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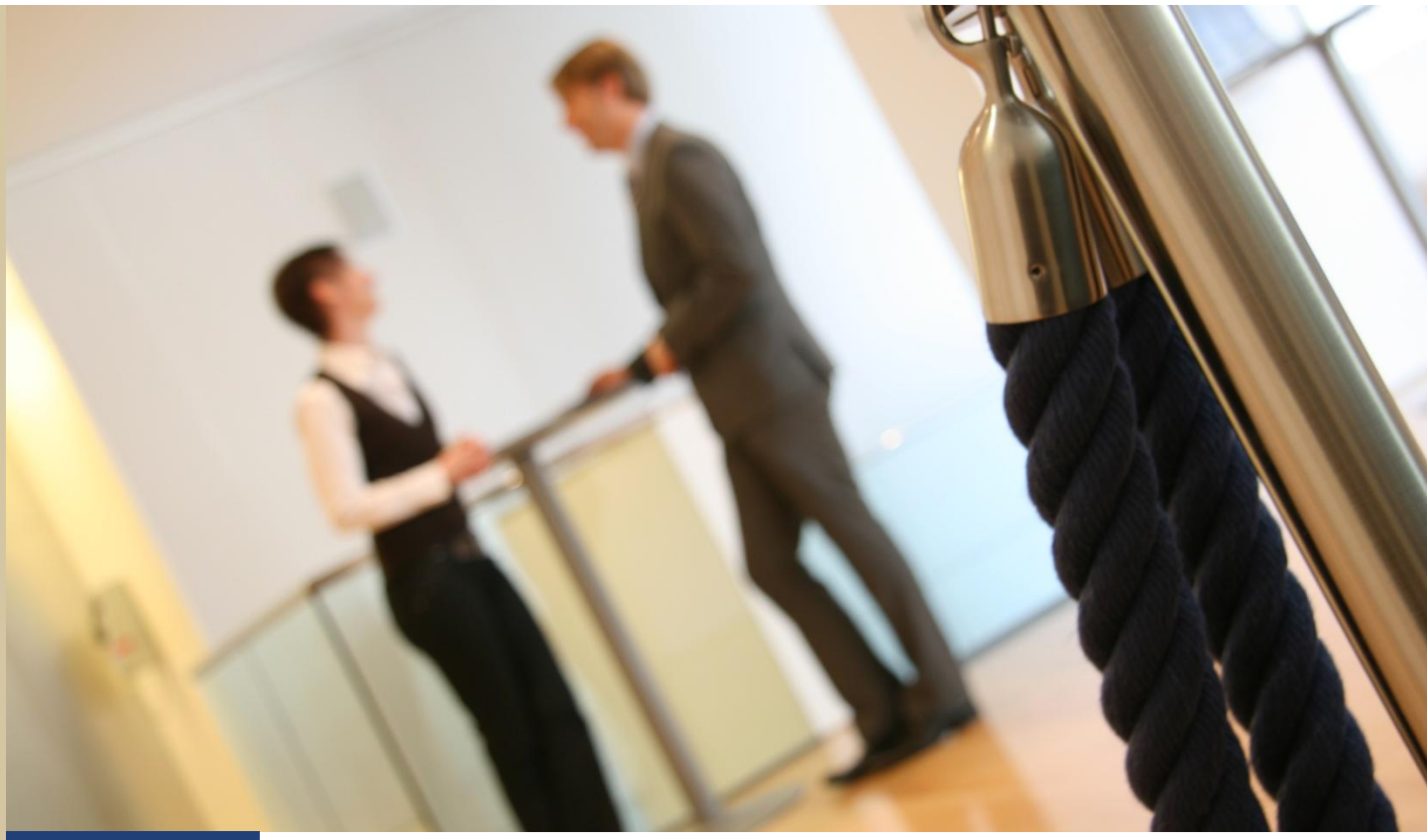
DOCUMENTATION

EU DISABILITY LAW AND THE UNCRPD



111DV67 **Trier, 23-24 May 2011**

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Trier, 23-24 May 2011

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EU Disability Law and the UN Convention on the Rights of Persons with Disabilities
Trier, 23-24 May 2011

Le droit européen des personnes handicapées et la convention de l'ONU
Trèves, 23-24 mai 2011

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Le droit européen des personnes handicapées et la convention de l'ONU Trèves, 23-24 mai 2011

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ERA PARTICIPANT EVALUATION

Your opinion matters to us: For the benefit of future participants, we should be grateful if you would reply briefly to the following questions.

As a thank-you for completing the questionnaire you will receive a souvenir of your stay in Trier.

EU Disability Law and the UN Convention on the Rights of Persons with Disabilities (111DV67)

Your profession

Lawyer in private practice	☐	Judiciary	☐	EU official	☐
Notary	☐	Prosecutor	☐	Ministry official	☐
In-house counsel	☐	Police/Law enforcement	☐	Regulatory authority	☐
Business	☐	Foundation/NGO/etc.	☐	Other civil servant	☐
Other (please specify):				Academic	☐

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Before you attended this event, were you aware of ERA? yes ☐ no ☐

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What particularly met with your approval?

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What is your assessment of this event?	very good	good	satisfactory	adequate	poor	Your comments:
Did the event match your needs?						
Did you gain relevant knowledge and information?						
Will you be able to apply such knowledge and information in your work?						
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Preparatory material						
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Preliminary practical information						
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Name of speaker	very good	good	satisfactory	adequate	poor	Your comments:
01 Delia Ferri						
02 Declan O'Dempsey						
03 André Gubbels						
04 Christopher Bovis						
05 Paul Lappalainen						
06 José Javier Soto Ruiz						
07 Francisco Bariffi						

What is your assessment of ...

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General

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Would you recommend ERA events to colleagues? yes ☐ no ☐

Why?

.....

On which further topics should ERA organise events?

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Original receipts only please

Seminar title	EU Disability Law and the UN Convention on the Rights of Persons with Disabilities				
Event number	111DV67/sj (23-24 May 2011)				
Mr/Mrs					
Institution					
Address					
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Account in Germany		Account in foreign country	
Account No.		IBAN	
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Bank			
Address of the bank			
Account holder			
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Participation as ☐ Speaker ☐ Delegate

Travel expenses:	**Number of vouchers**		**Amount in €**
Air ticket			
Rail ticket			
Car (€0,22/Km)		Km.	
(Please issue an invoice)			
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Hotel			
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Total			

I have incurred the above expenses, and enclose original receipts and tickets. I vouch the for accuracy of this claim.

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Avv. Delia Ferri, Ph.D.

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Introduction to the UN Convention on the Rights of Persons with Disabilities:

Development and Purpose of the UNCRPD, General Principles and Obligations for the Contracting States

avv. Delia Ferri, Ph.D.

SEMINAR FOR LEGAL AND POLICY PRACTITIONERS

Trier, 23-24 May 2011

ERA Conference Centre

[Provisional Version 16 May 2011]

INTRODUCTION TO THE UN CRPD

1. Development of international standards on disability
2. Overview of the UN CRPD: Rationale, Structure, General Obligations
3. General Principles, specific obligations and practical approaches

I.
Development of international standards on disability

Early Efforts to Develop International Standards on Disability

1971	***Declaration on the Rights of Mentally Retarded Persons***	It stipulates that a person with an intellectual impairment is accorded the same rights as any other person
1975	***Declaration on the Rights of Disabled Persons***	It proclaims the equal civil and political rights of all disabled persons, and sets out standards for equal treatment and access to services

The 1980s witnessed noteworthy progress…

1981	***International Year of Disabled Persons (United Nations)***
1982	***World Programme of Action concerning Disabled Persons*** (http://www.un.org/disabilities/default.asp?id=23)
1982 - 1992	***International Decade of Disabled Persons (United Nations)***

Towards Rights-Based Standards on Disability…

1993	***UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities*** (http://www.un.org/disabilities/default.asp?id=26)	The Standard Rules consists of 22 rules and incorporate the **human rights perspective**. The rules consist of four chapters (preconditions for equal participation, target areas for equal participation, implementation measures, and the monitoring mechanism) and **cover all aspects of life of disabled persons**. The rules provide **detailed guidelines** for policy development and implementation

In December 2001 the General Assembly established an Ad Hoc Committee to consider enacting a disability-based human-rights instrument…

On August 25, **2006**, the Ad Hoc Committee adopted the CRPD.

On December 13, **2006**, the UN General Assembly adopted the CRPD together with its Optional Protocol by consensus

The negotiation of the CRPD in a little over two years time is an unique achievement…

…Equally unprecedented was the participation of persons with disabilities and their representative associations in the negotiation process.

Numerous position papers and side events were aimed at raising awareness and lobbying delegations. Civil society was present throughout all the discussions.

The UN CRPD is the first human rights treaty of the 21st century, and represents the official recognition of disability as a human rights issue…

On March 30, **2007**, the CRPD and its Optional Protocol were opened for signature

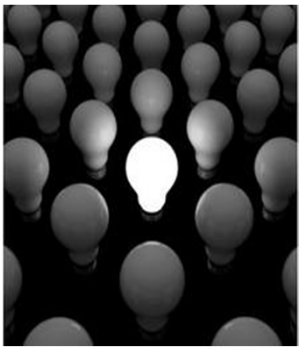
On May 3, 2008 the CRPD entered into force (in compliance with Art. 45 CRPD).

II.
THE UN CRPD

The rationale
The structure
The general Obligations

UN CRPD RATIONALE

- The Convention establishes a comprehensive framework to **protect** and **promote** the rights of persons with disabilities
- The Convention does not seek to create new rights for disabled persons, but rather elaborates and clarifies existing human rights obligations within the disability context
- The Convention categorically affirms the **social model of disability**



Art. 1 UN CRPD

"*The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

What obligations arise from Art. 1?

The CRPD has entirely adopted the social model of disability…

- The Convention see disability as a *social construct.*
- It is the society as a whole that is responsible for creating barriers to full participation of persons with disabilities, and it is the society as a whole that has the responsibility to remove them.

Structure of the Convention

- The UN CRPD includes **twenty-five** preambular paragraphs and **fifty** Articles.

- Introductory set of provisions outlining ***purpose*** (Art. 1) and key ***definitions*** (Art. 2),
- ***Articles of general (cross-cutting) application***, to be applied across the treaty text (**Articles 3-9**)
- ***Specific substantive rights*** elaborated across the full spectrum of civil, political, economic, social and cultural rights (**Articles 10 to 30**).
- ***System of monitoring and implementation*** (Articles 31 to 40).
- ***Final provisions*** that govern the operation of the Convention (Articles 41 to 50).

Rights in the Convention

- Right to life, liberty and security of the person (articles 10 & 14)
- Equal recognition before the law and legal capacity (article 12)
- Freedom from torture (article 15)
- Freedom from exploitation, violence and abuse (article 16)
- Right to respect physical and mental integrity (article 17)
- Freedom of movement and nationality (article 18)
- Right to live in the community (article 19)
- Freedom of expression and opinion (article 21)
- Respect for privacy (article 22)
- Respect for home and the family (article 23)
- Right to education (article 24)
- Right to health (article 25)
- Right to work (article 27)
- Right to adequate standard of living (article 28)
- Right to participate in political and public life (article 29)
- Right to participation in cultural life (article 30)

Art. 31

- Art. 31 introduces a new element to human rights treaties and requires State Parties to specifically acquiring disability data and statistics to facilitate UN CRPD implementation.
- Disability data collection should enable Parties to formulate, implement, monitor, evaluate policies and programs, in order to give effect to the CPRD.
- Art. 31(2) requires disability data to be *disaggregated* in order to be used for monitoring purposes
- Art. 31(3) requires States Parties to ensure that this information is disseminated to persons with disabilities in accessible formats and to other interested parties

Art. 32

- The UN CRPD expressly recognizes the role that international cooperation and disability inclusive development can play in support of national implementation efforts.
- Article 32 identifies a range of measures that States Parties can take within the framework of international cooperation, including:
  1. **capacity building, including through the exchange and sharing of information, experiences, training programs**
  2. **research programs and the facilitation of access to scientific knowledge; and**
  3. **technical and economic assistance, including the facilitation of access to accessible and assistive technologies**

System of monitoring and implementation

Mechanism of **internal follow-up** (Art. 33)

Art. 33(1) UN CRPD states that Parties to the Convention must designate "one or more **focal points** within their governments for matters relating to the implementation of the Convention", and they can designate a **coordination mechanism**.

Art. 33(2) requires Parties to designate or establish a '**framework**, including one or more independent mechanisms', to promote, protect and monitor the implementation of the Convention.

The CRPD creates an international monitoring body along the lines of other core human rights treaties…

- The **Committee on the Rights of Persons** with Disabilities is the body of **12 independent experts** which monitors implementation of the Convention by the States Parties
- All **States parties are obliged to submit regular reports to the Committee on how the Convention is being implemented**
- The **Committee examines each report** and shall make such **suggestions** and general **recommendations** on the report as it may consider appropriate and shall forward these to the State Party concerned

The Optional Protocol

- 18 articles
- It introduces two procedures to strengthen the implementation of the Convention:
  A. The **individual communication** procedure permits individuals and groups of individuals (the petitioner) in a State Party to complain to the Committee on the Rights of Persons with Disabilities that the State has breached one of its obligations under the Convention.
  B. If the Committee receives reliable information indicating grave or systematic violations of the Convention by a State, an **enquiry** can be opened.

General Obligations

- Article 4 of the CRPD expressly requires Parties to give effect to Convention within their domestic legal orders
- Among other obligations, it requires Parties: to **adopt** legislative, administrative and other measures to implement the Convention; to **abolish** or **amend** existing laws, regulations, customs and practices that discriminate against persons with disabilities; to **refrain** from engaging in any act or practice that is inconsistent with the Convention; to **ensure** that public authorities and institutions act in conformity with the Convention; and to **adopt** an inclusive approach to protect and promote the rights of persons with disabilities in all policies and programmes.

General Obligations

- The Convention requires:
  - **A *scoping exercise* to measure compliance with the Convention across laws, bylaws and regulatory schemes.**
  - **Enactment of legislation (amendament of existing acts, repeal of inconsistent legislation…)**
- But also…
  - **Training on disability rights**
  - **Research and development of accessible goods, services and technologies for persons with disabilities**
  - **Accessible information about assistive technology**
- …and disability should be mainstreamed into policy formulation

General Obligations

Article 4 must be read in conjunction with Article 33 of the UN CRPD, which recommends States Parties to give due consideration to the establishment or designation of a governmental coordination mechanism to facilitate **cross-sectoral and multi-tiered implementation.**

General Obligations

- Article 4 requires the consultation with and **involvement of persons with disabilities** in developing and implementing legislation and policies and in decision-making processes concerning UN CRPD rights

III. General Principles, specific obligations and practical approaches

General Principles

- **Article 3 enunciates the general principles upon which the CRPD is based**
- **Some of the general principles are evident in other articles of general application (e.g. Article 5, non-discrimination and equality; Accessibility, Article 9) or in articles of specific obligation (e.g. Political Participation)**

" The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) Non-discrimination;

(c) Full and effective participation and inclusion in society;

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

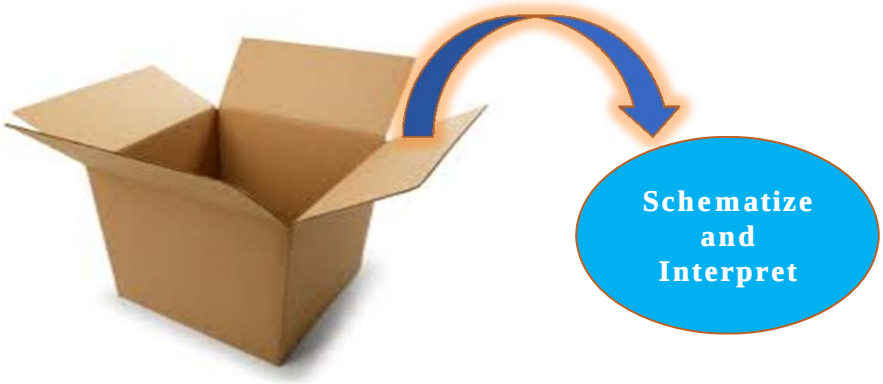
(e) Equality of opportunity;

(f) Accessibility;

(g) Equality between men and women;

(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities"

Unpacking the general principles…



Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons

- The concept of personal autonomy includes the right to establish details of one's identity as a human being, the right to make choices over her/his own body, in all matters relating family and relationships, the right to privacy and the freedoms of thought, conscience and religion.
- This principle closely matches with: **Art. 12** (Equal recognition before the law) which addresses the issue of *legal capacity*, and confirms that persons with disabilities "enjoy legal capacity on an equal basis with others in all aspects of life", with **Art. 23** (Respect for family and home), and with **Art. 18** which recognizes *inter alia* "the rights of persons with disabilities [...] to freedom to choose their residence"

Living independently (Art. 19)

- Article 19 recognises the right of persons with disabilities to **live independently** and be included in the community.
- **Article 19** can be seen as a logical extension of Article 12, in the sense that recognition of legal capacity restores the „power" of persons with disabilities to decide about their own lives, while the right to independent living paves the way for persons with disabilities to choose how to live their lives

Equality and non-discrimination

Art. 3

(b) Non-discrimination;
[...]
(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
(e) Equality of opportunity;
[...]
(g) Equality between men and women (Art. 6)

Art. 5

"1. States Parties recognize that all persons are **equal before and under the law** and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall **prohibit all discrimination** on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to **ensure that reasonable accommodation is provided**.
4. Specific **measures which are necessary to accelerate or achieve de facto equality** of persons with disabilities shall not be considered discrimination [...]"

Equality and non discrimination

Parties are required:

- To **combat any form of discrimination** (as defined by Art. 2), including **multiple discrimination**

  "Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation"

- To ensure **equality of opportunity**, either by adopting a range of measures usually referred to as "**positive actions**" to compensate for disadvantages, or by providing for specific measures to **remove individual and environmental (physical) barriers** which inhibit participation in society(Art. 5)

Full and effective participation and inclusion in society

- Participation and inclusion should be understood very broadly
- Participation should be understood well beyond the political participation (and the voting context).
- The principle of participation is further elaborated in **Art. 29** (Participation in political and public life), but miscellaneous articles of the CRPD make reference to participation.
- This principle must be read in conjunction with **Arts. 4** and **33**, which envisage participation of people with disabilities to the implementation of the Convention and to the monitoring of the implementation.

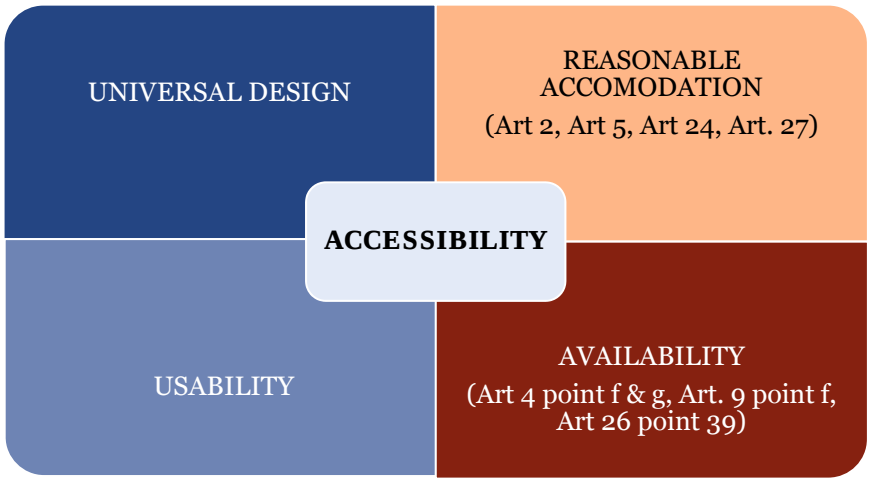
Accessibility

- Preamble (point V)
- Article 3 on general principles (point 3 f)
- Article 4 on general obligations (accessible information, point 4 h)
- Article 21 on access to information (points a, c and d)
- Article 31 on accessibility to statistical and research data of relevance for the realization of CRPD
- Article 49 on ensuring that CRPD is available in accessible formats

Accessibility

- It is one of the key general principles and main normative directions of the Convention
- 'Accessibility' means that persons with disabilities can access, on an equal basis with others, to **physical environments**, to **transportation**, to **information** and **communication**, including information and communication technologies and systems, and to other **facilities** and **services** open or provided to the public, both in urban and in rural areas. (Art. 9 para 1)

The UN CRPD makes references to 4 concepts that are related to accessibility



Accessibility

- Accessibility gives rise to specific applications in other substantive articles: **accessibility rights** in the UN CRPD serve the function of facilitating access in various contexts, including generally in public and private spheres, as well as specifically, in the **access to justice (Art. 13)** and political decision-making contexts **(Art. 29)**.

Art. 13 (Access to justice)

"States Parties shall ensure **effective access to** justice for persons with disabilities on an equal basis with others, including through the provision of **procedural** and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff".

Practical approaches…

- These principles are *benchmarks* against which national law frameworks must be assessed
- These principles must be used to interpret national provisions
  - **Trib. Catanzaro 9.094.2009**
  - **Trib. Varese 06.10.2009**
  - **Slovenian Const. Court 13.11.2008**
  - **Italian Const. Court 80/2010**

THANK YOU
FOR YOUR ATTENTION

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Declan O‘Dempsey

André Gubbels

André Gubbels

André Gubbels est Directeur général au Service Public Fédéral Sécurité Sociale. Il est responsable de la Direction générale Personnes Handicapées, laquelle gère différents régimes de prestations en espèces destinées aux personnes handicapées en Belgique.

Il a été auparavant Inspecteur général à l'Agence wallonne pour l'Intégration des personnes handicapées (2002-2006). Entre 1996 et 2002, il a été expert au sein de la Direction générale Emploi et Affaires sociales de la Commission européenne. Il a été aussi dans plusieurs cabinets ministériels belges conseiller auprès de Ministres en charge des Affaires sociales et de la Santé (1989-1994) et fonctionnaire au Fonds national de reclassement social des handicapés (1983-1988).

Il est licencié en Droit de l'Université de Liège. Il coordonne une revue consacrée à la réglementation relative au handicap en Belgique.

Disability and Employment:

Novelties of the UNCRPD

André Gubbels

Overview of the Presentation

- The employment rights for persons with disabilities and the correlative duties of the States under the UNCRPD
- The meaning of a human rights based approach to employment policies and practices for persons with disabilities and its practical implications
- A case study of this approach re disability benefits schemes

The UNCRPD - The Key Principles

- Respect for inherent dignity, individual autonomy and independence
- Non-discrimination
- Full and effective participation and inclusion in society
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- Equality of opportunity
- Accessibility

The UNCPRD - The Content Areas

- **Civil and political rights** : Right to life, Equal recognition before the law, Equality, Access to justice, Liberty and security of person, Freedom from torture or cruel, inhuman or degrading treatment or punishment, Freedom from exploitation, violence and abuse, Protecting the integrity of the person, Liberty of movement and nationality, Freedom of expression and opinion, and access to information, Respect for privacy, Respect for home and the family, Participation in political and public life.
- **Economic, social and cultural rights :** Living independently and being included in the community, Personal mobility, Education, Health, Habilitation and rehabilitation, Work and employment, Adequate standard of living and social protection, Participation in cultural life, recreation, leisure and sport.

Employment Rights under article 27 of the CRPD

- States Parties shall safeguard and promote the realization of the right to work by taking appropriate steps, including through legislation, to, inter alia:
  - Prohibit discrimination on the basis of disability
  - Enable persons with disabilities to have effective access to placement services and vocational and continuing training;
  - Promote opportunities for self-employment, entrepreneurship, the development of cooperatives;
  - Employ persons with disabilities in the public sector;
  - Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
  - Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
  - Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

Typology of duties imposed on the States by Article 27 of the UNCPRD

Respect	Protect	Fulfill	
Do not interfere in the enjoyment of human rights : *e.g. refrain to put obstacles for persons disabilities to earn a living through work that is freely chosen in an open and inclusive work environment*	Take steps to ensure that third parties do not interfere in the enjoyment of human rights : *e.g. prohibit employers to discriminate persons on basis of disability*	To facilitate : *e.g. take measures to promote employment of persons with disabilities in the private sector through appropriate policies and measures*	To provide : *e.g. organize comprehensive rehabilitation services in the areas of employment services*

What is really new in the UNCPRD

- The UNCPRD proposes a new framework for understanding disability and human rights.
- The UNCRPD does not only endorses the principle of equality by outlawing disability discrimination but it also demands more than equal treatment for persons with disabilities. It mandates for an holistic and integrate human rights approach to address social and economic inequality faced by persons with disabilities.
- The UNCRPD attach as much importance to the process than as to the outcomes. It requires services, supports, programs, and funding allocations to have participatory, inclusive aims and principles built into their designs.

A new meaning of disability

	Medical approach to disability	**Social approach to disability**
Definition of disability	An individual is limited to participate by is/her impairment	An individual with an impairment requires access to participate
Strategy to address the issue	Fix the individual, correct the deficit	Remove barriers, alter the physical and social environment to provide access
Methods to address disability	Provide medical, vocational or psychological rehabilitation segregated services	Provide supports, e.g., assistive technology, personal assistance
Legal Provisions	Specific social welfare benefits, labelling as dependents or unemployable	Antidiscrimination legislation, accessibility standards
Sources of interventions	Specialised professionals, clinicians and other rehabilitation providers	Peers, mainstream public and private services
Role of persons with disabilities	Patients, beneficiaries, incapables, dependents	Citizens, consumers, customers, decision makers

The meaning of human rights

- To have a particular right is to have a **claim** on other people or institutions that they should help or collaborate in ensuring access to some freedom.
- The mere invoking of laudable goals and reasons for action does not yield specific duties on the part of other people or social institutions to promote the achievement of an specified level of social progress, or of its components.
- With the invoking of rights and duties comes a host of related concerns, such as **accountability, culpability and responsibility**.

Needs vs Rights

What is required/necessary/specific	What is inherent to every human being
Needs are to be met or satisfied	Human Rights are to be realized
Needs do not necessarily imply duties	Human Rights always imply correlative duties
Needs can be met by charity and benevolence	Charity is seldom mandatory, rights always are
Needs are often associated with non-legal commitment or promises	Rights are always associated with legal obligations
Needs can be ranked a priori in a hierarchy	Rights cannot be ranked in a hierarchy

Practical implications

- If persons with disabilities are granted a **claim (right) to work** – it implies that others have **duties** (or obligations) to ensure that the right is realized.
- It means much more than that it would be a "good thing" for every person with disabilities to have a job or, even, that every disabled person should have a job.
- In asserting this right we are claiming that if persons with disabilities avoidably lack access to employment, there must be some **culpability somewhere in the social system**.

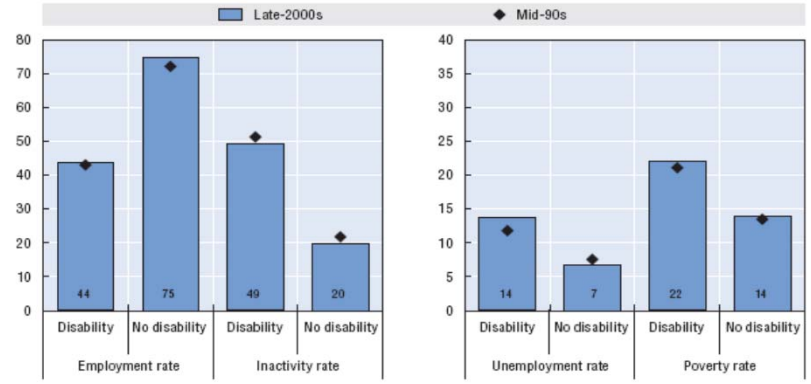
"'Thus, monitors should be asking what society has done or not done which is obstructing the full enjoyment of …[persons with disabilities'] rights – not how their physical or mental impairment has affected the enjoyment of their rights".'

Office of the Commissioner for Human Rights (2010)

Do persons with disabilities enjoy effective employment opportunities?

Figure 1.2. **Social and economic integration of persons with disability is lagging behind**

Key labour market indicators,[a] by disability status, OECD average,[b] late 2000s and mid-1990s, percentages



a) Employment rate: employment as a percentage of working-age population; Inactivity rate: inactive population as a percentage of working-age population; Unemployment rate: unemployed as a percentage of the labour force; working-age population; Poverty rate: percentage of people with disability in households with less than 60% of the median adjusted disposable income.

b) The OECD average is an unweighted average across 27 OECD countries (excluding Japan, New Zealand and Turkey).

Key barriers to labour market participation for persons with disabilities

- These key barriers include :
  - low levels of education/skills
  - attitudes/behaviour
  - lack of access
  - lack of workplace supports
  - design of income protection programs

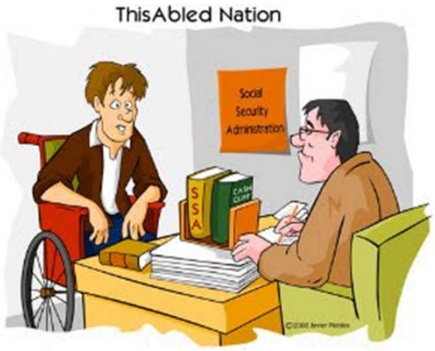
- Although discrimination at the workplace is plainly a major problem for persons with disabilities, many individuals with disabilities face significant barriers employment that operate well before they are ever in a position to be discriminated against by an employer.

Reassessing States duties viz right to work under the Convention

- Assessing :
  - The existence of laws, policies and programs to respect, protect and fulfill equal employment opportunities for persons with disabilities
  - The state's efforts (inputs) to meet its obligations / sufficiency in spending
  - The programmes performance (outputs, outcomes) / efficiency in spending
  - The programmes principles and process : do they foster dignity, autonomy and independence, full and effective participation and inclusion in society /adequacy in spending

A case study

When benefits become barriers



So what you're saying is, that I have to be declared disabled and unable to work before I am allowed to go to work?

What is the issue around the design of some disability benefits?

- The system acts as a strong work disincentive
  - The vast majority of the schemes requires that a person be out of the workforce entirely and be incapable of performing any work that would provide sufficient income for basic support
  - They force people to make a choice ; either seeking benefits and give up economic independence, either support themselves through work, despite significant risks

Old assumptions and new paradigms in employment programmes for people with disabilities

- *From "*Disability = inability to work"
  *Towards "*People need support to work"
- *From* "Inability to work is medically determinable"
  *Towards "*It is medically impossible to define a line between those who can work and those who cannot"
- *From* "Work as a burden : the price to pay to get the things that make life enjoyable"
  *Towards "*Work as a social good : the road to personal satisfaction, self-worth, social status, belonging"
- *From* "Income security as a gift"
  *Towards "*Income security as a right"
- *From* "Only full time paid work deserves respect"
  *Towards "*Paid work is not the only way to participate in the community"

Conclusion: barriers to human rights in-built into policy design and implementation

- States should redesign their relevant disability support programs according to the following features :
  - Participation expectations for all
  - Work expectations for many, but not all
  - Access to comprehensive, integrated services that support community participation and employment
  - Operating principles : accessibility, equity, adequacy, portability, responsiveness and consumer control

Advancing the application of employment rights under the UNCRPD

"Effective Convention implementation must result in a human rights practice that includes law reform or court-based advocacy, but also moves beyond it to include strategies that support deeper domestic internalization of human rights norms".

Michael Stein

About the justiciability of the economic rights

- A large number of conceptual and practical developments originating from international, regional and domestic spheres illustrate a range of possibilities of filing a complaint before a court and to request adequate remedies if a violation of a economic and social right has to be found.
- See in particular the *Grootboom* decision issued by the South African Constitutional Court in 2001 when it assessed the constitutional compatibility of a housing policy implemented by the government.

"Applying the disability rights approach to public aid does not call for abandonment of welfare interventions, much less disability-specific welfare programs. The approach instead calls for reshaping welfare so as to promote equality, autonomy, and personal dignity, and to permit more successful integration into the working economy where that can be achieved".

Mark Weber

Christopher Bovis

Professor Christopher Bovis

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He is regular commentator in international legal and management journals and has produced a number of books and monographs on European and business subjects. His academic work has been translated into different languages, including Chinese, French and German.

Services of General Economic Interest Public Procurement and State Aid

Prof Christopher H. Bovis

Public Services under EU Law

- Art 106 TFEU (ex Art 86 EC) = the foundation of public services
  - Public service obligations
  - Universal service obligations
  - Services of general economic interest
  - Social services of general interest

Public services as services of general interest

What is a (SGI)?

Protocol No 26 to the TFEU

> The concept of SGI refers to services, whether 'economic' or not that the Member States regard as being of general interest, and are subject to specific public service obligations

- SGI cover:
  - services of general economic interest (SGEIs) [TFEU applicable]
  - non-economic services of general interest [TFEU not applicable]

The characteristics of public services

- Economic nature
  - Cost and value considerations
- Lack of industrial or commercial character
- Sui generis market place
  - Limited use of anti-trust
  - State aid regulation
  - Procurement as competition benchmark

The Conceptual premise of SGEI

Services of General Economic Interest

- Articles 14 and 106(2) TFEU
- Protocol No 26

Non-commercial nature *versus*

- Demand
- Frequency of supply
- Quality of service
- End user charges
- Profitability of operator

SGEIs

- "services of an economic nature that the public authorities in the Member States at national, regional or local level, depending on the allocation of powers between them under national law, subject to specific **public service obligations** through an act of entrustment on the basis of a general-interest criterion and in order to ensure that the services are provided under conditions which are not necessarily the same as prevailing market conditions".

- **Examples of acts of entrustment**
  - Concession contract and tender documents
  - Ministerial programme contracts
  - Ministerial instructions
  - Laws and Acts
  - Yearly or multiannual performance contracts
  - Legislative decrees, regulatory decisions, municipal decisions or acts.

Public Service Obligations

- State financing not state aid
  - Art 14 TFEU (ex Art16 EC)
  - Art 106(2) TFEU (ex Art 86(2) EC)
  - Altmark ruling

The concept of social services of general interest (SSGI)

- *Commission Comminication: Implementing the Community Lisbon programme: Social services of general interest in the European Union*
- *Commission Comminication: Services of general interest, including social services of general interest: a new European commitment*

- SSGIs may be of an economic or non-economic nature
- SSGIs that are economic in nature are SGEIs

SSGIs

health services;

statutory and complementary social security schemes;

- life assuance
- health
- ageing
- occupational accidents
- unemployment
- retirement
- disability

SSGIs

other essential fundamental right services of social cohesion and social inclusion directly provided

assistance for persons faced by personal challenges or crises (debt,unemployment, drug addiction or family breakdown)

social integration activities (rehabilitation, language training for immigrants) and, in particular, return to the labour market (occupational training and reintegration).

services to integrate people with long-term health or disability problems.

social housing, housing for disadvantaged citizens or socially less advantaged groups.

Public Services and Competition: Principles of Public Procurement Regulation

- Transparency
- Accountability
- Objectivity
- Non-discrimination

What does public procurement stand for?

- Procedural safeguard of competition
- Conceptual instrument
  - Public policy
  - Public services

Public Procurement and public services

- Contracting authorities
  - Bodies governed by public law

"it must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character"

General public interest needs

- requirements of a community (local or national) in its entirety, which should not overlap with the specific or exclusive interest of a clearly determined person or group of persons

- C-179/90, *Merci Convenzionali Porto di Genova,* [1991] ECR 1-5889

The industrial or commercial character

- intention to achieve profitability
- pursuit of objectives through commercially motivated decisions

- C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*
- C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*

- Acid test:

  the state or other contracting authorities choose themselves to meet these needs or to have a decisive influence over their provision

Conceptual approaches of financing public services by the ECJ and the Commission

- the state aid approach
- the compensation approach
- the quid pro quo approach

The state aid approach

- All public funding regarded as state aid within Art 107(1) TFEU (ex Art 87(1) EC)
  - Could be justified under Art 106(2) TFEU (ex Art 86(2) EC)
  - Must comply with proportionality principle

The state aid approach (cont)

Article 107(1) TFEU: “Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”

Principle: state aid in any form is in general incompatible with the internal market

Procedure: notification, standstill, authorisation

European Commission has sole power to assess compatibility of state aid

The state aid approach (cont)

Concept of aid is wider than subsidies and includes any public measure that reduces costs normally borne in budget of undertakings and although they are not subsidies have similar effects [Italy v Comm, C-66/02, Chronopost, C-341/06]

The state aid approach (cont)

Advantage is any relief from **normal** costs = inherent in economic activity of beneficiary undertaking [Kahla, T-20/03; GEMO, C-126/01]

"Normal costs" are determined within prevailing legal context of Member States

The state aid approach (cont)

Advantage includes supply of goods and services on preferential terms [GEMO, C-126/01; UFEX, T-613/97]

Use of **public procurement** eliminates advantage for provider of goods/services to a public authority [Welsh public sector broadband network, N46/2007]

The state aid approach (cont)

- "... a tender procedure guaranteeing full competition can be taken as an important indicator that the services entrusted through a public contract or a concession are rendered at a market price and that there is no state aid. Complying with procurement rules will in these cases therefore also help in ensuring respect of the state aid provisions."

[Commission staff working document, Frequently asked questions concerning the application of public procurement rules to social services of general interest, accompanying document to the Communication on "Services of general interest, including social services of general interest: a new European commitment" SEC(2007) 1514, 21/11/2007

Application of the state aid approach

- Existence of public markets
  C-94/01 *Chronopost and Others*
- Inapplicability of private investor principle
- Public procurement as authentication instrument of public expenditure

The compensation approach

- Reflects upon a “compensation” for an appropriate remuneration
- Public funding regarded as state aid within Art 107(1) TFEU (ex Art 87(1) EC), if only and to the extent that any economic advantage exceeds such appropriate remuneration
- Appropriate remuneration = market price

Application of the compensation approach

- Real advantage theory
  - Any alleged advantages conferred must be examined in parallel to obligations
  - Synergy with transport regime and PSO
- Threshold benchmarking
  - Base line costs = market price (verified through public procurement)

C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GmbH*

The *quid pro quo* approach

- Public funding not regarded as state aid within Article 107(1) TFEU (ex Article 87(1) EC) if

  a direct and manifest link between

  state financing and

  clearly defined public service obligations

Application of the *quid pro quo* approach

- Departure from “effect of measures”
- Reliance upon formalities and procedure
- Market price = conceptual threshold
- Procurement verifies market price

  C-107/98, *Teckal Slr* v *Comune di Viano*

Altmark

- Hybrid between compensation and *quid pro quo* approaches
- Public funding not state aid if
  - Private sector to discharge public services which are clearly defined
  - Calculation for compensation established objectively and transparently
  - Compensation does not exceed costs plus reasonable profit
  - In the absence of public procurement, compensation to be determined by analysis of costs / profit structure of a typical undertaking

Is Public Procurement a safeguard for SGEI?

- The presence of public procurement
  - Reveals relevant markets
  - Provides for cost basis ?

Erosion of safeguard and false sense of security

Inapplicability of public procurement

- Dependency of undertaking
- Similarity of control
- Category 2 Services of the Services Directive
- Concession Services
- Affiliation of undertaking
- Special or exclusive rights
- Competitive markets in utilities (telecoms)
- Institutional Public-Private Partnerships

Inherent flexibility

- Award criteria
  - MEAT (most economically advantageous tender)
    - Opens the door for policy pursuit
      - Beentjes *(C-31/87, Gebroeders Beentjes B.V. v. Netherlands)*
      - Nord-Pas-de Calais *(C-225/98, Commission v. France)*
      - OPAC *(C-237/99, Commission v. France*)

The Interaction of the UNCRPD with the Public Procurement Regime of the European Union

Prof Christopher H. Bovis

- Directive 2004/18, OJ L 134, 30.4.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
- Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
- Directive 2007/66/ 11.12. 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

Principles of Public Procurement Regulation

- Transparency
- Accountability
- Objectivity
- Non-discrimination

What does public procurement stand for?

- Procedural safeguard of competition
- Conceptual instrument
  - **Public policy**
  - **Public services**

What has changed?

Codification of administrative laws

- Public sector rules
- Utilities rules
- Remedies

What has influenced the change?

- ECJ: *rule of reason approach*
- Magnitude of public procurement
  - **EURO 1 trillion**
  - **17% of GDP**

The ECJ Influence

- Centralised interpretation of public procurement rules
  - **Reference procedures under Article 234 EC**

The doctrine of objectivity

***1. equivalence test* to eliminate non-tariff barriers**

- **technical standards**
- **product specification**
- **standardization**

2. restrictive interpretation

- **selection procedures**
- **quantitative and qualitative suitability criteria**
- **award procedures, in particular negotiated procedures**

The doctrine of flexibility

- ***functionality***
- ***dependency***

  in order to define the notion of contracting authorities

- ***dualism***
- ***commercialism***
- ***competitiveness***

  in order to determine the applicability of public procurement rules

The doctrine of complementarity

- *compatibility* of socio-economic and environmental policies
- *contract compliance*

The doctrine of procedural autonomy

- wide discretion afforded to Member States to create the appropriate *fora* to receive complaints against decisions of contracting authorities and utilities, as well as actions for damages.

The doctrine of procedural equality

- Review procedures for public procurement disputes, as well as procedures for actions for damages must not differ, in a discriminatory context, from other review procedures and procedures for actions for damages under national law.

The doctrine of effectiveness

- Swift dispute resolution at national level
- Enforceability of decisions of national courts or tribunals

Common Breaches by Member States

- Applicability of Directives
  - Notion of contracting authorities
  - Bodies governed by public law
- Selection and Qualification
- Award Procedures
- Award Criteria
- Review procedures

Socially responsible public procurement (SRPP)

Features:

- employment opportunities
- decent work
- compliance with social and labour rights
- social inclusion (including persons with disabilities)
- equal opportunities
- accessibility and universal design (design for all)
- sustainability criteria, including ethical trade issues
- corporate social responsibility (CSR)
- enviromental considerations

SRPP

Benefits

- Compliance with social and labour law
- Stimulating socially conscious markets
- Demonstrating socially responsive governance
- Stimulating integration
- Ensuring more effective public expenditure

UNCRPD and the economic approach to the regulation of public procurement

- Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, [2000] ECR 8035 at paragraph 17;
- Case C-44/96, C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH,* [1998] ECR 73, paragraph 33;
- Case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821at paragraphs 42 and 43;
- C-237/99, *Commission v. France*, [2001] ECR 934, at paragraphs 41 and 42.

UNCRPD and the socio-economic approach to public procurement

- Case C-31/87*, Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635
- Case C-225/98, Nord-Pas-de-Calais Commission v. French Republic, [2000] ECR 7445

Procurement and environmental factors

- Case C-513/99, *Concordia Bus Filandia Oy Ab v. Helsingin Kaupunki et HKL-Bussiliikenne,* [2002] ECR 7213.
- C-448/01, *EVN AG, Wienstrom GmbH and Republik Österreich,* judgment of 4 December 2003.

Public Procurement and the Acquired Rights Directive

- Case C-29/91, *Dr Sophie Redmond Stichting* v. *Bartol*, [1992] ECR 3189;
- Case C-382/92, *Commission* v. *United Kingdom*, [1994] ECR 2435;
- Case C-24/85, *Spijkers* v. *Gebroders Benedik Abbatoir CV*, [1986] ECR 1123;
- Case C-209/91, *Rask* v. *ISS Kantinservice*, [1993] ECR 5735;
- Case C-392/92, *Schmidt* v. *Spar und Leihkasse der fruherer Amter Bordersholm, Kiel und Cronshagen*, [1994] ECR 1320;
- Case C-392/92, *Schmidt* v. *Spar und Leihkasse der fruherer Amter Bordersholm, Kiel und Cronshagen*, [1994] ECR 1320;
- Case C-48/94, *Rygaard* v. *Stro Molle Akustik*, [1995] ECR 2745;
- Case C-324/86, *Tellerup*, [1998] ECR 739.

Technical standards

Irish authorities specified a certain standard for pipelines

The *Neerlands Inkoopcentrum* used trade marks as compulsory specifications for the purchase of meteorological equipment

The “equivalent standard” doctrine

- C-45/87, *Commission v. Ireland*, [1988] ECR 4929;
- C-359/93, *Commission v. The Netherlands*, judgment of January 24, 1995.

Selection and qualification

Evidence of financial and economic standing may be provided by means of references including:

- **i) appropriate statements from bankers;**
- **ii) the presentation of the firm’s balance sheets or extracts from the balance sheets where these are published under company law provisions; and**
- **iii) a statement of the firm’s annual turnover and the turnover on construction works for the three previous financial years.**

- **C-76/81, *SA Transporoute et Travaux v. Minister of Public Works*, [1982] ECR 457.**
- **C-27/86, *Constructions et Enterprises Indusrtielles S.A (CEI) v. Association Intercommunale pour les Autoroutes des Ardennes*; case C-28/86, *Ing.A. Bellini & Co. S.p.A. v. Regie de Betiments*; case C-29/86, *Ing.A. Bellini & Co. S.p.A. v. Belgian State*, [1987] ECR 3347.**

The exceptional nature of negotiated procedures without prior advertisement

- **In cases C-199/85, *Commission v. Italy,* [1987] ECR 1039 and C-3/88, *Commission v. Italy*, [1989] ECR 4035, the Court rejected the existence of exclusive rights and regarded the abuse of this provision as contrary to the right of establishment and freedom to provide services which are based on the principle of equal treatment and prohibit not only overt discrimination on grounds of nationality, but also all covert forms of discrimination, which, by the application of other criteria of differentiation, lead to the same result.**
- **In case 199/85, *Commission v Italy*, *op.cit*, the Court elucidated that exclusive rights might include contractual arrangements such as know-how and intellectual property rights.**
- **For urgency reasons brought by unforeseen events to contracting authorities the Court established two tests: i) the need of a justification test based on the proportionality principle, and ii) the existence of a causal link between the alleged urgency and the unforeseen events (see C-199/85, *Commission v Italy*; C-3/88, *Commission v Italy*; C-24/91, *Commission v Spain*, [1994] CMLR 621; C-107/92, *Commission v Italy*, judgment of August 2, 1993; C-57/94, *Commission v Italy*, judgment of May 18, 1995; C-296/92, *Commission v Italy*, judgment of January 12, 1994).**

The restrictive interpretation of the grounds for using negotiated procedures with prior advertisement.

The grounds for using this procedure are confined to:

- i) the nature of the works or services or risks attached thereto do not permit overall pricing and
- ii) the nature of the services is such that specifications cannot be established with sufficient precision.

Award Criteria

- *Publicity of weighting of criteria*
- *Variants*
- *Criteria related to the subject matter of the contract*

Award criteria

- Inherent flexibility
  - MEAT (most economically advantageous tender)
    - Opens the door for policy pursuits

Reserved contracts

Article19 of the Public Sector Directive

Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities cannot carry on occupations under normal conditions.

Contractual performance

Subcontracting

Article 25 of the Public Sector Directive

In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors. This indication must be without prejudice to the question of the principal economic operator's liability.

Contractual performance (cont)

Socio-economic conditions

Article 26 of the Public Sector Directive

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Contractual performance (Cont)

- *Obligations relating to taxes, environmental protection, employment protection provisions and working conditions*

- Article 27(1) of the Public Sector Directive
- A contracting authority may state in the contract documents, or be obliged by a Member State to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which must be applicable to the works carried out on site or to the services provided during the performance of the contract.

Contractual performance (Cont)

- Article 27(2) of the Public Sector Directive
- A contracting authority must request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

Concessions as Public Contracts

- *The notion of public concessions*
  - the right to economically exploit the concession, although this right may be accompanied by a requirement to pay some consideration to the grantor
  - Risk transfer
- case C-360/96, *Arnhem and Rheden,* [1998] ECR I-6821
- *Vertical procurement* (subcontracting)
  - C-31/87 *Beentjes* [1988] ECR 4635, paragraph 11;
  - C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 62.

Service concessions as public contracts

Public prourement rules non-applicable BUT TFEU fundamental prinicples applicable

Some degree of publicity required to ensure competition

- case C-324/98 *Telaustria and Telefonadress*
- case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*
- C-458/03 *Parking Brixen*

Sub-dimensional public contracts

- Contracts below thresholds are subject to publicity requirements if there is material interest of cross-border nature in public contracts

case C-59/00, Bent Mousten Vestergaard and Spøttrup Boligselskabcase C-6/05, *Medipac-Kazantzidis AE v Venizelio-Pananio (PE.S.Y. KRITIS),*

Joined Cases C-147/06 and C-148/06, *SECAP SpA* (C-147/06) and *Santorso Soc. coop. arl* (C-148/06)

case C-59/00 *Vestergaard*

case C-412/04 *Commission* v *Italy*

Public Procurement, State Aid and Services of General Economic Interest

Prof Christopher H. Bovis*

Introduction

Jurisprudential developments at the European Court of Justice have revealed the pivotal position of public procurement in the process of determining the parameters under which public subsidies and state financing of public services constitute state aid. In the center of the debate regarding the relation between subsidies and public services, public procurement has emerged as an essential component of state aid regulation. The European Court of Justice has inferred that the existence of public procurement, as a legal system and a procedural framework, verifies conceptual links, creates compatibility safeguards and authenticates established principles applicable in state aid regulation. Public procurement in the common market represents not only the procedural framework for the contractual interface between public and private sectors[1], but it also reflects on the character of activities of the state and its organs in pursuit of public interest[2]. Public procurement regulation has acquired legal, economic and policy dimensions, as market integration and the fulfillment of treaty principles are balanced with policy choices[3].

The implications of the debate are important, not only because of the necessity for a coherent application of state aid regulation in common market[4] but mainly because of the need for a legal and policy framework regarding the financing of services of general

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[1] The Public Procurement regime includes Directive 2004/18, OJ L 134, 30.4.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. See Bovis, *The New Public Procurement Regime of the European Union: a critical analysis of policy, law and jurisprudence*, ELRev, Vol.30, 2005, pp. 607-630.

[2] See Bovis, *La notion et les attributions d'organisme de droit public comme pouvoirs adjudicateurs dans le régime des marchés publics*, Contrats Publics, Septembre 2003.

[3] See Bovis, *Public Procurement and the Internal Market of the 21st Century: Economic Exercise versus Policy Choice*, Chapter 5 in EU Law for the 21st Century: Rethinking the New Legal Order, O'Keeffe and Tridimas (eds) Hart 2004. Also Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions, "Working together to maintain momentum" 2001 Review of the Internal Market Strategy, Brussels, 11 April 2001, COM(2001)198 final. Also, European Commission, Commission Communication, Public procurement in the European Union, Brussels, March 11, 1998, COM (98) 143. See Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566, 15 October 2001. Also, Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274, 4 July 2001.

[4] See Bartosch, The relationship of Public Procurement and State Aid Surveillance – The Toughest Standard Applies? Common Market Law Review, 35, 2002 and the case law provided in the analysis.

interest and public service obligations by member states. The significance of the topic has been reflected on the attempts of the European Council[5] to provide for a policy framework of greater predictability and increased legal certainty in the application of the State aid rules to the funding of services of general interest. The present article intends to define the correlation link between public procurement and services of general interest and to ascertain the parameters of interplay between public procurement and state financing of public services within the regulatory regime of state aid.

1. The concept of services of general interest through public procurement jurisprudence

The application of public procurement rules, apart from the objective to integrate intra-community public sector trade, has served as a yardstick in order to determine the nature of an undertaking in its contractual interface when delivering public services. Public procurement regulation has prompted a distinctive category of markets within the common market, often described as public markets[6]. Public markets are such *fora* where the state and its organs would enter in pursuit of public interest[7]. Their respective activity does not resemble the commercial characteristics of private entrepreneurship, in as much as the aim of the public sector is not the maximisation of profits but the observance of public interest[8]. This fundamental factor provides the differential ground for the creation of *public markets* where public interest substitutes profit maximization[9].

There are further variances that distinguish private from public markets. These focus on structural elements of the market place, competitiveness, demand conditions, supply conditions, the production process, and finally pricing and risk. These variances also indicate different methods and approaches employed in the regulation of public markets[10]. Public markets have monopsony structure tendencies (the state and its organs often appear as the sole outlet for an industry's output) and function in a different way

[5] See the Conclusions of the European Council of 14 and 15 December 2001, paragraph 26; Conclusions of the Internal Market, Consumer Affairs and Tourism Council meeting of 26 November 2001 on services of general interest; Commission Report to the Laeken European Council on Services of General Interest of 17 October 2001, COM(2001) 598; Communication from the Commission on the application of the State aid rules to public service broadcasting, OJ 2001 C 320, p. 5; see also the two general Commission Communications on Services of General Interest of 1996 and 2000 in OJ 1996 C 281, p. 3 and OJ 2001 C 17, p. 4.

[6] See Bovis, *Public Procurement within the framework of European Economic Law,* European Law Journal, 4.2,1998.

[7] See Valadou, *La notion de pouvoir adjudicateur en matière de marchés de travaux,* Semaine Juridique, 1991, Ed. E, No.3.

[8] See Flamme et Flamme, *Enfin l' Europe des Marchés Publics,* Actualité Juridique - Droit Administratif, 1989.

[9] On the issue of public interest and its relation with profit, see cases C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano*, judgment of 10 May 2001; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, judgment of 10 November 1998; C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, judgment of 15 January 1998.

[10] See Bovis, *The Liberalisation of Public Procurement in the European Union and its Effects on the Common Market*, Chapter 1, Ashgate Dartmouth, 1998.

than private markets. In terms of its origins, demand in public markets is institutionalized and operates mainly under budgetary considerations rather than price mechanisms. It is also based on fulfillment of tasks (pursuit of public interest) and it is single for many products. Supply also has limited origins, in terms of the establishment of close ties between the public sector and industries supplying it and there is often a limited product range. Products are rarely innovative and technologically advanced and pricing is determined through tendering and negotiations. The purchasing decision is primarily based upon the life-time cycle, reliability, price and political considerations. Purchasing patterns follow tendering and negotiations and often purchases are dictated by policy rather than price/quality considerations.

Within the remit of public markets, the funding of services of general interest by the state may emerge through different formats, such as the payment of remuneration for services under a public contract, the payment of annual subsidies, preferential fiscal treatment or lower social contributions. However, the most common format is the existence of a contractual relation between the state and the undertaking charged to deliver public services. The above relation should, under normal circumstances emerge through the public procurement framework, not only as an indication of market competitiveness but mainly as a demonstration of the nature of the deliverable services as services of "general interest having non industrial or commercial character". The latter description appears as a necessary condition for the applicability of the public procurement regime.

1.2. Do needs in the general interest have non-commercial character?

For the public procurement regime to apply in a contractual interface between public and private sectors, the contracting authority must be the state or an emanation of the state, and in particular, a *body governed by public law.* The above category is subject to a set of cumulative criteria[11], *inter alia "*it must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character".

The criterion of specific establishment of an entity to meet needs in the general interest having non-commercial or industrial character has been the subject of the Court's attention in some landmark cases[12]. In order to define the term *needs in the general*

[11] See Article 1(b) of Directive 93/37. The criteria for bodies governed by public law to be considered as a contracting authority for the purposes of the EU public procurement Directives are: i) they must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character; ii) they must have legal personality; and iii) they must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by these bodies, or having an administrative 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. There is a list of such bodies in Annex I of Directive 93/37 which is not an exhaustive one, in the sense that Member States are under an obligation to notify the Commission of any changes to that list.

[12] See cases C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano,* and C-260/99 *Excelsior Snc di Pedrotti runa & C v. Ente Autonomo Fiera Internazionale di Milano,* judgment of 10 May 2001; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, judgment of 10 November 1998. C-

interest, the Court drew its experience from jurisprudence in the public undertakings field as well as case law relating to public order[13]. The Court approached the above concept by a direct analogy of the concept "general economic interest", as defined in Article 90(2) EC[14]. The concept "general interest", under the public procurement regime, denotes the requirements of a community (local or national) in its entirety, which should not overlap with the specific or exclusive interest of a clearly determined person or group of persons[15]. Moreover, the requirement of the *specificity* of the establishment of the body in question was approached by reference to the reasons and the objectives behind its establishment. Specificity of the purpose of an establishment does not mean exclusivity, in the sense that other types of activities can be carried out without escaping classification as a body governed by public law[16].

On the other hand, the requirement of non-commercial or industrial character of needs in the general interest has raised some difficulties. The Court interpreting the meaning of non-commercial and industrial undertakings had recourse to case law relating to public undertakings, where the nature of industrial and commercial activities of private or public undertakings was defined[17]. The industrial or commercial character of an organisation depends much upon a number of criteria that reveal the thrust behind the organisation's participation in the relevant market. The state and its organs may act either by exercising public powers or by carrying economic activities of an industrial or commercial nature by offering goods and services on the market. The key factor appears in the organisation's intention to achieve profitability and pursue its objectives through a spectrum of commercially motivated decisions. The distinction between the range of activities which relate to public authority and those which, although carried out by public persons, fall within the private domain is drawn most clearly from case-law and judicial precedence of the Court concerning the applicability of competition rules of the Treaty to the given activities.[18]

The non-commercial or industrial character of an activity is a strong indication of the existence of a general interest activity. The Court in *BFI*[19] had the opportunity to consider the relationship between bodies governed by public law and the pursuit of activities of general interest having non-industrial or commercial nature. The non-commercial or

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44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH,* judgment of 15 January 1998.

[13] See the Opinion of Advocate-General Léger, point 65 of the Strohal case.

[14] See case C-179/90, *Merci Convenzionali Porto di Gevova,* [1991] ECR 1-5889; General economic interest as a concept represents "activities of direct benefit to the public"; point 27 of the Opinion of Advocate-General van Gerven.

[15] See Valadou, L*a notion de pouvoir adjudicateur en matière de marchés de travaux,* Semaine Juridique, 1991, Ed. E, No.3. p.p. 33.

[16] See case C-44/96, *Mannesmann Anlangenbau Austria,* op.cit.

[17] For example see Case 118/85 *Commission v. Italy* [1987] ECR 2599 para 7, where the Court had the opportunity to elaborate on the distinction of activities pursued by public authorities and those pursued by commercial undertakings. For a detailed analysis, see Bovis, *Recent case law relating to public procurement: A beacon for the integration of public markets,* 39 Common Market Law Review, 2002.

[18] See Case C-364/92 *SAT Fluggesellschafeten* [1994] ECR 1-43; also Case C-343/95 *Diego Cali et Figli* [1997] ECR 1-1547.

[19] See case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV,* op.cit.

industrial character is a criterion intended to clarify the term needs in the general interest. In fact, it is regarded as a category of needs of general interest. The Court recognised that there might be needs of general interest, which have an industrial and commercial character and also it is possible that private undertakings can meet needs of general interest, which do not have industrial and commercial character. However, the acid test for needs in the general interest not having an industrial or commercial character is that the state or other contracting authorities choose themselves to meet these needs or to have a decisive influence over their provision.

If an activity which meets general needs is pursued in a competitive environment, there is a strong indication that the entity which pursues it is not a body governed by public law[20]. In the *Agora* case the Court indicated that the relationship between competitiveness and commerciality has significant implications on the relevant activity which meets needs of general interest. Market forces reveal the commercial or industrial character of an activity, irrespective the latter meeting the needs of general interest or not. However, market competitiveness as well as profitability cannot be absolute determining factors for the commerciality or the industrial nature of an activity, as they are not sufficient to exclude the possibility that a body governed by public law may choose to be guided by considerations other that economic ones. The absence of competition is not a condition necessarily to be taken into account in order to define a body governed by public law, although the existence of significant competition in the market place may be indicative of the absence of a need in the general interest, which does not carry commercial or industrial elements. The Court reached this conclusion by analysing the nature of the bodies governed by public law contained in Annex 1 of the Works Directive 93/37 and verifying that the intention of the state to establish such bodies has been to retain decisive influence over the provision of the needs in question.

Commerciality and its relationship with needs in the general interest is perhaps the most important theme that has emerged from the Court's jurisprudence and is highly relevant to the debate concerning the relationship between services of general interest and the organizations which pursue them. In fact the above theme sets to explore the interface between profit-making and public interest, as features which underpin the activities of bodies governed by public law. Certain activities, which by their nature fall within the fundamental tasks of the public authorities, cannot be subject to a requirement of profitability and therefore are not meant to generate profits. It is possible, therefore, that the reason, in drawing a distinction between bodies whose activity is subject to the public procurement legislation and other bodies, could be attributed to the fact that the criterion of "needs in the general interest not having an industrial or commercial character" indicates the lack of competitive forces in the relevant marketplace. Although the state as entrepreneur enters into transactions with a view to providing goods, services and works for the public, to the extent that it exercises *dominium,* these activities do not resemble the characteristics of entrepreneurship, in as much as the aim of the state's activities is

[20] See case C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano,* op.cit.

not the maximisation of profits but the observance of public interest. Public markets are the *fora* where *public interest* substitutes *profit maximisation.*[21]

1.3. The double image of Janus: the dual capacity of contracting authorities

The dual capacity of an entity as a public service provider and a commercial undertaking respectively, and the weighting of the relevant activity in relation to the proportion of its output, should be the decisive factor in determining whether an entity is a body governed by public law for the purposes of the public procurement regime. This argument appeared for the first time before the Court in the *Strohal*[22] case. Its was suggested that only if the activities in pursuit of the "public services obligations" of an entity supersede its commercial thrust, the latter could be considered as a body covered by public law and a contracting authority[23].

In practice, the argument put forward implied a selective application of the public procurement Directives in the event of dual capacity entities. This sort of application is not entirely unjustified as, on a number of occasions,[24] the public procurement Directives themselves utilise thresholds or proportions considerations in order to include or exclude certain contracts from their ambit. However, the Court ruled out a selective application of the Directives in the case of dual capacity contracting authorities, based on the principle of legal certainty. It substantiated its position on the fact that only the purpose for which an entity is established is relevant in order to classify it as body governed by public law and not the division between public and private activities. Thus, the pursuit of commercial activities by contracting authorities is incorporated with their public interest orientation aims and objectives, without taking into account their proportion and weighting in relation to the total activities dispersed, and contracts awarded in pursuit of commercial purposes fall under the remit of the public procurement Directives. The Court recognised the fact that by extending the application of public procurement rules to activities of a purely industrial or commercial character, an onerous constraint would be probably imposed upon the relevant contracting authorities, which may also seem unjustified on the grounds that public procurement law, in principle, does not apply to

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[21] See Flamme et Flamme, *Enfin l' Europe des Marchés Publics,* Actualité Juridique - Droit Administratif, November 20 1989, p.p. 653, argue along the same lines.

[22] See case C-44/96, *Mannesmann Anlangenbau Austria. v. Strohal Rotationsdurck GesmbH,* op.cit.

[23] In support of its argument that the relevant entity (*Österreichische Staatsdruckerei)* is not a body governed by public law, the Austrian Government maintained that the proportion of public interest activities represents no more than 15-20% of its overall activities. For a comprehensive analysis of the case and an insight to the concept of contracting authorities for the purposes of public procurement, see the annotation by Bovis in 36 Common Market Law Review, 1999, pp 205-225.

[24] For example, the relevant provisions stipulating the thresholds for the applicability of the Public Procurement Directives [Article 3(1) of Directive 93/37; Article 5(1) of Directive 93/36; Article 14 of Directive 93/38; Article 7(1) of Directive 92/50]; the provisions relating to the so-called "mixed contracts"[Article 6(5) of Directive 93/37], where the proportion of the value of the works or the supplies element in a public contract determines the applicability of the relevant Directive; and finally the relevant provisions which embrace the award of works contracts subsidised *directly* by more than 50% by the state within the scope of the Directive [Article 2(1)(2) of Directive 93/37].

private bodies, which carry out identical activities.[25] The above situation represents a considerable disadvantage in delineating the distinction between private and public sector activities and their regulation, to the extent that the only determining factor appears to be the nature of the organisation in question. The Court suggested that that disadvantage could be avoided by selecting the appropriate legal instrument for the objectives pursued by public authorities. As the reasons for the creation of a body governed by public law would determine the legal framework which would apply to its contractual relations, those responsible for establishing it must restrict its thrust in order to avoid the undesirable effects of that legal framework on activities outside their scope.

The Court in *Strohal* established dualism, to the extent that it specifically implied that contracting authorities may pursue a dual range of activities; to procure goods, works and services destined for the public, as well as participate in commercial activities. They can clearly pursue other activities in addition to those which meet needs of general interest not having an industrial and commercial character. The proportion between activities pursued by an entity, which on the one hand aim to meet needs of general interest not having an industrial or commercial character, and commercial activities on the other is irrelevant for the characterisation of that entity as a body governed by public law. What is relevant is the intention of establishment of the entity in question, which reflects on the "specificity" requirement of meeting needs of general interest. Also, specificity does not mean exclusivity of purpose. Instead, specificity indicates the intention of establishment to meet general needs. Along theses lines, ownership or financing of an entity by a contracting authority does not guarantee the condition of establishment of that entity to meet needs of general interest not having industrial and commercial character.

The dual capacity of contracting authorities is irrelevant to the applicability of public procurement rules. If an entity is a contracting authority, it must apply public procurement rules irrespective of the pursuit of general interest needs or the pursuit of commercial activities. Also, if a contracting authority assigns the rights and obligations of a public contract to an entity, which is not a contracting authority, that entity must follow public procurement rules. The contrary would be acceptable only if the contract fell within the remit of the entity, which is not a contracting authority, and the contract was entered into on its behalf by a contracting authority.

1.4. Links between contracting authorities and private undertakings

Contractual and legal or regulatory links between on the one hand the state and contracting authorities and private undertakings on the other hand expose the inadequacy of the public procurement framework. Such links dilute the concept of contracting authorities, which is essential to the applicability of the public procurement framework, to a degree that the provisions could not apply. Under the domestic laws of the Member States of the European Union, there are few restrictions which could prevent contracting authorities from acquiring private undertakings in an attempt to participate in market

[25] See Bovis, *The Liberalisation of Public Procurement in the European Union and its Effects on the Common Market*, Chapter 1, op.cit.

activities. The public procurement Directives have not envisaged such a scenario, where the avoidance of the rules could be justified on the fact that the entities which award the relevant contracts cannot be classified as contracting authorities within the meaning of the Directives. As a consequence, there is a considerable risk in circumventing the public procurement Directives if contracting authorities award their public contracts via private undertakings under their control, which cannot be covered by the framework of the Directives.

The Court, prior to the *Stohal* case, did not have the opportunity to examine such corporate relationships between the public and private sectors and the effect that public procurement law has upon them. Even in *Strohal*, the Court did not rule directly on the subject, but instead it provided the necessary inferences for national courts, in order to ascertain whether such relations between public and private undertakings have the aim or the result of avoiding the application of the public procurement directives. Indeed, national courts of the Member States, when confronted with relevant litigation, must establish *in concreto* whether a contracting authority has established an undertaking in order to enter into contracts for the sole purpose of avoiding the requirements specified in public procurement law. Such conclusions must be beyond doubt based on the examination of the actual purpose for which the undertaking in question has been established. The rule of thump appears to be the connection between the nature of a project and the aims and objectives of the undertaking, which awards it. If the realisation of a project does not contribute to the aims and objectives of an undertaking, then it is assumed that the project in question is awarded "on behalf" of another undertaking, and if the latter beneficiary is a contracting authority under the framework of public procurement law, then the relevant Directives should apply.

The Court applied the *Strohal* principles to *Teckal*[26], where it concluded that the exercise, by a contracting authority, of control over the management of an entity similar to that exercised over the management of its own departments prevents the applicability of the Directives. The *Teckal* judgment revealed also the importance of the *dependency test* between contracting authorities and private undertakings. Dependency, in terms of overall control of an entity by the state or another contracting authority presupposes a control similar to that which the state or another contracting authority exercises over its own departments. The "similarity" of control denotes lack of independence with regard to decision-making.

One of the criteria stipulated in the public procurement Directives for the existence of bodies governed by public law as contracting authorities is that they must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by these bodies, or having an administrative 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. To assess the existence of the above criterion of bodies governed by public law, the Court assumed that there is a close dependency of these bodies on the State, in terms of

[26] case C-107/98, *Teckal Slr* v *Comune di Viano,* op.cit

corporate governance, management supervision and financing[27]. These dependency features are alternative (in contrast to being cumulative), thus the existence of one satisfies the criterion. The Court held in *OPAC*[28] that management supervision by the state or other contracting authorities entails not only administrative verification of legality or appropriate use of funds or exceptional control measures, but the conferring of significant influence over management policy, such as the narrowly circumscribed remit of activities, the supervision of compliance, as well as the overall administrative supervision. Of interest and high relevance is the Court's analysis and argumentation relating to the requirements of management supervision by the state and other public bodies, where it maintained that entities entrusted to provide social housing in France are deemed to be bodies governed by public law, thus covered by the public procurement Directives. The Court (and the Advocate General) drew an analogy amongst the dependency features of bodies governed by public law on the state. Although the corporate governance and financing feature are quantitative (the state must appoint more than half of the members of the managerial or supervisory board or it must finance for the most part the entity in question), the exercise of management supervision is a qualitative one. The Court held that management supervision by the state denotes dependency ties similar to the financing or governance control of the entity concerned.

Receiving public funds from the state or a contracting authority is an indication that an entity could be a body governed by public law. However, this indication is not an absolute one. The Court, in the *University of Cambridge* case[29] was asked whether i) awards or grants paid by one or more contracting authorities for the support of research work; ii) consideration paid by one or more contracting authorities for the supply of services comprising research work; iii) consideration paid by one or more contracting authorities for the supply of other services, such as consultancy or the organisation of conferences; and iv) student grants paid by local education authorities to universities in respect of tuition for named students constitute public financing for the University.

The Court held that only specific payments made to an entity by the state of other public authorities have the effect of creating or reinforcing a specific relationship or subordination and dependency. The funding of an entity within a framework of general considerations indicates that the entity has close dependency links with the state of other contracting authorities. Thus, funding received in the form of grants or of awards paid by the state or other contracting authorities, as well as in the form of student grants for tuition fees for named students, constitutes public financing. The rationale for such approach rests in the lack of any contractual consideration between the entity receiving the funding and the state or other contracting authorities, which provide it in the context of the entity's public interest activities. The Court drew an analogy of public financing received by an entity with the receipt of subsidies[30]. However, if there is a specific

[27] This type of dependency resembles the Court's definition in its ruling on state controlled enterprises in case 152/84 *Marshall v. Southampton and South West Hampshire Area Health Authority*, [1986] ECR 723.
[28] See case C-237/99, *Commission v. France*, judgment of 1 February 2001.
[29] see case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, judgment of 3 October 2000.
[30] See paragraph 25 of the Court's judgment as well as the Opinion of the Advocate General, in paragraph 46.

consideration for the state to finance an entity, such as a contractual nexus, the Court suggested that the dependency ties are not sufficiently close to merit the entity financed by the state meeting the third criterion of the term bodies governed by public law. Such relationship is analogous to the dependency that exists in normal commercial relations formed by reciprocal contracts, which have been negotiated freely between the parties. Therefore, funding received by Cambridge University for the supply of services for research work, or consultancies, or conference organisation cannot be deemed as public financing. The existence of a contract between the parties, apart from the specific considerations for funding, indicates strongly supply substitutability, in the sense that the entity receiving the funding faces competition in the relevant markets. The Court stipulated that the proportion of public finances received by an entity, as one of the alternative features of the *dependency* criterion of the term bodies governed by public law must exceed 50% to enable it meeting that criterion. For assessment purposes of this feature, there must be an annual evaluation of the (financial) status of an entity for the purposes of being regarded as a contracting authority.

1.5. Private law entities as contracting authorities

It is apparent from the jurisprudence of the Court that an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority. The method in which the entity concerned has been set up is irrelevant in determining the applicability of public procurement law[31]. The cumulative conditions for the definition of *body governed by public law*[32], the functional[33] and broad[34] interpretation of the concept indicate that the effectiveness of the public procurement Directives would be jeopardized if an entity could be excluded solely on the basis of the fact that, under the national law to which it is subject, its legal form and rules which govern it fall within the scope of private law. An entity which is governed by private law but nevertheless meets all the requirements[35] of bodies governed by public law is considered to be a contracting authority[36]. The Court's jurisprudence[37] defines a body governed by public law as a body which fulfils three cumulative conditions[38] and interprets the term *contracting authority*

[31] See in particular, case C-44/96, *Mannesmann Anglagenbau,* [1998] ECR I-73, paragraphs 6 and 29; case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 61 and 62; and case C-237/99 *Commission* v *France*, [2001] ECR I-939, paragraphs 50 and 60.
[32] See case C-44/96 *Mannesmann Anlagenbau Austria,* [1998] ECR I-73, paragraphs 20 and 21.
[33] See case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraphs 41 to 43, and case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53.
[34] See case C-373/00 *Adolf Truley* [2003] ECR-1931, paragraph 43.
[35] See Article 1(b) of Directives 93/36 and 93/37.
[36] See case C-84/03, *Commission v Spain*, not yet reported.
[37] See case C-44/96 *Mannesmann Anlagenbau Austria,* [1998] ECR I-73, paragraphs 17 to 35.
[38] In particular, *bodies governed by public law* i) must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character; ii) they must have legal personality; and iii) they must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by these bodies, or having an administrative 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.

in functional terms[39]. The Court established that the concept *body governed by public law* represents a concept of Community law which must be given an autonomous and uniform interpretation throughout the Community in functional terms[40]. In order to determine whether a private law entity is to be classified as a body governed by public law it is only necessary to establish whether the entity in question satisfies the three cumulative criteria laid down in the Directives. The entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority for the purposes of the public procurement Directives[41]. The Court has also held that that interpretation does not amount to a disregard for the non-industrial or commercial character of the general interest needs which the body concerned satisfies, since these factors must be assessed individually and separately from the legal status of an entity[42]. Furthermore, that conclusion is not invalidated by the specific category of *public undertakings* which is used in the utilities Directive 93/38.

1.6. Private entities for industrial and commercial development as contracting authorities

A question was referred to the Court as to whether a limited company established, owned and managed by a regional authority may be regarded as meeting a specific need in the general interest, not having an industrial or commercial character, where that company's activity consists in procuring services for the construction of premises intended for the exclusive use of private undertakings and as to whether the assessment would be different if the entity's activities were intended to create favourable conditions on that local authority's territory for the exercise of commercial goals in general[43].

The Court found that a limited company established, owned and managed by a regional authority meets a need in the general interest, where it acquires services for the development of business and commercial activities on the territory of that regional authority. The Court's jurisprudence has made it clear that in determining whether or not a need in the general interest not having an industrial or commercial character exists, account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, *inter alia,* lack of competition on the market, its profitability as its primary aim, any risks associated with the activity and any public financing received for the activity in question[44]. The Court maintained that a distinction exists between needs in the general interest not having an industrial or commercial character and needs in the

[39] See case 31/87 *Beentjes* [1988] ECR 4635 and case C-360/96 *BFI Holding* [1998] ECR I-6821.
[40] See case C-44/96 *Mannesmann Anlagenbau Austria and Others*, [1998] ECR I-73, paragraphs 20 and 21; case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53; case C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraphs 52 and 53; and case C-283/00 *Commission* v *Spain* [2003] ECR I-11697, paragraph 69.
[41] See case C-214/00 *Commission* v *Spain*, paragraphs 54, 55 and 60.
[42] See case C-283/00 *Commission* v *Spain*, paragraph 75.
[43] See case C-18/01, *Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy, Rakennuttajatoimisto Vilho Tervomaa andVarkauden Taitotalo Oy,*
[44] See *Adolf Truley*, paragraph 66, and *Korhonen*, paragraphs 48 and 59.

general interest having an industrial or commercial character[45]. The concept "general interest" denotes the requirements of a community (local or national) in its entirety, which should not overlap with the specific or exclusive interest of a clearly determined person or group of persons. The Court drew analogies from jurisprudence in the field of public undertakings, as well as case law relating to public order to define the term *needs in the general interest*[46] and approached the concept by a direct analogy of the concept "general economic interest", as defined in Article 90(2) EC[47]. However, the problematic concept of the *specificity*[48]of the establishment of an entity to meet needs in the general interest having non-commercial or industrial character has been approached by reference to the reasons and the objectives behind its establishment. Specificity of the purpose of an establishment does not mean exclusivity, in the sense that other types of activities can be carried out without escaping classification as a body governed by public law[49].

The requirement of non-commercial or industrial character of needs in the general interest has raised some difficulties. The Court had recourse to case law relating to public undertakings, where the nature of industrial and commercial activities of private or public undertakings is defined[50]. The industrial or commercial character of an organisation depends much upon a number of criteria that reveal the thrust behind the organisation's participation in the relevant market. The state and its organs may act either by exercising public powers or by carrying economic activities of an industrial or commercial nature, offering goods and services on the market. The key issue is the organisation's intention to achieve profitability and to pursue its objectives through a spectrum of commercially motivated decisions. The distinction between the range of activities which relate to public authority and those which, although carried out by public persons, fall within the private domain is drawn most clearly from case-law of the Court concerning the applicability of competition rules of the Treaty to the given activities.[51] The Court in *BFI*[52] had the opportunity to clarify the non-commercial or industrial character of needs in the general interest. The non-commercial or industrial character is an integral criterion to the concept of *needs in the general interest*, intended to clarify the term. The Court proceeded to regard the non-commercial or industrial character of needs in the general interest as a category of needs of general interest. The distinctive factor for needs of general interest not having an industrial and commercial character is the fact that the

[45] See, *inter alia*, *BFI Holding*, paragraph 36, and *Agorà and Excelsior*, paragraph 32

[46] See the Opinion of Advocate-General Léger, point 65 of the *Mannesmann* case C-44/96, [1998] ECR I-73, *op.cit.*

[47] See case C-179/90, *Merci Convenzionali Porto di Gevova*, [1991] ECR 1-5889; General economic interest as a concept represents "activities of direct benefit to the public"; see point 27 of the Opinion of Advocate-General van Gerven in the case.

