutien financier de l'industrie cinématographique
- Fonds spécial d'investissement routier
- Fonds national d'aménagement foncier et d'urbanisme
- Union des groupements d'achats publics (UGAP)

(2) National administrative public bodies

Académie de France à Rome

Académie de marine

Académie des sciences d'outre-mer

Agence centrale des organismes de sécurité sociale (ACOSS)

Agences financières de bassins

Agence nationale pour l'amélioration des conditions de travail (ANACT)

Agence nationale pour l'amélioration de l'habitat (ANAH)

Agence nationale pour l'emploi (ANPE)

Agence nationale pour l'indemnisation des Français d'outre-mer (ANIFOM)

Assemblée permanente des chambres d'agriculture (APCA)

Bibliothèque nationale

Bibliothèque nationale et universitaire de Strasbourg

Bureau d'études des postes et télécommunications d'outre-mer (BEPTOM)

Caisse d'aide à l'équipement des collectivités locales (CAEC)

Caisse autonome de la reconstruction

Caisse des dépôts et consignations

Caisse nationale des allocations familiales (CNAF)

Caisse nationale des autoroutes (CNA)

Caisse nationale d'assurance-maladie des travailleurs salariés (CNAM)

Caisse nationale d'assurance-vieillesse des travailleurs salariés (CNAVTS)

Caisse nationale militaire de sécurité sociale (CNMSS)

Caisse nationale des monuments historiques et des sites

Caisse nationale des télécommunications (;)

Caisse du prèts aux organismes HLM

Casa de Velasquez

(1) Postal business only.

Centre d'enseignement zootechnique de Rambouillet

Centre d'études du milieu et de pédagogie appliquée du ministère de l'agriculture

Centre d'études supérieurs de sécurité sociale

Centres de formation professionnelle agricole

Centre national d'art et de culture Georges Pompidou

Centre national de la cinématographie française

Centre national d'études et de formation pour l'enfance inadaptée

Centre national d'études et d'experimentation du machinisme agricole

Centre national d'études et de formation pour l'adaptation scolaire et l'éducation spécialisée (CNEFASES)

Centre national de formation et de perfectionnement des professeurs d'enseignement ménager et ménager agricole

Centre national des lettres

Centre national de documentation pédagogique

Centre national des oeuvres universitaires et scolaires (CNOUS)

Centre national d'ophtalmologie des Quinze-Vingts

Centre national de préparation au professorat de travaux manuels éducatifs et d'enseignement ménager

Centre national de la promotion rurale de Marmilhat

Centre national de la recherche scientifique (CNRS)

Centres pédagogiques régionaux

Centres régionaux d'éducation populaire

Centres régionaux d'éducation physique et sportive (CREPS)

Centres régionaux des oeuvres universitaires (CROUS)

Centres régionaux de la propriété forestière

Centre de sécurité sociale des travailleurs migrants

Centres universitaires

Chancelleries des universités

Collèges

Collèges agricoles

Commission des operations de Bourse

Conseil supérieur de la pêche
Conservatoire de l'espace littoral et des rivages lacustres
Conservatoire national des arts et métiers
Conservatoire national supérieur de musique
Conservatoire national supérieur d'art dramatique
Domaine de Pompadour
Ecole centrale - Lyon
Ecole centrale des arts et manufactures
Ecole française d'archéologie d'Athènes
Ecole française d'Extrême-Orient
Ecole française de Rome
Ecole des hautes études en sciences sociales
Ecole nationale d'administration
Ecole nationale de l'aviation civile (ENAC)
Ecole nationale des Chartes
Ecole nationale d'équitation
Ecole nationale féminine d'agronomie de Marmilhat (Puy-de-Dôme)
Ecole nationale féminine d'agronomie de Toulouse (Hte-Garonne)
Ecole nationale du génie rural et des eaux et forêts (ENGREF)
Ecoles nationales de l'industrie laitière
Ecoles nationales d'ingénieurs
Ecole nationale d'ingénieurs des industries des techniques agricoles et alimentaires
Ecoles nationales d'ingénieurs des travaux agricoles
Ecole nationale des ingénieurs des travaux ruraux et techniques sanitaires
Ecole nationale des ingénieurs des travaux des eaux et forêts (ENITEF)
Ecole nationale de la magistrature
Ecoles nationales de la marine marchande
Ecole nationale de la santé publique (ENSP)
Ecole nationale de ski et d'alpinisme
Ecole nationale supérieure agronomique - Montpellier
Ecole nationale supérieure agronomique - Rennes
Ecole nationale supérieure des arts décoratifs
Ecole nationale supérieure des arts et industries - Strasbourg
Ecole nationale supérieure des arts et industries textiles - Roubaix

Ecole nationale supérieure d'arts et métiers
Ecole nationale supérieure des beaux-arts
Ecole nationale supérieur des bibliothécaires
Ecole nationale supérieure de céramique industrielle - Sèvres
Ecole nationale supérieure de l'électronique et de ses applications (ENSEA)
Ecole nationale supérieure d'horticulture
Ecole nationale supérieure des industries agricoles alimentaires
Ecole nationale supérieure du paysage
Ecole nationale supérieure des sciences agronomiques appliquées (ENSSAA)
Ecoles nationales veterinaires
Ecoles nationales de perfectionnement
Ecoles nationales de premier degré
Ecole nationale de voirie
Ecoles normales d'instituteurs et d'institutrices
Ecoles normales nationales d'apprentissage
Ecole normales supérieures
Ecole polytechnique
Ecole de sylviculture - Crogny (Aube)
Ecole technique professionnelle agricole et forestière de Meymac (Corrèze)
Ecole de viticulture et d'oenologie de la Tour Blanche (Gironde)
Ecole de viticulture - Avize (Marne)
Etablissement national de convalescentes du Vésinet (ENCV)
Etablissement national de convalescents de Saint-Maurice
Etablissement national des invalides de la marine (ENIM)
Etablissement national de Koenigs Warter
Fondation Carnegie
Fondation Singer-Polignac
Fonds d'action sociale pour les travailleurs migrants
Hôpital-hospice national Dufresne-Sommeiller
Institut d'élevage et de médicine vétérinaires des pays tropicaux (IEMVPT)
Institut français d'archéologie orientale du Caire
Institut géographique national
Institut industriel du Nord
Institut international d'administration publique (IIAP)

