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Europäische Rechtsakademie
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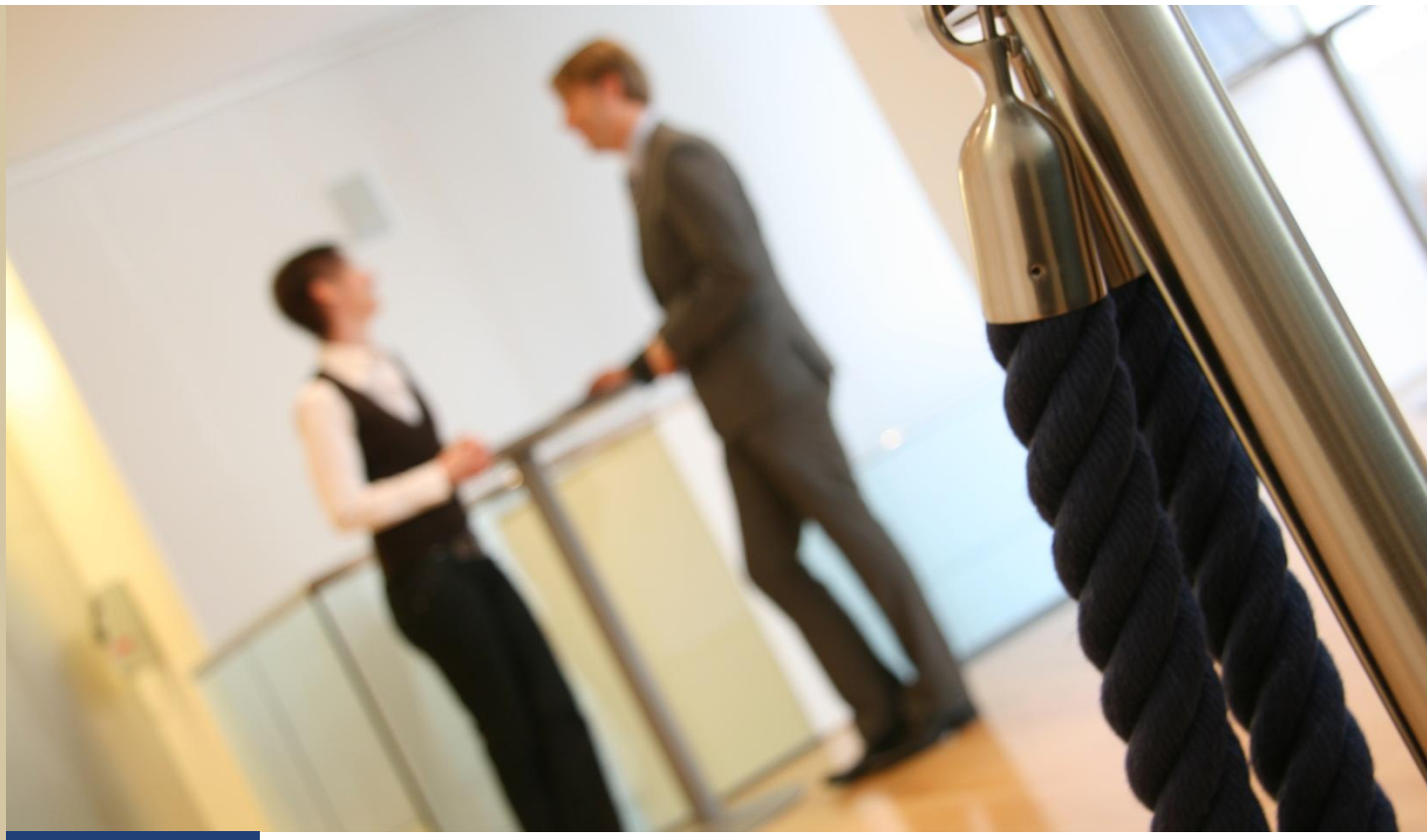
DOCUMENTATION

EU DISABILITY LAW AND THE UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES



111DV68 **Trier, 20-21 June 2011**

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Trier, 20-21 June 2011

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EU-Recht für Menschen mit Behinderungen und das Übereinkommen der Vereinten Nationen /

EU Disability Law and the UN Convention on Rights of Persons with Disabilities

Trier, 20.-21. Juni 2011/ Trier, 20-21 June 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 (111DV68)

Your profession

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Notary	☐	Prosecutor	☐	Ministry official	☐
In-house counsel	☐	Police/Law enforcement	☐	Regulatory authority	☐
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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:
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Did you gain relevant knowledge and information?						
Will you be able to apply such knowledge and information in your work?						
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Preliminary practical information						
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Execution of the programme						
Assistance during the seminar						

Name of speaker	very good	good	satisfactory	adequate	poor	Your comments:
01 Delia Ferri						
02 Jenny Goldschmidt						
03 Richard Whittle						
04 John Horan						
05 Jason Galbraith-Marten						
06 José Javier Soto Ruiz						
07 Shivaun Quinlivan						
08 Aleksandra Melesko						

What is your assessment of ...

... the conference venue?	very good	good	satisfactory	adequate	poor	Your comments:
Seminar room facilities						

... the hotel?	very good	good	satisfactory	adequate	poor	Your comments:
Arcadia						

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What is most important for you when choosing a conference or training programme?

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

Why?

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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 PARTIES

AVV. DELIA FERRI, PH.D.

Seminar for Members of the Judiciary

Trier, 20-21 June 2011

ERA Conference Centre

INTRODUCTION TO THE UN CRPD

I. Development of international standards on disability
II. Overview of the UN CRPD: Rationale, Structure, General Obligations
III. 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***
1975	***Declaration on the Rights of Disabled Persons***

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 UN 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/ organizations 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 on the Convention.

The UN CRPD is the first human rights treaty of the 21st century

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

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

II.

THE UN CRPD

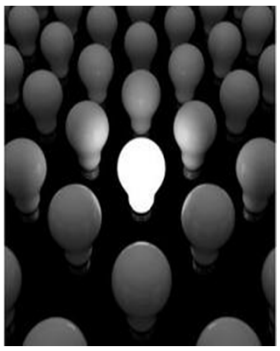
The Rationale

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 UN CRPD aims to apply the **principle of discrimination** to every human righ (Bariffi)



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*".

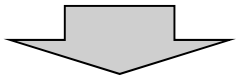
What obligations arise from Art. 1?

The UN CRPD has adopted the Social Model of Disability

- The social model of disability identifies systemic barriers, negative attitudes and exclusion by society (purposely or inadvertently) that mean society is the main contributory factor in disabling people. I.e. 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).

Substantive Rights

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

System of Monitoring and Implementation

The UN 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 (18 with 60th ratification) 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 **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 in a State Party (to the OP) to complain to the Committee on the Rights of Persons with Disabilities that the State has breached one of its obligations under the Convention (Art. 1 OP).
  B. If the Committee receives reliable information indicating grave or systematic violations of the Convention by a State Party to the OP, an **enquiry** can be opened (Art. 6 OP).

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 mainstreaming of disability into policy and legislation

General Obligations

Article 4 must be read in conjunction with Article 33 UN CRPD, which recommends States Parties to give due consideration to the establishment or designation of on or more focal point and 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

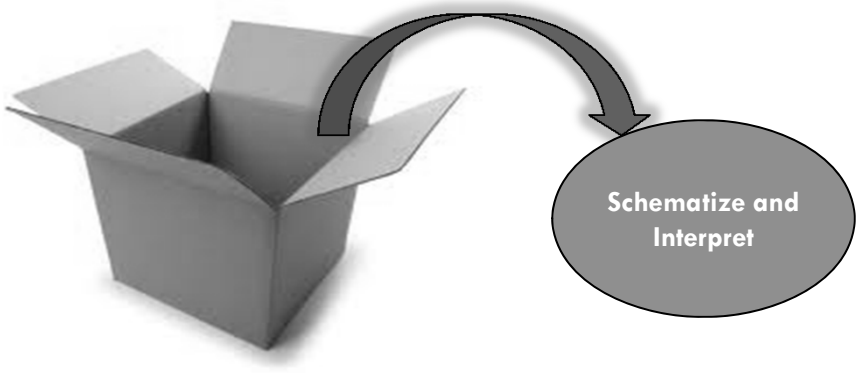
III. General Principles, Specific Obligations and Practical Approaches

General Principles

- **Article 3 enunciates the general principles upon which the UN 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 freedom of thought, conscience and religion.
- This principle closely matches with: **Art. 12** (**Equal recognition before the law**) which addresses ***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
  - State Parties must ensure legal framework to promote authonomy of persons with disabilities and their full inclusion in society

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)

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 UN 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.

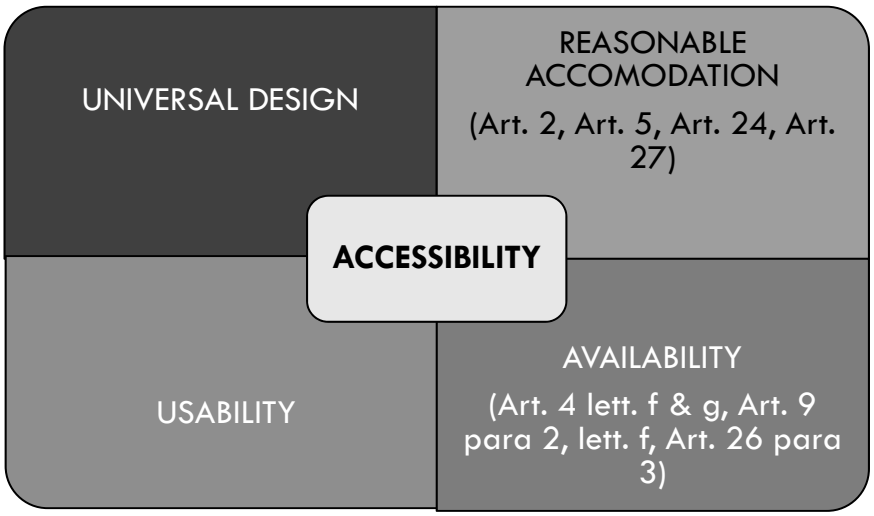
Accessibility

- Preamble (para. (v))
- Article 3 on general principles (lett. f)
- Article 4 on general obligations (accessible information, para 1, lett. h)
- Article 21 on access to information (lett. a, c and d)
- Article 31 on accessibility to statistical and research data of relevance for the realization of UN CRPD
- Article 49 on ensuring that UN CRPD is available in accessible formats

Accessibility

- It is one of the key general principles 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 related to accessibility



Accessibility

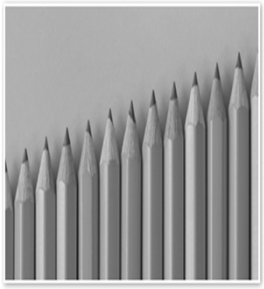
- Accessibility gives rise to specific applications in other substantive articles: **accessibility rights** in the UN CRPD serve the function of facilitating access in various contexts, including generally in public and private spheres
- Specifically the UN CRPD demands Parties to ensure the **access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

Art. 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".

Practical Approaches…



- These principles are ***benchmarks* against which national law frameworks must be assessed**
- These principles must be used to interpret national provisions (consistent interpretation)
  - **Trib. Catanzaro - Decr. 9.04.2009**
  - **Trib. Varese - Decr. 06.10.2009**
  - **Tribunal Supremo Esp. 282/2009**
  - **Slovenian Const. Court 13.11.2008**
  - **Italian Const. Court 80/2010**

THANK YOU FOR YOUR ATTENTION

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EU Disability Law, Charter of Fundamental Rights and the UNCRPD

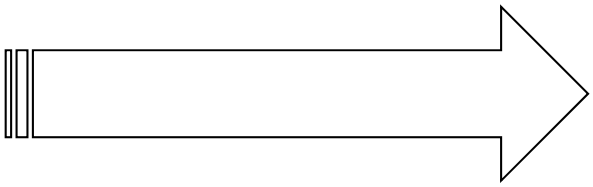
avv. Delia Ferri, Ph.D.

SEMINAR FOR MEMBERS OF THE JUDICIARY
Trier, 20-21 June 2011
ERA Conference Centre

The Creation of a new EU legal Framework on Disability

1. The development of a EU disability law and policy
2. The conclusion of the UN CRPD by the EU, status and effects of the UN CRPD as a mixed agreement.
3. Concluding remarks: the implementation of the UN CRPD in the EU

I. The Development of a EU Disability Law and Policy: a Brief Overview



EC Disability Policy until 1996

The original involvement of the EC (under the pre-Amsterdam treaties) in the area of disability was limited. This is due to the fact that none of the Pre-Amsterdam treaties contained a reference to disability.

The EC initiatives targeted to disabled people took the form of action programmes intended to exchange information, or were soft law documents. The only proposal for the adoption of a binding act in the field of transport was rejected.

In 1996…

- The Commission adopted the Communication on Equality of Opportunity for people with disabilities, which launched the ***European Community Disability Strategy.***
  This soft law instrument was inspired by the UN Standard Rules: through this Communication, the Commission endorsed the international move towards a rights based approach in the disability policy field. This *Strategy* laid the **policy foundations for future strategies and developments in the area of disability**

The Legal Breakthrough

- The Treaty of Amsterdam restated the principle of non-discrimination in stronger terms, adding a new provision to the EC Treaty: **Art. 13 EC (now Art. 19 TFEU)**
- Art. 13 EC complemented Art. 12 EC (prohibiting discrimination on grounds of nationality), and enabled the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation.

Declaration regarding persons with disability

- The Intergovernmental Conference that drew up the Treaty of Amsterdam decided to include a **declaration** in the Final Act, stating that the Community institutions must take account of the needs of persons with a disability when adopting measures under former Art. 95 EC to approximate Member States' legislation.

On the basis of Art. 13 EC, a "Non-Discrimination Package" was adopted…

- This package included **two-non discrimination directives** and a **non-discrimination action programme**
- The most relevant piece of legislation is **Council Directive 2000/78/EC** (establishing a general framework for equal treatment in employment and occupation). This Directive implements the principle of equal treatment in the area of employment and **prohibits discrimination on various ground, including disability**
- **Council Directive 2000/78/EC** defines discrimination as including direct and indirect discrimination, as well as harassment and instruction to discriminate, and such discrimination is prohibited in employent and training related areas. Art. 5 of the Directive requires that **reasonable accomodation** be made for disabled persons: "…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"

From 2000 onwards

- Other steps have been taken towards a more comprehensive disability legislation and policy.
- Whilst the Directive 2000/78 is the most significant development, other **pieces of legislation addressing disability (directly or indirectly)** where adopted
- The EC/EU has been relatively successful in **mainstreaming** disability into its general legislation specifically in the area of transport
- In addition, a variety of **non-binding instruments** has been adopted (e.g. *inter alia* Council Resolution of 15 July 2003 on promoting employment and social integration of people with disabilities)

The EU Disability Action Plan 2003-2010

- The Commission adopted the Communication COM(2003) 650 of 30.10.2003 '*Equal opportunities for people with disabilities: A European Action Plan*'.
- This Communication introduced a **multi-annual Action Plan for 2003-2010**
- This Plan carries forward the *1996 Strategy* and proceeds in the direction already traced by the preceding initiatives.
- The EU Disability Action Plan was established by the European Commission1 to ensure a **coherent policy follow-up to the European Year of Disabled people** in the enlarged Europe

The EU Charter of Fundamental Rights

- The EU Charter of Fundamental Rights, which was proclaimed in December 2000 and **became binding in December 2009** when the Lisbon Treaty came into force (Art. 6 TEU), represented a new step towards a more comprehensive action in field of disability
- The Charter includes two explicit references to disability and contains other provisions which are of interest for persons with disabilities

The EU Charter of Fundamental Rights

- **Art. 21** of the Charter lists disability as one of the grounds on which discrimination must be prohibited
- **Art. 26** deals with the "*Integration of persons with disabilities*" and states: "*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*".

The EU Charter of Fundamental Rights

Art. 3: "1. Everyone has the right to respect for his or her **physical and mental integrity**.

2. In the fields of medicine and biology, the following must be respected in particular:

the **free and informed consent** of the person concerned, according to the procedures laid down by law,

the **prohibition of eugenic practices**, in particular those aiming at the selection of persons,

the prohibition on making the human body and its parts as such a source of financial gain,

the prohibition of the reproductive cloning of human beings"

- **Art. 14** (Right to education)
- **Art. 15** (Freedom to choose an occupation and right to engage in work)
- **Art. 25** (Rights of the elderly)
- **Art. 34** (Social security and social assistance)

  Art. 34 para 3: "In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices"

The EU Charter of Fundamental Rights

- Since 1 December 2009, "the Charter has become the reference text and the starting point for the **CJEU's assessment of the fundamental rights** which that legal instrument recognises" (*Joint communication from Presidents Costa and Skouris*- Jan 2011)
  - **Case C-92/09 and C-93/09 *Volker and Markus Schecke***
  - **Case C-236/o9 *Association belge des Consummateurs Tests-Achats***

II. The Conclusion of the UN CRPD by the EC/EU

The Conclusion of the UN CRPD by the EC/EU

- After having been a signatory, the EC (now EU) acceded to *UN Convention on the Rights of Persons with Disabilities,* with the **Council Decision 2010/48/EC**, formally adopted on 26 November 2009, under the former EC Treaty.
- The instrument of ratification was deposited in December **2010**, after the adoption of a **Code of Conduct** by the Council

The UN CRPD is a "Mixed Agreement"

- Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand.
- Mixity is due to the fact that. **part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States**
- Mixity has been a very **complex topic** of scholarly debate: the phenomenon of mixed agreements is not only deeply interrelated to EU Law and its division of powers doctrine, but also to public international law.
- Recent practice related to mixed agreements has revealed many **legal challenges**

Competence to conclude the UN CRPD

- The EC/EU competence to **conclude** the *UN CRPD* derived from **former Arts. 13 and 95 EC**, which addressed (disability) discrimination and the internal market respectively, in conjunction with the (procedural) provisions of Art. 300(2) EC and Art. 300(3) EC [now Art. 19, 114, 218 TFEU]
- Being absent in the former EC Treaty an adequate legal basis for accessing human rights treaties, and standing Opinion 2/94 (now overcome by the Treaty of Lisbon), Art. 13 EC, addressing combating discrimination, reflected the UN CRPD main purpose.
- Many areas of the Convention extend beyond non discrimination: this has been reflected in the **dual legal basis**. Given that the internal market is an extremely broad notion that encompasses the removal of all kinds of barriers to trade, it is not surprising to find Art. 95 EC

Legal Basis

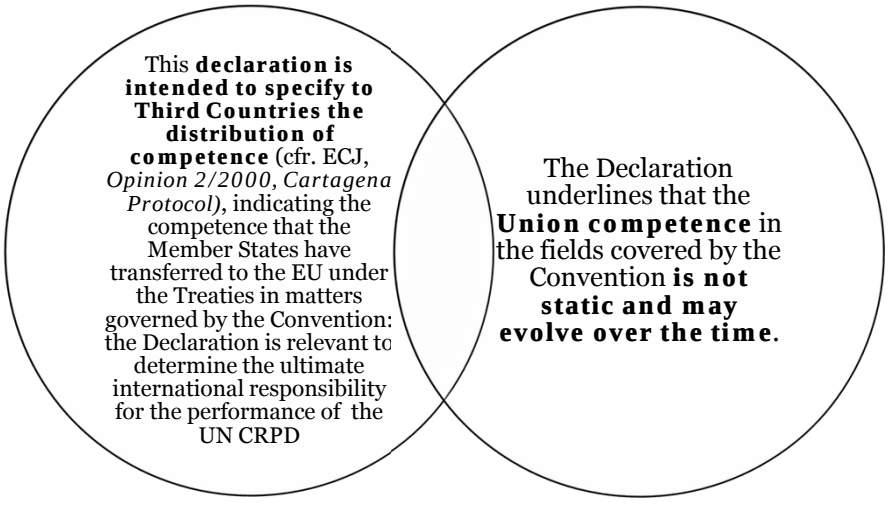
The **choice of the legal basis for the decision concluding the agreement is very important but it is not decisive for the implementation**. In **Case C-178/03**, the ECJ stated that: «*the fact that one or more provisions of the Treaty have been chosen as legal bases for the approval of an international agreement is not sufficient to show that those same provisions must also be used as legal bases for the adoption of measures intended to implement that agreement at Community level*».

The ECJ does not regard the issue of legal base as a purely internal affair. On the contrary, the ECJ confirms the importance of the correct legal base as **a signal to other Contracting Parties of the extent of EU competence and the division of competence between the EU and the Member States** (Case C-94/03).

Declaration of Competence

- **The UN CRPD**, as other multilateral agreements that make provision for participation by regional economic integration organisations (REIOs) such as the EU alongside its Member States, **provides for a Declaration of competence by the REIO, specifying which areas of the agreement fall within the competence of the REIO and which within that of its Member States.**
- In compliance with Art. 44 UN CRPD, **a declaration of competence has been annexed to the Decision on the Conclusion of the UN CRPD**

Declaration of Competence



Status of the UN CRPD in the EU Legal Order

The CJEU has regularly been confronted with international agreements and their legal consequences, in particular through preliminary questions on the basis of Article 267 TFEU (former Art. 234 EC).

However, scholars underline that there is no coherent picture of the impact of international agreements in the legal order of the EU and its Member States.