[48] See cases C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*, and C-260/99 *Excelsior Snc di Pedrotti runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821; C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR I-73.

[49] See case C-44/96, *Mannesmann Anlangenbau Austria*, [1998] ECR I-73, *op.cit.*

[50] For example, see case C-118/85 *Commission v. Italy* [1987] ECR 2599, where the Court elaborated on the distinction of activities pursued by public authorities and public undertakings respectively.

[51] See case C-364/92 *SAT Fluggesellschafeten* [1994] ECR 1-43; also Case C-343/95 *Diego Cali et Figli* [1997] ECR 1-1547.

[52] See case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821.

State or other contracting authorities choose themselves to meet these needs or to have a decisive influence over their provision. In *Agora*[53] the Court indicated that if an entity pursues an activity which meets general needs is pursued in a competitive environment, there is a strong indication that the entity is not a body governed by public law. Market forces reveal the commercial or industrial character of an activity, irrespective of the latter meeting the needs of general interest. However, market competitiveness as well as profitability cannot be absolute determining factors for the commerciality or the industrial nature of an activity, as they are not sufficient to exclude the possibility that a body governed by public law may choose to be guided by considerations other that economic ones. The absence of competition is not a condition necessarily to be taken into account in order to define a body governed by public law, although the existence of significant competition in the market place may be indicative of the absence of a need in the general interest, which does not carry commercial or industrial elements.

1.7. Entities meeting needs of general interest retrospectively

Entities which have not been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but which have subsequently taken responsibility for such needs are considered as bodies governed by public law, on condition that the assumption of responsibility for meeting those needs can be established objectively[54]. The effectiveness of public procurement law would be jeopardized if an entity could be excluded from its remit on the grounds that the tasks in the general interest having a character other than industrial or commercial which carries out were not entrusted to it at the time of its establishment. The Court has held that, in the light of the principles of competition[55] and non-discrimination[56], the functionality test[57] for the definition of bodies governed by public law expands the thrust of the concept so that it can embrace entities which pursue commercial activities. *Mannesmann Anlagenbau*[58] made no distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest, and those which are unrelated to that task. It is immaterial that the activity in question may be unrelated to the body's task in the general interest, or may not involve any public funds. The critical factor is that the entity should continue to attend to the needs which it is specifically required to meet.

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[53] See case C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605.
[54] See case C-470/99, *Universale-Bau AG, Bietergemeinschaft Hinteregger & Söhne Bauges.mbH Salzburg, ÖSTU-STETTIN Hoch- und Tiefbau GmbH, and Entsorgungsbetriebe Simmering GesmbH,*
[55] See case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16, and case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 41.
[56] See, in particular, *University of Cambridge*, paragraph 17, and C-237/99 *Commission* v *France*, paragraph 42.
[57] See case C-237/99 *Commission* v *France*, paragraph 43.
[58] See case C-44/96 *Mannesman* [1998] ECR I-73.

1.8. Semi-public undertakings as contracting authorities

In *Staad Halle*[59], a question arose as to whether the public procurement rules apply, where a contracting authority intends to conclude a public contract with a company governed by private law, legally distinct from the authority and in which it has a majority capital holding and exercises a certain control. In other words, the question prompted the criteria and their references under which mere participation of a contracting authority, even in a minority form, in the shareholding of a private company with which it concludes a contract as a ground for the applicability of the public procurement Directives. According to the Court's jurisprudence, the public procurement Directives are applicable in cases where a contracting authority plans to conclude a contract with an entity which is legally distinct from it, whether or not that entity is itself a contracting authority[60]. However, the public procurement rules are inapplicable where the contracting entity and the entity with which concludes a public contract are dependent of each other in terms of management and control. This is the case where a contracting authority exercises over an entity control similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority[61], even though the entity is legally distinct from the contracting authority. The Court held that where a contracting authority intends to conclude a contract within the material scope of the public procurement Directives with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public procurement rules apply. The crucial factor is the participation, even as a minority shareholder, of a private undertaking in the capital of a company in which a contracting authority is also a participant, a factor which excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments. The Court maintained that the obligation to apply the public procurement rules in the case of semi-public undertakings is confirmed by the fact that the relevant Directives[62] cover a public body which offers services[63]. The approach followed in *Teckal* was utilised to cover contractual relations between independent contracting authorities or bodies governed by public law. Thus, inter-administrative agreements between legally distinctive contracting authorities are considered as public contracts[64].

However, contracting authorities are free to set up legally independent entities if they wish to offer services to third parties under normal market conditions. If such entities aim to make profit, bear the losses related to the exercise of their activities, and perform no public tasks, they are not to be classified as contracting authorities. An entity which aims to make a profit and bears the losses associated with the exercise of its activity will not

[59] See case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna,* not yet reported.
[60] See case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 50 and 51.
[61] See case C-107/98 *Teckal*, *op.cit*, established the dependency test. See Bovis, *Recent case law relating to public procurement: A beacon for the integration of public markets,* 39 CMLRev, 2002, *op.cit.* footnote 1.
[62] See Article 1(c) of the services Directive 92/50.
[63] See case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 28.
[64] See case C-84/03, *Commission v Spain,* not yet reported.

normally become involved in a contract award procedure on conditions which are not economically justified[65].

On the other hand, the links of a body governed by public law with the State must give rise to dependency on the part of the entity[66], equivalent to that which exists where one of the three cumulative criteria is fulfilled, namely where the entity in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of its administrative, managerial or supervisory organs, enabling the public authorities to influence their decisions in relation to public contracts[67]. The criterion of managerial supervision cannot be regarded as being satisfied in the case of mere review since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts. That criterion is, however, satisfied where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regulatory compliance, economic performance and benchmarking and where those public authorities are authorized to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds, through another company, all the shares in the body in question[68].

1.9. State commercial companies as contracting authorities

A question arose whether private companies under state control should be considered as contracting authorities[69]. The public procurement Directives draw a distinction between the concept of a body governed by public law and the concept of *public undertakings*, the definition of which corresponds to that of a public commercial company. The Court's case law has demonstrated that many undertakings in the private sector, despite of their dependency on the State, pursue specifically commercial objectives and operate in accordance with market principles and the need to achieve profitability. The key component for their status as bodies governed by public law and thus as contracting authorities, is meeting cumulatively the requirements of establishment for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, having legal personality and being closely dependent on the State, regional or local authorities or other bodies governed by public law[70]. The absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law[71]. On the contrary, the autonomous definition of the criterion relating to the non-industrial or commercial character of needs in the general interest[72] is an essential

[65] See case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 51.
[66] See case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, [2000] ECR 8035, paragraph 20, and case C-237/99, *Commission v. France*, [2001] ECR 934, paragraph 44.
[67] See case C-237/99 *Commission* v *France* (OPAC), [2001] ECR I-939, paragraphs 48 and 49.
[68] See case C-373/00 *Adolf Truley GmbH and Bestattung Wien GmbH*, [2003] ECR I-1931.
[69] See case *C-283/00, Commission v Spain*, [2003] ECR I-11697.
[70] See case 44/96 *Mannesmann Anlagenbau Austria*, [1998] ECR I-73, paragraphs 20 and 21; case C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraph 52.
[71] See case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 47.
[72] See case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 32 and 36.

component of that concept. The notion of general interest is closely linked to public order and the institutional operation of the State and even to the very essence of the State, in as much as the State holds the monopoly of powers which do not possess an industrial or commercial character[73]. The notion of needs in the general interest, not having an industrial or commercial character, is an autonomous concept of Community law and must accordingly be given a uniform interpretation the search for which must take account of the background to the provision in which it appears and of the purpose of the rules in question[74]. Needs in the general interest, not having an industrial or commercial character are generally needs which are satisfied otherwise than by the supply of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence[75]. The Court found in *Korhonen*[76], that if the body operates in normal market conditions, aims at making a profit and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims at meeting are not of an industrial or commercial nature.

The functional interpretation of the notion of contracting authority and, therefore, of body governed by public law implies that the latter notion includes commercial companies under public control, provided that they fulfil the cumulative conditions of establishment for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, legal personality and close dependence on the State. The distinction drawn between the definitions of *bodies governed by public law* and *public undertakings*, serves the extension of the scope *ratione personae* of the public procurement principles to cover certain entities in the utilities sectors, namely, public undertakings and those which enjoy special or exclusive rights granted by the authorities. The concept of a public undertaking has always been different from that of a body governed by public law, in that bodies governed by public law are created specifically to meet needs in the general interest having no industrial or commercial character, whereas public undertakings act to satisfy needs of an industrial or commercial character. The Court went further to declare that state controlled companies seem unlikely that they themselves should have to bear the financial risks related to their activities. Instead, the State would take all necessary measure to protect the financial viability of such entities, such as measures to prevent compulsory liquidation. In those circumstances, it is possible that the award of public contracts could be guided by other than purely economic considerations. Therefore, in order to safeguard against such a possibility, it is essential to apply the public procurement Directives[77].

[73] See case C-44/96 *Mannesmann Anlagenbau Austria*, [1998] ECR I-73, paragraph 24.
[74] See case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraphs 36, 40 and 45.
[75] See *Adolf Truley, op.cit.* paragraph 50, and case C-18/01 *Korhonen* [2003] ECR I-5321, paragraph 47.
[76] See case C-18/01, *Korhonen , op.cit*
[77] See cases *Adolf Truley*, paragraph 42, and *Korhonen*, paragraphs 51 and 52.

1.10. Procurement and contractualised governance

The above inferences from the Court, which point out themes that have emerged within the public sector management such as commercialism and public services, dualism and dependency, prompt the start of an important debate relevant to the main thesis of this article: the nature of governance in delivering (and financing) public services. The dramatic change in the relationship between public and private sectors, the perceptions of the public toward the dispersement of public services, as well as new forms of governance emanating through the privatization process have witnesses an era of contractualised governance in the delivery of public services.

Whereas, *traditional corporatism* mapped the dimension of the state as a service provider and asset owner, with public procurement as the verification process of public law norms[78] such accountability, probity and transparency, it failed to mimic the competitive structure of private markets. Corporatism allowed the creation of *marchés publics*, *sui generis* markets where competitive tendering attempted to satisfy public law norms and to introduce a balanced equilibrium in the supply / demand equation[79]. A first step away from corporatism towards government by contract appears to be the process of privatisation[80]. Privatisation, as a process of transfer of public assets and operations to private hands, on grounds of market efficiency and competition, as well as responsiveness to customer demand and quality considerations is often accompanied by simultaneous regulation. It is not entirely clear whether privatisation has reclaimed public markets and transformed them to private ones. The extent to which the market freedom of a privatised entity could be curtailed by regulatory frameworks deserves a complex and thorough analysis, which exceeds by far the remit of this article. However, it could be maintained that through the privatisation process, the previously clear-cut distinction between public and private markets becomes blur. However, there is strong evidence of public law elements to the extent that regulation is the dominant feature in the relations

[78] See Freeman, *Extending Public Law Norms through Privatization*, 116 Harvard Law Review, 2003, p.p. 1285 et seq. Freeman argues that privatization does not curtail the remit of the state. On the contrary it enacts a process of "publicization", where through the extension of public law norms to private undertakings entrusted with the delivery of public services the state maintains a dominant position in the dispersement of governance. Also, along the same lines see Frug, *New Forms of Governance, Getting Public Power to Private Actors,* 49 UCLA Review 2002, pp. 1687.

[79] Corporatism has been deemed as an important instrument of industrial policy of a state, in particular where procurement systems have been utilised with a view to promoting structural adjustment policies and favour "national champions". See Bovis, *The Choice of Policies and the Regulation Public Procurement in the European Community* in T. Lawton (ed) *European Industrial Policy and Competitiveness: concepts and instruments*, Macmillan Publishers, 1998.

[80] Alongside privatisation, the notion of *contracting out* represents a further departure from the premises of traditional corporatism. The notion of *contracting out* is an exercise which aims at achieving potential savings and efficiency gains for contracting authorities, when they *test the market* in an attempt to define whether the provision of works or the delivery of services from a commercial operator could be cheaper than that from the in-house team. Contracting out differs from privatisation to the extent that the former represents a transfer of undertaking only, whereas the latter denotes transfer of ownership. Contracting out depicts a price-discipline exercise by the state, against the principle of *insourcing*, where, the self-sufficient nature of corporatism resulted in budgetary inefficiencies and poor quality of deliverables to the public. See Domberger and Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, Oxford Review of Economic Policy, Winter 1997.

between public and private sectors with a view to observing public interest in the relevant operations. The economic freedom and the risks associated with such operations are also subject to regulation, a fact which implies that any regulatory framework incorporates more than procedural rules.

In various jurisdictions within the common market, the socio-economic climate is very much in favour towards public - private sector partnerships, in the form of joint-ventures or in the form of private financing of public projects[81]. However, it would be difficult, in legal and political terms, to justify the empowerment of the private sector in as much as it could assume the role of service deliverer along the public sector across all Member States of the European Union. Constitutional provisions could nullify such attempts and often a number of socio-economic factors would collide with the idea of private delivery of public services. The evolution of public/private sector relations has arrived in times when the role and the responsibilities of the state are in the process of being redefined[82]. Constitutionally, the state and its organs are under obligation to provide a range of services to the public in the form of *e.g.* healthcare, education, transport, energy, defence, social security, policing. The state and its organs then enter the market place and procure goods, works and services in pursuit of the above objective, on behalf of the public[83]. The state in its own capacity or through delegated or legal monopolies and publicly controlled enterprises has engaged in market activities in order to serve public interest. Traditionally, the function of the state as a public service provider has been linked with ownership of the relevant assets. The integral characteristics of privately financed projects reveal the degree that the state and its organs are prepared to drift away from *traditional corporatism* towards *contractualised governance.* Departure from traditional corporatism also reflects the state's perception vis-à-vis its responsibilities towards the public. A shift towards contractualised governance would indicate the departure from the assumption that the state embraces both roles of asset owner and service deliverer. It should also insinuate the shrinkage of the state and its organs and the need to define a range of core activities that are not to be contractualised[84]. Finally, in practical terms, it

[81] Classic example of such approach is the views of the UK Government in relation to the involvement of the private sector in delivering public services through the so-called *Private Finance Initiative (PFI)*, which attempts to create a framework between the public and private sectors working together in delivering public services. See in particular, *Working Together - Private Finance and Public Money*, Department of Environment, 1993. *Private Opportunity, Public Benefit - Progressing the Private Finance Initiative*, Private Finance Panel and HM Treasury, 1995.

[82] See Freeman, *The Private Role in Public Governance*, 75 NYUL Rev, 2000, pp. 534 et seq. Also, Bovis, *Understanding Public Private Partnerships*, 2002 Alexander Maxwell Law Scholarship Trust.

[83] See the ratione of the Court in the cases *BFI*, *Strohal* and *Agora* cases, op.cit.

[84] For example, defence, policing or other essential or core elements of public governance. It is maintained here that activities related to *imperium (*the use of force by way of regulatory or criminal law) could not be the subject of contractualised governance. A useful analysis for such argument is provided in case C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH,* (judgment of January 15, 1998), where the notions of public security and safety are used to described a range of activities by the state which possess the characteristic of "public service obligations". For a commentary of the case, see Bovis, *Redefining Contracting Authorities under the EC Public Procurement Directives*: *An Analysis of the case C-44/96, Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, 36 Common Market Law Review, 1998.

would be very difficult to prove the intention of a contracting authority to circumvent the public procurement rules and enforce their application on private undertakings.

1.11. The "public" nature of public procurement: formality versus functionality

The remit and thrust of public procurement legislation relies heavily on the connection between contracting authorities and the state. A comprehensive and clear definition of the term *contracting authorities*, a factor that determines the applicability of the relevant rules is probably the most important element of the public procurement legal framework. The structure of the Directives is such as to embrace the purchasing behaviour of all entities, which have a close connection with the state. These entities, although not formally part of the state, disperse public funds in pursuit or on behalf of public interest. The Directives describe as contracting authorities the *state*, which covers central, regional, municipal and local government departments, as well as *bodies governed by public law*. Provision has been also made to cover entities, which receive more than 50% subsidies by the state or other contracting authorities. The enactment of the Utilities Directives[85] brought under the procurement framework entities operating in the water, energy, transport and telecommunications sectors. A wide range of these entities are covered by the term *bodies governed by public law*, which is used by the Utilities Directives for the contracting entities operating in the relevant sectors[86]. Another category of contracting authorities under the Utilities Directives includes *public undertakings.*[87] The term indicates any undertaking over which the state may exercise direct or indirect dominant influence by means of ownership, or by means of financial participation, or by means of laws and regulations, which govern the public undertaking's operation. Dominant influence can be exercised in the form of a majority holding of the undertaking's subscribed capital, in the form of majority controlling of the undertaking's issued shares, or, finally in the form of the right to appoint the majority of the undertaking's management board. Public undertakings cover utilities operators, which have been granted exclusive rights of exploitation of a service. Irrespective of their ownership, they are subject to the Utilities Directive in as much as the *exclusivity* of their operation precludes other entities from entering the relevant market under substantially the same competitive conditions. Privatised utilities could be, in principle, excluded from the procurement rules when a genuinely competitive regime[88] within the relevant market structure would rule out purchasing patterns based on non-economic considerations.

Although the term contracting authorities appears rigorous and well defined, public interest functions are dispersed through a range of organisations which *stricto sensu* could not fall under the ambit of the term contracting authorities, since they are not formally part of the state, nor all criteria for the definition of bodies governed by public

[85] EC Directive 90/531, as amended by EC Directive 93/38, O.J. L 199.
[86] Article 1(1) of Directive 93/38.
[87] Article 1(2) of Directive 93/38.
[88] The determination of a genuinely competitive regime is left to the utilities operators themselves. See case, C 392/93, *The Queen and H.M. Treasury, ex parte British Telecommunications PLC*, O.J. 1993, C 287/6. This is perhaps a first step towards self-regulation which could lead to the disengagement of the relevant contracting authorities from the public procurement regime.

law are present.[89] The Court addressed the *lex lacuna* through its landmark case *Beentjes*[90]. The Court diluted the rigorous definition of contracting authorities for the purposes of public procurement law, by introducing a *functional dimension* of the state and its organs. In particular, it considered that a *local land consolidation committee* with no legal personality, but with its functions and compositions specifically governed by legislation as part of the state. The Court interpreted the term contracting authorities in *functional terms* and considered the local land consolidation committee, which depended on the relevant public authorities for the appointment of its members, its operations were subject to their supervision and it had as its main task the financing and award of public works contracts, as falling within the notion of state, even though it was not part of the state administration in *formal terms*[91]. The Court held that the aim of the public procurement rules, as well as the attainment of freedom of establishment and freedom to provide services would be jeopardised, if the public procurement provisions were to be held inapplicable, solely because entities, which were set up by the state to carry out tasks entrusted to by legislation were not formally part of its administrative organisation.

The Court in two recent cases applied the functionality test, when was requested to determine the nature of entities which could not meet the criteria of bodies governed by public law, but had a distinctive public interest remit. In *Teoranta*[92], a private company established according to national legislation to carry out business of forestry and related activities was deemed as falling within the notion of the state. The company was set up by the state and was entrusted with specific tasks of public interest, such as managing national forests and woodland industries, as well as providing recreation, sporting, educational, scientific and cultural facilities. It was also under decisive administrative, financial and management control by the state, although the day-to-day operations were left entirely to its board. The Court accepted that since the state had at least indirect control over the *Teoranta's* policies, in functional terms the latter was part of the state. In the *Vlaamese Raad*[93], the Flemish parliament of the Belgian federal system was considered part of the "federal" state. The Court held that the definition of the state encompasses all bodies, which exercise legislative, executive and judicial powers, at both regional and federal levels. The Raad, as a legislative body of the Belgian state, although under no direct control by it[94], was held as falling within the definition of the state and thus being regarded as a contracting authority.

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[89] This is particularly the case of non-governmental organisations (NGOs) which operate under the auspices of the central or local government and are responsible for public interest functions. See Bovis, *Public entities awarding procurement contracts under the framework of EC Public Procurement Directives*, Journal of Business Law, 1993, Vol.1, p.p. 56-78; Arrowsmith, *The Law of Public and Utilities Procurement*, Sweet & Maxwell, 1997, p.p. 87-88.

[90] Case 31/87, *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635.

[91] The formality test and the relation between the state and entities under its control was established in cases C-249/81, *Commission v. Ireland*, [1982] ECR 4005; C-36/74 *Walrave and Koch v. Association Union Cycliste International et al*, (1974) ECR 1423.

[92] See cases C-353/96, *Commission v. Ireland* and C-306/97, *Connemara Machine Turf Co Ltd v. Coillte Teoranta*, judgment of 17 December 1998.

[93] See case C-323/96, *Commission v Kingdom of Belgium*, judgment of 17 September 1998.

[94] The fact that the Belgian Government did not, at the time, exercise any direct or indirect control relating to procurement policies over the Vlaamese Raad was considered immaterial on the grounds that a state

The functional dimension of contracting authorities has exposed the Court's departure from the formality test, which has rigidly positioned an entity under state control on *stricto sensu* traditional public law grounds. Functionality, as an ingredient of assessing the relationship between an entity and the state demonstrates, in addition to the elements of management or financial control, the importance of constituent factors such as the intention and purpose of establishment of the entity in question. Functionality depicts a flexible approach in the applicability of the procurement Directives, in a way that the Court through its precedence established a pragmatic approach as to the nature of the demand side of the public procurement equation.

2. Financing public services and services of general economic interest: how is legal certainty enhanced through the rule of reason and the application of universal obligations.

There are three approaches under which the European judiciary and the Commission have examined the financing of public services: *the state aid approach, the compensation approach and the quid pro quo approach.* The above approaches reflect not only conceptual and procedural differences in the application of state aid control measures within the common market, but also raise imperative and multifaceted questions relevant to the state funding of services of general interest[95].

The State aid approach[96] examines state funding granted to an undertaking for the performance of obligations of general interest. It thus, regards the relevant funding as state aid within the meaning of Article 87(1) EC[97] which may however be justified under

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cannot rely on its own legal system to justify non-compliance with EC law and particular Directives. For these comments, see also case C-144/97 *Commission v France*, [1998] ECR 1-613.

[95] See Alexis, *Services publics et aides d'Etat*, Revue du droit de l'Union Européenne, 2002, p 63; Grespan, *An example of the application of State aid rules in the utilities sector in Italy*, Competition Policy Newsletter, No 3, October 2002, p 17; Gundel, *Staatliche Ausgleichszahlungen für Dienstleistungen von allgemeinem wirtschaftlichem Interesse: Zum Verhδltnis zwischen Artikel 86* Absatz 2 EGV und dem EG-Beihilfenrecht, Recht der Internationalen Wirtschaft, 3/2002, p222; Nettesheim, *Euroäische Beihilfeaufsicht und mitgliedstaatliche Daseinsvorsorge*, Europäisches Wirtschafts und Steuerrecht, 6/2002, p 253; Nicolaides, *Distortive effects of compensatory aid measures: a note on the economics of the Ferring judgment*, European Competition Law Review, 2002, p 313; Nicolaides, *The new frontier in State aid control. An economic assessment of measures that compensate enterprises*, Intereconomics, vol. 37, No 4, 2002, p 190; Rizza, *The financial assistance granted by Member States to undertakings entrusted with the operation of a service of general economic interest: the implications of the forthcoming Altmark judgment for future State aid control policy*, Columbia Journal of European Law, 2003; Bovis, *Public procurement, state aid and the financing of public services: between symbiotic correlation and asymmetric geometry*, European State Aid Law Quarterly, November 2003, pp. 563-577.

[96] See Case C-387/92 [1994] ECR I-877; Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229; Case C-174/97 P [1998] ECR I-1303; Case T-46/97 [2000] ECR II-2125.

[97] Article 87(1) EC defines State aid as "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods ..., in so far as it affects trade between Member States".

Article 86(2) EC[98], provided that the conditions of that derogation are fulfilled and, in particular, if the funding complies with the principle of proportionality. The state aid approach provides for the most clear and legally certain procedural and conceptual framework to regulate state aid, since it positions the European Commission, in its administrative and executive roles at the centre of that framework.

The compensation approach[99] reflects upon a "compensation" being intended to cover an appropriate remuneration for the services provided or the costs of providing those services. Under that approach State funding of services of general interest amounts to State aid within the meaning of Article 87(1) EC, only if and to the extent that the economic advantage which it provides exceeds such an appropriate remuneration or such additional costs. European jurisprudence considers that state aid exist only if, and to the extent that, the remuneration paid, when the state and its organs procure goods or services, exceeds the market price.

The choice between the state aid approach and the compensation approach does not only reflect upon a theoretical debate; it mainly reveals significant practical ramifications in the application of state aid control within the common market. Whilst it is generally accepted that the pertinent issue of substance is whether the state funding exceeds what is necessary to provide for an appropriate remuneration or to offset the extra costs caused by the general interest obligations, the two approaches have very different procedural implications. Under the compensation approach, state funding which does not constitute state aid escapes the clutches of EU state aid rules and need not be notified to the Commission. More importantly, national courts have jurisdiction to pronounce on the nature of the funding as state aid without the need to wait for an assessment by the Commission of its compatibility with *acquis*. Under the state aid approach the same measure would constitute state aid which, must be notified in advance to the Commission. Moreover, the derogation in Article 86(2) EC is subject to the same procedural regime as the derogations in Article 87(2) and (3) EC, which means that new aid cannot be implemented until the Commission has declared it compatible with Article 86(2) EC. Measures which infringe that stand-still obligation constitute illegal aid. Another procedural implication from the application of the compensation approach is that national courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from the infringement of the last sentence of Article 88(3) EC, as regards the validity of the measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.

Departing from the rationale of the above approaches, a third approach has been introduced in order to assist in understanding the relationship between the funding of

[98] Article 86(2) EC stipulates that…"Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

[99] See Case 240/83 [1985] ECR 531; Case C-53/00, judgment of 22 November 2001; Case C-280/00, judgment of 24 July 2003.

public services and state aid. The *quid pro quo* approach distinguishes between two categories of state funding; in cases where there is a direct and manifest link between the state financing and clearly defined public service obligations, any sums paid by the State would not constitute state aid within the meaning of the Treaty. On the other hand, where there is no such link or the public service obligations were not clearly defined, the sums paid by the public authorities would constitute state aid.

The quid pro quo approach[100] positions at the centre of the analysis of state funding of services of general interest a distinction between two different categories; i) the nature of the link between the financing granted and the general interest duties imposed and ii) the degree of clarity in defining those duties. The first category would comprise cases where the financing measures are clearly intended as a *quid pro quo* for clearly defined general interest obligations, or in other words where the link between, on the one hand, the State financing granted and, on the other hand, clearly defined general interest obligations imposed is direct and manifest. The clearest example of such a direct and manifest link between State financing and clearly defined obligations are public service contracts awarded in accordance with public procurement rules. The contract in question should define the obligations of the undertakings entrusted with the services of general interest and the remuneration which they will receive in return. Cases falling into that category should be analysed according to the compensation approach. The second category consists of cases where it is not clear from the outset that the State funding is intended as a *quid pro quo* for clearly defined general interest obligations. In those cases the link between State funding and the general interest obligations imposed is either not direct or not manifest or the general interest obligations are not clearly defined.

The quid pro quo approach appears at first instance consistent with the general case-law on the interpretation of Article 87(1) EC. Also it gives appropriate weight to the importance of services of general interest, within the remit of Article 16 EC and of Article 36 of the EU Charter of Fundamental Rights. On the other hand, the *quid pro quo* approach presents a major shortcoming: it introduces elements[101] of the nature of public financing into the process of determining the legality of state aid. According to state aid

[100] See Opinion of Advocate General Jacobs in Case C-126/01, *Ministre de l'economie, des finances et de l'industrie v GEMO SA*, 30 April 2002

[101] For example the form in which the aid is granted (See cases C-323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 31; Case C-142/87 *Belgium* v *Commission*, cited in note 18, paragraph 13; and Case 40/85 *Belgium* v *Commission* [1986] ECR I-2321, paragraph 120, the legal status of the measure in national law (See Commission Decision 93/349/EEC of 9 March 1993 concerning aid provided by the United Kingdom Government to British Aerospace for its purchase of Rover Group Holdings over and above those authorised in Commission Decision 89/58/EEC authorising a maximum aid to this operation subject to certain conditions (OJ 1993 L 143, p. 7, point IX), the fact that the measure is part of an aid scheme (Case T-16/96, *Cityflyer Express* v *Commission*, [1998] ECR II- 757), the reasons for the measure and the objectives of the measure ((case C-173/73 *Italy* v *Commission* [1974] ECR 709; *Deufil* v *Commission*, [1987] ECR 901; Case C-56/93 *Belgium* v *Commission*, [1996] ECR I-723; Case C-241/94 *France* v *Commission* [1996] ECR I-4551;Case C-5/01 *Belgium* v *Commission* [2002] ECR I-3452) and the intentions of the public authorities and the recipient undertaking (Commission Decision 92/11/EEC of 31 July 1991 concerning aid provided by the Derbyshire County Council to Toyota Motor Corporation, an undertaking producing motor vehicles (OJ 1992 L 6, p. 36, point V).

jurisprudent, only the effects of the measure are to be taken into consideration[102], and as a result of the application of the *quid pro quo* approach legal certainty could be undermined.

2.1. Public service obligations: towards universality of services and their financing

A category of services of general interest is the concept of public service obligations with reference to the Common Transport policy of the Community and the way the Treaty and also secondary legislation regulates their financing and their relationship with state aid. It appears that the financing of public service obligations and its interplay with state aid follows the compensation approach, where the state provides for adequate and fair compensation to undertakings in order to provide the relevant services that have public interest characteristics. However, the regulation of the funding of such services is *lex specialis*, in the sense that Article 84 EC expressly excludes the application of state aid provisions to air transport and therefore, the reimbursement of undertakings costs for fulfilling public service obligation requirements must be assessed on the basis of the general rules of the Treaty, which apply to air transport[103]. The Treaty provides that state aid are compatible with its principles, if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of public service, do not apply to air transport[104]. A Member State may thus reimburse the air carrier selected for carrying out the imposed public service obligation[105] by taking into account the costs and revenue (that is the deficit) generated by the service[106]. In the context of air transport, public service obligation is defined[107] as any obligation imposed upon an air carrier to take, in respect of any route which it is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying pre-determined standards of continuity, regularity, capacity and pricing, which standards the air carrier would not assume if it were solely considering its economic interest[108].

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[102] See case C-173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27; *Deufil* v *Commission*, [1987] ECR 901; Case C-56/93 *Belgium* v *Commission*, [1996] ECR I-723 paragraph 79; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20; and Case C-5/01 *Belgium* v *Commission* [2002] ECR I-3452, paragraphs 45 and 46.

[103] See Case 156/77, Commission v. Belgium, [1978] ECR 1881.

[104] A similar approach is followed for maritime transport. See The European Commission's Guidelines on State aid to maritime transport, OJ 1997 C 205.

[105] See Article 4 (1) (h) of Regulation 2408/92 OJ L 240 1992 on access for air carriers to intra-Community air routes.

[106] The development and the implementation of these schemes must be transparent. The Commission would expect the selected company to have an analytical accounting system sophisticated enough to apportion the relevant costs (including fixed costs) and revenues.

[107] See Article 2 of Regulation 2408/92.

[108] Such public service obligations may be imposed on scheduled air services to an airport serving peripheral or development regions in its territory or on a thin route to any regional airport in its territory provided that any such route is considered vital for the economic development of the region in which the airport is located.

The acceptability of the reimbursement shall be considered in the light of the state aid principles as interpreted by the Court. In this context it is important that the airline, which has access to a route on which a public service obligation has been imposed, may be compensated only after being selected by public tender. However, Community rules on public procurement contracts do not apply to the awarding by law or contract of exclusive concessions, which are entirely regulated by the procedure provided for pursuant to Article 4 (1) of Regulation 2408/92, which has set out uniform and non-discriminatory rules for the distribution of air traffic rights on routes upon which public service obligations have been imposed.

This tendering procedure enables Member States to value the offer for that route, and make its choice by taking into consideration both the consumers interest and cost of the compensation. Furthermore, the criteria for calculation of the compensation have been clearly established. A reimbursement, is calculated on the basis of the operating deficit incurred on a route, cannot involve any overcompensation of the air carrier. Such system excludes the possibility of state aid elements being included within the reimbursement for public service obligations. A compensation of the mere deficit incurred on a specific route (including a reasonable remuneration for capital employed) by an airline which has been fairly selected following an open bidding procedure, is a neutral commercial operation between the relevant State and the selected airline which cannot be considered as aid. The essence of an aid lies in the benefit for the recipient[109]; a reimbursement limited solely to losses sustained because of the operation of a specific route does not bring about any special benefit for the company, which has been selected on the basis of the objective criteria.

Therefore, the Commission considers that compensation for public service obligations does not involve aid provided that: i) the undertaking has been correctly selected through a call for tender, on the basis of the limitation of access to the route to one single carrier, and ii) the maximum level of compensation does not exceed the amount of deficit as laid down in the bid. However, the fact that the public tender has not been conducted in accordance with the public procurement regime, give rise to certain concerns.

In case there is clear evidence that the Member State has not selected the best offer, the Commission may request information from the Member State in order to be able to verify whether the award includes State aid elements. In fact, such elements are likely to occur where the Member State engages itself to pay more financial compensation to the selected carriers than it would have paid to the carrier which submitted the best (not necessarily the cheapest) offer. Although the public tendering process under Regulation 2408/92 refers to the compensation required as just one of the criteria to be taken into consideration for the selection of submissions, the Commission considers however, that the level of compensation is the main selection criterion[110]. Indeed, other criteria such as adequacy, prices and standards required are generally already included in the public service obligations themselves. Consequently, it is possible that the selected carrier could

[109] See Case 173/73, Italian Government v. Commission, [1974] ECR 709.
[110] See Cases C301/87 France v. Commission, [1990] ECR I, p. 307; Case C142/87 Belgium v. Commission [1990] ECR I-959.

be other than the one which requires the lowest financial compensation. However, if the Commission concludes that the Member State concerned has not selected the best offer it will most likely consider that the chosen carrier has received aid pursuant to Article 92 EC. Should the Member State not have notified the aid pursuant to Article 93 (3) EC, the Commission would consider the aid, in the case that compensation has already been paid, as illegally granted and would open the procedure pursuant to Article 93 (2) EC[111].

3. Public procurement and the three approaches of financing public services

The application of the state aid approach creates a *lex and a policy lacunae* in the treatment of funding of services of general economic interest and other services, which is filled by the application of the public procurement regime. In fact, it presupposes that the delivery of services of general economic interest emerge and take place in a different market, where the state and its emanations act in a public function. Such markets are not susceptible to the private operator principle[112] which has been relied upon by the Commission and the European Courts[113] to determine the borderline between market behavior and state intervention. The state aid approach runs parallel with the assumption that services of general interest emerge and their delivery takes place within distinctive markets, which bear little resemblance with private markets in terms of competitiveness, demand and supply substitutability, structure and even regulation.

European jurisprudence distinguishes the economic nature of state intervention and the exercise of public powers[114]. The application of the private operator principle is confined to the economic nature of state intervention[115] and is justified by the principle of equal

[111] Article 5 of Regulation 2408/92 allows for exclusive concessions on domestic routes granted by law or contract, to remain in force, under certain conditions, until their expiry or for three years, whichever deadline comes first. Possible reimbursement given to the carriers benefiting from these exclusive concessions may well involve aid elements, particularly as the carriers have not been selected by an open tender (as foreseen in the case of Article 4 (1) of Regulation 2408/92).

[112] See the Communication of the Commission to the Member States concerning public authorities' holdings in company capital (*Bulletin EC* 9-1984, point 3.5.1). The Commission considers that such an investment is not aid where the public authorities effect it under the same conditions as a private investor operating under normal market economy conditions. See also Commission Communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ 1993 C 307, p. 3, point 11).

[113] See in particular Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14; Case C-142/87 *Belgium* v *Commission* (*'Tubemeuse'*) [1990] ECR I-959, paragraph 26; and Case C-305/89 *Italy* v *Commission* (*'Alfa Romeo'*) [1991] ECR I-1603, paragraph 19.

[114] See Joined Cases C-278/92 to C-280/92 Spain v Commission [1994] ECR I-4103.

[115] For example where the public authorities contribute capital to an undertaking (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603), grant a loan to certain undertakings(Case C-301/87 *France* v *Commission* [1990] ECR I-307; Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757), provide a state guarantee (Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267), sell goods or services on the market (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723; Case C-39/94 *SFEI and Others* [1996] ECR I-3547), or grant facilities for the payment of social security contributions (Case C-256/97 *DM Transport* [1999] ECR I-3913), or the repayment of wages Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459).

treatment between the public and private sectors[116], which requires that intervention by the State should not be subject to stricter rules than those applicable to private undertakings. The non-economic character of state intervention[117] renders immaterial the test of private operator, for the reason that profitability, and thus the *raison d'être* of the private investment, is not present. It follows that services of general economic interest cannot be part of the same demand / supply equation, as other normal services the state and its organs procure[118]. Along the above lines, a convergence emerges between public procurement jurisprudence and the state aid approach in the light of the reasoning behind the *BFI*[119] and *Agora*[120] cases. Services of general economic interest are *sui generis*, having as main characteristics the lack of industrial and commercial character, where the absence of profitability and competitiveness are indicative of the relevant market place. As a rule of thump, the procurement of such services should be subject to the rigor and discipline of public procurement rules and in analogous ratione, classified as state aid, in the absence of the competitive award procedures. In consequence, the application of the public procurement regime reinforces the character of services of general interest as non-commercial or industrial and the existence of *marchés publics*[121].

Of interest is the latest case *Chronopost*[122], where the establishment and maintenance of a public postal network such as the one offered by the French *La Poste* to its subsidiary *Chronopost* was not considered as a "market network". The Court arrived at this reasoning by using a market analysis which revealed that under normal conditions it would not have been rational to build up such a network with the considerable fixed costs such would have implied merely in order to provide third parties with the assistance of the kind at issue in that case. Therefore the determination of a platform under which the normal remuneration a private operator occurs would have constituted an entirely hypothetical exercise. As the universal network offered by La Poste was not a "market network" there were no specific and objective references available in order to establish what normal market conditions should be. On the one hand, there was only one single undertaking, i.e. La Poste that was capable of offering the services linked to its network and none of the competitors of *Chronopost* had ever sought access to the French Post

[116] See Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 20; Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 15; and Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 70.

[117] For example where the public authorities pay a subsidy directly to an undertaking (Case 310/85 *Deufil* v *Commission* [1987] ECR 901), grant an exemption from tax (Case C-387/92 *Banco Exterior* [1994] ECR I-877; Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857) or agree to a reduction in social security contributions (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671; Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1)

[118] See the analysis in the Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103.

[119] See Case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV, op.cit.*

[120] cases C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano, op.cit.*

[121] See Bazex, *Le droit public de la concurrence*, RFDA, 1998; Arcelin, *L'enterprise en droit interne et communautaire de la concurrence*, Paris, Litec, 2003; Guézou, *Droit de la concurrence et droit des marchés publics: vers une notion transverale de mise en libre concurrence*, Contrats Publics, Mars 2003.

[122] See Joined Cases C-83/01 P, C-93/01 P and C-94/01 *Chronopost and Others* [2003], not yet reported; see also the earlier judgment of the CFI Case T-613/97 *Ufex and Others v Commission* [2000] ECR II-4055.

Office's network. Consequently, objective and verifiable data on the price paid within the framework of a comparable commercial transaction did not exist. The Commission's solution of accepting a price that covered all the additional costs, fixed and variable, specifically incurred by La Poste in order to provide the logistical and commercial assistance, and an adequate part of the fixed costs associated with maintaining the public postal network, represented a sound way in order to exclude the existence of State aid within the meaning of Article 87(1) EC. The *Chronopost* ruling disapplied the private investor principle from state aid regulation, by indirectly accepting the state aid approach and therefore the existence of *sui generis markets* within which services of general interest emerge and being delivered and which cannot feasibly be compared with private ones.

The compensation approach relies heavily upon the real advantage theory to determine the existence of any advantages conferred to undertakings through state financing[123]. Thus, under the real advantage theory, the advantages given by the public authorities and threaten to distort competition are examined together with the obligations on the recipient of the aid. Public advantages thus constitute aid only if their amount exceeds the value of the commitments the recipient enters into. The compensation approach treats the costs offsetting the provision of services of general interest as the base line over which state aid should be considered. That base line is determined by the market price, which corresponds to the given public / private contractual interface and is demonstrable through the application of public procurement award procedures. The application of the compensation approach reveals a significant insight of the financing of services of general interest. A quantitative distinction emerges, over and above which state aid exist. The compensation approach introduces an applicability threshold of state aid regulation, and that threshold is the perceived market price, terms and conditions for the delivery of the relevant services.

An indication of the application of the compensation approach is reflected in the *Stohal*[124] case, where an undertaking could provide commercial services and services of general interest, without any relevance to the applicability of the public procurement rules. The rationale of the case runs parallel with the real advantage theory, up to the point of recognizing the different nature and characteristics of the markets under which normal (commercial) services and services of general interest are provided. The distinction begins where, for the sake of legal certainty and legitimate expectation, the activities undertakings of dual capacity are equally covered by the public procurement regime and the undertaking in question is considered as *contracting authority* irrespective of any proportion or percentage between the delivery of commercial services and services of general interest. This finding might have a significant implication for the compensation approach in state aid jurisprudence: irrespective of any costs offsetting the costs related to the provision of general interest, the entire state financing could be viewed under the state aid approach.

[123] See Evans, *European Community Law of State Aid*, Clarendon Press, Oxford, 1997.
[124] C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH,, op.cit.* See also the analysis of the case by Bovis, in 36 CMLR (1999), pp 205-225.

Nevertheless, the real advantage theory upon which the compensation approach seems to rely runs contrary to the apparent advantage theory which underlines Treaty provisions[125] and the so-called "effects approach"[126] adopted by the Court in determining the existence of state aid. The real advantage theory seems to underpin the quid pro quo approach and it also creates some conceptual difficulties in reconciling jurisprudential precedent in state aid regulation.

The quid pro quo approach appears to define state aid no longer by reference solely to the effects of the measure, but by reference to criteria of a purely formal or procedural nature. This means that the existence of a procedural or a substantive link between the state and the service in question lifts the threat of state aid regulation, irrespective of any effect the state measure has on competition. However, the Court considers that to determine whether a State measure constitutes aid, only the effects of the measure are to be taken into consideration, whereas other elements[127] typifying a measure are not relevant during the stage of determining the existence of aid, because they are not liable to affect competition. However, the relevance of these elements may appear when an assessment of the compatibility of the aid[128] with the derogating provisions of the Treaty takes place.

The application of the *quid pro quo* approach amounts to introducing such elements into the actual definition of aid. The presence of a direct and manifest link between the state funding and the public service obligations amounts to the existence of a public service contract awarded after a public procurement procedure. In addition, the clear definition of public service obligations amounts to the existence of laws, regulations or contractual provisions which specify the nature and content of the undertaking's obligations. The borderline of the market price, which will form the conceptual base above which state aid would appear, is not always easy to determine, even with the presence of public procurement procedures. The state and its organs as contracting authorities (state emanations and bodies governed by public law) have wide discretion to award public contracts under the public procurement rules[129]. Often, price plays a secondary role in the

[125] According to Advocate General Léger in his Opinion on the *Altmark* case, the apparent advantage theory occurs in several provisions of the Treaty, in particular in Article 92(2) and (3), and in Article 77 of the EC Treaty (now Article 73 EC). Article 92(3) of the Treaty provides that aid may be regarded as compatible with the common market if it pursues certain objectives such as the strengthening of economic and social cohesion, the promotion of research and the protection of the environment.

[126] See case C-173/73 *Italy* v *Commission* [1974] ECR 709; *Deufil* v *Commission*, [1987] ECR 901; Case C-56/93 *Belgium* v *Commission*, [1996] ECR I-723; Case C-241/94 *France* v *Commission* [1996] ECR I-4551; Case C-5/01 *Belgium* v *Commission* [2002] ECR I-3452.

[127] For example the form in which the aid is granted, the legal status of the measure in national law, the fact that the measure is part of an aid scheme, the reasons for the measure, the objectives of the measure and the intentions of the public authorities and the recipient undertaking.

[128] For example certain categories of aid are compatible with the common market on condition that they are employed through a specific format. See Commission notice 97/C 238/02 on Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1997 C 283.

[129] According to Article 26 of Directive 93/36, Article 30 of Directive 93/37, Article 34 of Directive 93/38 and Article 36 of Directive 92/50, two criteria provide the conditions under which contracting authorities award public contracts: *the lowest price* or the *most economically advantageous offer*. The first criterion indicates that, subject to the qualitative criteria and financial and economic standing, contracting authorities do not rely on any other factor than the price quoted to complete the contract. The Directives provide for an automatic disqualification of an "obviously abnormally low offer". The term has not been interpreted in

award criteria. In cases when the public contract is awarded to the lowest price[130], the element of *market price* under the compensation approach could be determined. However, when the public contract is to be awarded by reference to the most economically advantageous offer[131], the market price might be totally different than the price the contracting authority wish to pay for the procurement of the relevant services. The mere existence of public procurement procedures cannot, therefore, reveal the necessary element of the compensation approach: the market price which will determine the "excessive" state intervention and introduce state aid regulation.

Finally, the *quid pro quo* approach relies on the existence of a direct and manifest link between state financing and services of general interest, existence indicative through the presence of a public contract concluded in accordance with the provisions of the public procurement Directives. Apart from the criticism it has received concerning the introduction of elements into the assessment process of state aid, the interface of the *quid pro quo* approach with public procurement appears as the most problematic facet in its application. The procurement of public services does not always reveal a public contract between a contracting authority and an undertaking.

The quid pro quo approach appears to define state aid no longer by reference solely to the effects of the measure, but by reference to criteria of a purely formal or procedural nature. This means that the existence of a procedural or a substantive link between the state and the service in question lifts the threat of state aid regulation, irrespective of any effect the state measure has on competition. However, the Court considers that to determine whether a State measure constitutes aid, only the effects of the measure are to be taken into consideration, whereas other elements[132] typifying a measure are not relevant during the stage of determining the existence of aid, because they are not liable to affect competition. However, the relevance of these elements may appear when an assessment

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detail by the Court and serves rather as an indication of a "lower bottom limit" of contracting authorities accepting offers from the private sector tenderers See Case 76/81, *SA Transporoute et Travaux v. Minister of Public Works*, [1982] ECR 457; Case 103/88, *Fratelli Costanzo S.p.A. v. Comune di Milano*, [1989] ECR 1839; Case 296/89, *Impresa Dona Alfonso di Dona Alfonso & Figli s.n.c. v. Consorzio per lo Sviluppo Industriale del Comune di Monfalcone*, judgment of June 18, 1991.

[130] An interesting view of the lowest price representing market value benchmarking is provided by the case C-94/99, *ARGE Gewässerschutzt, op.cit, where* the Court ruled that directly or indirectly subsidised tenders by the state or other contracting authorities or even by the contracting authority itself can be legitimately part of the evaluation process, although it did not elaborate on the possibility of rejection of an offer, which is appreciably lower than those of unsubsidised tenderers by reference to the of abnormally low disqualification ground.

[131] The meaning of the most economically advantageous offer includes a series of factors chosen by the contracting authority, including price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitments with regard to spare parts and components and maintenance costs, security of supplies. The above list is not exhaustive.

[132] For example the form in which the aid is granted, the legal status of the measure in national law, the fact that the measure is part of an aid scheme, the reasons for the measure, the objectives of the measure and the intentions of the public authorities and the recipient undertaking.

of the compatibility of the aid[133] with the derogating provisions of the Treaty takes place. The application of the *quid pro quo* approach amounts to introducing such elements into the actual definition of aid. Its first criterion suggests examining whether there is a direct and manifest link between the State funding and the public service obligations. In practice, this amounts to requiring the existence of a public service contract awarded after a public procurement procedure. Similarly, the second criterion suggests examining whether the public service obligations are clearly defined. In practice, this amounts to verifying that there are laws, regulations or contractual provisions which specify the nature and content of the undertaking's obligations.

Although the public procurement regime embraces activities of the *state,* which covers central, regional, municipal and local government departments, as well as *bodies governed by public law*, and public utilities, in-house contracts are not subject to its coverage. The existence of dependency, in terms of overall control of an entity by the state or another contracting authority renders the public procurement regime inapplicable. Dependency presupposes a control similar to that which the state of another contracting authority exercises over its own departments. The "similarity" of control denotes lack of independence with regard to decision-making. The Court in *Teckal*[134], concluded that a contract between a contracting authority and an entity, which the former exercises a control similar to that which exercises over its own departments and at the same time that entity carries out the essential part of its activities with the contracting authority, is not a public contract, irrespective of that entity being a contracting authority or not. The similarity of control as a reflection of dependency reveals another facet of the thrust of contracting authorities: the non-applicability of the public procurement rules for in-house relationships.

Along the same line of arguments, contracts to affiliated undertakings escape the clutches of the Directives. Article 6 of the Services Directive provides for the inapplicability of the Directive to service contracts which are awarded to an entity which is itself a contracting authority within the meaning of the Directive on the basis of an exclusive right which is granted to the contracting authority by a law, regulation or administrative provision of the Member State in question. Article 13 of the Utilities Directive provides for the exclusion of certain contracts between contracting authorities and affiliated undertakings. For the purposes of Article 1(3) of the Utilities Directive, an affiliated undertaking is one the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the seventh company law Directive[135]. These are service contracts, which are awarded to a service-provider, which is affiliated to the contracting entity, and service contracts, which are awarded, to a service-provider, which is affiliated, to a contracting entity participating in a joint venture formed for the purpose of carrying out an activity covered by the Directive[136].

[133] For example certain categories of aid are compatible with the common market on condition that they are employed through a specific format. See Commission notice 97/C 238/02, OJ 1997 C 283 on Community guidelines on State aid for rescuing and restructuring firms in difficulty.
[134] See case C-107/98, *Teckal Slr* v *Comune di Viano*, judgment of 18 November 1999.
[135] See Council Directive 83/349, OJ 1983 L193/1.
[136] The explanatory memorandum accompanying the text amending the Utilities Directive (COM (91) 347-SYN 36 1) states that this provision relates, in particular, to three types of service provision within groups.

In addition, the connection between the state and entities which operate in the utilities sector and have been privatised is also weak to sustain the presence of a public procurement contract for the delivery of services of general interest. Privatised utilities could be, in principle, excluded from the procurement rules when a genuinely competitive regime[137] within the relevant market structure would rule out purchasing patterns based on non-economic considerations. Under the Tokyo Round GATT Agreement on Government Procurement, the term public authorities confined itself to central governments and their agencies only.[138] The new World Trade Organisation Government Procurement Agreement (GPA) applies in principle to all bodies which are deemed as "contracting authorities" for the purposes of the Public Supplies and Public Works Directives. As far as utilities are concerned, the GPA applies to entities, which carry out one or more of certain listed "utility" activities,[139] where these entities are either "public authorities" or "public undertakings", in the sense of the Utilities Directive. However, the GPA does not cover entities operating in the utilities sector on the basis of *special and exclusive rights*.

4. The delineation between market forces and protection

The European Court of Justice and the Court of First Instance have approached the subject of financing services of general interest from different perspectives. These perspectives show a degree of inconsistency but they shed light on the demarcation of competitiveness and protection with respect to the financing of public services. Also, the inconsistent precedent has opened a most interesting debate focusing on the role and remit of the state within the common market and its relation with the provision and financing of services of general interest. The conceptual link between public procurement and the financing of services of general interest reveals the policy implications and the interplay of jurisprudence between public procurement and state aid. The three approaches used by the Courts to construct the premises upon which the funding of

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These categories, which may not or may not be distinct, are: the provision of common services such as accounting, recruitment and management; the provision of specialised services embodying the know how of the group; the provision of a specialised service to a joint venture. The exclusion from the provisions of the Directive is subject, however, to two conditions: the service-provider must be an undertaking affiliated to the contracting authority and, at least 80 per cent of its average turnover arising within the European Community for the preceding three years, derives from the provision of the same or similar services to undertakings with which it is affiliated. The Commission is empowered to monitor the application of this Article and require the notification of the names of the undertakings concerned and the nature and value of the service contracts involved.

[137] The determination of a genuinely competitive regime is left to the utilities operators themselves. See case, C 392/93, *The Queen and H.M. Treasury, ex parte British Telecommunications PLC*, O.J. 1993, C 287/6. This is perhaps a first step towards self-regulation which could lead to the disengagement of the relevant contracting authorities from the public procurement regime.

[138] Council Decision 87/565, O.J. 1987, L 345.

[139] The listed utility activities which are covered under the new GPA include (i) activities connected with the provision of water through fixed networks; (ii) activities concerned with the provision of electricity through fixed networks; (iii) the provision of terminal facilities to carriers by sea or inland waterway; and (iv) the operation of public services in the field of transport by automated systems, tramway, trolley bus, or cable bus.

public service obligations, services of general interest, and services for the public at large could be regarded as state aid, utilize public procurement in different ways. On the one hand, under the state aid and compensation approaches, public procurement sanitizes public subsidies as legitimate contributions towards public service obligations and services of general interest. From procedural and substantive viewpoints, the existence of public procurement award procedures, as well as the existence of a public contract between the state and an undertaking reveals the necessary links between the markets where the state intervenes in order to provide services of general interest. In fact, both approaches accept the *sui generis* characteristics of public markets and the role the state and its organs play within such markets. On the other hand, the quid pro quo approach relies on public procurement to justify the clearly defined and manifest link between the funding and the delivery of a public service obligation. It assumes that without these procedural and substantive links between public services and their financing, the financing of public services is state aid.

In most cases, public procurement connects the activities of the state with the pursuit of public interest. The subject of public contract and their respective financing relates primarily to services of general interest. Thus, public procurement indicates the necessary link between state financing and services of general interest, a link which takes state aid regulation out of the equation. The existence of public procurement and the subsequent contractual relations ensuing from the procedural interface between the public and private sectors neutralize state aid regulation. In principle, the financing of services of general interest, when channeled through public procurement reflects market value. However, it should be maintained that the safeguards of public procurement reflecting genuine market positions are not robust and the foundations upon which a quantitative application of state aid regulation is based are not stable. The markets within which the services of general interest emerged and being delivered reveal little evidence of similarities and do not render meaningful any comparison with private markets, where competitiveness and substitutability of demand and supply feature. The approach adopted by the European judiciary indicates the presence of *marchés publics*, *sui generis* markets where the state intervenes in pursuit of public interest. State aid regulation could be applied, as a surrogate system of public procurement, to ensure that distortions of competition do not emerge as a result of the inappropriate financing of services.

However, the debate of the delineation between market forces and protection in the financing of public services took a twist. The Court in *Altmark*,[140] followed a hybrid approach between the compensation and the quid pro quo approaches. It ruled that where subsidies are regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, they do not constitute state aid. Nevertheless for the purpose of applying that criterion, national courts should ascertain that four conditions are satisfied: first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined; second, the parameters on the basis of which the compensation is calculated

[140] See Case C-280/00, Altmark Trans GmbH, Regierungspräsidium Magdeburg et Nahverkehrsgesellschaft Altmark GmbH, Oberbundesanwalt beim Bundesverwaltungsgericht, (third party), judgment of 24 July 2003.

have been established beforehand in an objective and transparent manner; third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with appropriate means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The first criterion which requires the existence of a clear definition of the framework within which public service obligations and services of general interest have been entrusted to the beneficiary of compensatory payments runs consistently with Article 86(2) EC jurisprudence, where an express act of the public authority to assign services of general economic interest[141] is required. However, the second criterion which requires the establishment of the parameters on the basis of which the compensation is calculated in an objective and transparent manner departs from existing precedent[142], as it establishes an *ex post* control mechanism by the Member States and the European Commission. The third criterion that the compensation must not exceed what is necessary to cover the costs incurred in discharging services of general interest or public service obligations is compatible to the proportionality test applied in Article 86(2) EC. However, there is an inconsistency problem, as the European judiciary is rather unclear to the question whether any compensation for public service obligations may comprise a profit element[143]. Finally, the fourth criterion which establishes a comparison of the cost structures of the recipient on the one hand and of a private undertaking, well run and adequately provided to fulfil the public service tasks, in the absence of a public procurement procedure, inserts elements of subjectivity and uncertainty that will inevitably fuel more controversy.

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[141] See Case 127/73 *BRT v SABAM* [1974] ECR 313, para. 20; Case 66/86 *Ahmed Saeed Flugreisen v Commission* [1989] ECR 803, para. 55.

[142] The standard assessment criterion applied under Article 86(2) EC only requires for the application of Article 87(1) EC to frustrate the performance of the particular public service task, allowing for the examination being conducted on an *ex post facto* basis. See also the ratione behind the so-called "electricity judgments" of the ECJ of 23 October 1997; Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699; Case C-158/94 *Commission v Italy* [1997] ECR I-5789; Case C-159/94 *Commission v France* [1997] ECR I-5815 and C-160/94 *Commission v Spain* [1997] ECR I-5851; a great deal of controversy exists as to whether the material standard of the frustration of a public service task under Article 86(2) EC had lost its strictness. See Magiera, *Gefährdung der öffentlichen Daseinsvorsorge durch das EG-Beihilfenrecht?,* FS für Dietrich Rauschning 2000.

[143] See Opinion of Advocate General Lenz, delivered on 22 November 1984 in Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531 (536). Advocate-General Lenz in his opinion held that the indemnities granted must not exceed annual uncovered costs actually recorded by the undertaking, taking into account a reasonable profit. However, the Court In the *ADBHU* case did not allow for the permissibility of taking into account such a profit element. Interestingly, the approach of the Court of First Instance on Article 86(2) EC has never allowed any profit element to be taken into account, but instead focused on whether without the compensation at issue being provided the fulfillment of the specific public service tasks would have been jeopardised.

The four conditions laid down in *Altmark* are ambiguous. In fact they represent the hybrid link between the compensation approach and the quid pro quo approach. The Court appears to accept unequivocally the parameters of the compensation approach (*sui generis* markets, remuneration over and above normal market prices for services of general interest), although the link between the services of general interest and their legitimate financing requires the presence of public procurement, as procedural verification of competitiveness and cost authentication of market prices. However, the application of the public procurement regime cannot always depict the true status of the market. Furthermore, the condition relating to the clear definition of an undertaking's character in receipt of subsidies to discharge public services in an objective and transparent manner, in conjunction with the costs attached to the provision of the relevant services could give rise to major arguments across the legal and political systems in the common market. The interface between public and private sectors in relation to the delivery of public services is in an evolutionary state across the common market. Finally, the concept of "reasonable profit" over and above the costs associated with the provision of services of general interest could complicate matters more, since they appear as elements of subjectivity and uncertainty.

Conclusions

The relationship between public procurement and services of general economic interest reveals a symbiotic flexibility embedded in the regime of regulating the award of public contracts, as well as a direct nexus with state aid regulation. That flexibility conferred to contracting authorities is augmented by a wide margin of discretion available to Member States to introduce public policy considerations in dispersing public services. State aid, as regional development considerations, or as part of a national of EU wide industrial policy are inherently a part of this symbiotic policy approach. This finding removes the often misunderstood justification of public procurement as an economic exercise and places it in the heart of an ordo-liberal interpretation of the European integration process. On the other hand, the conceptual interrelation of public procurement with the financing of services of general interest reveals the policy and jurisprudence links between public procurement and state aid. These links offer a prism of an asymmetric geometry analysis, where the three approaches used to conceptualise the funding of public service obligations, services of general interest, and services for the public at large, utilize public procurement in different ways. The presence of public procurement award procedures, as well as the existence of a public contract between the state and an undertaking verifies the state aid approach and the compensation approach to the extent that they provide the necessary links between the markets where the state intervenes in order to provide services of general interest. On the other hand, the quid pro quo approach relies on public procurement to justify the clearly defined and manifest link between the funding and the delivery of a public service obligation. Even the hybrid approach adopted by *Altmark* confirms the delineation between market forces through competitiveness and protection through state aid in the financing of services of general interest. The public procurement framework not only will be used to insert competitiveness and market forces within *marchés publics*, but more importantly, in the author's view, it will be used by the

European judiciary and the European Commission as a system to verify conceptual links, create compatibility safeguards and authenticate established principles applicable in state aid regulation.

Paul Lappalainen

PAUL LAPPALAINEN

Paul Lappalainen has substantial experience in the promotion of equality and combating discrimination. Over the years he has worked in various capacities with the government and civil society. His particular focus has been on Sweden as well as Europe.

Born in 1954 in Canada, the son of Finnish immigrants, he grew up in the US before moving to Sweden in 1978.

In the US he received degrees in law as well as political science. He also has a Swedish law degree. He has been particularly interested in the interplay between law and social change. His international and comparative view often provides special insights into the tools needed to counteract discrimination.

During 2000-2004 he was the Swedish member of two of the EU-Commission's independent expert groups concerning implementation of the anti-discrimination directives. The groups covered disability and ethnicity and religion.

During 2003 – 2005 he was the Swedish government's special investigator concerning structural discrimination relatated to ethnicity and religion. The government inquiry resulted in *The Blue and Yellow Glass House: Structural Discrimination in Sweden* (SOU 2005:56). The inquiry includes an overview of discrimination as well as over 40 recommendations.

He has been scientific advisor to the UNESCO's ECCAR (European Coalition of Cities Against Racism) since its startup in 2004. He has also been a board member of the European Network Against Racism, an NGO.

Today he is the head of equality promotion with the Swedish Equality Ombudsman.

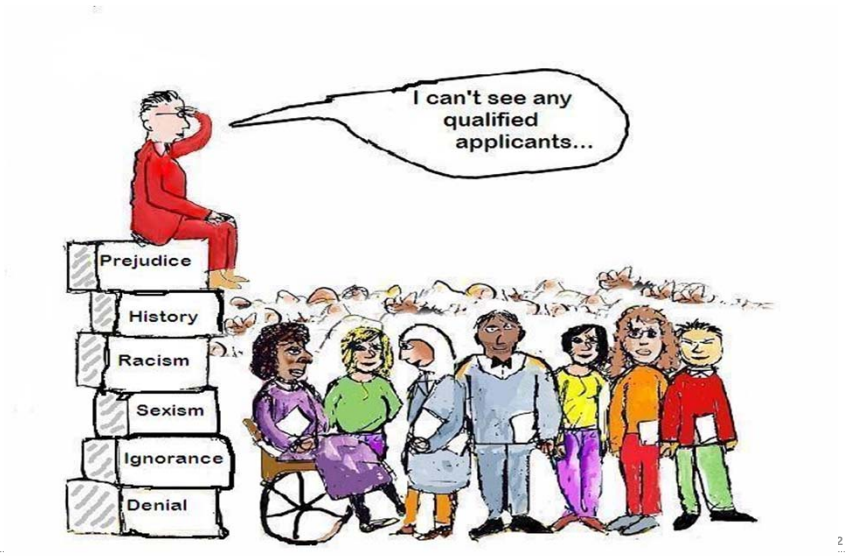
Anti-discrimination clauses and public contracts

Paul Lappalainen, Head of Equality Promotion, Swedish Equality Ombudsman, EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

23-24 May 2011, ERA Conference Centre, Trier, Germany

diskrimineringsombudsmannen

THE BLUE AND YELLOW GLASS HOUSE: STRUCTURAL DISCRIMINATION IN SWEDEN (SOU 2005:56)



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diskrimineringsombudsmannen

Who is free from prejudice?

- Harvard Implicit Association Test
  (https://implicit.harvard.edu/implicit/demo/)
- People with openly sexist or racist opinions have the same levels of underlying prejudices as “non-racists”
- Difference between the man on the soap-box and his audience?

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Creating change in behaviour or attitudes?

Earl Warren – Chief Justice US S Ct 1953-1969

“… you can't wipe out racial discrimination by law, only through changing the hearts and minds of men’.

This is a ‘false credo. True, prejudice cannot be wiped out, but infliction of it upon others can.’”

Making discrimination cost

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Laws at the individual level are often reactive – they put pressure on those who are the targets of discrimination

Proactive measures put pressure on those with the power to discriminate

Proactive measures raise the cost risks

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Why anti-discrimination clauses?

- ***They are legal***
- ***They strengthen equality***
- ***They strengthen democracy***
- ***They lead to quality***
- ***They are proactive, they work***

The EU directives:

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Sweden's Discrimination Act:

Employers (and others) shall not discriminate

Violations can lead to damages

Larger employers have a duty to develop gender equality plans and undertake active measures to promote ethnic equality

Violations can lead to fines

The Glass House clause § 1

§ 1 The supplier shall throughout the contract period, in his business activities in Sweden, follow the applicable anti-discrimination laws. The laws currently referred to are Article 141 of the EU Treaty, § 16:9 of the Swedish Penal Code, the Swedish Discrimination Act.

Discuss:

Why limit it to the period of the contract?

Why business activities in Sweden?

Does this cover both goods and services?

Should other laws be included?

The Glass House clause § 2

§ 2 The supplier, during the contract period, has a duty, at the request of the contracting entity, to provide a written report concerning the measures, equality plans etc., that have been undertaken in accordance with the duties specified in § 1. The report shall be submitted to the city within one week after a request is made unless some other agreement has been reached in the individual case.

Discuss:

Why has this § been included?

The Glass House clause § 3

§ 3. In his or her contracts with sub-contractors, the supplier shall apply the same duty to them as is specified in § 1. The supplier shall be responsible to the contracting entity for a sub-contractor's violation of the anti-discrimination laws specified in § 1. The supplier shall also ensure that the contracting entity can upon request be informed of the sub-contractor's measures, plans etc. in accordance with §2.

Discuss

Why should sub-contractors be included?

The Glass House clause §§ 1-4

§ 4 As it is of very substantial importance to the contracting entity that its suppliers live up to basic democratic values, a violation of the duties in §§ 1-3 shall constitute a significant breach of the contract. The contracting entity therefore has the right to cancel the contract if the supplier or a sub-contractor violates the conditions in §§ 1-3. However, the contract will not be cancelled if the supplier immediately remedies the situation or undertakes other measures with the purpose of achieving compliance with the laws specified in § 1, or if the violation is considered to be insignificant.

Discuss

Why is this § needed?

Should the § specify that a judgment re discrimination has been issued?

Must a contract be cancelled if discrimination has occurred?

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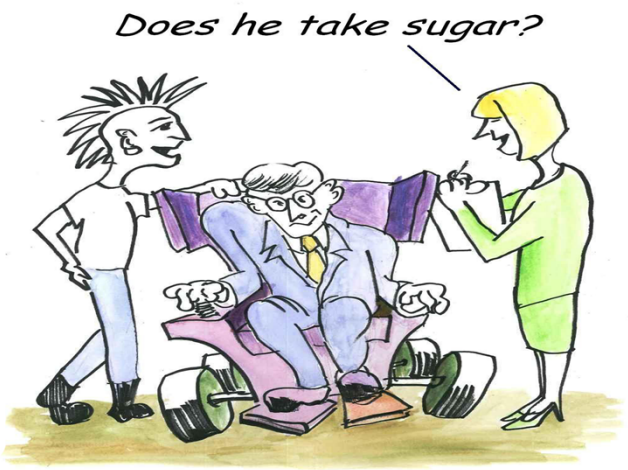

"No. But he does have a degree in disability law and he'll sue your ass if you don't speak to him directly!"

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Casting Stones in the Blue and Yellow Glass House

Equality measures for Sweden! – Ideas for Europe?

NOT FOR PUBLICATION. Yet!

This is basically a translation into English of an excerpt from the Swedish government inquiry – THE BLUE AND YELLOW HOUSE: STRUCTURAL DISCRIMINATION IN SWEDEN (SOU 2005:56) of the section proposing the use of anti-discrimination clauses in public contracts in chapter 13.

Paul Lappalainen, Head of the Inquiry and Head of equality promotion with the Swedish Equality Ombudsman

13.7 Measures for the DO

13.7.1 Situation testing as a method of proof

13.7.2 Critical analyses of recruitment processes

13.7.3 Code of conduct for working life

13.8 Area specific proposals

13.8.1 Structural discrimination and the police

13.8.2 Strengthened political rights

13.8.3 Anti-discrimination perspective in education

13.8.4 Measures related to the media

13.8.5 Research on structural discrimination

13.8.6 Knowledge bank for health care in a multicultural society

13.9 Inquiries into certain laws

13.9.1 Overview of the Alcohol Act in order to clarify the right of local governments to include anti-discrimination conditions in alcohol serving permits

13.9.2 Overview of the Local Government Act in order to specify a duty to promote equality

13.10 Recommendations to local politicians

CHAPTER 13 Introduction

Several years ago I headed a government inquiry into structural discrimination/institutional racism in Sweden. This work resulted in the inquiry entitled *The Blue and Yellow Glass House: Structural Discrimination in Sweden* (*Det blågula glashuset: strukturell diskriminering i Sverige* SOU 2005:56). The most effective measures have a focus on discrimination, rather than on the ground. This is in particular the starting point for the proposal for the use of an anti-discrimination clause in public contracts. Such clauses need to cover all grounds – including disability. At the same time it is also important to ensure that accessibility issues are covered by the contract itself. However, this was not the focus of the clause proposed in the Glass House.

Up until the time that the Glass House was published, many who worked in the fields of immigration, integration, minority rights, ethnic diversity and non-discrimination etc. often seemed to lack ideas as to what could be done to promote equality and counteract discrimination. At best they talked about strengthening the laws against discrimination – while at the same time being sceptical in regard to law as a vehicle for social change. At worst there was an overly simplified focus on changing attitudes through education – particularly about other cultures, religions and peoples.

There seemed to be little research on the idea that social change that involves the promotion of equality, both in theory and in fact, takes place in a context where there is an interplay between research, civil society mobilization and law and public policy.

While not having the time to carry out such research, I was nevertheless able to develop and recommend a number of measures that could be carried out in Sweden, both at a national and local and regional level. These measures and the thrust behind them were based on an analysis of the measures that exist in various countries that are assumed to be effective.

In response to the policymakers who seemed to have little idea as to what could be done to counteract racism and discrimination, I ended up recommending more than 40 measures. Beyond establishing that there are

a wealth of measures that can be undertaken, I hoped to indicate to the groups that are the targets of racism and discrimination that there are measures that they can unite behind. This in itself, mobilisation of the targets of discrimination, is a factor that I have assumed is necessary for ensuring that policymakers not only adopt measures but actually implement them.

Since I finished the inquiry, I have participated in conferences and seminars not only in Sweden but throughout Europe. The focus has usually been on an analysis of change, the need to bring pressure on policymakers, the need to mobilize the targets and the need to focus on the introduction and implementation of concrete measures. The positive response in European contexts has led me to conclude that the analyses that apply to Sweden, as well as the measures proposed, to a large extent can inspire similar analyses and measures throughout Europe.

The proposal for a government regulation requiring anti-discrimination clauses in public contracts

Structural discrimination due to ethnic or religious belonging is primarily a question of the ethnic power relations that exist in a society. **This applies to disability discrimination as well.** These power relations are based on the society's handling of and ability to deal with the "others" – in this case the ethnic and religious minorities. Who is affected and how varies to a certain extent from country to country, but the main tendencies are the same.

Based on the knowledge, reports and experiences that I have gathered, both in Sweden and in other countries, I have concluded that there are three important factors that contribute to the development of effective measures against structural discrimination.

These factors are

- Clear political leadership in the work against discrimination
- A strong civil society movement against racism and discrimination **OR EG DISABILITY DISCRIMINATION**
- Effective legislation and other complementary measures for equality and against discrimination.

These conclusions are mainly based on an analysis of the work with gender equality policy in Sweden, and the work on equality concerning ethnicity, gender and disability in Great Britain, Canada and the US.

I conclude that these three factors clarify the existing policy weaknesses in Sweden and thus the measures that need to be implemented. It is important to note that these measures are not independent of each other but that they affect, strengthen and combine with each other. There is no single magic solution involved in counteracting structural discrimination. At various levels within society, both greater and smaller measures are needed, both in terms of policy and operational methods.

There have been various questions about the dividing line between measures designed to counteract discrimination at the individual level and those that are aimed at counteracting discrimination at the institutional/structural level. These questions are based on the belief that there is a clear borderline between the individual and structural levels. However, in my view discriminatory actions are carried out by individuals within the framework of a structure, which in turn recreate the structure. It could be said that there is an interplay between individuals and structures. I see this interplay as a flow where individuals form structures, and structures form individuals.

I have also concluded that even if there are differences between various power structures (for example, the gender power structure and the ethnic power structure) and various discrimination grounds, there are also similarities and clear indications that the power structures intersect and interact and depend on the existence of the different structures. In line with this it can be noted that the development of effective measures has often been related to a more comprehensive view of discrimination. This comprehensive view has led to a situation where the targets of various types of discrimination have been able to contribute to the formulation of better legal tools as well as the placement of demands in regard to those

with the power to discriminate. It is these countries (Canada and the US) that have cleared the path for the development of a shift in the burden of proof, higher demands for damages, equality plans, affirmative action and anti-discrimination clauses in public contracts.

One of my conclusions is that the inability to see the common interest between grounds has been one of the major factors in the weak development of legislation and other tools for counteracting discrimination in Sweden.

This is why, for example, it is only recently that a more serious connection between equality and public contracts has developed in Sweden. At least during the 1980s and early 1990s, gender equality was the only focus, which meant that there was never enough political pressure to put it on the agenda. A major change has occurred once anti-discrimination clauses started to be presented that covered all grounds of discrimination covered by the law. While their effectiveness can be questioned, it is today much harder for policymakers to openly reject the connection between equality and public contracts.

Clear political leadership

The preceding immigrant policy and the current integration policy have failed, in my view, in regard to placing demands concerning equality and equal rights and opportunities, respectively, in a central role. During the period covered by the earlier immigrant policy, the introduction of laws against ethnic discrimination in working life was rejected due to the reasoning that ethnic discrimination did not occur within Swedish workplaces. The denial of discrimination has been particularly strong. Sweden has fought against racism and discrimination – in other countries.

The reason that politicians long denied the relevance of ethnic discrimination in Sweden and refrained from putting discrimination into focus, is the connection to power. If discrimination and the realization of equal rights are put into focus, it is necessary that those who lead this process are willing to challenge those with the power to discriminate and the power to counteract discrimination. This in turn would mean that the actions of employers, unions, civil servants and politicians are put into focus. The same reasoning applies to disability discrimination as well.

Empowerment

In countries that have developed a more effective work against structural discrimination, there are not only stronger institutional actors but also stronger actors in civil society that represent the targets of discrimination. They have played an important role both in placing demands for change, helping to formulate the measures adopted, and contributing to implementation and follow-up of those measures.

Effective measures carry cost risks
Earl Warren, Chief Justice of the US Supreme Court (1953–1969) made the following comment on the relation between attitudes and behaviour:

There was ‘an invidious view which is now held by many: you can’t wipe out racial discrimination by law, only through changing the hearts and minds of men’. Warren disdained that as ‘false credo. True, prejudice cannot be wiped out, but infliction of it upon others can’. (Cray, 1997:107)

The idea expressed by Warren is that effective laws and other measures can lead to a change in behaviour, in other words many individuals can be convinced to refrain from applying her/his open or underlying prejudices – if there sufficiently high costs or cost risks related to the behaviour. This is the lesson that can be learned from the US since the 1960s. Behaviour has changed as cost risks have become more apparent – whether in the form of damages or anti-discrimination clauses in public contracts.

Proactive measures

Anti-discrimination clauses in national public contracts

I propose: that the government adopt a regulation that specifies that all government contracts shall contain an anti-discrimination clause which specifies that the government authority retains the right to cancel a contract in cases where the contractor fails to follow the laws against discrimination.

The laws in the US against discrimination in combination with the clauses in federal contracts for promoting equality (contract compliance/affirmative action) have had measurable positive effects

concerning the improvement of the position of white women and ethnic minority men and women on the labour market. (Leonard J. *The Impact of Affirmative Action on Employment*, Working Paper No. 1310, National Bureau of Economic Research, March 1984, abstract and p 14. Leonard J. (1985) *The effectiveness of equal employment law and affirmative action regulation*. Working Paper No. 1745, National Bureau of Economic Research. Leonard J. (1994) "Use of Enforcement Techniques in Eliminating Glass Ceiling Barriers", Report to the Glass Ceiling Commission.) This also seems to apply to Canada. In England, similar clauses have had positive effects. Given the enormous economic resources that are at issue in regard to public contracts in any country, it is highly probable that businesses are sensitive to the demands that are placed in public contracts. This will be particularly true if it is clear that the clauses have not been introduced mainly for their symbolic value.