Institut national agronomique de Paris-Grignon
Institut national des appellations d'origine des vins et eaux-de-vie (INAOVEV)
Institut national d'astronomie et de géophysique (INAG)
Institut national de la consommation (INC)
Institut national d'éducation populaire (INEP)
Institut national d'études démographiques (INED)
Institut national des jeunes aveugles - Paris
Institut national des jeunes sourdes - Bordeaux
Institut national des jeunes sourds - Chambéry
Institut national des jeunes sourds - Metz
Institut national des jeunes sourds - Paris
Institut national de physique nucléaire et de physique des particules (I.N2.P3)
Institut national de promotion supérieur agricole
Institut national de la propriété industrielle
Institut national de la recherche agronomique (INRA)
Institut national de recherche pédagogique (INRP)
Institut national de la santé et de la recherche médicale (INSERM)
Institut national des sports
Instituts nationaux polytechniques
Instituts nationaux des sciences appliquées
Institut national supérieur de chimie industrielle de Rouen
Institut de recherches d'informatique et d'automatique (IRIA)
Institut de recherche des transports (IRT)
Instituts régionaux d'administration
Institut scientifique et technique des pêches maritimes (ISTPM)
Institut supérieur des matériaux et de la construction mécanique de Saint-Ouen
Lycées agricoles
Lycées classiques et modernes
Lycées d'enseignement professionnel
Lycées techniques
Musée de l'armée
Musée Gustave Moreau
Musée de la marine
Musée national J. J. Henner

Musée national de la légion d'honneur

Musée postal

Muséum national d'histoire naturelle

Musée Auguste Rodin

Observatoire de Paris

Office de coopération et d'accueil universitaire

Office français de protection des réfugiés et rapariés

Office national des anciens combattants

Office national de la chasse

Office national d'information sur les enseignements et les professions (ONISEP)

Office national d'immigration (ONI)

Office de la recherche scientifique et technique d'outre-mer (ORSTOM)

Office universitaire et culturel français pour l'Algérie

Palais de la découverte

Parcs nationaux

Réunion des musées nationaux

Service national des examens du permis de conduire

Syndicat des transport parisiens

Thermes nationaux - Aix-les-Bains

Universités

Federal Republic of Germany

LIST OF CENTRAL PURCHASING ENTITIES

1. Auswaertiges Amt
2. Bundesministerium fuer Arbeit und Sozialordnung
3. Bundesministerium fuer Bildung und Wissenschaft
4. Bundesministerium fuer Ernaehrung, Landwirtschaft und Forsten
5. Bundesministerium der Finanzen
6. Bundesministerium fuer Forschung und Technologie
7. Bundesministerium fuer Innerdeutsche Beziehungen
8. Bundesministerium des Inneren (nur Zivilgueter)
9. Bundesministerium fuer Jugend, Familie und Gesundheit
10. Bundesministerium der Justiz
11. Bundesministerium fuer Raumordnung, Bauwesen und Staedtebau
12. Bundesministerium fuer das Post- und Fernmeldewesen (;)

(1) Postal business only.

13. Bundesministerium fuer Wirtschaft

14. Bundesministerium fuer wirtschaftliche Zusammenarbeit

15. Bundesministerium der Verteidigung

Note

According to existing national obligations, the entities contained in this list shall, in conformity with special procedures, award contracts in certain regions which, as a consequence of the division of Germany, are confronted with economic disadvantages.

The same applies to the awarding of contracts to remove the difficulties of certain groups caused by the last war.

Ireland

1. MAIN PURCHASING ENTITIES

(a) Office of Public Works

(b) Stationery Office

2. OTHER DEPARTMENTS

President's Establishment

Office of the Houses of the Oireachtas (Parliament)

Department of the Taoiseach (Prime Minister)

General Statistics Office

Department of Finance

Office of the Comptroller and Auditor-General

Office of the Revenue Commissioners

State Laboratory

Office of the Attorney-General

Office of the Director of Public Prosecutions

Valuation Office

Ordnance Survey

Department of the Public Service

Civil Service Commission

Department of Economic Planning and Development

Department of Justice

Land Registry

Charitable Donations and Bequests Office

Department of the Environment

Department of Education

National Gallery of Ireland

Department of the Gaeltacht (Irish-speaking areas)

Department of Agriculture

Department of Fisheries and Forestry

Department of Labour

Department of Industry, Commerce and Energy

Department of Tourism and Transport

Department of Foreign Affairs

Department of Social Welfare

Department of Health

Department of Defence

Department of Posts and Telegraphs (;)

Italy

PURCHASING ENTITIES

1. Ministero del tesoro ($)
2. Ministero delle finanze (=)
3. Ministero di grazia e giustizia
4. Ministero degli affari esteri
5. Ministero della pubblica istruzione
6. Ministero dell'interno
7. Ministero dei lavori pubblici
8. Ministero dell'agricoltura e delle foreste
9. Ministero dell'industria, del commercio e dell'artigianato
10. Ministero del lavoro e della previdenza sociale
11. Ministero della sanità
12. Ministero per i beni culturali e ambientali
13. Ministero della difesa
14. Ministero del bilancio e della programmazione economica
15. Ministero delle partecipazioni statali
16. Ministero del turismo e dello spettacolo
17. Ministero del commercio con l'estero
18. Ministero delle poste e delle telecommunicazioni (;)

Luxembourg

LIST OF CENTRAL PURCHASING ENTITIES FALLING WITHIN THE SCOPE OF THE DIRECTIVE

1. Ministère d'Etat: service central des imprimés et des fournitures de l'Etat

2. Ministère de l'agriculture: administration des services techniques de l'agriculture

3. Ministère de l'éducation nationale: écoles d'enseignement secondaire, d'enseignement moyen, d'enseignement professionnel

(1) Postal business only.

($) Acting as the general purchasing entity for most of the other Ministries or entities.

(=) Not including purchases made by the tobacco and salt monopolies.

4. Ministère de la famille et de la solidarite sociale: maisons de retraite

5. Ministère de la force publique: armée - gendarmerie - police

6. Ministère de la justice: établissements pénitentiaires

7. Ministère de la santé publique: Mondorf-Etat, hôpital neuropsychiatrique

8. Ministère des travaux publics: bâtiments publies - ponts et chaussées

9. Ministère des finances: postes et télécommunications (;)

10. Ministère des transports et de l'énergie: centrales électriques de la haute et basse Sûre

11. Ministère de l'environnement: commissariat général à la protection des eaux

Netherlands

LIST OF ENTITIES

A. Ministries and central governmental bodies

1. Ministerie van Algemene Zaken

2. Ministerie van Buitenlandse Zaken

3. Ministerie van Justitie

4. Ministerie van Binnenlandse Zaken

5. Ministerie van Defensie

6. Ministerie van Financien

7. Ministerie van Economische Zaken

8. Ministerie van Onderwijs en Wetenschap

9. Ministerie van Volkshuisvesting en Ruimtelijke Ordening

10. Ministerie van Verkeer en Waterstaat (;), met inbegrip van post, telefoon en telegrafie

11. Ministerie van Landbouw en Visserij

12. Ministerie van Sociale Zaken

13. Ministerie van Cultuur, Recratie en Maatschappelijk Werk

14. Ministerie van Volksgezondheid en Milieuhygiene

15. Ministerie van Ontwikkelingssamenwerking

16. Ministerie van Wetenschapsbeleid

17. Kabinet van Nederlandse-Antilliaanse Zaken

18. Hoge Colleges van Staat

B. Central procurement offices

Entities listed above in A generally make their own specific purchases; other general purchases are effected through the entities listed below:

1. Rijksinkoopbureau
2. Directoraat-generaal voor de Waterstaat
3. Dienst van de Kwartiermeester-generaal
4. Directie Materieel Koninklijke Luchtmacht
5. Hoofd afdeling Materieel Koninklijke Marine

(1) Postal business only.