Status of the UN CRPD in the EU Legal Order

- According to **Art. 216(2) TFEU** (former Art. 300(7) EC) international agreements concluded by the EU are binding for the EU institutions as well as for the Member States
- The CJEU has stated:

> "*In accordance with case-law,* ***mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence*** *(see, to that effect, Case 12/86 Demirel [1987] ECR 3719, paragraph 9, and Case C-13/00 Commission v Ireland [2002] ECR I-2943, paragraph 14)*" [Case C-239/03, *Etang de Berre*, at (25)]

Status of the UN CRPD in the EU Legal Order

- From an EU law perspective, **the UN CRPD has become an integral part of EU law.**
- The UN CRPD is situated formally below the provisions of the Treaties.
- In hierarchical terms, the Convention is *inferior* to the provisions of the Treaty on the Functioning of the European Union (and the Treaty on European Union), but *superior* to secondary EU law

The Jurisdiction of the CJEU

- The CJEU has the jurisdiction to **interpret** mixed agreements **under Art. 267 TFEU** (*inter alia* Case 12/86, *Demirel;* Case C-53/96, *Hermes*; Joined Cases C-300/98 and 392/98 *Parfums Christian Dior).*
- The Court has jurisdiction to **rule on the validity** of EU measures under Art. 267 TFEU *vis a vis* an international agreement, but the legality of a EU measure can be called in question on grounds of breach of international agreements to which the EU is a party **only if the provisions of those agreements have direct effect**. There are just two famous exceptions (cases C-69/89 *Nakajima*, and C-70/87 *Fediol*): the legality of EU measures can be reviewed in the light of international rules when the EU measure has an executing character (i.e. 'intended to implement a particular obligation') or "refers expressly" to the international agreement (see also Case C-352/96 *Italy v Council)*

The Jurisdiction of the CJEU

- In another case, the Court did not consider the requirement of direct effect to be necessary with regard to the Rio de Janeiro Convention on Biological Diversity of 5 June 1992 (Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council*):

> "*Even if, as the Council maintains, the CBD contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement*"

Effects of the UN CRPD in the EU legal order

- *In abstracto,* the UN CRPD seems capable, in light of its objectives and 'spirit', of conferring rights upon individuals. However, the provisions are literally addressed to the Parties. Thus, it could be argued that none of its provisions seems to be sufficiently clear, precise and unconditional so as to have direct effect under the standard established by the ECJ.
- On the other hand, the ECJ's case law leaves the door open to the review of EU measures in light of the UN CRPD, in particular where the EU intends to implement a specific obligation entered into within the framework of international rules, or if an EU act expressly refers to specific provisions of the Convention (*Nakajima* and *Fediol* exceptions). The judgment of the Court in *Netherlands v Parliament and Council* provides good grounds to consider that the review of EU measures in light of the UN CRPD may be possible regardless of whether the Convention has direct effect

The Jurisdiction of the CJEU

- The Commission might bring an infringement case against a Member State not properly implementing the UN CRPD under Art. 258 TFEU (former 226 EC). **A Member State has a EU law obligation to implement the UN CRPD (as mixed agreement) insofar as its provisions are within the scope of EU competence.**

  "*In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the* ***Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement***" [Case C-239/03, *Etang de Berre*, at (25)]

  See also *Mox Plant* Case (case C-459/03 *Commission v. Ireland*]

The duty of cooperation

- When considering issues in the context of mixed agreements, the ECJ has emphasized the need for common action, or close cooperation, between the EU and its Member States.

  In its *Opinion 1/94*, the ECJ stated: "[...] *it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into*".
- The principle of cooperation expressed in a general manner in the Treaty (now **Art. 4(3) TEU**) has been consistently "applied" by the ECJ to mixed agreements: there is a duty (i.e. a legal obligation) upon the EU and its Member States to collaborate among themselves during all the phases of the agreement.

III. Concluding remarks

Implementing the UN CRPD

- With the new **European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe (COM (2010)636 fin)**, launched in November 2010, the Commission aims at ensuring effective implementation of the UN Convention across the EU

http://ec.europa.eu/news/justice/101115_en.htm
http://ec.europa.eu/social/main.jsp?catId=429&langId=en

European Disability Strategy 2010-2020

- The 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*"
- The Commission has identified 8 main **areas for action**: **Accessibility, Participation, Equality, Employment, Education and Training, Social Protection, Health, and External Action.**
- For each area, key actions are identified (SEC(2010) 1324/2):
  - E.g. prepare a EU Accessibility Act setting out a general legal framework in relation to good and services
  - E.g. support the negotitation in Council of the new **Directive on equal treatment**

The new Commission Proposal for a Directive on Implementing the Principle of Equal Treatment

- The Commission recently proposed a "Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation" in order to supplement the existing legal framework on anti-discrimination, beyond the sphere of employment and occupation.
- The proposal makes explicit reference to the UN CRPD

http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/em0008_en.htm

THANK YOU
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Jenny Goldschmidt

Jenny Goldschmidt

Jenny Goldschmidt is Director of the Netherlands Institute of Human Rights (SIM) since 1 October 2007 where she was appointed professor in human rights law since 1 January 2004. From 1994-2003 she was president of the Equal Treatment Commission and also part time professor Equality and Legal Pluralism at Leiden University. Before, she was professor Legal Women's Studies at Utrecht University.

The topic of her dissertation was "National and indigenous constitutional law in Ghana: their development and their relation to each other" (Leiden, 1981).

She is a.o. Vice-President of Commission Integrity of Civil Servants, Member of Human Rights Commission of the Advisory Council for Foreign Policy of the Netherlands, Member of the Netherlands' Helsinki Committee, Member of the International Commission of Jurists (Geneva).

Her research interests include the implementation of international human rights in national legal systems, nature of obligations in human rights law, Equality and non-discrimination.

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Reasonable Accommodation in the EU law

The Fight against Discrimination

Prof. Dr. Jenny E. Goldschmidt (Netherlands´ Institute of Human Rights, Utrecht University)

ERA Trier 20 June 2011

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Outline

- Introduction
- Relevant international law
- Concept of disability
- Disability rights
- Reasonable accommodation: a new element?
- positive obligations
- Difference with positive discrimination
- Scope
- Concluding remarks and questions.

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International law: some important provisions

- article 26 ICCPR
- CESCR GC No 20→ see next slide
- ECHR art 14 (accessory nature)
- 12th Protocol ECHR
- UN Convention on the Rights of persons with Disabilities (incl. optional Protocol)

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GC CESCR

- The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.[1] States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,[2] as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.
- [1] See CRPD, art. 2: "'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."
- [2] See CESCR general comment No. 5, para. 22.

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Concept of disability

- **No definition in texts**
- **Diverse**
- **Including: 'assumed' disabilities**

Scope:

- **EUCoJ 11 July 2006, Sonia Chacón Navas:**

  - Sickness as such is not covered by ground disability

  - 17 July 2008: Coleman: protection of employees associated with persons with disabilities.

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Disability Rights

- **In essence two elements:**

a. impairment of person

b. Environmental barriers

See:

Preamble of Draft Convention sub (c)

- Development from 'hand in cap' to participation.

Framework directive 2000/78/EC:

Article 2.2.(b) (ii):
(in relation to indirect discrimination)

- as regards persons with a particular disability, the employer or any person or organization 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.

Article 5:

- In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided.

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Positive obligations

- Respect, fulfill and protect as Human Rights obligations
- Fits into non-discrimination framework to take difference into account.

→ Different forms of positive obligations defined by international and national courts and commissions.

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Progressive implementation

- Autism France v. France, ECSR 4-11-2003, Complaint No. 13/2002.

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Reasonable accommodation- general aspects

- not only relevant in cases of disability
- e.g. obligation to have women's facilities in the workplace
- but: absolute necessity in disability cases.
- barriers are caused by the environment
- Refusal is sui generis form of discrimination, but no exception to equality.

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Reasonable accommodation-specific aspects

- no absolute duty
- but: proportionality test
- depends on concrete circumstances.

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Reasonable accomodation ≠ preferential treatment

- Not temporary
- Aim is to guarantee equality, not to repair inequalities or to accelerate equality.

Broad scope

- Relation to torture: see Report of UN SR on Torture 2008
- Access to Justice: ECtHR Farcas v. Romania 32596/04 (non admissible)
- Prison Conditions: ECtHR 24-1—2006, Vincent v. France

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Concluding remarks

- Due Diligence
- Progressive approach

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Relevant websites

- SIM data base :http://sim.law.uu.nl/SIM/Dochome.nsf?Open
- Equal Treatment Commission of the Netherlands: www.cgb.nl
- EU and disability: http://ec.europa.eu/employment_social/disability/index_en.html
- UN and disability: http://www.un.org/esa/socdev/enable/
- UNHCOR and disability: http://www.ohchr.org/english/issues/disability/index.htm
- Case law:
- http://cmiskp.echr.coe.int/
- http://curia.europa.eu/

Richard Whittle

Richard Whittle

Senior lecturer in law, LLB(Hons), LLM, PGC Res, Law Department Sheffield Hallam University

Richard is the BA (Hons) Law and Criminology course leader. He joined the Law Research Group in 2007. Prior to this appointment he was a Jean Monnet Lecturer in EU Law at the University of Leeds.

His principal research interest is in EC disability law and policy. Between 1998 and 1999 he represented the Disability Unit of the EU Commission in the development of what is now Directive 2000/78/EC (the Employment Framework Directive).

Richard is an expert advisor to the British Disability Rights Commission (recently subsumed within the Equality and Human Rights Commission) and the European Disability Forum. He has acted as a consultant for various groups and institutional bodies in and out of Europe and is a regular contributor to academic journals and symposia at national and international levels. Since 2003, Richard has been a registered expert on the EU Commission's DG Employment and Social Affairs AMI-INT Expert database (registration number: 20030225-0560).

He is also a regular speaker on equality and disability law at the Academy of European Law (ERA) in Trier, Germany.

Research

Key areas of interest

- EC disability law and policy
- EC equality law
- EC legislative powers and the decision-making process
- comparative disability equality law
- international human rights law and disability

‘Accessibility’: a right & an obligation under the UN CRPD

Richard Whittle,
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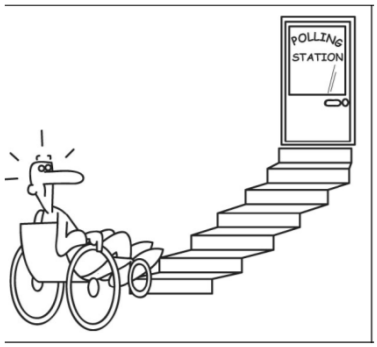
Location of the right & obligation

- A dedicated substantive provision (Article 9).
- Explicit references in other substantive provisions (eg. Articles 12, 13, 19, 20 and 21), as well as two of the ‘implementation’ provisions (Articles 31 and 32).
- Included as one of the eight General Principles in the Convention (Article 3f).
- Included in the preamble (paragraph V).

Nature of the right & obligation

- A general principle that informs all rights and obligations in the Convention.
  - Paragraph V of the preamble: “Recognizing the importance of accessibility … in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.”
  - Applies to both ‘civil & political’ and ‘social & economic’ type rights.
- A right & obligation that encapsulates the underlying goal of the Convention, namely, achieving ‘substantive’ equality for people with disabilities.
- Inter-relationship with Article 5 in particular.

The challenge: **changing mindsets**



Securing a better fit between the individual, their physical, organisational, administrative and legal environments as well as the goods, services and facilities they interact with (‘design for all’).

Changing mindsets

- (Un)willingness to adapt lies in human nature.
  - Who moved my cheese!?!
  - A challenge for most, if not all, of us especially when the impairment is 'invisible' or, conversely, when physical or mental differences appear to offer a convenient excuse not to change.
- A continuous challenge necessitating an on-going commitment to barrier prevention & removal.
- Demanding a holistic approach to barrier identification and an integrated response to barrier removal (such barriers are not always conveniently divided up into policy sectors that reflect national ministries).

The meaning of 'accessibility': five core components

- Taking 'accessibility' seriously means:
  1. The removal and prevention of directly and indirectly discriminatory 'rules and practices' that have an exclusionary or limiting effect on the participation of disabled people in relation to goods, facilities and services and all matters concerning all forms of employment, employment opportunities and all national and local policy programmes.
- And ensuring:
  2. the 'physical' accessibility of goods, facilities & services (both as regards the design of the product and its geographic location - e.g. ensuring that essential services are within physical reach of urban and rural areas).

The meaning of ‘accessibility’ (cont.)

- And ensuring (cont.):
  3. the 'economic' accessibility of goods facilities & services (in other words ‘affordability’, noting the link between disability and poverty).
  4. ‘information and communication’ accessibility (including the right to seek, receive and impart information & ideas).
  5. ‘legal & procedural’ accessibility (including access to justice concerns and public procurement obligations).

Achieving ‘accessibility’

- The value and use of ‘standards’.
  - Effective through proper consultation; enforceable through clear timelines, written explanations, sanctions and monitoring mechanisms.
  - The differences from, and similarities with, the ‘reasonable accommodation duty’ (*barrier pre-emption, group level standard setting, better management of horizontal impact across policy domains*).
  - Filling the ‘guidance gap’.
- Promoting the ‘design for all’ principle.
- Disability awareness training, disability action plans and accessibility reports.
- Public procurement.

The ‘facilitators’ & ‘mechanisms’

- The CRPD Committee (General Comments; Reviews & Recommendations and the Optional Protocol).
- The national authorities (policy maker, legislator and adjudicator).
  - Article 4 (National implementation).
  - Article 33 (Domestic Institutional Architecture – ‘focal point’, ‘coordination mechanism’ within Government and ‘designated independent body or bodies’).
- The EU system (policy maker, legislator and adjudicator).
  - The internal market; the Disability Declaration; the Notification Directive (98/34); Article 19 TFEU; incentive measures; public procurement & state aid; the Open Method of Cooperation.
- International Cooperation & Conference of State Parties under the CRPD (Articles 32 and 40, respectively).

Access to Justice & Article 13 of the CRPD

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The legal context

- Article 13 CRPD builds on established provisions in international human rights law supporting access to justice - such as the right to an effective remedy, to fair procedures and the right to be heard in proceedings affecting the person (Articles 6-11 UDHR and 14-16 of the ICCPR).
- The UN Standard Rules on the equalisation of opportunities for persons with disabilities (1993) addresses - in a non-binding capacity - a number of issues affecting access to justice (Rules 1, 4, 5, 6 & 19, respectively).
- Article 13 CRPD explicitly addresses access to justice in the context of disability as a human right and imposes concrete and binding obligations on State Parties.

The extent of the ‘problem’

- Consider the various reasons why we might use the justice system.
- Identify the institutions people turn to for justice in these situations (the 'Justice Sector').
- Consider the various roles that people play within the Justice Sector and identify those roles regularly performed by disabled people.
- Where disabled people are excluded from these roles or encounter significant barriers in performing them they are effectively precluded from fully participating in the justice system. Consider the effects on (a) the person? (b) the justice system? (c) society as whole?

Key types of barriers

- Physical access barriers
- Information barriers
- Attitudinal barriers
- Communication barriers
- Barriers accessing legal advice
- Regulatory and procedural barriers

Article 13: the right

- 'effective' access to justice.
- on an 'equal basis' with others.
- as 'direct' and 'indirect' participants.
- in *all* legal proceedings (including investigative & other proceedings).

Article 13: the obligation

- State Parties must not interfere with the exercise and enjoyment of the right protected by Article 13.
- State Parties must ensure that non-State actors (eg. families and private lawyers) do not interfere with the right protected by Article 13.
- State Parties must take action to ensure 'effective access' on an 'equal basis with others' (including, 'procedural and age appropriate accommodations' and the promotion of 'appropriate training' within the Justice Sector).
- Articles 4, 33 and 40 CRPD and the EU overlap.

Necessary & effective State action

- Raise national awareness of the CRPD and the rights that it protects (as required by Articles 33 & 49 CRPD).
- Encourage the recognition that unequal access to justice is essentially a denial of an effective remedy before the law and a breach of a fundamental civil & political right.
- Adopt accessibility standards for all components of the justice sector and improve the sector's operational coherence and support facilities in full consultation with disabled people.

Necessary & effective State action (cont.)

- Encourage and fund 'accessibility audits'.
- Ensure that information about the Justice Sector is fully accessible both in terms of its individual components and the various journeys that an individual may take through the sector as a whole.
- Provide adequate training on disability equality within the Justice Sector recognising the full range of access barriers and the effects of multiple discrimination.

Necessary & effective State action (cont.)

- Conduct a review of legal, procedural and information type barriers by field of legislation.
- Encourage and fund a significant increase in legal expertise on disability and human rights.
- Encourage and fund adequate advocacy support for disabled people.
- Provide incentives to private lawyers to accept clients with disabilities.

John Horan

John Horan

"On the day before the millennium John Horan had a stroke – it changed his life and made him a better discrimination lawyer. His extensive experience in battling for the rights of disabled people has led to expertise in employment, goods and services, education and public authorities.

He also has a particular interest in other kinds of anti-discrimination work and employment law generally. It has taken him to Trinidad, successfully changing the state honour system as fostering difference and not in compliance with the international law; its has taken him to the Croydon ET where he successfully challenged the terms offer to part time high court judges as discriminatory, and to Hull where he was the first advocate to persuade the ET to recommend reinstatement of a police office.

His views have lead to him being interviewed by the BBC's Ouch and being the subject of stories by The Guardian and The Times. He champions the rights of the disability community and was awarded Bar Council "Pro Bono Lawyer for the Year" in 2003.

John appears frequently for law centres, the FRU, ELAAS, Bar Pro Bono Unit and the Disability Law Association as well as well-known solicitors firms."

"John's approach to disability discrimination is absolutely inspirational. His expertise is second to none and together with his experience, he is a formidable force in the fight to eradicate discrimination based on disability." Les Willans (represented by John in a goods and services discrimination case)

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Special EU Regulations on disability matters in the field of public procurement, state aid, transport, telecommunications, etc: obligations for the State and public bodies

by John Horan

CLOISTERS

ICRPD in form:

- "social" not "medical" model of disability
- Articles of general application (Art 3-9) and specific substantive rights (Art 10 to 30). Note:
  - Art 4.1(a)(b)(d)
  - Art 5.1 and 5.2
  - Art 12 and 13
- System of monitoring and implementation (Art 31 to 40) i.e. Art 31 – acquiring disability data

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How was the IORPD approved by the EU?

Council Decision 2010-48 26/11/09

- Art 1.1 - approved
- Art 2 - authorized signatory
- Art 3 - focal point for monitoring
- Art 4 - matter which for under EU exclusive and shared competence

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What the effect of CD 2010-48?

- UNRPD becomes an integral part of EU law
  - Relevant text in domestic law
  - Relevant case law
  - EU/UN rules of construction
  - Direct Effect?

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Art 3 and 4 CD 2010-48

- Art 3 – Exclusive (e.g. common market) and shared (e.g. combat discrimination of "disabled" grounds, transport) competence
- Art 4 – Illustrative Directives which may "establish common rules that are affected by the provisions of the Convention"
- ?

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Art 4 cont.

- A lot of Directives and Commission Decision!
- Accessibility e.g. D 2004/18/EC: Procedures for award of public contracts
- Independent living, social inclusion, work and employment e.g. D 2000/78/EC: Equal treatment in employment and occupation
- Personal mobility e.g. R (EC) 1371/2007: Rail passengers right and obligations

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Art 4 cont.

- Access to information e.g. D 2001/29/EC: Copyright
- Statistics and data collection e.g. Protection of individuals from processing of personal data
- International cooperation e.g. R (EC) 1905/2006: Financing development cooperation

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What does that mean for Judges?:

- Direct Affect?
- EU/UN rules of construction where domestic law follow EU law
- ICRPD
- Different rule which follow ICRPD
- A hint by EU that it's Directive etc will have to be re-interpreted in light of ICRPD?

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- What does that mean for Judges (2)?:
  - Courts and the State
  - E.g. English "Common Law"
    - Establish disabled rights "which have always been there"
    - Is informed by the ICRPD – Art 12, 13
    - Rules of Procedure
    - Unwritten rules

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Final thoughts:

- Training – Art 13.2 -"Training is an essential component of Art 13 and should be provided to all justice agency personnel so as to facilitate access to justice for persons with disabilities. Therefore training should be provided to …legal practitioners, magistrates and judges… and should cover human rights and access to justice for persons with disabilities" - Study on Challenges and Good ERC Practices, Oct 2010
- Monitoring and data collection - European Disability Strategy 2010-2020

John Horan
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Jason Galbraith-Marten

Jason Galbraith-Marten

Jason is named the Star Individual for employment law by Chambers and Partners and by the Legal 500 and Legal Experts as one of the country's leading employment barristers. He is particularly regarded for his ability to balance sound commercial judgement with a real understanding of, and dedication to, a client's needs.

Jason represents trade unions and their members as well as acting for a number of blue chip and multinational companies. He is instructed by a range of organisations from magic circle to high street solicitors, the top claimant solicitors, local government and the EHRC.

He has appeared in a number of the leading employment and discrimination cases. He is currently acting for a large group of former IBM employees in age discrimination claims arising out of the operation of the company's final salary pension scheme, for the BBC in an age and sex discrimination claim brought by a former presenter of Countryfile and for the EHRC looking at facilities for disabled supporters at a Premiership football club.

Jason works across all sectors but has particular expertise in local government, pharmaceutical, healthcare and motor industries.

areas of practice

- Employment
- Discrimination and equality
- Human rights
- Commercial and common law
- Public and regulatory

appointments and memberships

Jason is Chair of the Industrial Law Society and a long-serving member of the Employment Law Bar Association's Executive Committee.

publications and training

Co-author of Bullen & Leake & Jacob's and of Butterworths Employment Law Guide

Contributor to Butterworths XpertHR online service

EU DISABILITY LAW

AND

THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

CASE STUDIES

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CASE STUDY 1 – DISCRIMINATION IN EMPLOYMENT

Article 27

Mrs. Archibald worked as a road sweeper for the respondent public authority. In 2009, she developed a problem with her feet and following a complication during surgery, became virtually unable to walk and thus no longer able to carry out the main functions of her job. She was off work continuously for some 18 months but, in accordance with the Authority's standard policy, only received 'sick pay' for six months of that period.

Mrs. Archibald was able to carry out general clerical work. The Authority placed her on its list of 'redeployees' and interviewed her for a number of administrative roles, including some that would have amounted to a promotion in terms of pay and benefits, but in each case a better qualified candidate was appointed.

Earlier this year, taking the view that there was no realistic prospect of a return to work, the Authority dismissed Mrs. Archibald. She brings a claim in the labour court.