This can be compared to the interest in following the requirements of e.g. the Swedish Law on gender equality on the labour market. The relevance of workplace gender equality plans to gender equality can be questioned against the background of a 1999 Sweden Statistics report *Jämställdhetsplanernas betydelse för jämställdheten*). The law requires employers with 10 or more employees to produce an annual gender equality plan. In 1999, according to Sweden Statistics only 22% of the covered private employers had a gender equality plan. The private employers had the following distribution in regard to the number of employees: 10-49 employees 17%, 50-199 42%, 200 or more 71%. The equivalent figure for public sector employers was 73%. It is easy to draw the conclusion that employers who want to participate in the public procurement process will become very sensitive to the requirements of the law once an anti-discrimination clause is put into public contracts. The number of plans will definitely increase. However, it should be kept in mind that the existence of a plan does not necessarily lead to anything.

The value of Swedish national public contracts amounts to more than 100 billion Swedish Crowns annually (about 10 billion Euros). Even if the clauses only lead to more effective efforts against discrimination among a portion of the companies involved, the overall effects should be substantial in regard to those who today are the targets of discrimination.
The government needs to introduce an anti-discrimination clause into all public contracts. The best means for doing this is through a government regulation that specifies the minimum contents of such a clause that all government authorities are required to use. The issue has been under

discussion for many years. As a rule government authorities have either done nothing or have introduced clauses that at best have a minimal symbolic value. Leadership is required. Such a regulation would also put all businesses on notice concerning the contents and meaning of such a clause. Instead of proposing the more extensive demands placed in Canadian and US public contracts my proposal is the minimum that should be accepted. However, its effects should be evaluated in a few years to determine if more extensive demands are needed. I have formulated the following regulation.

All government authorities shall include the following anti-discrimination clause in all public contracts:

§ 1. The supplier shall throughout the contract period, in his business activities in Sweden, follow the applicable anti-discrimination laws. The laws currently referred to are Article 141 of the EU Treaty, § 16:9 of the Swedish Penal Code, and the Discrimination Act (2008:567).

§ 2. The supplier, during the contract period, has a duty, at the request of the contracting entity, to provide a written report concerning the measures, equality plans etc., that have been undertaken in accordance with the duties specified in § 1. The report shall be submitted to the contracting entity within one week after a request is made unless some other agreement has been reached in the individual case.

§ 3. In his or her contracts with sub-contractors, the supplier shall apply the same duty to them as is specified in paragraph 1 above. The supplier shall be responsible to the contracting entity for a sub-contractor's violation of the anti-discrimination laws specified in paragraph 1. The supplier shall also ensure that the contracting entity can upon request be informed of the sub-contractor's measures, plans etc. in accordance with paragraph 2.

§ 4. As it is of very substantial importance to the contracting entity that its suppliers live up to basic democratic values, a violation of the duties in §§ 1-3 shall constitute a significant breach of the contract. The contracting entity therefore has the right to cancel the contract if the supplier or a sub-contractor violates the conditions in paragraphs 1-3. However, the contract will not be cancelled if the supplier

immediately remedies the situation or undertakes other measures with the purpose of achieving compliance with the laws specified in paragraph 1, or if the violation is considered to be insignificant.

The model for this regulation is the clause that was adopted by the Stockholm City Council 24 January 2005.

The Stockholm Executive Council declaration 2005:7 is entitled: The use of Stockholm's public contracts as a means to counteract discrimination – proposal for an anti-discrimination clause. The Stockholm clause is expected to send a clear signal to contractors that compliance with Swedish anti-discrimination law is required. The undertaking of the contractor is to apply to all of the contractor's business activities and all contracts regardless of if they involve goods, services or some combination. The clause also applies to sub-contractors. The clause also establishes the city's right to follow up the contractor's ongoing compliance with the laws. Finally, the clause specifies that the city retains the right to cancel the contract in cases where the contractor violates the clause. At the same time the city emphasizes that its main purpose is not cancellation of contracts but the creation of an incentive to comply with these laws in a manner that underlines the importance of the issue. For example, in the US, even though the clauses seem to have led to substantial effects on improved labour market opportunities for white women and ethnic minority men and women, very few contracts have actually been cancelled. The same applies to Canada.

The government needs to issue a regulation that sends the same clear signal in regard to all national contracts that has been sent by the Stockholm city government to its various divisions as well as to the contractors that want to do business with Stockholm.

The proposal here is the result of a long policy process in which various ideas have been the subject of discussion and analysis (Lappalainen P. Integrationsverket. (2000) *Ingen diskriminering med skattemedel! Avtalsklauser mot diskriminering vid offentlig upphandling – No discrimination with public funds! Anti-discrimination clauses in public contracts*).

The issue has been the subject of two other government inquiries. The introduction of such clauses was already proposed in *Räkna med mångfald!* (SOU 1997:174) as a complementary measure to a new law

against ethnic discrimination in working life. This inquiry pointed out that it was possible to specify in a contractual clause that a supplier/contractor guarantees that they will carry out active measures to promote ethnic diversity as specified by law as well as undertaking to follow the existing anti-discrimination laws in regard to employees and job applicants as well as customers. Additional investigation was recommended so that a more unified proposal could be developed. It was assumed that it would be better for contractors if there was a single basic clause used in all national public contracts rather than be faced with a multitude of clauses that vary depending on which government authority the contractor is dealing with.
Later in *Mera värde för pengarna* (*More value for the money* SOU 2001:31 s. 21) the public procurement committee pointed out, among other things, that:

"There is no doubt that social clauses, for example in the form of anti-discrimination clauses, can be included in public procurement contracts. One condition is that they have been included in the bidding process (förfrågningsunderlaget) and that the clauses are not themselves discriminatory. The limitation that exists is that such clauses cannot be "exported", i.e. they cannot be applied to business activities that are outside the country in which the contracting unit is located."

The committee pointed out that an anti-discrimination perspective could even be brought into other parts of the contracting process. However, I have concluded that these other parts of the contracting process are not currently suitable for a uniform analysis or reform. At the same time it would naturally be positive if different contracting units introduce an anti-discrimination perspective into, for example, the specifications related to the focus of the contract. These types of issues can be more contract specific. Ensuring accessibility for the disabled is important in regard to building contracts while bilingual services can be important in regard to health services that are contracted out to the private sector. It is also a well-known fact that, for example, a number of the breakthroughs concerning the development of computer programs that are accessible in regard to various disabilities were the result of the demands placed in a huge public procurement contract in the US.

To summarize, it should be enough for now if the government introduces a uniform clause in all national public contracts. Other steps beyond this should be developed by the authorities themselves given due regard to the specifics of their tasks and the particular contract.

As a result of the inquiry above, the government proposed an amendment of the law on public procurement (LOU) so that the law itself states that contracting units can include clauses of this type in their contracts. The amendment, which clarifies but does not change current law, had no equivalent in any directive (Prop. 2001/02:142 s. 44). The bill declared that ”the government finds it to be of particular importance that the contracting units exercise this right to introduce anti-discrimination clauses into their public contracts.” (Ibid.)

In an interpretive communication (15 October 2001), the Commission of the European Communities clarified its view concerning the possibilities for integrating social considerations into public procurement (KOM [2001] 566). In the summary the commission states that:
“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.” (Interpretative Communication of the Commission COM(2001) 566 final, p 3)

This conclusion is a continuation and clarification of the line of thinking that the commission has been developing for many years. Already prior to the presentation of the public procurement committee’s findings, the government had given the Swedish Public Procurement Board (NOU) the task (2002-01-17) of developing examples of anti-discrimination clauses that can be used in public contracts. The NOU was also given the additional task (2002-03-27) of investigating the consequences for small businesses of the use of such clauses. (NOU 2002:1)

The NOU presented its report and proposed clause on 31 May 2002 (NOU 2002).

The NOU:s view of its own proposed clause
“According to the government, examples of clauses should be produced that are in compliance with Swedish public procurement law and the requirements of EC law. However, the NOU concluded that there doubts

concerning the interpretation of EC law and the legal basis for the use of e.g. anti-discrimination clauses" (NOU 2002:29).
The NOU pointed out its doubts concerning the commission's interpretation of the possibilities for integrating social considerations into public procurement. This was in particular in regard to the EC-court's Beentjes decision (fn 37 Case 31/87, Gebroeders Beentjes BV v. the Netherlands) and the French school case (fn 38 Case C-225/98, Commission v. France).

In other words, the government's proposal for an amendment concerning social clauses is based on the commission's interpretive communication concerning the possibilities for integrating social considerations into public procurement (KOM [2001] 566). Furthermore, the NOU asserts that the commission has wrongly interpreted the EC court's case law. There is therefore a risk, according to the NOU, that interpretations put forth by the Swedish government as well as the commission will not last. "This means in turn that the NOU:s proposed clause currently is based on an insecure legal basis". (NOU 2002:29)

EU:s public procurement directives
Today there should no longer be any doubts about the possibility of using an anti-discrimination clause within the framework of EU law. According to article 26 in the new public procurement directive: (fn 38 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). There is an equivalent article (article 38) in 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)).

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

The ombudsmen against discrimination

The opinions of the ombudsmen in regard to the problems with the NOU proposal for anti-discrimination clause were summarized in a report sent on 2002-07-04 from the Ombudsman against discrimination due to sexual orientation (HomO) to the Finance Ministry. Among other things, the report points out that the NOU "failed to take into account the views put forth by HomO and the other ombudsmen in earlier coordination meetings with the NOU". The ombudsmen pointed out that that the NOU clause included a number of limitations that were unnecessary from a legal point of view. These limitations would mean that the clause would at best have a symbolic value. The ombudsmen's criticism led to the development of a more extensive clause that the ombudsmen and the Swedish Integration Authority agreed would be used in their public contracts. (fn 39 Presented at the Conference on Anti-discrimination clauses in public contracts at the Ombudsman against ethnic discrimination (DO), 6 May 2003.) Their proposal is examined later in this text.

Their clause clearly specifies the right to cancel the contract in cases where discrimination has occurred, that the clause covers the supplier's entire business and is to apply to sub-contractors. Furthermore, all of the anti-discrimination laws applicable in Sweden are included within the reach of the clause.

The inquiry's conclusions

The clause used by the city of Stockholm represents a reasonable balance of interests. It has mainly been influenced by the ombudsmen's clause while at the same time including the NOU:s requirement of a clear right to follow up the results related to the clause. The clause which I propose is more than merely a symbolic act. It should thus have the expected preventive effects. It should lead to a greater interest on behalf of companies in Sweden's laws against discrimination. This in turn should lead to an improved position on the labour market for those who today are disregarded due to irrelevant regard being given to such factors as sex, ethnicity, religion, disability and sexual orientation. (Even age in the future.) The clause should also contribute to an improvement in the quality of public contracts as the basic requirement of the anti-discrimination laws is that employers shall not disregard the most qualified job-seekers and employees due to irrelevant factors such as sex, ethnicity, religion, disability and sexual orientation.

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Toward the Establishment of Employment Equity Within the European Union and Sweden?

The developing policies related to the use of anti-discrimination clauses in public contracts. An institutional strategy for changing discriminatory behaviour on the labour market[']

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Workshop 3

Arbetsmarknaden och arbetslivet/

Etnisk diskriminering i arbetslivet

[’] The Swedish Integration Board has published a report “Ingen diskriminering med skattemedel!”(No discrimination with tax funds!) and taken the initiative in developing its own policy concerning its public contracts and anti-discrimination clauses. This paper reflects to a large extent the ideas presented in this report. The views expressed in this paper, however, reflect those of the author and do not necessarily reflect the opinions of the Swedish Integration Board.

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The main goal of this paper is twofold. The first goal is to provide a description of the use of contract compliance in different countries in structuring and developing institutional strategies for counteracting ethnic discrimination. The second focus is to provide an analysis of the current policy building and policy implementation that is taking place in Sweden. These factors may be laying the framework for moving in the direction of employment equity as it is being developed in Canada.

Contract compliance means the use of anti-discrimination clauses in public contracts in order, among other things, to complement and ensure compliance with the anti-discrimination laws and norms of the society. Depending on the national setting, the violation of such clauses can lead to various sanctions such as cancellation of the contract, damages or a ban on participation in future contract bidding. Contract compliance as a policy is assumed to discourage discrimination and promote diversity. The idea is to convince the employer to shift his focus and awareness onto his general employment practices and patterns by raising the potential risk related to discrimination (e.g. cancellation of the contract or disqualification from future contracts) through a format (contracts as opposed to only a law) that the employer deals with daily and relates directly to the employer's direct interests (his profits as opposed to the general well-being of society (law)).

This historical and legal background provides a brief insight into the situation in the US, Canada and the UK - the countries that have went the furthest in the development and application of contract compliance. The use of anti-discrimination clauses in the US as well as the development of contract compliance and its use today is examined more closely. Contract compliance in Canada and the UK is also presented. A brief overview of the EU's position follows thereafter as there has been a broadly held, though inaccurate, general assumption that EC law prevents the use of contract compliance. This includes an analysis of the positions taken by the EU, the EC-court and the Commission. Finally the varying developments concerning the ongoing policy processes in Sweden are analysed.

The policy process has come quite far in Sweden, at both the local and the national levels. If contract compliance is actually implemented, Sweden will become the first continental European country to put this policy into practice in the anti-discrimination field. Many policymakers have been asserting that this is a necessary complementary policy tool for promoting diversity and counteracting discrimination.

These policy processes may in the end result in policies that are comparable to the policy of employment equity found in Canada.

The disposition of the paper is the following. The paper begins with a short description of historical and legal situation concerning anti-discrimination clauses in the US. The next sections describe the situations in Canada, the UK and the European Union. I conclude with a description and a short evaluation of the institutional strategies for implementing anti-discrimination clauses in Sweden.

1. USA - Historical and legal background
2. Canada
3. UK
4. EU
5. Sweden

1. Anti-discrimination clauses in USA - historical and legal background.

The federal level

The historical legal origin behind anti-discrimination clauses at the national level in the US can be found in President Roosevelt's 1941 Executive Order concerning the introduction of clauses in all federal defense contracts. In 1941 black workers were routinely discriminated against within the expanding defense industry. Among others black union leaders and the NAACP arranged a meeting with Roosevelt to explain their concerns. One issue discussed was a mass demonstration in Washington to protest discrimination in the defense industry.

It was a sensitive point in history. Hitler was sweeping through Europe and the US was on the edge of entering into the war. The US war industry was already gearing up. Blacks had become an increasingly important part of the labour force needed by the expanding war industry. At the same time Roosevelt felt that obtaining the help of Congress in passing an anti-discrimination law was impossible. A creative political solution was needed. Roosevelt thus signed Executive Order 8802 one week before the demonstration as a means of indicating his position to its leaders. Two years later the President expanded the scope of the order to all federal contracts.

Initially the order basically required a declaration of an intent to not discriminate from the contractor if they wanted to participate in the federal contracting process. But no advice was given on the prevention of discrimination and sanctions were basically non-existent.

Eventually the clause was strengthened in various ways so that under President Kennedy it included a possibility to cancel the contract and a requirement that affirmative action be used by the contractor to ensure non-discrimination. This meant that the contractor not only was to prevent discrimination but also to undertake affirmative action to promote equal employment opportunities. In concrete terms non-compliant contractors could have their contracts cancelled and be banned from participating in future federal contracts.

These clauses were strengthened when race and sex discrimination were banned through adoption of the 1964 Civil Rights Act. Sex discrimination was thus incorporated into the clauses.

Eventually requirements were placed concerning the adoption of plans containing goals and time tables for achieving the goal of equal employment opportunities for those involved. Finally the Executive Order was expanded to cover the disabled as well.

Various researchers have come to the conclusion that the US federal Contract Compliance Program has had a substantial effect in promoting equal employment opportunities for women and ethnic minorities. For example, one study of contract compliance during 1974-80 showed that there was a 20 % increase in employment of minorities among federal contractors compared to a 12 % increase among non-federal contractors. For women the increase was 15 % compared with 2.2 %. There were even more dramatic differences found in the employment of "professionals" such as lawyers and doctors (a 57 % increase compared with 12 %). The most extensive research has probably been carried out by economist Jonathan Leonard. He has compared federal contractors and non-federal contractors over time and included controls for such factors as enterprise size, branch of industry, region and professional structure. He concludes that affirmative action in contract compliance terms has effective and that the policy has been decisive in convincing companies to increase the numbers of women and minorities they employ.

Similar contract compliance developments have also taken place at the state and local levels. It is even possible to see that the local/state level has often provided new ideas for the federal level.

According to Executive Order 11246 all companies that are parties to a contract worth more than 10,000 dollars per year for goods or services are considered to have agreed to not discriminate on the basis of race, skin color, gender, religion or national origin. In addition all contractors and sub-contractors with contracts worth more than 50,000 dollars per year and more than 50 employees are to develop written affirmative action programs for use by the company. A section of the Labor Department, the Office of Federal Contract Compliance Programs (OFCCP), is responsible for the collection and following up of these affirmative action programs. The OFCCP as a rule tries to reach negotiated settlements in regard to violations of the undertaking. If this does not work, the anti-discrimination clauses contain the possibility of cancelling the contract and disqualifying the contractor from future contracts until he is found to be in compliance with the requirements of Executive Order 11246. In practice contractors have almost always been willing to reach settlements with the OFCCP rather than risk the sanctions that can be applied. Additional sanctions are also available in accordance with Title VII of the Civil Rights Act. The government can also sue the contractor for damages for breach of contract.

This area of contract compliance programs is one of the areas concerning equal employment opportunities at the federal level where "affirmative action" is an issue. In addition a court can order a company that has violated Title VII, i.e. has discriminated, to develop and implement an affirmative action program to come to terms with its discriminatory employment policies. It should be note however that no federal law places

a general requirement on companies to implement affirmative action programs or anything similar.)

Examples of affirmative action measures:
• A declaration in want ads that the company is an equal opportunity employer.
• The placement of want ads in newspapers and other media that reach minorities.
• General training programs or programs directed toward specific target groups.
• The removal of tests that have a built-in bias against certain groups, i.e. tests that are not relevant to the work involved.
• The setting of various goals and time plans for achieving a diverse workforce.

It is this last point that is considered to be controversial. Some assert that this means that quotas are required. In spite of the various misconceptions in this regard it should be noted that these goals are not to be achieved through the use of quotas. According to the OFCCP quotas are forbidden by the Executive Order and would violate the order. A company only has to undertake "good faith" efforts to achieve the goals. Most companies should be able to demonstrate their good faith efforts without any greater problems.

State and local level
In a similar as in other federal states (Canada and Australia) almost all states have their own anti-discrimination laws. These laws basically mirror the federal law but can often contain for example additional grounds for discrimination. There are often similar state level government authorities, usually with a name like the state commission for human rights. In a similar way many states have contract compliance programs for state level contracts. According to Wisconsin's Contract Compliance Law state contractors shall in principle undertake to carry out an equal opportunities program in its personnel policies. All contractors with at least 25 employees and contracts worth more than 25,000 dollars must turn in an affirmative action program within 15 days after they agree to the contract. Similar requirements are placed on sub-contractors. The goal is a balance workforce which means that the program should take the underrepresentation of women, minorities and the disabled into account.

At the local or municipal level various anti-discrimination rules and policies have been adopted by many cities and counties. They often have a local control authority. San Francisco local rules require all city departments to place demand in their contracts that the contractor agrees to not discriminate in its employment policies in any of its activities with the boundaries of the US. The rules referred to in such contracts cover discrimination on such grounds as race, skin color, religion, disability or HIV-status and sexual orientation. This applies, for example, both when the ground actually exists (the person in question is disabled) as well as when the contractor has merely assumed that the ground exists (he is wrong in the assumption that the disability exists). For monitoring such contracts San Francisco has its own Human Rights Commission. The sanctions available include cancellation of the contract and disqualification from participation in future contracts. It should be noted that even these local requirements function in relation to contractors within the framework of normal contracts law. The city is able to place the

quality requirements and contract clauses that it chooses as an individual party to a contract. This means that the city is not bound to use only the general discrimination grounds defined in state or federal law. Sexual orientation was thus introduced as a discrimination ground in San Francisco long before it was adopted at the state level.

2. Other national implementation strategies

2.1 Canada

The federal level

Article 15 of Canada's Charter of Rights and Freedoms states the following:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Article 15 (2) underlines the principle that affirmative action programs for the benefit of disadvantaged individuals or groups are allowed.

The Canadian Human Rights Act - CHRA - was adopted in 1977 and last amended in 1996. The purpose of the law (§ 2): "The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted."

CHRA is a federal law that protects all residents of Canada against discrimination by or within the different federal authorities, the postal service, banks, airlines and other communications companies, and other federally regulated private industries. The ban on discrimination covers actions within industry and commerce (goods and services), within the rental and housing markets and working life (including employment advertisements). The law also indicates that unions are not allowed to discriminate against their members. Harassment is also banned.

Canada has also adopted the Employment Equity Act - EEA. The latest version entered into effect in 1996. All employers, both private and public, that are covered by federal legislation and have more than 100 employees are covered by the EEA. About 900,000 employees or 8 % of the Canadian workforce are covered by the law. The Canadian Human Rights Commission is to monitor the law. The purpose of the EEA (§ 2) is to achieve equality in the "workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences."

As complement to the EEA, a Federal Contractors Program has been developed. The program has the same purpose as the EEA, follows the same guidelines and relates to contractors that participate in federal public contracts. All organizations with more than 100 employees that want to participate in a federal contract worth at least 200,000 Canadian dollars must agree to follow the EEA guidelines. They shall also declare that the undertaking is part of their bid or contract offer. Once a contract has been granted the fulfilment of this undertaking is to be monitored. If it turns out that the contractor has failed to fulfil his undertaking, the result can be various sanctions such as disqualification from future contracts.

The states

In the same way as in the US there are laws and supervisory authorities at the state (province) level. Quite often it is the state laws that have provided guidance concerning new trends and developments for the federal level. Ontario's Human Rights Code contained a ban on sexual orientation discrimination long before it was adopted at the national level. At the same time it should be pointed out that the state laws to a large extent reflect the national law. They cover working life, housing, merchants (goods and services) and union membership. The same grounds are covered but they more clearly cover citizenship as well.

One interesting difference compared to the national law could be found a few years ago in Ontario where the law specified that one condition for every (state or provincial) public contract was that the contractor agreed to not violate the ban on discrimination in working life. The same also applied to every provincial subsidy, donation, loan or guarantee. The law also declared that violations that amounted to a breach of the condition, are sufficient ground for cancellation or voidance of the contract, subsidy, donation, loan or guarantee. Such violations also Ontario the right to refuse to enter into new agreements with the party involved. To determine which sanctions should be applied a Board of Inquiry can be appointed by the Ontario Human Rights Commission if a determination has been made that an inquiry is called for and that it has not been possible to reach a settlement. It is important to note that this law was repealed by a new government that later came to power in Ontario.

2.2 The United Kingdom

The supervisory authority in the UK for the Race Relations Act (RRA) is the Commission for Racial Equality (CRE). The CRE's main task is to counteract discrimination and promote equal opportunities, and follow up the manner in which the law is functioning and recommend changes when needed. In this connection it can also be noted that the CRE has participated in the development of so-called codes of practice for different braches of working life. These are to help employers and others to understand the law. Recommendations are provided concerning various ways to prevent discrimination and promote ethnic equality in working life. While these codes are not legally binding an industrial tribunal can take them into account in determining if a company has done what it should have in order to avoid discrimination. These codes also can play a role in the work of the local authorities with contract compliance.

Background to contract compliance in the UK

According to the original § 71 RRA local authorities have been under a duty to ensure that they carry out their functions with due regard to the need to elimination illegal racial discrimination and promote equal opportunities and good relations between people of different races. The law has been strengthened recently in a number of respects.

In addition to their support to Racial Equality Councils certain larger local authorities fulfil this duty through supporting a local contract compliance policy. In other words certain minimum requirements are placed on suppliers of goods and services (contractors) concerning their employment policies and the establishment of equal opportunities.

During the 1980s several local authorities used "contract compliance" as a qualification ground for public contracts. Many of these authorities had special contract compliance units. Various studies have shown that the adoption of equal opportunities policies increased markedly among the contractors involved. The CRE is convinced of the importance and effectiveness of contract compliance as a complement to the law as well as the various codes of practice. Contract compliance programs provide companies with a clear and direct economic encouragement to counteract discrimination.

Since 1969 all national contracts have included a clause that requires contractors to undertake reasonable measures to ensure that their employees and sub-contractors follow the rules in the Race Relations Act. However, no government has yet established system for following up compliance with the clause.

On the other hand, at the local level contract compliance has been handled in more than a symbolic manner. In 1983 the Greater London Council (GLC) introduced the use of contract compliance at the local government level in the UK. GLC's basically required in effect that the contractors undertook to follow the anti-discrimination laws in effect, i.e. those concerning race and gender. In 1988 the local right to utilize such clauses was

limited to the use of such clauses in relation to race discrimination and only to a limited extent. The Local
Government Act 1988, Section 18, (which limited the powers of local governments) together with the EC public procurement directives forms the legal framework for the CRE's views concerning the local contract compliance initiatives in this field.

The CRE:s view of the local initiatives

The background according to the Commission for Racial Equality (CRE) to the need for the local work with contract compliance is that race discrimination is common in the UK even though it is a multiethnic society. Unemployment is much higher among ethnic minorities than among the white majority. Among those with higher educations there is a much higher unemployment level among minorities than among whites with the same or even a somewhat lower level of education. The CRE also assumes that there is a very high rate of underreporting concerning ethnic discrimination. All this has led the CRE to the conclusion that local authorities can help to improve this situation through encouraging contractors to implement racial equality policies.

According to the Commission for Racial Equality (CRE) there are several bases for the use of contract clauses concerning equal employment opportunities

1 There is a legal duty for the local authorities to counteract ethnic discrimination and promote ethnic diversity (Race Relations Act, § 71).
2 Contract requirements concerning equal employment opportunities are effective. Various studies in the US and England have shown that these types of programs increase the employment opportunities of persons from groups that have been subjected to discrimination.
3 The applicable legislation gives local authorities the right to act. In spite of the limits in the law local governments have a right to promote equal employment opportunities policies through public contracts. Here the UK Local Government Act sets greater limits than for example the EC-directives.
4 The promotion of fairness and equal opportunities is a rational use of the taxpayer's money. A great deal of tax money goes to the voluntary and private sectors. These funds are paid in from all parts of society, men and women, disabled and non-disabled and people from all ethnic groups. Thus the local authorities are seen to have a moral (democratic) duty to ensure that public funds do not get paid to contractors or activities that directly or indirectly discriminate against any ethnic group.
5 This is also a rational use of the taxpayer's money with regard to quality and value for money. Presumptive contractors are naturally analyzed on the basis of various qualitative factors. And equal opportunities policies have become more and more recognized as being a part of good management practice, and have been pointed out as such by employer's organizations, professional institutions and the central government. Such policies promote employer recruitment of the most suitable personnel, i.e. on the basis of

competence and without regard to irrelevant factors such as ethnic background. This should lead to better quality production during the time of the contract.

These factors are the basis for the local work with contract compliance in the UK. As far as the CRE is concerned the legitimacy (democratic) and quality arguments are the overriding issues that need to be looked, as well as the fact that contract compliance combined with effective anti-discrimination achieves changes in behavior.

The Commission for Racial Equality thus recommends the use of the following points in contracts:

1 The contractor, and his subcontractors, shall adopt a policy for fulfilling his legal duties in accordance with the RRA, and thus agree to not discriminate.

2 The contractor, and his subcontractors, shall as a minimum act in accordance with the authority's written criteria and the CRE's Code of Practice in employment, which provides advice steps that can be taken to encourage underrepresented minorities to seek employment.

3 In those cases where it can be established through a court proceeding, an industrial tribunal or a CRE investigation that ethnic discrimination has taken place, the contractor shall inform the authority about this and undertake the measures necessary to prevent a repetition.

4 The contractor shall, upon request, inform the authority of the details related to (3).

5 The contractor shall provide such information to the authority that reasonably needs in order to be able to examine the contractor's fulfilment of 1-4 above, including requests for instructions, employment ads and other information and details about the monitoring of job seekers as well as the workforce currently employed.

The CRE functions as an advisor to the local authorities that work with contract compliance.

3. New directions within the European Union

Article 2 of the EC-treaty indicates that the community has the tasks, among other things, of promoting a high level of employment and social protection, free movement for workers, equal opportunities for men and women, improved working conditions and the social integration of the disabled and other less favored categories. The Commission has issued a green paper on public procurement within the EU. This paper examines article 2 together with the public procurement directives. Other important documents related to the EU and the relationship between social issues and public procurement are the Commission Communication of March 1998 and the Court's case law, particularly the Beentjes case.

The Green Paper on Public Procurement

According to the Green Paper procurement entities "may be called upon to implement various aspects of social policy when awarding their contracts, as public procurement is a

tool that can be used to influence significantly the behaviour of economic operators."

It is pointed out that the directives provide various possibilities for taking social issues into account. It is possible for example to exclude or disqualify contractors where they have been convicted of an "offence concerning their professional conduct or have been found guilty of grave professional misconduct. These rules clearly also apply where the offence or misconduct involves an infringement of legislation designed to promote social objectives." This clearly means that certain social objectives, such as non-discrimination, can be pursued to some extent in contract award procedures.

Another possibility mentioned is the possibility of placing conditions of a social character during the time the contract is being performed. The examples mentioned relate to obligations aimed at the "employment of women or the protection of certain disadvantaged groups." It is specified however that such conditions are not allowed if they result in discrimination against tenderers from other Member States and that transparency concerning such conditions must be ensured by mentioning the conditions in the contract notices or contract documents.

The commission does point out that in its view the Directives do not allow social considerations to be taken into account "when it comes to checking the suitability of candidates or tenderers on the basis of the selection criteria, which relate to their financial and economic standing or their technical capability, nor when it comes to awarding contracts on the basis of the award criteria, which must relate to the economic qualities required of the supplies, works or services covered by the contract." (This conclusion may be in conflict with the analysis made by the Court in a recent decision.).

The Beentjes case

The Commission's position in the Green Paper was based on among other things the Court's case law. In the Beentjes case (ECJ 31/87) a contractor was required to employ a number of long-term unemployed. The case involved the application of Council directive 71/305. The Court stated that placing such a requirement in a contract does not in itself violate the directive. However, the requirement cannot directly or indirectly discriminate against tenderers or applicants from other Member States. Furthermore, transparency is required.

Commission Communication: Public Procurement In The European Union

In addition to the Green Paper the Commission has issued a communication to clarify some aspects of public procurement policy in the EU (11 mars 1998). The communication underlines the importance of social policy and points out that the Amsterdam Treaty lays down as a priority "the elimination of inequality and the promotion of equality between men and women in all the policies and activities of the European Union and requires it to combat every type of discrimination".

The Commission repeats here the idea that social objectives can be taken into account in purchasing through the exclusion of candidates who violate national social legislation,

including those related to promotion of equal opportunities as well as through requiring compliance with contract conditions that, for example, are aimed at “promoting the employment of women or encouraging the protection of certain disadvantaged groups”.
Again the Commission points out that the limits of Community law must be respected, i.e. transparency and non-discrimination.

The Commission concluded its comments concerning social issues and procurement by stating that the Commission encourages the Member States to use their procurement powers to pursue the social objectives mentioned and indicated that the Commission will act similarly in its own procurement activity.

Concerning EC-law, given the Green Paper, the Communication and Court’s case it is clear that
1. Exclusion of candidates is allowed if they have violated anti-discrimination laws or norms. 2. Contract conditions requiring agreement to not violate anti-discrimination laws are valid, as long as certain formal norms are complied with. The only thing that is unclear is the extent to which a contracting entity can go beyond this type of law-related requirement. The Beentjes case involved a condition that did not relate to any legal requirement at all.

Interpretive Communication of the Commission

On 15 October 2001 the Commission issued its long awaited interpretive communication on the Community law applicable to public procurement. Development of this communication was mentioned in the Commission’s Communication on "Public procurement in the European Union" of 11 March 1998. The aim is to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement.

The most significant conclusion concerning the addition of anti-discrimination clauses to public contracts is that: “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.”

Furthermore it states that:

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

4. Sweden's developing contract compliance strategy

In Sweden the policy process concerning contract compliance has moved quite far. Right now Sweden seems poised to move into a new stage since policymakers on various levels are coming to the conclusion that the formal hinders that have been thought to exist are just not there. This means that politicians are simply going to have to face the question of whether or not a policy of contract compliance should be used in relation to the hundreds of billions of Swedish crowns that are used in public procurement.

Government Enquiries
The issue of anti-discrimination clauses was examined in a Government Enquiry in 1997. This Enquiry recommended their use as a complement to the proposal for a new law against ethnic discrimination that was developed. The Enquiry found that such clauses were within the framework of both EC-law and Swedish law. Their use was recommended to the greatest possible extent in public contracts for goods and services, as long as no legal hinders existed.
The Enquiry did recommend a further examination of the contents of such a clause and the routines that should be established for follow-up purposes.

This later led to a Parliamentary Enquiry which recently completed its findings. In its directive the Enquiry was to analyze the possibilities for a contracting entity to use so-called anti-discrimination clauses in public procurement contracts. The Enquiry clarified, as indicated above in the section on the EU, that "It is clear that social conditions, for example conditions concerning anti-discrimination, can be adopted in the form of added contract conditions (or clauses). A prerequisite is that the condition is presented in the information concerning the procurement and that the condition is not discriminatory."

European Conference Against Racism (Strasbourg, October 2000)
The Swedish government was one of participating States that agreed to the general conclusion that "The European Conference calls upon participating States to ensure that public funds are not awarded to companies or other organisations which are not committed to non-discriminatory policies."

National Action Plan Against Racism

In a national plan against racism submitted to the Parliament on 8 February 2001 the Government gave notice that it going to work in the direction of actually making use of the possibilities regarding the implementation of anti-discrimination clauses in public contracts.

Government Budget September 2001 - Introduction of clauses by 1 July 2002

One result of the government's budget negotiations with the Green Party and the Left Party is a clear indication that the Government intends to introduce anti-discrimination clauses into national public contracts by 1 July 2002.

Local policy processes in Sweden

Various local policy processes have been initiated throughout Sweden at the local level. Local motions supporting the use of anti-discrimination clauses have been submitted in most major urban areas at both the city and county government levels. These initiatives are currently at different stages. The most advanced processes can be found in Stockholm and Malmö.

The main points in the motions submitted use the following lines of reasoning:

• Despite its broad legislation Sweden still has substantial problems with among other things gender and ethnic discrimination. These clauses are a concrete way of complementing the existing legislation.
• They have a "human rights" perspective in that they are directed against all discrimination banned by law and are not related only one interest. The clauses include the idea that there is no reason to discriminate between the different grounds of discrimination and that the right to non-discrimination due to irrelevant factors is a human right.
• It is a way for local politicians to counteract discrimination, with actions as well as words.
• Their use will lead to an effective use of public funds.
• As more and more "public sector" activities are turned over to the private sector it is increasingly important that the public authorities retain certain responsibilities for how that money is used, i.e. it is democratically unacceptable that recipients of public funds are allowed to discriminate against various members of the public, including ethnic minorities.

They generally contain a formulation for a contract clause: the contractor, or sub-contractor who is used by the contractor, agrees to not violate any of the existing anti-discrimination laws. This is complemented with a cancellation clause: since the contracting entity considers discrimination to be a serious breach of contract, the contractor is put on notice that the contracting entity hereby has the right to cancel the contract if the contractor, or his sub-contractor, violates any of the existing anti-discrimination laws.

Stockholm

On 1 October 2002 the conservative majority in the Stockholm City Council agreed in principle to the introduction of anti-discrimination clauses in Stockholm's public contracts. This is a proposal that the opposition parties had long been supporting. The majority at the same time voted against a proposal that included specific wording for such clauses. Thus the specific details are going to be presumably worked out by the city's attorneys. The final specifics are expected to include a clause that will only allow for cancellation of a contract if the contractor has been required to pay damages in accordance with a final court judgment or is convicted of unlawful discrimination in accordance with §16:9 of the Penal Code.

The policy process has been underway since 1996. It will thus be important to follow the development of the details since the issue has been sidetracked a number of times even given majority support on occasion. In any case, since the parliamentary enquiry above clearly indicated that such clauses are legal politicians have had to focus on the political will to accept or reject such clauses.

City Council decision in Malmö
The policy process has come the furthest in Malmö. In the year 2000 a political majority adopted a motion proposing the use of anti-discrimination clauses. It has taken a long time but right now Malmö is in the process of introducing such clauses into their public contracts. The original proposal by the administration focused on race and ethnic discrimination but will presumably be expanded to other discrimination grounds given the Commission's clear statement in its interpretive communication mentioned above.

The National Integration Office
The National Integration Office has formulated a two-part anti-discrimination policy proposal in relation to the Office's own public contracts. The proposal indicates that the Office shall indicate in its contracts that the Office appreciates contractors that have a diverse ethnic workforce and that the contractor shall agree to not discriminate on any ground covered by law.

The National Public Procurement Office (NOU) has commented on the proposal above. In general the NOU's comments on the proposal for a cancellation clause were positive in that such clauses are within the bounds of Swedish and EC-law if they are written properly. This is however explained in extremely careful terms.

On the other hand the NOU was more critical concerning the requirement of a positive view towards ethnic diversity, particularly if this involved any active involvement. Here it was somewhat unclear if the NOU was making an analysis of the legality of the idea or only its suitability. But it should be apparent from the EC-Court's case law and the statements of the Commission above that even such possibilities exist as long as they are formulated in a legally correct manner.

The Parliament (Riksdagen)

In June 2002 the Riksdag basically adopted a government bill (Proposition 2001/02:142) concerning changes in the legislation concerning public procurement. One of the points in the bill was a proposed change in the law that specifies that public procurement contracts can include so-called social conditions to the extent allowed by EC-law, for example, related to compliance with anti-discrimination laws. While an amendment in the law was proposed, the government specified that this was a clarification that such social conditions could be included by government entities dealing with public procurement, but that this amendment "did not result in any change in the applicable legal rules and case law."

The Government Bill also pointed out that, in order to provide guidance regarding the types of contract conditions that can be used, the Government (dnr Fi2002/422) gave the National Public Procurement Board (Nämnden för offentlig upphandling) the task of developing examples of contract conditions for the promotion of equal treatment without regard to gender, race, skin color, national or ethnic origin, religious faith, disability or sexual orientation. The examples are to include contract clauses related to a contractor's undertaking to comply with existing anti-discrimination laws, and the consequences of a failure to comply.
The examples were to be developed in cooperation with the Gender equality ombudsman (JämO), the Ombudsman against ethnic discrimination (DO), the Disability ombudsman (HO) and the Ombudsman against discrimination due to sexual orientation (HOMO). The NOU was also to consult with the local government associations (Svenska Kommunförbundet and Landstingsförbundet) as well as business organisations and the unions.

The Public Procurement Board (Nämnden för offentlig upphandling)
The Board completed its report concerning examples of anti-discrimination clauses prior to the treatment of the public procurement bill in parliament. In general, the Board recommended only the use of an extremely limited anti-discrimination clause. Among other things, subcontractors were excluded from the scope of the clause. Furthermore, concerning recourse, rather than specifically allowing for the possibility of cancellation of a contract if a contractor discriminates or otherwise fails to follow the laws against discrimination, the maximum penalty recommended is a contract fine of about 2000 Swedish Crowns (USD 200 or 200 euros) for failure to properly report the compliance measures undertaken, and a maximum fine of 3 % of the contract amount for ongoing violations of the laws.

Final comments

In counteracting discrimination as a social phenomenon it is worthwhile to keep in mind the distinction that sociologists like R.M. McIver started making during the late 1940s. They taught people to distinguish between discrimination as a form of behaviour and prejudice as an attitude. The distinction was important in that while one could lead to the

other, neither was a prerequisite to the other. There can be a connection between the two, but a prejudiced person does not necessarily discriminate and discrimination is not always the result of prejudice.

This issue is relevant to the manner in which discrimination is approached in Europe. The tendency has been to use law in a manner that will hopefully change attitudes, as opposed to changing behaviour. One means of focusing on, and changing, behaviour that has been developed in some countries is the use of contract compliance. On the continent of Europe there have been serious doubts raised as to the legality of contract compliance. This has meant that little attention has been paid to its planning, structure and effectiveness. Yet these are the issues that policymakers will soon be faced with.

Europe in general has been extremely slow in developing laws against ethnic discrimination, in particular effective laws. Rather weak laws or no laws at all have been the norm. It seems that denial concerning the issue of racism and discrimination as European problems have been the norm. The EC Race Directive will mean that all EU member states must have a minimum level of legal protection against race and ethnic discrimination by July 2003. The implementation process will presumably also give an extra impetus to other complementary means of combating racism and discrimination. The use of anti-discrimination clauses will presumably be one of those means, and may lay the foundation for developments in the direction of employment equity.

Anti-discrimination clauses (contract compliance) have been found to be an effective complement to anti-discrimination legislation in the US, Canada and the UK. They are presumably effective in that they appeal to a contractor's basic interest in his own profits. Laws reach an employer on a more general level, whereas contract clauses involve a contractor's daily interests. If the issue of anti-discrimination is brought up within the environment of a contract, the contractor needs to consider the issue immediately. Does he have any problems in this regard? Can they be remedied? Can they be prevented? This presumably is what leads to the changes in the contractor's behaviour, at least in a preventive sense. This does not mean that anti-discrimination clauses are not uncontroversial. Whether or not they can even be used on the continent of Europe has been questioned. (The Swedish business community has expressed serious doubts about their usage in relation to Sweden's public contracts market that amounts to about 350-400 billion Swedish Crowns.)

The initial issue seems to always focus on the legality of contract compliance as a concept. It is possible that the legality issue is raised because it is harder to argue against their suitability given the legitimacy and quality arguments involved.

In any case, the EU stance on contract compliance has become much clearer. As long as certain minimum legal standards are met both the Commission and the Court agree that anti-discrimination clauses can be used.

In Sweden the policy process has been developing for a number of years. At least it has become almost impossible for the policymakers to say that legality is a major issue, since two government enquiries have dealt with this issue, and the Commission has been as clear as it has. The next step is thus going to be a focus on suitability. Apparently the national government, along with the parliamentary majority, has decided to move into the implementation stage. Local governments have also started moving in the same direction. At the same time it is going to be important to follow the details. Given the broad opposition that has existed on various levels it is important that the policy process is followed through to the development of concrete and effective clauses. Otherwise they risk ending up as symbols without any real content.

The so-called example presented by the Public Procurement Board provides an interesting barrier in the development of serious measures against racism and discrimination. It is quite possibly a new form of denial. The policy process concerning the development of laws against ethnic discrimination in Sweden started with little recognition of the issue as a Swedish problem. It was not until 1999 that a relatively modern law against ethnic discrimination in the workplace was adopted. This was largely due to widespread denial of racism and discrimination as a problem in Sweden - by both politicians and government bureaucrats. The Board seems to be following earlier processes in the field, by proposing a symbolic measure that can hardly be expected to change the behaviour of contractors.

Whether or not policymakers (i.e. politicians) will be sidetracked by the Board's report remains to be seen. If not, Sweden may be moving toward the implementation of an effective combination of laws and other measures to counteract discrimination and thus promote equal treatment within society.

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José Javier Soto Ruiz

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Jose Javier Soto Ruíz

INTRODUCTION:

On December 13, 2006 the organization of the United Nations (UN) approves the final text of the Convention on the Rights of Persons with Disabilities, an international treaty that is a fundamental myth in the way to equal rights for people, for all people and is based on the recognition of the inherent worth of dignity and equal and inalienable rights without distinction of any kind.

It's been almost five years after the adoption of this essential tool to recognize the equality of persons before the law. Its development was a rapid and hopeful process, rich in discussion, now almost five years after its adoption in the way of its implementation, the process of adapting their legal content to perform the essential purposes contained in the treaty.

Six years ago, two years before approval, I received a call from a dear friend and a key person in the rights of persons with disabilities, which is Miguel Angel Cabra de Luna, who told me that was brewing and talking about the possibility of a universal treaty on the rights of persons with disabilities, and that he would start, at the seat of royal patronage of disability, a subcommittee of experts on the Convention to say, from Spain, on proposals that were made in New York at United Nations headquarters.

Of course I accepted with enthusiasm, and what I perceived there was hope, enthusiasm, and continuous learning.

At first, I naturally had a passive attitude, as a witness, but I was getting involved perhaps motivated by the hope and the enthusiasm they showed me. Since that time, at 2006, there have been many conferences, meetings and discussions about the implementation and application of the Convention. And that´s another scene where we attended.

1. A BIT OF HISTORY:

The word of *person* comes from the Latin *"personare"* and from the Greek *"prosopon",* meaning the mask that the actors put on to get in the scene.

In this way, as each actor plays a different role according to the director assignment, each person plays a different role under the law, assigned by the State. So there are people to whom it is not considered appropriate to assign any role of relevance in the legal system. This explains the existence of slavery, persons to whom the law does not give them any role to play.

In this way, person is not synonymous of personality understood as capacity to have rights and obligations. The legal personality within the legal capacity is a concession of law, from the legal system to the individual subject.

All subsequent development marks a clear tendency to identify people with legal personality and therefore being entitled of rights and obligations by the mere fact of being born.

In relation to persons with disabilities is illustrative the **Ganzenmüller** and **Escudero** appointment in his work of *Disability and Law* [1]:

"Aristotle said that the best thing you could do with a person with disability was to leave them at the gates of the temples. In Sparta, a council of elders examined the health of newborns, and if the creatures were not normal, they abandon them to the beast or hurl them from Taygetus Mount. During Nazi Germany were burned in a brutal way. Were exploited and used during World War II when a shortage of workers and then abandoned to their luck again. Today,

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[1] ***"Disability and Law".*** C. **Ganzenmüller** and F. **Escudero.** Legal treatment and sociology. Editorial Bosh, 2005.

In general, in this matter is also recommended reading the book ***"Disability and Law"*** 2008 (press Tecnigraf), published by the Foundation for the Promotion and Support of Persons with Disabilities (FUTUEX) in collaboration with the Illustrious Professional Association of Lawyers of Badajoz directed by **José García-Camacho Soto**, and the book ***"Towards a disability law: Studies in honor of Rafael de Lorenzo"*** 2009, published by Thompson- Aranzadi and directed by **Luis Cayo Pérez Bueno**.

in psychiatric institutions of the so-called first world continue to be bound by a straitjacket since when they entered at four years old, probably because they had a behavior problem, and are now forty or fifty years old and are still tied".

In relation with the terms *legal personality*, *legal capacity* and *capacity to act*, **Carmen Pérez Ontiveros**, states *"all humans beings are persons so this consideration must be regardless of the condition of person with disability; however, from a legal point of view, it is person to whom the law recognizes personality. The recognition of legal personality is a prerequisite for the acquisition of specific rights and obligations, and it is a legal quality to be conferred regardless of specific situations and should be spread over the lifetime of the individual subject. Therefore, it is the birth of a person the only thing that may make the attribution of personality.*

Legal capacity, understood as an attitude to have rights and duties is inherent in the concept of person and legal personality. If any person as a human being has legal personality, any person must also has legal capacity without any kind of distinction. Legal personality and legal capacity are united in the person's condition, regardless of any physical, mental or sensory circumstance that might affect and that may be the key of any type of disability.

In the Spanish law there is a difference between legal capacity, that is, the ability to be titular of rights and duties, and the capacity to act, which is the ability to perform legal acts with full effects"[2]*.*

The difference between the *legal capacity* and the *capacity to act* will be one of the aspects that we will analyze in the discussion around to Article 12 of the Convention, particularly in the declarations and reservations made to it.

2. THE DEBATE ABOUT THE CAPACITY AROUND TO ARTICLE 12 OF THE CONVENTION

2.1 The discussions over the text.

2 ***"Legal Capacity and Disability"*** (A Comparative Study of Private Law in the light of the International Convention on the Rights of Persons with Disabilities). Published by the **Permanent Congress on Disability and Human Rights**, Book 7, Volume I, 2009, printed by Graphic arts APROSUBA. See also ***"Treaty on Disability"*** authors **Rafael de Lorenzo** and **Luis Cayo Pérez Bueno**, 2007, editorial Aranzadi

The importance of this article, its central character, the heart of the Convention, took to intense and logical debates due to the wide scope of this international treaty.

It has been especially highlighted the debate around the concepts of "legal capacity" and "capacity to act", we referred to above, as well as discussions on the expressions used by the earlier drafts regarding the appointment of "Personal representatives".

In relation with this latter, it is illustrative the position of the **European Disability Forum** on the draft that was still referring to the appointment of a personal representative, they oppose it: *"The appointment of a personal representative comes from the premise of the inability of persons with disabilities. This creates a hard impression of permanence and brings us back to the system of guardianship that we are trying to change with this Convention."*

"It is precisely to break this paradigm of replacing what has made the International Caucus (supported by the EDF) suggested that this support is seen as a right that is not pejorative about the capacity of people with disabilities. The concept of support allows assistance to be adapted according to the needs of individuals with disabilities without replacing them. "

"At the same time, EDF recognizes that States are worried about potential abuse in the decision-making support and feel driven to prevent them. However, from our point of view, detailed procedures to prevent such abuses should not be included in the text of the Convention. It would be enough if the convention includes a mandate to the States to adopt legislative measures to prevent this abuse."

And that is what is being doing today with more or less speed and success.

In relation with the discussions about the concept of capacity, it is often highlighted the draft of the Eighth Session (in the August 2006), before the final report, the article 12 was accompanied by something at least unusual: a footnote page that said *"In Arabic, Chinese and Russian, the expression "legal capacity "refers to" legal capacity for rights" and not the "capacity to act."*

I have to note also the letters dated 5 December 2006 from the Permanent Representative of Iraq to the United Nations addressed to the Chairman:

> *I have the honour, as the Chair of the Arab Group for the month of December 2006, and on behalf of Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen, to inform you that the aforementioned States are joining the consensus on the Convention based on the understanding that legal capacity mentioned in paragraph 2 of Article 12 of the Convention entitled "Equal recognition before the law" means the capacity of rights and not the capacity to act, in accordance with the national laws and legislation of these States.*
>
> *We kindly request that this letter be included in the report of the Ad Hoc Committee. We will be presenting it to the General Assembly when the text of the Convention is submitted prior to its adoption.*

***And the* Corrigendum**

> **First paragraph, line 9**
>
> *After* the capacity of rights and not the capacity to act *insert* for those who are unable to practice the capacity to act
>
> *(Signed) Hamad* ***Al-Bayati***
> *Chairman of the Arab Group for the month of December 2006*
> *Permanent Representative of Iraq to the United Nations*

An the Letter dated 5 December 2006 from the Permanent Representative of Finland to the United Nations addressed to the Chairman

> *"According to paragraph 2 of Article 12 of the Convention 'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'. It is our understanding that the concept of 'legal capacity' has the same meaning in all language versions.*
>
> *It is on the basis of this understanding that we are ready to join the consensus. We would also request to include this letter in the report of this meeting".*
>
> (*Signed*) Kirsti **Lintonen**
> Representative of the Presidency of the European Union
> Permanent Representative of Finland to the United Nations

This caused an immediate reaction which exemplifies one of the conclusions of the informative seminar on the convention organized by the CERMI at September 26, 2006: *“CERMI adheres to requests promoted by different entities, both public and civil society representatives, strongly requesting the removal of the footnote included in Article 12 of the Convention, dedicated to equality before the law ".*

2.2 The final text.

Article 12 of the Convention in its final version reads:

Article 12 - Equal recognition before the law

1. “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans,

mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property".

2.3 Declarations and reservations

The declarations and reservations were made upon ratification, formal confirmation or accession:

AUSTRALIA
Upon ratification
Declaration

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life.

Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others.

Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others.

Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.

CANADA
Declaration and reservation:

“Canada recognizes that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.

To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards.

With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal”.

EGYPT
Interpretative declaration made upon signature:

The Arab Republic of Egypt declares that its interpretation of article 12 of the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities, which deals with the recognition of persons with disabilities on an equal basis with others before the law, with regard to the concept of legal capacity dealt with in paragraph 2 of the said article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub) but not the capacity to perform ('ahliyyat al-'ada'), under Egyptian law.

FRANCE
With regard to article 29 of the Convention, the exercise of the right to vote is a component of legal capacity that may not be restricted except in the conditions and in accordance with the modalities provided for in article 12 of the Convention.

MEXICO
Interpretative declaration

The Mexican State reiterates its firm commitment to creating conditions that allow all individuals to develop in a holistic manner

and to exercise their rights and freedoms fully and without discrimination.

Accordingly, affirming its absolute determination to protect the rights and dignity of persons with disabilities, the United Mexican States interprets paragraph 2 of article 12 of the Convention to mean that in the case of conflict between that paragraph and national legislation, the provision that confers the greatest legal protection while safeguarding the dignity and ensuring the physical, psychological and emotional integrity of persons and protecting the integrity of their property shall apply, in strict accordance with the principle "pro homine".

SYRIAN ARAB REPUBLIC
Upon signature:
Understanding:

Our signature of this Convention does not in any way, imply recognition of Israel or entry into relations with Israel, in any shape or form, in connection with the Convention. We signed today on the basis of the understanding contained in the letter dated 5 December 2006 from the Permanent Representative of Iraq to the United Nations addressed, in his capacity as Chairman of the Group of Arab States for that month, to the Chairman of the Committee, which contains the interpretation of the Arab Group concerning article 12 relating to the interpretation of the concept of "legal capacity".

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
Reservations:

Equal Recognition before the Law – Convention Article 12.4
The United Kingdom's arrangements, whereby the Secretary of State may appoint a person to exercise rights in relation to social security claims and payments on behalf of an individual who is for the time being unable to act, are not at present subject to the safeguard of regular review, as required by Article 12.4 of the Convention and the UK reserves the right to apply those arrangements. The UK is therefore working towards a proportionate system of review."

3. THE DISCUSSION TODAY.

After the adoption of the Convention and its Optional Protocol begins the process of adaptation into national laws.

The debate today is especially rich in the associative and doctrinal level, having already taken some decisions and legislative reforms.

Particular interest have the conclusions of the ***Symposium on the legal capacity of persons with disabilities in the light of the UN Convention on the Rights of Persons with Disabilities***, organized by the European Foundation Centre and the European Disability Forum in Brussels on June 4, 2009.

In them, **Miguel Angel Cabra de Luna** highlighted the challenges of Article 12 and the need to explore the impact of this provision in the national and the European Union level, and the clear protection of legal personality and legal capacity of persons with disabilities will require the revision of national legal institutions such as guardianship or incapacitation.

Yannis Vardakastanis, president of the European Disability Forum, intervened saying that for too long the rights of persons with intellectual and psychosocial disabilities, people living in institutions and others have been deprived of their most basic human rights, and that the Convention deleted the outdated system of guardianship, which suppresses the rights and duties of persons with disabilities, and replaces it with the support system in making decisions, imposes on governments the obligation to ensure the political right to vote of persons with disabilities, and ensures that the communication will be developed so that every person, regardless of disability, will be heard and heeded.

He emphasized that understanding the impact of the Convention on the legal capacity involves the reassessment of concepts like the dignity, integrity and equality, and a review civil and criminal legislation to improve accessibility for people with disabilities in communication and procedures and educate all relevant actors in the paradigm shift.

Johan Ten Geuzendam, head of the Unit for the Integration of Persons with Disabilities in the European Commission, explained

that with regard to the implementation of the Convention, the Commission has identified some key issues including the development of consistent and comparable data, targets and indicators, the exchange of good practices and sharing experiences with the following initial priorities with respect to the Convention: Accessibility, Access to justice, Independent living and Right to vote, Monitoring mechanisms, Empowerment of people with disabilities and Legal capacity.

So, the legal capacity is one of the priority areas in Europe. He noted that on that date -June 2009 - seven States were currently reviewing their legislation in the light of the Convention.

Gerard Quinn said why the reform discussion with regard to Article 12 is so important in both practical and symbolic terms. Article 12 is the vehicle that allows us to complete the journey of non-discrimination to protect people from the behavior of others, giving voice to people to run their own lives. For **Quinn**, the revolution of the Article 12 is emblematic of a paradigm shift that has been happening in the field of disability in the last fifteen years at European level and through the heart of the Convention.

Dignity, autonomy and equality are essential values.
Dignity, all human beings are ends in themselves. People with disabilities were traditionally viewed as objects and not subjects worthy of equal respect.
Autonomy, we decide our fates, the Government's job is to provide our freedom.

The balance between autonomy and protection was not present in our laws inherited on legal capacity. An excessive paternalism and over-protective attitude led us go against the autonomy of individuals.

Quinn stressed that many of the first laws were decreed to protect actives or property rather than people. A perverse result of intervention to protect them against each other has been the institutionalization, I mean, placing people in institutions where their exposure to violence, exploitation and abuse were even worse.

The bridge here is equality, this is what the Convention brings back to the field of disability, and is what clearly animates Article 12. Respect for equality means to extend to people with disabilities the

same expansive freedom that allowed other people to commit their own lives and make their own mistakes.

Gerard Quinn added another value to the dignity, autonomy and equality, the solidarity. If we are serious about respecting the autonomy of persons with disabilities on an equal base with others our first impulse to a certain lack of functional capacity should not remove it but to support.

Gerard Quinn also highlighted an essential aspect of reservations. He reminded that any reservation that would defeat the object and purpose of a treaty is invalid. In his opinion, a reserve that allows to maintain in force the laws of guardianship is unacceptable.

In the same way, I think it is interesting to bring up the main ideas of **Gabor Gombos** in his speech at the symposium, about the obligations that the Article 12 of the Convention imposes in the future to the European Union and its member states.

In his opinion, the Convention indicates the way to follow. First, *"nothing for us without us",* which means the involvement of persons with disabilities, having the Government a legal obligation to consult civil society. In second place, the Convention recognizes personality to all persons with disabilities, which involves two aspects: identity and capacity to act.

He remembered that during the negotiations in the ad hoc Committee of the UN some States were opposed to accept that Article 12 could mean that the legal capacity should include capacity to act. But in his opinion, this can not be refuse now because Convention engages an equalitarian principle that includes both aspects of the personality and clearly includes all persons even those with severe disabilities.

Currently, the most guardianships of the member states are not consequent with the Convention. In his view, any attempt to present the guardianship as a support mechanism is problematic.

In his opinion, there is a minimum core of aspects in relation to Article 12:

-Complete protection (incapacitation) should be deleted or removed.
-The main gaps should be identified.
- New laws are needed.

- Article 12 is an ambitious article.
- The Convention calls for full legal inclusion and not only for legal recognition.
- How to access to support decision making within the institutions.

In the associative´s field (remember: ***Nothing about us without us***) it is also remarkable The Human Rights and Disability (Spain report 2009) drafted by the CERMI State Delegation for the UN Convention, approved by the executive committee of CERMI the May 27, 2010[3].

One of the fundamental aims of CERMI, as the entity which represents organized disability in Spain, with more than 5,500 associations and bodies of persons with disabilities and their families, is to defend the rights of this social group, who in this country number over four million people and who, with their families, amount to around ten million citizens.

CERMI has been appointed as an independent entity to monitor the convention in Spain. Of This alternative report and the one presented by the government highlights the need to adapt the Spanish law with regard the exercise of the rights of persons with disabilities and their protection. CERMI drawn up as a basic initial proposal to establish a new procedure for providing support for decision making, according to the convention which highlights the following:

"The full legal equality of persons with disabilities is an area where the effects of the International Convention on the Rights of Persons with Disabilities are most strongly felt. Disability is now no longer an excuse or justification for limiting or reducing people's capacity in the legal system. Systems, like the Spanish system, based on substituted decision-making on the grounds of disability – usually intellectual or mental– must cease to be effective, as they go against the new paradigm of the free determination of individuals, all individuals, including men and women with disabilities".

For these reasons, CERMI has put it to the Ministry of Justice that the current civil process of legal incapacitation should be replaced by one of supported free decision-making for people with disabilities who need it.

3 Human Rights and Disability. Spain Report 2009

The Convention, in force in Spain since 2008, makes it mandatory for the States Parties to revoke any systems which, like legal incapacitation, limit the equal legal capacity of people, including those with disabilities, and replace them with other systems which guarantee supported free and autonomous decision-making.

CERMI considers that Spain's system of legal capacity limitation is not compatible with the mandates of the Convention, and therefore just a few adjustments to details would not be acceptable (an easy way out which some courts find tempting), a new model needs to be created which focuses on autonomy and support. For CERMI, the Convention presents an historical opportunity to abandon paternalistic systems which compromise the equality of persons with disabilities under the law, and exchange them for others, in tune with the times, which promote free determination with the necessary supports and safeguards.

Despite the resistance from legal sectors which cling on to age-old institutions, which they consider to be immovable, the Convention is an indisputable and irreversible legal fact which overrides any pre-existing internal Law.

CERMI considers that the Executive and the Legislature have to be brave and meet the challenges set them in terms of the law by the UN Convention on legal equality and the right to freely make decisions. The time has come for supported free choice in decision-making.

This requires legally analysing how the new system should replace the institution of incapacitation regulated in the Civil Code (Title IX) and the institution of guardianship of incapacitated persons (Title X). Article 200 of the Civil Code establishes that "persistent physical or mental diseases or impairments which prevent the person being able to govern him/herself are causes for incapacitation". The basis of the civil institution of incapacitation has become obsolete and it does not conform to article 12 of the Convention.

CERMI developed this alternative report to the Government of Spain's one because Spanish law is considered one of the most advanced in recognizing the rights of persons with disabilities. SPAIN has in relation with the Article 12 a system according with the convention and is trying to make some modifications.

Because of this report, the Committee of right of persons with disabilities UN, entity to monitor the convention required to Spain in April 2011 further explanations before issuing its recommendations about the implementation in Spain of the treaty. Specifically in relation to Article 12 requires the data concerning of the number of people with disabilities who have been placed under guardianship as a way of exercising their legal capacity and, the number of decisions that modify the capacity to act.

The Committee also requests information about how control is exercised to ensure that the guardianship is exercised for the benefit of the tutored taking into account that at the current legislation there are no safeguards against the undue influence.

Finally asked about the measures planned or being taken so, instead of the replacement decisions (guardianship) it will be used the support for people with disabilities in exercising their legal capacity, in accordance with the Article 12 of the convention.

Without any doubt the conclusions of the UN Committee will provide light that is absolutely necessary today in a key issue as the legal capacity and support system.

One essential aspect concerning to the legal capacity is the right of suffrage, active and passive.

In a letter from **Luis Cayo Perez Bueno** as a president of the Spanish Committee of Representatives of Persons with Disabilities (CERMI) dated October 5, 2010, states that the current electoral law in Spain allows the deprivation of the right of suffrage, active and passive for persons incapacitated by court if the sentence expressly declares it.

This possibility also applies to persons interned in a psychiatric hospital with judicial authorization, during the period of their internment if the court´s authorization expressly states the inability to exercise the right to vote.

This deprivation of fundamental rights, which may affect mainly persons with intellectual disabilities or mental illness, it has no sense from a human rights vision and comes in contradiction with

International Convention on the Rights of Persons with Disabilities of United Nations signed and ratified by Spain.

This international treaty, in its article 12, recognize the full legal equality of persons with disabilities in all aspects of life without any restrictions by reason of disability. It also guarantees the right of persons with disabilities to participate in the political and electoral processes without any kind of exclusions.

That´s why the current Spanish legislation is against the UN convention, so it has be changed urgently so that persons with disabilities can exercise fully their basic rights, and it is requested the intervention of the Ombudsman in order to amend the Organic Law of General Electoral System to eliminate the possibility to deprive the right of suffrage to persons with disabilities.

In relation to this matter is remarkable the Sentence of the court of first instance number 15, Las Palmas de Gran Canarias, dated April 27, 2010 (Magistrate Judge **Carmen Maria Simon Rodriguez**).

In the legal basis, making an appointment of article 12 of the Convention states "*So, is inferred of Article 12, that provides for a fundamental change in the way of dealing with the issue of legal capacity in situations where a person with disability may need the help of a third party. This change can be called the replacement of the model of substitution in the making-decision for the model of support or assistance in the making-decisions so the total inability (incapacity) stops as a rule and becomes exceptional.*

Therefore, in processes for modifying or denying the capacity to act it is necessary to promote, protect and ensure on an equal basis with others the human rights and fundamental freedoms, by adopting measures to support and protection necessary".

In this way, evaluating all the circumstances, the sentence issued to-suit or a dress as unique to that person, has to fit his needs, so the inability, accommodates perfectly only and exclusively to him, each person with disability needs his special measure of protection.

Concerning the right of suffrage, whose deprivation is interested in demand it is not appropriate.

The interpretation of the General Election Law, according to the spirit of the Convention requires respect, to the greatest extent possible, of the autonomy and fundamental rights of persons with modified capacity, so they may not be deprived of the right to vote generally, except in exceptional cases, because it would be a setback for the necessary social integration that is advocated in this treaty.

In the particular case prosecuted, has not been accredited the special inability to choose a particular option and exercise his right to vote, because this exercise requires only a manifestation of will, which is necessary, not so much a certain level of reasoning or knowledge but the expression of a personal decision or choice on the various electoral Offers, depending of the cultural education of each person.

Also in the concrete case the sentence established a system of curatorship, considering that the curator will not supply the will, just reinforces it, controls and directs by supplementing it, so that his role is not to as representative but as assistance and protection providing support and intervention for those acts to be conducted by the person whose capacity is modified and are specified in the sentence, which not necessary have to be exclusively of patrimonial nature.

Another issue denounced by the CERMI is the impossibility to perform certain acts, for example, complains that the Notary law discriminates persons with disabilities because it states *"are unable or unqualified to act as witnesses in writing, the persons with mental disabilities, blind, deaf and dumb."*

CERMI considers that the regulation violates the Convention, recalling that Article 12. 2 states that persons with a disabilities enjoy legal capacity on an equal basis with others in all aspects of life, recalling also the content of Article 12. 3. concerning to the adoption of appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity, and recalling that Article 13 of the Convention states that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect

participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

CERMI considers that if the Convention clearly recognizes the rights of persons with disabilities to be witnesses in the area of justice, they can not understand the opposition to amend the regulation of notarial acts, taking into account that the law should not deprive persons with disabilities the exercise of this right, just should ensure a reasonable adaptation.

At the conference organized by the **Disability State Observatory** in Spain on 15 December 2010 under the title "Legal Capacity and Disability: From the replacement of the capacity system to the support model"[4], **Carlos Ganzenmüller** prosecutor of the Supreme Court made a complete study of other aspects **about judicial pronouncements.**

He highlighted the Supreme Court sentence of April 29, 2009, the already mentioned sentence of Las Palmas de Gran Canarias and other one of Gijón which adopts an intermediate form using the institution of partial guardianship (*Sentence October 13, 2009 1st instance Court No. 8 in Gijón, Judge* **Angel Luis Campo**) respect the Supreme Court judgment, the court was questioned in the appeal if the support or institutional care specifically regulated in our laws were in line with the convention or not. And basically if the curatorship was an institution accredited by the convention because the existence of a natural and complemented capacity, the rest of the capacity needed for persons with disability could promptly act on certain issues without a general supervisory institution of guardianship which completely deprives the capacity to decide of the person, by supplanting and representing.

Carlos Ganzenmüller said that this was our approach. Also he said that the Supreme Court does not enter into the question, because he knows the commitment of government, in a law of April 25, 2009 will regular within six months the capacity procedures of individuals subjects. So they do not resolve this issue just reiterates the traditional doctrine.

[4] **"Legal Capacity and Disability: From the replacement of the capacity system to the support model".** Disability State Observatory

On the doctrinal level, the report made by the Institute of Human Rights **Bartolomé de las Casas of the University Carlos III**[5] in Madrid about the impact of the Convention in the Spanish legal system starts about the shift of model that will require gradual changes, in which there are probably periods where both institutions, the incapacitation and the new measures "must coexist" because while this mechanism is not articulated should be set curatorship, understood as a model of support and assistance under the principle of best interests of the person with disability, as the mechanism to which the judge should go as a general rule, and the guardianship will be reserved - always waiting for a normative reform that means its disappearance because it is directly confronted with the provisions of the convention-, for those decisions takings when the circumstances and needs of a person with disability can prevent know his will in relation to traffic (relative with a economic acts) but never in relation with a fundamental rights.

Against this provisional position, I highlight the words of **Torcuato Recover**:

"We are talking about fundamental rights, the Human Rights. It is a substantial nuance because it means that the provisions of Article 199 and following of the Civil Code are not rules of interpretation and conflict of interest between individuals, no. When the Civil Code regulates if a person should give or not his opinion, his will to lease or dispose of his patrimony, if his will should be eliminated or ignored, we are not talking about individual rights but a fundamental right..

And these are patrimonial questions, but if we go to a more personal level, if a person should be in an institution, if a person can exercise his right to parenthood, this can not be decided by others without taking into account his opinion, the person can exercise those rights."

After recalling the appointment of **Luis Cayo Pérez Bueno**, president of CERMI *"The Convention is such a deep charge for the more traditional view and mediocrity of what was the disability it seems that we are not yet aware of the size and scope of this transformation and what takes place in all areas*", he notes that *"The approach of Article 12 is openly opposed to regulating the civil*

[5] Institute of Human Rights **Bartolomé de las Casas of the University Carlos III**

code, which says the opposite, persons with disabilities subject to a process and a judgment that meant his total inability, is openly opposed, not only for the terminology and the nature of the underlying concepts behind words, is absolutely opposed to that definition in paragraph 2 of Article 12.

"We can not, therefore, today, continue to dictate judgments in which it is said that the person is incapacitated. This approach conflicts with the legal practice. The family courts are dictating decisions that are contrary to a law that is already directly applicable as the International Convention. It is urgent, therefore, a reform in line with the principles of the Convention."

Fabián Cámara, President of Down Spain[6] states that the UN Convention opens up new horizons for equal legal capacity before the Law.
In his opinion, "*The International Convention on the Rights of Persons with Disabilities (CIDPCD) supposes the ratification of the fact that persons with disabilities are subjects of law, situation that already had been recognized in a general way by the Universal Declaration of Human Rights and the Spanish Constitution.*

This reiteration is justified by the existence of a legal protectionist attitude and a social perception of the collective as special citizens, which have resulted an endless selection of restrictive measures that prevent literally their enjoyment, because of their safety and security, producing even situations of continuous violation of their most fundamental rights.

The situation becomes even more evident in the collective of persons with intellectual disability, whom are permanent considered incapable without any type of previous evaluation. The immense majority of people with intellectual disability are not aware of their

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[6] DOWN SPAIN is the Spanish Federation of Institutions for Down Syndrome. The federation aims to improve the general quality of life of people with Down Syndrome and their families through these activities:

- The promotion of investigation and innovation to promote standardization, inclusion and autonomy of people with Down syndrome.
- Participation and work together of our institutions, with presence in all the Autonomous Communities.
- The protection, promotion and enjoyment of the rights of persons with trisomy 21.

DOWN SPAIN belongs to international associations such as the European Down Syndrome and Down Syndrome Association International and is a founding member of the Iberoamerican Federation of Down Syndrome (FIADOWN).
http://www.sindromedown.net/

rights, and this fault of recognition carries them to assume naturally the violations suffered without any protest, and not consider even the slightest claim of change in the social, legal, and judicial treatment for themselves.

This situation has generated a legal and judicial system that aims to protect from potential abuses, especially in the property field, based on denying their capacity of decision and moving it to their guardians. In the practice, it is necessary incapacitate legally persons so they can "enjoy" its patrimony or inheritance or to make routinely prohibitions from exercising their right to vote.

In this context, the appearance of the CIDPCD supposes a radical change in the situation, a before and an afterwards. The highest degree of friction between the content of the CIDPCD and the Spanish legislation is about the regulation of personality rights and legal capacity of persons with disabilities. The Article 12 of the Convention declares explicitly the full equality under the law of persons with disabilities without any kind of distinction.
This statement comes into full confrontation with some of the institutions that in our law regulate the legal capacity, such as the guardianship, the conservatorship, the extended parental authority or the judicial incapacitation.

Given this diatribe, the Spanish Down´s position is absolutely support the statement of the article 12 of the Convention and therefore, requires:

- *The disappearance, because it is unacceptably and discriminatory, of any judicial or administrative proceeding which removes, deletes, forbids or simply restricts the legal capacity of a person by reason of disability, this is, the institution generally known as "judicial incapacitation" (or any other name that is tried to give it in the future).*

- *The disappearance (with the transitional arrangements necessary respect of situations existing and settled in the practice) of any institution that replaces the civil will of persons with disabilities, such as the guardianship, the conservatorship or any other similar institution.*

- *The establishment of the new system of supports to the legal capacity of the convention respecting the basic principle of*

"respect the rights, the will and the preferences of the person with disability, ensure the other conditions also established by the convention, this is, the "appropriate and effective safeguards to prevent abuses", "the conflict of interests and the undue influence ".[7]

On the legislative level, we are in the process of adaptation. Colombia, Hungary, and in the Catalan law, among others, mention the Convention as the base of modifications in their legal systems.[8]

Specifically in the Autonomous Community of Cataluña, the second book of the **Catalan Civil Code** (Law of July 29, 2010), concerning to the person and the family, invokes in its preamble, the Convention

"The present law keeps the traditional institutions of protection linked to the incapacitation, but also regulates other ones which operate outside it, because in many cases the person with disabilities or their families prefer not to promote it. This diversity of protection systems recognize the duty to respect the rights, the will and the preferences of the person and the principles of proportionality and adaptability to the circumstances of the protection measures, as advocated by the Convention ... "

"Along with the provision that allows not provide the guardianship if it had been granted a power in anticipation of the loss of capacity, changes in relation to the custody of fact are a reflection of the new model of protection of the individual subject…that´s the reason why ... includes a new instrument of protection, assistance, created for the adult who needs to take care of his person or property because of the decrease nondisabling of his physical or mental faculties.

So we start from a conception of the protection of the person who is not necessarily linked to lack of capacity but also includes

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[7] Article published in the journal cermi.es

[8] Currently, the Foundation "Law and Disability" is developing a deep study on this matter. It is recommended in relation with a general view, the comparative study of law in matter of legal capacity and disability realized by the Permanent Congress on Disability and Human Rights 2008, which includes the concerning legislation in different countries. You can access to the collection through the following websites:
http://www.futuex.com/index.php/herramientas/biblioteca/category/8-p-p

http://www.observatoriodeladiscapacidad.es/informacion/documentos?q=informacion/documentos/documentos_recientes

http://www.cermi.es/es-ES/Biblioteca/Paginas/Inicio.aspx

instruments based on the free development of personality to protect them in situations such as aging, mental illness or disability.
This instrument can be very useful to certain vulnerable groups for which the incapacitation and the implementation of a system of guardianship or conservatorship (curatorship) are disproportionate, as the individuals affected by mild mental retardation or other for which the type of decrease suffering, the traditional instruments are not appropriate for their needs.

In line with the guidelines of Committee of Ministers of the Council of Europe´s recommendation of 28 February 1999 and following the precedents existing in different legal systems in Cataluña is considered more appropriate this model of protection parallel to the guardianship or curatorship. Also, this is the trend that inspires the Convention on the Rights of Persons with Disabilities. "

AS A FINAL: THE CONVENTION AS A PRINCIPLE

A general approximation to comparative law show us clearly that the adaptation to the convention involves a change needed that finds the old schemes instituted in the theory of legitimacy about the absolutely protection, under static figures which find the protection, becomes abandoned person.

We find legal designs, with formal controls, based basically on patrimonial protection, with legislation introduced in the sleep of the righteous, pleasing of themselves.

It calls so much the attention the statements that no changes or adjustments are needed, that the legislations already "protect" people with disabilities ... and put them under the light of legitimate opinion of people with disabilities.

Finally, tell a parent of a child with intellectual disabilities that the current disability process needs no changes, or that the legal tools required to answer the question of what will happen to my child when I am gone, exist.
Ask a person with communication difficulties which can be solved by technology why he cannot perform actions.

Well, I want to maintain the illusion that defined the Convention itself and for that, the parameters to define a support system are clear:

equality, respect for autonomy, the article twelve states with absolute clarity that should be taken into account the will and preferences of individuals subjects this is essential especially for provisions regulating in anticipation of future disability, and support measures must be proportionate, fit in the shortest time possible, that is absolutely incompatible with long processes. Those are the parameters that should define the adaptation to the Convention.

Especially significant is how to configure the performance of these systems support.

The Convention showed extreme caution in relation with institutionalized persons, carefully reasoned measure because at that time the guardianship system in most countries gave rise to who was responsible for a disabled person as his representative, under the name of a tutor or guardian, took a completely passive attitude.

Passive in the sense of complying with formal requirements which had a clear impact heritage. There is still evidence of that in our Civil Code talking about accountability, inventory ..., aspects, I insist, economics. Internment, with a representative who has the enormous responsibility of ensuring that disabled person can become an absolute distance of the intended purpose. As a basic rule, we must ensure the person in need, provide education, care for their health and, of course, assume that the disability is not permanent.

The tutor should work to build capacity and that means that the processes, which designates the measures of support, they need regular review. We can not give validity to support measures that are needed often in a social context and forget about them and let them perpetuate in the time. Whoever takes on this awesome responsibility must have an active involvement in the development of personality, a real concern, where the north is the personal aspects.

Of course we should care about economic aspects, our legislation must ensure any measure that does not goes against the patrimony of a person. Of course, we should go against the greed, the bad faith, the person is the first.