6. Staatsdrukkerij en Uitgeverijbedrijf
7. Staatsbedrijf der Posterijen, Telegrafie en Telefonie, Centrale Afdeling Inkoop en Materieel

controle (;)

8. Rijksautomobielcentrale
9. Rijkskantoormachinecentrale
10. Staatsbosbeheer
11. Rijksdienst Ijsselmeerpolders

United Kingdom

LIST OF ENTITIES

Board of Inland Revenue

British Museum

British Museum (Natural History)

Cabinet Office

Central Office of Information

Charity Commission

Civil Service Department

Ancient Monuments (Scotland) Commission

Ancient Monuments (Wales) Commission

Boundary Commission for England and Wales

Boundary Commission for Northern Ireland

Central Computer Agency

Chessington Computer Centre

Civil Service Catering Organization

Civil Service College

Civil Service Commission

Civil Service Pay Research Unit
Historical Manuscripts Commission
Historical Monuments (England) Commission
Medical Advisory Service
Museum and Galleries Standing Commission
Office of the Parliamentary Counsel
Review Board for Government Contracts
Royal Commission on Criminal Procedure
Royal Commission on Environmental Pollution
Royal Commission on Gambling
Royal Commission on Legal Services (England, Wales and Northern Ireland)
Royal Commission on Legal Services (Scotland)
Royal Fine Art Commission (England)
Royal Fine Art Commission (Scotland)

(1) Postal business only.

Crown Estate Office (Vote-borne, services only)
Crown Office, Scotland
Customs and Excise Department
Department for National Savings
Department of Agriculture and Fisheries for Scotland
Artifical Insemination Service
Crofters Commission
Red Deer Commission
Royal Botanic Garden, Edinburgh etc.
Department of Education and Science
University Grants Committee
Department of Employment
Duchess of Gloucester House
Employment Appeal Tribunal
Industrial Tribunals
Office of Manpower Economics
Royal Commission on the Distribution of Income and Wealth
Department of Energy
Department of Health and Social Security

Attendance Allowance Board
Central Council for Education and Training in Social Work
Council for the Education and Training of Health Visitors
Dental Estimates Board
Joint Board of Clinical Nursing Studies
Medical and Dental Referee Service
Medical Boards and Examining Medical Officers (War Pensions)
National Health Service
National Health Service Authorities
National Insurance Commissioners
Occupational Pensions Board
Prescription Pricing Authority
Public Health Laboratory Service Board
Supplementary Benefits Appeal Tribunals
Supplementary Benefits Commission
Department of Industry
Computer-Aided Design Centre
Laboratory of the Government Chemist
National Engineering Laboratory
National Maritime Institute
National Physical Laboratory
Warren Spring Laboratory
Department of Prices and Consumer Protection
Domestic Coal Consumers' Council
Electricity Consultative Councils for England and Wales
Gas Consumers' Councils
Metrication Board
Monopolies and Mergers Commission
Department of the Environment
British Urban Development Services Unit
Building Research Establishment
Commons Commissioners - (except payment of rates)
Countryside Commission
Directorate of Estate Management Overseas

Fire Research Station/Boreham Wood
Hydraulics Research Station
Local Valuation Panels
Location of Offices Bureau
Property Services Agency
Rent Control Tribunals and Rent Assessment Panels and Committees
Department of the Government Actuary
Department of the Registers of Scotland
Department of Trade
Coastguard Services
British Export Marketing Centre, Tokyo
Market Entry Guarantee Scheme
Patent Office
Department of Transport
Road Construction Units and Sub-Units
Transport and Road Research Laboratory
Transport Tribunal - (except payment of rates)
Transport Users Consultative Committees - (except payment of rates)
Director of Public Prosecutions
Exchequer and Audit Department
Exchequer Office Scotland
Export Credits Guarantee Department
Foreign and Commonwealth Office
Government Communications Headquarters
Middle East Centre for Arab Studies
Wiston House Conference and European Discussion Centre
Home Office
Gaming Board for Great Britain
Immigration Appeals Tribunal
Inspectors of Constabulary
Parole Board and Local Review Committees
House of Commons
House of Lords
Imperial War Museum

Intervention Board for Agricultural Produce
Legal Aid Funds
Lord Chancellor's Department
Council on Tribunals
County Courts
Courts Martial Appeal Court
Crown Courts
Judge Advocate-General and Judge Advocate of the Fleet
Lands Tribunal
Law Commission
Pensions Appeal Tribunals
Supreme Court
Ministry of Agriculture, Fisheries and Food
Advisory Services
Agricultural Development and Advisory Service
Agricultural Dwelling House Advisory Committees
Agricultural Land Tribunals
Agricultural Wages Board and Committees
Artificial Insemination Research Centres
Central Council for Agricultural and Horticultural Cooperation
Plant Pathology Laboratory
Plant Variety Rights Office
Royal Botanic Gardens, Kew
Ministry of Defence
Procurement Executive
Meteorological Office
Ministry of Overseas Development
Centre of Overseas Pest Research
Directorate of Overseas Surveys
Land Resources Division
Tropical Products Institute
National Debt Office and Pensions Commutation Board
National Gallery
National Galleries of Scotland

National Library of Scotland
National Maritime Museum
National Museum of Antiquities of Scotland
National Portrait Gallery
Northern Ireland Government Departments and Public Authorities
Department of the Civil Service
Department of Agriculture
Department of Commerce
Department of Education
Department of the Environment
Department of Finance
Department of Health and Social Services
Department of Manpower Services
Nothern Ireland Police Authority
Northern Ireland Office
Coroners Courts
County Courts
Crown Solicitor's Office
Department of the Director of Public Prosecutions
Enforcement of Judgements Office
Forensic Science Service
Magistrates Courts
Pensions Appeal Tribunals
Probation Service
Registration of Electors and Conduct of Elections
State Pathologist Service
Supreme Court of Judicature and Court of Criminal Appeal of Northern Ireland
Office of Fair Trading
Office of Population Censuses and Surveys
National Health Service Central Register
Office of the Parliamentary Commissioner for Administration and
Health Service Commissioners
Paymaster General's Office
Postal Business of the Post Office