1. Would the Authority have been justified in terminating Mrs. Archibald's employment any earlier, given that she was incapable of performing the main functions of her job?

2. Was the Authority obliged to provide reasonable accommodation in circumstances where nothing could be done to enable Mrs. Archibald to perform the main functions of her job?

3. Was it appropriate to require Mrs. Archibald to go through a competitive interview process for the alternative administrative roles or should she have simply been put into one of those jobs, even though there were better qualified candidates?

4. Would it have been appropriate to give her a role even if that would have amounted to a promotion?

5. Was the Authority obliged to train Mrs. Archibald so that she became better qualified to carry out an administrative role?

6. Should the Authority have paid Mrs. Archibald throughout the period of her sickness absence?

CASE STUDY 2 – DISCRIMINATION IN THE PROVISION OF GOODS / SERVICES

Articles 5 & 9

The claimant, Mr. Ross, suffers from cerebral palsy and arthritis, is unable to walk for long distances and has difficulties in standing. He is not a permanent wheelchair user but does require use of a wheelchair to travel any significant distance. However he does not own a wheelchair.

Mr. Ross owns a property abroad and is a regular visitor to it. To get there he uses a state-owned and run airport near to his home and usually travels with the same commercial airline, obviously to the same destination.

At the airport, after check-in there is a very long walk, through the duty-free shops, via various bars and restaurants, to the departure gate. Mr. Ross says that he cannot travel this distance without the use of a wheelchair. The airport authority will allow wheelchair users to take their own wheelchairs from the point of check-in to the door of the plane they are travelling on. It also makes available a small number of wheelchairs for others to use, but charges a fee of €20 for doing so. It also points out that there are numerous benches along the route to the departure gates so that Mr. Ross is able to make frequent stops and does not have to make the journey in a single go.

When Mr. Ross has travelled in the past he has regularly found that there is no wheelchair available for him to use. Even when one is available, he resents having to pay the fee to use it pointing out that non-disabled passengers are not charged to negotiate their way around the airport.

The airline provides no help or assistance at all, taking the view that how Mr. Ross negotiates his way around the airport is a matter solely for the airport authority. It allows up to four passengers per flight to be accompanied by a wheelchair.

Mr. Ross sues the airport authority and the airline.

1. Should those who need a wheelchair to negotiate around the airport provide their own?

2. If a wheelchair ought to be provided, who should be responsible for doing so the airport authority, the airline or both?

3. And how do you determine the number that ought to be provided?

4. Alternatively, is it enough that there are numerous benches along the route so that it is not strictly necessary for Mr. Ross to have use of wheelchair?

5. Is it appropriate to charge for use of a wheelchair where one is provided? Is Mr. Ross’s ability to pay relevant?

CASE STUDY 3 – DISCRIMINATION IN RELATION TO HOUSING

Article 19 & 28

Mrs. Barwick is an elderly and long term disabled resident of a local authority owned and run residential care home. She is 99 years old and has been living at the care home for some 7 years, having used the day care facilities there for some years before that. The care home is well and caringly run by the Authority and it is regarded by Mrs. Barwick as her real home and the staff and other residents as not only her friends but her family. Closure of the home would represent an immense disruption for her.

The full capacity of the care home is 30 residents. For various reasons, the number of residents at the care home has fallen to only 9.

The Authority is committed to a programme of modernising services to people with high care needs, including disabled people. So far as accommodation provision is concerned, its strategy includes the aim of moving away from the traditional model of the residential care home to a new model where those with care needs are provided with self-contained accommodation with appropriate and flexible care and support services.

In accordance with its strategy the Authority has taken the decision to close the home and move Mrs. Barwick to self-contained accommodation which is in a different geographical location. Mrs. Barwick challenges the decision.

1. Is the fact that Mrs. Barwick is a disabled person relevant? What could it add to her challenge?

2. In particular how, if at all, can the UNCRPD or EU disability law be relied upon by Mrs. Barwick to undermine the Authority's decision?

3. What would the Authority have to do to demonstrate compliance with any obligations under the UNCRPD / EU disability law?

CASE STUDY 4 – DISCRIMINATION IN ACCESS TO JUSTICE

Articles 1, 12 & 13

On the first day of a trial / hearing Mr Smith, the Claimant, who is not legally represented and intends to present his own case, declares that he has a mental impairment that will make it very difficult for him to participate effectively in the trial process without reasonable accommodation being made for him. He provides a list of the things he would like done which includes the following:

- That the trial be moved from a courtroom to a less formal environment as he feels intimidated and overwhelmed by the formality of the courtroom and legal proceedings.

- Provision of a 'support worker' / intermediary who can explain matters to him as the trial progresses and to assist him formulating questions and answers.

- Breaks, as he will find the proceedings very tiring.

- Judicial patience, as things may need to be explained to him on more than one occasion before he properly understands them and he will have trouble making oral submissions at the end.

1. Is the claimant disabled? If you do not know the answer, how would you determine that issue? Is an adjournment necessary?

2. If the claimant is disabled, how would you determine what, if any, of the above suggested accommodations should be provided and how? What is the test – is it based on the claimant's capacity? Reasonableness? Practicability? Balancing the interests of justice? A combination of some or all of those? Something else?

3. If the case is adjourned, the defendant / respondent may make a costs application against the claimant. How do you deal with that?

4. Would your answer to any of the above questions be different if the claimant had attended court on at least one previous occasion, to deal with interim matters, but had never before suggested that he was (a) disabled or (b) would need any reasonable accommodation?

5. Would your answer to any of the above questions be different if it was not a party, but a representative / advocate who had the mental impairment? Or a witness

José Javier Soto Ruiz

JOSE JAVIER SOTO RUIZ

Currently:

1. - CIVIL NOTARY LAW
2. - EXECUTIVE VICE-PRESIDENT OF THE "FUNDACION DERECHO Y DISCAPACIDAD" ("RIGHT AND DISABILITY FOUNDATION")
3. - LEGAL COUNSEL OF THE EUROPEAN CONSORTIUM ON FOUNDATIONS FOR THE HUMAN RIGHTS AND DISABILITY

Previously:

- DEFENDER OF THE RIGHTS OF PERSONS WITH DISABILITY IN EXTREMADURA (SPAIN) during the period 2005-2008
- PRESIDENT OF THE FOUNDATION FOR THE PROMOTION AND SUPPORT TO PERSONS WITH DISABILITY ("FUTUEX") also during the period 2001- 2008
- MEMBER OF THE SUB-COMISSION OF EXPERTS ABOUT THE UN CONVENTION OF THE ROYAL PATRONAGE ABOUT DISABILITY OF SPAIN during 2004-2006

He still ostents the charge of President of the Permanent Congress on Human Rights and Disability.

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

TRIER 21.06.2011

JOSE JAVIER SOTO

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.

Articulo 12 - Igual reconocimiento como persona ante la Ley

1. "Los estados partes reafirman que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su personalidad jurídica.

2. Los estados partes reconocerán que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos los aspectos de la vida.

3. Los estados partes adoptarán las medidas pertinentes para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica.

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

TRIER 21.06.2011

Article 12 - Equal recognition before the law	***Articulo 12 - Igual reconocimiento como persona ante la Ley***
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.	***4. Los estados parte asegurarán que en todas las medidas relativas al ejercicio de la capacidad jurídica se proporcionen salvo a guardias adecuadas y efectivas para impedir los abusos de conformidad con el derecho internacional en materia de derechos humanos. Esas salvaguardias asegurarán que las medidas relativas al ejercicio de la capacidad jurídica respeten los derechos, la voluntad y las preferencias de las personas, que no haya conflicto de intereses ni influencia indebida, que sean proporcionales y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y que estén sujetas a exámenes periódicos por parte de una autoridad o un órgano judicial competente, independiente, e imparcial. Las salvaguardias serán proporcionales al grado en que dichas medidas afecten a los derechos e intereses de las personas .***

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

TRIER 21.06.2011

Article 12 - Equal recognition before the law	***Articulo 12 - Igual reconocimiento como persona ante la Ley***
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".	***5. Sin perjuicio de lo dispuesto en el presente artículo, los estados partes tomaran todas las medidas que sean pertinentes y efectivas para garantizar el derecho de las personas con discapacidad, en igualdad de condiciones con los demás, a ser propietarias y heredar bienes, controlar sus propios asuntos económicos y tener acceso en igualdad de condiciones a préstamos bancarios, hipotecas y otras modalidades de crédito financiero, y velarán por que las personas con discapacidad no sean privadas de sus bienes de manera arbitraria ".***

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

TRIER 21.06.2011

- ***ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE HIGH COMMISSIONER AND THE SECRETARY-GENERAL***
- ***Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities***
- ***26 January 2009***

- ***INFORME ANUAL DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS E INFORMES DE LA OFICINA DEL ALTO COMISIONADO Y DEL SECRETARIO GENERAL***
- ***Estudio temático preparado por la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos para mejorar el conocimiento y la comprensión de la Convención sobre los derechos de las personas con discapacidad***
- ***26 de enero de 2009***

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

TRIER 21.06.2011

4. Recognition before the law, legal capacity and decision-making

43. Article 12 of the Convention requires States parties to recognize persons with disabilities as individuals before the law, possessing legal capacity, including capacity to act, on an equal basis with others. Article 12, paragraphs 3 and 4, requires States to provide access by persons with disabilities to the support they might require in exercising their legal capacity and establish appropriate and effective safeguards against the abuse of such support. The centrality of this article in the structure of the Convention and its instrumental value in the achievement of numerous other rights should be highlighted.

44. Article 16, paragraph 1, of the International Covenant on Civil and Political Rights already requires the recognition of legal personality of persons with disabilities. The implementation of the obligations contained in article 12, paragraphs 2, 3, 4 and 5, of the Convention on the Rights of Persons with Disabilities, on the other hand, requires a thorough review of both civil as well as criminal legislation containing elements of legal competence.

4. Reconocimiento de la personalidad jurídica, y de la capacidad jurídica y de obrar

43. Según el artículo 12 de la Convención, los Estados partes reconocerán la personalidad jurídica de las personas con discapacidad, así como su capacidad jurídica y de obrar en igualdad de condiciones con los demás. Los párrafos 3 y 4 del artículo 12 obligan a los Estados a proporcionar a las personas con discapacidad el apoyo que puedan necesitar para ejercer su capacidad jurídica, así como salvaguardias adecuadas y efectivas para impedir los abusos. Debe resaltarse el carácter central de este artículo en la estructura de la Convención y su valor instrumental para el disfrute de otros muchos derechos. A/HRC/10/48 página 16

44. El párrafo 1 del artículo 16 del Pacto Internacional de Derechos Civiles y Políticos ya reconoce la personalidad jurídica de las personas con discapacidad. Ahora bien, el cumplimiento de las obligaciones enunciadas en los párrafos 2, 3, 4 y 5 del artículo 12 de la Convención sobre los derechos de las personas con discapacidad requiere un examen a fondo de toda la legislación civil y penal que contenga elementos de capacidad jurídica.

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

TRIER 21.06.2011

45. In the area of civil law, interdiction and guardianship laws should represent a priority area for legislative review and reform. Legislation currently in force in numerous countries allows the interdiction or declaration of incapacity of persons on the basis of their mental, intellectual or sensory impairment and the attribution to a guardian of the legal capacity to act on their behalf. Whether the existence of a disability is a direct or indirect ground for a declaration of legal incapacity, legislation of this kind conflicts with the recognition of legal capacity of persons with disabilities enshrined in article 12, paragraph 2. Besides abolishing norms that violate the duty of States to respect the human right to legal capacity of persons with disabilities, it is equally important that measures that protect and fulfil this right are also adopted, in accordance with article 12, paragraphs 3, 4 and 5.

45. En el ámbito del derecho civil, las leyes que regulan la incapacitación y la tutela deben ser una esfera prioritaria del examen y la reforma de las leyes. En muchos países la legislación en vigor permite declarar incapaz a una persona por deficiencia mental, intelectual o sensorial y atribuir a un tutor la capacidad jurídica para actuar en su nombre. Toda ley que prevea que la existencia de una discapacidad es motivo directo o indirecto para declarar la incapacidad jurídica entra en conflicto con el reconocimiento de la capacidad jurídica de las personas con discapacidad consagrado en el pfo 2 del art 12. Además de derogar las normas que violan el deber de los Estados de respetar el derecho humano a la capacidad jurídica de las personas con discapacidad, es igualmente importante que se adopten medidas que protejan y hagan efectivo ese derecho, de conformidad con los párrafos 3, 4 y 5 del artículo 12.

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

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45.... This includes: legal recognition of the right of persons with disabilities to self-determination; of alternative and augmentative communication; of supported decision-making, as the process whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters; and the establishment of regulations clarifying the legal responsibilities of supporters and their liability.

45.... Esto incluye lo siguiente: el reconocimiento jurídico del derecho de las personas con discapacidad a la autonomía; a disponer de medios alternativos y aumentativos de comunicación; a la adopción de decisiones asistida, entendida como el proceso por el que una persona con discapacidad está habilitada para adoptar y comunicar decisiones con respecto a cuestiones personales o jurídicas; y el establecimiento de normas que precisen las facultades de quienes prestan el apoyo y su responsabilidad.

46. Norms of laws disqualifying a person from office or performing a function on the basis of their disability also need to be abolished. These include norms disqualifying persons with disabilities from running for political positions, or from participating in juries or as witnesses to legal acts.

47. In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.41 Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant. Procedural accommodations both during the pretrial and trial phase of the proceedings might be required in accordance with article 13 of the Convention, and implementing norms must be adopted.

46. También deben abolirse las normas o leyes que inhabilitan a una persona para desempeñar un cargo o función debido a su discapacidad. Esto incluye las normas que inhabilitan a las personas con discapacidad para ejercer cargos políticos, formar parte de jurados o testificar.

47. En el ámbito del derecho penal, el reconocimiento de la capacidad jurídica de las personas con discapacidad lleva a suprimir la circunstancia eximente de la responsabilidad penal constituida por la discapacidad mental o intelectual41. Por consiguiente, al examinar el elemento subjetivo del delito, se debe prescindir de la discapacidad y atender a la situación concreta del autor. De conformidad con el artículo 13 de la Convención, tal vez sea necesario retocar las normas procesales referidas, tanto a la fase de instrucción como al juicio, y ponerlas en práctica.

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COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES HOLDS DAY OF GENERAL DISCUSSION ON RIGHT TO EQUAL RECOGNITION BEFORE THE LAW

21 OCTOBER 2009

MOHAMMED AL-TARAWNEH

The goal of the Convention was not solely about abstract rights, but instead about the capacity for people to act.

Rights of persons with disabilities had been established before, but the true test of a right was whether or not it was applied in practice.

EL COMITÉ DE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD CELEBRA EL DÍA DE DEBATE GENERAL SOBRE EL DERECHO AL IGUAL RECONOCIMIENTO COMO PERSONA ANTE LA LEY

21 OCTUBRE 2009

MOHAMMED AL-TARAWNEH

El objetivo de la Convención no fue exclusivamente sobre los derechos abstractos, sino sobre la capacidad de las personas a actuar.

Los derechos de las personas con discapacidad se habían establecido antes, pero la verdadera prueba de un derecho era si se aplicó o no en la práctica

IBRAHIM SALAMA

Article 12 had the potential to provide many opportunities in meaningful change for persons with disabilities to reach equality of all persons before the law. The goals of the Convention would not be nearly as comprehensive without the assurances of a fair trial. There were many interesting questions that were raised by Article 12

One issue was that of supported decision making vs. substitutive decision making in courts. In the case of mental disability, under what circumstances would it be acceptable to make decisions on behalf of an individual through guardianship, ombudsmen or other relevant services, and how should these services be conducted?

IBRAHIM SALAMA

El artículo 12 tiene el potencial para proporcionar muchas oportunidades de un cambio significativo a las personas con discapacidad para alcanzar la igualdad de todos ante la ley. Los objetivos de la Convención no sería tan amplios sin las garantías de un juicio justo. Hubo muchas preguntas interesantes que se han planteado en el artículo 12

Uno de los problemas era el de la decisión apoyada frente a la decisión sustitutiva en los tribunales. En el caso de discapacidad mental, ¿en qué circunstancias sería aceptable tomar decisiones en nombre de un individuo a través de la tutela, los defensores del pueblo u otros servicios pertinentes, y cómo deberían ser llevados a cabo?

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IBRAHIM SALAMA

While Article 12 did not specifically mention the use of support for persons with disabilities in legal proceedings, it did ask that States use appropriate measures to provide access by persons with disabilities to the support they might require in exercising their legal capacity. It might be that supported decision making could be applied to the vast majority of cases, but that perhaps a small percentage would not be able to use this kind of assistance

IBRAHIM SALAMA

Mientras que el artículo 12 no menciona específicamente el uso de apoyo para las personas con discapacidad en los procedimientos judiciales, se pidió que los Estados el uso de medidas apropiadas para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica. Puede ser que el apoyo en la toma de decisiones podría aplicarse a la gran mayoría de los casos, pero que tal vez un pequeño porcentaje no sería capaz de utilizar este tipo de asistencia.

IBRAHIM SALAMA

Another question had to do with the so-called “insanity defense”. Should courts recognize that in certain situations, some forms of disability could amount to the non-accountability for crimes? There were those who argued that this type of defense should be abolished in courts, given the recognition of the capacity to act. But it was not entirely clear what should be done in cases of criminality where the perpetrator experienced a genuine loss of self volition? The balance lay perhaps somewhere in the process of determining what constituted loss of faculty

IBRAHIM SALAMA

Otra pregunta tenía que ver con la llamada "defensa de la locura". ¿Deben los tribunales reconocer que en ciertas situaciones, algunas formas de discapacidad podría llevar a la falta de responsabilidad por los delitos? Había quienes sostenían que este tipo de defensa debería ser abolida en los tribunales, dado el reconocimiento de la capacidad de actuar. Pero no fue del todo claro qué debe hacerse en los casos de delincuencia en que el autor experimentó una pérdida genuina de la voluntad propia? El equilibrio estaba tal vez en el proceso de determinar qué constituye la pérdida de la facultad

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AMITA DHANDA

Article 12 was at the heart of the Convention. It was important to look closely at it if one wanted to be serious about addressing the issue of exclusion. People with intellectual and psychosocial disabilities had been, in a large part, at the forefront of negotiations when Article 12 was drafted. Article 12 had been formulated totally accepting the vision of inclusions for all; including people with sensory, physical, intellectual and psychosocial disabilities. It was extremely appropriate that the Committee had taken this Article as the first it had wished to look closely at.

The Office of the High Commissioner for Human Rights Handbook on Legal Capacity project would highlight the existing discrimination in existing laws and elaborate on Article 12 obligations. It would assist countries in planning for law reform, policy and programme. Article 12 spoke to the entire human community. There was no question or misunderstanding on the provisions of Article 12. What needed to be worked through was how to ensure its implementation.

AMITA DHANDA

El artículo 12 estaba en el corazón de la Convención. Es importante observar de cerca si se quería tomar en serio abordar el problema de la exclusión. Las personas con discapacidad intelectual y psicosocial habían estado, en gran parte, a la vanguardia de las negociaciones cuando se redactó el artículo 12. El artículo 12 se había formulado aceptando totalmente la visión de las inclusiones para todos, incluidas las personas con discapacidad sensorial, física, intelectual y psicosocial. Era sumamente apropiado que el Comité hubiera tomado este artículo como el primero que ha querido mirar de cerca

El proyecto del Manual de Capacidad Legal de la Oficina del Alto Comisionado para los Derechos Humanos pondría de relieve la discriminación existente entre las leyes actuales y las obligaciones basadas en el artículo 12. Esto ayudaría a los países en la planificación de la reforma legal, la política y la programación. El artículo 12, habló a toda la comunidad humana. No había duda o mala interpretación de las disposiciones del artículo 12. Lo que había que trabajar era acerca de la forma de garantizar su aplicación

Committee on the Rights of Persons with Disabilities
Fifth session **Quinto período de sesiones**
Geneva, 11-15 April 2011

The Committee has received the following initial reports which are pending consideration:
El Comité ha recibido los siguientes informes iniciales cuyo examen está pendiente:

State party	*Due*	*Date received*	*Symbol*
Spain	2010	3 May 2010	CRPD/C/ESP/1
Tunisia	2010	1 July 2010	CRPD/C/TUN/1
Peru	2010	8 July 2010	CRPD/C/PER/1
China	2010	30 August 2010	CRPD/C/CHN/1
Argentina	2010	6 October 2010	CRPD/C/ARG/1
Hungary	2010	14 October 2010	CRPD/C/HUN/1
Paraguay	2010	21 October 2010	CRPD/C/PRY/1
Austria	2010	2 November 2010	CRPD/C/AUT/1
Australia	2010	3 December 2010	CRPD/C/AUS/1
El Salvador	2010	5 January 2011	CRPD/C/SLV/1
Sweden	2010	7 February 2011	CRPD/C/SWE/1
Azerbaijan	2011	16 February 2011	CRPD/C/AZE/1

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Tunisia

Equal recognition before the law (art. 12)

The Committee is concerned that no measures have been undertaken to replace substitute decision-making by supported decision-making in the exercise of legal capacity.

The Committee recommends that the State party review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making. It further recommends that training be provided on this issue to all relevant public officials and other stakeholders.

Tunez

Igual reconocimiento como persona ante la ley (art. 12)

Al Comité le preocupa que no se han adoptado medidas para reemplazar la sustitución en la toma de decisiones por el apoyo en la toma de decisiones en el ejercicio de la capacidad jurídica.

El Comité recomienda al Estado Parte que revise las leyes que permitan la guarda y tutela, y tomar medidas para desarrollar leyes y políticas para reemplazar los regímenes de sustitución en la toma de decisiones por el apoyo en la toma de decisiones. Además, recomienda que se sensibilice sobre este tema a todos los funcionarios públicos pertinentes y otras partes interesadas.