If we need a representative to develop our capacity, that representative, again, must have an active and personal involvement, not mere paper that we just completed. Although this

may seem so obvious, in most countries of the world has led to unjust consequences, such abandonment, the tranquility of the State to say that because I have appointed a representative and I can forget about this person, has led to abuse, loss of fundamental rights of persons with disabilities.

When I assumed that responsibility as defender of persons with disabilities in Extremadura I did it for a reason, not because I were agree with the definition of the figure, or because I could discuss the figure in doctrinal aspects, but for reasons of necessity, utility, being a positivist, because at that time when I talked to the legitimate representatives of people with disabilities, we felt it was necessary.

My summary end at that time was to say that this huge worry in connection with the persons who were interned, is that only rarely was a violation of Human Rights. In a comparative law perspective, it is absolutely necessary because you always have to look beyond, we realize that this was not so exceptional in many other countries.

Find a representative of a person with disability who does not know how is this person and if center where it is located are having a primary consideration and good treatment…, it is true that these exceptions were here in Extremadura unusually, but very painful. The general trend is the opposite; the general trend is that the internment meant for practical purposes a neglect of the state's responsibility.

And now we have the possibility to configure a system for all of us to ensure that when support measures are needed, these are exercised in a way that does not violate fundamental rights, call it as you want to call it, guardian, conservator or tutor (Although I consider more useful to abandon the old terminology and write blank papers without having to adjust to the already written), the north should always be to watch over the good of that person and his development.

In Spain is frequently that legal persons be designated to exercise the guardianship and in that case the State assumes the responsibility of that persons under guardianship. If this is true for individual subjects, more should be for the State or to entities that carry out functions of support. The State should ensure the independence of the legal persons who have entrusted this

enormous responsibility. Passive attitudes are not worth If they are entities or legal persons.

FEAPS[9] promoted the creation of tutelary foundations caring for people with intellectual disabilities who need support, and have had an essential role during all these years. Now we must continue with the development under the parameters that the convention recognizes and marks[10]. These parameters mean professionalism of his performance.

Many times, when I had to comment on a particular aspect, of course I have always had people who knew what they had to speak. We can not do things out of reality, we need professionals, and the need to train professionals means that the state has an obligation to provide financial and economic resources to these institutions to develop their role.

But I would like to conclude with my perception as a witness during all these years. I would not want to leave the illusion that once we had, I would not to place ourselves in a perceived loss of a vital opportunity.

Unfortunately, I am watching passive attitudes and that is not what I've lived when people who were discussing the Convention wanted and that's not what that day (December 13, 2006) was crystallized at the headquarters United Nations. Depends on us that this is a fundamental text for the development of Human Rights, Just on us, with a critical and realistic view.

Of course, taking into account those who know, do not place these discussions in intellectual circles far from the associations. I can only

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[9] FEAPS is the Spanish Confederation of Organizations for Persons with Intellectual Disabilities who defends the rights of persons with intellectual or developmental disabilities and their families. The FEAPS Movement's mission is to contribute from its ethical commitment, with support and opportunities to every person with intellectual or developmental disabilities and their families to develop their quality of life project, and to promote their inclusion as full citizens law in a just and solidary society.

http://www.feaps.org/

[10] About some specific proposals of support models, we note:
Foundation for the promotion and support of persons with disabilities (FUTUEX)

CERMI

conclude with a sense of hope, perhaps enforced at the moment, but it is what parents of people with intellectual disabilities led me to getting involved in this world.

Despite all obstacles, despite the legal conformity, despite all, hope.

Francisco Bariffi

Background Documentation

CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION 30.3.2010

Official Journal of the European Union C 83, 30.3.2010

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3
(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 6
(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Official Journal of the European Union C 83, 30.3.2010

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 19
(ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

(2000/C 364/01)

CHAPTER III

EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26

Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

EUROPEAN COMMISSION

Brussels, 15.11.2010
COM(2010) 636 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe

{SEC(2010) 1323}
{SEC(2010) 1324}

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

European Disability Strategy 2010-2020:
A Renewed Commitment to a Barrier-Free Europe

TABLE OF CONTENTS

1. INTRODUCTION

One in six people in the European Union (EU) has a disability[1] that ranges from mild to severe making around 80 million who are often prevented from taking part fully in society and the economy because of environmental and attitudinal barriers. For people with disabilities the rate of poverty is 70% higher than the average[2] partly due to limited access to employment.

Over a third of people aged over 75 have disabilities that restrict them to some extent, and over 20% are considerably restricted[3]. Furthermore, these numbers are set to rise as the EU's population ages.

The EU and its Member States have a strong mandate to improve the social and economic situation of people with disabilities.

- Article 1 of the Charter of Fundamental Rights of the EU (the Charter) states that 'Human dignity is inviolable. It must be respected and protected.' Article 26 states that 'the EU recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.' In addition, Article 21 prohibits any discrimination on the basis of disability.

- The Treaty on the Functioning of the EU (TFEU) requires the Union to combat discrimination based on disability when defining and implementing its policies and activities (Article 10) and gives it the power to adopt legislation to address such discrimination (Article 19).

- The United Nations Convention on the Rights of Persons with Disabilities (the UN Convention), the first legally-binding international human rights instrument to which the EU and its Member States are parties, will soon apply throughout the EU[4]. The UN Convention requires States Parties to protect and safeguard all human rights and fundamental freedoms of persons with disabilities.

According to the UN Convention, people with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The Commission will work together with the Member States to tackle the obstacles to a barrier-free Europe, taking up recent European Parliament and Council resolutions[5]. This

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1 EU Labour Force Survey ad hoc module on employment of disabled people (LFS AHM), 2002.

2 EU Statistics on Income and Living Conditions (EU-SILC), 2004.

3 LFS AHM and EU- SILC 2007.

4 Agreed in 2007 and signed by all Member States and the EU; ratified by October 2010 by 16 Member States (BE, CZ, DK, DE, ES, FR, IT, LV, LT, HU, AT, PT, SI, SK, SE, UK) while the rest are in the process of doing so. The UN Convention will be binding on the EU and will form part of the EU legal order.

5 Council Resolutions (SOC 375 of 2 June 2010) and 2008/C 75/01 and European Parliament Resolution B6-0194/2009, P6_TA(2009)0334.

Strategy provides a framework for action at European level, as well as with national action to address the diverse situation of men, women and children with disabilities.

Full economic and social participation of people with disabilities is essential if the EU's Europe 2020 strategy[6] is to succeed in creating smart, sustainable and inclusive growth. Building a society that includes everyone also brings market opportunities and fosters innovation. There is a strong business case for making services and products accessible to all, given the demand from a growing number of ageing consumers. For example, the EU market for assistive devices (with an estimated annual value of over € 30 billion[7]) is still fragmented, and the devices are expensive. Policy and regulatory frameworks do not reflect the needs of people with disabilities adequately, neither do product and service development. Many goods and services, as well as much of the built environment, are still not accessible enough.

The economic downturn has had an adverse impact on the situation of people with disabilities, making it all the more urgent to act. This Strategy aims to improve the lives of individuals, as well as bringing wider benefits for society and the economy without undue burden on industry and administrations.

2. OBJECTIVES AND ACTIONS

The overall aim of this Strategy is to empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy, notably through the Single market. Achieving this and ensuring effective implementation of the UN Convention across the EU calls for consistency. This Strategy identifies actions at EU level to supplement national ones, and it determines the mechanisms[8] needed to implement the UN Convention at EU level, including inside the EU institutions. It also identifies the support needed for funding, research, awareness-raising, statistics and data collection.

This Strategy focuses on eliminating barriers[9]. The Commission has identified eight main areas for action: **Accessibility, Participation, Equality, Employment, Education and training, Social protection, Health, and External Action**. For each area, key actions are identified, with the overarching EU-level objective highlighted in a box. These areas were selected on the basis of their potential to contribute to the overall objectives of the Strategy and of the UN Convention, the related policy documents from EU institutions and the Council of Europe, as well as the results of the EU Disability Action Plan 2003-2010, and a consultation of the Member States, stakeholders and the general public. The references to national actions are intended to supplement action at EU level, rather than to cover all national obligations under the UN Convention. The Commission will also tackle the situation of people with disabilities through the Europe 2020 strategy, its flagship initiatives and the relaunch of the single market.

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6 COM(2010) 2020.

7 Deloitte & Touche, Access to Assistive Technology in the EU, 2003, and BCC Research, 2008.

8 Article 33 UN Convention.

9 2006 Eurobarometer: 91% find that more money should be spent on eliminating physical barriers for people with disabilities.

2.1. Areas for action

1 — Accessibility

'Accessibility' is defined as meaning that people with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications technologies and systems (ICT), and other facilities and services. There are still major barriers in all of these areas. For example, on average in the EU-27, only 5% of public websites comply fully with web accessibility standards, though more are partially accessible. Many television broadcasters still provide few subtitled and audio-described programmes[10].

Accessibility is a precondition for participation in society and in the economy, but the EU still has a long way to go in achieving this. The Commission proposes to use legislative and other instruments, such as standardisation, to optimise the accessibility of the built environment, transport and ICT in line with the Digital Agenda and Innovation Union flagships. Based on smarter regulation principles, it will explore the merits of adopting regulatory measures to ensure accessibility of products and services, including measures to step up the use of public procurement (proven to be very effective in the US[11]). It will encourage the incorporation of accessibility and 'design for all' in educational curricula and training for relevant professions. It will also foster an EU-wide market for assistive technology. Following further consultations with Member States and other stakeholders, the Commission will consider whether to propose a 'European Accessibility Act' by 2012. This could include developing specific standards for particular sectors to substantially improve the proper functioning of the internal market for accessible products and services.

EU action will support and supplement national activities for implementing accessibility and removing existing barriers, and improving the availability and choice of assistive technologies.

Ensure accessibility to goods, services including public services and assistive devices for people with disabilities.

2 — Participation

There are still many obstacles preventing people with disabilities from fully exercising their fundamental rights - including their Union citizenship rights - and limiting their participation in society on an equal basis with others. Those rights include the right to free movement, to choose where and how to live, and to have full access to cultural, recreational, and sports activities. For example a person with a recognised disability moving to another EU country can lose access to national benefits, such as free or reduced-cost public transport.

The Commission will work to:

– overcome the obstacles to exercising their rights as individuals, consumers, students, economic and political actors; tackle the problems related to intra-EU mobility and facilitate and promote the use of the European model of disability parking card;

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10 EC (2007), SEC(2007) 1469, p. 7.

11 Section 508 of Rehabilitation Act and Architectural Barriers Act.

– promote the transition from institutional to community-based care by: using Structural Funds and the Rural Development Fund to support the development of community-based services and raising awareness of the situation of people with disabilities living in residential institutions, in particular children and elderly people;

– improve the accessibility of sports, leisure, cultural and recreational organisations, activities, events, venues, goods and services including audiovisual ones; promote participation in sports events and the organisation of disability-specific ones; explore ways of facilitating the use of sign language and Braille in dealing with the EU institutions; address accessibility to voting in order to facilitate the exercise of EU citizens' electoral rights; foster the cross-border transfer of copyright works in accessible format; promote use of the scope for exceptions provided by the Directive on copyright[12].

EU action will support national activities to:

– achieve the transition from institutional to community-based care, including use of Structural Funds and the Rural Development Fund for training human resources and adapting social infrastructure, developing personal assistance funding schemes, promoting sound working conditions for professional carers and support for families and informal carers;

– make sports, leisure, cultural and recreational organisations and activities accessible, and use the possibilities for exceptions in the Directive on copyright.

Achieve full participation of people with disabilities in society by: - enabling them to enjoy all the benefits of EU citizenship; - removing administrative and attitudinal barriers to full and equal participation; - providing quality community-based services, including access to personal assistance.

3 — Equality

Over half of all Europeans consider discrimination on grounds of disability or age to be widespread in the EU[13]. As required by Articles 1, 21 and 26 of the EU Charter and by Articles 10 and 19 TFEU, the Commission will promote the equal treatment of people with disabilities through a two-pronged approach. This will involve using existing EU legislation to provide protection from discrimination, and implementing an active policy to combat discrimination and promote equal opportunities in EU policies. The Commission will also pay attention to the cumulative impact of discrimination that people with disabilities may experience on other grounds, such as nationality, age, race or ethnicity, sex, religion or belief, or sexual orientation.

It will also ensure that Directive 2000/78/EC[14] banning discrimination in employment is fully implemented; it will promote diversity and combat discrimination through awareness-raising

[12] Directive 2001/29/EC. A Stakeholder Memorandum of Understanding signed on 14.9.2009.
[13] Special Eurobarometer 317.
[14] Council Directive 2000/78/EC (OJ L 303, 2.12.2000, p. 16).

campaigns at EU and national level, and support the work of EU-level NGOs active in the area.

EU action will support and supplement national policies and programmes to promote equality, for instance by promoting the conformity of Member State legislation on legal capacity with the UN Convention.

Eradicate discrimination on grounds of disability in the EU.

4 — Employment

Quality jobs ensure economic independence, foster personal achievement, and offer the best protection against poverty. However, the rate of employment for people with disabilities is only around 50%[15]. To achieve the EU's growth targets, more people with disabilities need to be in paid employment on the open labour market. The Commission will exploit the full potential of the Europe 2020 Strategy and its Agenda for new skills and jobs by providing Member States with analysis, political guidance, information exchange and other support. It will improve knowledge of the employment situation of women and men with disabilities, identify challenges and propose remedies. It will pay particular attention to young people with disabilities in their transition from education to employment. It will address intra-job mobility on the open labour market and in sheltered workshops, through information exchange and mutual learning. It will also address the issue of self employment and quality jobs, including aspects such as working conditions and career advancement, with the involvement of the social partners. The Commission will step up its support for voluntary initiatives that promote diversity management at the workplace, such as diversity charters signed by employers and a Social Business Initiative.

EU action will support and supplement national efforts to: analyse the labour market situation of people with disabilities; fight those disability benefit cultures and traps that discourage them from entering the labour market; help their integration in the labour market making use of the European Social Fund (ESF); develop active labour market policies; make workplaces more accessible; develop services for job placement, support structures and on-the-job training; promote use of the General Block Exemption Regulation[16] which allows the granting of state aid without prior notification to the Commission.

Enable many more people with disabilities to earn their living on the open labour market.

5 — Education and training

In the 16-19 age group the rate of non-participation in education is 37% for considerably restricted people, and 25% for those restricted to some extent, against 17% for those not restricted[17]. Access to mainstream education for children with severe disabilities is difficult and sometimes segregated. People with disabilities, in particular children, need to be integrated appropriately into the general education system and provided with individual support in the best interest of the child. With full respect for the responsibility of the Member

15 LFS AHM 2002.
16 Commission Regulation (EC) No 800/2008 (OJ L 214, 9.8.2008, p. 3).
17 LFS AHM 2002.

States for the content of teaching and the organisation of education systems, the Commission will support the goal of inclusive, quality education and training under the Youth on the Move initiative. It will increase knowledge on levels of education and opportunities for people with disabilities, and increase their mobility by facilitating participation in the Lifelong Learning Programme.

EU action will support national efforts through ET 2020, the strategic framework for European cooperation in education and training[18], to remove legal and organisational barriers for people with disabilities to general education and lifelong learning systems; provide timely support for inclusive education and personalised learning, and early identification of special needs; provide adequate training and support for professionals working at all levels of education and report on participation rates and outcomes.

Promote inclusive education and lifelong learning for pupils and students with disabilities.

6 –Social protection

Lower participation in general education and in the labour market lead to income inequalities and poverty for people with disabilities, as well as to social exclusion and isolation. They need to be able to benefit from social protection systems and poverty reduction programmes, disability-related assistance, public housing programmes and other enabling services, and retirement and benefit programmes. The Commission will pay attention to these issues through the European Platform against Poverty. This will include assessing the adequacy and sustainability of social protection systems and support through the ESF. In full respect of the competence of the Member States, the EU will support national measures to ensure the quality and sustainability of social protection systems for people with disabilities, notably through policy exchange and mutual learning.

Promote decent living conditions for people with disabilities.

7 — Health

People with disabilities may have limited access to health services, including routine medical treatments, leading to health inequalities unrelated to their disabilities. They are entitled to equal access to healthcare, including preventive healthcare, and specific affordable quality health and rehabilitation services which take their needs into account, including gender-based needs. This is mainly the task of the Member States, which are responsible for organising and delivering health services and medical care. The Commission will support policy developments for equal access to healthcare, including quality health and rehabilitation services designed for people with disabilities. It will pay specific attention to people with disabilities when implementing policies to tackle health inequalities; promote action in the field of health and safety at work to reduce risks of disabilities developing during working life and to improve the reintegration of workers with disabilities[19]; and work to prevent those risks.

[18] Council conclusions of 12 May 2009 on ET 2020 **(**OJ C 119, 28.5.2009, p. 2).

[19] EU Strategy on Health and Safety at Work 2007-2012 - COM(2007) 62.

EU action will support national measures to deliver accessible, non-discriminatory health services and facilities; promote awareness of disabilities in medical schools and in curricula for healthcare professionals; provide adequate rehabilitation services; promote mental health services and the development of early intervention and needs assessment services.

Foster equal access to health services and related facilities for people with disabilities.

8 — External action

The EU and the Member States should promote the rights of people with disabilities in their external action, including EU enlargement, neighbourhood and development programmes. The Commission will work where appropriate within a broader framework of non discrimination to highlight disability as a human rights issue in the EU's external action; raise awareness of the UN Convention and the needs of people with disabilities, including accessibility, in the area of emergency and humanitarian aid; consolidate the network of disability correspondents, increasing awareness of disability issues in EU delegations; ensure that candidate and potential candidate countries make progress in promoting the rights of people with disabilities and ensure that the financial instruments for pre-accession assistance are used to improve their situation.

EU action will support and complement national initiatives to address disability issues in dialogues with non-member countries, and where appropriate include disability and the implementation of the UN Convention taking into account the Accra commitments on aid-effectiveness. It will foster agreement and commitment on disability issues in international fora (UN, Council of Europe, OECD).

Promote the rights of people with disabilities within the EU external action.

2.2. Implementation of the Strategy

This Strategy requires a joint and renewed commitment of the EU institutions and all Member States. The actions in the main areas above need to be underpinned by the following general instruments:

1 — Awareness-raising

The Commission will work to ensure that people with disabilities are aware of their rights, paying special attention to accessibility of materials and information channels. It will promote awareness of 'design for all' approaches to products, services and environments.

EU action will support and supplement national public awareness campaigns on the capabilities and contributions of people with disabilities and promote exchange of good practices in the Disability High Level Group (DHLG).

Raise society's awareness of disability issues and foster greater knowledge among people with disabilities of their rights and how to exercise them.

2 — Financial support

The Commission will work to ensure that EU programmes in policy areas relevant to people with disabilities offer funding possibilities, for example in research programmes. The cost of measures to enable people with disabilities to take part in EU programmes should be eligible for reimbursement. EU funding instruments, particularly the Structural Funds, need to be implemented in an accessible and non-discriminatory way.

EU action will support and supplement national efforts to improve accessibility and combat discrimination through mainstream funding, proper application of Article 16 of the Structural Funds General Regulation[20], and by maximising requirements regarding accessibility in public procurement. All measures should be implemented in accordance with European competition law, in particular State aid rules.

Optimise use of EU funding instruments for accessibility and non-discrimination and increase visibility of disability-relevant funding possibilities in post-2013 programmes.

3 — Statistics and data collection and monitoring

The Commission will work to streamline information on disability collected through EU social surveys (EU Statistics on Income and Living Conditions, Labour Force Survey ad hoc module, European Health Interview Survey), develop a specific survey on barriers for social integration of disabled people and present a set of indicators to monitor their situation with reference to key Europe 2020 targets (education, employment and poverty reduction). The EU Fundamental Rights Agency is requested to contribute to this task, within the framework of its mandate, by data collection, research and analysis.

The Commission will also establish a web-based tool giving an overview of the practical measures and legislation used to implement the UN Convention.

EU action will support and supplement Member States' efforts to collect statistics and data that reflect the barriers preventing people with disabilities from exercising their rights.

Supplement the collection of periodic disability-related statistics with a view to monitoring the situation of persons with disabilities.

4 — Mechanisms required by the UN Convention

The governance framework required under Article 33 of the UN Convention (focal points, coordination mechanism, independent mechanism and involvement of people with disabilities and their organisations) needs to be addressed on two levels: *vis-à-vis* the Member States in a wide range of EU policies, and within EU institutions. At EU level, mechanisms for coordination based on existing facilities will be established both between the Commission services and the EU institutions, and between the EU and the Member States. The implementation of this Strategy and of the UN Convention will be regularly discussed at the DHLG with representatives of the Member States and their national focal points, the Commission, disabled people and their organisations and other stakeholders. It will continue to provide progress reports for informal ministerial meetings.

[20] Council Regulation (EC) No 1083/2006 (OJ L 210, 31.7.2006, p. 25).

Also, a monitoring framework including one or more independent mechanisms will be established to promote, protect and monitor implementation of the UN Convention. After the UN Convention is concluded and after considering the possible role of a number of existing EU bodies and institutions, the Commission will propose a governance framework without undue administrative burden to facilitate implementation of the UN Convention in Europe.

By the end of 2013, the Commission will report on progress achieved through this Strategy, covering implementation of actions, national progress and the EU report to the UN Committee on the Rights of Persons with Disabilities[21]. The Commission will use statistics and data collection to illustrate changes in disparities between people with disabilities and the population as a whole, and to establish disability-related indicators linked to the Europe 2020 targets for education, employment and poverty reduction. This will provide an opportunity to revise the Strategy and the actions. A further report is scheduled for 2016.

3. CONCLUSION

This Strategy is intended to harness the combined potential of the EU Charter of Fundamental Rights, the Treaty on the Functioning of the European Union, and the UN Convention, and to make full use of Europe 2020 and its instruments. It sets in motion a process to empower people with disabilities, so that they can participate fully in society on an equal basis with others. As Europe's population ages, these actions will have a tangible impact on the quality of life of an increasingly large proportion of its people. The EU institutions and the Member States are called upon to work together under this Strategy to build a barrier-free Europe for all.

[21] Articles 35 and 36 UN Convention.

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COUNCIL DECISION

of 26 November 2009

concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities

(2010/48/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 13 and 95 in conjunction with the second sentence of the first paragraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Whereas:

(1) In May 2004, the Council authorised the Commission to conduct negotiations on behalf of the European Community concerning the United Nations Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (hereinafter referred to as the UN Convention).

(2) The UN Convention was adopted by the United Nations General Assembly on 13 December 2006 and entered into force on 3 May 2008.

(3) The UN Convention was signed on behalf of the Community on 30 March 2007 subject to its possible conclusion at a later date.

(4) The UN Convention constitutes a relevant and effective pillar for promoting and protecting the rights of persons with disabilities within the European Union, to which both the Community and its Member States attach the greatest importance.

(5) The UN Convention should be thus approved, on behalf of the Community, as soon as possible.

(6) Such approval should, however, be accompanied by a reservation, to be entered by the European Community, with regard to Article 27(1) of the UN Convention, in order to state that the Community concludes the UN Convention without prejudice to the Community law-based right, as provided under Article 3(4) of Council Directive 2000/78/EC [2], of its Member States not to apply to armed forces the principle of equal treatment on the grounds of disability.

(7) Both the Community and its Member States have competence in the fields covered by the UN Convention. The Community and the Member States should therefore become Contracting Parties to it, so that together they can fulfil the obligations laid down by the UN Convention and exercise the rights invested in them, in situations of mixed competence in a coherent manner.

(8) The Community should, when depositing the instrument of formal confirmation, also deposit a declaration under Article 44.1 of the Convention specifying the matters governed by the Convention in respect of which competence has been transferred to it by its Member States,

HAS DECIDED AS FOLLOWS:

Article 1

1. The UN Convention on the Rights of Persons with Disabilities is hereby approved on behalf of the Community, subject to a reservation in respect of Article 27.1 thereof.

2. The text of the UN Convention is set out in Annex I to this Decision.

The text of the reservation is contained in Annex III to this Decision.

[1] Opinion delivered on 27 April 2009, not yet published in the Official Journal.

[2] OJ L 303, 2.12.2000, p. 16.

Article 2

1. The President of the Council is hereby authorised to designate the person(s) empowered to deposit, on behalf of the European Community, the instrument of formal confirmation of the Convention with the Secretary-General of the United Nations, in accordance with Articles 41 and 43 of the UN Convention.

2. When depositing the instrument of formal confirmation, the designated person(s) shall, in accordance with Articles 44.1 of the Convention, deposit the Declaration of Competence, set out in Annex II to this Decision, as well as the Reservation, set out in Annex III to this Decision.

Article 3

With respect to matters falling within the Community's competence and without prejudice to the respective competences of the Member States, the Commission shall be a focal point for matters relating to the implementation of the UN Convention in accordance with Article 33.1 of the UN Convention. The details of the function of focal point in this regard shall be laid down in a Code of Conduct before the deposition of the instrument of formal confirmation on behalf of the Community.

Article 4

1. With respect to matters falling within the Community's exclusive competence, the Commission shall represent the Community at meetings of the bodies created by the UN Convention, in particular the Conference of Parties referred to in Article 40 thereof, and shall act on its behalf as concerns questions falling within the remit of those bodies.

2. With respect to matters falling within the shared competences of the Community and the Member States, the Commission and the Member States shall determine in advance the appropriate arrangements for representation of the Community's position at meetings of the bodies created by the UN Convention. The details of this representation shall be laid down in a Code of Conduct to be agreed before the deposition of the instrument of formal confirmation on behalf of the Community.

3. At the meetings referred to in paragraphs 1 and 2 the Commission and the Member States, when necessary in prior consultation with other institutions of the Community concerned, shall closely cooperate, in particular as far as the questions of monitoring, reporting and voting arrangements are concerned. The arrangements for ensuring close cooperation shall also be addressed in the Code of Conduct referred to in paragraph 2.

Article 5

This Decision shall be published in the *Official Journal of the European Union*.

Done at Brussels, 26 November 2009.

For the Council
The President
J. BJÖRKLUND

ANNEX I

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Preamble

THE STATES PARTIES TO THE PRESENT CONVENTION,

(a) Recalling the principles proclaimed in the Charter of the United Nations which recognise the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

(b) Recognising that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

(c) Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

(d) Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

(e) Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

(f) Recognising the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalise opportunities for persons with disabilities,

(g) Emphasising the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,

(h) Recognising also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(i) Recognising further the diversity of persons with disabilities,

(j) Recognising the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

(l) Recognising the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,

(m) Recognising the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

(n) Recognising the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

(o) Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

(p) Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

(q) Recognising that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

(r) Recognising that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

(s) Emphasising the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,

(t) Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognising the critical need to address the negative impact of poverty on persons with disabilities,

(u) Bearing in mind that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,

(v) Recognising the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

(w) Realising that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the International Bill of Human Rights,

(x) Convinced that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

(y) Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

HAVE AGREED AS FOLLOWS:

Article 1

Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2

Definitions

For the purposes of the present Convention:

'Communication' includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

'Language' includes spoken and signed languages and other forms of non-spoken languages;

'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

'Universal design' means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design. 'Universal design' shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 3

General principles

The principles of the present Convention shall be:

(a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) non-discrimination;

(c) full and effective participation and inclusion in society;

(d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) equality of opportunity;

(f) accessibility;

(g) equality between men and women;

(h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4

General obligations

1. States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention;

(b) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(d) to refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(e) to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise;

(f) to undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in Article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

(g) to undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(h) to provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(i) to promote the training of professionals and staff working with persons with disabilities in the rights recognised in the present Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognised or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognise such rights or freedoms or that it recognises them to a lesser extent.

5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 5

Equality and non-discrimination

1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 6

Women with disabilities

1. States Parties recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7

Children with disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.

Article 8

Awareness-raising

1. States Parties undertake to adopt immediate, effective and appropriate measures:

(a) to raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(b) to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(c) to promote awareness of the capabilities and contributions of persons with disabilities.

2. Measures to this end include:

(a) initiating and maintaining effective public awareness campaigns designed:

(i) to nurture receptiveness to the rights of persons with disabilities;

(ii) to promote positive perceptions and greater social awareness towards persons with disabilities;

(iii) to promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

(b) fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

(c) encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

(d) promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 9

Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

(a) buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

(b) information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

(a) to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

(b) to ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

(c) to provide training for stakeholders on accessibility issues facing persons with disabilities;

(d) to provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

(e) to provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

(f) to promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

(g) to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

(h) to promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10

Right to life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11

Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12

Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13

Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14

Liberty and security of person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) enjoy the right to liberty and security of person;

(b) are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 15

Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16

Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 17

Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18

Liberty of movement and nationality

1. States Parties shall recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

(a) have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

(b) are not deprived, on the basis of disability, of their ability to obtain, possess and utilise documentation of their nationality or other documentation of identification, or to utilise relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

(c) are free to leave any country, including their own;

(d) are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19

Living independently and being included in the community

States Parties to the present Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(c) community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20

Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

(a) facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

(b) facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

(c) providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;

(d) encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Article 21

Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in Article 2 of the present Convention, including by:

(a) providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;

(b) accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;

(c) urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;

(d) encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;

(e) recognising and promoting the use of sign languages.

Article 22

Respect for privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Article 23

Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(a) the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised;

(b) the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognised, and the means necessary to enable them to exercise these rights are provided;

(c) persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realising these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 24

Education

1. States Parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

(a) the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

(b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

(c) enabling persons with disabilities to participate effectively in a free society.

2. In realising this right, States Parties shall ensure that:

(a) persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

(b) persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

(c) reasonable accommodation of the individual's requirements is provided;

(d) persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

(e) effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

(a) facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

(b) facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

(c) ensuring that the education of persons, and in particular children, who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximise academic and social development.

4. In order to help ensure the realisation of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25

Health

States Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

(a) provide persons with disabilities with the same range, quality and standard of free or affordable healthcare and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

(b) provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities, including among children and older persons;

(c) provide these health services as close as possible to people's own communities, including in rural areas;

(d) require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private healthcare;

(e) prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(f) prevent discriminatory denial of healthcare or health services or food and fluids on the basis of disability.

Article 26

Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

(a) begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;

(b) support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27

Work and employment

1. States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) employ persons with disabilities in the public sector;

(h) promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

Article 28

Adequate standard of living and social protection

1. States Parties recognise the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability.

2. States Parties recognise the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realisation of this right, including measures:

(a) to ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

(b) to ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

(c) to ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;

(d) to ensure access by persons with disabilities to public housing programmes;

(e) to ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 29

Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

(a) to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

(i) ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

(b) to promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) participation in non-governmental organisations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

(ii) forming and joining organisations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Article 30

Participation in cultural life, recreation, leisure and sport

1. States Parties recognise the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

(a) enjoy access to cultural materials in accessible formats;

(b) enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

(c) enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilise their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(a) to encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

(b) to ensure that persons with disabilities have an opportunity to organise, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

(c) to ensure that persons with disabilities have access to sporting, recreational and tourism venues;

(d) to ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

(e) to ensure that persons with disabilities have access to services from those involved in the organisation of recreational, tourism, leisure and sporting activities.

Article 31

Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

(a) comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

(b) comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

Article 32

International cooperation

1. States Parties recognise the importance of international cooperation and its promotion, in support of national efforts for the realisation of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organisations and civil society, in particular organisations of persons with disabilities. Such measures could include, inter alia:

(a) ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;

(b) facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

(c) facilitating cooperation in research and access to scientific and technical knowledge;

(d) providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

Article 33

National implementation and monitoring

1. States Parties, in accordance with their system of organisation, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.

Article 34

Committee on the Rights of Persons with Disabilities

1. There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as the Committee), which shall carry out the functions hereinafter provided.

2. The Committee shall consist, at the time of entry into force of the present Convention, of 12 experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of 18 members.

3. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognised competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in Article 4, paragraph 3, of the present Convention.

4. The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilisation and of the principal legal systems, balanced gender representation and participation of experts with disabilities.

5. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

7. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.

8. The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.

9. If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.

10. The Committee shall establish its own rules of procedure.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention, and shall convene its initial meeting.

12. With the approval of the General Assembly of the United Nations, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

13. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 35

Reports by States Parties

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

3. The Committee shall decide any guidelines applicable to the content of the reports.

4. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in Article 4, paragraph 3, of the present Convention.

5. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36

Consideration of reports

1. Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

2. If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply.

3. The Secretary-General of the United Nations shall make available the reports to all States Parties.

4. States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.

5. The Committee shall transmit, as it may consider appropriate, to the specialised agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance contained therein, along with the Committee's observations and recommendations, if any, on these requests or indications.

Article 37

Cooperation between States Parties and the Committee

1. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.

2. In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38

Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

(a) the specialised agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialised agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialised agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) the Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39

Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40

Conference of States Parties

1. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.

2. No later than six months after the entry into force of the present Convention, the Conference of States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General biennially or upon the decision of the Conference of States Parties.

Article 41

Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Article 42

Signature

The present Convention shall be open for signature by all States and by regional integration organisations at United Nations Headquarters in New York as of 30 March 2007.

Article 43

Consent to be bound

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organisations. It shall be open for accession by any State or regional integration organisation which has not signed the Convention.

Article 44

Regional integration organisations

1. 'Regional integration organisation' shall mean an organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organisations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to 'States Parties' in the present Convention shall apply to such organisations within the limits of their competence.

3. For the purposes of Article 45, paragraph 1, and Article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organisation shall not be counted.

4. Regional integration organisations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organisation shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 45

Entry into force

1. The present Convention shall enter into force on the thirtieth day after the deposit of the 20th instrument of ratification or accession.

2. For each State or regional integration organisation ratifying, formally confirming or acceding to the present Convention after the deposit of the 20th such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 46

Reservations

1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 47

Amendments

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to Articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48

Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 49

Accessible format

The text of the present Convention shall be made available in accessible formats.

Article 50

Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorised thereto by their respective governments, have signed the present Convention.

ANNEX II

DECLARATION CONCERNING THE COMPETENCE OF THE EUROPEAN COMMUNITY WITH REGARD TO MATTERS GOVERNED BY THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

(Declaration made pursuant to Article 44(1) of the Convention)

Article 44(1) of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter referred to as the Convention) provides that a regional integration organisation in its instrument of formal confirmation or accession is to declare the extent of its competence with respect to matters governed by the Convention.

The current members of the European Community are the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

The European Community notes that for the purpose of the Convention, the term 'State Parties' applies to regional integration organisations within the limits of their competence.

The United Nations Convention on the Rights of Persons with Disabilities shall apply, with regard to the competence of the European Community, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, in particular Article 299 thereof.

Pursuant to Article 299, this Declaration is not applicable to the territories of the Member States in which the said Treaty does not apply and is without prejudice to such act or positions as may be adopted under the Convention by Member States concerned on behalf and in the interests of those territories.

In accordance with Article 44(1) of the Convention, this Declaration indicates the competences transferred to the Community by the Member States under the Treaty establishing the European Community, in the areas covered by the Convention.

The scope and the exercise of Community competence are, by their nature, subject to continuous development and the Community will complete or amend this Declaration, if necessary, in accordance with Article 44(1) of the Convention.

In some matters the European Community has exclusive competence and in other matters competence is shared between the European Community and the Member States. The Member States remain competent for all matters in respect of which no competence has been transferred to the European Community.

At present:

1. The Community has exclusive competence as regards the compatibility of State aid with the common market and the Common Custom Tariff.

   To the extent that provisions of Community law are affected by the provision of the Convention, the European Community has an exclusive competence to accept such obligations with respect to its own public administration. In this regard, the Community declares that it has power to deal with regulating the recruitment, conditions of service, remuneration, training etc. of non-elected officials under the Staff Regulations and the implementing rules to those Regulations ([1]).

2. The Community shares competence with Member States as regards action to combat discrimination on the ground of disability, free movement of goods, persons, services and capital agriculture, transport by rail, road, sea and air transport, taxation, internal market, equal pay for male and female workers, trans-European network policy and statistics.

([1]) Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ L 56, 4.3.1968, p. 1).

The European Community has exclusive competence to enter into this Convention in respect of those matters only to the extent that provisions of the Convention or legal instruments adopted in implementation thereof affect common rules previously established by the European Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the European Community to act in this field. Otherwise competence rests with the Member States. A list of relevant acts adopted by the European Community appears in the Appendix hereto. The extent of the European Community's competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.

3. The following EC policies may also be relevant to the UN Convention: Member States and the Community shall work towards developing a coordinated strategy for employment. The Community shall contribute to the development of quality of education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action. The Community shall implement a vocational training policy which shall support and supplement the action of the Member States. In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. The Community conducts a development cooperation policy and economic, financial and technical cooperation with third countries without prejudice to the respective competences of the Member States.

Appendix

COMMUNITY ACTS WHICH REFER TO MATTERS GOVERNED BY THE CONVENTION

The Community acts listed below illustrate the extent of the area of competence of the Community in accordance with the Treaty establishing the European Community. In particular the European Community has exclusive competence in relation to some matters and in some other matters competence is shared between the Community and the Member States. The extent of the Community's competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules that are affected by the provisions of the Convention.

— regarding accessibility

Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ L 91, 7.4.1999, p. 10)

Directive 2001/85/EC of the European Parliament and of the Council of 20 November 2001 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, amending Directives 70/156/EEC and 97/27/EC (OJ L 42, 13.2.2002, p. 1)

Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system (OJ L 235, 17.9.1996, p. 6), as amended by Directive 2004/50/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 114)

Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system (OJ L 110, 20.4.2001, p. 1), as amended by Directive 2004/50/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 114)

Directive 2006/87/EC of the European Parliament and of the Council of 12 December 2006 laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC (OJ L 389, 30.12.2006, p. 1)

Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003 amending Council Directive 98/18/EC on safety rules and standards for passenger ships (OJ L 123, 17.5.2003, p. 18)

Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ L 263, 9.10.2007, p. 1)

Commission Decision 2008/164/EC of 21 December 2007 concerning the technical specification of interoperability relating to 'persons with reduced mobility' in the trans-European conventional and high-speed rail system (OJ L 64, 7.3.2008, p. 72)

Directive 95/16/EC of the European Parliament and of the Council of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (OJ L 213, 7.9.1995, p. 1), as amended by Directive 2006/42/EC of the European Parliament and of the Council on machinery, and amending Directive 95/16/EC (OJ L 157, 9.6.2006, p. 24)

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 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of services (OJ L 15, 21.1.1998, p. 14), as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ L 176, 5.7.2002, p. 21), and as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3)

Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25)

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1)

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 (OJ L 134, 30.4.2004, p. 114)

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p. 31)

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p. 31)

— in the field of independent living and social inclusion, work and employment

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16)

Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation) (OJ L 214, 9.8.2008, p. 3)

Commission Regulation (EEC) No 2289/83 of 29 July 1983 laying down provisions for the implementation of Articles 70 to 78 of Council Regulation (EEC) No 918/83 establishing a Community system of duty-free arrangements (OJ L 220, 11.8.1983, p. 15)

Council Directive 83/181/EEC of 28 March 1983 determining the scope of Article 14(1)(d) of Directive 77/388/EEC as regards exemption from value added tax on the final importation of certain goods (OJ L 105, 23.4.1983, p. 38)

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23)

Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ L 105, 23.4.1983, p. 1)

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1), as amended by Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax (OJ L 116, 9.5.2009, p. 18)

Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1)

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51)

— in the field of personal mobility

Council Directive 91/439/EEC of 29 July 1991 on driving licences (OJ L 237, 24.8.1991, p. 1)

Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ L 403, 30.12.2006, p. 18)

Directive 2003/59/EC of the European Parliament and of the Council of 15 July 2003 on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers, amending Council Regulation (EEC) No 3820/85 and Council Directive 91/439/EEC and repealing Council Directive 76/914/EEC (OJ L 226, 10.9.2003, p. 4)

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1)

Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, Text with EEA relevance (OJ L 204, 26.7.2006, p. 1)

Regulation (EC) No 1899/2006 of the European Parliament and of the Council of 12 December 2006 amending Council Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (OJ L 377, 27.12.2006, p. 1)

Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14)

Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1)

Commission Regulation (EC) No 8/2008 of 11 December 2007 amending Council Regulation (EEC) No 3922/91 as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane (OJ L 10, 12.1.2008, p. 1)

— regarding access to information

Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medical products for human use (OJ L 311, 28.11.2001, p. 67), as amended by Directive 2004/27/EC of the European Parliament and of the Council (OJ L 136, 30.4.2004, p. 34)

Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10)

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (OJ L 149, 11.6.2005, p. 22)

— regarding statistics and data collection

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (OJ L 281, 23.11.1995, p. 31)

Council Regulation (EC) No 577/98 of 9 March 1998 on the organisation of the Labour Force Sample Survey in the Community (OJ L 77, 14.3.1998, p. 3) with related implementing Regulations

Regulation (EC) No 1177/2003 of the European Parliament and of the Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC): text with EEA relevance (OJ L 165, 3.7.2003, p. 1) with related implementing regulations

Regulation (EC) No 458/2007 of the European Parliament and of the Council of 25 April 2007 on the European system of integrated social protection statistics (ESSPROS) (OJ L 113, 30.4.2007, p. 3) with related implementing regulations

Regulation (EC) No 1338/2008 of the European Parliament and of the Council of 16 December 2008 on Community statistics on public health and health and safety at work (OJ L 354, 31.12.2008, p. 70)

— in the field of international cooperation

Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (OJ L 378, 27.12.2006, p. 41)

Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (OJ L 386, 29.12.2006, p. 1)

Commission Regulation (EC) No 718/2007 of 12 June 2007 implementing Council Regulation (EC) No 1085/2006 establishing an Instrument for Pre-accession Assistance (IPA) (OJ L 170, 29.6.2007, p. 1)

ANNEX III

RESERVATION BY THE EUROPEAN COMMUNITY TO ARTICLE 27(1) OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The European Community states that pursuant to Community law (notably Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), the Member States may, if appropriate, enter their own reservations to Article 27(1) of the Disabilities Convention to the extent that Article 3(4) of the said Council Directive provides them with the right to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces from the scope of the Directive. Therefore, the Community states that it concludes the Convention without prejudice to the above right, conferred on its Member States by virtue of Community law.

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The States Parties to the present Protocol have agreed as follows:

Article 1

1. A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 2

The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous;
(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;
(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
(d) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
(e) It is manifestly ill-founded or not sufficiently substantiated; or when
(f) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3

Subject to the provisions of article 2 of the present Protocol, the Committee shall bring any communications submitted to it confidentially to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 4

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5

The Committee shall hold closed meetings when examining communications under the present Protocol. After examining a communication, the Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

Article 6

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 7

1. The Committee may invite the State Party concerned to include in its report under article 35 of the Convention details of any measures taken in response to an inquiry conducted under article 6 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 6, paragraph 4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 8

Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.

Article 9

The Secretary-General of the United Nations shall be the depositary of the present Protocol.

Article 10

The present Protocol shall be open for signature by signatory States and regional integration organizations of the Convention at United Nations Headquarters in New York as of 30 March 2007.

Article 11

The present Protocol shall be subject to ratification by signatory States of the present Protocol which have ratified or acceded to the Convention. It shall be subject to formal confirmation by signatory regional integration organizations of the present Protocol which have formally confirmed or acceded to the Convention. It shall be open for accession by any State or regional integration organization which has ratified, formally confirmed or acceded to the Convention and which has not signed the Protocol.

Article 12

1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and the present Protocol. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention and the present Protocol.

Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to "States Parties" in the present Protocol shall apply to such organizations within the limits of their competence.

3. For the purposes of article 13, paragraph 1, and article 15, paragraph 2, of the present Protocol, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the meeting of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 13

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Protocol after the deposit of the tenth such instrument, the Protocol shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 14

1. Reservations incompatible with the object and purpose of the present Protocol shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 15

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be

submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 16

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 17

The text of the present Protocol shall be made available in accessible formats.

Article 18

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.

COUNCIL DIRECTIVE 2000/78/EC
of 27 November 2000
establishing a general framework for equal treatment in employment and occupation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the Opinion of the European Parliament [2],

Having regard to the Opinion of the Economic and Social Committee [3],

Having regard to the Opinion of the Committee of the Regions [4],

Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(2) The principle of equal treatment between women and men is well established by an important body of Community law, in particular in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [5].

(3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.

(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.

(7) The EC Treaty includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.

(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

(10) On 29 June 2000 the Council adopted Directive 2000/43/EC [6] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. That Directive already provides protection against such discrimination in the field of employment and occupation.

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social

[1] OJ C 177 E, 27.6.2000, p. 42.
[2] Opinion delivered on 12 October 2000 (not yet published in the Official Journal).
[3] OJ C 204, 18.7.2000, p. 82.
[4] OJ C 226, 8.8.2000, p. 1.
[5] OJ L 39, 14.2.1976, p. 40.
[6] OJ L 180, 19.7.2000, p. 22.

protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.

(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

(19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

(26) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community [1], the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities [2], affirmed the importance of giving specific attention *inter alia* to recruitment, retention, training and lifelong learning with regard to disabled persons.

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(30) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

(32) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.

(33) Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the workplace and to combat them.

(34) The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.

(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.

(37) In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the creation within the Community of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

[1] OJ L 225, 12.8.1986, p. 43.
[2] OJ C 186, 2.7.1999, p. 3.

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Article 4

Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 5

Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate

aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 7

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 8

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 9

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 10

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 11

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 12

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.

Article 13

Social dialogue

1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.

2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to conclude at the appropriate level agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and by the relevant national implementing measures.

Article 14

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment.

CHAPTER III

PARTICULAR PROVISIONS

Article 15

Northern Ireland

1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.

2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

CHAPTER IV

FINAL PROVISIONS

Article 16

Compliance

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

Article 17

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 18

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest or may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 19

Report

1. Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 20

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 November 2000.

For the Council

The President

É. GUIGOU

JUDGMENT OF THE COURT (Grand Chamber)

11 July 2006 (*)

(Directive 2000/78/EC – Equal treatment in employment and occupation – Concept of disability)

In Case C-13/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Social No 33 de Madrid (Spain), made by decision of 7 January 2005, received at the Court on 19 January 2005, in the proceedings

Sonia Chacón Navas

v

Eurest Colectividades SA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann and J. Makarczyk, Presidents of Chambers, J.-P. Puissochet, N. Colneric (Rapporteur), K. Lenaerts, P. Kūris, E. Juhász, E. Levits and A. Ó Caoimh, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Eurest Colectividades SA, by R. Sanz García-Muro, abogada,

– the Spanish Government, by E. Braquehais Conesa, acting as Agent,

– the Czech Government, by T. Boček, acting as Agent,

– the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

– the Netherlands Government, by H. G. Sevenster, acting as Agent,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the United Kingdom Government, by C. White, acting as Agent, and T. Ward, Barrister,

– the Commission of the European Communities, by I. Martinez del Peral Cagigal and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 March 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation, as regards discrimination on grounds of disability, of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) and, in the alternative, possible prohibition of discrimination on grounds of sickness.

2 The reference was made in the course of proceedings between Ms Chacón Navas and Eurest Colectividades SA ('Eurest') regarding her dismissal whilst she was on leave of absence from her employment on grounds of sickness.

Legal and regulatory context

Community law

3 The first paragraph of Article 136 EC reads:

'The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

4 Article 137(1) and (2) EC confers on the Community the power to support and complement the activities of the Member States with a view to achieving the objectives of Article 136 EC, inter alia in the fields of integrating persons excluded from the labour market and combating social exclusion.

5 Directive 2000/78 was adopted on the basis of Article 13 EC in the version prior to the Treaty of Nice, which provides:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

6 Article 1 of Directive 2000/78 provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

7 That directive states in its recitals:

'(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. …

…

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

…

(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community [OJ 1986 L 225, p. 43], the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.'

8 Article 2(1) and (2) of Directive 2000/78 provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.'

9 Under Article 3 of that directive:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…'

10 Article 5 of that directive reads:

'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo

training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.'

11 The Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, to which Article 136(1) EC refers, states in point 26:

'All disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration.

These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing.'

National legislation

12 Under Article 14 of the Spanish Constitution:

'Spanish people are equal before the law; there may be no discrimination on grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.'

13 Legislative Royal Decree No 1/1995 of 24 March 1995 approving the amended text of the Workers' Statute (Estatuto de los Trabajadores, BOE No 75 of 29 March 1995, p. 9654; 'the Workers' Statute') distinguishes between unlawful dismissal and void dismissal.

14 Article 55(5) and (6) of the Workers' Statute provides:

'5. Any dismissal on one of the grounds of discrimination prohibited by the Constitution or by law or occurring in breach of the fundamental rights and public freedoms of workers shall be void.

…

6. Any dismissal which is void shall entail the immediate reinstatement of the worker, with payment of unpaid wages or salary.'

15 It follows from Article 56(1) and (2) of the Workers' Statute that, in the event of unlawful dismissal, save where the employer decides to reinstate the worker, he loses his job but receives compensation.

16 As regards the prohibition of discrimination in employment relationships, Article 17 of the Workers' Statute, as amended by Law 62/2003 of 30 December 2003 laying down fiscal, administrative and social measures (BOE No 313 of 31 December 2003, p. 46874), which is intended to transpose Directive 2000/78 into Spanish law, provides:

'1. Regulatory provisions, clauses in collective agreements, individual agreements, and unilateral decisions by an employer, which involve direct or indirect unfavourable discrimination on grounds of age or disability, or positive or unfavourable discrimination in employment, or with regard to remuneration, working hours, and other conditions of employment based on sex, race, or ethnic origin, civil status, social status, religion or beliefs, political opinions, sexual orientation, membership or lack of membership of trade unions or compliance with their agreements, the fact of being related to other workers in the undertaking, or language within the Spanish State, shall be deemed void and ineffective.

…'.

The main proceedings and the questions referred for a preliminary ruling

17 Ms Chacón Navas was employed by Eurest, an undertaking specialising in catering. On 14 October 2003 she was certified as unfit to work on grounds of sickness and, according to the

public health service which was treating her, she was not in a position to return to work in the short term. The referring court provides no information about Ms Chacón Navas' illness.

18 On 28 May 2004 Eurest gave Ms Chacón Navas written notice of her dismissal, without stating any reasons, whilst acknowledging that the dismissal was unlawful and offering her compensation.

19 On 29 June 2004 Ms Chacón Navas brought an action against Eurest, maintaining that her dismissal was void on account of the unequal treatment and discrimination to which she had been subject, stemming from the fact that she had been on leave of absence from her employment for eight months. She sought an order that Eurest reinstate her in her post.

20 The referring court points out that, in the absence of any other claim or evidence in the file, it follows from the reversal of the burden of proof that Ms Chacón Navas must be regarded as having been dismissed solely on account of the fact that she was absent from work because of sickness.

21 The referring court observes that, according to Spanish case-law, there are precedents to the effect that this type of dismissal is classified as unlawful rather than void, since, in Spanish law, sickness is not expressly referred to as one of the grounds of discrimination prohibited in relationships between private individuals.

22 Nevertheless, the referring court observes that there is a causal link between sickness and disability. In order to define the term 'disability', it is necessary to turn to the International Classification of Functioning, Disability and Health (ICF) drawn up by the World Health Organisation. It is apparent from this that 'disability' is a generic term which includes defects, limitation of activity and restriction of participation in social life. Sickness is capable of causing defects which disable individuals.

23 Given that sickness is often capable of causing an irreversible disability, the referring court takes the view that workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. Otherwise, the protection intended by the legislature would, in large measure, be nullified, because it would thus be possible to implement uncontrolled discriminatory practices.

24 Should it be concluded that disability and sickness are two separate concepts and that Community law does not apply directly to sickness, the referring court suggests that it should be held that sickness constitutes an identifying attribute that is not specifically cited which should be added to the ones in relation to which Directive 2000/78 prohibits discrimination. This follows from a joint reading of Articles 13 EC, 136 EC and 137 EC, and Article II-21 of the draft Treaty establishing a Constitution for Europe.

25 It was in those circumstances that the Juzgado de lo Social No 33 de Madrid decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Directive 2000/78, in so far as Article 1 thereof lays down a general framework for combating discrimination on the grounds of disability, include within its protective scope a … [worker] who has been dismissed by her employer solely because she is sick?

(2) In the alternative, if it should be concluded that sickness does not fall within the protective framework which Directive 2000/78 lays down against discrimination on grounds of disability and the first question is answered in the negative, can sickness be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination?'

The admissibility of the reference for a preliminary ruling

26 The Commission casts doubt on the admissibility of the questions referred on the ground that the facts described in the order for reference lack precision.

27 In this respect, it must be observed that despite the absence of any indication of the nature and possible course of Ms Chacón Navas' sickness, the Court has enough information to enable it to give a useful answer to the questions referred.

28 It is apparent from the order for reference that Ms Chacón Navas, who was certified as unfit for work on grounds of sickness and was not in a position to return to work in the short term, was, according to the referring court, dismissed solely on account of the fact that she was absent from work because of sickness. It is also apparent from that order that the referring court takes the view that there is a causal link between sickness and disability and that a worker in the situation of Ms Chacón Navas must be protected under the prohibition of discrimination on grounds of disability.

29 The question principally referred concerns in particular the interpretation of the concept of 'disability' for the purpose of Directive 2000/78. The Court's interpretation of that concept is intended to enable the referring court to decide whether Ms Chacón Navas was, at the time of her dismissal, on account of her sickness, a person with a disability for the purpose of that directive who enjoyed the protection provided for in Article 3(1)(c) thereof.

30 The question referred in the alternative relates to sickness as an 'identifying attribute' and therefore concerns any type of sickness.

31 Eurest maintains that the reference for a preliminary ruling is inadmissible since the Spanish courts, in particular the Tribunal Supremo, have already ruled, in the light of Community legislation, that the dismissal of a worker who has been certified as unfit to work on grounds of sickness does not as such amount to discrimination. However, the fact that a national court has already interpreted Community legislation cannot render inadmissible a reference for a preliminary ruling.

32 As regards Eurest's argument that it dismissed Ms Chacón Navas without reference to the fact that she was absent from work on grounds of sickness because, at that time, her services were no longer necessary, it must be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27, and Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33).

33 Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, and Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 25).

34 Since none of those conditions have been satisfied in this case, the reference for a preliminary ruling is admissible.

The questions

The first question

35 By its first question, the referring court is asking, in essence, whether the general framework laid down by Directive 2000/78 for combating discrimination on the grounds of disability confers protection on a person who has been dismissed by his employer solely on account of sickness.

36 As is clear from Article 3(1)(c) of Directive 2000/78, that directive applies, within the limits of the areas of competence conferred on the Community, to all persons, as regards inter alia dismissals.

37 Within those limits, the general framework laid down by Directive 2000/78 for combating discrimination on grounds of disability therefore applies to dismissals.

38 In order to reply to the question referred, it is necessary, first, to interpret the concept of 'disability' for the purpose of Directive 2000/78 and, second, to consider to what extent disabled persons are protected by that directive as regards dismissal.

Concept of 'disability'

39 The concept of 'disability' is not defined by Directive 2000/78 itself. Nor does the directive refer to the laws of the Member States for the definition of that concept.

40 It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, and Case C-323/03 *Commission* v *Spain* [2006] ECR I-0000, paragraph 32).

41 As is apparent from Article 1, the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination based on any of the grounds referred to in that article, which include disability, as regards employment and occupation.

42 In the light of that objective, the concept of 'disability' for the purpose of Directive 2000/78 must, in accordance with the rule set out in paragraph 40 of this judgment, be given an autonomous and uniform interpretation.

43 Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.

44 However, by using the concept of 'disability' in Article 1 of that directive, the legislature deliberately chose a term which differs from 'sickness'. The two concepts cannot therefore simply be treated as being the same.

45 Recital 16 in the preamble to Directive 2000/78 states that the 'provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability'. The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time.

46 There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.

47 It follows from the above considerations that a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78.

Protection of disabled persons as regards dismissal

48 Unfavourable treatment on grounds of disability undermines the protection provided for by Directive 2000/78 only in so far as it constitutes discrimination within the meaning of Article 2(1) of that directive.

49 According to Recital 17 in the preamble to Directive 2000/78, that directive does not require the recruitment, promotion or maintenance in employment of an individual who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

50 In accordance with Article 5 of Directive 2000/78, reasonable accommodation is to be provided in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities. That provision states that this means that employers are to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer.

51 The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

52 It follows from all the above considerations that the answer to the first question must be that:

– a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78;

– the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

The second question

53 By its second question, the referring court is asking whether sickness can be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.

54 In this connection, it must be stated that no provision of the EC Treaty prohibits discrimination on grounds of sickness as such.

55 Article 13 EC and Article 137 EC, read in conjunction with Article 136 EC, contain only the rules governing the competencies of the Community. Moreover, Article 13 EC does not refer to discrimination on grounds of sickness as such in addition to discrimination on grounds of disability, and cannot therefore even constitute a legal basis for Council measures to combat such discrimination.

56 It is true that fundamental rights which form an integral part of the general principles of Community law include the general principle of non-discrimination. That principle is therefore binding on Member States where the national situation at issue in the main proceedings falls within the scope of Community law (see, to that effect, Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 30 and 32, and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 75, and the case-law cited). However, it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof.

57 The answer to the second question must therefore be that sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **A person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.**

2. **The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.**

3. **Sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.**

[Signatures]

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* Language of the case: Spanish.

JUDGMENT OF THE COURT (Grand Chamber)

17 July 2008 (*)

(Social policy – Directive 2000/78/EC – Equal treatment in employment and occupation – Articles 1, 2(1), (2)(a) and (3) and 3(1)(c) – Direct discrimination on grounds of disability – Harassment related to disability – Dismissal of an employee who is not himself disabled but whose child is disabled – Included – Burden of proof)

In Case C-303/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Employment Tribunal, London South (United Kingdom), made by decision of 6 July 2006, received at the Court on 10 July 2006, in the proceedings

S. Coleman

v

Attridge Law

and

Steve Law,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano, Presidents of Chambers, M. Ilešič, J. Klučka, A. Ó Caoimh (Rapporteur), T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 October 2007,

after considering the observations submitted on behalf of:

– Ms Coleman, by R. Allen QC and P. Michell, Barrister,

– the United Kingdom Government, by V. Jackson, acting as Agent, and N. Paines QC,

– the Greek Government, by K. Georgiadis and Z. Chatzipavlou, acting as Agents,

– Ireland, by N. Travers, BL,

– the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,

– the Lithuanian Government, by D. Kriaučiūnas, acting as Agent,

– the Netherlands Government, by H.G. Sevenster and C. ten Dam, acting as Agents,

– the Swedish Government, by A. Falk, acting as Agent,

– the Commission of the European Communities, by J. Enegren and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The reference was made in the course of proceedings between Ms Coleman, the claimant in the main proceedings, and Attridge Law, a firm of solicitors, and Mr Law, a partner in that firm (together, the 'former employer'), concerning Ms Coleman's claim of constructive dismissal.

Legal context

Community legislation

3 Directive 2000/78 was adopted on the basis of Article 13 EC. Recitals 6, 11, 16, 17, 20, 27, 31 and 37 in the preamble to the directive are worded as follows:

'(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.

…

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

…

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

…

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

…

(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community [OJ 1986 L 225, p. 43], the Council established a guideline

framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities [OJ 1999 C 186, p. 3], affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.

…

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

…

(37) In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the creation within the Community of a level playing field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.'

4 Article 1 of Directive 2000/78 states that '[t]he purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

5 Article 2(1) to (3) of the directive, headed 'Concept of discrimination', states:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

…’

6 Article 3(1) of Directive 2000/78 provides:

‘Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…’

7 Article 5 of Directive 2000/78, headed ‘Reasonable accommodation for disabled persons’, provides:

‘In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. …’

8 Article 7 of Directive 2000/78, headed ‘Positive action’, is worded as follows:

‘1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.’

9 Article 10 of Directive 2000/78, headed ‘Burden of proof’, provides:

‘1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.’

10 In accordance with the first paragraph of Article 18 of Directive 2000/78, Member States were required to adopt the laws, regulations and administrative provisions necessary to comply with that directive by 2 December 2003 at the latest. Nevertheless, the second paragraph of Article 18 states:

‘In order to take account of particular conditions, Member States may, if necessary, have an additional period of three years from 2 December 2003, that is to say a total of six years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.’

11 As the United Kingdom of Great Britain and Northern Ireland requested such an additional period for the implementation of the directive, that period did not expire until 2 December 2006 as regards that Member State.

National legislation

12 The Disability Discrimination Act 1995 ('the DDA') essentially aims to make it unlawful to discriminate against disabled persons in connection, inter alia, with employment.

13 Part 2 of the DDA, which regulates the employment field, was amended, on the transposition of Directive 2000/78 into United Kingdom law, by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, which came into force on 1 October 2004.

14 According to section 3A(1) of the DDA, as amended by those 2003 Regulations ('the DDA as amended in 2003'):

'… a person discriminates against a disabled person if –

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and

(b) he cannot show that the treatment in question is justified.'

15 Section 3A(4) of the DDA as amended in 2003 none the less specifies that the treatment of a disabled person cannot be justified if it amounts to direct discrimination falling within section 3A(5), according to which:

'A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.'

16 Harassment is defined in section 3B of the DDA as amended in 2003 as follows:

'(1) ... a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –

(a) violating the disabled person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect.'

17 Under section 4(2)(d) of the DDA as amended in 2003, it is unlawful for an employer to discriminate against a disabled person whom he employs by dismissing him or by subjecting him to any other detriment.

18 Section 4(3)(a) and (b) of the DDA as amended in 2003 provides that it is also unlawful for an employer, in relation to employment by him, to subject to harassment a disabled person whom he employs or a disabled person who has applied to him for employment.

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 Ms Coleman worked for her former employer as a legal secretary from January 2001.

20 In 2002, she gave birth to a son who suffers from apnoeic attacks and congenital laryngomalacia and bronchomalacia. Her son's condition requires specialised and particular care. The claimant in the main proceedings is his primary carer.

21 On 4 March 2005, Ms Coleman accepted voluntary redundancy, which brought her contract of employment with her former employer to an end.

22 On 30 August 2005, she lodged a claim with the Employment Tribunal, London South, alleging that she had been subject to unfair constructive dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child. She claims that that treatment caused her to stop working for her former employer.

23 The order for reference states that the material facts of the case in the main proceedings have not yet been fully established, since the questions referred for a preliminary ruling arose only as a preliminary issue. The referring tribunal stayed that part of the action concerning Ms Coleman's dismissal, but held a preliminary hearing on 17 February 2006 to consider the discrimination plea.

24 The preliminary issue raised before that tribunal is whether the claimant in the main proceedings can base her application on national law, in particular those provisions designed to transpose Directive 2000/78, in order to plead discrimination against her former employer on the ground that she was subjected to less favourable treatment connected with her son's disability.

25 It is apparent from the order for reference that, should the Court's interpretation of Directive 2000/78 contradict that put forward by Ms Coleman, her application to the referring tribunal could not succeed under national law.

26 It is also apparent from the order for reference that, under United Kingdom law, where there is a preliminary hearing on a point of law, the court or tribunal hearing the case assumes that the facts are as related by the claimant. In the main proceedings, the facts of the dispute are assumed to be as follows:

– On Ms Coleman's return from maternity leave, her former employer refused to allow her to return to her existing job, in circumstances where the parents of non-disabled children would have been allowed to take up their former posts;

– her former employer also refused to allow her the same flexibility as regards her working hours and the same working conditions as those of her colleagues who are parents of non-disabled children;

– Ms Coleman was described as 'lazy' when she requested time off to care for her child, whereas parents of non-disabled children were allowed time off;

– the formal grievance which she lodged against her ill treatment was not dealt with properly and she felt constrained to withdraw it;

– abusive and insulting comments were made about both her and her child. No such comments were made when other employees had to ask for time off or a degree of flexibility in order to look after non-disabled children; and

– having occasionally arrived late at the office because of problems related to her son's condition, she was told that she would be dismissed if she came to work late again. No such threat was made in the case of other employees with non-disabled children who were late for similar reasons.

27 Since the Employment Tribunal, London South, considered that the case before it raised questions of interpretation of Community law, it decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the context of the prohibition of discrimination on grounds of disability, does [Directive 2000/78] only protect from direct discrimination and harassment persons who are themselves disabled?

(2) If the answer to Question (1) above is in the negative, does [Directive 2000/78] protect employees who, though they are not themselves disabled, are treated less

favourably or harassed on the ground of their association with a person who is disabled?

(3) Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of the principle of equal treatment established by [Directive 2000/78]?

(4) Where an employer harasses an employee, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of the principle of equal treatment established by [Directive 2000/78]?'

Admissibility

28 While accepting that the questions put by the referring tribunal are based on an actual dispute, the Netherlands Government called into question the admissibility of the reference for a preliminary ruling on the basis that, given that these are preliminary questions raised at a preliminary hearing, all the facts at issue have not yet been established. It points out that, for the purposes of such a preliminary hearing, the national court or tribunal presumes that the facts are as related by the claimant.

29 It must be borne in mind that Article 234 EC establishes the framework for a relationship of close cooperation between the national courts or tribunals and the Court of Justice based on the assignment to each of different functions. It is clear from the second paragraph of that article that it is for the national court or tribunal to decide at what stage in the proceedings it is appropriate for that court or tribunal to refer a question to the Court of Justice for a preliminary ruling (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5, and Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 30).

30 In the case in the main proceedings, the referring tribunal found that, if the Court of Justice should decide not to interpret Directive 2000/78 in accordance with Ms Coleman's submissions, her case would fail in the material respects. The referring tribunal therefore decided, as permitted under United Kingdom legislation, to consider whether that directive must be interpreted as being applicable to the dismissal of an employee in Ms Coleman's situation, before establishing whether, in fact, Ms Coleman did suffer less favourable treatment or harassment. It is for that reason that the questions referred for a preliminary ruling were based on the presumption that the facts of the dispute in the main proceedings are as summarised in paragraph 26 of this judgment.

31 Where, as here, the Court receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings and it has the necessary information in order to give appropriate answers to the questions put to it in relation to the applicability of Directive 2000/78 to those proceedings, it must reply to that request and is not required to consider the facts as presumed by the referring court or tribunal, a presumption which it is for the referring court or tribunal to verify subsequently if that should prove to be necessary (see, to that effect, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 12).

32 In those circumstances, the request for a preliminary ruling must be held to be admissible.

The questions referred for a preliminary ruling

The first part of Question 1, and Questions 2 and 3

33 By these questions, which should be examined together, the referring tribunal asks, in essence, whether Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a), must be interpreted as prohibiting direct discrimination on grounds of disability only in respect of an employee who is himself disabled, or whether the principle of equal treatment and the prohibition of direct discrimination apply equally to an employee who is not himself disabled

but who, as in the present case, is treated less favourably by reason of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.

34 Article 1 of Directive 2000/78 identifies its purpose as being to lay down, as regards employment and occupation, a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation.

35 Article 2(1) of Directive 2000/78 defines the principle of equal treatment as meaning that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1, including, therefore, disability.

36 According to Article 2(2)(a), direct discrimination is to be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds, inter alia, of disability.

37 Article 3(1)(c) of Directive 2000/78 provides that the directive is to apply, within the limits of the areas of competence conferred on the Community, to all persons, as regards both the public and private sectors, including public bodies, in relation to employment and working conditions, including dismissals and pay.

38 Consequently, it does not follow from those provisions of Directive 2000/78 that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the directive. On the contrary, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1. That interpretation is supported by the wording of Article 13 EC, which constitutes the legal basis of Directive 2000/78, and which confers on the Community the competence to take appropriate action to combat discrimination based, inter alia, on disability.

39 It is true that Directive 2000/78 includes a number of provisions which, as is apparent from their very wording, apply only to disabled people. Thus, Article 5 provides that, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation is to be provided. This means that employers must take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

40 Article 7(2) of Directive 2000/78 also provides that, with regard to disabled persons, the principle of equal treatment is to be without prejudice either to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting the integration of such persons into the working environment.

41 The United Kingdom, Greek, Italian and Netherlands Governments contend, in the light of the provisions referred to in the two preceding paragraphs and also of recitals 16, 17 and 27 in the preamble to Directive 2000/78, that the prohibition of direct discrimination laid down by the directive cannot be interpreted as covering a situation such as that of the claimant in the main proceedings, since the claimant herself is not disabled. Only persons who, in a comparable situation to that of others, are treated less favourably or are placed in a disadvantageous situation because of characteristics which are particular to them can rely on that directive.

42 Nevertheless, it must be noted in that regard that the provisions referred to in paragraphs 39 and 40 of this judgment relate specifically to disabled persons either because they are provisions concerning positive discrimination measures in favour of disabled persons themselves or because they are specific measures which would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only. Thus, as recitals 16 and 20 in the preamble to Directive 2000/78 indicate, the measures in question are intended to accommodate the needs of disabled people at the workplace and to adapt the workplace to their disability. Such measures are therefore designed specifically to facilitate and promote the integration of disabled people into the working environment and,

for that reason, can only relate to disabled people and to the obligations incumbent on their employers and, where appropriate, on the Member States with regard to disabled people.

43 Therefore, the fact that Directive 2000/78 includes provisions designed to accommodate specifically the needs of disabled people does not lead to the conclusion that the principle of equal treatment enshrined in that directive must be interpreted strictly, that is, as prohibiting only direct discrimination on grounds of disability and relating exclusively to disabled people. Furthermore, recital 6 in the preamble to the directive, concerning the Community Charter of the Fundamental Social Rights of Workers, refers both to the general combating of every form of discrimination and to the need to take appropriate action for the social and economic integration of disabled people.

44 The United Kingdom, Italian and Netherlands Governments also contend that it follows from the judgment in Case C-13/05 *Chacón Navas* [2006] ECR I-6467 that the scope *ratione personae* of Directive 2000/78 must be interpreted strictly. According to the Italian Government, in *Chacón Navas*, the Court opted for a strict interpretation of the concept of disability and its implications in an employment relationship.

45 The Court defined the concept of 'disability' in its judgment in *Chacón Navas* and, in paragraphs 51 and 52 of that judgment, it found that the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post. However, it does not follow from this interpretation that the principle of equal treatment defined in Article 2(1) of that directive and the prohibition of direct discrimination laid down by Article 2(2)(a) cannot apply to a situation such as that in the present case, where the less favourable treatment which an employee claims to have suffered is on grounds of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.

46 Although the Court explained in paragraph 56 of the judgment in *Chacón Navas* that, in view of the wording of Article 13 EC, the scope of Directive 2000/78 cannot be extended beyond the discrimination based on the grounds listed exhaustively in Article 1 of the directive, with the result that a person who has been dismissed by his employer solely on account of sickness cannot fall within the scope of the general framework established by Directive 2000/78, it nevertheless did not hold that the principle of equal treatment and the scope *ratione personae* of that directive must be interpreted strictly with regard to those grounds.

47 So far as the objectives of Directive 2000/78 are concerned, as is apparent from paragraphs 34 and 38 of the present judgment, the directive seeks to lay down, as regards employment and occupation, a general framework for combating discrimination on one of the grounds referred to in Article 1 – including, in particular, disability – with a view to putting into effect in the Member States the principle of equal treatment. It follows from recital 37 in the preamble to the directive that it also has the objective of creating within the Community a level playing field as regards equality in employment and occupation.

48 As Ms Coleman, the Lithuanian and Swedish Governments and the Commission maintain, those objectives, and the effectiveness of Directive 2000/78, would be undermined if an employee in the claimant's situation cannot rely on the prohibition of direct discrimination laid down by Article 2(2)(a) of that directive where it has been established that he has been treated less favourably than another employee is, has been or would be treated in a comparable situation, on the grounds of his child's disability, and this is the case even though that employee is not himself disabled.

49 In that regard, it follows from recital 11 in the preamble to the directive that the Community legislature also took the view that discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the Treaty, in particular, as regards employment.

50 Although, in a situation such as that in the present case, the person who is subject to direct discrimination on grounds of disability is not herself disabled, the fact remains that it is the disability which, according to Ms Coleman, is the ground for the less favourable treatment

which she claims to have suffered. As is apparent from paragraph 38 of this judgment, Directive 2000/78, which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applies not to a particular category of person but by reference to the grounds mentioned in Article 1.

51 Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

52 As to the burden of proof which applies in a situation such as that in the present case, it should be observed that, under Article 10(1) of Directive 2000/78, Member States are required to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of that principle. According to Article 10(2), Article 10(1) does not prevent Member States from introducing rules on the burden of proof which are more favourable to plaintiffs.

53 In the case before the referring tribunal, it is therefore for Ms Coleman, in accordance with Article 10(1) of Directive 2000/78, to establish, before that tribunal, facts from which it may be presumed that there has been direct discrimination on grounds of disability contrary to the directive.

54 In accordance with Article 10(1) of Directive 2000/78 and recital 31 in the preamble thereto, the rules on the burden of proof must be adapted when there is a prima facie case of discrimination. In the event that Ms Coleman establishes facts from which it may be presumed that there has been direct discrimination, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the respondents, who must prove that there has been no breach of that principle.

55 In that context, the respondents could contest the existence of such a breach by establishing by any legally permissible means, in particular, that the employee's treatment was justified by objective factors unrelated to any discrimination on grounds of disability and to any association which that employee has with a disabled person.

56 In the light of the foregoing considerations, the answer to the first part of Question 1 and to Questions 2 and 3 must be that Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).

The second part of Question 1, and Question 4

57 By these questions, which should be examined together, the referring tribunal asks, in essence, whether Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as prohibiting harassment related to disability only in respect of an employee who is himself disabled, or whether the prohibition of harassment applies equally to an employee who is not himself disabled but who, as in the present case, is the victim of unwanted conduct amounting to harassment related to the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.

58 Since, under Article 2(3) of Directive 2000/78, harassment is deemed to be a form of discrimination within the meaning of Article 2(1), it must be held that, for the same reasons as those set out in paragraphs 34 to 51 of this judgment, that directive, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as not being limited to the prohibition of harassment of people who are themselves disabled.

59 Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the principle of equal treatment enshrined in Directive 2000/78 and, in particular, to the prohibition of harassment laid down by Article 2(3) thereof.

60 In that regard, it must nevertheless be borne in mind that, according to the actual wording of Article 2(3) of the directive, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

61 With regard to the burden of proof which applies in situations such as that in the main proceedings, it must be observed that, since harassment is deemed to be a form of discrimination within the meaning of Article 2(1) of Directive 2000/78, the same rules apply to harassment as those set out in paragraphs 52 to 55 of this judgment.

62 Consequently, as is apparent from paragraph 54 of this judgment, in accordance with Article 10(1) of Directive 2000/78 and recital 31 in the preamble thereto, the rules on the burden of proof must be adapted when there is a prima facie case of discrimination. In the event that Ms Coleman establishes facts from which it may be presumed that there has been harassment, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the respondents, who must prove that there has been no harassment in the circumstances of the present case.

63 In the light of the foregoing considerations, the answer to the second part of Question 1 and to Question 4 must be that Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as meaning that the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3).

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).**

2. **Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as meaning that the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3).**

[Signatures]

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* Language of the case: English.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.7.2008
COM(2008) 426 final

2008/0140 (CNS)

Proposal for a

COUNCIL DIRECTIVE

on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

(presented by the Commission)

{SEC(2008) 2180}
{SEC(2008) 2181}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

The aim of this proposal is to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market. It sets out a framework for the prohibition of discrimination on these grounds and establishes a uniform minimum level of protection within the European Union for people who have suffered such discrimination.

This proposal supplements the existing EC legal framework under which the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation applies only to employment, occupation and vocational training[1].

General context

The Commission announced in its legislative and work programme adopted on 23 October 2007[2] that it would propose new initiatives to complete the EU anti-discrimination legal framework.

The current proposal is presented as part of the 'Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe'[3], and accompanies the Communication 'Non-Discrimination and Equal Opportunities: A Renewed Commitment'[4].

The UN Convention on the Rights of Persons with Disabilities has been signed by the Member States and the European Community. It is based on the principles of non-discrimination, participation and inclusion in society, equal opportunities and accessibility. A proposal for the conclusion of the Convention by the European Community has been presented to the Council[5].

Existing provisions in the area of the proposal

This proposal builds upon Directives 2000/43/EC, 2000/78/EC and 2004/113/EC[6] which prohibit discrimination on grounds of sex, racial or ethnic origin, age, disability, sexual orientation, religion or belief[7]. Discrimination based on race or ethnic origin is prohibited in employment, occupation and vocational training, as well as in non-employment areas such as

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1 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p.22 and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16

2 COM (2007) 640

3 COM (2008) 412

4 COM (2008) 420

5 [COM (2008) XXX]

6 Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373 of 21.12.2004, p.37

7 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000), Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000)

social protection, health care, education and access to goods and services, including housing, which are available to the public. Discrimination based on sex is prohibited in the same range of areas, with the exception of education and media and advertising. However, discrimination based on age, religion and belief, sexual orientation and disability is prohibited only in employment, occupation and vocational training.

Directives 2000/43/EC and 2000/78/EC had to be transposed into national law by 2003, with the exception of those provisions dealing with age and disability discrimination, for which an extra three years was available. A report on the implementation of Directive 2000/43/EC was adopted by the Commission in 2006[8] and a report on the implementation of Directive 2000/78/EC was adopted on 19 June 2008[9]. All except one Member State have transposed these directives. Directive 2004/113/EC had to be transposed by the end of 2007.

As far as possible, the concepts and rules provided for in this proposal build on those used in the existing Directives based on Article 13 EC.