Privy Council Office
Public Record Office
Public Trustee Office
Public Works Loan Commission
Queen's and Lord Treasurer's Remembrancer
Crown Office
Department of Procurators Fiscal
Lords Advocate's Department
Lands Tribunal
Registrar-General's Office, Scotland
National Health Service Central Register
Registry of Friendly Societies
Royal Commission, etc. (see references under Civil Service Department)
Commission on the Constitution
Royal Commission on the National Health Service
Royal Commission on Gambling
Royal Hospital, Chelsea
Royal Mint
Royal Scottish Museum
Science Museum
Scottish Courts Administration
Court of Session
Court of Justiciary
Accountant of Court's Office
Sheriff Courts
Scottish Land Court
Scottish Law Commission
Pensions Appeal Tribunals
Scottish Development Department
Local Government Reorganization Commissions etc.
Rent Assessment Panel and Committees, etc.
Scottish Economic Planning Department
Scottish Electricity Consultative Councils
Scottish Education Department

Royal Scottish Museum
Scottish Home and Health Department
Common Services Agency
Council for the Education and Training of Health Visitors
Fire Service Training School
Inspectors of Constabulary
Local Health Councils
Mental Welfare Commission for Scotland
National Health Service
National Health Service authorities
Parole Board for Scotland and Local Review Committees
Planning Council
Scottish Antibody Production Unit
Scottish Crime Squad
Scottish Criminal Record Office
Scottish Council for Post-Graduate Medical Education and Training
Scottish Police College
Scottish Land Court
Scottish Office
Scottish Record Office
Stationery Office
Tate Gallery
Treasury
Exchequer Office, Scotland
National Economic Development Council
Rating of Government Property Department
Treasury Solicitor's Department
Department of the Director of Public Prosecutions
Law Officer's Department
Department of the Procurator-General and Treasury Solicitor
Victoria and Albert Museum
Wallace Collection
Welsh Office
Central Council for Education and Training in Social Work

Commons Commissioners

Council for the Education and Training of Health Visitors

Dental Estimates Board

Local Government Boundary Commission

Local Valuation Panels and Courts

National Health Service

National Health Service authorities

Public Health Laboratory Service Board

Rent Control Tribunals and Rent Assessment Panels and Committees

TABLE III LIST OF PRODUCTS PURCHASED BY CONTRACTING AUTHORITIES IN THE FIELD OF DEFENCE THAT ARE COVERED BY DIRECTIVE 80/767/EEC

NB: This product classification is currently being reviewed to adapt it to the new combined nomenclature of goods enacted by Council Regulation (EEC) N° 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ N° L 256, 7. 9. 1987), which enters into force on 1 January 1988.

The revised list will have to be approved under the procedure provided in the GATT procurement code.

The Directive will then be amended to introduce the revised list.

Chapter 25:

Salt; sulphur; earths and stone; plastering materials, lime and cement

Chapter 26:

Metallic ores, slag and ash

Chapter 27:

Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes

except:

ex 27.10: special engine fuels

Chapter 28:

Inorganic chemicals; organic and inorganic compounds of precious metals, of rare-earth metals, of radio-active elements and of isotopes

except:

ex 28.09: explosives

ex 28.13: explosives

ex 28.14: tear gas

ex 28.28: explosives

ex 28.32: explosives

ex 28.39: explosives

ex 28.50: toxic products

ex 28.51: toxic products

ex 28.54: explosives

Chapter 29:

Organic chemicals

except:

ex 29.03: explosives

ex 29.04: explosives

ex 29.07: explosives

ex 29.08: explosives

ex 29.11: explosives

ex 29.12: explosives

ex 29.13: toxic products

ex 29.14: toxic products

ex 29.15: toxic products

ex 29.21: toxic products

ex 29.22: toxic products

ex 29.23: toxic products

ex 29.26: explosives

ex 29.27: toxic products

ex 29.29: explosives

Chapter 30:

Pharmaceutical products

Chapter 31:

Fertilizers

Chapter 32:

Tanning and dyeing extracts; tannins and their derivatives; dyes, colours, paints and varnishes; putty, fillers and stoppings; inks

Chapter 33:

Essential oils and resinoids; perfumery, cosmetic or toilet preparations

Chapter 34:

Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing and scouring preparations, candles and similar articles, modelling pastes and 'dental waxes'

Chapter 35:

Albuminoidal substances; glues; enzymes

Chapter 37:

Photographic and cinematographic goods

Chapter 38:

Miscellaneous chemical products

except:

ex 38.19: toxic products

Chapter 39:

Artificial resins and plastic materials, cellulose esters and ethers; articles thereof

except:

ex 39.03: explosives

Chapter 40:

Rubber, synthetic rubber, factice, and articles thereof

except:

ex 40.11: bullet-proof tyres

Chapter 41:

Raw hides and skins (other than furskins) and leather

Chapter 42:

Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silk-worm gut)

Chapter 43:

Furskins and artificial fur; manufactures thereof

Chapter 44:

Wood and articles of wood; wood charcoal

Chapter 45:

Cork and articles of cork

Chapter 46:

Manufactures of straw of esparto and of other plaiting materials; basketware and wickerwork

Chapter 47:

Paper-making material

Chapter 48:

Paper and paperboard; articles of paper pulp, of paper or of paperboard

Chapter 49:

Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts

and plans

Chapter 65:

Headgear and parts thereof

Chapter 66:

Umbrellas, sunshades, walking-sticks, whips, riding-crops and parts thereof

Chapter 67:

Prepared feathers and down and articles made of feathers or of down; artificial flowers; articles of human hair

Chapter 68:

Articles of stone, of plaster, of cement, of asbestos, of mica and of similar materials

Chapter 69:

Ceramic products

Chapter 70:

Glass and glassware

Chapter 71:

Pearls, precious and semi-precious stones, precious metals, rolled precious metals, and articles thereof; imitation jewellery

Chapter 73:

Iron and steel and articles thereof

Chapter 74:

Copper and articles thereof

Chapter 75:

Nickel and articles thereof

Chapter 76:

Aluminium and articles thereof

Chapter 77:

Magnesium and beryllium and articles thereof

Chapter 78:

Lead and articles thereof

Chapter 79:

Zinc and articles thereof

Chapter 80:

Tin and articles thereof

Chapter 81:

Other base metals employed in metallurgy and articles thereof

Chapter 82:

Tools, implements, cutlery, spoons and forks, of base metal; parts thereof

except:

ex 82.05: tools

ex 82.07: tools, parts

Chapter 83:

Miscellaneous articles of base metal

Chapter 84:

Boilers, machinery and mechanical appliances; parts thereof

except:

ex 84.06: engines

ex 84.08: other engines

ex 84.45: machinery

ex 84.53: automatic data-processing machines

ex 84.55: parts of machines under heading N° 84.53

ex 84.59: nuclear reactors

Chapter 85:

Electrical machinery and equipment; parts thereof

except:

ex 85.13: telecommunication equipment

ex 85.15: transmission apparatus

Chapter 86:

Railway and tramway locomotives, rolling-stock and parts thereof; railway and tramway tracks fixtures and fittings; traffic signalling equipment of all kinds (not electrically powered)

except:

ex 86.02: armoured locomotives, electric

ex 86.03: other armoured locomotives

ex 86.05: armoured wagons

ex 86.06: repair wagons

ex 86.07: wagons

Chapter 87:

Vehicles, other than railway or tramway or tramway rolling-stock, and parts thereof

except:

ex 87.08: tanks and other armoured vehicles

ex 87.01: tractors

ex 87.02: military vehicles

ex 87.03: breakdown lorries

ex 87.09: motorcycles

ex 87.14: trailers

Chapter 89:

Ships, boats and floating structures

except:

ex 89.01 A: warships

Chapter 90:

Optical, photographic, cinematographic, measuring, checking, precision, medical and surgical instruments and apparatus; parts thereof

except:

ex 90.05: binoculars

ex 90.13: miscellaneous instruments, lasers

ex 90.14: telemeters

ex 90.28: electrical and electronic measuring instruments

ex 90.11: microscopes

ex 90.17: medical instruments

ex 90.18: mechano-therapy appliances

ex 90.19: orthopaedic appliances

ex 90.20: X-ray apparatus

Chapter 91:

Clocks and watches and parts thereof

Chapter 92:

Musical instruments; sound recorders or reproducers; television image and sound recorders or reproducers; parts and acccessories of such articles

Chapter 94:

Furniture and parts thereof; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings

except:

ex 94.01 A: aircraft seats

Chapter 95:

Articles and manufactures of carving or moulding material

Chapter 96:

Brooms, brushes, powder-puffs and sieves

Chapter 98:

Miscellaneous manufactured articles

TABLE IV

LIST OF ACTIVITIES THAT MAY FORM THE SUBJECT OF PUBLIC WORKS CONTRACTS WITHIN THE MEANING OF DIRECTIVE 71/304/EEC

as set out in the nomenclature of industries in the European Communities

(NICE)

Major

Group

Group

40

CONSTRUCTION

400

Construction (non-specialised); demolition

400.1

Non-specialised construction

400.2

Demolition

Major

Group

Group

40

(cont'd)

401

Construction of buildings (dwellings or other)

401.1

General building work

401.2

Roofing

401.3

Construction of chimneys and furnaces

401.4

Weatherproofing

401.5

Re-dressing and maintenance of facades

401.6

Scaffolding

401.7

Other building activities (including structural work)

402

Civil engineering; building of roads, bridges, railways, etc.

402.1

General civil engineering

402.2

Earth-moving work above ground

402.3

Building of engineering structures on land (above or below ground)

402.4

Building of inland waterway and maritime engineering structures

402.5

Highway construction (including airport and runway construction)

402.6

Specialist activities in other fields of civil engineering (including installation of roads signs and signals and seamarks, installation of mains and pipelines for gas, water and hydrocarbons, and installation of electric power transmission and telecommunication lines)

403

Installation work

403.1

General installation

403.2

Services (gas, water and sanitary equipment installation)

403.3

Heating and ventilation installation (installation of central-heating, air-conditioning, and ventilation plant)

403.4

Heat, sound and vibration insulation

403.5

Installation of electricity

403.6

Installation of aerials, lightning conductors, telephones, etc.

404

Decorating and finishing

404.1

General decorating and finishing

404.2

Plastering

404.3

Woodwork, with particular reference to installation of wooden fittings (including laying of wooden floors)

404.4

Painting and glazing, wallpapering

404.5

Application of facings and coverings for floors and walls (fixing of tiles, other floor coverings and adhesive finishings)

404.6

Miscellaneous finishing work (including installation of stoves and fireplaces, etc.)

>TABLE POSITION>

TABLE V

LIST OF CORPORATE BODIES GOVERNED BY PUBLIC LAW OR EQUIVALENT ENTITIES TREATED AS AUTHORITIES FOR THE PURPOSES OF DIRECTIVE 71/305/EEC

XIII.

In all Member States:

Associations governed by public law formed by regional or local authorities, e.g., associations de communes, syndicats de communes, Gemeindeverbaende etc.

XIII.

In Belgium:

- le Fonds des routes,

- het Wegenfonds,

- la Régie des voies aériennes,

- de Regie der luchtwegen,

- public assistance commissions,

- structures of the Church,

- l'Office régulateur de la navigation

intérieure,

- de Dienst voor regeling van de binnenvaart,

- la Régie des services frigorifiques de

l'Etat belge,

- de Regie der Belgische Rijkskoel- en vries-

diensten.

XIII.

In Germany:

the bundesunmittelbare Koerperschaften, Anstalten und Stiftungen des oeffentlichen Rechts.

IIIV.

In France:

- other administrative public bodies at national, departmental and local levels.

IIIV.

In Italy:

- state universities, state university institutes, consortia for university development works,

- higher scientific and cultural institutes, astronomical, astrophysical, geophysical and vulcanological observatories,

- the Enti di riforma fondiaria,

- relief and charity organisations.

IIVI.

In Luxembourg:

- social insurance offices,

- other public administrative bodies.

IVII.

In the Netherlands:

- the Waterschappen,

- the Rijskuniversiteiten, the Academische Ziekenhuizen, the Gemeentelijke Universiteit van Amsterdam, the Rooms-Katholieke Universiteit von Nijmegen, the Vrije Universiteit van Amsterdam, the Technische Hogescholen,

- the Nederlandse Centrale Organisatie voor toegepast natuurwetenschappelijk onderzoek (TNO) and its dependent organisations.

VIII.

In the United Kingdom:

- local authorities,

- new towns' cooperations,

- Commission for the New Towns,

- Scottish Special Housing Association,

- Nothern Ireland Housing Executive.

IIIX.

In Denmark:

- andre forvaltningssubjekter.

IIIX.

In Ireland:

- other public authorities whose public works contracts are subject to control by the State.

IIXI.

In Greece:

other legal persons governed by public law whose public works contracts are subject to control by the State.

IXII.

In Spain:

other corporate bodies subject to public rules for the award of contracts.