Spain

52. With regard to paragraphs 1 and 2 of this article, under article 29 of the Civil Code personality is established by the fact of birth provided that the conditions stipulated in article 30 are met, and every individual enjoys legal capacity from the moment of birth. Since persons with disabilities enjoy recognized legal personality and the same legal capacity as others, it may therefore be stated that the legal order is fully in line with article 12, paragraphs 1 and 2, of the Convention .

España

52. Apartados 1 y 2 del artículo 12. Conforme a nuestro Código Civil (art. 29) el nacimiento determina la personalidad, siempre que se den las condiciones señaladas en el artículo 30, y toda persona física tiene capacidad jurídica desde su nacimiento. En consecuencia, dado que las personas con discapacidad tienen reconocida personalidad jurídica e igual capacidad jurídica que las demás personas, hay que afirmar la plena compatibilidad del ordenamiento jurídico con las previsiones de los apartados 1 y 2 del artículo 12 de la Convención.

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Spain

53. Paragraph 3 requires States parties to take appropriate measures to provide persons with disabilities with the support they may require in exercising their legal capacity. This obligation appears to be met in Spanish legislation by the institutions for the guardianship and protection of persons and property in general or exclusively for that of persons with disabilities. These institutions are governed by Parts IX and X of Book I of the Civil Code, which govern deprivation of capacity (articles 199 to 201), guardianship (articles 215 to 285), curatorship (articles 286 to 293), the Legal Defender and the de facto custodian (articles 303 and 304).

España

53. El apartado 3 del artículo 12 obliga a los Estados Partes a adoptar las medidas pertinentes para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica. Obligación que en nuestra legislación quedaría cubierta por las instituciones de guarda y protección de la persona y bienes, o solamente de la persona o de los bienes del incapacitado. Estas instituciones están reguladas en los Títulos IX y X del Libro I del Código civil en cuanto regulan la Incapacitación (arts. 199 a 201), la Tutela (arts. 215 a 285), la Curatela (arts. 286 a 293), el Defensor judicial (arts. 299 a 302) y la Guardia de hecho (arts. 303 y 304).

Spain

55. The safeguards and measures concerning the exercise of legal capacity mentioned in paragraph 4 of this article are enshrined in Spanish legislation in the following terms:

56. Respect for the rights, will and preferences of the individual is fundamentally reflected in article 200 of the Civil Code, which requires guardians to perform their task in a manner in line with the personalities of their wards and respectful of their physical and psychological integrity.

España

55. Apartado 4. Las salvaguardas de las medidas relativas al ejercicio de la capacidad jurídica contenidas en este apartado 4, subyacen en nuestra legislación en los términos que seguidamente se indican.

56. El respeto de los derechos, la voluntad y las preferencias de la persona, está reflejado básicamente en el artículo 268 del Código civil en cuanto obliga a los tutores a ejercer su cargo de acuerdo con la personalidad de sus pupilos, respetando su integridad física y psicológica.

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Spain

57. The requirement of absence of conflicts of interest is mentioned in article 244(4), which states that the existence of major conflicts of interest with the incapacitated person is a disqualification for guardianship, while article 247 provides for removal of guardianship where this disqualifying factor arises or the guardian is guilty of misconduct in the performance of his task through failure to discharge the duties pertaining thereto, either through manifest incompetence or when serious and continuing problems of coexistence arise. . Both provisions also apply to curators and legal defenders. Article 299 provides for the appointment of a legal defender to represent and safeguard the interests of the disabled person when a conflict of interest arises between that person and his/her legal representatives or curator. Finally, article 221 prohibits any person discharging a guardianship function from representing the ward when by so doing he or she will intervene in a personal capacity or on behalf of a third person and there is a conflict of interest

España

57. La inexistencia de conflicto de intereses está prevenida en el Código civil, artículo 244-4, al considerar causa de inhabilidad para ser tutor la existencia de importantes conflictos de intereses con el incapacitado y artículo 247, que establece la remoción de la tutela a los que incurren en dicha causa de inhabilidad o cuando el tutor se conduzca mal en el desempeño de sus funciones por incumplimiento de los deberes propios del cargo o por notoria ineptitud de su ejercicio o cuando surgieran problemas de convivencia graves y continuados. Ambos preceptos son extensivos al curador y al defensor judicial. Además, el artículo 299 prevé el nombramiento de un defensor judicial que represente y ampare los intereses del incapacitado cuando en algún asunto exista conflicto de intereses entre éste y sus representantes legales o el curador. Finalmente, el artículo 221 prohíbe a quien desempeñe un cargo tutelar representar al tutelado cuando en el mismo acto intervenga en nombre propio o de un tercero y existiera conflicto de intereses.

Spain

58. There is no express safeguard in current legislation against undue influence. However, that safeguard may be deemed implicit in articles 208 (mentioned earlier) and 216, which require guardianship to be exercised for the benefit of the ward and under the safeguard of the judiciary.

59. As regards proportionality and adaptation to the circumstances of a person with disabilities, article 760 of the Civil Judgements Act No. 1/2007 (LEC), taken in conjunction with articles 267, 289 and 290 of the Civil Code, require the declaration of incapacity to specify the extent and limits thereof, the acts which the person concerned can perform unaided and those requiring the intervention of a guardian or the assistance of a curator.

España

58. Inexistencia de influencia indebida. Esta salvaguarda no está recogida expresamente en la vigente regulación, aunque puede considerarse implícita en los artículos 268, ya comentado, y 216, en cuanto exige ejercer las funciones tutelares en beneficio del tutelado y bajo la salvaguarda de la autoridad judicial.

59. Proporcionalidad y adaptación a las necesidades y circunstancias de la persona con discapacidad. De conformidad con la el artículo 760 de la Ley Nº 1/2007 de Enjuiciamiento Civil (LEC) y en relación con los artículos 267, 289 y 290 del Código Civil, la sentencia que declare la incapacitación deberá indicar la extensión y límites de ésta y especificar los actos que el incapacitado puede realizar por sí solo y aquellos en los que necesita la intervención del tutor o la asistencia del curador.

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Spain

60. With regard to application of measures for the shortest possible time and their regular review by a competent, independent and impartial authority or judicial body, proceedings concerning legal capacity are regulated by articles 756 to 768 of the LEC. This Act makes provision for subsequent proceedings for the restoration of capacity and amendment to the scope of a declaration of incapacity. Such proceedings may be instituted by the persons empowered to seek the declaration of incapacity. Automatic review of these measures is not envisaged.

España

60. Aplicación de las medidas en el plazo más corto posible y revisión periódica por parte de una autoridad o un órgano judicial competente, independiente e imparcial. Los artículos 756 a 768 de la LEC regulan el proceso sobre la capacidad de las personas. Esta ley procesal prevé la posibilidad de instar ulteriores procesos para la reintegración de la capacidad y modificación del alcance de la incapacitación. Están legitimados para instar estos procesos las personas legitimadas para promover la declaración de incapacidad, pero no se contempla la revisión de oficio de estas medidas.

Spain

62. To achieve full compliance with article 12(4) and better adaptation to the spirit and terminology of the Convention, work is proceeding on the preparation of a draft Act amending Parts IX and X of the Civil Code and Book IV, Part I, chapter II, of the Civil Judgements Act, which regulate proceedings concerning the capacity of individuals, and also introducing minor amendments, principally to adapt the terminology used in the Commercial Code, the Mortgages Act and the Organization Statute of the Public Prosecutor's Office

España

62. Para el cumplimiento completo del artículo 12.4 y una mejor adaptación al espíritu y a la terminología de la Convención, se está trabajando en la redacción de un anteproyecto de ley que modificará los Títulos IX y X del Libro I del Código civil y el Capítulo II del Título I del Libro IV de la LEC que regula los procesos sobre la capacidad de las personas e introducirá algunas modificaciones puntuales, básicamente para adaptación de la terminología empleada en el Código de Comercio, Ley Hipotecaria y Estatuto Orgánico del Ministerio Fiscal.

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Spain

63. Paragraph 5 of article 12 requires States parties to take all necessary measures to secure the right of persons with disabilities to own or inherit property and control their own financial affairs on an equal basis with others. The Civil Code contains provisions concerning the capacity to inherit and to make wills which may apply to persons with disabilities; these are described below

España

63. El apartado 5 del artículo 12 obliga a los Estados Partes a tomar todas las medidas que sean necesarias para garantizar el derecho de las personas con discapacidad a ser propietarias, heredar bienes y a controlar sus propios asuntos económicos, en igualdad de condiciones con las demás. El Código civil contiene previsiones relativas a la capacidad de heredar y la capacidad de testar que pueden incidir en las personas con discapacidad que seguidamente se comentan

HUMAN RIGHTS AND DISABILITY

ALTERNATIVE REPORT SPAIN 2010

Drawn up by CERMI State Delegation for the UN Convention.

For the

UN Committee on the rights of persons with disability

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Article 12. Equal recognition before the law

30. Spain does not have a support system in line with the Convention. Spain's legal system governing the legal capacity and capacity to act of persons (Articles 200 and following of the Civil Code and Civil Procedure Act - *Ley de Enjuiciamiento Civil*) regulates a system which restricts certain persons with disabilities' exercising their rights by legal ruling.

31. Limiting the capacity to act is based in these cases on the existence of "illness or persistent impairments of a physical or mental nature which prevent the persons acting for themselves" (Art 200 CC).

32. The legal system covers the substitution of the rights of persons who have been "incapacitated" and places them under a protection regime by legal ruling. These persons may not then exercise their rights themselves, this is undertaken by a guardian who will do so in their name.

Artículo 12. Igual reconocimiento ante la ley

30. España no cuenta con un sistema de apoyos acorde a la Convención. El ordenamiento jurídico español que regula la capacidad jurídica y de obrar de las personas, (Código Civil artículos 200 y ss. y Ley de Enjuiciamiento Civil), regula un sistema para determinadas personas con discapacidad que les limita en el ejercicio de sus derechos por sentencia judicial.

31. La limitación de la capacidad de obrar se fundamenta en estos casos en la existencia de "*enfermedades o deficiencias persistentes de carácter físico o psíquico que impida a la personas gobernarse por si misma"* (art 200 CC).

32. El sistema legal prevé la sustitución en el ejercicio de los derechos de aquellas personas que hayan sido "incapacitadas" y sujetas a un régimen de tutela a través de una sentencia judicial. Estas personas no podrán ejercer entonces sus derechos por sí mismas si no que serán sustituidas en su ejercicio por un tutor que lo hará en su nombre.

33. Although the law contains other concepts and safeguards, there is **an abuse of the substitution system** which means that the rights of persons with disabilities are generally exercised via a legal representative. The experience of the organisations for persons with disabilities and their families confirms this perception, but the official data needs to be looked at which shows the number of guardianships in the total of completed proceedings, and how many of them cover the person and their assets (legal substitution for asset-based and very personal rights).

33. Aunque la ley contiene otras figuras y salvaguardas, existe un **abuso del sistema de sustitución total** que da lugar a que los derechos de una persona con discapacidad sean ejercidos a través de su representante legal con carácter general. Esta percepción se constata en la experiencia de las organizaciones de personas con discapacidad y sus familias, pero sería necesario conocer los datos oficiales que reflejen el número de tutelas del total de procedimientos concluidos, y cuantas de ellas son sobre la persona y los bienes (sustitución legal para derechos patrimoniales y personalísimos).

34. **Spain lacks a support system for decision making in order to promote autonomy in exercising rights**; this "protection system" is almost exclusively turned to when legal business (asset based) involving persons with support needs requires validation – or when their admission into a care home has been requested. This recurring reason highlights the lack of a support system to exercise fundamental rights other than asset-based rights, which in accordance with the Convention, should exist to ensure equality before the law for persons in need of this.

34. **España carece de un sistema de apoyo a la toma de decisiones que fomente la autonomía en el ejercicio de los derechos**; de forma casi exclusiva se acude a este "sistema de protección" cuando es necesario validar un negocio jurídico (de ámbito patrimonial) en el que participa una personas con necesidades de apoyo- o cuando se solicita su ingreso en una residencia-. Esta recurrente motivación evidencia la carencia de un sistema de apoyos en el ejercicio de derechos fundamentales otros de los patrimoniales, que de acuerdo a la Convención debería existir para garantizar la igualdad ante la ley de aquellas personas que lo necesiten.

35. **The safeguards demanded under the CRPD are not guaranteed by our legislation:**

- Our legal system does not guarantee respect of a person's will and preferences: on the one hand because the guardian has the capacity to substitute their ward in exercising his or her rights and is not obliged to respect their will. Respect for *the ward's personality* cannot be compared with respect for their will (as mentioned in the Report presented by Spain), *will* being understood as the power to decide and be in charge of their own behaviour at any given moment.
- The Government's report itself recognises the absence of any specific legal guarantees in place to prevent *undue influence*.

35. **Las salvaguardas exigidas en la CDPD no están garantizadas por nuestra legislación:**

- El respeto a la voluntad y a las preferencias de la persona no están garantizados por nuestro ordenamiento jurídico: de una parte porque el tutor tiene la capacidad de sustituirle en el ejercicio de sus derechos y no cuenta con la obligación de respetar la voluntad del pupilo. No se puede asimilar *el respeto de la personalidad* del pupilo con el respeto a su voluntad, (como menciona el Informe presentado por España) entendiendo por v*oluntad* la facultad de decidir y ordenar la propia conducta en un momento concreto.
- El propio informe del Gobierno reconoce la ausencia de garantías legales expresas que eviten la *influencia indebida*.

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35….

- There is no obligation for court review of rulings modifying the capacity to act. This safeguard, which should be mandatory in accordance with the Convention (periodic examinations), is optional and in practice there is no data on reviews of these rulings.
- Abuse of the concept of guardianship confirms that the *proportionality* of the rulings is not guaranteed either. There is no data on the number of guardianships appointed with regard to the number of rulings modifying the capacity to act.

35….

- No existe una obligación de revisar de oficio las sentencias de modificación de la capacidad de obrar. Esta salvaguarda, que debiera ser obligatoria de acuerdo a la Convención (exámenes periódicos), es potestativa y en la práctica no existen datos de revisiones de estas sentencias.

El abuso de la figura de tutela constata que la *proporcionalidad* de las sentencias tampoco está garantizada. No existen datos del número de tutelas constituidas respecto al número de sentencias de modificación de la capacidad de obrar.

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36. **Adaptation to the Convention requires substantial changes to Spanish legislation on the capacity to act of persons with disabilities.** CERMI understand that the limiting capacity system which exists in Spain is not compatible with the mandates of the Convention, therefore no tweaks or adjustments would be acceptable. A new model needs to be created instead, based on support. For CERMI the Convention is an historical opportunity to abandon paternalistic systems which compromise the equality of persons with disabilities before the law, and change them for others which promote free determination, with the necessary supports and safeguards.

37. On occasion the equality before the law of persons with disability is obstructed due to the lack of awareness of the social model and human rights of the CRPD. We attach as an appendix a ruling which reflects this lack of awareness as it uses a situation of disability to take the custody of a child away from a mother with a disability.

36. **La adaptación a la Convención requiere cambios sustanciales en la regulación española de la capacidad de obrar de las personas con discapacidad** El CERMI entiende que el sistema de limitación de la capacidad existente en España no es compatible con los mandatos de la Convención, por lo que no serían admisibles retoques o ajustes de detalle, sino que hay que crear un nuevo modelo, centrado en los apoyos. Para el CERMI, la Convención es una oportunidad histórica para abandonar sistemas paternalistas que merman la igualdad de las personas con discapacidad ante la ley, y cambiarlos por otros potencien la libre determinación, con los soportes y salvaguardias necesarios

37. La igualdad ante la ley de las personas con discapacidad en ocasiones se ve obstaculizada por la falta de concienciación sobre el modelo social y los derechos humanos de la CDPD. Adjuntamos como anexo una sentencia que refleja esta falta de concienciación ya que parte de la situación de discapacidad para justificar la retirada de la custodia de una menor a una madre con discapacidad.

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Article 29. Participation in political and public life.

136. Current electoral legislation in Spain allows the active and passive right of suffrage to be removed from people who have been legally incapacitated, as long as the incapacitation ruling specifically covers this.

137. This possibility also extends to people who are interned in a psychiatric hospital by legal authorisation, during the period of their internment, as long as the judge expressly decides that they are incapable of exercising their right to vote.

Artículo 29. Participación en la vida política y pública.

136. La legislación electoral vigente en España permite que se prive del derecho del sufragio, activo y pasivo, a las personas incapacitadas judicialmente, siempre que la sentencia que declara la incapacitación lo prevea expresamente.

137. Esta posibilidad también se extiende a las personas internadas en un hospital psiquiátrico con autorización judicial, durante el período que dure su internamiento, siempre que en la autorización el juez declare expresamente la incapacidad para el ejercicio del derecho de sufragio.

138. This deprivation of fundamental rights, which can principally affect people with intellectual disabilities or mental illnesses, makes no sense from a human rights point of view and clearly contravenes the United Nations' International Convention on the Rights of Persons with Disabilities, signed and ratified by Spain.

139. Article 12 of this international treaty declares the full legal equality of persons with disabilities in all spheres of life, without room for any restrictions on the grounds of disability. In addition, it guarantees the right of persons with disabilities to participate in political life and in the electoral processes with no exclusion of any type.

140. Current Spanish legislation, therefore, is incompatible with the UN Convention, and thus has to be urgently amended in order that persons with disabilities may exercise their basic rights to the full.

138. Esta privación de derechos fundamentales, que puede afectar principalemente a personas con discapacidad intelectual o con enfermedad mental, carece de sentido desde una visión derechos humanos y entra en clara contradicción con la Convención Internacional sobre los Derechos de las personas con Discapacidad de Naciones Unidas, firmada y ratificada por España.

139. Este tratado internacional, en su artículo 12, establece la plena igualdad legal de las personas con discapacidad en todas las esferas de la vida, sin que quepan restricciones por razón de discapacidad. Además, garantiza el derecho de las personas con discapacidad a participar en la vida política y en los procesos electorales sin ningún tipo de exclusiones.

140. La vigente legislación española es incompatible, por tanto, con las Convención de la ONU, por lo que tiene que ser modificada con urgencia para que las personas con discapacidad puedan ejercer sus derechos básicos en plenitud.

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Implementation of the Convention on the Rights of Persons with Disabilities

List of issues to be taken up in connection with the consideration of the initial report of Spain (CRPD/C/ESP/1), concerning articles 1 to 33 of the Convention on the Rights of Persons with Disabilities

Aplicación de la Convención sobre los derechos de las personas con discapacidad

Lista de cuestiones que deben abordarse en relación con el examen del informe inicial de España (CRPD/C/ESP/1), con respecto a los artículos 1 a 33 de la Convención sobre los derechos de las personas con discapacidad

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Equal recognition before the law (article 12)

1. Please provide data on how many persons with disabilities have been put under guardianship to enable them to exercise legal capacity and on the number of rulings modifying the capacity to act, if any (Cf. paras.52-69).

2. Please explain on how it is ensured that guardianship is exercised to the benefit of the ward, in view of the absence of explicit safeguards in current legislation against undue influence or conflict of interest. (Cf. para.58).

3. Please provide information on the measures planned or undertaken to replace substitute decision-making (guardianship) by supported decision-making in the exercise of legal capacity, in accordance with article 12 of the Convention (Cf. para.53).

Igual reconocimiento ante la ley (art 12)

9. Sírvanse facilitar datos sobre el número de personas con discapacidades que han sido puestas bajo tutela como forma de ejercer la capacidad jurídica y, en su caso, sobre el número de decisiones modificando la capacidad de actuar (párrafos 52 a 69 del informe del Estado parte).

10. Sírvanse explicar como se garantiza que la tutela se ejerza en beneficio del pupilo teniendo en cuenta que en la legislación actual no existen salvaguardas contra la influencia indebida o el conflicto de intereses (párrafo 58 del informe del Estado parte).

11. Sírvanse facilitar información sobre las medidas previstas o que se han tomando para que, en vez de la sustitución en la adopción de decisiones (guarda) se recurra al apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica, de conformidad con el artículo 12 de la Convención (párrafo 53 del informe del Estado parte).

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Equal recognition before the law

and equal capacity to act:

understanding and implementing

Article 12 of the UN Convention

on the Rights of Persons with Disabilities

EDF Position paper - October 2009

Igual reconocimiento como persona ante la ley

e igual capacidad para actuar:

comprensión y aplicación de el artículo 12 de la Convención de la ONU sobre los Derechos de las Personas con Discapacidad

EDF Position paper - October 2009

"Equal recognition before the law"

The notion of "equal recognition before the law" is wider than "legal capacity" (the concept that is also present in Article 12). It builds on other human rights treaties, mainly on Article 6 of the Universal Declaration of Human Rights and on Article 16 of the International Convent on Civil and Political Rights (ICCPR), which states that "*everyone shall have the right to recognition everywhere as a person before the law".*

"Igual reconocimiento como persona ante la ley"

La noción de "Igual reconocimiento como persona ante la ley" es más amplia que la "capacidad jurídica" (el concepto que también está presente en el artículo 12). Se basa en otros tratados de derechos humanos, principalmente en el artículo 6 de la Declaración Universal de los Derechos Humanos y en el artículo 16 del Convenio Internacional de Derechos Civiles y Políticos (PIDCP), que establece que "toda persona debe tener el derecho al reconocimiento en todas partes, como persona ante la ley ".

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"Legal capacity"

"Legal capacity" in the sense of Article 12 is understood as *evolving* capacity to exercise these equal rights and includes the capacity to act. This applies to the legal systems of all countries for all people, irrespective of the nature or degree of their disability or apparent need for support. Under Article 12 CRPD, legal capacity cannot be challenged or denied based on the disability of a person. Instead, support measures to exercise legal capacity may have to be provided whenever needed.

"**Capacidad juridica**"

"La capacidad jurídica"en el sentido del artículo 12, se entiende como la capacidad evolutiva de ejercer estos derechos iguales e incluye la capacidad de actuar. Esto se aplica a los sistemas jurídicos de todos los países para todas las personas, independientemente de la naturaleza o el grado de su discapacidad o necesidad evidente de apoyo. Según el artículo 12 CDPD, la capacidad jurídica no puede ser cuestionada o negada basada en la discapacidad de una persona. En cambio, las medidas de apoyo a ejercer su capacidad jurídica puede tener que ser siempre que sea necesario.