Consistency with other policies and objectives of the Union

This proposal builds upon the strategy developed since the Amsterdam Treaty to combat discrimination and is consistent with the horizontal objectives of the European Union, and in particular with the Lisbon Strategy for Growth and Jobs and the objectives of the EU Social Protection and Social Inclusion Process. It will help to further the fundamental rights of citizens, in line with the EU Charter of Fundamental Rights.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation

In preparing this initiative, the Commission sought to associate all stakeholders with a potential interest and care was taken to ensure that those who might want to comment would have the opportunity and time to respond. The European Year of Equal Opportunities for All provided a unique opportunity to highlight the issues and encourage participation in the debate.

Particular mention should be made of the public on-line consultation[10], a survey of the business sector[11], and a written consultation of, and meetings with, the social partners and European level NGOs active in the non-discrimination field[12]. The results of the public consultation and that of the NGOs were a call for legislation at EU level to increase the level of protection against discrimination although some argued for ground-specific directives in the area of disability and of sex. The European Business Test Panel consultation indicated that businesses believe it would be helpful to have the same level of protection from discrimination across the EU. The social partners representing business were against new legislation in principle, which they saw as increasing red tape and costs, while the trade unions were in favour.

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8 COM (2006) 643 final

9 COM (2008) 225

10 The full results of the consultation can be accessed at: http://ec.europa.eu/employment_social/fundamental_rights/news/news_en.htm#rpc

11 http://ec.europa.eu/yourvoice/ebtp/consultations/index_en.htm

12 http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm#ar

The responses to the consultation highlighted concerns about how a new Directive would deal with a number of sensitive areas and also revealed misunderstandings about the limits or extent of Community competence. The proposed Directive addresses these concerns and makes explicit the limits of Community competence. Within these limits the Community has the power to act (Article 13 EC Treaty) and believes that action at EU level is the best way forward.

The responses also emphasised the specific nature of disability-related discrimination and the measures needed to address it. These are addressed in a specific Article.

Concerns have been expressed that a new Directive would bring costs for business but it should be emphasised that this proposal builds largely on concepts used in the existing directives with which economic operators are familiar. As to measures to deal with disability discrimination, the concept of reasonable accommodation is familiar to businesses since it was established in Directive 2000/78/EC. The Commission proposal specifies the factors to be taken into account when assessing what is 'reasonable'.

It was pointed out that, unlike the other two Directives, Directive 2000/78/EC does not require Member States to establish equality bodies. Attention was also drawn to the need to tackle multiple discrimination, for example by defining it as discrimination and by providing effective remedies. These issues go beyond the scope of this Directive but nothing prevents Member States taking action in these areas.

Finally, it was pointed out that the scope of protection from sex discrimination under Directive 2004/113/EC is not as extensive as in Directive 2000/43/EC and that this should be addressed in new legislation. The Commission does not take up this suggestion now since the date for transposition of Directive 2004/113/EC has only just passed. However the Commission will report in 2010 on the Directive's implementation and can propose modifications then, if appropriate.

Collection and use of expertise

A study[13] in 2006 showed that, on the one hand, most countries provide legal protection in some form that goes beyond the current EC requirements in most of the areas examined, and on the other hand, there was a good deal of variety between countries as to the degree and nature of the protection. It also showed that very few countries carried out ex-ante impact assessments on non-discrimination legislation. A further study[14] looked at the nature and extent of discrimination outside employment in the EU, and the potential (direct and indirect) costs this may have for individuals and society.

In addition, the Commission has used the reports from the European Network of Independent Experts in the non-discrimination field, notably their overview 'Developing Anti-Discrimination Law in Europe'[15] as well as a study on 'Tackling Multiple Discrimination: practices, policies and laws'[16].

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13 http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf

14 Will be available on:http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm

15 http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm#leg

16 http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/multdis_en.pdf

Also relevant are the results of a special Eurobarometer survey [17] and a Eurobarometer flash survey in February 2008[18].

Impact assessment

The impact assessment report[19] looked at evidence of discrimination outside the labour market. It found that, while non-discrimination is recognised to be one of the fundamental values of the EU, in practice the level of legal protection to secure these values differs between Member States and between discrimination grounds. As result, those at risk of discrimination often find themselves less able to participate fully in society and the economy, with negative effects both for the individual and for broader society.

The report defined three objectives which any initiative should meet:

- to increase protection from discrimination ;
- to ensure legal certainty for economic operators and potential victims across the Member States;
- to enhance social inclusion and promote the full participation of all groups in society and the economy.

Of the various measures identified that could help reach the objectives, six options were selected for further analysis, notably no new action at EU level; self-regulation; recommendations; and one or more directives prohibiting discrimination outside the employment sphere .

In any event, Member States will have to implement the UN Convention on the Rights of Persons with Disabilities which defines the denial of reasonable accommodation as discrimination. A legally binding measure which prohibits discrimination on grounds of disability entails financial costs because of the adaptations needed but there are also benefits from the fuller economic and social inclusion of groups currently facing discrimination.

The report concludes that a multi-ground directive would be the appropriate response, designed so as to respect the principles of subsidiarity and proportionality. A small number of Member States already have rather complete legislative protection while most others have some, but less comprehensive, protection. The legislative adaptation arising from new EC rules would therefore vary.

The Commission received many complaints about discrimination in the insurance and banking sector. The use of age or disability by insurers and banks to assess the risk profile of customers does not necessarily represent discrimination: it depends on the product. The Commission will initiate a dialogue with the insurance and banking industry together with other relevant stakeholders to achieve a better common understanding of the areas where age or disability are relevant factors for the design and pricing of the products offered in these sectors.

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17 Special Eurobarometer Survey 296 on discrimination in the EU: http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm and http://ec.europa.eu/public_opinion/archives/eb_special_en.htm

18 Flash Eurobarometer 232; http://ec.europa.eu/public_opinion/flash/fl_232_en.pdf

19 Will be available on:http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm

3. LEGAL ASPECTS

Legal base

The proposal is based on Article 13(1) EC Treaty.

Subsidiarity and proportionality

The principle of subsidiarity applies insofar as the proposal does not fall under the exclusive competence of the Community. The objectives of the proposal cannot be sufficiently achieved by the Member States acting alone because only a Community–wide measure can ensure that there is a minimum standard level of protection against discrimination based on religion or belief, disability, age or sexual orientation in all the Member States. A Community legal act provides legal certainty as to the rights and obligations of economic operators and citizens, including for those moving between the Member States. Experience with the previous directives adopted under Article 13(1) EC is that they had a positive effect in achieving a better protection against discrimination. In accordance with the principle of proportionality, the proposed directive does not go beyond what is necessary to achieve the objectives set.

Moreover, national traditions and approaches in areas such as healthcare, social protection and education tend to be more diverse than in employment-related areas. These areas are characterised by legitimate societal choices in areas which fall within national competence.

The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. Nor does it affect national rules governing the activities of churches and other religious organisations or their relationship with the state. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or display of religious symbols in schools, whether to recognise same-sex marriages, and the nature of any relationship between organised religion and the state.

Choice of instrument

A directive is the instrument that best ensures a coherent minimum level of protection against discrimination across the EU, whilst allowing individual Member States that want to go beyond the minimum standards to do so. It also allows them to choose the most appropriate means of enforcement and sanctions. Past experience in the non-discrimination field is that a directive was the most appropriate instrument.

Correlation table

Member States are required to communicate to the Commission the text of national provisions transposing the directive as well as a correlation table between those provisions and the directive.

European Economic Area

This is a text of relevance to the European Economic Area and the Directive will be applicable to the non-EU Member States of the European Economic Area following a decision of the EEA Joint Committee

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

5. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS

Article 1: Purpose

The main objective of the directive is to combat discrimination based on religion or belief, disability, age or sexual orientation and to put into effect the principle of equal treatment, outside the field of employment. The directive does not prohibit differences of treatment based on sex which are covered by Articles 13 and 141 of the EC Treaty and related secondary legislation.

Article 2: Concept of discrimination

The definition of the principle of equal treatment is based on that contained in the previous directives adopted under Article 13(1) EC [as well as relevant case law of the European Court of Justice].

Direct discrimination consists of treating someone differently solely because of his or her age, disability, religion or belief and sexual orientation. Indirect discrimination is more complex in that a rule or practice which seems neutral in fact has a particularly disadvantageous impact upon a person or a group of persons having a specific characteristic. The author of the rule or practice may have no idea of the practical consequences, and intention to discriminate is therefore not relevant. As in Directives 2000/43/EC, 2000/78/EC and 2002/73/EC[20], it is possible to justify indirect discrimination (if "that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary").

Harassment is a form of discrimination. The unwanted conduct can take different forms, from verbal or written comments, gestures or behaviour, but it has to be serious enough to create an intimidating, humiliating or offensive environment. This definition is identical to the definitions contained in the other Article 13 directives.

A denial of reasonable accommodation is considered a form of discrimination. This is in line with the UN Convention on the rights of people with disabilities and coherent with Directive 2000/78/EC. Certain differences of treatment based on age may be lawful, if they are justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (proportionality test).

[20] OJ L269 of 5.10.2002

In the existing Article 13 EC directives exceptions to the prohibition of direct discrimination were allowed for "genuine and determining occupational requirements", for differences of treatment based on age, and in the context of sex discrimination, in access to goods and services. Although the current proposal does not cover employment, there will be differences of treatment in the areas mentioned in Article 3 that should be allowed. However, as exceptions to the general principle of equality should be narrowly drawn, the double test of a justified aim and proportionate way of reaching it (i.e. in the least discriminatory way possible) is required.

A special rule is added for insurance and banking services, in recognition of the fact that age and disability can be an essential element of the assessment of risk for certain products, and therefore of price. If insurers are not allowed to take age and disability into account at all, the additional costs will have to be entirely borne by the rest of the "pool" of those insured, which would result in higher overall costs and lower availability of cover for consumers. The use of age and disability in the assessment of risk must be based on accurate data and statistics.

The directive does not affect national measures based on public security, public order, the prevention of criminal offences, the protection of health and the rights and freedoms of others.

Article 3: Scope

Discrimination based on religion or belief, disability, age or sexual orientation is prohibited by both the public and private sector in:

- social protection, including social security and health care;
- social advantages;
- education;
- access to and supply of goods and services which are available to the public, including housing.

In terms of access to goods and services, only professional or commercial activities are covered. In other words, transactions between private individuals acting in a private capacity will not be covered: letting a room in a private house does not need to be treated in the same way as letting rooms in a hotel. The areas are covered only to the extent that the subject matter falls within the competences of the Community. Thus, for example, the organisation of the school system, activities and the content of education courses, including how to organise education for persons with disabilities, is a matter for the Member States, and they may provide for differences in treatment in access to religious educational institutions. For example, a school could arrange a special presentation just for children of a certain age, while a faith based school would be allowed to arrange school trips with a religious theme.

The text makes it clear that matters related to marital and family status, which includes adoption, are outside the scope of the directive. This includes reproductive rights. Member States remain free to decide whether or not to institute and recognise *legally* registered partnerships. However once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies[21].

[21] Judgment of the ECJ of 1.4.2008 in case C-267/06 Tadao Maruko

Article 3 specifies that the directive does not cover national laws relating to the secular nature of the State and its institutions, nor to the status of religious organisations. Member States may thus allow or prohibit the wearing of religious symbols in schools. Differences in treatment based on nationality are also not covered.

Article 4: Equal treatment of persons with disabilities

Effective access for disabled people to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing, shall be provided by anticipation. This obligation is limited by the defence that if this would impose a disproportionate burden or would require major changes to the product or service, it does not need to be done.

In some cases individual measures of reasonable accommodation may be necessary to ensure effective access for a particular disabled person. As above, this is only the case if it would not impose a disproportionate burden. A non-exhaustive list is given of factors that could be taken into account in assessing whether the burden is disproportionate, thus allowing the specific situation of small and medium sized, and micro enterprises, to be taken into account.

The concept of reasonable accommodation already exists in the employment sphere under Directive 2000/78/EC, and Member States and businesses therefore have experience in applying it. What might be appropriate for a large corporation or public body may not be for a small or medium-sized company. The requirement to make reasonable accommodation does not only imply making physical changes but may entail an alternative means of providing a service.

Article 5: Positive action

This provision is common to all Article 13 directives. It is clear that in many cases, formal equality does not lead to equality in practice. It may be necessary to put in place specific measures to prevent and correct situations of inequality. The Member States have different traditions and practices regarding positive action, and this article lets Member States provide for positive action but does not make this an obligation.

Article 6: Minimum requirements

This provision is common to all Article 13 directives. It allows Member States to provide a higher level of protection than that guaranteed by the Directive, and confirms that there should be no lowering of the level of protection against discrimination already afforded by Member States when implementing the Directive.

Article 7: Defence of rights

This provision is common to all Article 13 directives. People should be able to enforce their right to non-discrimination. This article therefore provides that people who believe that they have been the victim of discrimination should be able to use administrative or judicial procedures, even after the relationship in which the discrimination is alleged to have taken place has ended, in accordance with the ruling of the European Court of Justice in the Coote[22] case.

[22] Case C-185/97 [1998] ECR I-5199

The right to effective legal protection is strengthened by allowing organisations, which have a legitimate interest in the fight against discrimination, to help victims of discrimination in judicial or administrative procedures. National rules on time limits for initiating actions are unaffected by this provision.

Article 8: Burden of proof

This provision is common to all Article 13 directives. In judicial procedures, the general rule is that a person who alleges something must prove it. However, in discrimination cases, it is often extremely difficult to obtain the evidence necessary to prove the case, as it is often in the hands of the respondent. This problem was recognised by the European Court of Justice[23] and the Community legislator in Directive 97/80/EC[24].

The shift of the burden of proof applies to all cases alleging breach of the principle of equal treatment, including those involving associations and organisations under Article 7(2). As in the earlier directives, this shift in the burden of proof does not apply to situations where the criminal law is used to prosecute allegations of discrimination.

Article 9: Victimisation

This provision is common to all Article 13 directives. Effective legal protection must include protection against retaliation. Victims may be deterred from exercising their rights due to the risk of retaliation, and it is therefore necessary to protect individuals against any adverse treatment due to the exercise of the rights conferred by the Directive. This article is the same as in Directives 2000/43/EC and 2000/78/EC.

Article 10: Dissemination of information

This provision is common to all Article 13 directives. Experience and polls show that individuals are badly or insufficiently informed of their rights. The more effective the system of public information and prevention is, the less need there will be for individual remedies. This replicates equivalent provisions in Directives 2000/43/EC, 2000/78/EC and 2002/113/EC.

Article 11: Dialogue with relevant stakeholders

This provision is common to all Article 13 directives. It aims to promote dialogue between relevant public authorities and bodies such as non-governmental organisations which have a legitimate interest in contributing to the fight against discrimination on grounds of religion or belief, disability, age or sexual orientation. A similar provision is contained in the previous anti-discrimination directives.

Article 12: Bodies for the promotion of equal treatment

This provision is common to two Article 13 directives. This article requires the Member States to have a body or bodies ("Equality Body") at national level to promote equal treatment of all persons without discrimination on the grounds of religion or belief, disability, age or sexual orientation.

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[23] Danfoss, Case 109/88**.** [1989] ECR 03199

[24] OJ L.14, 20.1.1998

It replicates the provisions of Directive 2000/43/EC in as far as they deal with access to and supply of goods and services, and builds on equivalent provisions in Directives 2002/73/EC[25] and 2004/113/EC. It sets out minimum competences applicable to bodies at national level which should act independently to promote the principle of equal treatment. Member States may decide that these bodies be the same as those already established under the previous directives.

It is both difficult and expensive for individuals to mount a legal challenge if they think they have been discriminated against. A key role of the Equality Bodies is to give independent help to victims of discrimination. They must also be able to conduct independent surveys on discrimination and to publish reports and recommendations on issues relating to discrimination.

Article 13: Compliance

This provision is common to all Article 13 directives. Equal treatment involves the elimination of discrimination arising from any laws, regulations or administrative provision and the directive therefore requires the Member States to abolish any such provisions. As with earlier legislation, the directive also requires that any provisions contrary to the principle of equal treatment must be rendered null and void or amended, or must be capable of being so rendered if they are challenged.

Article 14: Sanctions

This provision is common to all Article 13 directives. In accordance with the case law of the Court of Justice[26], the text provides that that there should be no upper limit on the compensation payable in cases of breach of the principle of equal treatment. This provision does not require criminal sanctions to be introduced.

Article 15: Implementation

This provision is common to all Article 13 directives. It gives the Member States a period of two years to transpose the directive into national law and to communicate to the Commission the texts of the national law. Member States may provide that the obligation to ensure effective access for disabled persons only applies four years after the adoption of the Directive.

Article 16: Report

This provision is common to all Article 13 directives. It requires the Commission to report to the European Parliament and the Council on the application of the Directive, on the basis of information from Member States. The report will take account of the views of the social partners, relevant NGOs and the EU Fundamental Rights Agency.

Article 17: Entry into force

This provision is common to all Article 13 directives. The Directive will enter into force on the day it is published in the Official Journal.

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[25] Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269 of 5.10.2002, p.15

[26] Cases C-180/95 Draehmpaehl, ECR 1997 I p.2195 and C-271/91 Marshall ECR 1993 I P.4367

Article 18: Addressees

This provision is common to all Article 13 directives, making it clear that the Directive is addressed to the Member States.

2008/0140 (CNS)

Proposal for a

COUNCIL DIRECTIVE

on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13(1) thereof,

Having regard to the proposal from the Commission[27],

Having regard to the opinion of the European Parliament[28],

Having regard to the opinion of the European Economic and Social Committee[29],

Having regard to the opinion of the Committee of the Regions[30],

Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the UN Convention on the Rights of Persons with Disabilities, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, to which [all] Member States are signatories. In particular, the UN Convention on the Rights of Persons with Disabilities includes the denial of reasonable accommodation in its definition of discrimination.

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27 OJ C , , p. .
28 OJ C , , p. .
29 OJ C , , p. .
30 OJ C , , p. .

(3) This Directive respects the fundamental rights and observes the fundamental principles recognised in particular by the Charter of Fundamental Rights of the European Union. Article 10 of the Charter recognises the right to freedom of thought, conscience and religion; Article 21 prohibits discrimination, including on grounds of religion or belief, disability, age or sexual orientation; and Article 26 acknowledges the right of persons with disabilities to benefit from measures designed to ensure their independence.

(4) The European Years of Persons with Disabilities in 2003, of Equal Opportunities for All in 2007, and of Intercultural Dialogue in 2008 have highlighted the persistence of discrimination but also the benefits of diversity.

(5) The European Council, in Brussels on 14 December 2007, invited Member States to strengthen efforts to prevent and combat discrimination inside and outside the labour market[31].

(6) The European Parliament has called for the extension of the protection of discrimination in European Union law[32].

(7) The European Commission has affirmed in its Communication 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe'[33] that, in societies where each individual is regarded as being of equal worth, no artificial barriers or discrimination of any kind should hold people back in exploiting these opportunities.

(8) The Community has adopted three legal instruments[34] on the basis of article 13(1) of the EC Treaty to prevent and combat discrimination on grounds of sex, racial and ethnic origin, religion or belief, disability, age and sexual orientation. These instruments have demonstrated the value of legislation in the fight against discrimination. In particular, Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation. However, variations remain between Member States on the degree and the form of protection from discrimination on these grounds beyond the areas of employment.

(9) Therefore, legislation should prohibit discrimination based on religion or belief, disability, age or sexual orientation in a range of areas outside the labour market, including social protection, education and access to and supply of goods and services, including housing. It should provide for measures to ensure the equal access of persons with disabilities to the areas covered.

(10) Directive 2000/78/EC prohibits discrimination in access to vocational training; it is necessary to complete this protection by extending the prohibition of discrimination to education which is not considered vocational training.

(11) This Directive should be without prejudice to the competences of the Member States in the areas of education, social security and health care. It should also be without

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31 Presidency conclusions of the Brussels European Council of 14 December 2007, point 50.
32 Resolution of 20 May 2008 P6_TA-PROV(2008)0212
33 COM (2008) 412
34 Directive 2000/43/EC, Directive 2000/78/EC and Directive 2004/113/EC

prejudice to the essential role and wide discretion of the Member States in providing, commissioning and organising services of general economic interest.

(12) Discrimination is understood to include direct and indirect discrimination, harassment, instructions to discriminate and denial of reasonable accommodation.

(13) In implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(14) The appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination should remain a matter for the national judicial or other competent bodies in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.

(15) Actuarial and risk factors related to disability and to age are used in the provision of insurance, banking and other financial services. These should not be regarded as constituting discrimination where the factors are shown to be key factors for the assessment of risk.

(16) All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. This Directive should not apply to economic transactions undertaken by individuals for whom these transactions do not constitute their professional or commercial activity.

(17) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of religion, and the freedom of association. This Directive is without prejudice to national laws on marital or family status, including on reproductive rights. It is also without prejudice to the secular nature of the State, state institutions or bodies, or education.

(18) Member States are responsible for the organisation and content of education. The Commission Communication on Competences for the 21st Century: An Agenda for European Cooperation on Schools draws attention to the need for special attention to be paid to disadvantaged children and those with special educational needs. In particular national law may provide for differences in access to educational institutions based on religion or belief. . Member States may also allow or prohibit the wearing or display of religious symbols at school.

(19) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. Measures to enable persons with disabilities to have effective non-discriminatory access to the areas covered by this Directive play an important part in ensuring full equality in practice. Furthermore, individual measures of reasonable accommodation may be required in some cases to ensure such access. In neither case are measures

required that would impose a disproportionate burden. In assessing whether the burden is disproportionate, account should be taken of a number of factors including the size, resources and nature of the organisation. The principle of reasonable accommodation and disproportionate burden are established in Directive 2000/78/EC and the UN Convention on Rights of Persons with Disabilities.

(20) Legal requirements[35] and standards on accessibility have been established at European level in some areas while Article 16 of Council Regulation 1083/2006 of 11 July 2006 on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999[36] requires that accessibility for disabled persons is one of the criteria to be observed in defining operations co-financed by the Funds. The Council has also emphasised the need for measures to secure the accessibility of cultural infrastructure and cultural activities for people with disabilities[37].

(21) The prohibition of discrimination should be without prejudice to the maintenance or adoption by Member States of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation. Such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

(22) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(23) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should be empowered to engage in proceedings, including on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(24) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

(25) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.

(26) In its resolution on the Follow-up of the European Year of Equal Opportunities for All (2007), the Council called for the full association of civil society, including

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35 Regulation (EC) No. 1107/2006 and Regulation (EC) No 1371/2007

36 OJ L 210, 31.7.2006, p.25. Regulation as last amended by Regulation (EC) No 1989/2006 (OJ L 411, 30.12.2006, p.6)

37 OJ C 134, 7.6.2003, p.7

organisations representing people at risk of discrimination, the social partners and stakeholders in the design of policies and programmes aimed at preventing discrimination and promoting equality and equal opportunities, both at European and national levels.

(27) Experience in applying Directives 2000/43/EC and 2004/113/EC show that protection from discrimination on the grounds covered by this Directive would be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.

(28) In exercising their powers and fulfilling their responsibilities under this Directive, these bodies should operate in a manner consistent with the United Nations Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights.

(29) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(30) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives.

(31) In accordance with paragraph 34 of the interinstitutional agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public.

HAS ADOPTED THIS DIRECTIVE:

Chapter 1
GENERAL PROVISIONS

Article 1
Purpose

This Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.

Article 2
Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. Denial of reasonable accommodation in a particular case as provided for by Article 4 (1)(b) of the present Directive as regards persons with disabilities shall be deemed to be discrimination within the meaning of paragraph 1.

6. Notwithstanding paragraph 2, Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.

7. Notwithstanding paragraph 2, in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data.

8. This Directive shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.

Article 3
Scope

1. Within the limits of the powers conferred upon the Community, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) Social protection, including social security and healthcare;

(b) Social advantages;

(c) Education;

(d) Access to and supply of goods and other services which are available to the public, including housing.

Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity.

2. This Directive is without prejudice to national laws on marital or family status and reproductive rights.

3. This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems, including the provision of special needs education. Member States may provide for differences in treatment in access to educational institutions based on religion or belief.

4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief. It is equally without prejudice to national legislation promoting equality between men and women.

5. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4
Equal treatment of persons with disabilities

1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities:

a) The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments. Such measures should not impose a disproportionate burden, nor require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto.

b) Notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.

2. For the purposes of assessing whether measures necessary to comply with paragraph 1 would impose a disproportionate burden, account shall be taken, in particular, of the size and resources of the organisation, its nature, the estimated cost, the life cycle of the goods and services, and the possible benefits of increased access for persons with disabilities. The burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the equal treatment policy of the Member State concerned.

3. This Directive shall be without prejudice to the provisions of Community law or national rules covering the accessibility of particular goods or services.

Article 5
Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.

Article 6
Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II
REMEDIES AND ENFORCEMENT

Article 7
Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 shall be without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 8
Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the prohibition of discrimination.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Member States need not apply paragraph 1 to proceedings in which the court or competent body investigates the facts of the case.

5. Paragraphs 1, 2, 3 and 4 shall also apply to any legal proceedings commenced in accordance with Article 7(2).

Article 9
Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10
Dissemination of information

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by appropriate means throughout their territory.

Article 11
Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders, in particular non-governmental organisations, which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on the grounds and in the areas covered by this Directive.

Article 12
Bodies for the Promotion of Equal treatment

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, including rights under other Community acts including Directives 2000/43/EC and 2004/113/EC.

2. Member States shall ensure that the competences of these bodies include:

– without prejudice to the right of victims and of associations, organizations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

– conducting independent surveys concerning discrimination,

– publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER III
FINAL PROVISIONS

Article 13
Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected and in particular that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

Article 14
Sanctions

Member States shall lay down the rules on sanctions applicable to breaches of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. Sanctions may comprise the payment of compensation, which may not be restricted by the fixing of a prior upper limit, and must be effective, proportionate and dissuasive.

Article 15
Implementation

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by …. at the latest [two years after adoption]. They shall forthwith inform the Commission thereof and shall communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. In order to take account of particular conditions, Member States may, if necessary, establish that the obligation to provide effective access as set out in Article 4 has to be complied with by … [at the latest] four [years after adoption].

Member States wishing to use this additional period shall inform the Commission at the latest by the date set down in paragraph 1 giving reasons.

Article 16
Report

1. Member States and national equality bodies shall communicate to the Commission, by …. at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organizations, as well as the EU Fundamental Rights Agency. In accordance with the principle of gender mainstreaming, this report shall, inter alias, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 17
Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 18
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President

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(Acts whose publication is obligatory)

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) and Article 55 and Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the Opinion of the Economic and Social Committee [2],

Having regard to the Opinion of the Committee of the Regions [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4], in the light of the joint text approved by the Conciliation Committee on 9 December 2003,

Whereas:

(1) On the occasion of new amendments being made to Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [5], which are necessary to meet requests for simplification and modernisation made by contracting entities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996, the Directive should, in the interests of clarity, be recast. This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting entities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting entity, are expressly mentioned and comply with the fundamental principles mentioned in recital 9.

(2) One major reason for the introduction of rules coordinating procedures for the award of contracts in these sectors is the variety of ways in which national authorities can influence the behaviour of these entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies.

(3) Another main reason why it is necessary to coordinate procurement procedures applied by the entities operating in these sectors is the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

(4) Community legislation, and in particular Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector [6] and Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [7], is designed to introduce more competition between carriers providing air transport services to the public. It is therefore not appropriate to include such entities in the scope of this Directive. In view of the competitive position of Community shipping, it would also be inappropriate to make the contracts awarded in this sector subject to the rules of this Directive.

[1] OJ C 29 E, 30.1.2001, p. 112 and OJ C 203 E, 27.8.2002, p. 183.
[2] OJ C 193, 10.7.2001, p. 1.
[3] OJ C 144, 16.5.2001, p. 23.
[4] Opinion of the European Parliament of 17 January 2002 (OJ C 271 E, 7.11.2002, p. 293), Council Common Position of 20 Mars 2003 (OJ C 147 E, 24.6.2003, p. 137) and Position of the European Parliament of 2 July 2003 (not yet published in the Official Journal). Legislative Resolution of the European Parliament of 29 January 2004 and Decision of the Council of 2 February 2004.
[5] OJ L 199, 9.8.1993, p. 84. Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1).
[6] OJ L 374, 31.12.1987, p. 1. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).
[7] OJ L 374, 31.12.1987, p. 9. Regulation as last amended by the 1994 Act of Accession.

(5) The scope of Directive 98/38/EEC covers, at present, certain contracts awarded by contracting entities operating in the telecommunications sector. A legislative framework, as mentioned in the Fourth report on the implementation of the telecommunications regulations of 25 November 1998, has been adopted to open this sector. One of its consequences has been the introduction of effective competition, both de jure and de facto, in this sector. For information purposes, and in the light of this situation, the Commission has published a list of telecommunications services [1] which may already be excluded from the scope of that Directive by virtue of Article 8 thereof. Further progress has been confirmed in the Seventh report on the implementation of telecommunications regulations of 26 November 2001. It is therefore no longer necessary to regulate purchases by entities operating in this sector.

(6) It is therefore no longer appropriate to maintain the Advisory Committee on Telecommunications Procurement set up by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy transport and telecommunications sectors [2].

(7) Nevertheless, it is appropriate to continue to monitor developments in the telecommunications sector and to reconsider the situation if it is established that there is no longer effective competition in that sector.

(8) Directive 93/38/EEC excludes from its scope purchases of voice telephony, telex, mobile telephone, paging and satellite services. Those exclusions were introduced to take account of the fact that the services in question could frequently be provided only by one service provider in a given geographical area because of the absence of effective competition and the existence of special or exclusive rights. The introduction of effective competition in the telecommunications sector removes the justification for these exclusions. It is therefore necessary to include the procurement of such telecommunications services in the scope of this Directive.

(9) In order to guarantee the opening up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. Such coordination is based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

For public contracts the value of which is lower than that triggering the application of provisions of Community coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaties referred to above apply.

(10) To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 295 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.

(11) Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a contract does not cause any distortion of competition in relation to private tenderers.

(12) Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of the Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

(13) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public morality, public policy, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.

[1] OJ C 156, 3.6.1999, p. 3.
[2] OJ L 297, 29.10.1990, p. 1. Directive as last amended by Directive 94/22/EC of the European Parliament and of the Council (OJ L 164, 30.6.1994, p. 3).

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) ([1]), approved in particular the WTO Agreement on Government Procurement (hereinafter referred to as the 'Agreement'), the aim of which is to establish a multilateral framework of balanced rights and obligations relating to public contracts with the aim of achieving the liberalisation and expansion of world trade. In view of the international rights and commitments devolving on the Community as a result of the acceptance of the Agreement, the arrangements to be applied to tenderers and products from signatory third countries are those defined by the Agreement. The Agreement does not have direct effect. The contracting entities covered by the Agreement which comply with this Directive and which apply the latter to economic operators of third countries which are signatories to the Agreement should therefore be in conformity with the Agreement. It is also appropriate that this Directive should guarantee for Community economic operators conditions for participation in public procurement which are just as favourable as those reserved for economic operators of third countries which are signatories to the Agreement.

(15) Before launching a procurement procedure, contracting entities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications, provided, however, that such advice does not have the effect of precluding competition.

(16) In view of the diversity of works contracts, contracting entities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards. The decision to award contracts separately or jointly should be determined by qualitative and economic criteria, which may be defined by national law.

A contract may be considered to be a works contract only if its subject-matter specifically covers the execution of activities listed in Annex XII, even if the contract covers the provision of other services necessary for the execution of such activities. Service contracts, in particular in the sphere of property management services, may in certain circumstances include works. However, insofar as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a works contract.

For the purpose of calculating the estimated value of a works contract it is appropriate to take as a basis the value of the works themselves as well as the estimated value of supplies and services, if any, that the contracting entities place at the disposal of contractors, insofar as these services or supplies are necessary for the execution of the works in question. It should be understood that, for the purposes of this paragraph, the services concerned are those rendered by the contracting entities through their own personnel. On the other hand, calculation of the value of services contracts, whether or not to be placed at the disposal of a contractor for the subsequent execution of works, follows the rules applicable to service contracts.

(17) The field of services is best delineated, for the purpose of applying the procedural rules of this Directive and for monitoring purposes, by subdividing it into categories corresponding to particular headings of a common classification and by bringing them together in two Annexes, XVII A and XVII B, according to the regime to which they are subject. As regards services in Annex XVII B, the relevant provisions of this Directive should be without prejudice to the application of Community rules specific to the services in question.

(18) As regards service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information.

(19) Obstacles to the free provision of services should be avoided. Therefore, service providers may be either natural or legal persons. This Directive should not, however, prejudice the application, at national level, of rules concerning the conditions for the pursuit of an activity or a profession, provided that they are compatible with Community law.

(20) Certain new electronic purchasing techniques are continually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Contracting entities may make use of electronic purchasing techniques, provided that such use complies with the rules of this Directive

([1]) OJ L 336, 23.12.1994, p. 1.

and the principles of equal treatment, non-discrimination and transparency. To that extent, a tender submitted by a tenderer, in particular under a framework agreement or where a dynamic purchasing system is being used, may take the form of that tenderer's electronic catalogue if the latter uses the means of communication chosen by the contracting entity in accordance with Article 48.

(21) In view of the rapid expansion of electronic purchasing systems, appropriate rules should now be introduced to enable contracting entities to take full advantage of the possibilities afforded by these systems. Against this background, it is necessary to define a completely electronic dynamic purchasing system for commonly used purchases and to lay down specific rules for setting up and operating such a system in order to ensure the fair treatment of any economic operator who wishes to join. Any economic operator which submits an indicative tender in accordance with the specification and meets the selection criteria should be allowed to join such a system. This purchasing technique allows the contracting entity, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to join, to have a particularly broad range of tenders, as a result of the electronic facilities available, and hence to ensure optimum use of funds through broad competition.

(22) Since use of the technique of electronic auctions is likely to increase, such auctions should be given a Community definition and be governed by specific rules in order to ensure that they operate fully in accordance with the principles of equal treatment, non-discrimination and transparency. To that end, provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts. With the same objective, it should also be possible to establish the respective ranking of the tenderers at any stage of the electronic auction. Recourse to electronic auctions enables contracting entities to ask tenderers to submit new prices, revised downwards, and, when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices. In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting entity, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions. Consequently, certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, should not be the object of electronic auctions.

(23) Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding contracts/framework agreements for contracting entities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing. Provision should therefore be made for a Community definition of central purchasing bodies used by contracting entities. A definition should also be given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting entities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.

(24) In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting entities may use central purchasing bodies, dynamic purchasing systems or electronic auctions, as defined and regulated by this Directive.

(25) There has to be an appropriate definition of the concept of special or exclusive rights. The consequence of the definition is that the fact that, for the purpose of constructing networks or port or airport facilities, an entity 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 will not in itself constitute exclusive or special rights within the meaning of this Directive. Nor does the fact that an entity supplies drinking water, electricity, gas or heat to a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned in itself constitute an exclusive or special right within the meaning of this Directive. Nor may rights granted by a Member State in any form, including by way of acts of concession, to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria to enjoy those rights be considered special or exclusive rights.

(26) It is appropriate for the contracting entities to apply common procurement procedures in respect of their activities relating to water and for such rules also to apply where contracting authorities within the meaning of this Directive award contracts in respect of their projects in the field of hydraulic engineering, irrigation, land drainage or the disposal and treatment of sewage. However, procurement rules of the type proposed for supplies of goods are inappropriate for purchases of water, given the need to procure water from sources near the area in which it will be used.

(27) Certain entities providing bus transport services to the public were already excluded from the scope of Directive 93/38/EEC. Such entities should also be excluded from the scope of this Directive. In order to forestall the existence of a multitude of specific arrangements applying to certain sectors only, the general procedure that permits the effects of opening up to competition to be taken into account should also apply to all entities providing bus transport services that are not excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.

(28) Taking into account the further opening up of Community postal services to competition and the fact that such services are provided through a network by contracting authorities, public undertakings and other undertakings, contracts awarded by contracting entities providing postal services should be subject to the rules of this Directive, including those in Article 30, which, safeguarding the application of the principles referred to in recital 9, create a framework for sound commercial practice and allow greater flexibility than is offered by 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 [1]. For a definition of the activities in question, it is necessary to take into account the definitions of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [2].

Whatever their legal status, entities providing postal services are not currently subject to the rules set out in Directive 93/38/EEC. The adjustment of contract award procedures to this Directive could therefore take longer to implement for such entities than for entities already subject to those rules which will merely have to adapt their procedures to the amendments made by this Directive. It should therefore be permissible to defer application of this Directive to accommodate the additional time required for this adjustment. Given the varying situations of such entities, Member States should have the option of providing for a transitional period for the application of this Directive to contracting entities operating in the postal services sector.

(29) Contracts may be awarded for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single contract intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the contract is principally intended may be based on an analysis of the requirements which the specific contract must meet, carried out by the contracting entity for the purposes of estimating the contract value and drawing up the tender documents. In certain cases, such as the purchase of a single piece of equipment for the pursuit of activities for which information allowing an estimation of the respective rates of use would be unavailable, it might be objectively impossible to determine for which activity the contract is principally intended. The rules applicable to such cases should be indicated.

(30) Without prejudice to the international commitments of the Community, it is necessary to simplify the implementation of this Directive, particularly by simplifying the thresholds and by rendering applicable to all contracting entities, regardless of the sector in which they operate, the provisions regarding the information to be given to participants concerning decisions taken in relation to contract award procedures and the results thereof. Furthermore, in the context of Monetary Union, such thresholds should be established in euro in such a way as to simplify the application of these provisions while at the same time ensuring compliance with the thresholds laid down in the Agreement, which are expressed in Special Drawing Rights (SDR). In this context, provision should also be made for periodic reviews of the thresholds expressed in euro so as to adjust them, where necessary, in line with possible variations in the value of the euro in relation to the SDR. In addition, the thresholds applicable to design contests should be identical to those applicable to service contracts.

(31) Provision should be made for cases in which it is possible to refrain from applying the measures for coordinating procedures on grounds relating to State security or secrecy, or because specific rules on the awarding of contracts which derive from international agreements, relating to the stationing of troops, or which are specific to international organisations are applicable.

[1] See page 114 of this Official Journal.
[2] OJ L 15, 21.1.1998, p. 14. Directive as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

(32) It is appropriate to exclude certain service, supply and works contracts awarded to an affiliated undertaking having as its principal activity the provision of such services, supply or works to the group of which it is part, rather than offering them on the market. It is also appropriate to exclude certain service, supply and works contracts awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive and of which that entity is part. However, it is appropriate to ensure that this exclusion does not give rise to distortions of competition to the benefit of the undertakings or joint ventures that are affiliated with the contracting entities; it is appropriate to provide a suitable set of rules, in particular as regards the maximum limits within which the undertakings may obtain a part of their turnover from the market and above which they would lose the possibility of being awarded contracts without calls for competition, the composition of joint ventures and the stability of links between these joint ventures and the contracting entities of which they are composed.

(33) In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of procurement rules inappropriate.

(34) Arbitration and conciliation services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules.

(35) In accordance with the Agreement, the financial services covered by this Directive do not include contracts relating to the issue, purchase, sale or transfer of securities or other financial instruments; in particular, transactions by the contracting entities to raise money or capital are not covered.

(36) This Directive should cover the provision of services only where based on contracts.

(37) Pursuant to Article 163 of the Treaty, the encouragement of research and technological development is a means of strengthening the scientific and technological basis of Community industry, and the opening up of service contracts contributes to this end. This Directive should not cover the cofinancing of research and development programmes: research and development contracts other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting entity, are therefore not covered by this Directive.

(38) To forestall the proliferation of specific arrangements applicable to certain sectors only, the current special arrangements created by Article 3 of Directive 93/38/EEC and Article 12 of Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons [1] governing entities exploiting a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels should be replaced by the general procedure allowing for exemption of sectors directly exposed to competition. It has to be ensured, however, that this will be without prejudice to Commission Decision 93/676/EEC of 10 December 1993 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the Netherlands an activity defined by Article 2(2)(b)(i) of Council Directive 90/531/EEC and that entities carrying on such an activity are not to be considered in the Netherlands as operating under special or exclusive rights within the meaning of Article 2(3)(b) of the Directive [2], Commission Decision 97/367/EC of 30 May 1997 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the United Kingdom an activity defined by Article 2(2)(b)(i) of Council Directive 93/38/EEC and that entities carrying on such an activity are not to be considered in the United Kingdom as operating under special or exclusive rights within the meaning of Article 2(3)(b) of the Directive [3], Commission Decision 2002/205/EC of 4 March 2002 following a request by Austria applying for the special regime provided for in Article 3 of Directive 93/38/EEC [4] and Commission Decision 2004/73/EC on a request from Germany to apply the special procedure laid down in Article 3 of Directive 93/38/EEC [5].

(39) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.

[1] OJ L 164, 30.6.1994, p. 3.
[2] OJ L 316, 17.12.1993, p. 41.
[3] OJ L 156, 13.6.1997, p. 55.
[4] OJ L 68, 12.3.2002, p. 31.
[5] OJ L 16, 23.1.2004, p.57.

(40) This Directive should apply neither to contracts intended to permit the performance of an activity referred to in Articles 3 to 7 nor to design contests organised for the pursuit of such an activity if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited. It is therefore appropriate to introduce a procedure, applicable to all sectors covered by this Directive, that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Community law in this area.

(41) Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. The implementation and application of appropriate Community legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. When updating, the Commission takes in particular into account the possible adoption of measures entailing a genuine opening up to competition of sectors other than those for which a legislation is already mentioned in Annex XI, such as that of railway transports. Where free access to a given market does not result from the implementation of appropriate Community legislation, it should be demonstrated that, de jure and de facto, such access is free. For this purpose, application by a Member State of a Directive, such as Directive 94/22/EC opening up a given sector to competition, to another sector, such as the coal sector, is a circumstance to be taken into account for the purposes of Article 30.

(42) The technical specifications drawn up by purchasers should allow public procurement to be opened up to competition. To this end, it should be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it should be possible to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety should be considered by the contracting entities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting entities should be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting entities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method**,** and/or specific environmental effects of product groups or services. They may use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-) national eco-labels or any other eco-label provided that the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and provided that the label is accessible and available to all interested parties. Contracting entities should, whenever possible, 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 tenderers know what the requirements established by the contracting entity cover.

(43) In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.

(44) Contract performance conditions are compatible with the Directive provided that they are not directly or indirectly discriminatory and are indicated in the notice used to make the call for competition, or in the specifications. They may in particular be intended to encourage on-site vocational training, the employment of people experiencing particular difficulty in integration, the fight against unemployment or the protection of the environment. For example, mention may be made of the requirements — applicable during the performance of the contract — to recruit long-term jobseekers or to implement training measures for the unemployed or for young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

(45) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during the performance of a contract, provided that such rules, and their application, comply with Community law. In cross-border situations where workers from one Member State provide services in another Member State for the purpose of performing a contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the

posting of workers in the framework of the provision of services [1] lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a contract.

(46) In view of new developments in information and telecommunications technology, and the simplifications these can bring in terms of publicising contracts and the efficiency and transparency of procurement procedures, electronic means should be put on a par with traditional means of communication and information exchange. As far as possible, the means and technology chosen should be compatible with the technologies used in the other Member States.

(47) The use of electronic means leads to savings in time. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Community level. However, it is necessary to ensure that the cumulative effect of reductions of time limits does not lead to excessively short time limits.

(48) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [2] and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') [3] should, in the context of this Directive, apply to the transmission of information by electronic means. The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. To this end, use of electronic signatures, in particular advanced electronic signatures, should, as far as possible, be encouraged. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.

(49) It is appropriate that the participants in an award procedure are informed of decisions to conclude a framework agreement or to award a contract or to abandon the procedure within time limits that are sufficiently short so as not to render the lodging of requests for review impossible; this information should therefore be given as soon as possible and in general within 15 days following the decision.

(50) It should be clarified that contracting entities which establish selection criteria in an open procedure should do so in accordance with objective rules and criteria, just as the selection criteria in restricted and negotiated procedures should be objective. These objective rules and criteria, just as the selection criteria, do not necessarily imply weightings.

(51) It is important to take into account Court of Justice case-law in cases where an economic operator claims the economic, financial or technical capabilities of other entities, whatever the legal nature of the link between itself and those entities, in order to meet the selection criteria or, in the context of qualification systems, in support of its application for qualification. In the latter case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of the qualification. For the purposes of that qualification, a contracting entity may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another entity, it may require that that entity be held liable, if necessary jointly and severally.

Qualification systems should be operated in accordance with objective rules and criteria, which, at the contracting entities' choice, may concern the capacities of the economic operators and/or the characteristics of the works, supplies or services covered by the system. For the purposes of qualification, contracting entities may conduct their own tests in order to evaluate the characteristics of the works, supplies or services concerned, in particular in terms of compatibility and safety.

(52) The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.

(53) In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a contract, the application of such measures or schemes may be required. Environmental management schemes,

[1] OJ L 18, 21.1.1997, p. 1.
[2] OJ L 13, 19.1.2000, p. 12.
[3] OJ L 178, 17.7.2000, p. 1.

whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001 (EMAS) [1], can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

(54) The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC to these contracting entities. The obligation to apply Article 45(1) should therefore be limited only to contracting entities that are contracting authorities. Where appropriate, the contracting entities should ask applicants for qualification, candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of these economic operators, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of res judicata.

If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Non-observance of national provisions implementing the Council Directives 2000/78/EC [2] and 76/207/EEC [3] concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

(55) Contracts must be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender'.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting entities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting entities may derogate from indicating the weighting of the criteria for the award of the contract in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

Where contracting entities choose to award a contract to the most economically advantageous tender, they should assess the tenders in order to determine which one offers the best value for money. In order to do this, they should determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting entity. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. In order to guarantee equal treatment, the criteria for the award of the contract must enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting entity to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting entity may use criteria aiming to meet social requirements, in particular in response to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

[1] Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing a voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (OJ L 114, 24.4.2001, p. 1).

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

[3] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, (OJ L 39 of 14.2.1976, p. 40). Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

(56) The award criteria must not affect the application of national provisions on the remuneration of certain services, such as the services provided by architects, engineers or lawyers.

(57) Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits [1] should apply to the calculation of the time limits contained in this Directive.

(58) This Directive should be without prejudice to the existing international obligations of the Community or of the Member States and should not prejudice the application of the provisions of the Treaty, in particular Articles 81 and 86 thereof.

(59) This Directive should not prejudice the time-limits set out in Annex XXV, within which Member States are required to transpose and apply Directive 93/38/EEC.

(60) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, [2].

HAVE ADOPTED THIS DIRECTIVE:

CONTENTS

[1] OJ L 124, 8.6.1971, p. 1.
[2] OJ L 184, 17.7.1999, p. 23.

TITLE I

GENERAL PROVISIONS APPLICABLE TO CONTRACTS AND DESIGN CONTESTS

CHAPTER I

Basic terms

Article 1

Definitions

1. For the purposes of this Directive, the definitions set out in this Article shall apply.

2. (a) 'Supply, works and service contracts' are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.

(b) 'Works contracts' are contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex XII or a work, or the realisation by whatever means of a work corresponding to the requirements specified by the contracting entity. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

(c) 'Supply contracts' are contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products.

A contract having as its object the supply of products, which also covers, as an incidental matter, siting and installation operations shall be considered to be a 'supply contract';

(d) 'Service contracts' are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

A contract having as its object both products and services within the meaning of Annex XVII shall be considered to be a 'service contract' if the value of the services in question exceeds that of the products covered by the contract.

A contract having as its object services within the meaning of Annex XVII and including activities within the meaning of Annex XII that are only incidental to the principal object of the contract shall be considered to be a service contract.

3. (a) A 'works concession' is a contract of the same type as a works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in that right together with payment;

(b) A 'service concession' is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.

4. A 'framework agreement' is an agreement between one or more contracting entities referred to in Article 2(2) and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

5. A 'dynamic purchasing system' is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entity, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

6. An 'electronic auction' is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods. Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions.

7. The terms 'contractor', 'supplier' or 'service provider' mean either a natural or a legal person, or a contracting entity within the meaning of Article 2(2)(a) or (b), or a group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, products or services.

The terms 'economic operator' shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interests of simplification.

A 'tenderer' is an economic operator who submits a tender, and 'candidate' means one who has sought an invitation to take part in a restricted or negotiated procedure.

8. A 'central purchasing body' is a contracting authority within the meaning of Article 2(1)(a) or a contracting authority within the meaning of Article 1(9) of Directive 2004/18/EC which:

— acquires supplies and/or services intended for contracting entities or

— awards public contracts or concludes framework agreements for works, supplies or services intended for contracting entities.

9. 'Open, restricted and negotiated procedures' are the procurement procedures applied by contracting entities, whereby:

(a) in the case of open procedures, any interested economic operator may submit a tender;

(b) in the case of restricted procedures, any economic operator may request to participate and only candidates invited by the contracting entity may submit a tender;

(c) in the case of negotiated procedures, the contracting entity consults the economic operators of its choice and negotiates the terms of the contract with one or more of these.

10. 'Design contests' are those procedures which enable the contracting entity to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after having been put out to competition with or without the award of prizes.

11. 'Written' or 'in writing' means any expression consisting of words or figures that can be read, reproduced and subsequently communicated. It may include information transmitted and stored by electronic means.

12. 'Electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

13. 'Common Procurement Vocabulary (CPV)' means the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002 of 5 November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CVP) [1] while ensuring equivalence with the other existing nomenclatures.

In the event of varying interpretations of the scope of this Directive, owing to possible differences between the CPV and NACE nomenclatures listed in Annex XII or between the CPV and CPC (provisional version) nomenclatures listed in Annex XVII, the NACE or the CPC nomenclature respectively shall take precedence.

[1] OJ L 340, 16.12.2002, p. 1.

CHAPTER II

Definition of the activities and entities covered

Section 1

Entities

Article 2

Contracting entities

1. For the purposes of this Directive,

(a) 'Contracting authorities' are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

'A 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,

— having legal personality and

— financed, for the most part, by the State, 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;

(b) a 'public undertaking' is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

— hold the majority of the undertaking's subscribed capital, or

— control the majority of the votes attaching to shares issued by the undertaking, or

— can appoint more than half of the undertaking's administrative, management or supervisory body.

2. This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

3. For the purposes of this Directive, 'special or exclusive rights' mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 3 to 7 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

Section 2

Activities

Article 3

Gas, heat and electricity

1. As far as gas and heat are concerned, this Directive shall apply to the following activities:

(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 gas or heat; or

(b) the supply of gas or heat to such networks.

2. The supply of gas or heat to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where:

(a) the production of gas or heat by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in paragraphs 1 or 3 of this Article or in Articles 4 to 7; and

(b) 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.

3. As far as electricity is concerned, this Directive shall apply to the following activities:

(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 electricity; or

(b) the supply of electricity to such networks.

4. The supply of electricity to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 3 where:

(a) the production of electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraphs 1 or 3 of this Article or in Articles 4 to 7; and

(b) 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 energy, having regard to the average for the preceding three years, including the current year.

Article 4

Water

1. This Directive shall apply to the following activities:

(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 drinking water; or

(b) the supply of drinking water to such networks.

2. This Directive shall also apply to contracts or design contests awarded or organised by entities which pursue an activity referred to in paragraph 1 and which:

(a) are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations, or

(b) are connected with the disposal or treatment of sewage.

3. The supply of drinking water to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where:

(a) the production of drinking water by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in Articles 3 to 7; and

(b) 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, having regard to the average for the preceding three years, including the current year.

Article 5

Transport services

1. This Directive shall apply to activities relating to the provision or 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.

2. This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.

Article 6

Postal services

1. This Directive shall apply to activities relating to the provision of postal services or, on the conditions set out in paragraph 2(c), other services than postal services.

2. For the purpose of this Directive and without prejudice to Directive 97/67/EC:

(a) 'postal item': means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;

(b) 'postal services': means services consisting of the clearance, sorting, routing and delivery of postal items. These services comprise:

— 'reserved postal services': postal services which are or may be reserved on the basis of Article 7 of Directive 97/67/EC,

— 'other postal services': postal services which may not be reserved on the basis of Article 7 of Directive 97/67/EC; and

(c) 'other services than postal services': means services provided in the following areas:

— mail service management services (services both preceding and subsequent to despatch, such as 'mailroom management services'),

— added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail),

— services concerning postal items not included in point (a), such as direct mail bearing no address,

— financial services, as defined in category 6 of Annex XVII A and in Article 24(c) and including in particular postal money orders and postal giro transfers,

— philatelic services, and

— logistics services (services combining physical delivery and/or warehousing with other non-postal functions),

on condition that such services are provided by an entity which also provides postal services within the meaning of point (b), first or second indent, and provided that the conditions set out in Article 30(1) are not satisfied in respect of the services falling within those indents.

Article 7

Exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports

This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

(a) exploring for or extracting oil, gas, coal or other solid fuels, or

(b) the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

Article 8

Lists of contracting entities

The non-exhaustive lists of contracting entities within the meaning of this Directive are contained in Annexes I to X. Member States shall notify the Commission periodically of any changes to their lists.

Article 9

Contracts covering several activities

1. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

However, the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding it from the scope of this Directive or, where applicable, Directive 2004/18/EC.

2. If one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned Directive 2004/18/EC and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the abovementioned Directive 2004/18/EC.

3. If one of the activities for which the contract is intended is subject to this Directive and the other is not subject to either this Directive or the abovementioned Directive 2004/18/EC, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with this Directive.

CHAPTER III

General principles

Article 10

Principles of awarding contracts

Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

TITLE II

RULES APPLICABLE TO CONTRACTS

CHAPTER I

General provisions

Article 11

Economic operators

1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of service and works contracts as well as supply contracts covering in addition services and/or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting entities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent to which this change is necessary for the satisfactory performance of the contract.

Article 12

Conditions relating to agreements concluded within the World Trade Organisation

For the purposes of the award of contracts by contracting entities, Member States shall apply in their relations conditions as favourable as those which they grant to economic operators of third countries in implementation of the Agreement. Member States shall, to this end, consult one another within the Advisory Committee for Public Contracts on the measures to be taken pursuant to the Agreement.

Article 13

Confidentiality

1. In the context of provision of technical specifications to interested economic operators, of qualification and selection of economic operators and of award of contracts, contracting entities may impose requirements with a view to protecting the confidential nature of information which they make available.

2. Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 43 and 49, and in accordance with the national law to which the contracting entity is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.

Article 14

Framework agreements

1. Contracting entities may regard a framework agreement as a contract within the meaning of Article 1(2) and award it in accordance with this Directive.

2. Where contracting entities have awarded a framework agreement in accordance with this Directive, they may avail themselves of Article 40(3)(i) when awarding contracts based on that framework agreement.

3. Where a framework agreement has not been awarded in accordance with this Directive, contracting entities may not avail themselves of Article 40(3)(i).

4. Contracting entities may not misuse framework agreements in order to hinder, limit or distort competition.

Article 15

Dynamic purchasing systems

1. Member States may provide that contracting entities may use dynamic purchasing systems.

2. In order to set up a dynamic purchasing system, contracting entities shall follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system. All tenderers who satisfy the selection criteria and have submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification. With a view to setting up the system and to the award of contracts under that system, contracting entities shall use solely electronic means in accordance with Article 48(2) to (5).

3. For the purposes of setting up the dynamic purchasing system, contracting entities shall:

(a) publish a contract notice making it clear that a dynamic purchasing system is involved;

(b) indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;

(c) offer by electronic means, on publication of the notice and until the system expires, unrestricted, direct and full access to the specification and to any additional documents and shall indicate in the notice the internet address at which such documents may be consulted.

4. Contracting entities shall give any economic operator, throughout the entire period of the dynamic purchasing system, the possibility of submitting an indicative tender and of being admitted to the system under the conditions referred to in paragraph 2. They shall complete evaluation within a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime.

Contracting entities shall inform the tenderer referred to in the first subparagraph at the earliest possible opportunity of its admittance to the dynamic purchasing system or of the rejection of its indicative tender.

5. Each specific contract shall be the subject of an invitation to tender. Before issuing the invitation to tender, contracting entities shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, in accordance with paragraph 4, within a time limit that may not be less than 15 days from the date on which the simplified notice was sent. Contracting entities may not proceed with tendering until they have completed evaluation of all the indicative tenders received within that time limit.

6. Contracting entities shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end, they shall set a time limit for the submission of tenders.

They shall award the contract to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system. Those criteria may, if appropriate, be formulated more precisely in the invitation referred to in the first subparagraph.

7. A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases.

Contracting entities may not resort to this system to prevent, restrict or distort competition.

No charges may be billed to the interested economic operators or to parties to the system.

CHAPTER II

Thresholds and exclusion provisions

Section 1

Thresholds

Article 16

Contract thresholds

Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

(a) EUR 499 000 in the case of supply and service contracts;

(b) EUR 6 242 000 in the case of works contracts.

Article 17

Methods of calculating the estimated value of contracts, framework agreements and dynamic purchasing systems

1. The calculation of the estimated value of a contract shall be based on the total amount payable, net of VAT, as estimated by the contracting entity. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

Where the contracting entity provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.

2. Contracting entities may not circumvent this Directive by splitting works projects or proposed purchases of a certain quantity of supplies and/or services or by using special methods for calculating the estimated value of contracts.

3. With regard to framework agreements and dynamic purchasing systems, the estimated value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement or system.

4. For the purposes of Article 16, contracting entities shall include in the estimated value of a works contract both the cost of the works and the value of any supplies or services necessary for the execution of the works, which they make available to the contractor.

5. The value of supplies or services which are not necessary for the performance of a particular works contract may not be added to the value of the works contract when to do so would result in removing the procurement of those supplies or services from the scope of this Directive.

6. (a) Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 16, this Directive shall apply to the awarding of each lot.

However, the contracting entities may waive such application in respect of lots the estimated value of which, net of VAT, is less than EUR 80 000 for services or EUR 1 million for works, provided that the aggregate value of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

(b) Where a proposal for the acquisition of similar supplies may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 16.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 16, this Directive shall apply to the awarding of each lot.

However, the contracting entities may waive such application in respect of lots, the estimated value of which, net of VAT, is less than EUR 80 000, provided that the aggregate cost of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

7. In the case of supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding twelve months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;

(b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.

8. The basis for calculating the estimated value of a contract including both supplies and services shall be the total value of the supplies and services, regardless of their respective shares. The calculation shall include the value of the siting and installation operations.

9. With regard to supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:

(a) in the case of fixed-term contracts, if that term is less than or equal to 12 months, the total estimated value for the term of the contract or, if the term of the contract is greater than 12 months, the total value including the estimated residual value;

(b) in the case of contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.

10. For the purposes of calculating the estimated contract value of service contracts, the following amounts shall, where appropriate, be taken into account:

(a) the premium payable, and other forms of remuneration, in the case of insurance services;

(b) fees, commissions, interest and other modes of remuneration, in the case of banking and other financial services;

(c) fees, commissions payable and other forms of remuneration, in the case of contracts involving design tasks.

11. In the case of service contracts which do not indicate a total price, the value to be used as the basis for calculating the estimated contract value shall be:

(a) in the case of fixed-term contracts, if that term is less than or equal to 48 months: the total value for their full term;

(b) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

Section 2

Contracts and concessions and contracts subject to special arrangements

SUBSECTION 1

Article 18

Works and service concessions

This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.

SUBSECTION 2

Exclusions applicable to all contracting entities and to all types of contract

Article 19

Contracts awarded for purposes of resale or lease to third parties

1. This Directive shall not apply to contracts awarded for purposes of resale or lease to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or lease the subject of such contracts, and other entities are free to sell or lease 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 in the *Official Journal of the European Union*, for information purposes, lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.

Article 20

Contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country

1. This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Community.

2. The contracting entities shall notify the Commission at its request of any activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the *Official Journal of the European Union* for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

Article 21

Contracts which are secret or require special security measures

This Directive shall not apply to contracts when they are declared to be secret by a Member State, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the basic security interests of that Member State so requires.

Article 22

Contracts awarded pursuant to international rules

This Directive shall not apply to contracts governed by different procedural rules and awarded:

(a) pursuant to an international agreement concluded in accordance with the Treaty between a Member State and one or more third countries and covering supplies, works, services or design contests intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 68;

(b) pursuant to a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;

(c) pursuant to the particular procedure of an international organisation.

Article 23

Contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture

1. For the purposes of this Article, 'affiliated undertaking' means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 44(2)(g) of the Treaty on consolidated accounts [1] [2], or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of Article 2(1)(b) hereof or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

2. Provided that the conditions in paragraph 3 are met, this Directive shall not apply to contracts awarded:

(a) by a contracting entity to an affiliated undertaking, or

(b) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 3 to 7, to an undertaking which is affiliated with one of these contracting entities.

3. Paragraph 2 shall apply:

(a) to service contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to services for the preceding three years derives from the provision of such services to undertakings with which it is affiliated;

(b) to supplies contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to supplies for the preceding three years derives from the provision of such supplies to undertakings with which it is affiliated;

(c) to works contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to works for the preceding three years derives from the provision of such works to undertakings with which it is affiliated.

When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it will be sufficient for that undertaking to show that the turnover referred to in points (a), (b) or (c) is credible, particularly by means of business projections.

Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

4. This Directive shall not apply to contracts awarded:

(a) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 3 to 7, to one of these contracting entities, or

(b) by a contracting entity to such a joint venture of which it forms part, provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period.

5. Contracting entities shall notify to the Commission, at its request, the following information regarding the application of paragraphs 2, 3 and 4:

(a) the names of the undertakings or joint ventures concerned,

(b) the nature and value of the contracts involved,

(c) such proof as may be deemed necessary by the Commission that the relationship between the undertaking or joint venture to which the contracts are awarded and the contracting entity complies with the requirements of this Article.

[1] OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

[2] Editorial Note: The title of the Directive has been adjusted to take account of the renumbering of the Articles of the Treaty in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g) of the Treaty.

SUBSECTION 3

Exclusions applicable to all contracting entities, but to service contracts only

Article 24

Contracts relating to certain services excluded from the scope of this Directive

This Directive shall not apply to service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable 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 this Directive;

(b) arbitration and conciliation services;

(c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting entities to raise money or capital;

(d) employment contracts;

(e) research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting entity.

Article 25

Service contracts awarded on the basis of an exclusive right

This Directive shall not apply to service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 2(1)(a) or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

SUBSECTION 4

Exclusions applicable to certain contracting entities only

Article 26

Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy

This Directive shall not apply:

(a) to contracts for the purchase of water if awarded by contracting entities engaged in one or both of the activities referred to in Article 4(1).

(b) to contracts for the supply of energy or of fuels for the production of energy, if awarded by contracting entities engaged in an activity referred to in Article 3(1), Article 3(3) or Article 7(a).

SUBSECTION 5

Contracts subject to special arrangements, provisions concerning central purchasing bodies and the general procedure in case of direct exposure to competition

Article 27

Contracts subject to special arrangements

Without prejudice to Article 30 the Kingdom of the Netherlands, the United Kingdom, the Republic of Austria and the Federal Republic of Germany shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Decisions 93/676/EEC, 97/367/EEC, 2002/205/EC and 2004/73/EC:

(a) observes the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the entity makes available to economic operators concerning its procurement intentions;

(b) communicates to the Commission, under the conditions defined in Commission Decision 93/327/EEC defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the Commission information relating to the contracts they award ([1]).

Article 28

Reserved contracts

Member States may reserve the right to participate in contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

The notice used to make the call for competition shall make reference to this Article.

([1]) OJ L 129, 27.5.1993, p. 25.

Article 29

Contracts and framework agreements awarded by central purchasing bodies

1. Member States may prescribe that contracting entities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting entities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(8) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it or, where appropriate, with Directive 2004/18/EC.

Article 30

Procedure for establishing whether a given activity is directly exposed to competition

1. Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this Directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question.

3. For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the provisions of Community legislation mentioned in Annex XI.

If free access to a given market cannot be presumed on the basis of the first subparagraph, it must be demonstrated that access to the market in question is free de facto and de jure.

4. When a Member State considers that, in compliance with paragraphs 2 and 3, paragraph 1 is applicable to a given activity, it shall notify the Commission and inform it of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in paragraph 1, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned.

Contracts intended to enable the activity concerned to be carried out shall no longer be subject to this Directive if the Commission:

— has adopted a Decision establishing the applicability of paragraph 1 in accordance with paragraph 6 and within the period it provides for, or

— has not adopted a Decision concerning such applicability within that period.

However, where free access to a given market is presumed on the basis of the first subparagraph of paragraph 3, and where an independent national authority that is competent in the activity concerned has established the applicability of paragraph 1, contracts intended to enable the activity concerned to be carried out shall no longer be subject to this Directive if the Commission has not established the inapplicability of paragraph 1 by a Decision adopted in conformity with paragraph 6 and within the period it provides for.

5. When the legislation of the Member State concerned provides for it, the contracting entities may ask the Commission to establish the applicability of paragraph 1 to a given activity by a Decision in conformity with paragraph 6. In such a case, the Commission shall immediately inform the Member State concerned.

That Member State shall, taking account of paragraphs 2 and 3, inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in paragraph 1, where appropriate together with the position adopted by an independent national authority that is competent in the activity concerned.

The Commission may also begin the procedure for adoption of a Decision establishing the applicability of paragraph 1 to a given activity on its own initiative. In such a case, the Commission shall immediately inform the Member State concerned.

If, at the end of the period laid down in paragraph 6, the Commission has not adopted a Decision concerning the applicability of paragraph 1 to a given activity, paragraph 1 shall be deemed to be applicable.

6. For the adoption of a Decision under this Article, in accordance with the procedure under Article 68(2), the Commission shall be allowed a period of three months commencing on the first working day following the date on which it receives the notification or the request. However, this period may be extended once by a maximum of three months in duly justified cases, in particular if the information contained in the notification or the request or in the documents annexed thereto is incomplete or inexact or if the facts as reported undergo any substantive changes. This extension shall be limited to one month where an independent national authority that is competent in the activity concerned has established the applicability of paragraph 1 in the cases provided for under the third subparagraph of paragraph 4.

When an activity in a given Member State is already the subject of a procedure under this Article, further requests concerning the same activity in the same Member State before the expiry of the period opened in respect of the first request shall not be considered as new procedures and shall be treated in the context of the first request.

The Commission shall adopt detailed rules for applying paragraphs 4, 5 and 6 in accordance with the procedure under Article 68(2).

These rules shall include at least:

(a) the publication in the Official Journal, for information, of the date on which the three-month period referred to in the first subparagraph begins, and, in case this period is prolonged, the date of prolongation and the period by which it is prolonged;

(b) publication of the possible applicability of paragraph 1 in accordance with the second or third subparagraph of paragraph 4 or in accordance with the fourth subparagraph of paragraph 5; and

(c) the arrangements for forwarding positions adopted by an independent authority that is competent in the activity concerned, regarding questions relevant to paragraphs 1 and 2.

CHAPTER III

Rules applicable to service contracts

Article 31

Service contracts listed in Annex XVII A

Contracts which have as their object services listed in Annex XVII A shall be awarded in accordance with Articles 34 to 59.

Article 32

Service contracts listed in Annex XVII B

Contracts which have as their object services listed in Annex XVII B shall be governed solely by Articles 34 and 43.

Article 33

Mixed service contracts including services listed in Annexes XVII A and services listed in Annex XVII B

Contracts which have as their subject-matter services listed both in Annex XVII A and in Annex XVII B shall be awarded in accordance with Articles 34 to 59 where the value of the services listed in Annex XVII A is greater than the value of the services listed in Annex XVII B. In other cases, contracts shall be awarded in accordance with Articles 34 and 43.

CHAPTER IV

Specific rules governing specifications and contract documents

Article 34

Technical specifications

1. Technical specifications as defined in point 1 of Annex XXI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex XXI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent';

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting entities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4. Where a contracting entity makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the ground that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting entity, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

5. Where a contracting entity uses the option provided for in paragraph 3 of laying down performance or functional requirements, it may not reject a tender for products, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard, or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer shall prove to the satisfaction of the contracting entity and by any appropriate means that the product, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

6. Where contracting entities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, provided that:

— those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,

— the requirements for the label are drawn up on the basis of scientific information,

— the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and

— they are accessible to all interested parties.

Contracting entities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier from the manufacturer or a test report from a recognised body.

7. 'Recognised bodies', within the meaning of this Article, are test and calibration laboratories, and certification and inspection bodies which comply with applicable European standards.

Contracting entities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words 'or equivalent'.

Article 35

Communication of technical specifications

1. Contracting entities shall make available on request to economic operators interested in obtaining a contract the technical specifications regularly referred to in their supply, works or service contracts, or the technical specifications which they intend to apply to contracts covered by periodic indicative notices within the meaning of Article 41(1).

2. Where the technical specifications are based on documents available to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

Article 36

Variants

1. Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

Contracting entities shall indicate in the specifications whether or not they authorise variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation.

2. In procedures for awarding supply or service contracts, contracting entities which have authorised variants pursuant to paragraph 1 may not reject a variant on the sole ground that it would, if successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

Article 37

Subcontracting

In the contract documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in his tender any share of the contract he intends to subcontract to third parties and any proposed subcontractors. This indication shall be without prejudice to the question of the principal economic operator's liability.

Article 38

Conditions for performance of contracts

Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Article 39

Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

1. A contracting entity may state in the contract documents, or be required by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to protection provisions and to the working conditions which are in force in the Member State, region or locality in which the services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. A contracting entity which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the service is to be provided.

The first subparagraph shall be without prejudice to the application of Article 57.

CHAPTER V

Procedures

Article 40

Use of open, restricted and negotiated procedures

1. When awarding supply, works or service contracts, contracting entities shall apply the procedures adjusted for the purposes of this Directive.

2. Contracting entities may choose any of the procedures described in Article 1(9)(a), (b) or (c), provided that, subject to paragraph 3, a call for competition has been made in accordance with Article 42.

3. Contracting entities may use a procedure without prior call for competition in the following cases:

(a) when no tenders or no suitable tenders or no applications have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of contract are not substantially altered;

(b) where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;

(c) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular economic operator;

(d) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for open procedures, restricted procedures and negotiated procedures with a prior call for competition cannot be adhered to;

(e) in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;

(f) for additional works or services which were not included in the project initially awarded or in the contract first concluded but have, through unforeseen circumstances, become necessary to the performance of the contract, on condition that the award is made to the contractor or service provider executing the original contract:

— when such additional works or services cannot be technically or economically separated from the main contract without great inconvenience to the contracting entities, or

— when such additional works or services, although separable from the performance of the original contract, are strictly necessary to its later stages;

(g) in the case of works contracts, for new works consisting in the repetition of similar works assigned to the contractor to which the same contracting entities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded after a call for competition; as soon as the first project is put up for tender, notice shall be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting entities when they apply the provisions of Articles 16 and 17;

(h) for supplies quoted and purchased on a commodity market;

(i) for contracts to be awarded on the basis of a framework agreement, provided that the condition referred to in Article 14(2) is fulfilled;

(j) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;

(k) for purchases of supplies under particularly advantageous conditions from either a supplier definitively winding up his business activities or the receivers or liquidators of a bankruptcy, an arrangement with creditors or a similar procedure under national laws or regulations;

(l) when the service contract concerned is part of the follow-up to a design contest organised in accordance with the provisions of this Directive and shall, in accordance with the relevant rules, be awarded to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.

CHAPTER VI

Rules on publication and transparency

Section 1

Publication of notices

Article 41

Periodic indicative notices and notices on the existence of a system of qualification

1. Contracting entities shall make known, at least once a year, by means of a periodic indicative notice as referred to in Annex XV A, published by the Commission or by themselves on their 'buyer profile', as described in point 2(b) of Annex XX:

(a) where supplies are concerned, the estimated total value of the contracts or the framework agreements by product area which they intend to award over the following 12 months, where the total estimated value, taking into account the provisions of Articles 16 and 17, is equal to or greater than EUR 750 000.

The product area shall be established by the contracting entities by reference to the CPV nomenclature:

(b) where services are concerned, the estimated total value of the contracts or the framework agreements in each of the categories of services listed in Annex XVII A which they intend to award over the following 12 months, where such estimated total value, taking into account the provisions of Articles 16 and 17, is equal to or greater than EUR 750 000;

(c) where works are concerned, the essential characteristics of the works contracts or the framework agreements which they intend to award over the following 12 months, whose estimated value is equal to or greater than the threshold specified in Article 16, taking into account the provisions of Article 17.

The notices referred to in subparagraphs (a) and (b) shall be sent to the Commission or published on the buyer profile as soon as possible after the beginning of the budgetary year.

The notice referred to in subparagraph (c) shall be sent to the Commission or published on the buyer profile as soon as possible after the decision approving the planning of the works contracts or the framework agreements that the contracting entities intend to award.

Contracting entities which publish a periodic indicative notice on their buyer profiles shall transmit to the Commission, electronically, a notice of the publication of the periodic indicative notice on a buyer profile, in accordance with the format and procedures for the electronic transmission of notices indicated in point 3 of Annex XX.

The publication of the notices referred to in subparagraphs (a), (b) and (c) shall be compulsory only where the contracting entities take the option of reducing the time limits for the receipt of tenders as laid down in Article 45(4).

This paragraph shall not apply to procedures without prior call for competition.

2. Contracting entities may, in particular, publish or arrange for the Commission to publish periodic indicative notices relating to major projects without repeating information previously included in a periodic indicative notice, provided that it is clearly pointed out that these notices are additional ones.

3. Where contracting entities choose to set up a qualification system in accordance with Article 53, the system shall be the subject of a notice as referred to in Annex XIV, indicating the purpose of the qualification system and how to have access to the rules concerning its operation. Where the system is of a duration greater than three years, the notice shall be published annually. Where the system is of a shorter duration, an initial notice shall suffice.

Article 42

Notices used as a means of calling for competition

1. In the case of supply, works or service contracts, the call for competition may be made:

(a) by means of a periodic indicative notice as referred to in Annex XV A; or

(b) by means of a notice on the existence of a qualification system as referred to in Annex XIV; or

(c) by means of a contract notice as referred to in Annex XIII A, B or C.

2. In the case of dynamic purchasing systems, the system's call for competition shall be by contract notice as referred to in paragraph 1(c), whereas calls for competition for contracts based on such systems shall be by simplified contract notice as referred to in Annex XIII D.

3. When a call for competition is made by means of a periodic indicative notice, the notice shall:

(a) refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;

(b) indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested economic operators to express their interest in writing; and

(c) have been published in accordance with Annex XX not more than 12 months prior to the date on which the invitation referred to in Article 47(5) is sent. Moreover, the contracting entity shall meet the time limits laid down in Article 45.

Article 43

Contract award notices

1. Contracting entities which have awarded a contract or a framework agreement shall, within two months of the award of the contract or framework agreement, send a contract award notice as referred to in Annex XVI under conditions to be laid down by the Commission in accordance with the procedure referred to in Article 68(2).

In the case of contracts awarded under a framework agreement within the meaning of Article 14(2), the contracting entities shall not be bound to send a notice of the results of the award procedure for each contract based on that agreement.

Contracting entities shall send a contract award notice based on a dynamic purchasing system within two months after the award of each contract. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within two months of the end of each quarter.

2. The information provided in accordance with Annex XVI and intended for publication shall be published in accordance with Annex XX. In this connection, the Commission shall respect any sensitive commercial aspects which the contracting entities may point out when forwarding this information, concerning the number of tenders received, the identity of economic operators, or prices.

3. Where contracting entities award a research-and-development service contract ('R&D contract') by way of a procedure without a call for competition in accordance with Article 40(3)(b), they may limit to the reference 'research and development services' the information to be provided in accordance with Annex XVI concerning the nature and quantity of the services provided.

Where contracting entities award an R&D contract which cannot be awarded by way of a procedure without a call for competition in accordance with Article 40(3)(b), they may, on grounds of commercial confidentiality, limit the information to be provided in accordance with Annex XVI concerning the nature and quantity of the services supplied.

In such cases, contracting entities shall ensure that any information published under this paragraph is no less detailed than that contained in the notice of the call for competition published in accordance with Article 42(1).

If they use a qualification system, contracting entities shall ensure in such cases that such information is no less detailed than the category referred to in the list of qualified service providers drawn up in accordance with Article 53(7).

4. In the case of contracts awarded for services listed in Annex XVII B, the contracting entities shall indicate in the notice whether they agree to publication.

5. Information provided in accordance with Annex XVI and marked as not being intended for publication shall be published only in simplified form and in accordance with Annex XX for statistical purposes.

Article 44

Form and manner of publication of notices

1. Notices shall include the information mentioned in Annexes XIII, XIV, XV A, XV B and XVI and, where appropriate, any other information deemed useful by the contracting entity in the format of standard forms adopted by the Commission in accordance with the procedure referred to in Article 68(2).

2. Notices sent by contracting entities to the Commission shall be sent either by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX, or by other means.

The notices referred to in Articles 41, 42 and 43 shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex XX.

3. Notices drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX, shall be published no later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX shall be published not later than 12 days after they are transmitted. However, in exceptional cases, the contract notices referred to in Article 42(1)(c) shall be published within five days in response to a request by the contracting entity, provided that the notice has been sent by fax.