XIII.

In Portugal:

other corporate bodies governed by public law subject to a procedure for the award of contracts.

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TABLE VII LIST OF EC BUSINESS INFORMATION CENTRES CURRENTLY OPERATING OR PLANNED

>TABLE POSITION>

TABLE VIII MODEL NOTICES OF SUPPLY CONTRACTS

A. Open procedures

1. The name, address, telephone number and, where applicable, telegraphic address and telex number of the contracting authority (Article 13 (e)):

2. The award procedure chosen (Article 13 (b)):

3. (a) The place of delivery (Article 13 (c)):

(b) The nature and quantity of goods to be supplied (Article 13 (c)):

(c) Whether suppliers can tender for some and/or all of the goods required (Article 13 (c)):

4. Any time limit for delivery (Article 13 (d)):

5. (a) Name and address of the service from which the relevant documents may be requested (Article 13 (f)):

(b) The final date for making such request (Article 13 (f)):

(c) Where applicable, the amount and terms of payment of any sum payable for such documents (Article 13 (f)):

6. (a) The final date for receipt of tenders (Article 13 (g)):

(b) The address to which they must be sent (Article 13 (g)):

(c) The language or languages in which they must be drawn up (Article 13 (g)):

7. (a) The persons authorized to be present at the opening of tenders (Article 13 (h)):

(b) The date, time and place of this opening (Article 13 (h)):

8. Any deposits and guarantees required (Article 13 (i)):

9. The main terms concerning financing and payment and/or references to the provisions regulating these (Article 13 (j)):

10. Where applicable, the legal form to be taken by the grouping of suppliers winning the contract (Article 13 (k)):

11. The information and formalities necessary for an appraisal of the minimum economic and technical standards required of the supplier (Article 13 (l)):

12. The period during which the tenderer is bound to keep open his tender (Article 13 (m)):

13. The criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents (Article 25):

14. Other information:

15. The date of dispatch of the notice (Article 13 (a)):

B. Restricted procedures

1. The name, address, telephone number and, where applicable, telegraphic address and telex number of the contracting authority (Article 14 (a)):

2. The award procedure chosen (Article 14 (a)):

3. (a) The place of delivery (Article 14 (a)):

(b) The nature and quantity of goods to be supplied (Article 14 (a)):

(c) Whether suppliers can tender for some and/or all of the goods required (Article 14 (a)):

4. Any time limit for delivery (Article 14 (a)):

5. Where applicable, the legal form to be assumed by the grouping of suppliers winning the contract (Article 14 (a)):

6. (a) The final date for the receipt of requests to participate (Article 14 (b)):

(b) The address to which they must be sent (Article 14 (b)):

(c) The language or languages in which they must be drawn up (Article 14 (b)):

7. The final date for the dispatch of invitations to tender (Article 14 (c)):

8. Information concerning the supplier's personal position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him (Article 14 (d)):

9. The criteria for the award of the contract if these are not stated in the invitation to tender (Article 15 (d)):

10. Other information:

11. The date of dispatch of the notice (Article 14 (a)):

TABLE IX

MODEL NOTICES OF PUBLIC WORKS CONTRACTS

A. Open procedures

1. Name and address of the authority awarding the contract (Article 16 (e)) (;):

2. The award procedure chosen (Article 16 (b)):

3. (a) The site (Article 16 (e)):

(b) The nature and extent of the services to be provided and the general nature of the work (Article 16 (c)):

(c) If the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several, or for all of the lots (Article 16 (c)):

(d) Information relating to the purpose of the contract if the contract entails the drawing up of projects (Article 16 (c)):

4. Any time limit for the completion of the works (Article 16 (d)):

5. (a) Name and address of the service from which the contract documents and additional documents may be requested (Article 16 (f)):

(b) The final date for making such request (Article 16 (f)):

(c) Where applicable, the amount and terms of payment of any sum payable for such documents (Article 16 (f)):

6. (a) The final date for receipt of tenders (Article 16 (g)):

(b) The address to which they must be sent (Article 16 (g)):

(c) The language or languages in which they must be drawn up (Article 16 (g)):

7. (a) The persons authorized to be present at the opening of tenders (Article 16 (h)):

(b) The date, time and place of this opening (Article 16 (h)):

8. Any deposits and guarantees required (Article 16 (i)):

9. The main procedure for financing and payment and/or references to the instruments regulating these (Article 16 (j)):

(;) The Articles in brackets refer to Council Directive N° 71/305/EEC of 26. 7. 1971 (OJ N° L 185, 16. 8. 1971, p. 5).

10. Where applicable, the specific legal form which must be assumed by the group of contractors to whom the contract is awarded (Article 16 (k)) (;):

11. The minimum economic and technical standards required of the contractors (Article 16 (l)):

12. Period during which the tenderer is bound to keep open his tender (Article 16 (m)):

13. Criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents (Article 29):

14. Other information:

15. The date of dispatch of the notice (Article 16 (a)):

B. Restricted procedures

1. Name and address of the authority awarding the contract (Article 17 (a)) (;):

2. The award procedure chosen (Article 17 (a)):

3. (a) The site (Article 17 (a)):

(b) The nature and extent of the services to be provided and the general nature of the work (Article 17 (a)):

(c) If the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several, or for all of the lots (Article 17 (a)):

(d) Information relating to the purpose of the contract if the contract entails the drawing up of projects (Article 17 (a)):

4. Any time limit for the completion of the works (Article 17 (a)):

5. Where applicable, the specific legal form which must be assumed by the group of contractors to whom the contract is awarded (Article 17 (a)):

6. (a) The final date for the receipt of requests to participate (Article 17 (b)):

(b) The address to which they must be sent (Article 17 (b)):

(c) The language or languages in which they must be drawn up (Article 17 (b)):

7. The final date for the dispatch of invitations to tender (Article 17 (c)):

8. Information concerning the contractor's personal position, and the minimum economic and technical standards required of him (Article 17 (d)):

9. The criteria for the award of the contract if these are not stated in the invitation to tender (Article 18 (d)):

10. Other information:

11. The date of dispatch of the notice (Article 17 (a)):

TABLE X MODEL NOTICES OF SUBCONTRACTS

1. (a) The site (N° ii) ($):

(b) The nature and extent of the service to be provided and the general nature of the work (N° ii):

2. Any time limit for the completion of the works (N° iii):

(;) The Articles in brackets refer to Council Directive N° 71/305/EEC of 26. 7. 1971 (OJ N° L 185, 16. 8. 1971, p. 5).

($) The numbers quoted refer to the Declaration of the Representatives of the Governments of the Member States meeting within the Council concerning procedures to be followed in the field of public works concessions - II subcontracts, 2, rules on publication (OJ N° C 82, 16. 8. 1971, p. 14).