"Support in exercising legal capacity"

Supported decision-making as enshrined in Article 12 starts from the presumption of full and equal legal capacity of all citizens, including those with severe and profound levels of disability. The Convention provides that the States Parties take *"appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity*" (Article 12.3) and *"ensure that all measures that related to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse"* (Article 12.4).

"El apoyo en el ejercicio de la capacidad jurídica"

El apoyo de toma de decisión, consagrado en el artículo 12, parte de la presunción de capacidad jurídica plena e igualitaria de todos los ciudadanos, incluyendo aquellos con niveles severos y profundos de la discapacidad. La Convención dispone que los Estados Partes adoptarán "medidas adecuadas para facilitar el acceso de las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica" (artículo 12.3) y "garantizar que todas las medidas relacionadas con el ejercicio de la capacidad jurídica proporcionen salvaguardias adecuadas y efectivas para impedir los abusos "(artículo 12.4).

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In accordance with the international human rights law, the respect of equal and inalienable rights must be in the centre of the discourse on determining the extent of support needed by the particular individual with a disability. Therefore, the concept of incapacity must be rejected from the outset, and the degree of assistance made proportional to the needs and abilities of the person and vary depending on the situation (for example, they might need support making important financial decisions, but can manage their daily tasks independently).

Consequently, the support in exercising legal capacity must always be based on a personal knowledge of the person (but not such as to create a conflict of interests!), and involve trust-building activities through alternative and augmentative communication methods.

De conformidad con la ley internacional de derechos humanos, el respeto de los derechos iguales e inalienables deben estar en el centro del discurso sobre la determinación del grado de apoyo que necesita el individuo con una discapacidad. Por lo tanto, el concepto de incapacidad debe ser rechazada desde el principio, y el grado de asistencia debe ser proporcional a las necesidades y capacidades de la persona y variar dependiendo de la situación (por ejemplo, puede ser que necesite apoyo para la toma de decisiones financieras importantes, pero pueda gestionar sus tareas diarias de forma independiente).

En consecuencia, el apoyo en el ejercicio de la capacidad jurídica siempre debe basarse en un conocimiento personal de la persona (pero no como para crear un conflicto de intereses!), e implicar actividades de fomento de la confianza a través de métodos de comunicación alternativos y aumentativos

People whose abilities to make complex decisions or to communicate their decisions to others are either temporarily or permanently impaired may need high levels of support in most or all areas of life. In such cases they must be provided with such support that ensures that their legal capacity is nevertheless enjoyed on an equal basis with others while helping them to evaluate the implications and consequences of some of their actions or inactions.

At present, there is no sufficient evidence and practice to determine how supported decision-making can be ensured for this group of persons with disabilities. States Parties as well as disability organisations are called upon to test with urgency practical models of supported decision-making in pilot projects to resolve this outstanding question. The crucial point is how a trusting support relationship can be established in the cases of *all* people with disabilities.

Las personas cuyas habilidades para tomar decisiones complejas o para comunicar sus decisiones a los demás están temporal o permanentemente deterioradas necesitarán altos niveles de apoyo en la mayoría o todos los ámbitos de la vida. En este caso, deberán contar con tal apoyo que asegure que su capacidad jurídica se disfruta en todo caso en igualdad de condiciones con los demás al tiempo que se les ayuda a evaluar las implicaciones y consecuencias de algunas de sus acciones o inacciones.

En la actualidad, no hay pruebas ni práctica suficientes para determinar cómo el apoyo en la toma de decisiones se puede garantizar para este grupo de personas con discapacidad. Los Estados Partes, así como las organizaciones de discapacidad están llamados a probar con urgencia modelos prácticos de apoyo de toma de decisiones en los proyectos piloto para resolver esta cuestión pendiente. El punto crucial es cómo se puede establecer una relación de apoyo con confianza en todos los casos de personas con discapacidad

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“Safeguards”

The Convention requires that appropriate and effective safeguards be put in place to prevent abuse of persons with disabilities in the exercise of their legal capacity.

The text of the Convention itself provides important guidelines to be respected by the support measures. Namely, they must be “*appropriate and effective*”, “*proportional and tailored to the person’s circumstances, apply for the shortest time possible*” as well as “*subject to regular review by a[n...] independent authority*”. The Convention obliges States Parties to develop disability-neutral criteria to protect persons with disabilities against abuse in the same way as all other citizens are protected

“Salvaguardias”

La Convención exige que las salvaguardias apropiadas y efectivas sean puestas en marcha para prevenir el abuso de las personas con discapacidad en el ejercicio de su capacidad jurídica.

El texto de la propia Convención establece pautas importantes que deben respetar las medidas de apoyo. Es decir, deben ser "adecuadas y eficaces", "proporcionales y adaptadas a las circunstancias de la persona, aplicadas durante el menor tiempo posible", así como "sujetas a revisión periódica por una [n. ..] autoridad independiente". La Convención obliga a los Estados Partes a desarrollar criterios imparciales por la incapacidad para proteger a las personas con discapacidad contra el abuso de la misma manera que están protegidos los demás ciudadanos

In practice that means the establishment of a system for impartial assessment of the actual need for supported decision-making in exercising legal capacity, performed with the assistance of recognised independent experts, rigorous determination of the extent of the supporters' role and power, periodical re-examination of the measures adopted and possible appeal of decisions by disabled persons or their families. Again, it must be emphasised that the disabled person's wishes must always be the determining factor.

Special attention must be paid to safeguarding the rights of people in need of high level of support in all areas of life, who may be particularly vulnerable to undue influence.

These safeguards must be clearly separate from the support network, since they should also protect the person from exploitation or abuse by supporters.

En la práctica eso significa el establecimiento de un sistema para la evaluación imparcial de las necesidades actuales de apoyo en la toma de decisiones en el ejercicio de la capacidad jurídica, realizado con la ayuda de reconocidos expertos independientes, la determinación rigurosa de la extensión de la actuación y facultades de las personas que prestan el apoyo, la revisión periódica de las medidas adoptadas y el posible recurso de las decisiones por parte de las personas con discapacidad o sus familias. Una vez más, hay que destacar que los deseos de la persona con discapacidad debe ser siempre el factor determinante.

Se debe prestar especial atención a la protección de los derechos de las personas necesitadas de un alto nivel de apoyo en todos los ámbitos de la vida, que pueden ser particularmente vulnerables a la influencia indebida.

Estas garantías deben estar claramente separadas de la red de apoyo, ya que también deben proteger a la persona de la explotación o abuso por parte de la persona que presta el apoyo.

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Eight steps for achieving equal recognition before the law

1. Promotion and support of self-determination of people with disabilities

2. Replacing traditional guardianship by a system of supported decision-making

3. Developing a system for supporting decision-making

4. Selection and registration of support persons

5. Overcoming communication barriers

6. Preventing and resolving conflicts between supporter and supported person

7. Implementing safeguards

8. Using mainstream mechanisms for the protection of the best interests of a person

Ocho pasos para lograr el igual reconocimiento como persona ante la ley

1. Promoción y apoyo de la autodeterminación de las personas con discapacidad

2. Sustitución de la tutela tradicional por un sistema de apoyo de toma de decisiones

3. Desarrollar un sistema de apoyo a la toma de decisiones

4. Selección y registro de las personas de apoyo

5. Superar las barreras de comunicación

6. Prevención y resolución de conflictos entre la persona que presta el apoyo y la que lo recibe

7. La aplicación de salvaguardias

8. Utilización de los mecanismos principales para la protección de los intereses de una persona

CERMI initial proposal for establishing a new procedure for providing support for decision making

"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".

Propuesta inicial del CERMI para instaurar un nuevo procedimiento de provisión de apoyos para la toma de decisiones

"Si hay una esfera donde los efectos de la convención se dejan sentir con mayor contundencia esa es la de la plena igualdad jurídica de las personas con discapacidad. La discapacidad ya no puede ser excusa o cuartada para limitar o reducir la capacidad de las personas de realizar actos válidos en el tráfico jurídico. Los sistemas como el español, basados en la sustitución de la voluntad de la persona por razón de discapacidad – de ordinario intelectual o mental – han de quedar sin efecto, pues son contrarios al nuevo paradigma de la libre determinación de los individuos, de todos, incluidos los hombres y mujeres con discapacidad.

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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.

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.

Por estos motivos, el Cermi ha planteado al Ministerio de Justicia que el actual proceso civil de incapacitación judicial, sea sustituido por uno de apoyos a la toma libre de decisiones, en el caso de personas con discapacidad que así lo precisen.

La convención, vigente en España desde 2008, obliga a los estados partes a derogar los sistemas que como el de la incapacitación judicial limitan la igualdad jurídica de las personas, incluidas aquellas que presentan una discapacidad, y a reemplazarlos por otros que garanticen apoyos para la toma libre y autónoma de decisiones.

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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.

El Cermi entiende que el sistema de limitación de la capacidad existente en España no es compatible con los mandatos de la convención, por lo que no serían admisibles retoques o ajustes de detalles (salida fácil a la que algunas instancias están tentadas), sino que hay que crear un nuevo modelo centrado en la autonomía y en los apoyos. Para el Cermi, la convención es una oportunidad histórica de abandonar sistemas paternalistas que merman la igualdad de las personas ante la Ley, y trocarlos por otros, en consonancia con los tiempos, que potencian la libre determinación, con los soportes y salvaguardias necesarios.

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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.

A pesar de las resistencias de sectores jurídicos que se aferran a instituciones seculares que a su entender son inamovibles, la convención es un hecho jurídico indiscutible e irreversible que esta por encima del derecho interno preexistente.

A juicio del Cermi, el ejecutivo y el legislador han de ser valientes y audaces para responder normativamente a los desafíos que en materia de igualdad jurídica y toma libre de decisiones plantea la convención de la ONU. Es llegada la hora de los apoyos para la libre toma de decisiones.

Ello obliga a analizar jurídicamente como debe sustituir el nuevo sistema al de la institución de la incapacitación regulado en el código civil (titulo IX) y a la institución de la tutela de incapacitados (titulo X). El articulo 200 del código civil establece que "son causas de incapacitación las enfermedades o deficiencias persistentes de carácter físico o psíquico que impidan a la persona gobernarse por si misma". El mismo fundamento de la institución civil de la incapacitación ha quedado obsoleto y no se ajusta al articulo 12 de la convención".

Right of suffrage

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

Derecho de sufragio

Carta dirigida al Defensor del Pueblo por Luis Cayo Perez Bueno en su condición de presidente del comité español de representantes de personas con discapacidad (CERMI) de fecha 5 de octubre de 2010, expone que la legislación electoral vigente en España permite que se prive del derecho del sufragio, activo y pasivo a las personas incapacitadas judicialmente, siempre que la sentencia que declara la incapacitación lo prevea expresamente.

Esta posibilidad también se extiende a las personas internadas en un hospital psiquiátrico con autorización judicial, durante el periodo que dure su internamiento, siempre que en la autorización el juez declare expresamente la incapacidad para el ejercicio del derecho de sufragio.

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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.

Esta privación de derechos fundamentales, que puede afectar fundamentalmente a personas con discapacidad intelectual o con enfermedad mental, carece de sentido desde una visión de derechos humanos y entra en clara contradicción con la convención internacional sobre los derechos de las personas con discapacidad de naciones unidas, firmada y ratificada por España.

Este tratado internacional, en su artículo 12, establece la plena igualdad legal de las personas con discapacidad en todas las esferas de la vida, sin que quepan restricciones por razón de discapacidad. Además, garantiza el derecho de las personas con discapacidad a participar en la vida política y en los procesos electorales sin ningún tipo de exclusiones.

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.

Por ello dado que la vigente legislación Española es incompatible, por tanto, con la convención de la ONU, por lo que tiene que ser modificada con urgencia para que las personas con discapacidad puedan ejercer sus derechos básicos en plenitud, solicita la intervención del defensor del pueblo a fin de que se modifique la Ley orgánica de régimen electoral general para suprimir la posibilidad de que se pueda privar del derecho de sufragio a las personas con discapacidad.

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Fabián Cámara,

President of Down Spain, states that the UN Convention opens up new horizons for equal legal capacity before the Law.

Para Fabián Cámara,

Presidente de Down España, la Convención de la Onu abre nuevos horizontes para la igual capacidad jurídica ante la ley

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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.

El mayor grado de fricción entre la convención y la legislación española se encuentra en la regulación de los derechos de la personalidad y la capacidad jurídica y de obrar de las personas con discapacidad .El artículo 12 de la Convención declara explícitamente la igualdad plena ante la ley de las personas con discapacidad sin distinción alguna .

Esta afirmación entra en plena confrontación con algunas de las instituciones que en nuestro derecho regulan la capacidad jurídica , tales como la tutela , la curatela , la prórroga de la patria potestad , …, o la propia incapacitación judicial

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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 "

Ante esta diatriba, la postura de Down España es la de apoyar absolutamente lo expresado en el artículo 12 de la Convención, y en consecuencia, exigir :

-la desaparición, por inaceptablemente discriminatoria, de cualquier proceso, judicial o administrativo , por el que se retire , elimine , prohíba o simplemente se restrinja la capacidad de obrar de una persona por razón de su discapacidad , esto es , la institución generalmente conocida como "incapacitación "(o cualquier otro nombre que se le pretenda dar en el futuro).

-La desaparición (con el régimen transitorio que sea preciso, respecto de situaciones ya existentes y asentadas en la práctica) de toda institución sustitutiva de la voluntad civil de las personas con discapacidad , ya se trate de tutelas, curatelas o cualquier otra institución similar .

-La instauración del nuevo sistema de la convención de apoyos a la capacidad de obrar propia de tal manera que tales apoyos respetando el principio básico del respeto a los derechos, la voluntad y las preferencias de la persona con discapacidad, aseguren el resto de condiciones también establecido por la convención, esto es, las salvaguardias adecuadas y efectivas para impedir los abusos, el conflicto de intereses y la influencia indebida"

***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.*

***Simposium sobre la capacidad jurídica de las personas con discapacidad a la luz de la Convención de la ONU** de los derechos de las Personas con discapacidad,organizado por el EUROPEAN FOUNDATION CENTER y el EUROPEN DISABILITY FORUM en Bruselas, el 4 de Junio de 2009*

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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.

Miguel Angel Cabra de Luna destacó los desafíos del artículo 12 y la necesidad de explorar el impacto de esta disposición en el ámbito nacional y en el de la Unión Europea ,y que la clara protección que en él se contiene a la personalidad jurídica y la capacidad legal de las personas con discapacidad requerirá la revisión de instituciones legales nacionales tales como la tutela o la incapacitación .

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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.

Yannis Vardakastanis , presidente del European Disability Forum , intervino señalando que durante demasiado tiempo los derechos de las personas con discapacidad intelectual , con discapacidades psicosociales , personas que vivían en instituciones y otras , han sido privados de sus más básicos derechos humanos , y que la Convención suprime el sistema pasado de moda de la tutela , que suprime los derechos y los deberes de las personas con discapacidad ,y lo substituye por el sistema de apoyo en la toma de Decisiones, impone a los gobiernos la obligación de asegurar el derecho pol´çitico al voto de las personas con discapacidad , y se asegura de la comunicación estén desarrollados de modo que cada persona , sin importar su discapacidad , sea oída y escuchada

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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.

Acentuó que entender el impacto de la Convención en la capacidad legal implica el reevaluar conceptos como el de la dignidad , la integridad y la igualdad , y revisar la legislación civil y penal mejorando la accesibilidad de las personas con discapacidad en la comunicación y procedimientos y educando a todos los agentes relevantes en el cambio de paradigma

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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.

Johan Ten Geuzendam ,jefe de la Unidad para la Integración de las Personas con Discapacidad de la Comisión europea , explicó que en lo referente a la puesta en práctica de la Convención , la Comisión ha identificado algunas cuestiones claves incluyendo el desarrollo de datos constantes y comparables , de objetivos e indicadores , del intercambio de buenas prácticas y de compartir experiencias con las siguientes prioridades iniciales con respecto a a la Convención :Accesibilidad , acceso a la justicia , vida independiente y derecho al voto , mecanismos de supervisión , otorgamiento de poder a las personas con discapacidad , y la capacidad jurídica .

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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.

Gerard Quinn destacó por qué la discusión de la reforma en lo referente al artículo 12 es tan importante tanto en términos prácticos como simbólicos .Por su parte , el artículo 12 es el vehículo que nos permite terminar el viaje de la no discriminación que proteja a las personas del comportamiento de terceros , dando voz de nuevo a las personas para dirigir sus propias vidas . Para **Quinn** , la revolución contenida en el artículo 12 es emblemática del cambio de paradigma que ha estado ocurriendo en el campo de la discapacidad en los últimos quince años a nivel europeo, y atraviesa el núcleo de la Convención .

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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.

Dignidad , autonomía e igualdad son valores esenciales .

Dignidad ,todos los seres humanos son un fín en sí mismos .Las personas con discapacidad fueron vistas tradicionalmente como objetos y no como sujetos merecedores de igual respeto.

Autonomía ,somos nosotros quienes decidimos nuestros destinos , el trabajo del gobierno es facilitar nuestra libertad .

El equilibrio entre autonomía y protección no estaba presente en nuestras leyes heredadas sobre capacidad jurídica .

Un exceso de paternalismo y una actitud excesivamente protectora nos llevó a ir en contra de la autonomía de las personas .

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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.

Destacó **Quinn** que muchas de las primeras leyes fueron decretadas para proteger activos o propiedades más bien que a las personas .Un resultado perverso de la intervención para para proteger a unos contra otros ha sido la institucionalización , es decir , colocar a las personas en instituciones donde su exposición a la violencia , a la explotación y al abuso eran incluso peores .

El puente aquí es la igualdad , esto es lo que trae de nuevo la Convención al campo de la discapacidad , y es lo que anima claramente el artículo 12 .El respeto a la igualdad significa ampilar a las personas con discapacidad la misma libertad expansiva permitida al resto de las personas para cometer sus propias vidas y cometer sus propias equivocaciones .

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

Gerard Quinn añadió otro valor a los de dignidad, autonomía e igualdad , el de la solidaridad .

Si somos serios en el respeto de la autonomía de las personas con discapacidad sobre una base igual con otras nuestro primer impulso ante una cierta carencia de la capacidad funcional no debe ser quitarla sino apoyarla .

También destacó **Gerard Quinn** un aspecto esencial , las reservas. Recordó que cualquier reserva que frustre el objeto y el propósito de un tratado no es válida .A su juicio , parece claro que una reserva que deje hueco para mantener las leyes en pleno de las tutelas es inaceptable .

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DECLARATIONS AND RESERVATIONS

DECLARACIONES Y RESERVAS

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.

Momento de la ratificación .

Declaración .

Australia reconoce que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos las aspectos de la vida .

Australia declara su entendimiento de que la Convención permite por completo los apoyos o la sustitución en la toma de decisiones en nombre de una persona solamente cuando tales decisiones sean necesarias, como último recurso y sujeto a las salvaguardias .

Australia reconoce que toda persona con discapacidad tiene derecho a que se respete su integridad física y psíquica en igualdad de condiciones con los demás .

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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.

Australia declara su entendimiento de que la Convención permite la asistencia obligatoria o el tratamiento de las personas, incluidas las medidas adoptadas para el tratamiento de la discapacidad mental, cuando ese tratamiento sea necesario, como último recurso y sujeto a las salvaguardias .

Australia reconoce los derechos de las personas con discapacidad a la libertad de movimiento, a la libertad para elegir su residencia y a una nacionalidad, en igualdad de condiciones con los demás .

Australia además declara su entendimiento de que la convención no crea el derecho de toda persona a entrar o permanecer en un país en el que no es nacional, o se pueda incidir en los requisitos de salud de Australia por los extranjeros que intentan entrar o permanecer en Australia, donde estos requisitos se basan en criterios legítimos, objetivos y razonables

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.

CANADA

Declaración y reserva .

Canadá reconoce la presunción de que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con los demás en todos los aspectos de la vida .Canadá declara su entendimiento de que el artículo 12 permite los mecanismos de apoyo y sustitución de toma de decisiones en circunstancias apropiadas y de conformidad con la ley .

En la medida en el artículo 12 puede interpretarse como una exigencia de eliminación de todos los mecanismos de sustitución en la toma de decisiones Canadá se reserva el derecho de continuar usándolos en circunstancias apropiadas y con las garantías adecuadas y efectivas .

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CANADA

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".

CANADA

Con respecto al artículo 12 . 4 . Canadá se reserva el derecho de no someter estas medidas a un a revisión periódica por una autoridad independiente, cuando esas medidas ya está sujetas a revisión o apelación .

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.

EGIPTO

Declaración interpretativa hecha en el momento de la firma .

La república Arabe de Egipto declara que su interpretación del artículo 12 de la Convención Internacional sobre la protección y promoción de los derechos de las personas con discapacidad, que declara el reconocimiento de de las personas con discapacidad en igualdad de condiciones con los demás ante la ley, con relación al concepto de capacidad jurídica tratado en el apartado 2 de dicho artículo, es que las personas con discapacidad tienen capacidad para adquirir derechos y asumir responsabilidades, pero no la capacidad para ejercitarla (actuar) bajo la legislación egipcia .

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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.

FRANCIA

Con respecto al artículo 29 de la Convención, el ejercicio del derecho al voto es un componente de la capacidad jurídica que no puede ser restringido sino en las condiciones y de conformidad con las modalidades previstas en el artículo 12 de la Convención .

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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".

MEXICO

Declaración interpretativa

El Estado mexicano reitera su compromiso de crear condiciones que permitan a todos los individuos desarrollar de manera integral el ejercicio de sus derechos y libertades plenamente y sin discriminación .