4. Contract notices shall be published in full in an official language of the Community as chosen by the contracting entity, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

The costs of publication of notices by the Commission shall be borne by the Community.

5. Notices and their contents may not be published at national level before the date on which they are sent to the Commission.

Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile in accordance with the first subparagraph of Article 41(1), but shall mention the date of dispatch of the notice to the Commission or its publication on the buyer profile.

Periodic indicative notices may not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall mention the date of that dispatch.

6. Contracting entities shall ensure that they are able to supply proof of the dates on which notices are dispatched.

7. The Commission shall give the contracting entity confirmation of the publication of the information sent, mentioning the date of that publication. Such confirmation shall constitute proof of publication.

8. Contracting entities may publish in accordance with paragraphs 1 to 7 contract notices which are not subject to the publication requirements laid down in this Directive.

Section 2

Time limits

Article 45

Time limits for the receipt of requests to participate and for the receipt of tenders

1. When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article.

2. In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.

3. In restricted procedures and in negotiated procedures with a prior call for competition, the following arrangements shall apply:

(a) the time limit for the receipt of requests to participate, in response to a notice published under Article 42(1)(c), or in response to an invitation by the contracting entities under Article 47(5), shall, as a general rule, be fixed at no less than 37 days from the date on which the notice or invitation was sent and may in no case be less than 22 days if the notice is sent for publication by means other than electronic means or fax, and at no less than 15 days if the notice is transmitted by such means;

(b) the time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders;

(c) where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall, as a general rule, be at least 24 days and shall in no case be less than 10 days from the date of the invitation to tender.

4. If the contracting entities have published a periodic indicative notice as referred to in Article 41(1) in accordance with Annex XX, the minimum time limit for the receipt of tenders in open procedures shall, as a general rule, not be less than 36 days, but shall in no case be less than 22 days from the date on which the notice was sent.

These reduced time limits are permitted, provided that the periodic indicative notice has included, in addition to the information required by Annex XV A, part I, all the information required by Annex XV A, part II, insofar as the latter information is available at the time the notice is published, and that the notice has been sent for publication between 52 days and 12 months before the date on which the contract notice referred to in Article 42(1)(c) is sent.

5. Where notices are drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX the time-limits for the receipt of requests to participate in restricted and negotiated procedures, and for receipt of tenders in open procedures, may be reduced by seven days.

6. Except in the case of a time limit set by mutual agreement in accordance with paragraph 3(b), time limits for the receipt of tenders in open, restricted and negotiated procedures may be further reduced by five days where the contracting entity offers unrestricted and full direct access to the contract documents and any supplementary documents by electronic means from the date on which the notice used as a means of calling for competition is published, in accordance with Annex XX. The notice should specify the internet address at which this documentation is accessible.

7. In open procedures, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for the receipt of tenders of less than 15 days from the date on which the contract notice is sent.

However, if the contract notice is not transmitted by fax or electronic means, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for receipt of tenders in an open procedure of less than 22 days from the date on which the contract notice is transmitted.

8. The cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for receipt of requests to participate, in response to a notice published under Article 42(1)(c), or in response to an invitation by the contracting entities under Article 47(5), of less than 15 days from the date on which the contract notice or invitation is sent.

In restricted and negotiated procedures, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case, except that of a time limit set by mutual agreement in accordance with paragraph 3(b), result in a time limit for the receipt of tenders of less than 10 days from the date of the invitation to tender.

9. If, for whatever reason, the contract documents and the supporting documents or additional information, although requested in good time, have not been supplied within the time limits set in Articles 46 and 47, 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, the time limits for the receipt of tenders shall be extended accordingly, except in the case of a time-limit set by mutual agreement in accordance with paragraph 3(b), so that all economic operators concerned may be aware of all the information needed for the preparation of a tender.

10. A summary table of the time limits laid down in this Article is given in Annex XXII.

Article 46

Open procedures: specifications, additional documents and information

1. In open procedures, where contracting entities do not offer unrestricted and full direct access by electronic means in accordance with Article 45(6) to the specifications and any supporting documents, the specifications and supporting documents shall be sent to economic operators within six days of receipt of the request, provided that the request was made in good time before the time limit for the submission of tenders.

2. Provided that it has been requested in good time, additional information relating to the specifications shall be supplied by the contracting entities or competent departments not later than six days before the time limit fixed for the receipt of tenders.

Article 47

Invitations to submit a tender or to negotiate

1. In restricted procedures and negotiated procedures, contracting entities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate. The invitation to the candidates shall include either:

— a copy of the specifications and any supporting documents, or

— a reference to accessing the specifications and the supporting documents indicated in the first indent, when they are made directly available by electronic means in accordance with Article 45(6).

2. Where the specifications and/or any supporting documents are held by an entity other than the contracting entity responsible for the award procedure, the invitation shall state the address from which those specifications and documents may be requested and, if appropriate, the closing date for requesting such documents, the sum payable for obtaining them and any payment procedures. The competent department shall send that documentation to the economic operator immediately upon receipt of the request.

3. The additional information on the specifications or the supporting documents shall be sent by the contracting entity or the competent department not less than six days before the final date fixed for the receipt of tenders, provided that it is requested in good time.

4. In addition, the invitation shall include at least the following:

(a) where appropriate, the time limit for requesting additional documents, as well as the amount and terms of payment of any sum to be paid for such documents;

(b) the final date for receipt of tenders, the address to which they are to be sent, and the language or languages in which they are to be drawn up;

(c) a reference to any published contract notice;

(d) an indication of any documents to be attached;

(e) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;

(f) the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.

5. When a call for competition is made by means of a periodic indicative notice, contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations.

This invitation shall include at least the following information:

(a) nature and quantity, including all options concerning complementary contracts and, if possible, the estimated time available for exercising these options for renewable contracts, the nature and quantity and, if possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;

(b) type of procedure: restricted or negotiated;

(c) where appropriate, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;

(d) the address and closing date for the submission of requests for tender documents and the language or languages in which they are to be drawn up;

(e) the address of the entity which is to award the contract and the information necessary for obtaining the specifications and other documents;

(f) economic and technical conditions, financial guarantees and information required from economic operators;

(g) the amount and payment procedures for any sum payable for obtaining tender documents;

(h) the form of the contract which is the subject of the invitation to tender: purchase, lease, hire or hire-purchase, or any combination of these; and

(i) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, if this information is not given in the indicative notice or the specifications or in the invitation to tender or to negotiate.

Section 3

Communication and information

Article 48

Rules applicable to communication

1. All communication and information exchange referred to in this Title may be carried out by post, by fax, by electronic means in accordance with paragraphs 4 and 5, by telephone in the cases and circumstances referred to in paragraph 6, or by a combination of those means, according to the choice of the contracting entity.

2. The means of communication chosen shall be generally available and thus not restrict economic operators' access to the tendering procedure.

3. Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting entities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

4. The tools to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

5. The following rules are applicable to devices for the electronic transmission and receipt of tenders and to devices for the electronic receipt of requests to participate:

(a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, shall be available to interested parties. Moreover, the devices for the electronic receipt of tenders and requests to participate shall conform to the requirements of Annex XXIV;

(b) Member States may, in compliance with Article 5 of Directive 1999/93/EC, require that electronic tenders be accompanied by an advanced electronic signature in conformity with paragraph 1 thereof;

(c) Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices;

(d) tenderers or candidates shall undertake to submit, before expiry of the time limit laid down for the submission of tenders or requests to participate, the documents, certificates and declarations mentioned in Articles 52(2), 52(3), 53 and 54 if they do not exist in electronic format.

6. The following rules shall apply to the transmission of requests to participate:

(a) requests to participate in procedures for the award of contracts may be made in writing or by telephone;

(b) where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt;

(c) contracting entities may require that requests for participation made by fax should be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit for sending confirmation by post or electronic means, should be stated by the contracting entity in the notice used as a means of calling for competition or in the invitation referred to in Article 47(5).

Article 49

Information to applicants for qualification, candidates and tenderers

1. Contracting entities shall as soon as possible inform the economic operators involved of decisions reached concerning the conclusion of a framework agreement, the award of the contract, or admission to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system; this information shall be provided in writing if the contracting entities are requested to do so.

2. On request from the party concerned, contracting entities shall, as soon as possible, inform:

— any unsuccessful candidate of the reasons for the rejection of his application,

— any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 34(4) and (5), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements,

— any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken to do so may under no circumstances exceed 15 days from receipt of the written enquiry.

However, contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement or on admission to a dynamic purchasing system, referred to in the paragraph 1, is to be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.

3. Contracting entities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of six months.

If the decision will take longer than four months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

4. Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal as soon as possible and under no circumstances more than 15 days later than the date of the decision. The reasons shall be based on the criteria for qualification referred to in Article 53(2).

5. Contracting entities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in Article 53(2). Any intention to bring qualification to an end shall be notified in writing to the economic operator beforehand, at least 15 days before the date on which qualification is due to end, together with the reason or reasons justifying the proposed action.

Article 50

Information to be stored concerning awards

1. Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:

(a) the qualification and selection of economic operators and the award of contracts;

(b) the use of procedures without a prior call for competition by virtue of Article 40(3);

(c) the non-application of Chapters III to VI of this Title by virtue of the derogations provided for in Chapter II of Title I and in Chapter II of this Title.

Contracting entities shall take appropriate steps to document the progress of award procedures conducted by electronic means.

2. The information shall be kept for at least four years from the date of award of the contract so that the contracting entity will be able, during that period, to provide the necessary information to the Commission if the latter so requests.

CHAPTER VII

Conduct of the procedure

Article 51

General provisions

1. For the purpose of selecting participants in their award procedures:

(a) contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 54(1), (2) or (4) shall exclude economic operators which comply with such rules and meet such criteria;

(b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Article 54;

(c) in restricted procedures and in negotiated procedures with a call for competition, they shall where appropriate reduce in accordance with Article 54 the number of candidates selected pursuant to subparagraphs (a) and (b).

2. When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in award procedures for the specific contracts which are the subject of the call for competition, contracting entities shall:

(a) qualify economic operators in accordance with the provisions of Article 53;

(b) apply to such qualified economic operators those provisions of paragraph 1 that are relevant to restricted or negotiated procedures.

3. Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.

Section 1

Qualification and qualitative selection

Article 52

Mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence

1. When selecting participants for a restricted or negotiated procedure, in reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities shall not:

(a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;

(b) require tests or evidence which would duplicate objective evidence already available.

2. Where they request the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting entities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification.

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators.

3. For works and service contracts, and only in appropriate cases, the contracting entities may require, in order to verify the economic operator's technical abilities, an indication of the environmental management measures which the economic operator will be able to apply when carrying out the contract. In such cases, should the contracting entities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the EMAS or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification.

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.

Article 53

Qualification systems

1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

2. The system under paragraph 1 may involve different qualification stages.

It shall be operated on the basis of objective criteria and rules for qualification to be established by the contracting entity.

Where those criteria and rules include technical specifications, the provisions of Article 34 shall apply. The criteria and rules may be updated as required.

3. The criteria and rules for qualification referred to in paragraph 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), those criteria and rules shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

4. Where the criteria and rules for qualification referred to in paragraph 2 include requirements relating to the economic and financial capacity of the economic operator, the latter may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that these resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to that effect.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the capacity of participants in the group or of other entities.

5. Where the criteria and rules for qualification referred to in paragraph 2 include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators referred to in Article 11 may rely on the abilities of participants in the group or of other entities.

6. The criteria and rules for qualification referred to in paragraph 2 shall be made available to economic operators on request. The updating of these criteria and rules shall be communicated to interested economic operators.

Where a contracting entity considers that the qualification system of certain other entities or bodies meets its requirements, it shall communicate to interested economic operators the names of such other entities or bodies.

7. A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.

8. When establishing or operating a qualification system, contracting entities shall in particular observe the provisions of Article 41(3) concerning notices on the existence of a system of qualification, of Article 49(3), (4) and (5) concerning the information to be delivered to economic operators having applied for qualification, of Article 51(2) concerning the selection of participants when a call for competition is made by means of a notice on the existence of a qualification system as well as the provisions of Article 52 on mutual recognition concerning administrative, technical or financial conditions, certificates, tests and evidence.

9. When a call for competition is made by means of a notice on the existence of a qualification system, tenderers in a restricted procedure or participants in a negotiated procedure shall be selected from the qualified candidates in accordance with such a system.

Article 54

Criteria for qualitative selection

1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

2. Contracting entities which select candidates for restricted or negotiated procedures shall do so according to objective rules and criteria which they have established and which are available to interested economic operators.

3. In restricted or negotiated procedures, the criteria may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the procurement procedure with the resources required to conduct it. The number of candidates selected shall, however, take account of the need to ensure adequate competition.

4. The criteria set out in paragraphs 1 and 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), the criteria and rules referred to in paragraphs 1 and 2 of this Article shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

5. Where the criteria referred to in paragraphs 1 and 2 include requirements relating to the economic and financial capacity of the economic operator, the latter may where necessary and for a particular contract rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that the necessary resources will be available to it, for example by delivering an undertaking by those entities to that effect.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the capacities of participants in the group or of other entities.

6. Where the criteria referred to in paragraphs 1 and 2 include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary and for a particular contract rely on the abilities of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that for the performance of the contract those resources will be available to it, for example by delivering an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the abilities of participants in the group or of other entities.

Section 2

Award of the contract

Article 55

Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall:

(a) where the contract is awarded on the basis of the most economically advantageous tender from the point of view of the contracting entity, be various criteria linked to the subject-matter of the contract in question, such as delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after-sales service and technical assistance, commitments with regard to parts, security of supply, and price or otherwise

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a), the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting entity, weighting is not possible for demonstrable reasons, the contracting entity shall indicate the criteria in descending order of importance.

The relative weighting or order of importance shall be specified, as appropriate, in the notice used as a means of calling for competition, in the invitation to confirm the interest referred to in Article 47(5), in the invitation to tender or to negotiate, or in the specifications.

Article 56

Use of electronic auctions

1. Member States may provide that contracting entities may use electronic auctions.

2. In open, restricted or negotiated procedures with a prior call for competition, the contracting entities may decide that the award of a contract shall be preceded by an electronic auction when the contract specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 15.

The electronic auction shall be based:

(a) either solely on prices when the contract is awarded to the lowest price,

(b) or on prices and/or on the new values of the features of the tenders indicated in the specification, when the contract is awarded to the most economically advantageous tender.

3. Contracting entities which decide to hold an electronic auction shall state that fact in the notice used as a means of calling for competition.

The specifications shall include, *inter alia*, the following details:

(a) the features whose values will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

4. Before proceeding with the electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

5. When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tender carried out in accordance with the weighting provided for in the first subparagraph of Article 55(2).

The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic rerankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in the specifications; for that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

6. Throughout each phase of an electronic auction the contracting entities shall instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

7. Contracting entities shall close an electronic auction in one or more of the following manners:

(a) in the invitation to take part in the auction they shall indicate the date and time fixed in advance;

(b) when they receive no more new prices or new values which meet the requirements concerning minimum differences. In that event, the contracting entities shall state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before they close the electronic auction;

(c) when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

When the contracting entities have decided to close an electronic auction in accordance with subparagraph (c), possibly in combination with the arrangements laid down in subparagraph (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

8. After closing an electronic auction the contracting entities shall award the contract in accordance with Article 55 on the basis of the results of the electronic auction.

9. Contracting entities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as defined in the notice used as a means of calling for competition and in the specification.

Article 57

Abnormally low tenders

1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting entity shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the manufacturing process, of the services provided and of the construction method;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;

(c) the originality of the supplies, services or work proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting entity shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was granted legally. Where the contracting entity rejects a tender in these circumstances, it shall inform the Commission of that fact.

Section 3

Tenders comprising products originating in third countries and relations with those countries

Article 58

Tenders comprising products originating in third countries

1. This Article shall apply to tenders covering products originating in third countries with which the Community has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Community or its Member States in respect of third countries.

2. Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1], exceeds 50 % of the total value of the products constituting the tender. For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.

3. Subject to the second subparagraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 55, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %.

However, a tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.

4. For the purposes of this Article, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.

5. The Commission shall submit an annual report to the Council, commencing in the second half of the first year following the entry into force of this Directive, on progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

The Council, acting by a qualified majority on a proposal from the Commission, may amend the provisions of this Article in the light of such developments.

Article 59

Relations with third countries as regards works, supplies and service contracts

1. Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries.

2. The Commission shall report to the Council before 31 December 2005, and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with these countries on this subject, particularly within the framework of the WTO.

3. The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service contracts, a third country:

(a) does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country; or

(b) does not grant Community undertakings national treatment or the same competitive opportunities as are available to national undertakings; or

(c) grants undertakings from other third countries more favourable treatment than Community undertakings.

4. Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by their undertakings and which are due to the non-observance of the international labour law provisions listed in Annex XXIII when these undertakings have tried to secure the award of contracts in third countries.

5. In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council decide to suspend or restrict, over a period to be laid down in the decision, the award of service contracts to:

(a) undertakings governed by the law of the third country in question;

[1] OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council (OJ L 311, 12.12.2000, p. 17).

(b) undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Community but having no direct and effective link with the economy of a Member State;

(c) undertakings submitting tenders which have as their subject-matter services originating in the third country in question.

The Council shall act, by qualified majority, as soon as possible.

The Commission may propose these measures on its own initiative or at the request of a Member State.

6. This Article shall be without prejudice to the commitments of the Community in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.

TITLE III

RULES GOVERNING SERVICE DESIGN CONTESTS

Article 60

General provision

1. The rules for the organisation of a design contest shall be in conformity with paragraph 2 of this Article and with Articles 61 and 63 to 66 and shall be made available to those interested in participating in the contest.

2. The admission of participants to design contests shall not be limited:

(a) by reference to the territory or part of the territory of a Member State;

(b) on the ground that, under the law of the Member State in which the contest is organised, they would have been required to be either natural or legal persons.

Article 61

Thresholds

1. This Title shall apply to design contests organised as part of a procurement procedure for services whose estimated value, net of VAT, is equal to or greater than EUR 499 000. For the purposes of this paragraph, 'threshold' means the estimated value net of VAT of the service contract, including any possible prizes and/or payments to participants.

2. This Title shall apply to all design contests where the total amount of contest prizes and payments to participants is equal to or greater than EUR 499 000.

For the purposes of this paragraph, 'threshold' means the total amount of the prizes and payments, including the estimated value net of VAT of the service contract which might subsequently be concluded under Article 40(3) if the contracting entity does not exclude such an award in the contest notice.

Article 62

Design contests excluded

This Title shall not apply to:

(1) contests which are organised in the same cases as referred to in Articles 20, 21 and 22 for service contracts;

(2) design contests organised for the pursuit, in the Member State concerned, of an activity to which the applicability of paragraph 1 of Article 30 has been established by a Commission decision or has been deemed applicable pursuant to paragraph 4, second or third subparagraph, or to paragraph 5, fourth subparagraph, of that Article.

Article 63

Rules on advertising and transparency

1. Contracting entities which wish to organise a design contest shall call for competition by means of a contest notice. Contracting entities which have held a design contest shall make the results known by means of a notice. The call for competition shall contain the information referred to in Annex XVIII and the notice of the results of a design contest shall contain the information referred to in Annex XIX in accordance with the format of standard forms adopted by the Commission in accordance with the procedure in Article 68(2).

The notice of the results of a design contest shall be forwarded to the Commission within two months of the closure of the design contest and under conditions to be laid down by the Commission in accordance with the procedure referred to in Article 68(2). In this connection, the Commission shall respect any sensitive commercial aspects which the contracting entities may point out when forwarding this information, concerning the number of projects or plans received, the identity of the economic operators and the prices tendered.

2. Article 44(2) to (8) shall also apply to notices relating to design contests.

Article 64

Means of communication

1. Article 48(1), (2) and (4) shall apply to all communications relating to contests.

2. Communications, exchanges and the storage of information shall be such as to ensure that the integrity and the confidentiality of all information communicated by the participants in a contest are preserved and that the jury ascertains the contents of plans and projects only after the expiry of the time-limit for their submission.

3. The following rules shall apply to the devices for the electronic receipt of plans and projects:

(a) the information relating to the specifications which is necessary for the presentation of plans and projects by electronic means, including encryption, shall be available to the parties concerned. In addition, the devices for the electronic receipt of plans and projects shall comply with the requirements of Annex XXIV;

(b) Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for such devices.

Article 65

Rules on the organisation of design contests, the selection of participants and the jury

1. When organising design contests, contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Where design contests are restricted to a limited number of participants, contracting entities shall establish clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

3. The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required of participants in a contest, at least a third of the jury members shall have the same qualification or an equivalent qualification.

Article 66

Decisions of the jury

1. The jury shall be autonomous in its decisions or opinions.

2. It shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

3. It shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points which may need clarification.

4. Anonymity must be observed until the jury has reached its opinion or decision.

5. Candidates may be invited, if need be, to answer questions which the jury has recorded in the minutes to clarify any aspects of the projects.

6. Complete minutes shall be drawn up of the dialogue between jury members and candidates.

TITLE IV

STATISTICAL OBLIGATIONS, EXECUTORY POWERS AND FINAL PROVISIONS

Article 67

Statistical obligations

1. Member States shall ensure, in accordance with the arrangements to be laid down under the procedure provided for in Article 68(2), that the Commission receives every year a statistical report concerning the total value, broken down by Member State and by category of activity to which Annexes I to X refer, of the contracts awarded below the thresholds set out in Article 16 but which would be covered by this Directive were it not for those thresholds.

2. As regards the categories of activity to which Annexes II, III, V, IX and X refer, Member States shall ensure that the Commission receives a statistical report on contracts awarded no later than 31 October 2004 for the previous year, and before 31 October of each year thereafter, in accordance with arrangements to be laid down under the procedure provided for in Article 68(2). The statistical report shall contain the information required to verify the proper application of the Agreement.

The information required under the first subparagraph shall not include information concerning contracts for the R & D services listed in category 8 of Annex XVII A, for telecommunications services listed in category 5 of Annex XVII A whose CPV positions are equivalent to the CPC reference numbers 7524, 7525 and 7526, or for the services listed in Annex XVII B.

3. The arrangements under paragraphs 1 and 2 shall be laid down in such a way as to ensure that:

(a) in the interests of administrative simplification, contracts of lesser value may be excluded, provided that the usefulness of the statistics is not jeopardised;

(b) the confidential nature of the information provided is respected.

Article 68

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts instituted by Article 1 of Council Decision 71/306/EEC [1] (hereinafter referred to as 'the Committee').

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its rules of procedure.

Article 69

Revision of the thresholds

1. The Commission shall verify the thresholds established in Article 16 every two years from 30 April 2004, and shall, if necessary with regard to the second subparagraph, revise them in accordance with the procedure provided for in Article 68(2).

The calculation of the value of these thresholds shall be based on the average daily value of the euro, expressed in SDR, over the 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euro so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDR, are observed.

2. At the same time as performing the revision under paragraph 1, the Commission shall, in accordance with the procedure provided for in Article 68(2), align the thresholds laid down in Article 61 (design contests) with the revised threshold applicable to service contracts.

The values of the thresholds laid down in accordance with paragraph 1 in the national currencies of Member States not participating in Monetary Union shall, in principle, be revised every two years from 1 January 2004. The calculation of such values shall be based on the average daily values of those currencies, expressed in euro, over the 24 months terminating on the last day of August preceding the revision with effect from 1 January.

3. The revised thresholds referred to in paragraph 1, their values in national currencies and the aligned thresholds referred to in paragraph 2 shall be published by the Commission in the *Official Journal of the European Union* at the beginning of the month of November following their revision.

[1] OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

Article 70

Amendments

The Commission may amend, in accordance with the procedure provided for in Article 68(2):

(a) the list of contracting entities in Annexes I to X so that they fulfil the criteria set out in Articles 2 to 7;

(b) the procedures for the drawing-up, transmission, receipt, translation, collection and distribution of the notices referred to in Articles 41, 42, 43 and 63;

(c) the procedures for specific references to particular positions in the CPV nomenclature in the notices;

(d) the reference numbers in the nomenclature set out in Annex XVII, in so far as this does not change the material scope of the Directive, and the procedures for reference in the notices to particular positions in this nomenclature within the categories of services listed in the Annex;

(e) the reference numbers in the nomenclature set out in Annex XII, insofar as this does not change the material scope of the Directive, and the procedures for reference to particular positions of this nomenclature in the notices;

(f) Annex XI;

(g) the procedure for sending and publishing data referred to in Annex XX, on grounds of technical progress or for administrative reasons;

(h) the technical details and characteristics of the devices for electronic receipt referred to in points (a), (f) and (g) of Annex XXIV;

(i) in the interests of administrative simplification as provided for in Article 67(3), the procedures for the use, drawing--up, transmission, receipt, translation, collection and distribution of the statistical reports referred to in Article 67(1) and (2);

(j) the technical procedures for the calculation methods set out in Article 69(1) and (2), second subparagraph.

Article 71

Implementation of the Directive

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 January 2006 at the latest. They shall forthwith inform the Commission thereof.

Member States may avail themselves of an additional period of up to 35 months after expiry of the time limit provided for in the first subparagraph for the application of the provisions necessary to comply with Article 6 of this Directive.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such references shall be laid down by Member States.

The provisions of Article 30 are applicable from 30 April 2004.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 72

Monitoring mechanisms

In conformity with 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 [1], Member States shall ensure implementation of this Directive by effective, available and transparent mechanisms.

For this purpose they may, among other things, appoint or establish an independent body.

Article 73

Repeal

Directive 93/38/EEC is hereby repealed, without prejudice to the obligations of the Member States concerning the time limits for transposition into national law set out in Annex XXV.

References to the repealed Directive shall be construed as being made to this Directive and shall be read in accordance with the correlation table in Annex XXVI.

Article 74

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Article 75

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 31 March 2004.

For the European Parliament	*For the Council*
The President	*The President*
P. COX	D. ROCHE

[1] OJ L 76, 23.03.1992, p. 14. Directive amended by the 1994 Act of Accession (OJ 241, 29.8.1994, p. 228).

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) and Article 55 and Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Having regard to the opinion of the Committee of the Regions [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4], in the light of the joint text approved by the Conciliation Committee on 9 December 2003,

Whereas:

(1) On the occasion of new amendments being made to Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [5], 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [6] and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [7], which are necessary to meet requests for simplification and modernisation made by contracting authorities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996, the Directives should, in the interests of clarity, be recast. This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2.

(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

(3) Such coordinating provisions should comply as far as possible with current procedures and practices in each of the Member States.

(4) Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.

(5) Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

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[1] OJ C 29 E, 30.1.2001, p. 11 and OJ C 203 E, 27.8.2002, p. 210.
[2] OJ C 193, 10.7.2001, p. 7.
[3] OJ C 144, 16.5.2001, p. 23.
[4] Opinion of the European Parliament of 17 January 2002 (OJ C 271 E, 7.11.2002, p. 176), Council Common Position of 20 Mars 2003 (OJ C 147 E, 24.6.2003, p. 1) and Position of the European Parliament of 2 July 2003 (not yet published in the Official Journal). Legislative Resolution of the European Parliament of 29 January 2004 and Decision of the Council of 2 February 2004.
[5] OJ L 209, 24.7.1992, p. 1. Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1).
[6] OJ L 199, 9.8.1993, p. 1. Directive as last amended by Commission Directive 2001/78/EC.
[7] OJ L 199, 9.8.1993, p. 54. Directive as last amended by Commission Directive 2001/78/EC.

(6) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.

(7) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) [1], approved in particular the WTO Agreement on Government Procurement, hereinafter referred to as the 'Agreement', the aim of which is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade.

In view of the international rights and commitments devolving on the Community as a result of the acceptance of the Agreement, the arrangements to be applied to tenderers and products from signatory third countries are those defined by the Agreement. This Agreement does not have direct effect. The contracting authorities covered by the Agreement which comply with this Directive and which apply the latter to economic operators of third countries which are signatories to the Agreement should therefore be in conformity with the Agreement. It is also appropriate that those coordinating provisions should guarantee for Community economic operators conditions for participation in public procurement which are just as favourable as those reserved for economic operators of third countries which are signatories to the Agreement.

(8) Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition.

(9) In view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards. The decision to award contracts separately or jointly must be determined by qualitative and economic criteria, which may be defined by national law.

(10) A contract shall be deemed to be a public works contract only if its subject matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, insofar as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a public works contract.

(11) A Community definition of framework agreements, together with specific rules on framework agreements concluded for contracts falling within the scope of this Directive, should be provided. Under these rules, when a contracting authority enters into a framework agreement in accordance with the provisions of this Directive relating, in particular, to advertising, time limits and conditions for the submission of tenders, it may enter into contracts based on such a framework agreement during its term of validity either by applying the terms set forth in the framework agreement or, if all terms have not been fixed in advance in the framework agreement, by reopening competition between the parties to the framework agreement in relation to those terms. The reopening of competition should comply with certain rules the aim of which is to guarantee the required flexibility and to guarantee respect for the general principles, in particular the principle of equal treatment. For the same reasons, the term of the framework agreements should not exceed four years, except in cases duly justified by the contracting authorities.

(12) Certain new electronic purchasing techniques are continually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency. To that extent, a tender submitted by a tenderer, in particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used, may take the form of that tenderer's electronic catalogue if the latter uses the means of communication chosen by the contracting authority in accordance with Article 42.

[1] OJ L 336, 23.12.1994, p. 1.

(13) In view of the rapid expansion of electronic purchasing systems, appropriate rules should now be introduced to enable contracting authorities to take full advantage of the possibilities afforded by these systems. Against this background, it is necessary to define a completely electronic dynamic purchasing system for commonly used purchases, and lay down specific rules for setting up and operating such a system in order to ensure the fair treatment of any economic operator who wishes to take part therein. Any economic operator which submits an indicative tender in accordance with the specification and meets the selection criteria should be allowed to join such a system. This purchasing technique allows the contracting authority, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to take part, to have a particularly broad range of tenders as a result of the electronic facilities available, and hence to ensure optimum use of public funds through broad competition.

(14) Since use of the technique of electronic auctions is likely to increase, such auctions should be given a Community definition and governed by specific rules in order to ensure that they operate in full accordance with the principles of equal treatment, non-discrimination and transparency. To that end, provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts. With the same objective, it must also to be possible to establish the respective ranking of the tenderers at any stage of the electronic auction. Recourse to electronic auctions enables contracting authorities to ask tenderers to submit new prices, revised downwards, and when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices. In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of the tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions. Consequently, certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, should not be the object of electronic auctions.

(15) Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing. Provision should therefore be made for a Community definition of central purchasing bodies dedicated to contracting authorities. A definition should also be given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting authorities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.

(16) In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive.

(17) Multiplying the number of thresholds for applying the coordinating provisions complicates matters for contracting authorities. Furthermore, in the context of monetary union such thresholds should be established in euro. Accordingly, thresholds should be set, in euro, in such a way as to simplify the application of such provisions, while at the same time ensuring compliance with the thresholds provided for by the Agreement which are expressed in special drawing rights. In this context, provision should also be made for periodic reviews of the thresholds expressed in euro so as to adjust them, where necessary, in line with possible variations in the value of the euro in relation to the special drawing right.

(18) The field of services is best delineated, for the purpose of applying the procedural rules of this Directive and for monitoring purposes, by subdividing it into categories corresponding to particular headings of a common classification and by bringing them together in two Annexes, II A and II B, according to the regime to which they are subject. As regards services in Annex II B, the relevant provisions of this Directive should be without prejudice to the application of Community rules specific to the services in question.

(19) As regards public service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is

taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information.

(20) Public contracts which are awarded by the contracting authorities operating in the water, energy, transport and postal services sectors and which fall within the scope of those activities are covered by 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 [1]. However, contracts awarded by the contracting authorities in the context of their service activities for maritime, coastal or river transport must fall within the scope of this Directive.

(21) In view of the situation of effective market competition in the telecommunications sector following the implementation of the Community rules aimed at liberalising that sector, public contracts in that area should be excluded from the scope of this Directive insofar as they are intended primarily to allow the contracting authorities to exercise certain activities in the telecommunications sector. Those activities are defined in accordance with the definitions used in Articles 1, 2 and 8 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sector [2], such that this Directive does not apply to contracts which have been excluded from the scope of Directive 93/38/EEC pursuant to Article 8 thereof.

(22) Provision should be made for cases in which it is possible to refrain from applying the measures for coordinating procedures on grounds relating to State security or secrecy, or because specific rules on the awarding of contracts which derive from international agreements, relating to the stationing of troops, or which are specific to international organisations are applicable.

(23) Pursuant to Article 163 of the Treaty, the encouragement of research and technological development is a means of strengthening the scientific and technological basis of Community industry, and the opening-up of public service contracts contributes to this end. This Directive should not cover the cofinancing of research and development programmes: research and development 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, are not therefore covered by this Directive.

(24) In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of public procurement rules inappropriate.

(25) The awarding of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception must therefore be made for public service contracts for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme and contracts concerning broadcasting times. However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes. A broadcast should be defined as transmission and distribution using any form of electronic network.

(26) Arbitration and conciliation services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules.

(27) In accordance with the Agreement, the financial services covered by this Directive do not include instruments of monetary policy, exchange rates, public debt, reserve management or other policies involving transactions in securities or other financial instruments, in particular

[1] See p. 1 of this Official Journal.
[2] OJ L 199, 9.8.1993, p. 84. Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1).

transactions by the contracting authorities to raise money or capital. Accordingly, contracts relating to the issue, purchase, sale or transfer of securities or other financial instruments are not covered. Central bank services are also excluded.

(28) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.

(29) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements, and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties. Contracting authorities should, whenever possible, 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 tenderers know what the requirements established by the contracting authority cover.

(30) Additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document.

(31) Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance. To the extent that use of open or restricted procedures does not allow the award of such contracts, a flexible procedure should be provided which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate. However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous.

(32) In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.

(33) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

(34) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1] lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

(35) In view of new developments in information and communications technology, and the simplifications these can bring in terms of publicising contracts and the efficiency and transparency of procurement processes, electronic means should be put on a par with traditional means of communication and information exchange. As far as possible, the means and technology chosen should be compatible with the technologies used in other Member States.

(36) To ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto. Improved visibility should therefore be ensured for public notices by means of appropriate instruments, such as standard contract notice forms and the Common Procurement Vocabulary (CPV) provided for in Regulation (EC) No 2195/2002 of the European Parliament and of the Council [2] as the reference nomenclature for public contracts. In restricted procedures, advertisement is, more particularly, intended to enable contractors of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions.

(37) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [3] and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') [4] should, in the context of this Directive, apply to the transmission of information by electronic means. The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. To this end, use of electronic signatures, in particular advanced electronic signatures, should, as far as possible, be encouraged. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.

(38) The use of electronic means leads to savings in time. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Community level.

(39) Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.

(40) A contracting authority may limit the number of candidates in the restricted and negotiated procedures with publication of a contract notice, and in the competitive dialogue. Such a reduction of candidates should be performed on the basis of objective criteria indicated in

[1] OJ L 18, 21.1.1997, p. 1.
[2] OJ L 340, 16.12.2002, p.1.
[3] OJ L 13, 19.1.2000, p. 12.
[4] OJ L 178, 17.7.2000, p. 1.

the contract notice. These objective criteria do not necessarily imply weightings. For criteria relating to the personal situation of economic operators, a general reference in the contract notice to the situations set out in Article 45 may suffice.

(41) In the competitive dialogue and negotiated procedures with publication of a contract notice, in view of the flexibility which may be required and the high level of costs associated with such methods of procurement, contracting authorities should be entitled to make provision for the procedure to be conducted in successive stages in order gradually to reduce, on the basis of previously indicated contract award criteria, the number of tenders which they will go on to discuss or negotiate. This reduction should, insofar as the number of appropriate solutions or candidates allows, ensure that there is genuine competition.

(42) The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.

(43) The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of res judicata. If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Non-observance of national provisions implementing the Council Directives 2000/78/EC [1] and 76/207/EEC [2] concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

(44) In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required. Environmental management schemes, whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001 [3] (EMAS), can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

(45) This Directive allows Member States to establish official lists of contractors, suppliers or service providers or a system of certification by public or private bodies, and makes provision for the effects of such registration or such certification in a contract award procedure in another Member State. As regards official lists of approved economic operators, it is important to take into account Court of Justice case-law in cases where an economic operator belonging to a group claims the economic, financial or technical capabilities of other companies in the group in support of its application for registration. In this case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of

[1] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

[2] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40). Directive amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

[3] Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing a voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (OJ L 114, 24.4.2001, p. 1).

the registration. For the purposes of that registration, a Member State may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another company in the group, it may require that that company be held liable, if necessary jointly and severally.

(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender'.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.

In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

(47) In the case of public service contracts, the award criteria must not affect the application of national provisions on the remuneration of certain services, such as, for example, the services performed by architects, engineers or lawyers and, where public supply contracts are concerned, the application of national provisions setting out fixed prices for school books.

(48) Certain technical conditions, and in particular those concerning notices and statistical reports, as well as the nomenclature used and the conditions of reference to that nomenclature, will need to be adopted and amended in the light of changing technical requirements. The lists of contracting authorities in the Annexes will also need to be updated. It is therefore appropriate to put in place a flexible and rapid adoption procedure for this purpose.

(49) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1].

(50) It is appropriate that Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits [2] should apply to the calculation of the time limits contained in this Directive.

(51) This Directive should not prejudice the time limits set out in Annex XI, within which Member States are required to transpose and apply Directives 92/50/EEC, 93/36/EEC and 93/37/EEC,

HAVE ADOPTED THIS DIRECTIVE:

[1] OJ L 184, 17.7.1999, p. 23.
[2] OJ L 124, 8.6.1971, p. 1.

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TITLE I

DEFINITIONS AND GENERAL PRINCIPLES

Article 1

Definitions

1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2. (a) 'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) 'Public works contracts' are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

(c) 'Public supply contracts' are public contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.

A public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a 'public supply contract'.

(d) 'Public service contracts' are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a 'public service contract' if the value of the services in question exceeds that of the products covered by the contract.

A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract.

3. 'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

4. 'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

5. A 'framework agreement' is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

6. A 'dynamic purchasing system' is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

7. An 'electronic auction' is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions.

8. The terms 'contractor', 'supplier' and 'service provider' mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term 'economic operator' shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

An economic operator who has submitted a tender shall be designated a 'tenderer'. One which has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue shall be designated a 'candidate'.

9. 'Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A 'body governed by public law' means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, 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.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.

10. A 'central purchasing body' is a contracting authority which:

— acquires supplies and/or services intended for contracting authorities, or

— awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

11. (a) 'Open procedures' means those procedures whereby any interested economic operator may submit a tender.

(b) 'Restricted procedures' means those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender.

(c) 'Competitive dialogue' is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

For the purpose of recourse to the procedure mentioned in the first subparagraph, a public contract is considered to be 'particularly complex' where the contracting authorities:

— are not objectively able to define the technical means in accordance with Article 23(3)(b), (c) or (d), capable of satisfying their needs or objectives, and/or

— are not objectively able to specify the legal and/or financial make-up of a project.

(d) 'Negotiated procedures' means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.

(e) 'Design contests' means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.

12. 'Written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means.

13. 'Electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

14. The 'Common Procurement Vocabulary (CPV)' shall designate the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002, while ensuring equivalence with the other existing nomenclatures.

In the event of varying interpretations of the scope of this Directive, owing to possible differences between the CPV and NACE nomenclatures listed in Annex I, or between the CPV and CPC (provisional version) nomenclatures listed in Annex II, the NACE or the CPC nomenclature respectively shall take precedence.

15. For the purposes of Article 13, Article 57(a) and Article 68(b), the following phrases shall have the following meanings:

(a) 'public telecommunications network' means the public telecommunications infrastructure which enables signals to be conveyed between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means;

(b) a 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to, and efficient communication through, that public network;

(c) 'public telecommunications services' means telecommunications services the provision of which the Member States have specifically assigned, in particular, to one or more telecommunications entities;

(d) 'telecommunications services' means services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of broadcasting and television.

Article 2

Principles of awarding contracts

Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

Article 3

Granting of special or exclusive rights: non-discrimination clause

Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality.

TITLE II

RULES ON PUBLIC CONTRACTS

CHAPTER I

General provisions

Article 4

Economic operators

1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of public service and public works contracts as well as public supply contracts covering in addition services and/or siting and installation operations, legal persons may be required to indicate in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

Article 5

Conditions relating to agreements concluded within the World Trade Organisation

For the purposes of the award of contracts by contracting authorities, Member States shall apply in their relations conditions as favourable as those which they grant to economic operators of third countries in implementation of the Agreement on Government Procurement (hereinafter referred to as 'the Agreement'), concluded in the framework of the Uruguay Round multilateral negotiations. Member States shall, to this end, consult one another within the Advisory Committee for Public Contracts referred to in Article 77 on the measures to be taken pursuant to the Agreement.

Article 6

Confidentiality

Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35(4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.

CHAPTER II

Scope

Section 1

Thresholds

Article 7

Threshold amounts for public contracts

This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 162 000 for public supply and service contracts others than those covered by point (b), third indent, awarded by contracting authorities which are listed as central government authorities in Annex IV; in the case of public supply contracts awarded by contracting authorities operating in the field of defence, this shall apply only to contracts involving products covered by Annex V;

(b) EUR 249 000

— for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV,

— for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by Annex V,

— for public service contracts awarded by any contracting authority in respect of the services listed in Category 8 of Annex IIA, Category 5 telecommunications services the positions of which in the CPV are equivalent to CPC reference Nos 7524, 7525 and 7526 and/or the services listed in Annex II B;

(c) EUR 6 242 000 for public works contracts.

Article 8

Contracts subsidised by more than 50 % by contracting authorities

This Directive shall apply to the awarding of:

(a) contracts which are subsidised directly by contracting authorities by more than 50 % and the estimated value of which, net of VAT, is equal to or greater than EUR 6 242 000,

— where those contracts involve civil engineering activities within the meaning of Annex I,

— where those contracts involve building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes;

(b) service contracts which are subsidised directly by contracting authorities by more than 50 % and the estimated value of which, net of VAT, is equal to or greater than EUR 249 000 and which are connected with a works contract within the meaning of point (a).

Member States shall take the necessary measures to ensure that the contracting authorities awarding such subsidies ensure compliance with this Directive where that contract is awarded by one or more entities other than themselves or comply with this Directive where they themselves award that contract for and on behalf of those other entities.

Article 9

Methods for calculating the estimated value of public contracts, framework agreements and dynamic purchasing systems

1. The calculation of the estimated value of a public contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.

2. This estimate must be valid at the moment at which the contract notice is sent, as provided for in Article 35(2), or, in cases where such notice is not required, at the moment at which the contracting authority commences the contract awarding procedure.

3. No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive.

4. With regard to public works contracts, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting authorities.

5. (a) Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 7, this Directive shall apply to the awarding of each lot.

However, the contracting authorities may waive such application in respect of lots the estimated value of which net of VAT is less than EUR 80 000 for services or EUR 1 million for works, provided that the aggregate value of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

(b) Where a proposal for the acquisition of similar supplies may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 7(a) and (b).

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 7, this Directive shall apply to the awarding of each lot.

However, the contracting authorities may waive such application in respect of lots, the estimated value of which, net of VAT, is less than EUR 80 000, provided that the aggregate cost of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

6. With regard to public supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:

(a) in the case of fixed-term public contracts, if that term is less than or equal to 12 months, the total estimated value for the term of the contract or, if the term of the contract is greater than 12 months, the total value including the estimated residual value;

(b) in the case of public contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.

7. In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;

(b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.

The choice of method used to calculate the estimated value of a public contract may not be made with the intention of excluding it from the scope of this Directive.

8. With regard to public service contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:

(a) for the following types of services:

(i) insurance services: the premium payable and other forms of remuneration;

(ii) banking and other financial services: the fees, commissions, interest and other forms of remuneration;

(iii) design contracts: fees, commission payable and other forms of remuneration;

(b) for service contracts which do not indicate a total price:

(i) in the case of fixed-term contracts, if that term is less than or equal to 48 months: the total value for their full term;

(ii) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

9. With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

Section 2

Specific situations

Article 10

Defence procurement

This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty.

Article 11

Public contracts and framework agreements awarded by central purchasing bodies

1. Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it.

Section 3

Excluded contracts

Article 12

Contracts in the water, energy, transport and postal services sectors

This Directive shall not apply to public contracts which, under Directive 2004/17/EC, are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are awarded for the pursuit of those activities, or to public contracts excluded from the scope of that Directive under Article 5(2) and Articles 19, 26 and 30 thereof.

However, this Directive shall continue to apply to public contracts awarded by contracting authorities carrying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, insofar as the Member State concerned takes advantage of the option referred to in the second subparagraph of Article 71 thereof to defer its application.

Article 13

Specific exclusions in the field of telecommunications

This Directive shall not apply to public contracts for the principal purpose of permitting the contracting authorities to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services.

Article 14

Secret contracts and contracts requiring special security measures

This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires.

Article 15

Contracts awarded pursuant to international rules

This Directive shall not apply to public contracts governed by different procedural rules and awarded:

(a) pursuant to an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering supplies or works intended for the joint implementation or exploitation of a work by the signatory States or services intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 77;

(b) pursuant to a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;

(c) pursuant to the particular procedure of an international organisation.

Article 16

Specific exclusions

This Directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable 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 this Directive;

(b) the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time;

(c) arbitration and conciliation services;

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services;

(e) employment contracts;

(f) research and development services 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.

Article 17

Service concessions

Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).

Article 18

Service contracts awarded on the basis of an exclusive right

This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

Section 4

Special arrangement

Article 19

Reserved contracts

Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

The contract notice shall make reference to this provision.

CHAPTER III

Arrangements for public service contracts

Article 20

Service contracts listed in Annex II A

Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.

Article 21

Service contracts listed in Annex II B

Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).

Article 22

Mixed contracts including services listed in Annex II A and services listed in Annex II B

Contracts which have as their object services listed both in Annex II A and in Annex II B shall be awarded in accordance with Articles 23 to 55 where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B. In other cases, contracts shall be awarded in accordance with Article 23 and Article 35(4).

CHAPTER IV

Specific rules governing specifications and contract documents

Article 23

Technical specifications

1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent';

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4. Where a contracting authority makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

5. Where a contracting authority uses the option laid down in paragraph 3 to prescribe in terms of performance or functional requirements, it may not reject a tender for works, products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer must prove to the satisfaction of the contracting authority and by any appropriate means that the work, product or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that:

— those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,

— the requirements for the label are drawn up on the basis of scientific information,

— the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and

— they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

7. 'Recognised bodies', within the meaning of this Article, are test and calibration laboratories and certification and inspection bodies which comply with applicable European standards.

Contracting authorities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words 'or equivalent'.

Article 24

Variants

1. Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.

2. Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.

3. Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

4. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

In procedures for awarding public supply or service contracts, contracting authorities which have authorised variants may not reject a variant on the sole ground that it would, if successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Article 25

Subcontracting

In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

This indication shall be without prejudice to the question of the principal economic operator's liability.

Article 26

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Article 27

Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

The first subparagraph shall be without prejudice to the application of the provisions of Article 55 concerning the examination of abnormally low tenders.

CHAPTER V

Procedures

Article 28

Use of open, restricted and negotiated procedures and of competitive dialogue

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.

Article 29

Competitive dialogue

1. In the case of particularly complex contracts, Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this Article.

A public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender.

2. Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.

3. Contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

4. Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.

5. The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 53.

At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

8. The contracting authorities may specify prices or payments to the participants in the dialogue.

Article 30

Cases justifying use of the negotiated procedure with prior publication of a contract notice

1. Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

(a) in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with Articles 4, 24, 25, 27 and Chapter VII, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered.

Contracting authorities need not publish a contract notice where they include in the negotiated procedure all of, and only, the tenderers which satisfy the criteria of Articles 45 to 52 and which, during the prior open or restricted procedure or competitive dialogue, have submitted tenders in accordance with the formal requirements of the tendering procedure;

(b) in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing;

(c) in the case of services, *inter alia* services within category 6 of Annex II A, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures;

(d) in respect of public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

2. In the cases referred to in paragraph 1, contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender in accordance with Article 53(1).

3. During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

4. Contracting authorities may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice or the specifications. The contract notice or the specifications shall indicate whether recourse has been had to this option.

Article 31

Cases justifying use of the negotiated procedure without publication of a contract notice

Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

(1) for public works contracts, public supply contracts and public service contracts:

(a) when no tenders or no suitable tenders or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests;

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

(c) insofar as is 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 as referred to in Article 30 cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

(2) for public supply contracts:

(a) when the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;

(b) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years;

(c) for supplies quoted and purchased on a commodity market;

(d) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations;

(3) for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, 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;

(4) for public works contracts and public service contracts:

(a) for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:

— when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities,

or

— when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works or services may not exceed 50 % of the amount of the original contract;

(b) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure.

As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7.

This procedure may be used only during the three years following the conclusion of the original contract.

Article 32

Framework agreements

1. Member States may provide that contracting authorities may conclude framework agreements.

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

— by application of the terms laid down in the framework agreement without reopening competition, or

— where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

(b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;

(c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;

(d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

Article 33

Dynamic purchasing systems

1. Member States may provide that contracting authorities may use dynamic purchasing systems.

2. In order to set up a dynamic purchasing system, contracting authorities shall follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system. All the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification. With a view to setting up the system and to the award of contracts under that system, contracting authorities shall use solely electronic means in accordance with Article 42(2) to (5).

3. For the purposes of setting up the dynamic purchasing system, contracting authorities shall:

(a) publish a contract notice making it clear that a dynamic purchasing system is involved;

(b) indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;

(c) offer by electronic means, on publication of the notice and up to the expiry of the system, unrestricted, direct and full access to the specification and to any additional documents and shall indicate in the notice the internet address at which such documents may be consulted.

4. Contracting authorities shall give any economic operator, throughout the entire period of the dynamic purchasing system, the possibility of submitting an indicative tender and of being admitted to the system under the conditions referred to in paragraph 2. They shall complete evaluation within a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime.

The contracting authority shall inform the tenderer referred to in the first subparagraph at the earliest possible opportunity of its admittance to the dynamic purchasing system or of the rejection of its indicative tender.

5. Each specific contract must be the subject of an invitation to tender. Before issuing the invitation to tender, contracting authorities shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, in accordance with paragraph 4, within a time limit that may not be less than 15 days from the date on which the simplified notice was sent. Contracting authorities may not proceed with tendering until they have completed evaluation of all the indicative tenders received by that deadline.

6. Contracting authorities shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end they shall set a time limit for the submission of tenders.

They shall award the contract to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system. Those criteria may, if appropriate, be formulated more precisely in the invitation referred to in the first subparagraph.

7. A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases.

Contracting authorities may not resort to this system to prevent, restrict or distort competition.

No charges may be billed to the interested economic operators or to parties to the system.

Article 34

Public works contracts: particular rules on subsidised housing schemes

In the case of public contracts relating to the design and construction of a subsidised housing scheme the size and complexity of which, 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 authorities, experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team.

In particular, contracting authorities shall include in the contract notice 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. Furthermore, contracting authorities shall, in accordance with the qualitative selection criteria referred to in Articles 45 to 52, set out in such a contract notice the personal, technical, economic and financial conditions to be fulfilled by candidates.

Where such a procedure is adopted, contracting authorities shall apply Articles 2, 35, 36, 38, 39, 41, 42, 43 and 45 to 52.

CHAPTER VI

Rules on advertising and transparency

Section 1

Publication of notices

Article 35

Notices

1. Contracting authorities shall make known, by means of a prior information notice published by the Commission or by themselves on their 'buyer profile', as described in point 2(b) of Annex VIII:

(a) where supplies are concerned, the estimated total value of the contracts or the framework agreements by product area which they intend to award over the following 12 months, where the total estimated value, taking into account Articles 7 and 9, is equal to or greater than EUR 750 000.

The product area shall be established by the contracting authorities by reference to the CPV nomenclature;

(b) where services are concerned, the estimated total value of the contracts or the framework agreements in each of the categories of services listed in Annex II A which they intend to award over the following 12 months, where such estimated total value, taking into account the provisions of Articles 7 and 9, is equal to or greater than EUR 750 000;

(c) where works are concerned, the essential characteristics of the contracts or the framework agreements which they intend to award, the estimated value of which is equal to or greater than the threshold specified in Article 7, taking into account Article 9.

The notices referred to in subparagraphs (a) and (b) shall be sent to the Commission or published on the buyer profile as soon as possible after the beginning of the budgetary year.

The notice referred to in subparagraph (c) shall be sent to the Commission or published on the buyer profile as soon as possible after the decision approving the planning of the works contracts or the framework agreements that the contracting authorities intend to award.

Contracting authorities who publish a prior information notice on their buyer profiles shall send the Commission, electronically, a notice of the publication of the prior information notice on a buyer profile, in accordance with the format and detailed procedures for sending notices indicated in point 3 of Annex VIII.

Publication of the notices referred to in subparagraphs (a), (b) and (c) shall be compulsory only where the contracting authorities take the option of shortening the time limits for the receipt of tenders as laid down in Article 38(4).

This paragraph shall not apply to negotiated procedures without the prior publication of a contract notice.

2. Contracting authorities which wish to award a public contract or a framework agreement by open, restricted or, under the conditions laid down in Article 30, negotiated procedure with the publication of a contract notice or, under the conditions laid down in Article 29, a competitive dialogue, shall make known their intention by means of a contract notice.

3. Contracting authorities which wish to set up a dynamic purchasing system shall make known their intention by means of a contract notice.

Contracting authorities which wish to award a contract based on a dynamic purchasing system shall make known their intention by means of a simplified contract notice.

4. Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

In the case of framework agreements concluded in accordance with Article 32 the contracting authorities are not bound to send a notice of the results of the award procedure for each contract based on that agreement.

Contracting authorities shall send a notice of the result of the award of contracts based on a dynamic purchasing system within 48 days of the award of each contract. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 48 days of the end of each quarter.

In the case of public contracts for services listed in Annex II B, the contracting authorities shall indicate in the notice whether they agree to its publication. For such services contracts the Commission shall draw up the rules for establishing statistical reports on the basis of such notices and for the publication of such reports in accordance with the procedure laid down in Article 77(2).

Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Article 36

Form and manner of publication of notices

1. Notices shall include the information mentioned in Annex VII A and, where appropriate, any other information deemed useful by the contracting authority in the format of standard forms adopted by the Commission in accordance with the procedure referred to in Article 77(2).

2. Notices sent by contracting authorities to the Commission shall be sent either by electronic means in accordance with the format and procedures for transmission indicated in Annex VIII, paragraph 3, or by other means. In the event of recourse to the accelerated procedure set out in Article 38(8), notices must be sent either by telefax or by electronic means, in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII.

Notices shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex VIII.

3. Notices drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be published no later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be published not later than 12 days after they are sent, or in the case of accelerated procedure referred to in Article 38(8), not later than five days after they are sent.

4. Contract notices shall be published in full in an official language of the Community as chosen by the contracting authority, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

The costs of publication of such notices by the Commission shall be borne by the Community.

5. Notices and their contents may not be published at national level before the date on which they are sent to the Commission.

Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile in accordance with the first subparagraph of Article 35(1), but shall mention the date of dispatch of the notice to the Commission or its publication on the buyer profile.

Prior information notices may not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall mention the date of that dispatch.

6. The content of notices not sent by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be limited to approximately 650 words.

7. Contracting authorities must be able to supply proof of the dates on which notices are dispatched.

8. The Commission shall give the contracting authority confirmation of the publication of the information sent, mentioning the date of that publication. Such confirmation shall constitute proof of publication.

Article 37

Non-mandatory publication

Contracting authorities may publish in accordance with Article 36 notices of public contracts which are not subject to the publication requirement laid down in this Directive.

Section 2

Time limits

Article 38

Time limits for receipt of requests to participate and for receipt of tenders

1. When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article.

2. In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.

3. In the case of restricted procedures, negotiated procedures with publication of a contract notice referred to in Article 30 and the competitive dialogue:

(a) the minimum time limit for receipt of requests to participate shall be 37 days from the date on which the contract notice is sent;

(b) in the case of restricted procedures, the minimum time limit for the receipt of tenders shall be 40 days from the date on which the invitation is sent.

4. When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders under paragraphs 2 and 3(b) may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days.

The time limit shall run from the date on which the contract notice was sent in open procedures, and from the date on which the invitation to tender was sent in restricted procedures.

The shortened time limits referred to in the first subparagraph shall be permitted, provided that the prior information notice has included all the information required for the contract notice in Annex VII A, insofar as that information is available at the time the notice is published and that the prior information notice was sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

5. Where notices are drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, the time limits for the receipt of tenders referred to in paragraphs 2 and 4 in open procedures, and the time limit for the receipt of the requests to participate referred to in paragraph 3(a), in restricted and negotiated procedures and the competitive dialogue, may be shortened by seven days.

6. The time limits for receipt of tenders referred to in paragraphs 2 and 3(b) may be reduced by five days where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice in accordance with Annex VIII, specifying in the text of the notice the internet address at which this documentation is accessible.

This reduction may be added to that referred to in paragraph 5.

7. If, for whatever reason, the specifications and the supporting documents or additional information, although requested in good time, are not supplied within the time limits set in Articles 39 and 40, 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, the time limits for the receipt of tenders shall be extended so that all economic operators concerned may be aware of all the information needed to produce tenders.

8. In the case of restricted procedures and negotiated procedures with publication of a contract notice referred to in Article 30, where urgency renders impracticable the time limits laid down in this Article, contracting authorities may fix:

(a) a time limit for the receipt of requests to participate which may not be less than 15 days from the date on which the contract notice was sent, or less than 10 days if the notice was sent by electronic means, in accordance with the format and procedure for sending notices indicated in point 3 of Annex VIII;

(b) and, in the case of restricted procedures, a time limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender.

Article 39

Open procedures: Specifications, additional documents and information

1. In open procedures, where contracting authorities do not offer unrestricted and full direct access by electronic means in accordance with Article 38(6) to the specifications and any supporting documents, the specifications and supplementary documents shall be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time before the deadline for the submission of tenders.

2. Provided that it has been requested in good time, additional information relating to the specifications and any supporting documents shall be supplied by the contracting authorities or competent departments not later than six days before the deadline fixed for the receipt of tenders.

Section 3

Information content and means of transmission

Article 40

Invitations to submit a tender, participate in the dialogue or negotiate

1. In restricted procedures, competitive dialogue procedures and negotiated procedures with publication of a contract notice within the meaning of Article 30, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate or, in the case of a competitive dialogue, to take part in the dialogue.

2. The invitation to the candidates shall include either:

— a copy of the specifications or of the descriptive document and any supporting documents, or

— a reference to accessing the specifications and the other documents indicated in the first indent, when they are made directly available by electronic means in accordance with Article 38(6).

3. Where an entity other than the contracting authority responsible for the award procedure has the specifications, the descriptive document and/or any supporting documents, the invitation shall state the address from which those specifications, that descriptive document and those documents may be requested and, if appropriate, the deadline for requesting such documents, and the sum payable for obtaining them and any payment procedures. The competent department shall send that documentation to the economic operator without delay upon receipt of a request.

4. The additional information on the specifications, the descriptive document or the supporting documents shall be sent by the contracting authority or the competent department not less than six days before the deadline fixed for the receipt of tenders, provided that it is requested in good time. In the event of a restricted or an accelerated procedure, that period shall be four days.

5. In addition, the invitation to submit a tender, to participate in the dialogue or to negotiate must contain at least:

(a) a reference to the contract notice published;

(b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;

(c) in the case of competitive dialogue the date and the address set for the start of consultation and the language or languages used;

(d) a reference to any possible adjoining documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with Article 44, or to supplement the information referred to in that Article, and under the conditions laid down in Articles 47 and 48;

(e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if they are not given in the contract notice, the specifications or the descriptive document.

However, in the case of contracts awarded in accordance with the rules laid down in Article 29, the information referred to in (b) above shall not appear in the invitation to participate in the dialogue but it shall appear in the invitation to submit a tender.

Article 41

Informing candidates and tenderers

1. Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

2. On request from the party concerned, the contracting authority shall as quickly as possible inform:

— any unsuccessful candidate of the reasons for the rejection of his application,

— any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 23, paragraphs 4 and 5, the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

— any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken may in no circumstances exceed 15 days from receipt of the written request.

3. However, contracting authorities may decide to withhold certain information referred to in paragraph 1, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

Section 4

Communication

Article 42

Rules applicable to communication

1. All communication and information exchange referred to in this Title may be by post, by fax, by electronic means in accordance with paragraphs 4 and 5, by telephone in the cases and circumstances referred to in paragraph 6, or by a combination of those means, according to the choice of the contracting authority.

2. The means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.

3. Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting authorities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

4. The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

5. The following rules are applicable to devices for the electronic transmission and receipt of tenders and to devices for the electronic receipt of requests to participate:

(a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, shall be available to interested parties. Moreover, the devices for the electronic receipt of tenders and requests to participate shall conform to the requirements of Annex X;

(b) Member States may, in compliance with Article 5 of Directive 1999/93/EC, require that electronic tenders be accompanied by an advanced electronic signature in conformity with paragraph 1 thereof;

(c) Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices;

(d) tenderers or candidates shall undertake to submit, before expiry of the time limit laid down for submission of tenders or requests to participate, the documents, certificates and declarations referred to in Articles 45 to 50 and Article 52 if they do not exist in electronic format.

6. The following rules shall apply to the transmission of requests to participate:

(a) requests to participate in procedures for the award of public contracts may be made in writing or by telephone;

(b) where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt;

(c) contracting authorities may require that requests for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit for sending confirmation by post or electronic means, must be stated by the contracting authority in the contract notice.

Section 5

Reports

Article 43

Content of reports

For every contract, framework agreement, and every establishment of a dynamic purchasing system, the contracting authorities shall draw up a written report which shall include at least the following:

(a) the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;

(b) the names of the successful candidates or tenderers and the reasons for their selection;

(c) the names of the candidates or tenderers rejected and the reasons for their rejection;

(d) the reasons for the rejection of tenders found to be abnormally low;

(e) the name of the successful tenderer and the reasons why his tender was selected and, if known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;

(f) for negotiated procedures, the circumstances referred to in Articles 30 and 31 which justify the use of these procedures;

(g) as far as the competitive dialogue is concerned, the circumstances as laid down in Article 29 justifying the use of this procedure;

(h) if necessary, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system.

The contracting authorities shall take appropriate steps to document the progress of award procedures conducted by electronic means.

The report, or the main features of it, shall be communicated to the Commission if it so requests.

CHAPTER VII

Conduct of the procedure

Section 1

General provisions

Article 44

Verification of the suitability and choice of participants and award of contracts

1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.

3. In restricted procedures, negotiated procedures with publication of a contract notice and in the competitive dialogue procedure, contracting authorities may limit the number of suitable candidates they will invite to tender, to negotiate or to conduct a dialogue with, provided a sufficient number of suitable candidates is available. The contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number.

In the restricted procedure the minimum shall be five. In the negotiated procedure with publication of a contract notice and the competitive dialogue procedure the minimum shall be three. In any event the number of candidates invited shall be sufficient to ensure genuine competition.

The contracting authorities shall invite a number of candidates at least equal to the minimum number set in advance. Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities. In the context of this same procedure, the contracting authority may not include other economic operators who did not request to participate, or candidates who do not have the required capabilities.

4. Where the contracting authorities exercise the option of reducing the number of solutions to be discussed or of tenders to be negotiated, as provided for in Articles 29(4) and 30(4), they shall do so by applying the award criteria stated in the contract notice, in the specifications or in the descriptive document. In the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates.

Section 2

Criteria for qualitative selection

Article 45

Personal situation of the candidate or tenderer

1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA ([1]);

(b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 ([2]) and Article 3(1) of Council Joint Action 98/742/JHA ([3]) respectively;

(c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities ([4]);

(d) money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering ([5]).

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or 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 of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(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;

([1]) OJ L 351, 29.12.1998, p. 1.
([2]) OJ C 195, 25.6.1997, p. 1.
([3]) OJ L 358, 31.12.1998, p.2.
([4]) OJ C 316, 27.11.1995, p. 48.
([5]) OJ L 166, 28.6.1991, p. 77. Directive as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (OJ L 344, 28.12.2001, p. 76).

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

(a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the 'judicial record' or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

(b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned.

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent 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.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

Article 46

Suitability to pursue the professional activity

Any economic operator wishing to take part in a public contract may be requested to prove its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade registers or to provide a declaration on oath or a certificate as described in Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts.

In procedures for the award of public service contracts, insofar as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

Article 47

Economic and financial standing

1. Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.

Article 48

Technical and/or professional ability

1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(a) (i) 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 appropriate, the competent authority shall submit these certificates to the contracting authority direct;

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:

— where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,

— where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator;

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

(c) a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities;

(d) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;

(e) the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work;

(f) for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(g) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

(h) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

(i) an indication of the proportion of the contract which the services provider intends possibly to subcontract;

(j) with regard to the products to be supplied:

(i) samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests;

(ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards.

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

4. Under the same conditions a group of economic operators as referred to Article 4 may rely on the abilities of participants in the group or in other entities.

5. In procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

6. The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.

Article 49

Quality assurance standards

Should they require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting authorities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators.

Article 50

Environmental management standards

Should contracting authorities, in the cases referred to in Article 48(2)(f), require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.

Article 51

Additional documentation and information

The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.

Article 52

Official lists of approved economic operators and certification by bodies established under public or private law

1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Articles 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50. Member States shall also adapt them to Article 47(2) and Article 48(3) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list and that throughout the same period these companies continue to fulfil the qualitative selection requirements laid down in the Articles referred to in the second subparagraph on which operators rely for their registration.

2. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the competent certification body. The certificates shall state the references which enabled them to be registered in the list/to obtain certification and the classification given in that list.

3. Certified registration on official lists by the competent bodies or a certificate issued by the certification body shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability except as regards Articles 45(1) and (2)(a) to (d) and (g), Article 46, Article 47(1)(b) and (c), and Article 48(2)(a)(i), (b), (e), (g) and (h) in the case of contractors, (2)(a)(ii), (b), (c), (d) and (j) in the case of suppliers and 2(a)(ii) and (c) to (i) in the case of service providers.

4. Information which can be deduced from registration on official lists or certification may not be questioned without justification. With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is offered.

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only in favour of economic operators established in the Member State holding the official list.

5. For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to in paragraph 1, no further proof or statements can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 45 to 49 and, where appropriate, Article 50.

However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

6. Economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

7. The certification bodies referred to in paragraph 1 shall be bodies complying with European certification standards.

8. Member States which have official lists or certification bodies as referred to in paragraph 1 shall be obliged to inform the Commission and the other Member States of the address of the body to which applications should be sent.

Section 3

Award of the contract

Article 53

Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.

Article 54

Use of electronic auctions

1. Member States may provide that contracting authorities may use electronic auctions.

2. In open, restricted or negotiated procedures in the case referred to in Article 30(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in the second indent of the second subparagraph of Article 32(4) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 33.

The electronic auction shall be based:

— either solely on prices when the contract is awarded to the lowest price,

— or on prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender.

3. Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice.

The specifications shall include, *inter alia*, the following details:

(a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

4. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

5. When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 53(2).

The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic rerankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria fixed to determine the most economically advantageous tender, as indicated in the contract notice or in the specifications; for that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

6. Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

7. Contracting authorities shall close an electronic auction in one or more of the following manners:

(a) in the invitation to take part in the auction they shall indicate the date and time fixed in advance;

(b) when they receive no more new prices or new values which meet the requirements concerning minimum differences. In that event, the contracting authorities shall state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before they close the electronic auction;

(c) when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

When the contracting authorities have decided to close an electronic auction in accordance with subparagraph (c), possibly in combination with the arrangements laid down in subparagraph (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

8. After closing an electronic auction contracting authorities shall award the contract in accordance with Article 53 on the basis of the results of the electronic auction.

Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification.

Article 55

Abnormally low tenders

1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.

TITLE III

RULES ON PUBLIC WORKS CONCESSIONS

CHAPTER I

Rules governing public works concessions

Article 56

Scope

This Chapter shall apply to all public works concession contracts concluded by the contracting authorities where the value of the contracts is equal to or greater than EUR 6 242 000.

The value shall be calculated in accordance with the rules applicable to public works contracts defined in Article 9.

Article 57

Exclusions from the scope

This Title shall not apply to public works concessions which are awarded:

(a) in the cases referred to in Articles 13, 14 and 15 of this Directive in respect of public works contracts;

(b) by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of Directive 2004/17/EC where those concessions are awarded for carrying out those activities.

However, this Directive shall continue to apply to public works concessions awarded by contracting authorities carrying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, insofar as the Member State concerned takes advantage of the option referred to in the second subparagraph of Article 71 thereof to defer its application.

Article 58

Publication of the notice concerning public works concessions

1. Contracting authorities which wish to award a public works concession contract shall make known their intention by means of a notice.

2. Notices of public works concessions shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission pursuant to the procedure in Article 77(2).

3. Notices shall be published in accordance with Article 36(2) to (8).

4. Article 37 on the publication of notices shall also apply to public works concessions.

Article 59

Time limit

When contracting authorities resort to a public works concession, the time limit for the presentation of applications for the concession shall be not less than 52 days from the date of dispatch of the notice, except where Article 38(5) applies.

Article 38(7) shall apply.

Article 60

Subcontracting

The contracting authority may either:

(a) require the concessionaire to award contracts representing a minimum of 30 % of the total value of the work for which the concession contract is to be awarded, to third parties, at the same time providing the option for candidates to increase this percentage, this minimum percentage being specified in the concession contract, or

(b) request the candidates for concession contracts to specify in their tenders the percentage, if any, of the total value of the work for which the concession contract is to be awarded which they intend to assign to third parties.

Article 61

Awarding of additional works to the concessionaire

This Directive shall not apply to additional works not included in the concession project initially considered or in the initial contract but which have, through unforeseen circumstances, become necessary for the performance of the work described therein, which the contracting authority has awarded to the concessionaire, on condition that the award is made to the economic operator performing such work:

— when such additional works cannot be technically or economically separated from the initial contract without major inconvenience to the contracting authorities, or

— when such works, although separable from the performance of the initial contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works may not exceed 50 % of the amount of the original works concession contract.

CHAPTER II

Rules on contracts awarded by concessionaires which are contracting authorities

Article 62

Applicable rules

Where the concessionaire is a contracting authority as referred to in Article 1(9), it shall comply with the provisions laid down by this Directive for public works contracts in the case of works to be carried out by third parties.

CHAPTER III

Rules applicable to contracts awarded by concessionaires which are not contracting authorities

Article 63

Advertising rules: threshold and exceptions

1. The Member States shall take the necessary measures to ensure that public works concessionaires which are not contracting authorities apply the advertising rules defined in Article 64 when awarding works contracts to third parties where the value of such contracts is equal to or greater than EUR 6 242 000.

Advertising shall not, however, be required where a works contract satisfies the conditions listed in Article 31.

The values of contracts shall be calculated in accordance with the rules applicable to public works contracts laid down in Article 9.

2. Groups of undertakings which have been formed to obtain the concession or undertakings related to them shall not be considered third parties.

'Related undertaking' shall mean any undertaking over which the concessionaire can exert a dominant influence, whether directly or indirectly, or any undertaking which can exert a dominant influence on the concessionaire or which, as the concessionaire, is subject to the dominant influence of another undertaking as a result of ownership, financial participation or the rules which govern it. A dominant influence on the part of an undertaking is presumed when, directly or indirectly in relation to another undertaking, it:

(a) holds a majority of the undertaking's subscribed capital;

(b) controls a majority of the votes attached to the shares issued by the undertaking; or

(c) can appoint more than half of the undertaking's administrative, management or supervisory body.

The exhaustive list of such undertakings shall be included in the application for the concession. That list shall be brought up to date following any subsequent changes in the relationship between the undertakings.

Article 64

Publication of the notice

1. Works concessionaires which are not contracting authorities and which wish to award works contracts to a third party shall make known their intention by way of a notice.

2. Notices shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the works concessionaire, in accordance with the standard form adopted by the Commission in accordance with the procedure in Article 77(2).

3. The notice shall be published in accordance with Article 36(2) to (8).

4. Article 37 on the voluntary publication of notices shall also apply.

Article 65

Time limit for the receipt of requests to participate and receipt of tenders

In works contracts awarded by a works concessionaire which is not a contracting authority, the time limit for the receipt of requests to participate, fixed by the concessionaire, shall be not less than 37 days from the date on which the contract notice was dispatched and the time limit for the receipt of tenders not less than 40 days from the date on which the contract notice or the invitation to tender was dispatched.

Article 38(5), (6) and (7) shall apply.

TITLE IV

RULES GOVERNING DESIGN CONTESTS

Article 66

General provisions

1. The rules for the organisation of design contests shall be in conformity with Articles 66 to 74 and shall be communicated to those interested in participating in the contest.

2. The admission of participants to design contests shall not be limited:

(a) by reference to the territory or part of the territory of a Member State;

(b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.

Article 67

Scope

1. In accordance with this Title, design contests shall be organised by:

(a) contracting authorities which are listed as central government authorities in Annex IV, starting from a threshold equal to or greater than EUR 162 000;

(b) contracting authorities not listed in Annex IV, starting from a threshold equal to or greater than EUR 249 000;

(c) by all the contracting authorities, starting from a threshold equal to or greater than EUR 249 000 where contests concern services in category 8 of Annex II A, category 5 telecommunications services, the positions of which in the CPV are equivalent to reference Nos CPC 7524, 7525 and 7526 and/or services listed in Annex II B.

2. This Title shall apply to:

(a) design contests organised as part of a procedure leading to the award of a public service contract;

(b) design contests with prizes and/or payments to participants.

In the cases referred to in (a) the threshold refers to the estimated value net of VAT of the public services contract, including any possible prizes and/or payments to participants.

In the cases referred to in (b), the threshold refers to the total amount of the prizes and payments, including the estimated value net of VAT of the public services contract which might subsequently be concluded under Article 31(3) if the contracting authority does not exclude such an award in the contest notice.

Article 68

Exclusions from the scope

This Title shall not apply to:

(a) design contests within the meaning of Directive 2004/17/EC which are organised by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are organised for the pursuit of such activities; nor shall it apply to contests excluded from the scope of this Directive.

However, this Directive shall continue to apply to design contests awarded by contracting authorities carrying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, insofar as the Member State concerned takes advantage of the option referred to in the second subparagraph of Article 71 thereof to defer its application;

(b) contests which are organised in the same cases as those referred to in Articles 13, 14 and 15 of this Directive for public service contracts.

Article 69

Notices

1. Contracting authorities which wish to carry out a design contest shall make known their intention by means of a contest notice.

2. Contracting authorities which have held a design contest shall send a notice of the results of the contest in accordance with Article 36 and must be able to prove the date of dispatch.

Where the release of information on the outcome of the contest would impede law enforcement, be contrary to the public interest, prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or might prejudice fair competition between service providers, such information need not be published.

3. Article 37 concerning publication of notices shall also apply to contests.

Article 70

Form and manner of publication of notices of contests

1. The notices referred to in Article 69 shall contain the information referred to in Annex VII D in accordance with the standard model notices adopted by the Commission in accordance with the procedure in Article 77(2).

2. The notices shall be published in accordance with Article 36(2) to (8).

Article 71

Means of communication

1. Article 42(1), (2) and (4) shall apply to all communications relating to contests.

2. Communications, exchanges and the storage of information shall be such as to ensure that the integrity and the confidentiality of all information communicated by the participants in a contest are preserved and that the jury ascertains the contents of plans and projects only after the expiry of the time limit for their submission.

3. The following rules shall apply to devices for the electronic receipt of plans and projects:

(a) the information relating to the specifications which is necessary for the presentation of plans and projects by electronic means, including encryption, shall be available to the parties concerned. In addition, the devices for the electronic receipt of plans and projects shall comply with the requirements of Annex X;

(b) the Member States may introduce or maintain voluntary arrangements for accreditation intended to improve the level of the certification service provided for such devices.

Article 72

Selection of competitors

Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

Article 73

Composition of the jury

The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification.

Article 74

Decisions of the jury

1. The jury shall be autonomous in its decisions or opinions.

2. It shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

3. It shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points which may need clarification.

4. Anonymity must be observed until the jury has reached its opinion or decision.

5. Candidates may be invited, if need be, to answer questions which the jury has recorded in the minutes to clarify any aspects of the projects.

6. Complete minutes shall be drawn up of the dialogue between jury members and candidates.

TITLE V

STATISTICAL OBLIGATIONS, EXECUTORY POWERS AND FINAL PROVISIONS

Article 75

Statistical obligations

In order to permit assessment of the results of applying this Directive, Member States shall forward to the Commission a statistical report, prepared in accordance with Article 76, separately addressing public supply, services and works contracts awarded by contracting authorities during the preceding year, by no later than 31 October of each year.

Article 76

Content of statistical report

1. For each contracting authority listed in Annex IV, the statistical report shall detail at least:

(a) the number and value of awarded contracts covered by this Directive;

(b) the number and total value of contracts awarded pursuant to derogations to the Agreement.