3. Name and address of the service from which the contract documents and additional documents may be requested (N° vi):

4. (a) The final date for receipt of tenders (N° v):

(b) The address to which they must be sent (N° vii):

(c) The language or languages in which they must be drawn up:

5. Any deposit and guarantees required (N° iv):

6. The economic and technical standards required of the contractor (N° viii):

7. The criteria for the award of the contract (last paragraph of N° II.2):

8. Other information:

9. The date of dispatch of the notice (N° i):

TABLE XI COUNCIL REGULATION DETERMINING THE RULES APPLICABLE TO PERIODS, DATES AND TIME LIMITS

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (;),

Whereas numerous acts of the Council and of the Commission determine periods, dates or time limits and employ the terms 'working days' or 'public holidays';

Whereas it is necessary to establish uniform general rules on the subject;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules;

Whereas, to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods, dates and time limits;

Whereas no authority to establish such rules is provided for in the Treaties,

HAS ADOPTED THIS REGULATION:

Article 1

Save as otherwise provided, this Regulation shall apply to acts of the Council or Commission which have been or will be

(;) OJ N° C 51, 29. 4. 1970, p. 25.

passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.

CHAPTER I

Periods

Article 2

1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.

To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the Official Journal of the European Communities the lists transmitted by the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of the Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question.

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4:

(a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period;

(b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;

(c) a period expressed in weeks, months or years shall start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;

(d) if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having 30 days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

This provision shall not apply to periods calculated retroactively from a given date or event.

5. Any period of two days or more shall include at least two working days.

CHAPTER II

Dates and time limits

Article 4

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5,

apply to the times and periods of entry into force, taking effect, application, expiry of validity, termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts.

2. Entry into force, taking effect or application of acts of the Council or Commission - or of provisions of such acts - fixed at a given date shall occur at the beginning of the first hour of the day falling on the date.

This provision shall also apply when entry into force, taking effect or application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

3. Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission - or of any provisions of such acts - fixed at a given date shall occur on the expiry of the last hour of the day falling on the date.

This provision shall also apply when expiry of validity, termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment.

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date, it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date.

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place.

Article 6

This Regulation shall enter into force on 1 July 1971.

ANNEX III THE PROHIBITION OF 'MEASURES HAVING EQUIVALENT EFFECT' TO QUANTITATIVE RESTRICTIONS ON TRADE IN ARTICLE 30 OF THE EEC TREATY

To help ensure free trade in goods within the European Community, the EEC Treaty (Articles 30 et seq.) prohibits quantitative restrictions on imports and exports within the Community and 'all measures having equivalent effect'.

The prohibition applies both to goods originating in Member States and to goods imported from non-member countries which are 'in free circulation in Member States'. Imported goods are in free circulation if import formalities have been complied with and any customs duties or changes having equivalent effect that are payable have been levied in the Member State of importation and if they

have not benefited from a total or partial reimbursement of such duties or charges (1).

'Goods' are any products that have a monetary value and, as such, can be the subject of commercial transactions, regardless of their nature, characteristics or intended use (2).

Articles 30 et seq. do not apply to products covered by the European Coal and Steel Community and Euratom Treaties, as Article 232 of the EEC Treaty provides that the provisions of that Treaty do not prejudice those of the ECSC and Euratom Treaties. However, the ECSC and Euratom Treaties have similar provisions prohibiting quantitative restrictions and measures having equivalent effect.

As to the type of measures prohibited, the term 'quantitative restrictions', a synonym for import or export quotas, is self-explanatory. It has been further defined as unilateral measures by Member States amounting to a total or partial restraint of imports, exports or goods in transit within the Community (3). 'Measures having equivalent effect', on the other hand, is a catch-all phrase and has required considerable interpretation, both by the Commission and in a long line of judgments by the European Court of Justice.

These have provided guidance on the meaning of both 'measures' and 'measures having equivalent effect to quantitative restrictions'.

On the first aspect, Commission Directive 70/50/EEC of 22 December 1969 (4) on the abolition of measures having an effect equivalent to quantitative restrictions on imports

(1) Articles 9 (2) and 10 (1) of the EEC Treaty.

(2) Judgment of the European Court of Justice in Case 7/68 Commission v. Italy (1968) ECR 423 at 428-9.

(3) Judgment of the European Court of Justice in Case 2/73 Geddo v. Ente Nazionale Risi (1973) ECR 865 at 879.

(4) OJ N° L 13, 19. 1. 1970, p. 29 (English Special Edition 1970 (I), p. 17).

which were in operation on the date of entry into force of the EEC Treaty defined 'measures' as laws and regulations, administrative practices, and any acts of public authorities, including recommendations.

'Administrative practices' were further defined as any habitual conduct of a public authority and 'recommendations' as any acts of a public authority which, while not legally binding on the addressees, cause them to pursue a certain conduct. As the definition indicates, 'measures' include not only positive acts, but also omissions, i.e. the failure or neglect of a public authority to use its powers to prevent restrictions on trade in goods between Member States.

The Directive also made it clear that any public authority can be the author of 'measures'. In other words, the prohibition under Articles 30 et seq. applies not only to measures emanating from the State in the narrow sense of the central legislative, executive/administrative and judicial authority, but to measures by any of the multitude of other entities, commonly called public authorities, which, though leading a legally separate existence have such close links to the state that they can be regarded as part of its organization and as exercising powers delegated by the central authority.

The second term of the expression, 'having an effect equivalent to quantitative restrictions', indicates that, like quantitative restrictions, the measure must act as a total or partial restraint on imports or exports.

The effect of these restrictions, as indicated above, is to prohibit, in whole or in part, the imports or exports which could have been realized in their absence.

To have this effect, they need not prevent trade entirely, but only impede it.

Thus, in Directive 70/50/EEC the Commission defined such measures, with particular reference to those which formally discriminate between domestic and imported products, as those which either preclude importation or make it more difficult or costly than the marketing of equivalent domestic products. Similarly, in the Geddo judgment (5) the Court, after defining quantitative restrictions, stated that measures

(5) Judgment of the European Court of Justice in Case 2/73 Geddo v. Ente Nazionale Risi (1973) ECR 865 at 879.

having equivalent effect could take the form not only of outright prohibitions, but also of obstacles having the same effect, whatever their name or mode of operation.

Furthermore, it is not necessary for a measure actually to have restricted intra-Community trade; it only needs to be 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' (1).

This definition gives the prohibition of measures having equivalent effect a very wide scope. To specify all the possible types of measures caught by it would require a detailed analysis of all the cases the Commission and the Court have decided over the years.