En consecuencia, afirmando su absoluta determinación de proteger los derechos y la dignidad de las personas con discapacidad los estados Mexicanos interpretan el párrafo 2 del artículo 12 de la convención en el sentido de que en caso de conflicto entre dicho párrafo y la legislación nacional la disposición que confiere la mayor protección jurídica al tiempo que garantizan la dignidad y garantizar la integridad física, psíquica y emocional de las personas y la protección de la integridad de sus bienes se aplicará en estricta conformidad con el principio pro homine .

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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".

REPUBLICA ARABE DE SIRIA.

En el momento de la firma:

Entendimiento:

Nuestra firma de la presente Convención no implica en modo alguno reconocimiento de Israel o la entrada en relaciones con Israel, en cualquier forma y manera, en conexión con la Convención .

Hemos firmado hoy sobre la base del entendimiento que figura en la carta de fecha 5 de diciembre de 2006, dirigida por el representante permanente de Iraq acreditado ante las Naciones Unidas, en su calidad de presidente del grupo de estados arabes durante ese mes, al presidente del comité, que contiene la interpretación del grupo de estados árabes relativa al artículo 12 relativo a la interpretación del concepto de capacidad jurídica .

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."

REINO UNIDO DE GRAN BRETAÑA Y NORTE DE IRLANDA.

Reservas :

Igual reconocimiento ante la ley - Convención artículo 12.4

Las disposiciones del Reino Unido, por el que el secretario de estado puede designar una persona para el ejercicio de derechos en relación a las demandas de seguridad social y los pagos en nombre de una persona que es en ese momento incapaz de actuar no están actualmente sometidas a la salvaguardia de una regular revisión, como exige el artículo 12.4 de la convención y el Reino Unido se reserva el derecho de aplicar dicho régimen .El Reino Unido está por lo tanto trabajando hacia un sistema proporcional de revisión .

Gabor Gombos

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.

Gabor Gombos

La Convención indica el camino a seguir .En primer lugar , "nada para nosotros sin nosotros" , lo que significa la implicación de las personas con discapacidad teniendo el Estado la obligación legal de consultar a la sociedad civil .

En segundo lugar , la Convención reconoce personalidad a todas las personas con discapacidad , lo que implica dos aspectos :identidad y capacidad de acción .

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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.

Recordó que durante las negociaciones en el comité ad hoc de la ONU algunos estados eran renuentes a aceptar que el artículo 12 pudiera suponer que la capacidad jurídica debe incluir capacidad de actuar .Pero esto a su es juicio es innegable ahora pues la Convención engarza un principio igualitario que incluye ambos aspectos de la personalidad e incluye claramente a todas las personas incluso a aquellas con discapacidades severas .

Las tutelas actuales, según lo aplicado en la mayoría de los estados miembros, no son consecuentes con la Convención. En su opinión, cualquier tentativa de presentar la tutela como mecanismo de apoyo es problemático.

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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

A su juicio, existe un núcleo de aspectos mínimos en relación al artículo 12 :

-la tutela completa (incapacitación) debe suprimirse.

-las principales lagunas deben ser identificadas.

-Nuevas leyes son necesarias.

-El artículo 12 es un artículo ambicioso

-La Convención llama a la inclusión legal completa y no sólo al reconocimiento legal.

-Cómo tener acceso para apoyar la toma de decisión dentro de las instituciones.

Fernando Santos Urbaneja,
in 2009,
asked himself what is going wrong

Fernando Santos Urbaneja,
en 2009,
se preguntaba qué es lo que está fallando.

Human Rights Institute Bartolomé de las Casas of the Carlos III University of Madrid

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, as the mechanism to which the judge should go as a general rule

Instituto de Derechos Humanos Bartolomé de las Casas de la Universidad Carlos III de Madrid

el cambio de modelo requerirá cambios graduales, en los que probablemente existan períodos en los que ambas instituciones – incapacitación y las nuevas medidas – deban coexistir, mostrándose partidario de que mientras ese mecanismo no esté articulado debe configurarse la curatela, como el mecanismo al que el juez deba acudir como regla general

Torcuato Recover:

The approach of Article 12 is openly opposed to regulating the civil 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.

Torcuato Recover:

El planteamiento del artículo 12 es abiertamente contrario a lo que regulaba el Código civil, que decía lo contrario, las personas con discapacidad que se han de someter a un procedimiento y acababan en una sentencia que suponía su incapacitación, es abiertamente contrario, no sólo por la terminología sino por la naturaleza de los conceptos que subyacen detrás de palabras , es abiertamente contrario a esa definición del apartado 2 del artículo 12 .

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LEGISLATIVE REFORMS AFTER THE CONVENTION.

REFORMAS LEGISLATIVAS TRAS LA CONVENCION.

RUSSIA

Analysis of legal capacity law reform in Russia

Mental Disability Advocacy Center, 22 April 2011

1. Courts must notify an individual of a legal capacity case initiated against him. Legal capacity proceedings must always take place with the participation of the person concerned

Currently courts can deprive a person of legal capacity without even notifying them

RUSIA

Análisis de la reforma de la ley de capacidad jurídica en Rusia

Mental Disability Advocacy Center, 22 Abril 2011

1. Los tribunales deben notificar a una persona de un caso de capacidad legal iniciado en su contra. Los procedimientos de capacidad jurídica siempre deben realizarse con la participación de la persona afectada

En la actualidad los tribunales pueden privar a una persona de la capacidad jurídica sin siquiera notificarselo

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2. A person deprived of legal capacity may apply to court in order to seek restoration of legal capacity

Currently a person deprived of legal capacity may not initiate proceedings in order to have his legal capacity restored

3. A person deprived of legal capacity may appeal against the incapacity judgment personally or thorough his representative such as a lawyer

Currently, once the ten-day appeal term has passed, the judgment depriving legal capacity may be appealed only through the person's guardian, and the person has no right to choose a representative to assist him in this matter

2. Una persona privada de la capacidad jurídica puede solicitar a los tribunales la restauración de la capacidad jurídica

Actualmente una persona privada de la capacidad jurídica no puede incoar el procedimiento con el fin de que su capacidad jurídica sea restaurada

3. Una persona privada de la capacidad jurídica podrá recurrir contra la sentencia de incapacidad personalmente o a través de su representante, como un abogado

En la actualidad, una vez transcurrido el plazo de diez días para recurrir, la sentencia privativa de la capacidad jurídica sólo puede ser apelada a través del tutor de la persona, y la persona no tiene derecho a elegir a un representante para que le ayuden en este asunto

4. Courts can request participation of a person deprived of legal capacity in a hearing on any matter

Currently people deprived of legal capacity have no right to participate in court proceedings

4. Los tribunales pueden solicitar la participación de una persona privada de la capacidad jurídica en una audiencia sobre cualquier asunto

En la actualidad las personas privadas de capacidad jurídica no tienen derecho a participar en los procedimientos judiciales

5. Informed consent must be sought and obtained from anyone for mental health care interventions, regardless of the person's legal capacity

At present the person's guardian has unchecked power to send the person under guardianship to a psychiatric hospital

5. El consentimiento informado debe ser solicitado y obtenido de cualquiera de las intervenciones de salud mental, independientemente de la capacidad jurídica de la persona

En la actualidad el tutor tiene poder ilimitado para enviar a la persona bajo tutela a un hospital psiquiátrico

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6. Guardians cannot decide to send a person under their guardianship to a social care institution.

At present a guardian or the local government can place the person to social care institution on the basis of the psychiatric report, ignoring the wishes of the person under guardianship.

6. Los tutores no pueden decidir enviar a una persona bajo su custodia a una institución de asistencia social

En la actualidad, un tutor o el gobierno local puede enviar a la persona a una institución de asistencia social sobre la base del informe psiquiátrico, haciendo caso omiso de los deseos de la persona bajo tutela.

SPAIN

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 ... "

ESPAÑA

libro segundo del **Código Civil de Cataluña**, relativo a la persona y la familia , invoca en su exposición de motivos a la Convención:

"La presente ley mantiene las instituciones de protección tradicionales vinculadas a la incapacitación , pero también regula otras que operan o pueden eventualmente operar al margen de ésta , ateniéndose a la constatación de que en muchos casos la persona con discapacidad o sus familias prefieren no promoverla .Esta diversidad de regímenes de protección sintoniza den el deber de respetar los derechos , voluntad y preferencias de la persona y con los principios de proporcionalidad y de adaptación a las circunstancias de las medidas de protección , tal y como preconiza la Convención …"

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"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 instruments based on the free development of personality to protect them in situations such as aging, mental illness or disability.

"Junto a la disposición que permite no constituir la tutela si se hubiese otorgado un poder en previsión de la pérdida de capacidad , los cambios en relación con la guarda de hecho son un reflejo del nuevo modelo de protección de la persona …Es por ello mismo que …incluye un nuevo instrumento de protección , la asistencia , dirigido al mayor de edad que lo necesita para cuidar de su persona o bienes debido a la disminución no incapacitante de sus facultades físicas o psíquicas

Se parte así de una concepción de la protección de la persona que no se vincula necesariamente a la falta de capacidad sino que incluye instrumentos que basándose en el libre desarrollo de la personalidad sirven para proteger a esas personas en situaciones como la vejez , la enfermedad psíquica o la discapacidad

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. "

Este instrumento puede ser muy útil también para determinados colectivos especialmente vulnerables pero para los cuales la incapacitación y la aplicación de un régimen de tutela o curatela resultan desproporcionadas, como las personas afectadas por un retraso mental leve u otras para las que por el tipo de disminución que sufren los instrumentos tradicionales no son apropiados para atender sus necesidades.

En linea con las directrices de la recomendación de 28 de febrero de 1999 de Comité de Ministros del Consejo de Europa y con los precedentes existentes en diferentes ordenamientos jurídicos del entorno de Cataluña se considera más adecuado este modelo de protección paralelo a la tutela o curatela . Además, esta tendencia es la misma que inspira la Convención sobre los derechos de las personas con discapacidad."

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General observation of the Committee on the Elimination of All Forms of Discrimination against Persons with Disabilities, on the need to interpret Article I.2, Section B) in fine of the InterAmerican Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities, under Article 12 of the United Nations Convention on the Rights of Persons with Disabilities in its extraordinary meeting on 4 and 5 May 2011 in El Salvador

Observación General del Comité para la Eliminación de todas las formas de Discriminación contra las Personas con Discapacidad, sobre la necesidad de interpretar el artículo I.2, Inciso B) In fine de la Convención Interamericana para la Eliminación de todas las formas de Discriminación contra las Personas con Discapacidad, en el marco del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad, en su reunión extraordinaria de 4 y 5 de Mayo de 2011 en El Salvador

Judiciary sentences

Sentence of the European Court of Human Rights, April 30, 2009

Italy: Decree of Catanzaro Court on April, 9, take a position on the "administrazione di sostengo" and the Convention

Argentina: National Chamber of Civil Appeals of the Federal Capital March 29, 2010

Colombia: Plenary Chamber of the Constitutional Court on April 21, 2010

Pronunciamientos judiciales

Sentencia del Tribunal europeo de Derechos Humanos, de 30 de abril de 2009

Italia: decreto de 9 de Abril del Tribunal de Catanzaro se pronuncia sobre la "administrazione di sostengo " y la Convención

Argentina: Cámara Nacional de Apelaciones en lo Civil de la capital federal, 29 de Marzo de 2010

Colombia: Sala Plena de la Corte Constitucional, el 21 de Abril de 2010

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Supreme Court Sentence, on April 29, 2009

Sentence of the court 15th of Las Palmas de Gran Canaria, on April 27, 2010

Sentence of the court 8th of Gijon, on October 13, 2009

Sentence of the Provincial court of Guipuzcoa, on February 11, 2011

Instructions of the Attorney General's Office 4/2008

4/2009

y 3/2010

ESPAÑA

Sentencia del Tribunal Supremo de 29 de Abril de 2009

Sentencia de 27 de abril de 2010 del juzgado 15 de las Palmas de Gran Canaria

Sentencia del juzgado número 8 de Gijón de 13 de Octubre de 2009

Sentencia de 11 de Febrero de 2011 de la Audiencia Provincial de Guipúzcoa

Instrucciones de la Fiscalía General del Estado 4/2008

4/2009

y 3/2010

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Trier, 21.06.2011

CAPACIDAD JURIDICA Y DISCAPACIDAD A LA LUZ DE LA CONVENCION DE NACIONES UNIDAS DE DERECHOS DE LAS PERSONAS CON DISCAPACIDAD .

TRIER, 20 -21 DE JUNIO DE 2011.
ACADEMIA EUROPEA DE DERECHO.

Jose Javier Soto .

Dicen que el tiempo pone las cosas en su sitio .

En diciembre se habrán cumplido cinco años desde que la Organización de Naciones Unidas, en su sesión de 13 de diciembre de 2006, aprobara la Convención de los derechos las personas con discapacidad .

Tiempo para que los estados ratificaran el texto, para que los legisladores, tribunales,y profesionales del derecho lo conocieran .
Tiempo para ponderar las distancias entre las legislaciones vigentes y el texto y los propósitos de la Convención .
Tiempo para conocer otras respuestas .

Para preguntarse ahora, en este momento, si estamos después de casi cinco años en el mismo sitio .En aquel donde en todas partes del mundo se siguen vulnerando los derechos de las personas con discapacidad, en donde el Estado sigue instalado en el conformismo, en la autocomplacencia de los que aplican el Derecho .
O si estamos en el camino que señaló de forma clara ese 13 de diciembre de 2006 .El camino hacia la dignidad y la igualdad de todas las personas .

LA CAPACIDAD, EL PUNTO DE PARTIDA .

Esta es quizás mi primera impresión sobre la respuesta a la anterior pregunta .

En la relevancia que se dé a la persona, en el reconocimiento de su valor,de su autonomía .

Y en ese camino, no es redundante la manifestación de que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su personalidad jurídica, que enmarca el artículo 12 de la Convención .

Y no lo es a la vista de la historia, ni la realidad, en el 2006 o en el 2011, y mucho menos en un tratado internacional en que confluyen sociedades tan diversas .

Ese igual reconocimiento como persona ante la ley obliga a los estados a reconocer la capacidad jurídica en igualdad de condiciones con los demás y en consecuencia a proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica .

Obliga a los estados a proporcionar salvaguardias para impedir los abusos,en las que los derechos, la voluntad y las preferencias de la persona son la base de las medidas para el apoyo, que no haya conflicto de intereses ni influencia indebida, que sean proporcionales y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y que estén sujetas sujetas a exámenes periódicos, por parte de una autoridad o un órgano judicial competente, independiente e imparcial .

Más allá de los debates sobre los conceptos de “capacidad jurídica “ y “capacidad de obrar “([1])- que sí tienen alcance tras las

[1] En relación a las discusiones sobre el concepto de capacidad se suele poner de relieve que en el borrador de Agosto de 2006 del Octavo período de sesiones,anterior al texto definitivo, el artículo 12 iba acompañado de algo cuando menos inusual : una nota a pie de página que decía “En árabe, chino y ruso, la expresión “capacidad jurídica” se refiere a la “capacidad jurídica de ostentar derechos “ y no a la “capacidad de obrar “.

Ello motivó una reacción inmediata de la que es ejemplo una de las conclusiones del seminario informativo sobre la convención celebrado por el Cermi el 26 de Septiembre de 2006 :” El Cermi se adhiere a las peticiones promovidas desde diferentes instancias, tanto públicas como de representantes de la sociedad civil, solicitando enérgicamente la supresión de la nota a pié de página incluída en el artículo 12 de la Convención, dedicado a la igualdad ante la ley “

.

declaraciones y reservas efectuadas al texto-([2]) es a mi juicio destacable sobre todo el punto de partida .

Y este es la persona .

Por ello, tras la constancia de la igualdad, el artículo 12 no pretende a mi entender dar lugar a excepciones que en la práctica desvirtúen esta afirmación, sino que hace un esbozo de cual debe ser el marco en que hacerlo posible sin llegar a una regulación completa de esos sistemas de apoyo .

Especialmente destacable es el respeto a la voluntad y preferencias de las personas, en que se exige al estado la diligencia debida para conocerla y aplicarla,ámbito en que además cobran especial valor las manifestaciones previas ante una futura discapacidad .([3])

Así, el articulo 12 de la Convención en su versión definitiva dice que:

Articulo 12
Igual reconocimiento como persona ante la Ley.

1. Los estados partes reafirman que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su personalidad jurídica.

2. Los estados partes reconocerán que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos los aspectos de la vida.

3. Los estados partes adoptarán las medidas pertinentes para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica.

4. Los estados parte asegurarán que en todas las medidas relativas al ejercicio de la capacidad jurídica se proporcionen salvo a guardias adecuadas y efectivas para impedir los abusos de conformidad con el derecho internacional en materia de derechos

[2] Las Declaraciones y reservas pueden verse en el anexo al texto.

3 En este sentido son de interés las declaraciones legales preliminares de la legislación de Hungría, el mandato de protección futura de Francia y el poder preventivo del Código Civil español y del Derecho foral catalán, así como la legislación sobre esta misma materia de Canadá, Nueva Zelanda y Australia

humanos. Esas salvaguardias asegurarán que las medidas relativas al ejercicio de la capacidad jurídica respeten los derechos, la voluntad y las preferencias de las personas, que no haya conflicto de intereses ni influencia indebida, que sean proporcionales y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y que estén sujetas a exámenes periódicos por parte de una autoridad o un órgano judicial competente, independiente, e imparcial. Las salvaguardias serán proporcionales al grado en que dichas medidas afecten a los derechos e intereses de las personas.

5. Sin perjuicio de lo dispuesto en el presente artículo, los estados partes tomaran todas las medidas que sean pertinentes y efectivas para garantizar el derecho de las personas con discapacidad, en igualdad de condiciones con los demás, a ser propietarias y heredar bienes, controlar sus propios asuntos económicos y tener acceso en igualdad de condiciones a préstamos bancarios, hipotecas y otras modalidades de crédito financiero, y velarán por que las personas con discapacidad no sean privadas de sus bienes de manera arbitraria.

Pero si este es el texto, para responder a la pregunta inicial, es importante fijarnos una serie de referentes: Análisis de los trabajos en el seno del comité de derechos de las personas con discapacidad, manifestaciones del movimiento asociativo, opiniones doctrinales, reformas legislativas producidas y pronunciamientos judiciales . .

I-El **Comité de los derechos de las personas con discapacidad de la Organización de Naciones Unidas** en relación al artículo 12 de la Convención.

Especial atención merece en el seno de Naciones Unidas el trabajo del Comité de los derechos de las personas con discapacidad.

Sus funciones se recogen en los artículos 34 a 39 de la Convención, y en el Protocolo Facultativo de la Convención sobre los derechos de las personas con discapacidad .

Con carácter previo es interesante el informe realizado el **26 de enero de 2009**, que a continuación se transcribe en lo referente al articulo 12

“ INFORME ANUAL DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS E INFORMES DE LA OFICINA DEL ALTO COMISIONADO Y DEL SECRETARIO GENERAL

4. Reconocimiento de la personalidad jurídica, y de la capacidad jurídica y de obrar

43. Según el artículo 12 de la Convención, los Estados partes reconocerán la personalidad jurídica de las personas con discapacidad, así como su capacidad jurídica y de obrar en igualdad de condiciones con los demás. Los párrafos 3 y 4 del artículo 12 obligan a los Estados a proporcionar a las personas con discapacidad el apoyo que puedan necesitar para ejercer su capacidad jurídica, así como salvaguardias adecuadas y efectivas para impedir los abusos. Debe resaltarse el carácter central de este artículo en la estructura de la Convención y su valor instrumental para el disfrute de otros muchos derechos.

44. El párrafo 1 del artículo 16 del Pacto Internacional de Derechos Civiles y Políticos ya reconoce la personalidad jurídica de las personas con discapacidad. Ahora bien, el cumplimiento de las obligaciones enunciadas en los párrafos 2, 3, 4 y 5 del artículo 12 de la Convención sobre los derechos de las personas con discapacidad requiere un examen a fondo de toda la legislación civil y penal que contenga elementos de capacidad jurídica.

45. En el ámbito del derecho civil, las leyes que regulan la incapacitación y la tutela deben ser una esfera prioritaria del examen y la reforma de las leyes. En muchos países la legislación en vigor permite declarar incapaz a una persona por deficiencia mental, intelectual o sensorial y atribuir a un tutor la capacidad jurídica para actuar en su nombre. Toda ley que prevea que la existencia de una discapacidad es motivo directo o indirecto para declarar la incapacidad jurídica entra en conflicto con el reconocimiento de la capacidad jurídica de las personas con discapacidad consagrado en el párrafo 2 del artículo 12. Además de derogar las normas que violan el deber de los Estados de respetar el derecho humano a la capacidad jurídica de las personas con

discapacidad, es igualmente importante que se adopten medidas que protejan y hagan efectivo ese derecho, de conformidad con los párrafos 3, 4 y 5 del artículo 12. Esto incluye lo siguiente: el reconocimiento jurídico del derecho de las personas con discapacidad a la autonomía; a disponer de medios alternativos y aumentativos de comunicación; a la adopción de decisiones asistida, entendida como el proceso por el que una persona con discapacidad está habilitada para adoptar y comunicar decisiones con respecto a cuestiones personales o jurídicas; y el establecimiento de normas que precisen las facultades de quienes prestan el apoyo y su responsabilidad.

46. También deben abolirse las normas o leyes que inhabilitan a una persona para desempeñar un cargo o función debido a su discapacidad. Esto incluye las normas que inhabilitan a las personas con discapacidad para ejercer cargos políticos, formar parte de jurados o testificar.

47. En el ámbito del derecho penal, el reconocimiento de la capacidad jurídica de las personas con discapacidad lleva a suprimir la circunstancia eximente de la responsabilidad penal constituida por la discapacidad mental o intelectual[4]. Por consiguiente, al examinar el elemento subjetivo del delito, se debe prescindir de la discapacidad y atender a la situación concreta del autor. De conformidad con el artículo 13 de la Convención, tal vez sea necesario retocar las normas procesales referidas, tanto a la fase de instrucción como al juicio, y ponerlas en práctica."