As far as possible, the data referred to in point (a) of the first subparagraph shall be broken down by:

(a) the contract award procedures used; and

(b) for each of these procedures, works as given in Annex I and products and services as given in Annex II identified by category of the CPV nomenclature;

(c) the nationality of the economic operator to which the contract was awarded.

Where the contracts have been concluded according to the negotiated procedure, the data referred to in point (a) of the first subparagraph shall also be broken down according to the circumstances referred to in Articles 30 and 31 and shall specify the number and value of contracts awarded, by Member State and third country of the successful contractor.

2. For each category of contracting authority which is not given in Annex IV, the statistical report shall detail at least:

(a) the number and value of the contracts awarded, broken down in accordance with the second subparagraph of paragraph 1;

(b) the total value of contracts awarded pursuant to derogations to the Agreement.

3. The statistical report shall set out any other statistical information which is required under the Agreement.

The information referred to in the first subparagraph shall be determined pursuant to the procedure under Article 77(2).

Article 77

Advisory Committee

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Decision 71/306/EEC [1] (hereinafter referred to as 'the Committee').

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, in compliance with Article 8 thereof.

3. The Committee shall adopt its rules of procedure.

Article 78

Revision of the thresholds

1. The Commission shall verify the thresholds established in Article 7 every two years from the entry into force of this Directive and shall, if necessary, revise them in accordance with the procedure laid down in Article 77(2).

The calculation of the value of these thresholds shall be based on the average daily value of the euro, expressed in SDRs, over the 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euro so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDRs, are observed.

2. At the same time as the revision under paragraph 1, the Commission, in accordance with the procedure under Article 77(2), shall align:

(a) the thresholds established in (a) of the first subparagraph of Article 8, in Article 56 and in the first subparagraph of Article 63(1) on the revised threshold applying to public works contracts;

(b) the thresholds established in (b) of the first subparagraph of Article 8, and in Article 67(1)(a) on the revised threshold applying to public service contracts concluded by the contracting authorities referred to in Annex IV;

(c) the threshold established in Article 67(1)(b) and (c) on the revised threshold applying to public service contracts awarded by the contracting authorities not included in Annex IV.

3. The value of the thresholds set pursuant to paragraph 1 in the national currencies of the Member States which are not participating in monetary union is normally to be adjusted every two years from 1 January 2004 onwards. The calculation of such value shall be based on the average daily values of those currencies expressed in euro over the 24 months terminating on the last day of August preceding the revision with effect from 1 January.

4. The revised thresholds referred to in paragraph 1 and their corresponding values in the national currencies referred to in paragraph 3 shall be published by the Commission in the *Official Journal of the European Union* at the beginning of the month of November following their revision.

Article 79

Amendments

1. In accordance with the procedure referred to in Article 77(2), the Commission may amend:

(a) the technical procedures for the calculation methods set out in the second subparagraph of Article 78(1) and in Article 78(3);

[1] OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

(b) the procedures for the drawing-up, transmission, receipt, translation, collection and distribution of the notices referred to in Articles 35, 58, 64 and 69 and the statistical reports provided for in the fourth subparagraph of Article 35(4), and in Articles 75 and 76;

(c) the procedures for specific reference to specific positions in the CPV nomenclature in the notices;

(d) the lists of bodies and categories of bodies governed by public law in Annex III, when, on the basis of the notifications from the Member States, these prove necessary;

(e) the lists of central government authorities in Annex IV, following the adaptations necessary to give effect to the Agreement;

(f) the reference numbers in the nomenclature set out in Annex I, insofar as this does not change the material scope of this Directive, and the procedures for reference to particular positions of this nomenclature in the notices;

(g) the reference numbers in the nomenclature set out in Annex II, insofar as this does not change the material scope of this Directive, and the procedures for reference in the notices to particular positions in this nomenclature within the categories of services listed in the Annex;

(h) the procedure for sending and publishing data referred to in Annex VIII, on grounds of technical progress or for administrative reasons;

(i) the technical details and characteristics of the devices for electronic receipt referred to in points (a), (f) and (g) of Annex X.

Article 80

Implementation

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 81

Monitoring mechanisms

In conformity with 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 [1], Member States shall ensure implementation of this Directive by effective, available and transparent mechanisms.

For this purpose they may, among other things, appoint or establish an independent body.

Article 82

Repeals

Directive 92/50/EEC, except for Article 41 thereof, and Directives 93/36/EEC and 93/37/EEC shall be repealed with effect from the date shown in Article 80, without prejudice to the obligations of the Member States concerning the deadlines for transposition and application set out in Annex XI.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XII.

Article 83

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

[1] OJ L 395, 30.12. 1989, p. 33. Directive as amended by Directive 92/50/EEC.

Article 84

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 31 March 2004.

For the European Parliament	*For the Council*
The President	*The President*
P. COX	D. ROCHE

DIRECTIVES

DIRECTIVE 2007/66/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 December 2007

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Having regard to the opinion of the Committee of the Regions ([2]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([3]),

Whereas:

(1) Council Directives 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 ([4]) and 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 ([5]) concern the review procedures with regard to contracts awarded by contracting authorities as referred to in Article 1(9) of 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 ([6]) and contracting entities as referred to in Article 2 of 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 ([7]). Directives 89/665/EEC and 92/13/EEC are intended to ensure the effective application of Directives 2004/18/EC and 2004/17/EC.

(2) Directives 89/665/EEC and 92/13/EEC therefore apply only to contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC as interpreted by the Court of Justice of the European Communities, whatever competitive procedure or means of calling for competition is used, including design contests, qualification systems and dynamic purchasing systems. According to the case law of the Court of Justice, the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of Directives 2004/18/EC and 2004/17/EC.

(3) Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms

([1]) OJ C 93, 27.4.2007, p. 16.
([2]) OJ C 146, 30.6.2007, p. 69.
([3]) Opinion of the European Parliament of 21 June 2007 (not yet published in the Official Journal) and Council Decision of 15 November 2007.
([4]) OJ L 395, 30.12.1989, p. 33. Directive as amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).
([5]) OJ L 76, 23.3.1992, p. 14. Directive as last amended by Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).
([6]) OJ L 134, 30.4.2004, p. 114. Directive as last amended by Directive 2006/97/EC.
([7]) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Directive 2006/97/EC.

established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

(5) The duration of the minimum standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used. This Directive only provides for minimum standstill periods. Member States are free to introduce or to maintain periods which exceed those minimum periods. Member States are also free to decide which period should apply, if different means of communication are used cumulatively.

(6) The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. When the award decision is notified to them, the tenderers concerned should be given the relevant information which is essential for them to seek effective review. The same applies accordingly to candidates to the extent that the contracting authority or contracting entity has not made available in due time information about the rejection of their application.

(7) Such relevant information includes, in particular, a summary of the relevant reasons as set out in Article 41 of Directive 2004/18/EC and Article 49 of Directive 2004/17/EC. As the duration of the standstill period varies from one Member State to another, it is also important that the tenderers and candidates concerned should be informed of the effective period available to them to bring review proceedings.

(8) This type of minimum standstill period is not intended to apply if Directive 2004/18/EC or Directive 2004/17/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*, in particular in cases of extreme urgency as provided for in Article 31(1)(c) of Directive 2004/18/EC or Article 40(3)(d) of Directive 2004/17/EC. In those cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. In this case there is no other person remaining in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow for effective review.

(9) Finally, in cases of contracts based on a framework agreement or a dynamic purchasing system, a mandatory standstill period could have an impact on the efficiency gains intended by those tendering procedures. Member States should be able therefore, instead of introducing a mandatory standstill period, to provide for ineffectiveness as an effective sanction in accordance with Article 2d of both Directives 89/665/EEC and 92/13/EEC for infringements of the second indent of the second subparagraph of Article 32(4) and of Article 33(5) and (6) of Directive 2004/18/EC, and of Article 15(5) and (6) of Directive 2004/17/EC.

(10) In the cases referred to in Article 40(3)(i) of Directive 2004/17/EC, contracts based on a framework agreement do not require prior publication of a contract notice in the *Official Journal of the European Union*. In those cases a standstill period should not be mandatory.

(11) When a Member State requires a person intending to use a review procedure to inform the contracting authority or contracting entity of that intention, it is necessary to make it clear that this should not affect the standstill period or any other period to apply for review. Furthermore, when a Member State requires that the person concerned has first sought a review with the contracting authority or contracting entity, it is necessary that this person should have a reasonable minimum period within which to refer to the competent review body before the conclusion of the contract, in the event that that person should wish to challenge the reply or lack of reply from the contracting authority or contracting entity.

(12) Seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract. It is thus necessary to provide for an independent minimum standstill period that should not end before the review body has taken a decision on the application. This should not prevent the review body from making a prior assessment of whether the review as such is admissible. Member States may provide that this period shall end either when the review body has taken a decision on the application for interim measures, including on a further suspension of the conclusion of the contract, or when the review body has taken a decision on the merits of the case, in particular on the application for the setting aside of an unlawful decision.

(13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive 2004/18/EC. This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC.

(15) Possible justifications for a direct award within the meaning of this Directive may include the exemptions in Articles 10 to 18 of Directive 2004/18/EC, the application of Article 31, Article 61 or Article 68 of Directive 2004/18/EC, the award of a service contract in accordance with Article 21 of Directive 2004/18/EC or a lawful 'in-house' contract award following the interpretation of the Court of Justice.

(16) The same applies to contracts which meet the conditions for an exclusion or special arrangements in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of Directive 2004/17/EC, to cases involving the application of Article 40(3) of Directive 2004/17/EC or to the award of a service contract in accordance with Article 32 of Directive 2004/17/EC.

(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

(18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract.

(19) In the case of other infringements of formal requirements, Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for alternative penalties. Alternative penalties should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application.

(20) This Directive should not exclude the application of stricter sanctions in accordance with national law.

(21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.

(22) However, in order to ensure the proportionality of the sanctions applied, Member States may grant the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In those cases alternative penalties should be applied instead. The review body independent of the contracting authority or contracting entity should examine all relevant aspects in order to establish whether overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(23) In exceptional cases the use of the negotiated procedure without publication of a contract notice within the meaning of Article 31 of Directive 2004/18/EC or Article 40(3) of Directive 2004/17/EC is permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified.

(24) Economic interests in the effectiveness of a contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons.

(25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.

(26) In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directives 2004/18/EC and 2004/17/EC and has applied a minimum standstill period allowing for effective remedies. The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive 2004/18/EC or Directive 2004/17/EC.

(27) As this Directive strengthens national review procedures, especially in cases of an illegal direct award, economic operators should be encouraged to make use of these new mechanisms. For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected.

(28) Strengthening the effectiveness of national review procedures should encourage those concerned to make greater use of the possibilities for review by way of interlocutory procedure before the conclusion of a contract. In those circumstances, the corrective mechanism should be refocused on serious infringements of Community law on public procurement.

(29) The voluntary attestation system provided for by Directive 92/13/EEC, whereby contracting entities have the possibility of having the conformity of their award procedures established through periodic examinations, has been virtually unused. It cannot thus achieve its objective of preventing a significant number of infringements of Community law on public procurement. On the other hand, the requirement imposed on Member States by Directive 92/13/EEC to ensure the permanent availability of bodies accredited for this purpose can represent an administrative maintenance cost which is no longer justified in the light of the lack of real demand by contracting entities. For these reasons, the attestation system should be abolished.

(30) Similarly, the conciliation mechanism provided for by Directive 92/13/EEC has not elicited any real interest from economic operators. This is due both to the fact that it does not of itself make it possible to obtain binding interim measures likely to prevent in time the illegal conclusion of a contract, and also to its nature, which is not readily compatible with observance of the particularly short deadlines applicable to reviews seeking interim measures and the setting aside of decisions taken unlawfully. In addition, the potential effectiveness of the conciliation mechanism has been weakened further by the difficulties encountered in establishing a complete and sufficiently wide list of independent conciliators in each Member State, available at any time and capable of dealing with conciliation requests at very short notice. For these reasons, the conciliation mechanism should be abolished.

(31) The Commission should be entitled to request Member States to provide it with information on the operation of national review procedures proportionate to the objective pursued by involving the Advisory Committee for Public Contracts in determining the extent and nature of such information. Indeed, only by making such information available will it be possible to assess correctly the effects of the changes introduced by this Directive at the end of a significant period of implementation.

(32) The Commission should review progress made in the Member States and report to the European Parliament and to the Council on the effectiveness of this Directive no later than three years after its deadline for implementation.

(33) The measures necessary for the implementation of Directives 89/665/EEC and 92/13/EEC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([1]).

(34) Since, for the reasons stated above, the objective of this Directive, namely improving the effectiveness of review procedures concerning the award of contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective, while respecting the principle of the procedural autonomy of the Member States.

(35) In accordance with point 34 of the Interinstitutional Agreement on better law-making ([2]), Member States should draw up, for themselves and in the interests of the Community, their own tables illustrating the correlation between this Directive and the transposition measures, and make them public.

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.

(37) Directives 89/665/EEC and 92/13/EEC should therefore be amended accordingly,

([1]) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).
([2]) OJ C 321, 31.12.2003, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 89/665/EEC

Directive 89/665/EEC is hereby amended as follows:

1. Articles 1 and 2 shall be replaced by the following:

'Article 1

Scope and availability of review procedures

1. This Directive applies to contracts referred to in 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 (*), unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

Article 2

Requirements for review procedures

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

(*) OJ L 134, 30.4.2004, p. 114. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).';

2. the following articles shall be inserted:

'*Article 2a*

Standstill period

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

— a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, and,

— a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b

Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

(a) if Directive 2004/18/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*;

(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;

(c) in the case of a contract based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 33 of that Directive.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

— there is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC, and,

— the contract value is estimated to be equal to or to exceed the thresholds set out in Article 7 of Directive 2004/18/EC.

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

— the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18/EC,

— the contracting authority has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

— the contracting authority considers that the award of a contract is in accordance with the second indent of the second subparagraph of Article 32(4) or with Article 33(5) and (6) of Directive 2004/18/EC,

— the contracting authority has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e

Infringements of this Directive and alternative penalties

1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

— the imposition of fines on the contracting authority; or,

— the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

Article 2f

Time limits

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

— the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*, or

— the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive. This option also applies to the cases referred to in Article 2b(c) of this Directive;

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.';

3. Article 3 shall be replaced by the following:

'*Article 3*

Corrective mechanism

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/18/EC.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.';

4. the following articles shall be inserted:

'*Article 3a*

Content of a notice for voluntary ex ante transparency

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

(a) the name and contact details of the contracting authority;

(b) a description of the object of the contract;

(c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the contracting authority.

Article 3b

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (*) (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (**) shall apply, having regard to the provisions of Article 8 thereof.

(*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

(**) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).';

5. Article 4 shall be replaced by the following:

'*Article 4*

Implementation

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).';

6. the following article shall be inserted:

'*Article 4a*

Review

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.'.

Article 2

Amendments to Directive 92/13/EEC

Directive 92/13/EEC is hereby amended as follows:

1. Article 1 shall be replaced by the following:

'*Article 1*

Scope and availability of review procedures

1. This Directive applies to contracts referred to in 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 (*), unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4. Member States may require that the person wishing to use a review procedure has notified the contracting entity of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting entity. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting entity has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contracting entity has sent a reply or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

(*) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).';

2. Article 2 shall be amended as follows:

(a) the title 'Requirements for review procedures' shall be inserted;

(b) paragraphs 2 to 4 shall be replaced by the following:

'2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

3a. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

4. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.';

(c) paragraph 6 shall be replaced by the following:

'6. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.';

(d) in the first subparagraph of paragraph 9, the words 'court or tribunal within the meaning of Article 177 of the Treaty' shall be replaced by the words 'court or tribunal within the meaning of Article 234 of the Treaty';

3. the following articles shall be inserted:

'Article 2a

Standstill period

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/17/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

— a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC, and,

— a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b

Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

(a) if Directive 2004/17/EC does not require prior publication of a notice in the *Official Journal of the European Union*;

(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;

(c) in the case of specific contracts based on a dynamic purchasing system as provided for in Article 15 of Directive 2004/17/EC.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

— there is an infringement of Article 15(5) or (6) of Directive 2004/17/EC, and,

— the contract value is estimated to be equal to or to exceed the thresholds set out in Article 16 of Directive 2004/17/EC.

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/17/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/17/EC;

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c) in cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting entity may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

— the contracting entity considers that the award of a contract without prior publication of a notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/17/EC,

— the contracting entity has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

— the contracting entity considers that the award of a contract is in accordance with Article 15(5) and (6) of Directive 2004/17/EC,

— the contracting entity has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e

Infringements of this Directive and alternative penalties

1. In case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting entity shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

— the imposition of fines on the contracting entity; or,

— the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting entity and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

Article 2f

Time limits

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

— the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*, or

— the contracting entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC. This option also applies to the cases referred to in Article 2b(c) of this Directive;

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.';

4. Articles 3 to 7 shall be replaced by the following:

'*Article 3a*

Content of a notice for voluntary ex ante transparency

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

(a) the name and contact details of the contracting entity;

(b) a description of the object of the contract;

(c) a justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the contracting entity.

Article 3b

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (*) (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (**) shall apply, having regard to the provisions of Article 8 thereof.

(*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).
(**) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).';

5. Article 8 shall be replaced by the following:

'*Article 8*

Corrective mechanism

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC, or in relation to Article 27(a) of that Directive in the case of contracting entities to which that provision applies.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.';

6. Articles 9 to 12 shall be replaced by the following:

'*Article 12*

Implementation

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).

Article 12a

Review

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.';

7. the Annex shall be deleted.

Article 3

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 December 2009. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 11 December 2007.

For the *European Parliament*	*For the Council*
The President	*The President*
H.-G. PÖTTERING	M. LOBO ANTUNES

EUROPEAN COMMISSION

Brussels, 19.10.2010
SEC(2010) 1258 final

COMMISSION STAFF WORKING DOCUMENT

BUYING SOCIAL:
A GUIDE TO TAKING ACCOUNT OF SOCIAL CONSIDERATIONS IN PUBLIC PROCUREMENT

Important notice

Although the information in this Guide has been carefully checked, the European Commission accepts no liability with regard to the specific cases mentioned in it.

This Guide is an indicative Commission staff working document and cannot be considered binding on the Commission in any way. It is also subject to evolution of Commission practice and the case-law of the European Court of Justice.

CONTENTS

INTRODUCTION

Socially responsible public procurement (SRPP) is about setting an example and influencing the market-place. By promoting SRPP, public authorities can give companies real incentives to develop socially responsible management. By purchasing wisely, public authorities can promote employment opportunities, decent work, social inclusion, accessibility, design for all, ethical trade, and seek to achieve wider compliance with social standards. For some products, works and services, the impact can be particularly significant, as public purchasers command a large share of the market (e.g. in construction, business services, IT and so on). In general, public authorities are major consumers in Europe, spending some 17% of the EU's gross domestic product (a sum equivalent to half the GDP of Germany). Therefore, by using their purchasing power to opt for goods and services that also deliver good social outcomes, they can make a major contribution to sustainable development.

The legal basis for public procurement in the European Union is provided by Directives 2004/17/EC[1] and 2004/18/EC[2] (the 'Procurement Directives')[3], which offer scope for taking account of social considerations, provided in particular they are linked to the subject-matter of the contract[4] and are proportionate to its requirements and as long as the principles of value for money and equal access for all EU suppliers are observed.

This subject has been developed over the years by Court of Justice of the European Union (**CJEU**) case-law, by a European Commission Communication in 2001[5] and by a study published by the Commission in 2003 on diversity and equality in public procurement (http://ec.europa.eu/employment_social/fundamental_rights/public/arc_en.htm#Leaflets).

The purpose of this Guide is (a) to raise contracting authorities' awareness of the potential benefits of SRPP and (b) to explain in a practical way the opportunities offered by the existing EU legal framework for public authorities to take into account social considerations in their public procurement, thus paying attention not only to price but also to the best value for money. When drafting this Guide, the Commission widely consulted public authorities in the Member States and many other interested parties and stakeholders.

This Guide has been produced chiefly for public authorities, but also in the hope that it will inspire private-sector purchasers too.

For practical reasons, this Guide follows the procurement procedure step by step.

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1 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (hereafter the "**Directive 2004/17/EC**")**;**

2 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(hereafter the '**Directive 2004/18/EC**');.

3 The Procurement Directives are based on the principles of the Treaty and "*in particular the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency*". The provisions of the Procurement Directives should be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty (see Recital 2 of Directive 2004/18/EC and Recital 9 of Directive 2004/17/EC);

4 Or, alternatively, with performance of the contract, in cases where social considerations are included in the contract performance clauses.

5 COM(2001) 566 on the EU law applicable to public procurement and the possibilities for integrating social considerations into public procurement.

I. BUYING SOCIAL: KEY ISSUES

1. Socially responsible public procurement (SRPP): a definition

1.1 'SRPP' means procurement operations that take into account one or more of the following social considerations: employment opportunities, decent work, compliance with social and labour rights, social inclusion (including persons with disabilities), equal opportunities, accessibility design for all, taking account of sustainability criteria, including ethical trade issues[6] and wider voluntary compliance with corporate social responsibility (CSR), while observing the principles enshrined in the Treaty for the European Union (TFEU) and the Procurement Directives. SRPP can be a powerful tool both for advancing sustainable development and for achieving the EU's (and Member States') social objectives. SRPP covers a wide spectrum of social considerations, which may be taken into account by contracting authorities at the appropriate stage of the procurement procedure. Social considerations can be combined with green considerations in an integrated approach to sustainability in public procurement[7].

1.2 To support their social policies, contracting authorities have many ways of taking account of social considerations in public procurement. A **non-exhaustive list of examples** of social considerations potentially relevant to public procurement, **subject to compliance with the Procurement Directives and the fundamental principles of the TFEU, is set out below. However, many social considerations, depending on their nature, can be included only at certain stages of the procurement procedure[8]. In addition, contracting authorities should decide case by case which social considerations are relevant to their procurement, depending on the subject-matter of their contract and on their objectives.** The following social considerations could be relevant for procurement:

- Promoting *'employment opportunities'*, for example:

  - promotion of youth employment;

  - promotion of gender balance[9] (e.g. work/life balance, fighting against sectoral and occupational segregation, etc.);

  - promotion of employment opportunities for the long-term unemployed and for older workers;

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6 For further details, see Section 4 of Chapter IV ('Social labels and the implications for ethical trade').

7 As regards green considerations in public procurement, see Commission Communication COM(2008) 400/2 'Public procurement for a better environment' (http://ec.europa.eu/environment/gpp/pdf/com_2008_400.pdf) and the Commission services' document 'Buying Green — Handbook on Green Public Procurement' (http://ec.europa.eu/environment/gpp/guideline_en.htm). However, the Handbook on Green Public Procurement was published in 2004 and does not take into account the developments in EU law since then.

8 For example, social considerations regarding labour conditions are generally more appropriate to be included in the contract performance clauses, as in general they do not qualify as technical specifications or selection criteria, within the meaning of the Procurement Directives. On the other hand, it is generally more appropriate to include accessibility considerations in the technical specifications.

9 The concept of gender balance covers not only the under-representation of women in certain sectors, but also the under-representation of men in "feminised" sectors such as childcare and basic school education.

- diversity policies and employment opportunities for persons from disadvantaged groups (e.g. migrant workers, ethnic minorities, religious minorities, people with low educational attainment, etc.);

- promotion of employment opportunities for people with disabilities, including through inclusive and accessible work environments.

- Promoting *'decent work'*[10]:

This universally endorsed concept is based on the conviction that people have the right to productive employment in conditions of freedom, equity, security and human dignity. Four equally important and interdependent items make up the Decent Work Agenda: the right to productive and freely chosen work, fundamental principles and rights at work, employment providing a decent income and social protection and social dialogue. Gender equality and non-discrimination are considered cross-cutting issues on the Decent Work Agenda. In the context of SRPP, a number of issues can play an important role, such as:

  - compliance with core labour standards[11];
  - decent pay;
  - occupational health and safety;
  - social dialogue;
  - access to training;
  - gender equality and non-discrimination;
  - access to basic social protection.

- Promoting compliance with *'social and labour rights'*, such as:
  - compliance with national laws and collective agreements that comply with EU law;
  - compliance with the principle of equal treatment between women and men, including the principle of equal pay for work of equal value, and promotion of gender equality;
  - compliance with occupational health and safety laws;

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[10] European Commission, COM(2006) 249 of 24 May 2006, p. 2: 'Combining economic competitiveness and social justice in this way is at the heart of the European model of development. Playing an active part in promoting decent work forms an integral part of the European Social Agenda and of the EU's efforts to promote its values and share its experience and its model of integrated economic and social development.' See also the renewed commitment to the decent work agenda in the Commission Staff Working Document 'Report on the EU contribution to the promotion of decent work in the world', SEC(2008) 2184, based on COM(2008) 412 final.

[11] ILO core labour standards ban forced labour (Conventions 29 and 105) and child labour (Conventions 138 and 182) and establish the right to freedom of association and collective bargaining (Conventions 87 and 98) and to non-discrimination in terms of employment and occupation (Conventions 100 and 111). The legal bases for the Core Labour Standards are the eight above-mentioned core ILO Conventions that have been ratified by all 27 EU Member States.

– fighting discrimination on other grounds (age, disability, race, religion and belief, sexual orientation, etc.) and creating equal opportunities.

- Supporting *'social inclusion'* and promoting social economy organisations, such as:

  – equal access to procurement opportunities for firms owned by or employing persons from ethnic/minority groups - cooperatives, social enterprises and non-profit organisations, for example;

  – promoting supportive employment for persons with disabilities, including on the open labour market.

- Promoting *'accessibility and design for all'*[12], such as:

  – mandatory provisions in technical specifications to secure access for persons with disabilities to, for example, public services, public buildings, public transport, public information and ICT goods and services, including web-based applications. The key issue is to buy goods and services that are accessible to all.

- Taking into account *'ethical trade'*[13] issues, such as:

  – the possibility, under certain conditions[14], to take into account ethical trade issues in tender specifications and conditions of contracts.

- Seeking to achieve wider voluntary commitment to *'corporate social responsibility'* (CSR), i.e. companies acting voluntarily and going beyond the law to pursue environmental and social objectives in their daily business, such as:

  – working with contractors to enhance commitment to CSR values.

- Protecting against *human rights* abuse and encouraging respect for human rights.

- Promoting *'SMEs'* in so far as they can be connected with the considerations set out above:

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12 The UN Convention on Rights of Persons with Disabilities recognises accessibility as one of the general principles enshrined in Article 3 (the "Convention"). Furthermore, Article 9 of the Convention sets out the obligations of States Parties to ensure access to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. Furthermore, the Convention also calls for measures to implement 'universal design'. In Europe this concept is often known as 'design for all'.
The Convention has been signed by a significant number of UN members (including the European Community and all the Member States) and is currently being ratified by the signatories. In August 2008 the Commission submitted two proposals for Council decisions to conclude the UN Convention and its Optional Protocol. On 26 November 2009 the Council adopted a Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities: http://register.consilium.europa.eu/pdf/en/09/st15/st15540.en09.pdf.

13 Taking ethical trade considerations into account in public procurement was addressed in Communication COM(2009) 215 of 5 May 2009 'Contributing to sustainable development: The role of *Fair Trade* and non-governmental trade-related sustainability assurance schemes.'

14 For these conditions, see Chapter IVA on 'Defining the Requirements of the Contract', in particular Section 4 ('Social labels and the implications for ethical trade').

– provisions giving SMEs greater access to public procurement by reducing the cost and/or burden of participating in SRPP opportunities. This can be achieved, for example, by ensuring, where possible, that the size of the contract is not an obstacle in itself to participation by SMEs, by giving sufficient time to prepare bids, by ensuring payment on time, by setting proportionate qualification and economic requirements, etc.;

– equal opportunities by making subcontracting opportunities more visible.

The status of these social policy objectives differs markedly both in EU law and in different Member States. For example, in some sectors there are mandatory provisions regarding accessibility that go beyond the requirements of EU law in some Member States, but not in others.

2. The potential benefits of SRPP

2.1 Assisting compliance with social and labour law, including related national and international policy commitments/agendas

SRPP can contribute to enhancing compliance with national or international commitments to social development goals, as there is growing concern in many countries that traditional mechanisms for encouraging social justice and social cohesion are not adequate. SRPP can illustrate how social and economic considerations can be mutually reinforcing.

2.2 Stimulating socially conscious markets

SRPP can contribute to developing a market in socially beneficial products by expanding existing markets or creating new markets for goods and services that support achievement of social objectives and serve as a model for other consumers by offering them standards and information. Indeed, social public procurement can help create a level playing field in Europe and economies of scale. Market innovation can be stimulated, as can competition at European level, through for example, purchasing information technologies that are accessible for persons with disabilities, which will bring better and more affordable such products onto the market.

2.3 Demonstrating socially responsive governance

SRPP can contribute to enhancing compliance with community values and needs, as it responds to the growing public demand for governments to be socially responsible in their actions. For instance, by making sure that a social service contract takes into account the needs of all the users (such as including persons with disabilities or persons from different ethnic backgrounds), a contracting authority can meet the needs of the diverse community it serves.

2.4 Stimulating integration

Public intervention is sometimes desirable to encourage integration of significant groups in society (for example, people with disabilities, small businesses, women or minorities) in key market activities in order for an effective market to develop.

2.5 Ensuring more effective public expenditure

The volume of public procurement and the limits placed on direct social intervention by budgetary stringency could make procurement an attractive area for promoting social inclusion.

3. SRPP and the EU social model

3.1 One of the major benefits of SRPP, as already seen, is that it can be used by public authorities to further the European social model. The European social model is a vision of society that combines sustainable economic growth with improved living and working conditions. This has been seen to involve creation of a successful economy in which a particular set of social standards are progressively achieved: good-quality jobs, equal opportunities, non-discrimination, social protection for all, social inclusion, social dialogue, high-quality industrial relations and involvement of individuals in the decisions that affect them. These standards are not only intrinsically important but are also crucial factors in promoting best value for money and innovation.

3.2 Social standards have come to play a central role in building Europe's economic strength, by developing what has been described by EU institutions as a 'unique social model'[15]. Economic progress and social cohesion have come to be regarded as complementary pillars of sustainable development and are both at the heart of the process of European integration.

3.3. There has been increasing emphasis in the EU on social rights and equality, particularly in the workplace. As sustainable development moved beyond environmental issues into social issues, social standards were increasingly identified as one factor in the growing movement for corporate social responsibility. Taking gender equality as an example, at both European and national levels gender equality has become increasingly 'mainstreamed', meaning that the gender perspective has been progressively integrated into every stage of institutional policies, processes and practices, from design to implementation, monitoring or evaluation.

4. The legal and policy approach to SRPP in the EU

4.1 Developing the social dimension of EU policies and legislation

Over the last twenty years, the EU has developed its social dimension to a significant degree, embodied in 2008 by the renewed Social Agenda[16]. The important thing about these developments is that SRPP can now increasingly further policy at EU level, including its interaction with international policy. In some areas the EU has adopted legislation ─ notably on gender equality and non-discrimination on grounds of race, age, sexual orientation, disability and religious and other beliefs, and also on health and safety at work, working time, working conditions and information and consultation. Based on a number of provisions in the TFEU, there is now extensive EU legislation dealing with equal treatment, as well as Community level promotion of working conditions. In addition to legislation, the EU is also developing its social dimension by other means, such as by promoting social dialogue, the open method of coordination for employment, social protection and social inclusion policies, along with financial support from the European Social Fund. Further raising of social standards is a key objective of the EU in several respects, particularly where social standards are also fundamental rights.

In addition, at different times over the last few years, some social partner organizations have produced handbooks for organizations and public authorities on awarding contracts in specific

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15 See, for example, the preface to the Communication on the Social Policy Agenda.

16 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe', COM(2008) 412 final of 2 July 2008.

sectors (catering, cleaning, private security and textiles), based on the legal framework applicable at the time of writing[17]. These sectoral handbooks are the result of independent work by social partners within the European social dialogue process and they highlight the importance of technical guidance on the use of SRPP in those specific sectors. The EU legal framework has evolved in the mean time and more comprehensive and up-to-date guidance is now needed in order to make sure that procurement practice fully complies with the current EU public procurement law. That is the aim of this Guide.

4.2 The legal and policy approach to SRPP in the EU

The European Commission developed a strategy for clarification of the scope of SRPP. In its interpretative Communication of 15th October 2001, the European Commission set out the possibilities offered by Community law to integrate social considerations into public procurement procedures.[18] The aim of this Communication was 'to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. It seeks in particular to provide a dynamic and positive interaction between economic, social and employment policies, which mutually reinforce one another.' Both before and after publication of the Communication, the CJEU further clarified those possibilities in a series of landmark cases[19].

The Procurement Directives adopted on 31 March 2004 consolidated the legal framework. They specifically mention ways of incorporating social considerations into technical specifications, selection criteria, award criteria and contract performance clauses. A new provision regarding workshops for workers with disabilities was introduced.

The Procurement Directives do not apply to all public contracts. Some contracting authorities have adopted SRPP policies that specifically apply to contracts that are not covered by the Procurement Directives (such as contracts below the thresholds for application of the Directives) or are only partly covered (such as contracts for services that exceed the thresholds for application of the Procurement Directives listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC).

This Guide focuses on taking account of social considerations in public contracts that are fully covered by the Procurement Directives. It does not address in detail the TFEU rules applicable to inclusion of social considerations in contracts that are not covered or are only partly covered by the Procurement Directives (such as those mentioned in the previous paragraph).

However, it should be added that, in the case of such contracts, contracting authorities remain free (without prejudice to the national legislation in the field) to take considerations of a social nature into account (or not) in their procurement procedures, provided they comply with the general rules and principles of TFEU. Indeed, CJEU case-law has confirmed that the internal market rules in **TFEU also apply to contracts falling outside the scope of the Procurement**

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[17] Catering: 'Guide to most economically advantageous offering in contract catering' (2006); Cleaning: 'Selecting best value — A manual for organisations awarding contracts for cleaning services' (2004); Private security: 'Selecting best value — A manual for organisations awarding contracts for private guarding services' (1999); Textiles: 'Public procurement awarding guide for the clothing-textile sector' (2005).

[18] Interpretative Communication of the Commission on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement, COM (2001) 566 final, 15.10.2001.

[19] For example, CJEU judgments of 17 September 2002 in case C-513/99 (Concordia Bus) and of 4 December 2003 in case C-448/01 (Wienstrom).

Directives[20]. The CJEU has ruled that the TFEU principles of equal treatment and transparency, free movement of goods, freedom of establishment and freedom to provide services also apply to contracts under the thresholds set in the Procurement Directives.

Consequently, social considerations that are legally acceptable in procurement contracts fully covered by the Procurement Directives may, *a fortiori,* be included in procurement contracts not covered or only partly covered by the Directives.

4.3 Social services of general economic interest

This Guide does not specifically address the legal issues related to procurement of social services of general economic interest.

In November 2007 the Commission adopted a Communication on services of general interest, including social services of general interest[21], which highlights the importance of taking into account tailor-made qualitative criteria in the delivery of social services. It aims to provide practical guidance on application of the EU rules to these services. The Communication was accompanied by two Staff Working Papers replying to a series of questions relating to application of the rules on State aid and on public procurement to services of general interest[22]. Most of these questions were gathered during broad consultations in 2006-2007 on social services. To follow up the Communication, an interactive information service (IIS) was also set up in January 2008 to provide answers to other questions from citizens, public authorities and service-providers regarding application of the EU rules[23].

4.4 Small and medium-sized enterprises[24]

Several issues need to be taken into consideration when it comes to SMEs (whether profit or not-for-profit). One particularly important issue relates to the potential burdens[25] that adopting SRPP approaches could place on SMEs directly (if they are the main contractors) or indirectly (if they are subcontractors to whom SRPP obligations have been transferred by the main contractor). Public authorities contemplating introducing SRPP should be aware of these direct and indirect costs and should take them into account when deciding how or whether to incorporate social considerations[26] into their procurement operations. Contracting authorities also need to be aware that introduction of SRPP is unlikely to affect every SME in the same way. Some may be more able than others to reap the benefits of SRPP and seize opportunities to compete on the social standards aspects of the contract.

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20 See, for example, the CJEU judgment of 7 December 2000 in case C-324/98 (Teleaustria).

21 See Communication on 'Services of general interest, including social services of general interest: a new European commitment': COM(2007) 725 final of 20 November 2007.

22 http://ec.europa.eu/services_general_interest/faq_en.htm. The Staff Working Paper regarding application of public procurement rules to social services of general interest contains useful guidance about the application of public procurement rules to social services of general interest.

23 http://ec.europa.eu/services_general_interest/registration/form_en.html.

24 SMEs have been defined at EU level by Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises: http://ec.europa.eu/enterprise/enterprise_policy/sme_definition/index_en.htm.

25 For practical guidelines on how to make public procurement practices more friendly and accessible for small and medium-sized enterprises (SMEs) in general, see Commission Staff Working Document SEC(2008) 2193 'Code of best practices facilitating access by SMEs to public procurement contracts' available at: http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf.

26 Which must, of course, be linked to the subject-matter of the contract (or with performance of the contract, in cases where they are included in the contract performance clauses).

II. AN ORGANISATIONAL STRATEGY FOR BUYING SOCIAL

Public authorities that wish to achieve social objectives via SRPP will need to establish a strategy for implementing SRPP, focusing on their specific objectives.

1. Setting the objectives of socially responsible public procurement

Organisational strategies for SRPP may reflect the national, regional and/or local social priorities[27] and at the same time explicitly acknowledge the role that procurement plays in contributing to achieving them.

Example:

France: A 'Stratégie nationale du développement durable' was launched in 2003, followed by a 'Plan national d'action pour des achats publics durables' in 2007. The French government has engaged in major consultations with the social partners — the 'Grenelle de l'environnement' and 'Grenelle de l'insertion' – covering different measures with an impact on social integration, including public procurement. The aim is to build around the central idea of the 'État exemplaire', i.e. the State, and more generally all public entities, are expected to show the way forward to sustainable development.

2. Providing high-level political commitment and leadership for SRPP

Leadership is one of the keys to success for any SRPP strategy. This involves identifying the management structure and the (human and financial) resources necessary to carry out SRPP. SRPP needs leadership from the very top of the organisation and calls for political commitment and leadership through the management structures.

In principle, it should be fairly easy for all public authorities to take the political decision to buy social. Indeed, they should be encouraged to do so, as it will benefit not only society but also the contracting authority by improving its public image. In practice, a social purchasing policy does not normally require any structural changes on the part of the contracting authority.

[27] Obviously, this does not mean that contracting authorities could give preference to local, regional or national products in order to favour the local labour market.

Example:

UK: The Gender Duty imposed on public authorities came into force in April 2007 under the Equality Act (2006). This is a new legal tool with the potential to deliver significant progress on gender equality in the public sector, with some impact on the private sector too via their procurement.

The public-sector gender duty includes the requirement to ensure compliance with the Equal Pay Law. Gender equality schemes place an obligation on public authorities to adopt objectives that address the causes of the gender pay gap and consider ways of dealing with them, e.g. by changing recruitment methods, introducing flexible working and conducting equal pay reviews.

The gender duty has triggered initiatives in many parts of the public sector and reaches out to the terms of employment applied by private-sector contractors. To this end, procurement guidelines have been drafted to encourage the public sector to promote good practice on diversity and equal pay among contractors. Guidance on promoting gender equality in public-sector procurement was published in February 2006. This set out various positive measures public authorities should take to comply with the requirements of the gender duty in procurement functions. A code of practice for this Gender Equality Duty was published in 2007.

3. Measuring the risks and prioritising organisational spend categories to enhance social outcomes

Contracting authorities need to assess the social risks and impact of their purchasing activity and supply chain. This helps to focus their efforts on the most important spend categories and on those which can contribute to achieving their social targets.

Here are a few suggestions contracting authorities should consider when prioritising their approach to SRPP:

- Adopt a step-by-step approach. Start with a small range of products and services with a clear social impact or where socially responsible alternatives are easily available and not more expensive. For example, select products (e.g. vehicles) or services (e.g. cleaning) that have a high proportion of vulnerable workers (from ethnic minorities, persons with disabilities, etc.) or of female workers.

- Also start by making sure that contract specifications have no negative impact on social conditions (e.g. by assessing the impact of privatising delivery of services on vulnerable groups) or by reserving suitable procurement for sheltered workshops or sheltered employment programmes[28], taking into account their current production capacity.

[28] Based on Article 19 of Directive 2004/18/EC and Article 28 of Directive 2004/17/EC.

Example:

Sweden: To facilitate access to public procurement opportunities for SMEs, social-economy and voluntary organisations who work with socially disadvantaged groups, the Swedish Social Insurance Agency sometimes includes participation by these groups in its initial study on procurement, in order to take fuller account of their specific problems when drafting the tender documents.

To identify the risk of non-compliance with social standards, the Agency analyses the risks at the beginning of procurement. For example, in the case of procurement of cleaning services, the risk of non-compliance with legislation on working conditions is regarded as high.

- Focus initially on one or more social problems, such as fair wages or health and safety.

- Consider the availability and cost of socially superior alternatives and make sure they are in line with the applicable public procurement rules and principles. Are there more socially responsible ways of achieving the aims of the procurement strategy than the contracting authority has adopted? Will they meet the contracting authority's requirements and can it afford them? Consider what extra costs (if any) inclusion of social considerations could add and the potential effects of restricting competition.

- Consider the availability of data. Can the contracting authority find the social data it needs to establish a more socially responsible procurement strategy? How complicated will it be to decide what the contracting authority wants technically and to express it in a call for tenders?

- Consider the capacity of the contracting authority to put into action a workable, effective and efficient programme of action regarding SRPP.

- Consider alternative ways of delivering the social policy in question. Is delivering this social policy (partly) through public procurement an appropriate use of resources or is there a more effective way to deliver this policy, using other tools at the disposal of the contracting authority?

- Seek visibility. How visible will the socially responsible policy be to the public and to the staff? High-profile changes, like switching to sustainably produced/ethical trade coffee in the cafeteria, can help raise awareness of the policy and link it to other social projects.

- Consider the potential for future development. Socially responsible purchasing targeting services at an early stage of their development and marketing could be more successful than trying to change the social characteristics of mature sectors.

Examples:

France: The municipality of Angers designated an internal focal point (specialised legal advisor) for eco-responsible procurement in 2005, in charge of developing socially responsible public procurement practices with the objective of making them fully established practice in the procurement operations of the municipality. The advisor provided in-house training on sustainable procurement. Awareness-raising and tutoring was offered on both the technical and legal sides at the time of identifying needs, of preparing and launching the tender and of analysing and evaluating the offers received, in close cooperation with enterprises. As regards the social aspects, the municipality of Angers generally considers public works and services to be priority sectors, in particular construction of buildings, public roads and public parks and gardens.

UK: The Sustainable Procurement Task Force (SPTF) dealing with both social and environmental issues was set up in May 2005 and published its Action Plan in June 2006. The Action Plan presented the business case for sustainable procurement, recommended action across six broad areas and provided two tools that can help organisations to make progress: the Prioritisation Methodology and the Flexible Framework. The Prioritisation Methodology is a risk-based approach that helps organisations focus their efforts and resources appropriately. Instead of using just expenditure data, the method allows organisations to take account of the environmental and socio-economic risk, the potential that they have to influence suppliers and the actual scope to improve sustainability. The Flexible Framework is designed to help organisations understand the steps needed at organisational and process level to improve procurement practice and make sustainable procurement happen.

Putting an SRPP policy into practice will thus require strategic planning, i.e. setting priorities when choosing the contracts most suitable for SRPP. Some contracting authorities have chosen to adopt a coordinated and holistic approach to integrating social considerations.

4. Raising awareness of SRPP and involving key stakeholders

SRPP is of interest to a wide range of stakeholders, who need to be involved in the process of developing an SRPP approach in order to gain confidence in it and to build up commitment to achieving its objectives. Key stakeholders in SRPP include central, regional and local governments, potential suppliers or contractors, civil society, employers' organisations and trade unions. Workshops, seminars and conferences should be organised to gather views on the approach to SRPP. They should be organised at various stages of the development process, i.e. at the very start of the process when ideas are formulated, during drafting of the approach and towards the end when a final draft can be made available.

Finally, effective communication about the benefits of SRPP, good practice and success stories also play a key role in making progress. It is very important that all these stakeholders understand the nature of the challenge and their role. Better results will be achieved by means of an imaginative and committed partnership between purchasers and contractors.

Examples:

Sweden: The regional administration for South-West Sweden holds pre-bid meetings open to all potential bidders to explain any 'design-for-all' requirements included in the technical specifications.

UK: To come up with recommendations on how public-sector procurement in the UK could engage better with SMEs, HM Treasury and the Department for Business Enterprise and Regulatory Reform launched an on-line consultation on key questions exploring the barriers to SMEs bidding for contracts. The consultation was made available on a website and invited responses from procurers, stakeholder groups and suppliers. Subsequently, to implement the resulting recommendations, a stakeholder group has been established which keeps in regular contact with the project teams responsible for implementation and can provide comments on the approach to be taken.

Cooperation between purchasing authorities is another way of increasing access to social expertise and know-how and of communicating the policy to the outside world.

Example:

Denmark: SRPP is one of the topics covered in the market analysis carried out by National Procurement Ltd before each call for tenders. The organisation runs training programmes and workshops for all suppliers. It tries to make the tender documentation as simple as possible so that SMEs also have the resources to submit a bid. Framework contracts are often split into several lots (e.g. on a geographical basis), without infringing the thresholds set by the Procurement Directives[29], in order to give suppliers a chance to submit a bid.

5. Implementing the SRPP strategy

The SRPP strategy will need to give details of how SRPP will be implemented and of the steps which need to be taken to make progress. The strategy will need to take into consideration factors such as:

- the legal and regulatory framework;
- the institutional framework;
- the management structure;

[29] Article 9(3) of Directive 2004/18/EC and Article 16(2) of Directive 2004/17/EC.

- the availability of professional capacity and resources;
- a differentiated approach by sector, taking into account the particular characteristics of each field;
- the involvement of stakeholders.

As for how to implement the strategy, details will need to be given of responsibilities, targets with a realistic timescale for achieving them, the management structure for implementing them, the professional and financial resources needed, and measures to monitor and report on progress.

The steps that need to be taken could include setting up a social procurement task force, designing an action plan, including SRPP in policies and procedures, or developing simplified guidelines for budget-holders and procurement officers at all levels.

Capacity-building could involve training programmes for executives, managers and staff. It might also involve sharing good practice, making available the skills to implement SRPP, including SRPP skills in candidates' selection criteria, and making information on SRPP initiatives available at EU and/or government level.

The staff making the purchases should be given the legal, financial and social knowledge they need to decide to what extent and where social factors can or can best be introduced in the procurement procedure, whether they are set at the right level to get best value for money, and whether they match the social priorities of the contracting authority.

6. Measuring effective implementation

Measuring effective implementation of the SRPP strategy and its outcome involves setting up internal and external controls, which should assess outcomes against stated targets and standards of performance.

Internal measures need to be linked to existing reporting systems, which will have to be adapted in order to take into consideration SRPP objectives. They also need to be linked to internal audit procedures and could incorporate sanctions for non-compliance with SRPP objectives.

External measures should include independent auditing of SRPP performance. They could also include benchmarking against past performance or the performance of other organisations.

The outcome of audits of SRPP performance should be made available to the general public and should contribute to reviewing and updating policies, objectives and procedures for SRPP.

7. Overview of the procurement process

In taking account of the social considerations in public procurement, it is suggested that procurers act in relation to two main issues:

- getting the best value for money;

- acting fairly.

Best value for money: Contracting authorities are responsible for obtaining the best value for taxpayers' money for everything they procure. Best value for money does not necessarily mean accepting only the cheapest offer. It means the contracting authority has to secure the best deal within the parameters it sets. Best value for money could be defined as the optimum combination of whole-life cost and quality to meet the end-user's requirements. Value for money may also include social considerations.

Acting fairly: Acting fairly means following the principles of the internal market, which form the basis for the Procurement Directives and the national legislation based on them. The most important of these is the principle of equal treatment, which dictates that all competitors should have an equal opportunity to compete for the contract. To ensure this level playing field, the principle of transparency must also be applied.

- Examples of provisions applying the principle of equal treatment in the Procurement Directives are the time limits set for receipt of tenders and requests for participation, the common rules on technical specifications and the ban on discrimination against contractors from other Member States.

- Examples of application of the principle of transparency can be found in the different provisions on publication of notices and the obligation for contracting authorities to inform the tenderers concerned why their tenders were rejected.

7.1 The importance of legal advice

EC procurement rules stipulate how to handle the procurement process to safeguard the principles of fairness, non-discrimination and transparency. These rules permit taking account of sustainability and equal opportunity under certain conditions. Early expert legal advice on establishment of an SRPP action plan is likely to save difficulties later.

7.2 Preparing the procurement procedure

The preparatory stage of any procurement procedure is crucial, as each stage builds on those that have gone before. Therefore, before starting a tendering procedure, the contracting authority should set aside enough time to define the subject-matter of the contract and the means to be used to achieve the end result. The preparatory stage is also the best opportunity to identify which social considerations are relevant and appropriate to be taken into account in that particular procedure.

8. Stages of the procurement procedure and approaches to SRPP

Following the logic of this process, there are now at least four basic approaches to how social issues are currently addressed in public procurement.

The *first* arises when the purchaser decides to include social criteria in the subject matter of the contract itself and/or in the technical specifications that must be met by successful

contractors in a way that includes social criteria[30]. One example is specifying that computer equipment must comply with certain accessibility criteria.

In the *second* approach, bidders are prohibited, under certain conditions[31], from obtaining government contracts if they have been found guilty of previous wrongdoing in order to prevent public bodies contracting with bidders who have failed to achieve a particular standard of social behaviour.

The *third* approach attempts to persuade tenderers to commit to certain social standards and takes account of their success in doing so when it comes to awarding the contract. One form which this can take in practice is where the public body takes certain social issues into account in the award criteria[32].

The *fourth* approach focuses on the stage after the contract has been awarded. It requires whoever is awarded the contract to comply with certain conditions when carrying out the contract once it has been awarded[33]. This model requires all contractors to sign up to the same requirement, although there is no assessment of the ability of the contractor to comply with certain conditions.

These four basic approaches are not necessarily alternatives, but are frequently combined in the same public procurement procedure.

Example:

Spain: The Basque Country Government has issued an 'instruction' on incorporation of social, environmental and other public policy criteria in public procurement by its administration. This lays down which social and environmental criteria must be taken into account in all public procurement in the region and how.

Main goal of the instruction: To take account of social and environmental considerations (both of which are part of the sustainability approach) along with other aspects related to other public policies in public procurement by the administration and public entities in the Basque Country.

Assessment and monitoring: The Basque government departments for employment, social inclusion, social affairs and the environment periodically assess performance in contracting. The assessment includes the wording of the specifications, how they are applied in the award process and performance of the contract.

Technical specifications: The instruction recommends incorporating Accessibility and

30 The conditions under which social considerations can be taken into account in the subject-matter of the contract and/or the technical specifications are explained later in the sections 'Defining the subject-matter' and 'Defining the requirements of the contract'.

31 The conditions under which contracting authorities may (or, in some cases, are under an obligation to) exclude a tenderer from the procurement procedure are explained later in the section 'Exclusion criteria'.

32 The conditions under which social considerations can be taken into account as an award criterion are explained later in the section 'Awarding the contract'.

33 The conditions under which social considerations can be taken into account in the contract performance clauses are explained later in the section 'Contract performance'.

Design for All requirements in the technical specifications.

Award criteria: Whenever there is more than one award criterion, these criteria have to include that the products and services must be well-suited for people with disabilities (whenever this adaptation is above the legal mandatory minimum). Whenever disadvantaged groups are amongst the beneficiaries of the services defined in the subject-matter of the contract, the characteristics related to the fulfilment of their social needs will be included in the award criteria.

Contract performance clauses: The Instruction calls for the contract to include special performance clauses: environmental, social and related to other public policies. The aims of the special contract performance clauses are to protect the environment, health and safety, to promote employment of disadvantaged groups, to remove gender inequality from the labour market and to fight unemployment.

Examples of contract performance clauses in the Basque Country:

1. Labour inclusion of unemployed people that are difficult to employ: For this purpose, the instruction states that the staff performing the contract must include a set percentage of disadvantaged persons, such as unemployed people, people with disabilities, long-term unemployed women over 30, victims of household violence, persons with mental illness, unemployed single parents, immigrants unemployed for at least six months, long-term unemployed (more than one year) and unemployed young persons.

2. Employment quality and basic labour rights: The contractor must guarantee compliance with the ILO Core Labour Standards during performance of the contract in relation to the workers who make the products (the subject-matter of the contract) along the supply chain.

3. Health and safety in performance of contracts for building works and services.

Strategic development and prioritisation of SRPP initiatives —

IN A NUTSHELL

Identify national and local priorities relevant to SRPP.

Review organisations' procurement strategy and identify how SRPP links to overarching objectives and approaches. Identify how SRPP can help achieve these objectives and deliver value for money for the organisation.

Provide high-level political commitment and leadership for SRPP.

Identify the products and services the contracting authority procures that pose the greatest social risk and/or have the greatest capacity to enhance the social outcome.

Develop objectives and an action plan to address social issues in procurement.

Raise awareness of SRPP among stakeholders.

Ensure that procurement practices are open to bodies like small and medium-sized enterprises, social economy enterprises and the voluntary and community sector, whatever legal form they take.

III. IDENTIFYING THE NEEDS AND PLANNING PROCUREMENT

1. The importance of assessing actual needs

One crucial step that the contracting authority needs to take at this preparatory stage, even before defining the subject of the contract, is to assess its actual needs.

For example, the contracting authority might have decided that it needs to disseminate information to the public. Whenever possible, this should include a more socially inclusive solution, such as dissemination of information in accessible formats that can also be used by members of the public with disabilities.

This is the stage at which the public sector can best identify the social standards that procurement can help deliver. It requires those involved on the 'client side', from policy-makers to practitioners, to:

- actively seek out opportunities to promote social standards;
- ensure that the opportunities are linked to the subject-matter of the contract and are cost-effective;
- focus on the outcomes required;
- build in flexibility to accommodate changing requirements over the life of the project[34];
- identify the needs of all categories of users of the services, works or supplies to be procured.

Therefore, in order to be effective, the contracting authority should consider its needs in a functional manner, so as not to exclude any social effects.

2. Defining the subject-matter

Once the contracting authority has assessed its needs, it can determine more easily the subject-matter of the contract. The **'subject matter' of a contract is about the product, service or work the contracting authority wants to procure**. When defining the subject-matter of a contract, contracting authorities have great freedom to choose what they wish to procure, including goods or services that meet social standards, provided such social

[34] Provided such changes to the initial conditions of the procurement contract were envisaged in the initial tender contract or are justified by one of the circumstances listed in the Procurement Directives (in particular, Articles 31 and 61 of Directive 2004/18/EC relating to the award of additional supplies, services or works) and comply with any additional national rules that may exist on this issue.

standards are linked to the actual supplies, services or works to be purchased (which form the subject-matter of the contract).

Accessibility, for example, is often incorporated as a feature of the goods or services being purchased. Such purchases should be made without distorting the market, i.e. without limiting or hindering access to it. The process of determining what the subject-matter of the contract is will generally result in a basic description of the product, service or work, but can also take the form of a performance-based definition.

On the other hand, aspects that are not linked to the actual supplies, works or services the contracting authorities want to buy cannot be included in the subject-matter of the contract.

Examples:

Accessibility standards for persons with disabilities can be part of the subject-matter of a works contract for building a school, as they can be part of the description of the works the contracting authority wants to buy and linked to them.

- On the other hand, the labour conditions of the workers building the school cannot be part of the subject-matter of the contract, as they are not linked to the object of the contract, but only to the way in which the procurement contract will be performed. However, requirements relating to labour conditions could be included, under certain circumstances[35], in the contract performance clauses.
- In contracts for services, the contracting authority can specify in the subject-matter that the services provided must meet the needs of all categories of users, including the socially disadvantaged or excluded.

In principle, the contracting authority **is free to define the subject of the contract in any way that meets its needs**. Public procurement legislation is concerned not so much with what contracting authorities buy, but mainly with how they buy it. For that reason, neither of the Procurement Directives restricts the subject-matter of contracts as such.

However, **freedom to define the contract is not unlimited**. In some cases the choice of a specific product, service or work could distort the level playing-field in public procurement for companies throughout the EU. **There have to be some safeguards**. These safeguards lie, first of all, in the fact that the provisions of the TFEU on non-discrimination, freedom to provide services and free movement of goods apply in all cases and, therefore, also to public procurement contracts under the thresholds set in the Procurement Directives or to certain aspects of contracts which are not explicitly covered by these Directives.

In practice, this means that in all cases the contracting authority has to ensure that the contract will not affect access to its national market by other EU operators or operators from countries with equivalent rights[36]. For contracts covered by the Procurement Directives, the principle of

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35 All contract performance clauses, including those relating to labour conditions need in particular to be linked with the execution of the contract and, for transparency reasons, to be published in advance in the tender notice. For further details, see the section 'Rules governing contract performance clauses'.

36 For example, operators from countries that are bound by the WTO Government Procurement Agreement.

non-discrimination goes beyond nationality and requires strict equality of treatment between all candidates/tenderers in respect to all aspects of the procedure.

A second safeguard, considered in the next chapter, is that, in accordance with the public procurement rules, the technical specifications used to define the contract must not be worded in a discriminatory way and must be linked to the subject-matter of the contract.

In addition, existing EU legislation and national legislation that is compatible with EU law on social or other matters could well also limit or influence the freedom of choice over the subject-matter of the contract.

3. Increasing access to procurement opportunities

3.1 Improving access to procurement opportunities

However, some classes of tenderers may find it more difficult than others to gain access to the public procurement market (e.g. SMEs). Purchasers may address these difficulties, but are not permitted to prefer specific classes of tenderers. EU law permits positive action by purchasers, but not positive discrimination[37].

What's not permitted — examples

With the exception of the special provisions relating to sheltered workshops[38] and sheltered employment programmes, purchasers are not permitted to reserve performance of contracts for particular classes of firm, as that would breach the equal treatment requirements of EU law.

In the field of social services, however, it is possible, in exceptional cases when certain specific conditions are met, to reserve performance of certain contracts for non-profit operators[39]. This requires the existence of a national law regulating this particular activity and providing for restricted access to certain services for the benefit of non-profit operators. Nevertheless, any such national law would constitute a restriction of Articles 49 and 56 of the TFEU on freedom of establishment and the free movement of services and would have to be justified case by case. On the basis of the case-law of the CJEU, such a restriction could be justified, in particular, if it is necessary and proportionate for attainment of certain social objectives pursued by the national social welfare system.

The contracting authority cannot limit competition to bidders that already have an office within a certain geographical area, but the contract performance clauses may require the successful bidder to open a branch or office in a certain area, if this is justified for the purposes of successful performance of the contract (for instance, for coordinating a complex building contract on site).

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37 With the exception provided for in Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC which allow, under certain conditions, contracts to be reserved for sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes.

38 Which, due to their characteristics, might not be able to obtain contracts under normal conditions of competition (see Chapter III, Section 3.2, "*Set-asides for sheltered workshops*".

[39] See judgment of the Court of 17 June 1997 in case C-70/95 (Sodemare) [1997] ECR I-3395. See also the answer to question 2.7 in the Commission Staff Working Document 'Frequently asked questions concerning application of public procurement rules to social services of general interest', available at: //ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf.

Instead, the purpose is to guarantee a level playing field, so that purchasers offer under-represented businesses the same opportunities to compete for public contracts as other qualified suppliers. In this way, competition can be encouraged, drawing more companies into the tendering process. Various measures can be taken, within these limits:

- encouraging large organisations to address supplier diversity on a voluntary basis by providing equal opportunities to diverse suppliers as subcontractors and by promoting equality and diversity[40];

- stimulating participation by diverse suppliers by publishing a forward plan for major procurement activities, identifying large contracts that are due to be put out to tender over the next 12 months;

- organising 'meet the buyer' events open to all potential candidates in order to increase their awareness of the contracting authority's needs and policy priorities and thus improve the transparency and accessibility of the procurement process;

- developing business support programmes to improve the capacity of small and diverse suppliers and to provide guidance on the public procurement process.

Examples:

UK: The Greater London Authority (GLA) has adopted a policy of promoting greater diversity amongst its suppliers from the private sector. The purpose is to 'level the playing field', so that 'we offer under-represented businesses the same opportunities to compete for GLA group contracts as other qualified suppliers[41].' The GLA draws a distinction between positive action (which it adopts) and positive discrimination (which it rejects). The GLA Group has embarked on a review of its procurement procedures to remove barriers to SMEs and diverse suppliers competing for its contracts. Procurement procedures have been developed for large contracts to address supplier diversity by providing equal opportunities to diverse suppliers as subcontractors and by promoting equality and diversity. The GLA Group regularly monitors its expenditure with SMEs and other diverse businesses to identify trends and provide further input for activities to improve its procurement procedures.

A review of procurement procedures to identify the potential for SMEs to bid for contracts has commenced and existing suppliers have been asked for feedback on the GLA's procurement procedures to help identify action to make them more accessible.

In addition, via the London Development Agency (LDA), the GLA Group is actively linking its procurement procedures to business support programmes which improve the capability of small and diverse suppliers to bid for public-sector contracts. This process can improve businesses' chances of winning GLA Group contracts and give the GLA Group a more competitive base of suppliers bidding for work.

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40 However, given that positive discrimination is not permitted, contracting authorities cannot favour, at the award stage, tenderers that use a specific class of supplier or subcontractor (e.g. SMEs). Similarly, contracting authorities cannot require, in the contract performance clauses, that a certain percentage of the contractors' suppliers or subcontractors be SMEs or other specific classes.

41 ITC-ILO 'Study on the incorporation of social considerations in public procurement in the EU', 21 July 2008.

Ireland: The aim of InterTrade Ireland's Go-Tender Programme was 'to create cross-border business opportunities for SMEs in the all-island public procurement market through the provision of carefully targeted regional workshops'. The objectives of the Programme were to increase awareness amongst suppliers, particularly regarding cross-border contracts and to create cross-border opportunities for SMEs on the all-island public procurement market, provide knowledge for SMEs regarding the public-sector market throughout the island, develop the skills required to win public-sector work in both remits, and provide experienced one-to-one support in the process of bidding for work. Over the last three years presentations were made at 30 workshops attended by over 400 SME suppliers. Many of these suppliers went on to compete successfully for public-sector contracts in Ireland, Northern Ireland and across Europe.

- Subdividing contracts into lots clearly facilitates access by SMEs, both quantitatively (the size may correspond better to the production capacity of SMEs) and qualitatively (the content of the lots may correspond more closely to the specialities of SMEs). This is possible, provided contracts are not subdivided with the aim of avoiding application of the Procurement Directives[42].

Example:

France: In order to attract the widest possible competition, the general rule is to award contracts in the form of separate lots. However, contracting authorities are free to award global contracts if they consider that subdivision into lots would restrict competition or risk making performance of the contract technically difficult or expensive, or if the contracting authority is not in a position to coordinate performance of the contract.

3.2 Set-asides for sheltered workshops

The Procurement Directives[43] include, however, an explicit provision permitting Member States 'to reserve the right to participate in award procedures for public contracts' for sheltered workshops or 'provide for such contracts to be performed in the context of sheltered employment programmes'.

The explanation is that 'sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition[44].' Consequently, it is appropriate to allow Member States to grant

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42 Article 9(3) and (5) of Directive 2004/18/EC and Article 17(2) and (6) of Directive 2004/17/EC.

43 Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC refer to 'sheltered workshops' and 'sheltered employment programmes' 'where most of the employees concerned are handicapped persons'. Such entities may be known by different names in different Member States. It is to be noted that Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC cover **all similar entities (no matter what they are called)** provided (a) at least 50% of the staff employed are disabled persons and (b) they comply with the other conditions set by the above-mentioned articles.

44 Recital 28 of Directive 2004/18/EC and recital 39 of Directive 2004/17/EC.

preferences to enable such workshops to exist without having to compete with other economic operators.

Under the above-mentioned provisions of the Procurement Directives, such reservation is allowed only under certain conditions:

– any such reservation must be initiated by Member States by means of legislation and may not be adopted *ad hoc* by public bodies, in the absence of national legislation permitting such reservation;

– at least 50% of the employees of such sheltered workshops or sheltered employment programmes must be persons with disabilities;

– given the nature and seriousness of their disabilities, the employees concerned cannot carry out occupations under normal conditions.

Examples:

Germany: The Federal Decree of 10 May 2005 on contracts for workshops for the disabled requires Federal procurement agencies to reserve part of their budget for contracts which can be awarded to workshops for workers with disabilities. This might even involve large supply and services contracts. Participation is limited to workshops for workers with disabilities[45]. Nevertheless, these workshops have to compete in the award procedures and submit economically sound tenders. Moreover, contracting authorities have to meet the general transparency requirements of the Procurement Order. Many municipalities appear to have a procurement policy in favour of workers with disabilities. These workshops are often partly or fully owned by the municipalities which award the contracts.

France: Article L323-1 of the French *Code du travail* (Labour Code) requires private and public employers (with more than 25 employees) to give at least 6% of their jobs to disabled persons. Under Article L323-8 of the Code, employers, in particular procurement agencies, can partly fulfil this obligation by awarding contracts to companies supporting work for persons with disabilities. In the context of public procurement, this will consist of reserving certain contracts for entities where more than 50% of the staff employed are disabled persons in accordance with Article 19 of Directive 2004/18.

Where Member States avail themselves of these provisions, the contract notice must mention it and the scope of the preferences must be included in the prior information notices (PIN) and contract notices[46].

[45] The conditions under which contracting authorities may reserve contracts for workshops with disabilities are set out in Article 19 of Directive 2004/18/EC and Article 28 of Directive 2004/17/EC.

[46] Directive 2004/18/EC, Annex VII and Directive 2004/17/EC, Annex XIII: PIN and contract notices must indicate, where appropriate, 'whether the public contract is restricted to sheltered workshops or whether its execution is restricted to the framework of protected job programmes.'

Identifying the needs and planning procurement —

IN A NUTSHELL

In individual procurement procedures:

Identify the contracting authority's needs and express them appropriately.

Consider how, and to what extent, possible social policy objectives or obligations fit in with this procurement.

Apply the affordability and cost-effectiveness tests, including assessing the benefits and costs of using procurement to deliver social objectives.

Identify the subject-matter of the contract and to what extent the social objectives should or can be specified as part of the subject-matter of the contract.

Improve access to procurement opportunities by levelling the playing field, so that suppliers from under-represented businesses have the same opportunities to compete for public contracts as other qualified suppliers (provided this does not lead to 'positive discrimination').

Consider how best to communicate the contracting authority's policy to the outside world, ensuring optimum transparency for potential suppliers or service-providers and for the citizens the contracting authority is serving.

IV. THE CONTRACT

A) DEFINING THE REQUIREMENTS OF THE CONTRACT

1. Drawing up the technical specifications

Once the contracting authority has defined the subject of the contract, it has to translate this into detailed measurable technical specifications that can be applied directly in a public procurement procedure.

Technical specifications therefore have three functions:

- They describe the procurement requirements so that companies can decide whether they are interested. In this way, they determine the level of competition.
- They provide measurable requirements against which tenders can be evaluated.
- They constitute minimum compliance criteria. If they are not clear and correct, they will inevitably lead to unsuitable offers. Offers not complying with the technical specifications need to be rejected.

Under EU public procurement rules, the contracting authority can only evaluate or compare bidders' proposals against requirements in the technical specifications. Similarly, the contracting authority can only assess bidders' competence to deliver what is mentioned in the specifications. The specifications are issued early in the tendering process, which is why authorities have to get their requirements right first time.

Technical specifications must be **linked to the subject-matter of the contract**. Requirements that 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 Procurement Directives. Thus requirements regarding, for instance, recruitment of staff from certain groups (disabled persons, women, etc.) would not qualify as technical specifications. Nor can a label relating to the 'social capacity' of an undertaking be considered a 'technical specification' within the meaning of the Procurement Directives.

In addition, the Procurement Directives stipulate that technical specifications must **not reduce competition**[47], must be **transparent**[48] and must **not discriminate** against possible contractors from outside the Member State of the contracting authority[49].

[47] Article 23(2) of Directive 2004/18/EC.
[48] Article 23(1) of Directive 2004/18/EC.
[49] Article 23(3) of Directive 2004/18/EC.

What's permitted — some examples

- Requiring, in a contract for works, measures to avoid accidents at work and specific conditions for storage of dangerous products in order to safeguard the health and safety of workers.

- Requiring compliance with certain ergonomic characteristics for products in order to ensure access for all categories of users, including disabled people[50].

What's not permitted — some examples

- Requiring an outsourced contact centre delivering online and telephone support (which could legitimately be provided from any location) to be located in a particular town.

- Issuing specifications for a housing management contract but then selecting bidders on the basis that they might also be able to purchase the houses in future, if the authority were to decide to privatise the housing.

2. Using performance-based or functional specifications

The Procurement Directives explicitly allow contracting authorities to choose between specifications based on technical standards or on performance/functional requirements[51]. A performance-based/functional approach usually allows greater scope for market creativity and, in some cases, will challenge the market to develop innovative technical solutions. If the contracting authority opts for this approach, it does not need to go into too much detail in the technical specifications.

Having the possibility to define technical specifications in terms of performance or functional requirements enables contracting authorities to seek innovative solutions better suited to their needs. For example, accessibility requirements of a product may be defined either by setting very detailed technical standards or by setting standards based on functional accessibility requirements. The second option can act as a stimulus for economic operators to propose innovative solutions in their tenders.

As the options available on the market concerning performance-based specifications can vary considerably, the contracting authority should make sure its specifications are clear enough to allow it to make a proper and justifiable evaluation.

There may be more scope to take account of social issues in larger or complex projects, but regardless of the size of the project, the specifications must be:

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50 See Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

51 Article 23(3) of Directive 2004/18/EC.

- specific about the outcomes and output required and encourage bidders to use their skills and experience to devise solutions;

- sufficiently broad to allow bidders to add value, but not so broad that they feel exposed to risks that are difficult to quantify and therefore inflate their prices;

- linked to the subject-matter of the contract, while taking account of appropriate policy goals, including cross-cutting policies and legal obligations, and of market soundings about what industry can supply.

3. Use of variants

Dialogue with potential bidders before finalising the specifications can help to identify opportunities to promote equal opportunities and sustainability. These discussions can establish the best scope for requirements so that they are commercially viable, by making sensible arrangements for allocating and managing risk. Comparing current services with what is provided elsewhere could also help. When using these techniques, care should be taken to avoid putting any particular supplier at an advantage.

Even after such market research, it is possible that the contracting authority still might not be sure how best to integrate social standards into specific technical specifications. If this is the case, it might be useful to ask potential bidders to submit socially responsible variants. This means that the contracting authority should establish a minimum set of technical specifications for the product it wants to purchase, which will apply to both the neutral offer and to its socially responsible variant. For the latter, the contracting authority will add a social dimension to the technical specifications[52].

When the bids are sent in, the contracting authority can then compare them all (both the neutral and the socially responsible bids) on the basis of the same set of award criteria. Hence, the contracting authority can use variants to support social standards by allowing comparison between standard solutions and social options (based on the same standard technical requirements). Companies are free to make offers based either on the standard solution or on the variant, unless indicated otherwise by the contracting authority.

Before the contracting authority can accept variants in a public procurement procedure[53], it needs to indicate in advance in the tender documents:

- that variants will be accepted;

- the minimum social specifications which the variants have to meet (e.g. better social performance);

- specific requirements for presenting variants in bids (such as requiring a separate envelope indicating the variant or indicating that a variant can be submitted only in combination with a neutral bid).

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[52] This social dimension must, of course, be linked to the subject-matter of the contract (meaning the actual supplies, services or works which the contracting authority wants to buy) and comply with all EU rules and principles applicable to technical specifications in public procurement.

[53] See Article 24 of Directive 2004/18/EC and Article 36 of Directive 2004/17/EC.

Purchasers who allow variants can compare the neutral offers with the socially responsible variants — on the basis of the same award criteria — and evaluate bidders' proposals for additional gains in achieving social standards and decide if these are affordable.

Example:

One example is procurement of catering services for a public administration, where the contracting authority could invite suppliers to present, in addition to the neutral (standard) offer, a variant which will include a social dimension (preparation of low-calorie, unsalted and kosher food in order to meet the medical or religious needs of all categories of users).

4. Social labels and the implications for ethical trade

A contracting authority might want to purchase goods which make a contribution to sustainable development (hereafter referred to as "ethical trade goods"). In this case, it can take appropriate considerations into account in the tender specifications, but it cannot require the products to bear a specific ethical trade label/certification[54], because this would limit access to the contract for products which are not certified but meet similar sustainable trade standards. This is a general principle that applies not only to ethical trade labels, but to all labels which require prior certification of the economic operators or of their products. Likewise, a contracting authority that wishes to purchase 'bio' products cannot require a specific eco-label, but can ask, in the tender documents, for compliance with specific criteria for biological agriculture.

(a) Sustainability requirements may be incorporated in the technical specifications of a public tender, provided these criteria are linked to the subject-matter of the contract in question[55] and ensure compliance with the other relevant EU public procurement rules[56] and with the principles of equal treatment and transparency.

A contracting authority that wants to purchase ethical trade goods can do so by defining the relevant sustainability criteria in its technical specifications for the goods. Once a contracting authority has decided on the subject-matter of the procurement contract (what generic type of products to buy), it is free to define the technical specifications of those products[57]. The requirements must, however, relate to the characteristics or performance of the products (e.g. recycled material) or the production process of the products (e.g. organically grown).

Requirements relating to the labour conditions of the workers involved in the production process of the supplies to be procured cannot be taken into account in the technical specifications, as they are not technical specifications within the meaning of the Procurement Directives. Under certain conditions, they may, however, be included in the contract performance clauses[58].

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54 For the purposes of this Guide, 'ethical trade label/certification' means any non-governmental trade-related sustainability assurance scheme (for example, Fair Trade, Fairtrade, Max Havelaar, Utz, Rainforest Alliance, etc.). For further details on Fair Trade and other trade-related sustainability assurance schemes, see Commission Communication COM(2009) 215 final of 5 May 2009 'Contributing to sustainable development: The role of *Fair Trade* and nongovernmental trade-related sustainability assurance schemes' available at: http://trade.ec.europa.eu/doclib/docs/2009/may/tradoc_143089.pdf.

55 In accordance with Article 53 of Directive 2004/18/EC and Article 55 of Directive 2004/17/EC.

56 For further details, see the section 'Defining the requirements of the contract'.

57 It being understood that technical specifications must be defined in a non-discriminatory way.

58 See paragraph (b) below on contract performance clauses in procurement of sustainability assurance goods along with the general section 'Rules governing contract performance clauses'.

Contracting authorities that intend to purchase ethical trade goods should not simply 'cut and paste' all the technical specifications for an ethical trade label/certification[59] into the technical specifications for their purchases nor, even less so, designate a specific ethical trade label or certification. Instead, they should look at each of the sub-criteria underlying the ethical trade label or certification and must use only those which are linked to the subject-matter of their purchase. Contracting authorities may stipulate which ethical trade labels/certifications are deemed to fulfil these criteria, but they must always also allow other means of proof. Bidders should have the choice to prove compliance with the requirements defined either by using appropriate ethical trade labels/certifications or by other means.

(b) Sustainability criteria (including social criteria) may also be incorporated **in the contract performance conditions**, provided they are linked to performance of the contract in question[60] (e.g. minimum salary and decent labour conditions for the workers involved in performance of the contract) and comply *mutatis mutandis* with the other requirements mentioned in paragraph (a) above and, more generally, with the conditions set out in the section of this Guide on 'Rules governing contract performance clauses'.

Examples:

If a contracting authority wants to buy ethical trade coffee or fruits, it can, for example, insert in the contract performance conditions of the procurement contract a clause requesting the supplier to pay the producers a price permitting them to cover their costs of sustainable production, such as decent salaries and labour conditions for the workers concerned, environmentally friendly production methods and improvements of the production process and working conditions..

Germany: City of Düsseldorf

Point 7.3 of the Public Procurement Order for the city of Düsseldorf in North Rhine-Westphalia (*Vergabeordnung für die Stadtverwaltung Düsseldorf)* on execution of contracts stipulates that: 'no products of exploitation of child labour are to be procured. Independent certification (for example, a Transfair seal or Rugmark seal) may prove this. If no such certification exists for the product in question, a declaration in the form of acceptance of the additional contract provisions for execution of the works and acceptance of the additional contract provisions of the Procurement Order for Supplies and Services Contracts is acceptable.'

[59] Because certain specifications of these ethical trade labels/certifications may not be linked to the subject-matter of the contract. Therefore inserting them in the tender specifications would be contrary to the principles of the Procurement Directives.

[60] Conditions included in the contract performance clauses do not necessarily need to be linked to the subject-matter of the contract, but only to performance of the contract.

5. Taking into account social concerns in production and process methods

What a product is made of, and how it is made, can play a significant part in its social impact. Under the Procurement Directives, production methods can be taken explicitly into account when defining the technical specifications[61].

Example:

Public works contracts may include in the technical specifications technical requirements aiming to avoid accidents on the construction site. Such measures (which could include, for example, signposting, conditions for storage of dangerous products or routes for transport of equipment) are part of the project which is put out to tender.