For the purpose of this Guide, the following general classification will suffice. The prohibition of measures having an effect equivalent to quantitative restrictions covers measures which:

- subject the importation or marketing of imported products or the exportation of domestic products to conditions that are only applicable to imports or exports and make the importation or marketing of imported products or the exportation of domestic products impossible or more difficult or costly than the marketing of domestic products or sale on the domestic market,

- subject imports or exports to conditions that are different from those applicable to domestic products or marketing on the domestic market and thereby have a similar discriminatory effect on the importation or marketing of imported products, or of products imported through some channels rather than others, or on the exportation of domestic products,

- favour domestic products or grant them preferential treatment, other than aid, whether or not subject to conditions, or

- though equally applicable to domestic and imported products, have a restrictive effect on imports not justified by the requirement the measure is intended to serve.

The last category includes many of the regulations introduced by Member States in various fields for consumer protection, environmental and health and safety reasons. Such regulations generally prescribe technical requirements or quality standards that have to be met by any product, domestic or imported, of a certain kind that is put on sale on the domestic market, thereby effectively preventing the marketing, and hence importation, of products not meeting the prescribed requirements or standards. At first sight, such regulations do not appear to fall within the definition of measures having an effect equivalent to quantitative restrictions, as they apply equally to domestic and imported products and the exclusion of imports is merely an incidental result of the general and mandatory nature of such regulations, as of all law.

(1) Judgment of the European Court of Justice in Case 8/74 Procureur du Roi v. Dassonville (1974) ECR 837 at 852.

Yet it is possible for such regulations to restrict trade in a similar way to a quantitative restriction, by making imports impossible or more difficult or costly than the marketing of domestic products, without this being necessary to attain the objective of the regulations.

The Commission provided some initial illumination on this matter in Directive 70/50/EEC, when

it classed as measures having equivalent effect to quantitative restrictions measures governing the marketing of products and dealing, in particular, with their shape, size, weight, composition, presentation, identification or packaging, which though equally applicable to domestic and imported products had a restrictive effect on the free movement of goods that exceeded the effects inherent in the regulation of commerce. This was the case, in particular, where:

- the restrictive effects on the free movement of goods were out of proportion to their purpose,

- the same objective could be attained by other means that were less of a hindrance to trade.

The 1979 Cassis de Dijon judgment of the European Court (2) gave a whole new impetus and direction to the policy on trade barriers caused by divergent national technical regulations and standards. It established, first of all, that in the absence of Community rules on the production or marketing of a product, Member States were free to regulate all matters relating to the production or marketing of the product on their respective territories. It then, however, laid down the principle that any product lawfully produced and marketable in one Member State should be able to be imported and marketed in any other Member State. Products should be considered lawfully produced and marketable if they conformed to the legislation or traditional or established production or distribution practices of the Member State of manufacture. Obstacles to movement within the Community resulting from disparities between national regulations were only acceptable in so far as the national provisions were necessary, i.e. appropriate and not excessive, to satisfy 'essential requirements' relating, for example, to the enforcement of tax legislation, health and safety, fair trading or consumer protection, and were thus an essential safeguard of the public interest such as to take precedence over the requirements of free movement of goods, which was one of the fundamental rules of the Community.

Consequently, a Member State cannot prohibit the sale of a product lawfully produced and marketable in another Member State simply because the product does not meet its own quality specifications or technical standards. If the

(2) Case 120/78 REWE v. Bundesmonopolverwaltung fuer Branntwein (1979) ECR 649 at 662 and 664.

different specifications or standards to which the product has been manufactured attain the requirements served by the importing country's standards to an equivalent degree, then the product may not be denied entry.

On this analysis, which the Court has confirmed in all its subsequent judgments, the general rule is that Member States are obliged to admit on to their markets products that have been manufactured in other Member States to different technical requirements. Only if the importing Member State can prove that the different design of the products means that they do not reach standards equivalent to its own may it refuse entry to the products.

The later judgments of the Court have established how this rule applies to specific situations. For example, Member States may not duplicate tests or checks already carried out in the country of manufacture but must recognize the manufacturing country's test certificates. Nor may they require inspections of products manufactured in other Member States before being marketed unless the products pose a serious and definite danger to health or safety.

The rule has been taken up in the Commission's new policy towards technical barriers caused by divergent national product specifications and standards announced in its White Paper setting out a programme for removing the remaining internal barriers within the common market by 1992. This policy is that whenever EC harmonization of technical specifications and standards is not considered essential (1) for health and safety, consumer protection or the environment, or for industrial reasons, the principle of mutual recognition by Member States of each other's quality standards and composition requirements, etc., and each other's testing and certification procedures, will apply.

A number of statutory exceptions to the prohibition of restrictions on intra-Community trade contained in Articles 30 to 34 are made by Article 36. This provides that Member States may maintain in force or introduce 'prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

(1) In cases where EC harmonization is necessary, the harmonization will be confined to the essential requirements, leaving the framing of the actual technical standards to the European standardization institutes.

The Court of Justice and the Commission have consistently regarded this safeguard clause as applying also to measures having an effect equivalent to quantitative restrictions.

A quantitative restriction or a measure having equivalent effect is only covered by Article 36 if the following conditions are fulfilled:

(a) The measure must be justified on one of the stated grounds of exception. That is to say, there must be a causal link between it and the objective sought, it must be a sufficient and necessary condition of protection of the national interest, and the objective must not be attainable by other means less restrictive of intra-Community trade.

(b) The objective must strictly fall within one of the grounds of exception. That is to say, these are to be taken as justifying interference in trade only in limited exceptional circumstances and may not be given a broad interpretation.

(c) The measure must not be a means of arbitrary discrimination or a disguised restriction on intra-Community trade. That is to say, it may not be applied solely to imported or exported products unless there is similar provision for domestic products, and may not be intended to protect a domestic industry or disadvantage the industry of another Member State.

The same criteria apply in assessing whether a product may be refused entry on the ground that it does not meet an 'essential requirement' within the meaning of the Cassis de Dijon judgment.

However, whereas the grounds listed in Article 36 may be invoked in defence of measures that discriminate between imported and domestic products, 'essential requirements' may be asserted only where the measures apply to domestic and imported products alike.

The Treaty also makes provision for exceptions from the free trade rules in specific cases, under appropriate Community supervision. It would take too long to go into all of these here, but one important exception that should be mentioned is the right of Member States to take measures departing from the Treaty, including Articles 30 to 34, in relation to the production of or trade in arms, munitions and war materials, where such measures are necessary to protect its essential security interests and do not adversely affect competitive conditions in the common market for products not intended for specifically military purposes (2). In 1958 the Council drew up a list of the products for which Member States may invoke this safeguard clause.

(2) Article 223(1)(b) of the EEC Treaty.

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