En relación al trabajo del Comité, es asimismo destacable el **día de discusión general sobre el artículo 12, celebrado en Ginebra el 21 de Octubre del 2009**.

En él, Mohammed Al-Trawneh, Presidente de la Comisión, dijo que era una desafortunada circunstancia histórica el que las personas con discapacidad hubieran tenido poco recurso legal en todo el mundo. Los derechos fundamentales habían sido subyugados en el pasado, y en algunos lugares lo siguen siendo hoy en día, para las personas con discapacidad. Las formas de discriminación a que se enfrentan abarcan casi todas las esferas de influencia en sus vidas, que van desde la comunicación y la

[4] Often referred to as "insanity defence".

arquitectura, hasta el transporte y las normas y políticas que ahogaron su potencial inherente. Ellos también habían sido testigos de los efectos de la desigualdad ante la ley, y habían reconocido su carácter inaceptable

Había muchas partes de la Convención que no se prestan a interpretación, y que estaban destinados a proporcionar modelos explícitos para el tratamiento de las personas con discapacidad, dijo el Sr. Al-Tarawneh. El artículo 12, dio una indicación clara de la dirección en la que tenían que ir; garantizó el derecho al igual reconocimiento como persona de todos ante la ley, aseguró que todos los individuos deben ser reconocidos como personas ante el tribunal, y en todas las formas de interacción con la corte. Para aquellas personas con ciertas formas de discapacidad que no pudieron ejercer su capacidad por sí solos, la Convención exige que los Estados proporcionen siempre las medidas adecuadas a las personas para apoyarlos en la realización de su capacidad de actuar.

Los tribunales tienen la responsabilidad de ejercer la tutela significativa. Incluso en el caso de los intermediarios designados por el tribunal, tenía que haber un mecanismo de supervisión para garantizar que los asistentes estaban trabajando únicamente en el interes de los asistidos. Las salvaguardias tuvieron que ser puestas en marcha para luchar contra el interés personal o financiero que pudiera interferir con los intereses de la persona que recibe asistencia. El logro de estas normas para el apoyo intermediario requerirá regulación y formación, dijo el Sr. Al-Tarawneh.

Algunas de las circunstancias más difíciles se referirían a situaciones en las que la determinación de la voluntad de las personas con discapacidad mental extrema no fue directamente posible. ¿Dónde se puso la línea de la autoridad para la intermediación de terceros en estos casos? ¿Cuánta flexibilidad interpretativa se les debe dar y cómo podría esto ser legislado? También hay que tener en cuenta la necesidad de objetividad entre permitir que la justicia se cumpla y reconocer la realidad de la discapacidad mental grave, dijo el Sr. Al-Tarawneh. Cuando las personas puedan ser consideradas peligrosas para sí mismas, el apoyo tenía que ser de un tipo extraordinariamente profesional, educado, y especializado.

Aunque no está directamente sobre el artículo 12, también deben ser conscientes de las declaraciones en que fueron hechas por los Estados Partes al convertirse en signatarios de la Convención. A modo de ejemplo, el Reino Unido declaró que los derechos a la igualdad de trato y el empleo no debe aplicarse a cualquier forma de servicio militar. Sin embargo, esta declaración evitado evitó reconocer el espectro de tareas que uno podría realizar en el servicio militar. Cuando el objetivo sea la igualdad jurídica en todos los ámbitos de la vida, deben ser extremadamente cuidadoso de tales reservas, dijo el Sr. Al-Tarawneh.

El objetivo de la Convención no fue exclusivamente sobre los derechos abstractos, sino sobre la capacidad de las personas a actuar, dijo el Sr. Al-Tarawneh. Los derechos de las personas con discapacidad se habían establecido antes, pero la verdadera prueba de un derecho era si se aplicó o no en la práctica. ([5])

Ibrahim Salama, Jefe de la Subdivisión de Tratados de Derechos Humanos, Oficina del Alto Comisionado para los Derechos Humanos, en una declaración de apertura, dijo que hoy sería el examen de dos cuestiones, ambas en torno al tema del reconocimiento de la igualdad ante la ley. Se espera que a través de sus discusiones, como mejor y consolidó una mayor comprensión de estos temas se alcanzaría, que iban a avanzar en la comprensión de las acciones necesarias para la aplicación del artículo 12

El artículo 12 tiene el potencial para proporcionar muchas oportunidades de un cambio significativo a las personas con discapacidad para alcanzar la igualdad de todos ante la ley, dijo Salama. Los objetivos de la Convención no sería tan amplios sin las garantías de un juicio justo. Hubo muchas preguntas interesantes que se han planteado en el artículo 12.

Uno de los problemas era el de la decisión apoyada frente a la decisión sustitutiva en los tribunales, dijo Salama. En el caso de discapacidad mental, ¿en qué circunstancias sería aceptable tomar decisiones en nombre de un individuo a través de la tutela, los defensores del pueblo u otros servicios pertinentes, y cómo deberían ser llevados a cabo estos servicios?

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[5] NB. Traducción del autor.
Texto en ingles disponible en:
http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9547&LangID=E

Mientras que el artículo 12 no menciona específicamente el uso de apoyo para las personas con discapacidad en los procedimientos judiciales, se pidió que los Estados el uso de medidas apropiadas para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica, dijo el Sr. Salama . Puede ser que el apoyo en la toma de decisiones podría aplicarse a la gran mayoría de los casos, pero que tal vez un pequeño porcentaje no sería capaz de utilizar este tipo de asistencia.

Otra pregunta tenía que ver con la llamada "defensa de la locura". ¿Deben los tribunales reconocer que en ciertas situaciones, algunas formas de discapacidad podría llevar a la falta de responsabilidad por los delitos? Había quienes sostenían que este tipo de defensa debería ser abolida en los tribunales, dado el reconocimiento de la capacidad de actuar. Pero no fue del todo claro qué debe hacerse en los casos de delincuencia en que el autor experimentó una pérdida genuina de la voluntad propia? El equilibrio estaba tal vez en el proceso de determinar qué constituye la pérdida de la facultad, dijo Salama.

Todas estas preguntas tenían un significado importante para la interpretación del artículo 12 y las formas en que se aplicaba la Convención. Fue a través de los principios de inclusión e integración que el artículo 12 deriva su significado, y fue a través de ellos que iban a encontrar su mejor aplicación, dijo Salama. ([6])

Amita Dhanda, Consultor en el artículo 12 de la Convención, de la Oficina del Alto Comisionado para los Derechos Humanos, dijo que el artículo 12 estaba en el corazón de la Convención. Es importante observar de cerca si se quería tomar en serio abordar el problema de la exclusión. Las personas con discapacidad intelectual y psicosocial habían estado, en gran parte, a la vanguardia de las negociaciones cuando se redactó el artículo 12. El artículo 12 se había formulado aceptando totalmente la visión de las inclusiones para todos, incluidas las personas con discapacidad sensorial, física, intelectual y psicosocial. Era sumamente apropiado

[6] NB. Traducción del autor.
Texto en ingles disponible en:
http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9547&LangID=E

que el Comité hubiera tomado este artículo como el primero que ha querido mirar de cerca

La Sra. Dhanda también se refirió al proyecto del Manual de Capacidad Legal de la Oficina del Alto Comisionado para los Derechos Humanos. En este documento se pondría de relieve la discriminación existente entre las leyes actuales y las obligaciones basadas en el artículo 12. Esto ayudaría a los países en la planificación de la reforma legal, la política y la programación. El artículo 12, habló a toda la comunidad humana. No había duda o mala interpretación de las disposiciones del artículo 12. Lo que había que trabajar era acerca de la forma de garantizar su aplicación.

La Sra. Dhanda presentó a continuación dos ejemplos de proyectos de reformas a las leyes que se habían producido en la India y Hungría - dos países que habían estado entre los primeros en ratificar la Convención. ([7])

En el **Quinto período de sesiones del Comité**, celebrado en Ginebra del **11 al 15 de Abril de 2011**,se citan los informes iniciales cuyo examen está pendiente a esa fecha, además del examen del informe inicial de Túnez, y la aprobación de la lista de cuestiones sobre el informe de España ([8]).

[7] NB. Traducción del autor.
Texto en ingles disponible en:
http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9547&LangID=E

[8] **Presentación de informes por los Estados partes en virtud del artículo 35 de la Convención**

El Comité ha recibido los siguientes informes iniciales cuyo examen está pendiente:

Estado parte	*Fecha en que debía presentarse*	*Fecha de recepción*	*Signatura*
Argentina	2010	6 de octubre de 2010	CRPD/C/ARG/1
Australia	2010	3 de diciembre de 2010	CRPD/C/AUS/1
Austria	2010	2 de noviembre de 2010	CRPD/C/AUT/1
Azerbaiyán	2011	16 de febrero de 2011	CRPD/C/AZE/1
China	2010	30 de agosto de 2010	CRPD/C/CHN/1
El Salvador	2010	5 de enero de 2011	CRPD/C/SLV/1
España	2010	3 de mayo de 2010	CRPD/C/ESP/1

En relación a Túnez, y a propósito del artículo 12, el Comité dice :

"22. Al Comité le preocupa que no se han adoptado medidas para reemplazar la sustitución en la toma de decisiones por el apoyo en la toma de decisiones en el ejercicio de la capacidad jurídica.

23. El Comité recomienda al Estado Parte que revise las leyes que permitan la guarda y tutela, y tomar medidas para desarrollar leyes y políticas para reemplazar los regímenes de sustitución en la toma de decisiones por el apoyo en la toma de decisiones. Además, recomienda que se sensibilice sobre este tema a todos los funcionarios públicos pertinentes y otras partes interesadas."(9)

En relación a España, del informe inicial presentado por España como estado parte, de conformidad con el artículo 35 de la convención, España afirma en relación a los apartados 1 y 2 del artículo 12 que dado que las personas con discapacidad tienen reconocida personalidad jurídica e igual capacidad jurídica que las demás personas hay que afirmar la plena compatibilidad del ordenamiento jurídico en relación a las previsiones de los apartados 1 y 2 del artículo 12 .

En relación al apartado 3, obligación de proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica, se afirma que "quedaría cubierta por las instituciones de guarda y protección de la persona y

Hungría	2010	14 de octubre de 2010	CRPD/C/HUN/1
Paraguay	2010	21 de octubre de 2010	CRPD/C/PRY/1
Perú	2010	8 de julio de 2010	CRPD/C/PER/1
Suecia	2010	7 de febrero de 2011	CRPD/C/SWE/1
Túnez	2010	1º de julio de 2010	CRPD/C/TUN/1

Texto complete disponible en http://www2.ohchr.org/SPdocs/CRPD/5thsession/CRPD.C.5.1_sp.doc

[9] NB. Traducción del autor.
Texto en ingles disponible en:
http://www2.ohchr.org//SPdocs/CRPD/5thsession/CRPD-C-TUN-CO-1_en.doc

bienes, o solamente de la persona o de los bienes del incapacitado “.

Se afirma asimismo en relación al apartado 4 que las salvaguardas de las medidas relativas al ejercicio de la capacidad jurídica “subyacen en nuestra legislación en la medida que seguidamente se indican “ .

“El respeto de los derechos, la voluntad y las preferencias de la persona, está reflejado básicamente en el artículo 268 del Código Civil en cuanto obliga a los tutores a ejercer su cargo de acuerdo con la personalidad de sus pupilos, respetando su integridad física y psicológica “ .

“La inexistencia de conflicto de intereses está prevenida en el Codigo Civil, artículo 244-4 …y 247 …el artículo 221 prohíbe a quien desempeñe un cargo tutelar representar al tutelado cuando en el mismo acto intervenga en nombre propio o de un tercero y existiera conflicto de intereses “.

Inexistencia de influencia indebida . “Esta salvaguarda no está recogida expresamente en la vigente regulación, aunque puede considerarse implícita en los artículos 268, ya comentado, y 216, en cuanto exige ejercer las funciones tutelares en beneficio del tutelado y bajo la salvaguarda de la autoridad judicial . “

Proporcionalidad y adaptación a las necesidades y circunstancias de la persona con discapacidad .”De conformidad con el artículo 760 de la ley de Enjuiciamiento Cicil, y en relación con los artículos 267, 289 y 290 del Código Civil la sentencia que declare la incapacitación determinará la extensión y límites de ésta …”

Aplicación de las medidas en el plazo más corto posible y revisión periódica por parte de una autoridad o u órgano judicial competente, independiente e imparcial .”Los artículos 756 a 768 de la Ley de Enjuiciamiento Civil regulan el proceso sobre la capacidad de las personas ….”

“Para el cumplimiento completo del artículo 12.4 y una mejor adaptación al espíritu y a la terminología de la Convención se está trabajando en la redacción de un anteproyecto de ley …”

Respecto al apartado 5 –derecho de las personas con discapacidad a ser propietarias, heredar bienes y controlar sus propios asuntos –, el informe del gobierno de España habla de cuestión de adaptaciones terminológicas, de matices en definitiva ([10]).

Para el gobierno de España, prácticamente todo está conforme con la Convención .([11])

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[10] 64. Según establece el artículo 744 del Código Civil, pueden suceder aquellos que no estén incapacitados por la ley y, según el artículo 996, si la sentencia de incapacitación por enfermedades o deficiencias físicas o psíquicas no dispusiera otra cosa, el sometido a curatela podrá, asistido de curador, aceptar la herencia pura y simplemente o a beneficio de inventario.

65. De este modo, debe entenderse que el Código Civil no prohíbe heredar ni a las personas con discapacidad ni a los incapacitados judicialmente. Ahora bien, la adquisición de una herencia exige que el heredero acepte la herencia, acto para el cual el Código Civil sí exige la plena capacidad de obrar. Por ello, según el Código Civil, habrá que estar a lo que disponga la sentencia de incapacitación, y si no dispusiese lo contrario, se entenderá que permite al incapacitado aceptar la herencia con la asistencia del curador, o en su caso, al tutor como representante legal del incapacitado y administrador de su patrimonio (el cual, según el artículo 271.4, necesitará además autorización judicial para aceptar la herencia sin beneficio de inventario o para repudiarla).

66. En nuestro derecho, el artículo 662 del Código Civil permite testar a quienes la ley no lo prohíbe expresamente, y el artículo 663 establece la incapacidad para testar de aquel "que habitual o accidentalmente no se hallare en su cabal juicio". Por último, el artículo 665 precisa que en aquellos casos en que la sentencia de incapacitación no precise nada acerca de la capacidad para testar, si el incapacitado quiere otorgar testamento, tendrá que acudir al Notario para que éste designe a dos facultativos para que le reconozcan y le autoricen en su caso, respondiendo de su capacidad.

67. En resumen, no todas las personas con discapacidad ni incapacitadas tienen prohibido testar. Respecto de los incapacitados judicialmente, puede ocurrir que la sentencia haya establecido una prohibición al respecto o puede ocurrir que no diga nada, en cuyo caso se permitirá al incapacitado testar en las condiciones del artículo 665.

68. Por ello, no resulta necesario llevar a cabo ninguna modificación de fondo en este aspecto, si bien sí cabría articular alguna medida de apoyo al incapacitado para que pudiera testar con su asistencia. Por último, de nuevo serían pertinentes ciertas adaptaciones terminológicas, tanto por lo que se refiere a las menciones sobre la "incapacitación", como en relación con el término "cabal juicio", demasiado abierto e indeterminado. La pertinencia de estas modificaciones es objeto de estudio y valoración en los trabajos de redacción del anteproyecto de ley al que se ha aludido anteriormente.

69. Es importante la aprobación de la Ley Nº 1/2009, de 25 de marzo de reforma de la Ley de 8 de junio de 1957, sobre el Registro Civil, en materia de incapacitaciones, cargos tutelares y administradores de patrimonios por la que se impulsa la creación en el Registro Civil Central de un punto de concentración de toda la información relativa a las modificaciones judiciales en la capacidad de obrar, la constitución o la modificación de organismos tutelares. Así, se solucionará el problema de la dispersión de los asientos, que hace que los datos correspondientes a una misma persona puedan constar en distintos registros civiles municipales. Por otro lado establece el compromiso de reforma del procedimiento de incapacitación —que pasa a denominarse procedimiento para la modificación de la capacidad de obrar— a fin de adecuarlo a la Convención sobre los derechos de las personas con discapacidad.

Texto completo disponible en:
http://www2.ohchr.org/SPdocs/CRPD/5thsession/CRPD.C.ESP.1_sp.doc

[11] SI bien el informe de España intenta ser lo más amplio posible, omite un aspecto esencial, que es la diversidad legislativa consecuencia de la coexistencia del derecho común con los derechos forales. Así el

Frente a esta postura, el **informe alternativo presentado por el Cermi** como organismo independiente de seguimiento, es rotundo[12]:

"España no cuenta con un sistema de apoyos acorde a la convención "

"Existen un abuso del sistema de sustitución total "

"España carece de un sistema de apoyo a la toma de decisiones que fomente la autonomía en el ejercicio de los derechos"

"Las salvaguardas exigidas en la Convención no están garantizadas en nuestra legislación "

"La adaptación a la Convención requiere cambios sustanciales en la regulación española de la capacidad de obrar de las personas con discapacidad "

Estas afirmaciones respecto al artículo 12 las completa en relación al 13 ("la falta de accesibilidad de las dependencias de la Administración de justicia son notables", "No existe una obligación legal específica que reconozca el derecho de accesibilidad de las personas con discapacidad en el acceso a la justicia con carácter general ", "el reglamento del Notariado determina la incapacidad de intervenir como testigos a las personas con discapacidad "Existen una falta de previsión para el ejercicio de la función del jurado en los tribunales populares ","Por sentencia judicial se puede limitar la capacidad procesal para demandar o querellarse "…

También relaciona el artículo 12 con el 29 (Participación en la vida política y pública) : "La legislación electoral vigente en España permite que se prive del derecho de sufragio, activo y pasivo, a las personas incapacitadas judicialmente, siempre que la

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Comité no tiene conocimiento por esta vía, por ejemplo, de la legislación en esta materia de Cataluña, que en su reforma del año 2010 invoca expresamente a la Convención, tal como veremos con posterioridad.

[12] Conviene destacar que el Cermi como entidad representativa de la discapacidad organizada en España integra a más de 5500 asociaciones y entidades de personas con discapacidad y sus familias y tiene entre sus finalidades esenciales la de la defensa de los derechos de este grupo social que en España asciende a más de 4.000.000 de personas que junto con su familia suponen alrededor de 10 millones de ciudadanos y ciudadanas.

sentencia que declara la incapacitación lo prevea expresamente .esta posibilidad también se extiende a las personas internadas en un hospital psiquiátrico con autorización judicial …Esta privación de derechos fundamentales …entra en clara contradicción con la convención .

Este tratado internacional, en su artículo 12, establece la plena igualdad legal de las personas con discapacidad en todas las esferas de la vida, sin que quepan restricciones por razón de discapacidad . además, garantiza el derecho de las personas con discapacidad a participar en la vida política y en los procesos electorales sin ningún tipo de exclusiones .

La vigente legislación española es incompatible, por tanto, con la Convención .”

A la vista de estos dos informes, el Comité de derechos de las personas con discapacidad, en relación al artículo 12, solicita al gobierno de España :

“Sírvanse facilitar datos sobre el número de personas con discapacidad que han sido puestas bajo tutela como forma de ejercer la capacidad jurídica y, en su caso, sobre el número de decisiones modificando la capacidad de actuar “

“Sírvanse explicar cómo se garantiza que la tutela se ejerza en beneficio del pupilo teniendo en cuenta que en la legislación actual no existen salvaguardas contra la influencia indebida o el conflicto de intereses “

“Sírvanse facilitar información sobre las medidas previstas o que se han tomado para que en vez de la sustitución en la adopción de decisiones (guarda) se recurra al apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica, de conformidad con el artículo 12 de la Convención”.

A fecha de hoy estamos a la espera del informe final del Comité sobre España.

II- EL ARTÍCULO 12 EN EL ÁMBITO ASOCIATIVO .

En el ámbito asociativo destaca el informe elaborado por el **European Disability Forum (EDF) en Octubre de 2009 sobre el igual reconocimiento como persona ante la ley e igual capacidad para actuar: comprensión y aplicación del articulo 12 de la Convención de la ONU** sobre los derechos de las personas con discapacidad, del cual cabe destacar lo siguiente: ([13])

Ningún individuo en cualquier sociedad es verdaderamente independiente de la influencia de los demás. Las estructuras sociales y las jerarquías, la necesidad de una atención positiva, las necesidades económicas y la complejidad de muchas decisiones financieras, de salud y personales hace que a menudo los ciudadanos no discapacitados y personas con discapacidad dependen de otros para el apoyo en la toma de decisiones. Ejemplos de ello son asesores financieros, médicos, arquitectos y todas las otras profesiones que proporcionan experiencia para todos los ciudadanos. Muchas personas toman decisiones por sí mismos que tampoco son en su mejor interés. A menudo están determinados por factores que no están basados en la lógica: la publicidad comercial, el deseo de estatus social, la preferencia por los coches rápidos, etc Discapacitados o no, toda persona tiene derecho a cometer errores.

Sin embargo, en una situación en la que alguien está asesorando a otra persona en una decisión o ejercitando las facultades de toma de decisiones delegadas en él por esta persona, debe aplicarse la debida diligencia adicional para aceptar y

[13] NB. Traducción del autor.
Texto completo disponible en:
http://cms.horus.be/files/99909/MediaArchive/library/EDF_positon_on_equal_recognition_before_the_law_under_Article12_UNCRPD.doc
ó a través de la web deel EDF, http://www.edf-feph.org/

reconocer los deseos y las peticiones de la persona aconsejada. El mantenimiento de la plena capacidad jurídica de las personas debe estar siempre en el centro del discurso

El artículo 12 de la CDPD introduce una serie de conceptos clave que deben ser entendidos e interpretados de manera uniforme a fin de cumplir con las normas de aplicación de la Convención.