In a contract for procuring catering services for a hospital, in order to improve the well-being of patients, the contracting authority may require in the technical specifications that food should be prepared in accordance to certain methods that meet the diet and medical requirements of specific categories of patients.

However, since all technical specifications must be linked to the subject-matter of the contract, the contracting authority can only include social requirements which are also linked to the subject-matter of the contract.

6. Disability and technical specifications

The Procurement Directives[62] stipulate that technical specifications set out in the contract documentation should address the issue of accessibility of the works, supplies or services which are the subject of the contract. Article 23(1) of Directive 2004/18/EC states that 'Whenever possible … technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.' As explained earlier, compulsory national requirements specified in relevant legislation for 'accessibility for all' must be reflected in the subject-matter of the contract. It is imperative that procurement managers are made aware of these specific national regulatory requirements on accessibility and design for all and that these are fully incorporated in the tender documents, primarily in the form of technical specifications.

Example:

Italy: The Stanca Law makes it compulsory that all public websites should be accessible. The Law lays down a set of requirements to be used in public procurement of websites. The 'Decree establishing Technical Rules for Law 4/2004' is made up mainly of annexes which contain the technical web accessibility requirements, the methodology for evaluation of websites and the requirements for accessible hardware and software. The primary sources of inspiration for these groups were the W3C's Web Accessibility Initiative and the positive experience with Section 508 of the US Rehabilitation Act. CNIPA (the National Centre for Informatics in Public Administration) is responsible for

[61] Annex VI to Directive 2004/18/EC and Annex XXI to Directive 2004/17/EC.
[62] Article 23(1) of Directive 2004/18/EC and Article 34(1) of Directive 2004/17/EC.

assessing high-impact public ICT procurement tenders to see that they also include the accessibility requirements agreed in the legislation. Law 4/2004 assigns responsibility for monitoring enforcement of the Law to the Presidency of the Council of Ministers (Department for Innovation and Technology) and to CNIPA. During 2006, fifteen major procurement projects (worth € 71 million) were assessed to evaluate or improve their compliance with the Laws on Accessibility. Most of these projects, carried out by 10 different central administrations, focused on websites and hardware procurement.

It is difficult for all contracting authorities to be experts in every social domain. It is important for contracting authorities to bear in mind that practices in some countries outside the EU could facilitate their work on developing accessibility standards. In the USA, Section 508 of the Rehabilitation Act requires Federal contracting authorities to use accessibility standards in their public procurement and this has had repercussions in various EU Member States as well and has influenced industrial practice. In the EU, the European Commission has issued two standardisation mandates to support European accessibility requirements for public procurement of products and services in the area of information and communication technologies (ICT)[63] and the built environment[64] respectively. The results of the first phase of Mandate 376 are available and identify a set of standards on accessibility along with various methods to assess conformity with those standards when purchasing ICT[65].

Defining the requirements of the contract in the technical specifications —

IN A NUTSHELL

Draw up clear and precise technical specifications. Make sure that specifications are linked to the subject-matter of the contract, reflect all appropriate social requirements and are transparent and non-discriminatory.

Build on the 'best practices' of other contracting authorities. Use networking as a way of obtaining and spreading information.

Use performance-based or functional specifications to encourage innovative socially responsible offers. Consider taking social concerns into account in production and process methods.

If you are uncertain about the actual existence, price or quality of socially responsible products or services, you may ask for socially responsible variants.

Where appropriate, consider reserving the contract for sheltered workshops or provide for the

63 European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement in the ICT domain, M/376 EN, 7 December 2005.

64 European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement in the built environment, M/420 EN, 21 December 2007.

65 European accessibility requirements for public procurement for products and services in the ICT domain (European Commission Mandate M 376, phase 1); CEN/BT WG 185 and CLC/BT WG 101-5, Report on 'Conformity assessment systems and schemes for accessibility requirements'.

contract to be performed in the context of sheltered employment programmes.

Make sure that all intended outcomes are included — they cannot be added later in the process.

B) SELECTING SUPPLIERS, SERVICE-PROVIDERS AND CONTRACTORS

Selection criteria focus on companies' ability to perform the contract they are tendering for. The Procurement Directives contain two sets of rules on selection: exclusion criteria and rules regarding technical and economic capacity.

1. Exclusion criteria

The Procurement Directives contain an exhaustive list of cases where the personal situation of a candidate or tenderer may lead to its exclusion from the procurement procedure[66]. Some of these shortcomings may be of a social nature. For instance, candidates or tenderers may be excluded:

– for failure to pay social contributions[67]; or

– where the economic operator 'has been convicted by a final judgment (which has the force of *res judicata* in accordance with the legal provisions of the country) of any offence affecting his professional conduct'[68] or 'has been guilty of grave professional misconduct (proven by any means which the contracting authorities can demonstrate)'[69], based on the concept of "grave professional misconduct" is defined in national legislation[70].;

[66] Article 45 of Directive 2004/18/EC and Articles 53(3) and 54(4) of Directive 2008/17/EC. In some particularly serious criminal cases, it may even be mandatory to exclude tenderers.

[67] Article 45(2)(e) of Directive 2004/18/EC.

[68] Article 45(2)(c) of Directive 2004/18/EC.

[69] Article 45(2)(d) of Directive 2004/18/EC.

[70] 'Grave professional misconduct' is not yet defined by European legislation or EU case-law. It is therefore up to 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.

What's permitted — examples

- Exclusion of a tenderer who has been convicted by a judgment that has the force of *res judicata* for failure to comply with national legislation prohibiting clandestine employment, with national rules regarding health and safety at work or with national rules prohibiting discrimination on various grounds (race, gender, disability, age, sex, religious belief, etc.).
- Exclusion of a tenderer 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 the legislation is classified as grave professional misconduct in the Member State in question.

What's <u>not</u> permitted — an example

- Exclusion of a potential tenderer on the basis of political or personal beliefs of the tenderer that don't relate to professional conduct.

2. Technical capacity[71]

The selection process enables the contracting authorities to assess candidates' ability to deliver the requirements specified in the contract. The Procurement Directives contain an exhaustive list of technical capacity selection criteria, which can be applied to justify the choice of candidates. Selection criteria differing from those set out in the Procurement Directives would therefore not comply with the Directives.

Example:
In the Beentjes case[72] the Court found that a condition calling for employing long-term unemployed bore no relation to checking tenderers' suitability on the basis of their economic and financial standing and their technical knowledge and ability (clause 28 of the judgment)[73].

In addition, selection criteria must be non-discriminatory, proportionate and linked to the subject-matter of the contract.

In order to establish such a link, social considerations may be included in the technical selection criteria **<u>only if</u>** the achievement of the contract requires specific 'know-how' in the social field. Depending on the subject-matter of the contract, the contracting authority may investigate different aspects of candidates' technical capacity:

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71 This Guide will not analyse the economic and financial standing selection criteria, given that in view of the nature of the references required in order to assess the economic and financial standing of tenderers, it is not possible to include social considerations in them.

72 CJEU judgment of 20 September 1988 in case 31/87.

73 However, a condition calling for employment of long-term unemployed could be inserted in the contract performance clauses, provided this in line with the EU rules applicable at the performance stage (for further details, see the section 'Contract performance').

- Does the tendering company employ or have access to personnel with the knowledge and experience required to deal with the social issues of the contract (e.g. the need to have trained personnel and specific management experience in a contract for a crèche or engineers and architects qualified in accessibility matters for constructing a public building)?

- Does the tendering company own or have access to the technical equipment necessary for social protection (e.g. the need to have equipment suitable for elderly persons in a contract to run a retirement home)?

- Does the tendering company have the relevant specialist technical facilities available to cover the social aspects (e.g. in a contract for purchase of computer hardware, including accessibility requirements for disabled persons)?

Evidence of the economic operators' technical abilities may be provided by one or more of the exhaustive means specified in the Directives[74], such as:

- evidence of previous contracts completed, indicating the technicians or technical bodies to be involved;

- a description of the technical facilities used and related measures taken by the contractor;

- the educational and professional qualifications of the contractor's personnel (these are especially important in contracts that can only achieve their social objectives subject to proper training of the personnel);

- details of the manpower of the service-provider and numbers of managerial staff;

- details of the proportion of the contract that may be subcontracted.

A balance must be struck between the need for the contracting authority to have sufficient proof that the contractor will have the capacity to perform the contract and the need to avoid placing excessive burdens on the contractors.

[74] Article 48 of Directive 2004/18/EC.

Selecting suppliers, contractors and service-providers —

IN A NUTSHELL

Consider potential contractors' ability to deliver the particular contract in question. Establish selection criteria based on the exhaustive list set out in the Procurement Directives.

Does the contract require social capability or capacity (e.g. particular skills, training or adequate equipment to deal with the social aspects of the contract)? If so, include social criteria to demonstrate technical capacity to perform the contract.

The assessment of technical capacity must relate to the candidate's ability to deliver the contract.

Where relevant, consider suppliers' track record for delivering on similar contracts in relation to required social standards. Consider the possibility of excluding tenderers if the conditions of the Procurement Directives permitting such exclusion are met.

C) AWARDING THE CONTRACT

1. General rules for drafting award criteria and on awarding contracts

Social award criteria may be applied, provided they[75]:

- are linked to the subject-matter of the contract;
- do not confer unrestricted freedom of choice on the contracting authority;
- are expressly mentioned in the contract notice and tender documents; and
- comply with the fundamental principles of EU law.

When the contracting authority evaluates the quality of tenders, it uses predetermined award criteria, published in advance, to decide which tender is the best. Under the Procurement Directives, the contracting authority has two options: it can either compare offers on the basis of price alone[76] or choose to award the contract to the ' most economically advantageous' or best-value tender, which means that other award criteria will be taken into account in addition to the price.

Since the 'most economically advantageous tender' (MEAT) or best-value tender always combines two or more sub-criteria, these can include social criteria. Indeed, the non-exclusive list of examples in the Procurement Directives[77] allowing contracting authorities to determine the most economically advantageous tender include quality, price, technical merit, aesthetic and functional characteristics, social characteristics, running costs, cost-effectiveness, after-sales service, technical assistance, delivery date, delivery period and time to completion.

As the best offer will be determined on the basis of several different sub-criteria, the contracting authority can use several techniques for comparing and weighing up the different sub-criteria. These include matrix comparisons, relative weightings and 'bonus/malus' systems. It is the responsibility of contracting authorities to specify and publish the criteria for awarding the contract and the relative weighting given to each of those criteria in time for tenderers to be aware of them when preparing their tenders.

The individual criteria that will determine the most economically advantageous or best-value tender will need to be formulated in such a way that:

- They are linked to the subject-matter of the contract to be purchased (as described in the technical specifications).

  The technical specifications define the level of performance required (e.g. accessibility standards in the technical specifications). But the contracting authority can decide that any product/service performing better than the minimum level can be granted extra points at the award stage. For example, when a reference is made to a standard on accessibility, for example to the web as in the case of standard **UNE 139803**

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75 For further details of the conditions set out below, see the next section 'Conditions applicable to award criteria in tender evaluation' Please see also Recitals 1 and 2 of the Directive 2004/18/EC and Recitals 1 and 9 of the Directive 2004/17/EC;

76 For contracts awarded on the basis of the lowest price, the failure to take into account other award criteria (such as quality or social considerations) can to a certain extent be compensated by including high quality standards in the technical specifications for the contract (so that only offers complying with all the qualitative standards in the technical specifications will be taken into consideration at the award stage) or by including social considerations (depending on their nature) in the technical specifications (if such considerations are linked to the subject-matter of the contract) or in the contract performance clauses (if they are only linked to performance of the contract).

77 Recital 46 and Article 53 of Directive 2004/18/EC.

'Requisitos de accesibilidad para contenidos Web' (Spain), it is possible to comply at three levels — A, AA or AAA. Extra points could be given to the bid achieving the highest level.

- They allow the tenders to be assessed on the basis of their economic and qualitative criteria as a whole in order to determine which offers the best value for money[78]. In practice, this means that it is not necessary for each individual award criterion to give an economic advantage to the contracting authority, but that taken together the award criteria (i.e. economic plus social) must allow the authority to identify the bid offering the best value for money.

[78] See recital 46 of Directive 2004/18/EC and recital 55 of Directive 2004/17/EC.

What's permitted — examples

- In a contract for the procurement of care for persons with disabilities, the award criteria may take into account requirements relating to meeting the specific needs of each category of user (e.g. personalisation of the service depending on the age, gender or social difficulties of the users, etc.).

- In a contract for the procurement of recruitment tests and services for the public sector, the contracting authority can ask the tenderers to ensure that recruitment tests and services are designed and carried out in a way that ensures equal opportunities for all participants, irrespective of their age, gender and ethnic or religious background.

- In a contract for the procurement of software or hardware, an award criterion may be included that relates the number of points awarded to the levels of accessibility or specific accessibility features proposed for various groups of persons with disabilities. This includes, for example, whether the product or service is accessible for partially-sighted persons or blind people, for the hard of hearing or deaf, for persons with intellectual disabilities, or those with mobility and dexterity impairments, etc.

What's <u>not</u> permitted — examples

- Using award criteria relating to local purchases of equipment by the contractor (for example, in a contract for construction of a hospital) in order to stimulate creation of new jobs on the local market. First of all, any such criterion is not linked to the subject-matter of the contract (construction of the hospital). Secondly, this criterion is also discriminatory, because it gives tenderers that buy their equipment on the local market an undue advantage over other tenderers who buy from elsewhere.

- Using award criteria introduced at the last moment and not included in the tender documents.

- Using award criteria that may grant undue discretion to the contracting authority. For example, in a contract for IT equipment, an award criterion specifying that tenderers may receive between 1 and 20 points for the technical merits of the accessibility of the proposed products, without indicating the parameters or characteristics that the contracting authority will take into account to determine the exact number of points to be granted in each case, may give the contracting authority undue discretion for evaluation of the technical merits of the tenders.

1.1. Conditions applicable to award criteria in tender evaluation

The Procurement Directives explicitly allow social considerations to be included in award criteria. This legislation builds on CJEU case-law. The basic rule on social award criteria is derived from cases C-513/99 (Concordia Bus) and C-448/01 (Wienstrom) and from the

Procurement Directives, which specifically refer to this ruling in their first recital. All award criteria should meet the four conditions mentioned at the start of section C 1 above[79].

(a) Award criteria must be linked to the subject-matter of the contract

This is essential. It ensures that award criteria relate to the needs of the contracting authority, as defined in the subject-matter of the contract. In its judgment in the 'Wienstrom case'[80] the CJEU provided further information on how the link with the subject of the contract should be interpreted.

Examples:

Wienstrom case: In this case the CJEU ruled that in a tender for energy supply, a criterion relating solely to the amount of electricity produced from renewable sources in excess of the expected consumption of the contracting authority (which was the subject of the contract) could not be considered to be linked to the subject-matter of the contract. To establish such a link to the subject-matter of the contract, the criterion relating to the amount of electricity produced from renewable sources should have concerned only the electricity effectively supplied to the contracting authority.

Works contract: In the case of a contract incorporating social considerations, in a construction contract where the subject-matter of the contract consists of building a school, an award criterion based on how much money the contractor would transfer to the local community outside the contract is not legally permissible, as it would not be linked to the subject-matter of the contract.

(b) Award criteria must be specific and objectively quantifiable

The CJEU ruled that, based on its previous judgments, award criteria must never confer unrestricted freedom of choice on contracting authorities. They must restrict this freedom of choice by setting specific, product-related and measurable criteria or, as the CJEU put it, 'adequately specific and objectively quantifiable' criteria. The CJEU provided further clarification in the Wienstrom and Concordia Bus cases[81].

Examples:

The lack of clarity and objectivity of the award criteria in the Wienstrom case:

In the Wienstrom case the CJEU found that, in order to give tenderers equal

[79] CJEU judgment in case C-513/99. This judgement concerns environmental award criteria, but the same principles may be applied, *mutatis mutandis* to social award criteria in public procurement.

[80] CJEU judgment in case C-448/01.

[81] Both these cases concern environmental award criteria, but the principles deriving from these judgments may be applied *mutatis mutandis* to social award criteria.

opportunities when formulating the terms of their tenders, the contracting authority has to formulate its award criteria in such a way that 'all reasonably well-informed tenderers of normal diligence interpret them in the same way'[82]. Another aspect of the necessary clarity and measurability of the award criteria, as formulated by the CJEU, was that the contracting authority can only set criteria against which the information provided by the tenderers can actually be verified.

The specificity and measurability of the award criteria in the Concordia Bus case:

In the Concordia Bus case, before evaluation of the tenders, the Community of Helsinki had decided and published a system for awarding extra points for certain noise and emission levels[83]. The CJEU considered this system CJEU adequately specific and measurable.

(c) Award criteria must have been publicised previously

The Procurement Directives stipulate that contract notices must mention whether the contracting authority will award the contract on the basis of the 'lowest price' or the 'most economically advantageous tender'. The criteria used to identify the most economically advantageous tender must be mentioned in the notice or, at least, in the tender documents.

(d) Award criteria must comply with EU law (including the fundamental principles of the TFEU)

The last condition derived from the TFEU and the Procurement Directives is that award criteria must comply with all the fundamental principles of EU law.

The CJEU has explicitly stressed the importance of the principle of non-discrimination, which is the basis of other principles, such as the freedom to provide services and freedom of establishment. The issue of discrimination was expressly raised in the Concordia Bus case[84].

Example:

One of the objections of Concordia Bus was that the criteria set by the Community of Helsinki were discriminatory because the Community's own bus company HKL was the only company with gas-powered vehicles that could comply with the emission levels set. The CJEU ruled that the fact that one of a set of various award criteria imposed by the contracting authority could only be met by a small number of companies did not in itself make this discriminatory. Therefore, when determining whether there has been

82 In this case, the contracting authority did not determine the specific period for which the tenderers should state the amount that they could supply.

83 In this case, extra points were awarded, among other things, for 'use of buses with nitrogen oxide emissions below 4 g/kWh (+ 2.5 points/bus) or below 2 g/kWh (+ 3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus)'.

84 CJEU judgment in case C-513/99.

discrimination, all the facts of the case must be taken into account.

1.2 The 'additional criterion'

In case C-225/98 the CJEU held that contracting authorities can award a contract on the basis of a condition related to eg combating unemployment, provided this condition is in line with all the fundamental principles of EU law, **but only where the authorities had to consider two or more equivalent tenders**. The Member State in question regarded this condition as **an additional, non-determining criterion** and considered it only after tenders had been compared on the basis of the other award criteria. Finally, the CJEU stated that application of the award criterion regarding combating unemployment must have no direct or indirect impact on those submitting bids from other EU Member States and must be explicitly mentioned in the contract notice, so that potential contractors were able to know that such a condition existed.

Therefore, a criterion regarding combating unemployment (and other criteria which are not linked to the subject-matter of the contract) can be taken into account at the award stage only as 'an additional criterion' in order to choose between two equivalent tenders. All other award criteria (other than the additional criterion) must be linked to the subject-matter of the contract, as the CJEU ruled in 2001 in the 'Wienstrom case'[85] (see above).

2. Dealing with 'abnormally low bids'

Under the Procurement Directives, if contracting authorities consider a tender to be abnormally low, they must ask for explanations before they can reject it. The Directives state that these explanations may also refer (amongst other factors) to compliance with the 'provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed'[86]. Thus, the Procurement Directives specifically link the issue of abnormally low tenders with the issues of employment protection and working conditions. Some practices, including ignoring working conditions that are legally required, may give rise to *unfair* competition.

Examples:

France: The Ville d'Angers noticed that in the cleaning sector workers have tough work schedules. Thus an offer which is economically extremely attractive because it proposes a lower number of workers than is appropriate to the surface area to be cleaned, based on average ratios, will be considered abnormally low and rejected if the bidder is unable to explain how he will be able to guarantee such a low price without infringing any applicable laws (such as laws regarding the maximum number of working hours per day).

The Procurement Directives set out the procedures that the contracting authority must adopt before rejecting a tender on the ground that it is abnormally low[87]. Each case should be treated

[85] CJEU judgment in case C-448/01.

[86] Article 55(1)(d) of Directive 2004/18/EC and Article 57(1)(d) of Directive 2004/17/EC.

[87] Article 55 of Directive 2004/18/EC and Article 57 of Directive 2004/17/EC.

on its merits; there should be no automatic exclusion; tenderers should have an opportunity to rebut the case against them; and the condition of non-discrimination must be complied with.

What's permitted — an example

A tenderer may be excluded if the enquiry carried out in accordance with the above-mentioned rules of the Procurement Directives[88] finds the tender abnormally low as a consequence of non-compliance by the tenderer with the applicable rules regarding employment protection, payment of social contributions or of additional working hours, safety at work or prohibition of clandestine employment.

What's <u>not</u> permitted — an example

The contracting authority may not impose complete and automatic exclusion of any tender that falls below a specified proportion (e.g. 80%) of the average price of all tenders received.

The contracting authority can ask in writing for details that it considers relevant to being able to assess an abnormally low bid. These can relate to employment protection and working conditions. This does not appear to be restricted to requesting such details from the tenderer alone. In the case of working conditions, for example, it might be appropriate to request information from trade unions. Where the contracting authority does obtain information from other sources, however, the Procurement Directives require the contracting authority to 'verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.' The practical rules regarding such verification by the contracting authority are governed by national law, it being understood that such rules must permit the tenderer to present his position.

If the enquiry finds that the offer appears abnormally low, the contracting authority may reject it (although the Procurement Directives place no obligation on it to do so). However, in Member States that have adopted legislation to this effect, contracting authorities can nevertheless be under an obligation to reject such tenders.

3. Debriefing unsuccessful bidders

The contracting authority must provide feedback to bidders once the contract has been awarded. This can be a useful opportunity to engage with unsuccessful bidders in general and concerning the policies of the contracting authority regarding social issues in particular. If the bidder was unsuccessful in part because of failure to meet social criteria, details can be given of what the bidder might do in order to be more successful in future.

[88] Article 55 of Directive 2004/18/EC and Article 57 of Directive 2004/17/EC.

Awarding the contract: tender evaluation —

IN A NUTSHELL

Establish award criteria: where the criterion of the 'most economically advantageous tender' is chosen, relevant social criteria may be inserted either as a benchmark to compare socially responsible offers with each other or as a way of introducing a social element and giving it a certain weighting.

Social (and also economic or environmental) award criteria must:

- be linked to the subject-matter of the contract;
- not confer unrestricted freedom of choice on the contracting authority;
- be expressly mentioned in the contract notice and tender documents;
- be consistent with EU law (including the fundamental principles of the TFEU: transparency, equal treatment and non-discrimination);
- help identify the bid offering the best value for money for the contracting authority; and
- be consistent with the relevant rules of the Procurement Directives.

Consider whether the bid is 'abnormally low' because the tenderer is breaching social standards.

D) CONTRACT PERFORMANCE

The first thing which must be said is that public procurement contracts must always be performed in compliance with all the mandatory rules which are applicable, including the social and health regulations. If, in addition, the contracting authority wishes a contractor to achieve additional social objectives[89], it can use contract performance clauses to this end.

Contract performance clauses set out how the contract should be performed. Social considerations may be included in the contract performance clauses, provided (i) they are linked to performance of the contract, (ii) they are published in the contract notice and (iii) they comply with EU law (including the general principles of the TFEU).

1. Rules governing contract performance clauses

Contract performance clauses 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. Bids from tenderers who have not accepted any such conditions would not comply with the contract documents and could not therefore be accepted[90]. However, the conditions of contract need not be met at the time of submitting the tender.

Writing the required social standards into the contract will make the public authority's expectations clear. A rigorous approach during the planning and tendering phases will make it easier to state these intentions in specific terms, which can influence performance management.

Although contract performance clauses should neither play a role in determining which tenderer gets the contract nor be disguised technical specifications, award criteria or selection criteria, it is permissible to set additional conditions of contract, which are separate from the specifications, selection criteria and award criteria[91]. These can include social and environmental conditions. So, if the contracting authority wishes a contractor to achieve social goals that are not related to the specifications, it can set additional conditions of contract. These relate to performance of the contract only.

Tenderers must prove that their bids meet the technical specifications, but proof of compliance with contract performance clauses should not be requested during the procurement procedure.

In addition, contract performance clauses must:

– <u>be linked to performance of the contract</u>

  This means that the contract performance clauses must be linked to the tasks which are necessary to produce the goods/provide the services/execute the works put out to

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89 i.e. objectives that go beyond those set by the applicable mandatory legislation and that do not relate to the technical specifications, the selection criteria or the award criteria.

90 The CJEU judgment of 22 June 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 Procurement Directives.

91 Beentjes case, CJEU judgment in case 31/87.

tender. A condition would not be linked to 'performance' of the contract if, for example:

- it requires the contractor to hire a set proportion of workers with disabilities on another contract[92] or would restrict what the contractor is allowed to do on another contract;

- it requires the contractor to contribute financially to eg building a centre for disadvantaged people;

- it requires the contractor in a works contract to provide crèche services for staff's children. Such services are not related to tasks necessary for the performance of the works. If the contracting authority wishes to procure such services, it should also put them out to tender.

– be published in the contract notice

Even though contract performance clauses are considered to be outside the procedure for awarding contracts, they still need to be set out clearly in the call for tenders. Tenderers should be aware of all the obligations laid down in the contract and be able to reflect this in their prices[93]. The winning bidder must honour the commitments made in his bid on meeting the conditions of contract.

– comply with EU law (including the fundamental principles of the TFEU)

For instance, the conditions of contract must not put at an unfair disadvantage potential contractors from another state or, more generally, lead to unequal treatment between potential bidders. It is equally important, however, that the conditions of contract also comply with EU law in general, including EU social law.

Finally, public procurement contracts should, in any event, be performed in compliance with all applicable rules, including social, labour and health regulations.

2. Examples of social considerations that may be included in the contract performance clauses

The recitals in Directive 2004/18/EC (with minor differences in Directive 2004/17/EC)[94] give examples of social considerations that may be included in contract performance clauses:

'They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment .... to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions[95] ... and to recruit more handicapped persons ....'

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92 However, a requirement to hire a set proportion of workers with disabilities for performance of the contract in question (and not for another contract) would be linked to performance of the contract in question.

93 Article 26 of Directive 2004/18/EC and Article 38 of Directive 2004/17/EC.

94 Recital 33 of Directive 2004/18/EC and recital 44 of Directive 2004/17/EC.

95 The basic ILO Conventions referred to in the Procurement Directives are the eight core ILO Conventions which have been ratified by all Member States (see footnote 11 for further details).

Contract performance clauses are generally the most appropriate stage of the procedure to include social considerations relating to employment and labour conditions of the workers involved in performance of the contract[96].

The Commission's interpretative Communication of 2001 states that 'Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations' and lists 'some examples of additional specific conditions which a contracting authority might impose on the successful tenderer'. These are:

- 'The obligation to recruit unemployed persons, or to set up training programmes for the execution 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, or provide equal access to persons with disabilities;
- The obligation to comply, during the execution of the contract, with fundamental human rights (such as the prohibition of forced and child labour) guaranteed by the ILO core conventions, 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 persons with disabilities 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.'

Public contracts for works and services, in 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 contract performance clauses. It would appear more difficult to envisage contractual clauses relating to the manner in which supply contracts are performed, since 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.

[96] As pointed out in the previous sections, labour conditions of the workers involved in performance of the contract are not technical specifications or selection criteria within the meaning of the Procurement Directives. In addition, given that such social considerations are difficult to link to the subject-matter of the contract, it would generally not be possible to include them in the award criteria for the contract (except as an 'additional criterion' to make the difference between two equal tenders, as accepted by the CJEU in case C-225/98 and as explained in the section 'Awarding the contract').

Other examples:

Sweden: Construction contracts awarded by the National Road Administration contain a standard clause placing an obligation on the contractors to comply with certain (core ILO) conventions when performing contracts in Sweden. The same clause requires the contractor to comply with certain reporting requirements designed to verify that goods and products used in performance of the contract have been produced in a safe environment in accordance with the rules of the conventions mentioned. Goods found to be in conflict with this provision must be replaced at the contractor's expense. The contractor must ensure that subcontractors abide by the same obligations. A penalty is payable for any breach of these social obligations of the contractor.

UK: In 2004 Transport for London (TfL) put together a five-year £10 billion investment programme to fund large-scale construction projects in London, including an extension to the East London Line railway. Equality and inclusion were regarded as being at the heart of that programme and integral to procurement contracts. The East London Line Project (ELLP) was valued at £500 million for the main works and £350 million for the rolling stock and train servicing.

The strategy for the project set an objective of using the improved transport links to stimulate economic regeneration in areas surrounding the extension, which include some of the most deprived areas of London. These areas are home to a number of culturally and economically diverse communities, facing high levels of unemployment and social exclusion. There was also a need to foster positive community relations during the construction phase to minimise the impact of construction activity and create a positive environment for operation of the new railway. In the light of these circumstances, equality and inclusion were identified as two key social objectives. TfL therefore introduced a set of requirements for bidders to be implemented during the execution of the project: an equality policy for the project, a diversity training plan for staff working on the project and a supplier diversity plan (in order to ensure that diverse suppliers were able to bid for subcontracting opportunities arising from the project). These requirements were incorporated in the invitation to tender and in the conditions of contract.

Incorporation of social requirements into terms and conditions of contract should be balanced against the possibility, in practice, of monitoring compliance with these requirements during performance of the contract, in order not to add extra requirements which cannot (or will not) be monitored effectively. This implies contract management and compliance monitoring.

3. Compliance with national employment legal framework

Both Procurement Directives[97] make it clear that 'the laws, regulations and collective agreements, at both national and EU level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing such rules, and the way they are applied, comply with EU law[98].'

[97] Recital 34 of Directive 2004/18/EC and recital 45 of Directive 2004/17/EC.

[98] One example of such compliance with EU law is the need to comply with the requirements of Directive 96/71/EC, on posting of workers, in public procurement involving cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract.

Some examples of the way that Member States have approached this issue have been controversial internally in Member States. One example is the Rüffert case[99].

It must be pointed out that, although this judgment was rendered in the context of a public procurement contract, it has no implications for the possibilities offered by the Procurement Directives to take account of social considerations in public procurement. It only clarifies that social considerations (in public procurement) regarding posted workers must also comply with EU law, in particular with the Directive on the posting of workers[100].

Example:

Posted workers in the EU: the Rüffert case

The Law of Niedersachsen (the *Land* of Lower Saxony) on the award of public contracts stated, amongst other things, that public works contracts may be awarded only to contractors who undertake in writing to pay their employees at least the remuneration stipulated by the applicable (regional) collective agreement. The contractor must also undertake to impose the same obligation on subcontractors and to check that they comply with it. Non-compliance with that undertaking was triggering the payment of a contractual penalty.

The legality of these provisions was challenged before a regional German court in relation to the execution of a works contract between a German contracting authority and the company Objekt und Bauregie (O&B) to build the Göttingen-Rosdorf prison. The contracting authority had terminated the contract and sued O&B for payment of a contractual penalty, because it was found that the Polish subcontractor of O&B was paying its workers employed on the building site in Germany only 46.57% of the minimum wage stipulated by the applicable collective agreement.

Uncertain as to the lawfulness of the provision laying down a contractual penalty, the German regional court referred the issue to the CJEU for a preliminary ruling on interpretation of the EU law aspects relevant to this case.

The CJEU stated that the collective agreement had not been declared universally applicable (although Germany had a system for declaring collective agreements to be of universal application) and covered only part of the construction sector, since the relevant law making the 'Buildings and public works' collective agreement binding applied only to public contracts and not to private contracts. Therefore, the minimum wage provided for by the 'Buildings and public works' collective agreement was not set in accordance with one of the procedures laid down by Article 3 of Directive 96/71/EC concerning the posting of workers ("**Directive on the Posting of Workers**") [101].

In conclusion, the Court of Justice's judgment on the Rüffert case found the provisions in question incompatible with the Directive on Posting of Workers.

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99 CJEU judgment in case C-346/06 (Dirk Rüffert v. Land Niedersachsen).

100 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

101 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

The Procurement Directives provide that contracting authorities may address employment protection in the tendering process in two specific ways:

Firstly, contracting authorities may state in the contract documents where tenderers may obtain information on the obligations relating to employment protection and working conditions which are in force in the Member State, region or locality where the works are to be carried out or the service is to be provided[102].

Secondly, any contracting authority that supplies this information should request the tenderers to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection[103] and working conditions which are in force in the place where the works are to be carried out or the service is to be provided[104]. The purpose of this is linked to the fear that contractors might seek to reduce their levels of employment protection in order to be able to submit a lower bid.

4. Supply-chain management

Contracting authorities may also include in the contract performance clauses social considerations for subcontractors regarding, for example, prohibition of child and forced labour, health and safety requirements, minimum wage obligations, social security requirements and more generally decent work standards. Some contracting authorities have also begun to include clauses requiring subcontractors to comply with prohibitions on child and forced labour, in cases where the supply chain is likely to involve production or processing where these problems occur.

Example:

Ville de Paris: The clothing office of Paris city council has to provide clothing for its 29 000 employees. This office manages 300 000 articles of clothing and 300 orders per year. It has integrated social and environmental considerations into its purchasing procedures. In line with its social commitments, Paris city council asks its suppliers to sign a declaration committing themselves to respect certain fundamental rights at work (which include an explicit reference to the minimum age of workers), such as those defined by the International Labour Organisation, during performance of the contract. Paris city council also requires its suppliers to be subject to checks by an independent body designated by the city council and to implement any recommendations made as a result of these checks.

This has particular implications for dealings in and with countries outside the EU. For instance, public procurement authorities are increasingly concerned about the legality and sustainability of timber, especially when it is imported from third countries facing particular difficulties in this area. It is increasingly recognised that legal and sustainable forestry includes not only economic and environmental criteria, but also social criteria (such as decent wages and working, health and safety conditions, and respect for the tenure and use rights of local and indigenous communities).

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[102] Article 27(1) of Directive 2004/18/EC.

[103] Including that such provisions must comply with all relevant EU law.

[104] Article 27(2) of Directive 2004/18/EC.

When such requirements are also imposed on subcontractors, contracting authorities should ask the main contractor to provide proof of compliance, either by reference to specific certification schemes (where such schemes exist) or by any other reliable means[105].

For example, in the field of forestry, several certification schemes have been developed to provide independent verification that a timber source meets a certain standard of sustainability (including environmental and social criteria). Nevertheless, such schemes are not to be considered the exclusive means of proof for sustainable timber as other equivalent forms of evidence have to be accepted too.

5. Contract management and compliance monitoring

The performance management system will set the terms for assessing performance and taking action. This could mean rewarding contractors for good performance, addressing under-performance or working together to enhance delivery. Key performance indicators translate objectives into measurable targets and stipulate what would constitute an acceptable performance level. Monitoring arrangements should ensure that the right performance data are gathered and that they are analysed effectively. The payment conditions (which should be specified in the contract) provide the basis for ensuring that the contractor delivers to the required standard. They can provide financial disincentives for poor performance and incentives for exceeding baseline targets. These financial conditions must have been published in the contract notice.

The impetus for service improvement could come from poor key performance indicator results or from a sense that, while targets are being achieved, there is scope to do even better. Either way, the contractor and client should understand what is creating the current performance levels and agree on how to improve results. Persistent failure by the contractor should lead to invoking the breach of contract conditions, though any action taken must be reasonable. Equally, the analysis might lead to contractual variations, redesign of the service or innovation.

Example:

UK: To improve hospital catering services for the Northern Ireland Health Authority, the caterer contracted conducts an annual patient satisfaction survey and analyses the data by age, ethnic origin and gender. The Authority has also initiated an assessment of the meals service following press reports of malnutrition in geriatric wards. The combined evidence triggered contractual variations to improve the service to the geriatric ward by helping to feed patients.

A ‘partnering culture’ should underpin contract management. Clients and contractors can manage risks and achieve the best outcomes only with the aid of imaginative and committed teamwork. In general, the best contractors respond well in such relationships, voluntarily

[105] Contracting authorities should always permit contractors to submit alternative means of proof (such as certificates issued by a public authority or by third parties, third-party audit reports, copies of the employment contracts, copies of all relevant documents, evidence of monitoring visits, etc.). However, the contracting authority may require additional proof if the initial evidence submitted by the contractor appears (in the circumstances of the case) insufficient or unreliable.

taking on additional commitments, such as: basic skills programmes, environmental innovation, or supporting small firms along their supply chain.

Example:

France: Public institutions responsible for social inclusion have been instrumental in implementing the social clauses in procurement contracts, for example by providing facilitators helping successful bidders to manage the workforce involved in an insertion path, and can also act as certifiers of social compliance. For instance, the *Agglomération de Rouen* used money from the EU Social Fund to co-finance hiring a project manager responsible for implementation of the social insertion clauses in the different procurement contracts concluded. The Municipality of Arles chose to hire a specialised legal adviser to draft and manage procurement documents containing social clauses.

Contract conditions, contract management and contract monitoring —

IN A NUTSHELL

Contract performance clauses are generally the most appropriate stage of the procedure for including social considerations relating to employment and the labour conditions of the workers involved in performance of the contract.

Make sure the contract performance clauses are:

- linked to performance of the contract;
- consistent with achieving the best value for money;
- included in the tender documentation; and
- compatible with EU law (including the fundamental principles of the TFEU).

Ensure that compliance with the conditions of contract can be monitored effectively.

Work in partnership with the supplier to manage performance and maximise achievement of objectives and compliance with conditions of contract.

Maintain appropriate records on the performance of suppliers, contractors and service-providers.

Use variance clauses to envisage changes that may be required to the contract over time, provided these are compatible with the provisions of the Procurement Directives and with the principle of transparency.

Work with suppliers for continuous improvement — on a voluntary basis — and keep up to date with developments on the market generally. In particular, work with suppliers to facilitate compliance with the principles of decent work and corporate social responsibility all along the supply chain.

COMMISSION REGULATION (EC) No 2204/2002
of 12 December 2002
on the application of Articles 87 and 88 of the EC Treaty to State aid for employment

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [1], and in particular point (a)(iv) and point (b) of Article 1(1) thereof,

Having published a draft of this Regulation [2],

Having consulted the Advisory Committee on State Aid,

Whereas:

(1) Regulation (EC) No 994/98 empowers the Commission to declare, in accordance with Article 87 of the Treaty, that under certain conditions aid for employment is compatible with the common market and not subject to the notification requirement of Article 88(3) of the Treaty.

(2) Regulation (EC) No 994/98 also empowers the Commission to declare, in accordance with Article 87 of the Treaty, that aid that complies with the map approved by the Commission for each Member State for the grant of regional aid is compatible with the common market and is not subject to the notification requirement of Article 88(3) of the Treaty.

(3) The Commission has applied Articles 87 and 88 of the Treaty to employment aid in and outside assisted areas in numerous decisions and has also stated its policy, in the guidelines on aid to employment [3], in the notice on monitoring of State aid and reduction of labour costs [4], in the guidelines on national regional aid [5] and in Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises [6]. In the light of the Commissions experience in applying those provisions, it is appropriate, with a view to ensuring efficient supervision and simplifying administration without weakening Commission monitoring, that the Commission should make use of the powers conferred by Regulation (EC) No 994/98.

(4) This Regulation is without prejudice to the possibility for Member States to notify aid for employment. Such notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation, in Regulation (EC) No 70/2001 or in accordance with any relevant Community guidelines or frameworks. This is currently the case for the sector of maritime transport. The guidelines on State aid for employment [7] cease to apply from the date of entry into force of this Regulation, as do the notice on monitoring of State aid and reduction of labour costs and the notice on an accelerated procedure for processing notifications of employment aid [8]. Notifications pending at the entry into force of this Regulation will be assessed in accordance with its provisions. It is appropriate to lay down transitional provisions concerning the application of this Regulation to employment aid granted before its entry into force and in breach of the obligation in Article 88(3) of the Treaty.

(5) The promotion of employment is a central aim for the economic and social policies of the Community and of its Member States. The Community has developed a European employment strategy in order to promote this objective. Unemployment remains a significant problem in some parts of the Community, and certain categories of worker still find particular difficulty in entering the labour market. For this reason there is a justification for public authorities to apply measures providing incentives to enterprises to increase their levels of employment, in particular of workers from these disadvantaged categories.

(6) This Regulation applies only to employment measures which fulfil all the conditions of Article 87(1) of the Treaty and thus constitute State aid. A number of employment policy measures do not constitute State aid within the meaning of Article 87(1) because they constitute aid to individuals that does not favour certain undertakings or the production of certain goods, or because they do not affect trade between Member States or because they are general measures to promote employment which do not distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Such general measures, which may include general reduction of the taxation of labour and social costs, boosting investment in general education and training, measures to provide guidance and counselling, general assistance and training for the

[1] OJ L 142, 14.5.1998, p. 1.
[2] OJ C 88, 12.4.2002, p. 2.
[3] OJ C 334, 12.12.1995, p. 4.
[4] OJ C 1, 3.1.1997, p. 10.
[5] OJ C 74, 10.3.1998, p. 9.
[6] OJ L 10, 13.1.2001, p. 33.
[7] OJ C 371, 23.12.2000, p. 12.
[8] OJ C 218, 27.7.1996, p. 4.

unemployed and improvements in labour law are therefore unaffected by this Regulation. This is also the case of measures which are deemed not to meet all the criteria of Article 87(1) of the Treaty and therefore do not fall under the notification requirement of Article 88(3) of the Treaty by virtue of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid [1].

(7) Having regard to those considerations, the purpose and effect of the aid exempted by this Regulation should be to promote employment in accordance with the European employment strategy, in particular of workers from disadvantaged categories, without adversely affect trading conditions to an extent contrary to the common interest. Employment aid granted to a firm on an individual basis may have a major impact on competition in the relevant market because it favours that firm over others which have not received such aid. By being granted only to a single firm, such aid is likely to have only a limited effect on employment. For this reason individual awards of employment aid should continue to be notified to the Commission, and this Regulation should exempt aid only if given in the form of schemes.

(8) This Regulation should exempt any aid granted under a scheme that meets all the relevant requirements of this Regulation. With a view to ensuring efficient supervision and simplifying administration without weakening Commission monitoring, aid schemes should contain an express reference to this Regulation.

(9) This Regulation should not exempt from notification State aid in the shipbuilding and coal-mining sectors, for which special rules are laid down in, respectively, Council Regulation (EC) No 1540/98 [2] and Council Regulation (EC) No 1407/2002 [3].

(10) This Regulation should apply in the transport sector. However, having regard to the particular characteristics of competition in that sector, it is not appropriate to exempt aid for the creation of employment.

(11) The Commission has a consistently less favourable view of aid targeted at particular sectors, including, but not limited to, sensitive sectors experiencing overcapacity or crisis. Aid schemes which are targeted at specific sectors should not therefore be covered by the exemption from notification provided by this Regulation.

(12) In accordance with the established practice of the Commission, and with a view to better ensuring that aid is proportionate and limited to the amount necessary, thresholds should be expressed in terms of aid intensities in relation to a set of eligible costs, rather than in terms of maximum aid amounts.

(13) In order to determine whether or not aid is compatible with the common market pursuant to this Regulation, it is necessary to take into consideration the aid intensity and thus the aid amount expressed as a grant equivalent. The calculation of the grant equivalent of aid payable in several instalments and aid in the form of a soft loan requires the use of market interest rates prevailing at the time of grant. With a view to a uniform, transparent, and simple application of the State aid rules, the market rates for the purposes of this Regulation should be deemed to be the reference rates, provided that, in the case of a soft loan, the loan is backed by normal security and does not involve abnormal risk. The reference rates should be those which are periodically fixed by the Commission on the basis of objective criteria and published in the *Official Journal of the European Communities* and on the Internet.

(14) Having regard to the differences between enterprises of different sizes, different ceilings of aid intensity for the creation of employment should be set for small and medium sized enterprises and large enterprises. In order to eliminate differences that might give rise to distortions of competition, in order to facilitate coordination between different Community and national initiatives, and for reasons of administrative clarity and legal certainty, the definition of 'small and medium-sized enterprises' (SMEs) used in this Regulation should be that laid down in Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises [4]. That definition was also used in Regulation (EC) No 70/2001.

(15) The ceilings of aid intensity should be fixed, in the light of the Commissions experience, at a level that strikes the appropriate balance between minimising distortions of competition and the objective of promoting employment. In the interests of coherence, the ceilings should be harmonised with those fixed in the guidelines on national regional aid and in Regulation (EC) No 70/2001, which allowed aid to be calculated by reference to the creation of employment linked to investment projects.

[1] OJ L 10, 13.1.2001, p. 30.
[2] OJ L 202, 18.7.1998, p. 1.
[3] OJ L 205, 2.8.2002, p. 1.
[4] OJ L 107, 30.4.1996, p. 4.

(16) Employment costs form part of the normal operating costs of any enterprise. It is therefore particularly important that aid should have a positive effect on employment and should not merely enable enterprises to reduce costs which they would otherwise bear.

(17) Without rigorous controls and strict limits, employment aid can have harmful effects which cancel out its immediate effects on job creation. If the aid is used to protect firms exposed to intra-Community competition, it could have the effect of delaying adjustments needed to ensure the competitiveness of Community industry. In the absence of rigorous controls, such aid may be concentrated in the most prosperous regions, contrary to the objective of economic and social cohesion. Within the single market, aid granted to reduce costs of employment can lead to distortions of intra-Community competition and deflections in the allocation of resources and mobile investment, to the shifting of unemployment from one country to another, and to relocation.

(18) Aid to create jobs should be subject to the condition that the created job should be maintained for a certain minimum period. The period set in this regulation should override the five-year rule set out in point 4.14 of the guidelines on national regional aid.

(19) Aid to maintain jobs, meaning financial support given to a firm to persuade it not to lay off its workers, is similar to operating aid. Subject to any sectoral rules, therefore, such as those which exist in the sector of maritime transport, it should be authorised only in specific circumstances and for a limited period. It should continue to be notified to the Commission and should not be covered by the exemption from such notification provided by this Regulation. The limited circumstances in which it can be authorised include those where, in accordance with Article 87(2)(b) of the Treaty, it is intended to make good the damage caused by natural disasters or exceptional occurrences; another instance is under the conditions applying to operating aid in the guidelines on national regional aid, in regions eligible for the derogation under Article 87(3)(a) of the Treaty concerning the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, including ultra-peripheral regions; a third instance is where such aid is granted in the context of the rescue and restructuring of a company in difficulty, in accordance with the provisions of the relevant Community guidelines [1].

(20) A particular type of aid is aid granted to employers for the conversion of temporary or fixed-term employment contracts into contracts of indeterminate duration. Such measures should not be covered by the exemption from such notification provided by this Regulation and should be notified so that the Commission can determine whether they have positive employment effects. It should in particular be ensured that such measures do not allow the employment to be aided both at the creation of the post and at the conversion of the contract, in such a way that the ceiling for aid for initial investment or for creation of employment is exceeded.

(21) Small and medium-sized enterprises play a decisive role in job creation. At the same time, their size may present a handicap to the creation of new employment because of the risks and administrative burden involved in the recruitment of new personnel. Similarly, job creation can contribute to the economic development of less favoured regions in the Community and thus improve economic and social cohesion. Enterprises in those regions suffer from the structural disadvantage of the location. It is therefore appropriate that small and medium-sized enterprises, and enterprises in assisted regions, should be able to benefit from aid to create employment.

(22) Large firms in non-assisted areas do not suffer from particular difficulties and employment costs are part of their normal operating expenses. For this reason, and in order to maximise the incentive effect of aid to create jobs in SMEs and in regions eligible for the derogations under Article 87(3)(a) and (c) of the Treaty, large firms in regions not eligible for these derogations should not be eligible for aid to create employment.

(23) Certain categories of worker experience particular difficulty in finding work, because employers consider them to be less productive. This perceived lower productivity may be due either to lack of recent experience of employment (for example, young workers, long-term unemployed) or to permanent handicap. Employment aid intended to encourage firms to recruit such individuals is justified by the fact that the lower productivity of these workers reduces the financial advantage

[1] OJ C 288, 9.10.1999, p. 2.

accruing to the firm and by the fact that the workers also benefit from the measure and are likely to be excluded from the labour market unless employers are offered such incentives. It is therefore appropriate to allow schemes providing such aid, whatever the size or location of the beneficiary.

(24) The categories of worker considered to be disadvantaged should be defined, but it should be possible for Member States to notify aid to promote the recruitment of other categories they consider to be disadvantaged, with supporting arguments.

(25) Workers with a disability may need permanent help to enable them to remain in the labour market, going beyond aid for initial recruitment and possibly including participation in sheltered employment. Schemes providing aid for such purposes should be exempted from notification provided that the aid can be shown to be no more than necessary to compensate for the lower productivity of the workers concerned, the ancillary costs of employing them or the costs of establishing or maintaining sheltered employment. This condition is designed to prevent enterprises benefiting from such aid from selling below competitive prices in markets also served by other enterprises.

(26) This Regulation should not prevent the cumulation of aid for the recruitment of disadvantaged workers or for the recruitment or employment of disabled workers with other aid granted in respect of employment costs, since in such cases it is legitimate to provide an incentive for workers from these categories to be employed in preference to others.

(27) In order to ensure that the aid is necessary and acts as an incentive to employment, this Regulation should not exempt aid for the creation of employment or for recruitment which the beneficiary would already undertake under market conditions alone.

(28) This Regulation should not exempt aid for the creation of employment where this is cumulated with other State aid, including aid granted by national, regional or local authorities, or with Community assistance, in relation to the same eligible costs or to the costs of investments to which the employment concerned is linked, when such cumulation exceeds the thresholds fixed in this Regulation or in the Community rules on State aid for investment, in particular the Guidelines on national regional aid and Regulation (EC) No 70/2001. The only exceptions to this principle should be for aid for the recruitment of disadvantaged workers or for the recruitment or employment of disabled workers.

(29) It is appropriate that large amounts of aid should remain subject to an individual assessment by the Commission before they are put into effect. Accordingly, aid amounts exceeding a fixed amount over a certain period to a single enterprise or establishment are excluded from the exemption provided for in this Regulation and remain subject to the requirements of Article 88(3) of the Treaty.

(30) Aid measures to promote employment or other aid with objectives connected with employment and labour markets may be of a different nature from measures exempted by this Regulation. Such measures should be notified under Article 88(3).

(31) In the light of the World Trade Organisation (WTO) Agreement on Subsidies and Countervailing Measures, this Regulation should not exempt export aid or aid favouring domestic over imported products. Such aid would be incompatible with the Community's international obligations under that Agreement and should not therefore be exempted from notification, nor authorised if so notified.

(32) In order to ensure transparency and effective monitoring, in accordance with Article 3 of Regulation (EC) No 994/98, it is appropriate to establish a standard format in which Member States should provide the Commission with summary information whenever, in pursuance of this Regulation, an aid scheme is implemented, with a view to publication in the *Official Journal of the European Communities*. For the same reasons, it is appropriate to establish rules concerning the records that Member States should keep regarding the aid scheme exempted by this Regulation. For the purposes of the annual report to be submitted to the Commission by Member States, it is appropriate for the Commission to establish its specific requirements. In order to facilitate administrative treatment and in view of the wide availability of the necessary technology, the summary information and the annual report should be provided in computerised form.

(33) Having regard to the Commissions experience in this area, and in particular the frequency with which it is generally necessary to revise State aid policy, it is appropriate to limit the period of application of this Regulation. Pursuant to Article 4(2) of Regulation (EC) No 994/98, it is necessary to include transitional arrangements whereby aid schemes already exempted by this Regulation will, on its expiry, continue to be exempted for another six months,

HAS ADOPTED THIS REGULATION

Article 1

Scope

1. This Regulation shall apply to schemes which constitute State aid within the meaning of Article 87(1) of the Treaty and which provide aid for the creation of employment, provide aid for the recruitment of disadvantaged and disabled workers or provide aid to cover the additional costs of employing disabled workers.

2. This Regulation shall apply to aid in all sectors, including the activities relating to the production, processing and marketing of products listed in Annex I to the Treaty.

It shall not apply to any aid granted in the coal or shipbuilding sectors, nor to any aid for the creation of employment, within the meaning of Article 4, granted in the transport sector. Such aid shall remain subject to prior notification to the Commission in accordance with Article 88(3) of the Treaty.

3. This Regulation shall not apply:

(a) to aid to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;

(b) to aid contingent upon the use of domestic in preference to imported goods.

Article 2

Definitions

For the purpose of this Regulation:

(a) 'aid' means any measure fulfilling all the criteria laid down in Article 87(1) of the Treaty;

(b) 'small and medium-sized enterprises' means enterprises as defined in Annex I to Regulation (EC) No 70/2001;

(c) 'gross aid intensity' means the aid amount expressed as a percentage of the relevant costs. All figures used shall be taken before any deduction for direct taxation. Where aid is awarded in a form other than a grant, the aid amount shall be the grant equivalent of the aid. Aid payable in several instalments shall be discounted to its value at the moment of granting. The interest rate to be used for discounting purposes and for calculating the aid amount in a soft loan shall be the reference rate applicable at the time of grant;

(d) 'net aid intensity' means the discounted aid amount net of tax expressed as a percentage of the relevant costs;

(e) 'number of employees' means the number of annual working units (AWU), namely the number of persons employed full time in one year, part-time and seasonal work being AWU fractions;

(f) 'disadvantaged worker' means any person who belongs to a category which has difficulty entering the labour market without assistance, namely a person meeting at least one of the following criteria:

(i) any person who is under 25 or is within two years after completing full-time education and who has not previously obtained his or her first regular paid employment;

(ii) any migrant worker who moves or has moved within the Community or becomes resident in the Community to take up work;

(iii) any person who is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment;

(iv) any person who wishes to enter or to re-enter working life and who has been absent both from work and from education for at least two years, and particularly any person who gave up work on account of the difficulty of reconciling his or her working life and family life;

(v) any person living as a single adult looking after a child or children;

(vi) any person who has not attained an upper secondary educational qualification or its equivalent, who does not have a job or who is losing his or her job;

(vii) any person older than 50, who does not have a job or who is losing his or her job;

(viii) any long-term unemployed person, i.e. any person who has been unemployed for 12 of the previous 16 months, or six of the previous eight months in the case of persons under 25;

(ix) any person recognised to be or to have been an addict in accordance with national law;

(x) any person who has not obtained his or her first regular paid employment since beginning a period of imprisonment or other penal measure;

(xi) any woman in a NUTS II geographical area where average unemployment has exceeded 100 % of the Community average for at least two calendar years and where female unemployment has exceeded 150 % of the male unemployment rate in the area concerned for at least two of the past three calendar years;

(g) 'disabled worker' means any person either:

(i) recognised as disabled under national law; or

(ii) having a recognised, serious, physical, mental or psychological impairment;

(h) 'sheltered employment' means employment in an establishment where at least 50 % of the employees are disabled workers who are unable to take up work in the open labour market;

(i) 'wage cost' comprises the following components actually payable by the beneficiary of the State aid in respect of the employment concerned:

(i) the gross wage, i.e. before tax; and

(ii) the compulsory social security contributions.

(j) a job is 'linked to the carrying-out of a project of investment' if it concerns the activity to which the investment relates and if it is created within three years of the investment's completion. During this period, the jobs created following an increase in the utilisation rate of the capacity created by the investment are also linked to the investment;

(k) 'investment in tangible assets' means an investment in fixed physical assets relating to the creation of a new establishment, the extension of an existing establishment, or the engagement in an activity involving a fundamental change in the product or production process of an existing establishment (in particular through rationalisation, diversification or modernisation). An investment in fixed assets undertaken in the form of the takeover of an establishment which has closed or which would have closed had it not been purchased shall also be regarded as tangible investment;

(l) 'investment in intangible assets' means investment in transfer of technology by the acquisition of patent rights, licences, know-how or unpatented technical knowledge.

Article 3

Conditions for exemption

1. Subject to Article 9, aid schemes fulfilling all the conditions of this Regulation shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that:

(a) any aid that could be awarded under such scheme fulfils all the conditions of this Regulation;

(b) the scheme contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Communities*.

2. Aid granted under the schemes referred to in paragraph 1 shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) provided that the aid granted fulfils all the conditions of this Regulation.

Article 4

Creation of employment

1. Aid schemes for the creation of employment and any aid that could be awarded under such scheme shall fulfil the conditions of paragraphs 2, 3 and 4.

2. Where the employment is created in areas or in sectors which do not qualify for regional aid pursuant to Article 87(3)(a) and (c) at the moment the aid is granted, the gross aid intensity shall not exceed:

(a) 15 % in the case of small enterprises;

(b) 7,5 % in the case of medium-sized enterprises.

3. Where the employment is created in areas and in sectors which qualify for regional aid pursuant to Article 87(3)(a) and (c) at the moment at which the aid is awarded, the net aid intensity shall not exceed the corresponding ceiling of regional investment aid determined in the map applying at the time the aid is granted, as approved by the Commission for each Member State: for this purpose, regard shall be had, *inter alia*, to the multisectoral framework for regional aid for large investment projects ([1]).

In the case of small and medium-sized enterprises, and unless the map provides otherwise for such enterprises, this ceiling shall be increased by:

(a) 10 percentage points gross in areas covered by Article 87(3)(c), provided that the total net aid intensity does not exceed 30 %; or

(b) 15 percentage points gross in areas covered by Article 87(3)(a), provided that the total net aid intensity does not exceed 75 %.

The higher regional aid ceilings shall only apply if the beneficiary's contribution to financing is at least 25 % and if the employment is maintained within the qualifying region.

When employment is created in the production, processing and marketing of products listed in Annex I to the Treaty, in areas which qualify as less favoured areas under Council Regulation (EC) No 1257/1999 ([2]), these higher aid ceilings or, if applicable, the higher aid ceilings of that Regulation, shall apply.

4. The ceilings fixed in paragraphs 2 and 3 shall apply to the intensity of the aid calculated as a percentage of the wage costs over a period of two years relating to the employment created under the following conditions:

(a) the employment created must represent a net increase in the number of employees, both in the establishment and in the enterprise concerned, compared with the average over the past 12 months;

([1]) OJ C 70, 19.3.2002, p. 8.
([2]) OJ L 160, 26.6.1999, p. 80.

(b) the employment created shall be maintained for a minimum period of three years, or two years in the case of SMEs; and

(c) the new workers employed as a result of the creation of employment must have never had a job or have lost or be losing their previous job.

5. Where aid is granted for the creation of employment under a scheme exempted under this Article, additional aid may be granted in case of recruitment of a disadvantaged or disabled worker in accordance with the terms of Articles 5 or 6.

Article 5

Recruitment of disadvantaged and disabled workers

1. Aid schemes for the recruitment by any enterprise of disadvantaged and disabled workers and any aid that could be awarded under such scheme shall fulfil the conditions of paragraphs 2 and 3.

2. The gross intensity of all aid relating to the employment of the disadvantaged or disabled worker or workers concerned, calculated as a percentage of the wage costs over a period of one year following recruitment, shall not exceed 50 % for disadvantaged workers or 60 % for disabled workers.

3. The following conditions shall apply:

(a) where the recruitment does not represent a net increase in the number of employees in the establishment concerned, the post or posts must have fallen vacant following voluntary departure, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy, and

(b) except in the case of lawful dismissal for misconduct the worker or workers must be entitled to continuous employment for a minimum of 12 months.

Article 6

Additional costs of employment of disabled workers

1. Aid schemes for the employment of disabled workers and any aid that could be awarded under such a scheme shall fulfil the conditions of paragraphs 2 and 3.

2. The aid, together with any aid provided under Article 5, shall not exceed the level needed to compensate for any reduced productivity resulting from the disabilities of the worker or workers, and for any of the following costs:

(a) costs of adapting premises;

(b) costs of employing staff for time spent solely on the assistance of the disabled worker or workers;

(c) costs of adapting or acquiring equipment for their use,

which are additional to those which the beneficiary would have incurred if employing workers who are not disabled, over any period for which the disabled worker or workers are actually employed.

Where the beneficiary provides sheltered employment, aid may in addition cover, but shall not exceed, the costs of constructing, installing or expanding the establishment concerned, and any costs of administration and transport which result from the employment of disabled workers.

3. Schemes exempted by this Article shall provide that aid be subject to the condition that the beneficiary maintain records allowing verification that the aid granted to it meets the provisions of this Article and Article 8(4).

Article 7

Necessity for the aid

1. This Regulation shall only exempt aid under Article 4 if before the employment concerned is created:

(a) either an application for aid has been submitted to the Member State by the beneficiary; or

(b) the Member State has adopted legal provisions establishing a legal right to aid according to objective criteria and without further exercise of discretion by the Member State.

2. Aid shall enjoy exemption under Article 4 in cases where:

(a) the employment created is linked to the carrying-out of a project of investment in tangible or intangible assets; and

(b) the employment is created within three years of the investment's completion,

only if the application referred in paragraph 1(a), or the adoption referred to in paragraph 1(b), takes place before work on the project is started.

Article 8

Cumulation

1. The aid ceilings fixed in Articles 4, 5 and 6 shall apply regardless of whether the support for the aided employment or recruitment is financed entirely from State resources or is partly financed by the Community.

2. Aid under schemes exempted by Article 4 of this Regulation shall not be cumulated with any other State aid within the meaning of Article 87(1) of the Treaty, or with other Community funding, in relation to the same wage costs, if such cumulation would result in an aid intensity exceeding that fixed by this Regulation.

3. Aid under schemes exempted by Article 4 of this Regulation shall not be cumulated:

(a) with any other State aid within the meaning of Article 87(1) of the Treaty, or with other Community funding, in relation to costs of any investment to which the created employment is linked and which has not yet been completed at the time the employment is created, or which was completed in the three years before the employment is created; or

(b) with any such aid or funding in relation to the same wage costs or to other employment linked to the same investment,

if such cumulation would result in an aid intensity exceeding the relevant ceiling of regional investment aid determined in the guidelines on national regional aid and in the map approved by the Commission for each Member State or the ceiling in Regulation (EC) No 70/2001. Where the relevant ceiling has been adapted in a particular case, in particular by the application of State aid rules applying in a particular sector, or by an instrument applying to large investment projects, such as the applicable multisectoral framework for regional aid for large investment projects, the adapted ceiling shall apply for the purposes of this paragraph.

4. By way of derogation from paragraphs 2 and 3, aid under schemes exempted by Articles 5 and 6 of this Regulation may be cumulated with other State aid within the meaning of Article 87(1) of the Treaty, or with other Community funding, in relation to the same costs, including with aid under schemes exempted by Article 4 of this Regulation which complies with paragraphs 2 and 3, provided that such cumulation does not result in a gross aid intensity exceeding 100 % of the wage costs over any period for which the worker or workers are employed.

The first subparagraph shall be without prejudice to any lower limits on aid intensity that may have been set pursuant to the Community framework for State aid for research and development [1].

Article 9

Aid subject to prior notification to the Commission

1. Aid schemes which are targeted at particular sectors shall not be exempted from notification under this Regulation and shall remain subject to the notification requirement of Article 88(3) of the Treaty.

2. This Regulation shall not exempt from notification the grant of aid to a single enterprise or establishment exceeding a gross aid amount of EUR 15 million over any three-year period. The Commission shall assess such aid, if granted under a scheme which is otherwise exempted by this Regulation, by reference solely to the criteria of this Regulation.

3. This Regulation is without prejudice to any obligation on a Member State to notify individual grants of aid under obligations entered into in the context of other State aid Instruments, and in particular the obligation to notify, or to inform the Commission of, aid to an enterprise receiving restructuring aid within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty and the obligation to notify regional aid for large investment projects under the applicable multisectoral Framework.

4. Aid schemes to promote the recruitment of categories of worker who are not disadvantaged within the meaning of Article 2(f) shall remain subject to the notification requirement of Article 88(3) of the Treaty unless exempted under Article 4. On notification, Member States shall submit, for appraisal by the Commission, arguments showing that the workers concerned are disadvantaged. In this respect, Article 5 shall apply.

5. Aid to maintain jobs, namely financial support given to an undertaking to retain workers who would otherwise be laid off, shall remain subject to the notification requirement of Article 88(3) of the Treaty. Subject to any sectoral rules, such aid may be authorised by the Commission only where, in accordance with Article 87(2)(b) of the Treaty, it is intended to make good the damage caused by natural disasters or exceptional occurrences or, under the conditions applying to operating aid in the guidelines on national regional aid, in regions eligible for the derogation under Article 87(3)(a) concerning the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

6. Aid for the conversion of temporary or fixed-term employment contracts into contracts of indeterminate duration shall remain subject to the notification requirement of Article 88(3) of the Treaty.

7. Aid schemes for job-sharing, for provision of support for working parents and similar employment measures which promote employment but which do not result in a net increase in employment, in the recruitment of disadvantaged workers, or in the recruitment or employment of disabled workers shall remain subject to the notification requirement of Article 88(3) of the Treaty and shall be assessed by the Commission in accordance with Article 87.

[1] OJ C 45, 17.2.1996, p. 5.

8. Other aid measures with objectives connected with employment and labour markets, such as measures to encourage early retirement, shall also remain subject to the notification requirement of Article 88(3) of the Treaty and shall be assessed by the Commission in accordance with Article 87.

9. Individual cases of employment aid granted independently of any scheme shall remain subject to the notification requirement of Article 88(3) of the Treaty. Such aid will be assessed in the light of this Regulation and may be authorised by the Commission only if it is compatible with any specific applicable rules which may have been laid down in respect of the sector in which the beneficiary operates and only if it can be shown that the effects of the aid on employment outweigh the impact on competition in the relevant market.

Article 10

Transparency and monitoring

1. On implementation of an aid scheme exempted by this Regulation, Member States shall, within 20 working days, forward to the Commission, with a view to its publication in the *Official Journal of the European Communities*, a summary of the information regarding such aid scheme in the form laid down in Annex I. This shall be provided in computerised form.

2. Member States shall maintain detailed records regarding the aid schemes exempted by this Regulation and the individual aid granted under those schemes. Such records shall contain all information necessary to establish that the conditions for exemption, as laid down in this Regulation, are fulfilled, including information on the status of any company whose entitlement to aid depends on its status as an SME. Member States shall keep a record regarding an aid scheme for 10 years from the date on which the last individual aid was granted under such scheme. On written request, the Member State concerned shall provide the Commission, within a period of 20 working days or such longer period as may be fixed in the request, with all the information which the Commission considers necessary to assess whether the conditions of this Regulation have been complied with.

3. Member States shall compile a report on the application of this Regulation in respect of each whole or part calendar year during which this Regulation applies, in the form laid down in Annex II, in computerised form. Member States shall provide the Commission with such report no later than three months after the expiry of the period to which the report relates.

Article 11

Entry into force, period of validity, and transitional arrangements

1. This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities*.

It shall remain in force until 31 December 2006.

2. Notifications pending at the time of entry into force of this Regulation shall be assessed in accordance with its provisions.

Aid schemes implemented before the date of entry into force of this Regulation, and aid granted under these schemes, in the absence of a Commission authorisation and in breach of the obligation in Article 88(3) of the Treaty, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempted under this Regulation if they fulfil the conditions laid down in Article 3(1)(a) and Article 3(2). Any aid which does not fulfil these conditions shall be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.

3. At the end of the period of validity of this Regulation, aid schemes exempted under this Regulation shall remain exempted during an adjustment period of six months.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12 December 2002.

For the Commission

Mario MONTI

Member of the Commission

ANNEX I

Information communicated by Member States regarding State aid granted under Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment

(to be provided in computerised form, by electronic mail, to stateaidgreffe@cec.eu.int)

Aid No:

Explanatory remark: This number will be filled in by DG COMP.

Member State:

Region:

Explanatory remark: Indicate the name of the region if the aid is granted by a sub-central authority.

Title of aid scheme:

Explanatory remark: Indicate the name of the aid scheme.

Legal basis:

Explanatory remark: Indicate the precise national legal reference for the aid and a publication reference.

Annual expenditure planned under the scheme:

Explanatory remarks: Amounts are to be given in euro or, if applicable, national currency. Indicate the annual overall amount of the budget appropriation(s) or the estimated tax loss per year for all aid instruments contained in the scheme.

For guarantees, indicate the (maximum) amount of loans guaranteed.

Maximum aid intensity under:

— Article 4: creation of employment:

— Article 5: recruitment of disadvantaged and disabled workers:

— Article 6: additional costs of employment of disabled workers:

Explanatory remark: Indicate the maximum aid intensity distinguishing between aid under Articles 4, 5 and 6 of the Regulation.

Date of implementation:

Explanatory remark: Indicate the date from which aid may be granted under the scheme.

Duration of scheme:

Explanatory remark: Indicate the date (year and month) until which aid may be granted under the scheme.

Objective of aid:

— Article 4: creation of employment:

— Article 5: recruitment of disadvantaged and disabled workers:

— Article 6: employment of disabled workers:

Explanatory remark: The primary objective(s) of the measure should be identified from among the three options. This field also gives the opportunity to indicate further (secondary) objectives pursued.

Economic sector(s) concerned:

— all Community sectors ([1])

— all manufacturing ([1])

— all services ([1])

— other (please specify)

Explanatory remarks: Choose from the list, where relevant. Aid schemes which are targeted at specific sectors are not covered by the exemption from notification provided by this Regulation.

Name and address of the granting authority:

Explanatory remark: Please include the telephone No and where possible the address for electronic mail.

([1]) With the exception of the shipbuilding sector, and other sectors which are the subjects of special rules in regulations and directives governing all State aid within the sector.

Other information:

Explanatory remarks: If the scheme is co-financed by Community funds, please add the following sentence:

'The aid scheme is co-financed under [reference].'

If the scheme's duration extends beyond the date of validity of this Regulation, please add the following sentence:

'The exemption regulation expires on 31 December 2006 followed by a transitional period of six months.'

ANNEX II

Form of the periodic report to be provided to the Commission

Annual reporting format on aid schemes exempted under a group exemption regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98

Member States are required to use the format below for their reporting obligations to the Commission under group exemption regulations adopted on the basis of Regulation (EC) No 994/98.

The reports should be provided in computerised form to:

stateaidgreffe@cec.eu.int

Information required for all aid schemes exempted under group exemption regulations adopted pursuant to Article 1 of Regulation (EC) No 994/98

1. Title and No of aid scheme

2. Commission exemption regulation applicable

3. Expenditure

   Separate figures have to be provided for each aid instrument within a scheme (e.g. grant, soft loans, etc.). The figures have to be expressed in euro or, if applicable, national currency. In the case of tax expenditure, annual tax losses have to be reported. If precise figures are not available, such losses may be estimated.

   These expenditure figures should be provided on the following basis:

   For the year under review indicate separately for each aid instrument within the scheme (e.g. grant, soft loan, guarantee, etc.):

3.1. Amounts committed, (estimated) tax losses or other revenue forgone, data on guarantees, etc. for new decisions to grant aid. In the case of guarantee schemes, the total amount of new guarantees handed out should be provided.

3.2. Actual payments, (estimated) tax losses or other revenue forgone, data on guarantees, etc. for new and current grants of aid. In the case of guarantee schemes, the following should be provided: total amount of outstanding guarantees, premium income, recoveries, indemnities paid out, operating result of the scheme under the year under review.

3.3. Number of new decisions to grant aid.

3.4. Estimated overall number of jobs created or disadvantaged or disabled workers recruited or employed under new decisions to grant aid (as appropriate). Aid for the recruitment of disadvantaged workers should be broken down by the categories in Article 2(f).

3.5.

3.6. Regional breakdown of amounts under point 3.1 either by regions defined at NUTS ([1]) level II or below or by Article 87(3)(a) regions, Article 87(3)(c) regions and non-assisted regions.

3.7. Sectoral breakdown of amounts under point 3.1 by beneficiaries' sectors of activity (If more than one sector is covered, indicate the amount for each):
   — coalmining
   — manufacturing of which:
      — steel
      — shipbuilding
      — synthetic fibres
      — motor vehicles
      — other manufacturing
   — services of which:
      — transport services
      — financial services
      — other services
   — other sectors (please specify)

4. Other information and remarks

([1]) NUTS is the nomenclature of territorial units for statistical purposes in the European Community.

In this list, the items in blue are still proposals, the ones marked with a "+" are instruments implementing the main legislation.

Dans cette liste, les entrées en bleu sont encore à l'état de proposition, celles marquées avec un "+" sont des instruments qui mettent en œuvre la législation principale.

Bei den blau markierten Einträgen dieser Liste handelt es sich noch um Vorschlaege. Die Instrumente zur Politikumsetzung sind mit einem "+" gekennzeichnet.

List of secondary legislation relevant to "disability"

1) **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**

2) **Directive 2001/85/EC (relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat)**

3) **Directive 1999/5/EC (on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity)**

4) **Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data**

5) **Directive 95/16/EC of the European Parliament and of the Council of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (OJ L 312, 7.9.1995, p.1)**

6) **Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment**

7) **Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air Text with EEA relevance. OJ L 204, 26.7.2006 p.1-9**

8) **Regulation of the European Parliament and of the Council on rail passengers' rights and obligations**

9) **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)**

10) **Regulation (EC) N° 1177/2003 of the EP and Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC)**

+ Commission Regulation (EC) N° 1981/2003 of 21 October 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions.

+ Commission Regulation (EC) N° 1982/2003 of 21 October 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the sampling and tracing rules.

+ Commission Regulation (EC) N° 1983/2003 of 7 November 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the list of target primary variables.

+ Commission regulation (EC) N° 28/2004 of 5 January 2004 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the detailed content of intermediate and final quality reports.

+ Regulation (EC) N° 1553/2005 of the EP and Council of 7 September 2005 amending Regulation (EC) N° 1177/2003 of the EP and Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC).

+ Commission Regulation (EC) N° 698/2006 of 5 May 2006 amending Commission Regulation (EC) N° 1981/2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions.

11) Council Regulation (EC) 577/98 of 9 March on the organisation of the Labour Force Sample Survey in the Community (LFS):

+ **Commission Regulation (EC) N° 1571/98 of 20 July 1998 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community (OJ L 205, 22.7.98, p.40)**

+ Commission Regulation (EC) N° 1924/1999 of 8 September 1999 implementing Council Regulation (EC) 577/98 as regards the 2000 to 2002 programme of ad hoc modules to the LFS

+ **Commission Regulation (EC) N° 1566/2001 of 12 July 2001 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the specification of the 2002 ad hoc module on employment of disabled people** *

+ **Commission Regulation (EC) N° 1575/2000 of 19 July 2000 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2001 onwards (OJ L 181, 20.7.2000, p.16)**

+ Commission Regulation (EC) N° 1626/2000 of 24 July 2000 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community as regards the 2001 to 2004 program of ad hoc modules to the labour force survey.

+ Regulation (EC) N° 1991/2002 of the EP and of the Council of 8 October 2002 amending Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community.

+ Regulation (EC) N° 2257/2003 of the EP and of the Council of 25 November 2003 amending Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community to adapt the list of survey characteristics.

+ **Commission Regulation (EC) N° 430/2005 of 15 March 2005 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2006 onwards and the use of a sub-sample for collection of data on structural variables (OJ L 71, 17.3.2006, p.36).**

12) **Regulation (EC) No 458/2007 of the European Parliament and of the Council of 25 April 2007 on the European system of integrated social protection statistics (ESSPROS)**

13) **Proposal for a Regulation of the European Parliament and of the Council on Community statistics on public health and health and safety at work – COM(2007) 46 final**

14) **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax**

15) **Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty**

16) **Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes" (as amended by "Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes")**

17) **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)**

18) **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**

19) **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**

20) **Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medical product s for human use, as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ L 136, 30.4.2004, p.34)**

21) **Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22)**

22) **Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003 amending Council Directive 98/18/EC on safety rules and standards for passenger ships - OJ L 123, 17.5.2003, p. 18-21)**

23) **Directive 96/48/EC on the interoperability of the trans-European high-speed rail system (O J L 235, 17.09.1996, p. 6-24) as amended by Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 (O J L 164, 30.4.2004, p. 114-163)**

24) **Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans European conventional rail system (O J L 110, 20.04.2001, p. 1-27) -as amended by Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 (O J L 164, 30.4.2004, p. 114-163)**

25) **Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (Text with EEA relevance)(O J L 263, 9.10.2007, p 1)**

26) **Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance) (OJ L 332, 18.12.2007, p. 27)**

27) **Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999**

28) **Decision 1720/2006/EC of the European Parliament and of the Council of 15 November 2007 establishing an action programme in the field of lifelong learning**

29) **Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)**

30) **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").**

31) **Council Decision 2005/600/EC of 12 July 2006 on guidelines for the employment policies of the Member States**

+ Council Decision 2006/544/EC of 18 July 2006 on guidelines for the employment policies of the Member States

32) **Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December2006on establishing a financing instrument for the promotion of democracy and human rights worldwide**

33) **Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society**

34) **Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use**

35) **Proposal for a Regulation of the European Parliament and of the Council concerning the production and development of statistics on education and lifelong learning – COM(2005)625 final.**

36) **Directive 97/67/EC of the European Parliament and of the Council of 15 December on common rules for the development of the internal market of Community postal services and the improvement of quality of services**(OJ L15 of 21.01.1998), page 14) as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ, L176 of 05.07.2002, page 21).

37) **Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007 -2013)**

38) **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**

39) **Decision 2119/98 of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community**

40) **Directive 2004/23/EC of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells**

41) **Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood components and amending Directive 2001/83/EC**

Notes