2.1 “Igual reconocimiento como persona ante la ley”

La noción de "Igual reconocimiento como persona ante la ley" es más amplia que la "capacidad jurídica" (el concepto que también está presente en el artículo 12). Se basa en otros tratados de derechos humanos, principalmente en el artículo 6 de la Declaración Universal de los Derechos Humanos y en el artículo 16 del Convenio Internacional de Derechos Civiles y Políticos (PIDCP), que establece que "toda persona debe tener el derecho al reconocimiento en todas partes, como persona ante la ley ".

El Artículo 12 CDPD establece el principio de que todas las personas con discapacidad, al igual que los demás ciudadanos, tienen derecho a que su estado y capacidad estén reconocidos en el ordenamiento jurídico. Ello permite a todas las personas ostentar, ejercitar y beneficiarse de los derechos iguales e inalienables, independientemente de la naturaleza y el grado de su discapacidad. La personalidad jurídica se entiende como una característica inherente a los seres humanos. Sin este derecho, el individuo ya no sería una persona en el sentido jurídico y por lo tanto puede ser privado de todos los demás derechos.

2.2 “Capacidad juridica”

"La capacidad jurídica"en el sentido del artículo 12, se entiende como la capacidad evolutiva de ejercer estos derechos iguales e incluye la capacidad de actuar. Esto se aplica a los sistemas jurídicos de todos los países para todas las personas, independientemente de la naturaleza o el grado de su discapacidad o necesidad evidente de apoyo. Según el artículo 12 CDPD, la capacidad jurídica no puede ser cuestionada o negada basada en la discapacidad de una persona. En cambio, las medidas de apoyo a ejercer su capacidad jurídica puede tener que ser siempre que sea necesario.

El carácter evolutivo de la capacidad jurídica se demuestra con el siguiente ejemplo: todos los niños, incluidos aquellos con discapacidades, tienen una capacidad de evolución jurídica, que al nacer comienza con plena capacidad de tener derechos, y se desarrolla en plena capacidad de obrar en la edad adulta. Al nacer, su plena capacidad para tener derechos incluye, por ejemplo, el derecho a la vida y a recibir el mejor tratamiento disponible independientemente de la naturaleza y la gravedad de su discapacidad. A medida que el niño se desarrolla, también lo hace su capacidad jurídica, y tienen el derecho a disponer de apoyos adecuados a su edad y discapacidad para el ejercicio en igualdad con los niños sin discapacidad, en particular en relación con el derecho a la integridad física y la opción reproductiva. Los padres y tutores tienen el derecho y la responsabilidad de actuar en el mejor interés de sus hijos en el respeto del niño la capacidad de evolución

jurídica. Su derecho automático para actuar en nombre de sus hijos cesa cuando el niño alcanza la edad adulta legal.

2.3 “El apoyo en el ejercicio de la capacidad jurídica”

El apoyo de toma de decisión, consagrado en el artículo 12, parte de la presunción de capacidad jurídica plena e igualitaria de todos los ciudadanos, incluyendo aquellos con niveles severos y profundos de la discapacidad. La Convención dispone que los Estados Partes adoptarán "medidas adecuadas para facilitar el acceso de las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica" (artículo 12.3) y "garantizar que todas las medidas relacionadas con el ejercicio de la capacidad jurídica proporcionen salvaguardias adecuadas y efectivas para impedir los abusos "(artículo 12.4).

De conformidad con la ley internacional de derechos humanos, el respeto de los derechos iguales e inalienables deben estar en el centro del discurso sobre la determinación del grado de apoyo que necesita el individuo con una discapacidad. Por lo tanto, el concepto de incapacidad debe ser rechazada desde el principio, y el grado de asistencia debe ser proporcional a las necesidades y capacidades de la persona y variar dependiendo de la situación (por ejemplo, puede ser que necesite apoyo para la toma de decisiones financieras importantes, pero pueda gestionar sus tareas diarias de forma independiente).

En consecuencia, el apoyo en el ejercicio de la capacidad jurídica siempre debe basarse en un conocimiento personal de la

persona (pero no como para crear un conflicto de intereses!), e implicar actividades de fomento de la confianza a través de métodos de comunicación alternativos y aumentativos.

Las personas cuyas habilidades para tomar decisiones complejas o para comunicar sus decisiones a los demás están temporal o permanentemente deterioradas necesitarán altos niveles de apoyo en la mayoría o todos los ámbitos de la vida. En este caso, deberán contar con tal apoyo que asegure que su capacidad jurídica se disfruta en todo caso en igualdad de condiciones con los demás al tiempo que se les ayuda a evaluar las implicaciones y consecuencias de algunas de sus acciones o inacciones.☒

En la actualidad, no hay pruebas ni práctica suficientes para determinar cómo el apoyo en la toma de decisiones se puede garantizar para este grupo de personas con discapacidad. Los Estados Partes, así como las organizaciones de discapacidad están llamados a probar con urgencia modelos prácticos de apoyo de toma de decisiones en los proyectos piloto para resolver esta cuestión pendiente. El punto crucial es cómo se puede establecer una relación de apoyo con confianza en todos los casos de personas con discapacidad.

2.4 “Salvaguardias”

La Convención exige que las salvaguardias apropiadas y efectivas sean puestas en marcha para prevenir el abuso de las personas con discapacidad en el ejercicio de su capacidad jurídica.

El texto de la propia Convención establece pautas importantes que deben respetar las medidas de apoyo. Es decir,

deben ser "adecuadas y eficaces", "proporcionales y adaptadas a las circunstancias de la persona, aplicadas durante el menor tiempo posible", así como "sujetas a revisión periódica por una [n. ..] autoridad independiente". La Convención obliga a los Estados Partes a desarrollar criterios imparciales por la incapacidad para proteger a las personas con discapacidad contra el abuso de la misma manera que están protegidos los demás ciudadanos .

En la práctica eso significa el establecimiento de un sistema para la evaluación imparcial de las necesidades actuales de apoyo en la toma de decisiones en el ejercicio de la capacidad jurídica, realizado con la ayuda de reconocidos expertos independientes, la determinación rigurosa de la extensión de la actuación y facultades de las personas que prestan el apoyo, la revisión periódica de las medidas adoptadas y el posible recurso de las decisiones por parte de las personas con discapacidad o sus familias. Una vez más, hay que destacar que los deseos de la persona con discapacidad debe ser siempre el factor determinante.

Se debe prestar especial atención a la protección de los derechos de las personas necesitadas de un alto nivel de apoyo en todos los ámbitos de la vida, que pueden ser particularmente vulnerables a la influencia indebida.

Estas garantías deben estar claramente separadas de la red de apoyo, ya que también deben proteger a la persona de la explotación o abuso por parte de la persona que presta el apoyo.

3. Ocho pasos para lograr el igual reconocimiento como persona ante la ley

3.1. Promoción y apoyo de la autodeterminación de las personas con discapacidad

3.2. Sustitución de la tutela tradicional por un sistema de apoyo de toma de decisiones

3.3. Desarrollar un sistema de apoyo a la toma de decisiones

3.4. Selección y registro de las personas de apoyo

3.5. Superar las barreras de comunicación

3.6. Prevención y resolución de conflictos entre la persona que presta el apoyo y la que lo recibe

3.7. La aplicación de salvaguardias

3.8. Utilización de los mecanismos principales para la protección de los intereses de una persona

Asimismo es destacable el INFORME DEL CERMI, que elaboró a modo de propuesta inicial un esquema básico PARA INSTAURAR UN NUEVO PROCEDIMIENTO DE PROVISIÓN DE APOYOS PARA LA TOMA DE DECISIONES, de acuerdo a la convención del cual destaco lo siguiente:

“Si hay una esfera donde los efectos de la convención se dejan sentir con mayor contundencia esa es la de la plena igualdad jurídica de las personas con discapacidad. La discapacidad ya no puede ser excusa o cuartada para limitar o reducir la capacidad de las personas de realizar actos válidos en el tráfico jurídico. Los sistemas como el español, basados en la sustitución de la voluntad de la persona por razón de discapacidad – de ordinario intelectual o mental – han de quedar sin efecto, pues son contrarios al nuevo paradigma de la libre determinación de los individuos, de todos, incluidos los hombres y mujeres con discapacidad.

Por estos motivos, el Cermi ha planteado al Ministerio de Justicia que el actual proceso civil de incapacitación judicial, sea

sustituido por uno de apoyos a la toma libre de decisiones, en el caso de personas con discapacidad que así lo precisen.

La convención, vigente en España desde 2008, obliga a los estados partes a derogar los sistemas que como el de la incapacitación judicial limitan la igualdad jurídica de las personas, incluidas aquellas que presentan una discapacidad, y a reemplazarlos por otros que garanticen apoyos para la toma libre y autónoma de decisiones.

El Cermi entiende que el sistema de limitación de la capacidad existente en España no es compatible con los mandatos de la convención, por lo que no serían admisibles retoques o ajustes de detalles (salida fácil a la que algunas instancias están tentadas), sino que hay que crear un nuevo modelo centrado en la autonomía y en los apoyos. Para el Cermi, la convención es una oportunidad histórica de abandonar sistemas paternalistas que merman la igualdad de las personas ante la Ley, y trocarlos por otros, en consonancia con los tiempos, que potencian la libre determinación, con los soportes y salvaguardias necesarios.

A pesar de las resistencias de sectores jurídicos que se aferran a instituciones seculares que a su entender son inamovibles, la convención es un hecho jurídico indiscutible e irreversible que esta por encima del derecho interno preexistente.

A juicio del Cermi, el ejecutivo y el legislador han de ser valientes y audaces para responder normativamente a los desafíos que en materia de igualdad jurídica y toma libre de decisiones plantea la convención de la ONU. Es llegada la hora de los apoyos para la libre toma de decisiones.

Ello obliga a analizar jurídicamente como debe sustituir el nuevo sistema al de la institución de la incapacitación regulado en el código civil (titulo IX) y a la institución de la tutela de incapacitados (titulo X). El articulo 200 del código civil establece que “son causas de incapacitación las enfermedades o deficiencias persistentes de carácter físico o psíquico que impidan a la persona gobernarse por si misma”. El mismo fundamento de la institución civil de la incapacitación ha quedado obsoleto y no se ajusta al articulo 12 de la convención”.

En particular, **en relación con el derecho de sufragio**, cabe destacar que uno de los aspectos esenciales relacionado con la capacidad es el ejercicio del derecho del sufragio, activo y pasivo.

En una **carta dirigida al Defensor del Pueblo** por Luis Cayo Perez Bueno en su condición de presidente del comité español de representantes de personas con discapacidad (CERMI) de fecha 5 de octubre de 2010, expone que la legislación electoral vigente en España permite que se prive del derecho del sufragio, activo y pasivo a las personas incapacitadas judicialmente, siempre que la sentencia que declara la incapacitación lo prevea expresamente.

Esta posibilidad también se extiende a las personas internadas en un hospital psiquiátrico con autorización judicial, durante el periodo que dure su internamiento, siempre que en la autorización el juez declare expresamente la incapacidad para el ejercicio del derecho de sufragio.

Esta privación de derechos fundamentales, que puede afectar fundamentalmente a personas con discapacidad intelectual o con enfermedad mental, carece de sentido desde una visión de derechos humanos y entra en clara contradicción con la convención internacional sobre los derechos de las personas con discapacidad de naciones unidas, firmada y ratificada por España.

Este tratado internacional, en su artículo 12, establece la plena igualdad legal de las personas con discapacidad en todas las esferas de la vida, sin que quepan restricciones por razón de discapacidad. Además, garantiza el derecho de las personas con discapacidad a participar en la vida política y en los procesos electorales sin ningún tipo de exclusiones.

Por ello dado que la vigente legislación Española es incompatible, por tanto, con la convención de la ONU, por lo que tiene que ser modificada con urgencia para que las personas con discapacidad puedan ejercer sus derechos básicos en plenitud, solicita la intervención del defensor del pueblo a fin de que se modifique la Ley orgánica de régimen electoral general para suprimir la posibilidad de que se pueda privar del derecho de sufragio a las personas con discapacidad.

Para Fabián Cámara –Presidente de Down España –la Convención de la Onu abre nuevos horizontes para la igual capacidad jurídica ante la ley([14]).

[14] El articulo completo puede verse en la revista CERMI.ES

En su opinión, “el mayor grado de fricción entre la convención y la legislación española se encuentra en la regulación de los derechos de la personalidad y la capacidad jurídica y de obrar de las personas con discapacidad .El artículo 12 de la Convención declara explícitamente la igualdad plena ante la ley de las personas con discapacidad sin distinción alguna . Esta afirmación entra en plena confrontación con algunas de las instituciones que en nuestro derecho regulan la capacidad jurídica , tales como la tutela , la curatela , la prórroga de la patria potestad , …, o la propia incapacitación judicial .”

“Ante esta diatriba, la postura de Down España es la de apoyar absolutamente lo expresado en el artículo 12 de la Convención, y en consecuencia, exigir :

-la desaparición , por inaceptablemente discriminatoria , de cualquier proceso, judicial o administrativo , por el que se retire , elimine , prohíba o simplemente se restrinja la capacidad de obrar de una persona por razón de su discapacidad , esto es , la institución generalmente conocida como “incapacitación “(o cualquier otro nombre que se le pretenda dar en el futuro).

-La desaparición (con el régimen transitorio que sea preciso , respecto de situaciones ya existentes y asentadas en la práctica) de toda institución sustitutiva de la voluntad civil de las personas con discapacidad , ya se trate de tutelas , curatelas o cualquier otra institución similar .

-La instauración del nuevo sistema de la convención de apoyos a la capacidad de obrar propia de tal manera que tales apoyos respetando el principio básico del respeto a los derechos , la voluntad y las preferencias de la persona con discapacidad, aseguren el resto de condiciones también establecido por la convención , esto es , las salvaguardias adecuadas y efectivas para impedir los abusos , el conflicto de intereses y la influencia indebida” .

III- OPINIONES DOCTRINALES.

En Junio de 2009 tuve el honor de moderar, en marco del **Simposium sobre la capacidad jurídica de las personas con discapacidad a la luz de la Convención de la ONU** de los derechos de las Personas con discapacidad,organizado por el EUROPEAN FOUNDATION CENTER y el EUROPEN DISABILITY FORUM, una mesa redonda en la que intervenían Gerard Quinn y Gabor Gombos .

Como preámbulo, las intervenciones de Miguel Angel Cabra de Luna,Yannis Vardakastanis y Johan Ten Geuzendam .

En ellas , **Miguel Angel Cabra de Luna** destacó los desafíos del artículo 12 y la necesidad de explorar el impacto de esta disposición en el ámbito nacional y en el de la Unión Europea ,y que la clara protección que en él se contiene a la personalidad jurídica y la capacidad legal de las personas con discapacidad requerirá la revisión de instituciones legales nacionales tales como la tutela o la incapacitación .

Yannis Vardakastanis , presidente del European Disability Forum , intervino señalando que durante demasiado tiempo los derechos de las personas con discapacidad intelectual , con discapacidades psicosociales , personas que vivían en instituciones y otras , han sido privados de sus más básicos derechos humanos , y que la Convención suprime el sistema pasado de moda de la tutela , que suprime los derechos y los deberes de las personas con discapacidad ,y lo substituye por el sistema de apoyo en la toma de Decisiones , impone a los gobiernos la obligación de asegurar el derecho pol´çitico al voto de las personas con discapacidad , y se asegura de la comunicación estén desarrollados de modo que cada persona , sin importar su discapacidad , sea oída y escuchada .

Acentuó que entender el impacto de la Convención en la capacidad legal implica el reevaluar conceptos como el de la dignidad , la integridad y la igualdad , y revisar la legislación civil y penal mejorando la accesibilidad de las personas con discapacidad en la comunicación y procedimientos y educando a todos los agentes relevantes en el cambio de paradigma .

Johan Ten Geuzendam ,jefe de la Unidad para la Integración de las Personas con Discapacidad de la Comisión europea , explicó que en lo referente a la puesta en práctica de la Convención , la Comisión ha identificado algunas cuestiones claves incluyendo el desarrollo de datos constantes y comparables , de objetivos e indicadores , del intercambio de buenas prácticas y de compartir experiencias con las siguientes prioridades iniciales con respecto a a la Convención :Accesibilidad , acceso a la justicia , vida independiente y derecho al voto , mecanismos de supervisión , otorgamiento de poder a las personas con discapacidad , y la capacidad jurídica .

Así ,la capacidad jurídica es una de las áreas de prioridad a nivel europeo.Asímismo señaló que en esa fecha –junio 2009-siete estados miembros están en proceso de revisar su legislación a la luz de la Convención.

Gerard Quinn destacó por qué la discusión de la reforma en lo referente al artículo 12 es tan importante tanto en términos prácticos como simbólicos .Por su parte , el artículo 12 es el vehículo que nos permite terminar el viaje de la no discriminación que proteja a las personas del comportamiento de terceros , dando voz de nuevo a las personas para dirigir sus propias vidas . Para Quinn , la revolución contenida en el artículo 12 es emblemática del cambio de paradigma que ha estado ocurriendo en el campo de la discapacidad en los últimos quince años a nivel europeo, y atraviesa el núcleo de la Convención .

Dignidad , autonomía e igualdad son valores esenciales .

Dignidad ,todos los seres humanos son un fín en sí mismos .Las personas con discapacidad fueron vistas tradicionalmente como objetos y no como sujetos merecedores de igual respeto.

Autonomía ,somos nosotros quienes decidimos nuestros destinos , el trabajo del gobierno es facilitar nuestra libertad .

El equilibrio entre autonomía y protección no estaba presente en nuestras leyes heredadas sobre capacidad jurídica .

Un exceso de paternalismo y una actitud excesivamente protectora nos llevó a ir en contra de la autonomía de las personas .

Destacó Quinn que muchas de las primeras leyes fueron decretadas para proteger activos o propiedades más bien que a las personas .Un resultado perverso de la intervención para para proteger a unos contra otros ha sido la institucionalización , es decir

, colocar a las personas en instituciones donde su exposición a la violencia , a la explotación y al abuso eran incluso peores .

El puente aquí es la igualdad , esto es lo que trae de nuevo la Convención al campo de la discapacidad , y es lo que anima claramente el artículo 12 .El respeto a la igualdad significa ampilar a las personas con discapacidad la misma libertad expansiva permitida al resto de las personas para cometer sus propias vidas y cometer sus propias equivocaciones .

Gerard Quinn añadió otro valor a los de dignidad , autonomía e igualdad , el de la solidaridad .

Si somos serios en el respeto de la autonomía de las personas con discapacidad sobre una base igual con otras nuestro primer impulso ante una cierta carencia de la capacidad funcional no debe ser quitarla sino apoyarla .

También destacó Gerard Quinn un aspecto esencial , las reservas.

Recordó que cualquier reserva que frustre el objeto y el propósito de un tratado no es válida .A su juicio , parece claro que una reserva que deje hueco para mantener las leyes en pleno de las tutelas es inaceptable .

Del mismo modo creo de interés traer a colación las ideas centrales de **Gabor Gombos**([15]) en su intervención en dicho simposium , en torno a las obligaciones que el artículo 12 de la Convención impone en lo sucesivo para la Unión europea y sus estados miembros .

A su juicio , la Convención indica el camino a seguir .En primer lugar , “nada para nosotros sin nosotros” , lo que significa la implicación de las personas con discapacidad teniendo el Estado la obligación legal de consultar a la sociedad civil .

En segundo lugar , la Convención reconoce personalidad a todas las personas con discapacidad , lo que implica dos aspectos :identidad y capacidad de acción .

[15] Al presentar a Gabor Gombos, él explico que como sobreviviente de la psiquiatría había estado abogando por los derechos de las personas con discapacidades psicosociales, tratando de ligar la tutela a los derechos humanos desde el año 1993, desempeñando un papel activo en la negociación del articulo 12 de la Convención en el comité ad hoc de la ONU. La importancia de su implicación la he conocido a través del trabajo del MDAC, del que después trataremos al hablar de la legislación en Rusia.

Recordó que durante las negociaciones en el comité ad hoc de la ONU algunos estados eran renuentes a aceptar que el artículo 12 pudiera suponer que la capacidad jurídica debe incluir capacidad de actuar .Pero esto a su es juicio es innegable ahora pues la Convención engarza un principio igualitario que incluye ambos aspectos de la personalidad e incluye claramente a todas las personas incluso a aquellas con discapacidades severas .

Las tutelas actuales, según lo aplicado en la mayoría de los estados miembros, no son consecuentes con la Convención. En su opinión, cualquier tentativa de presentar la tutela como mecanismo de apoyo es problemático.

A su juicio, existe un núcleo de aspectos mínimos en relación al artículo 12 :

-la tutela completa (incapacitación) debe suprimirse.

-las principales lagunas deben ser identificadas.

-Nuevas leyes son necesarias.

-El artículo 12 es un artículo ambicioso

-La Convención llama a la inclusión legal completa y no sólo al reconocimiento legal.

-Cómo tener acceso para apoyar la toma de decisión dentro de las instituciones.

Fernando Santos Urbaneja, en 2009, se preguntaba qué es lo que está fallando.

Su planteamiento es el siguiente:

“Al abordar este tema tenemos que partir de una dolorosa constatación: En torno al 95% de las demandas de incapacitación terminan con una sentencia de incapacitación plena, para todo y para siempre.

Hace años pensaba que ello se debía fundamentalmente a un problema de actitud de los profesionales que intervienen en estos procedimientos (Juez, Fiscal, Médico Forense, Abogados, etc…) pero hace tiempo que he abandonado esta idea pues donde concurren profesionales motivados no se mejoran mucho los resultados, ni tampoco la concentración de la materia en los Juzgados de Familia o incluso en los Juzgados con competencia exclusiva ha permitido transformar radicalmente este estado de cosas.

Así, si analizamos nuestra realidad actual y la comparamos con nuestra realidad histórica en este punto, podemos llegar a la

demoledora conclusión (sálvese el que pueda) de que seguimos haciendo las cosas como hace cien años. El ámbito judicial, en su conjunto, en su estructura, no se ha sumado aún a la revolución, ya en marcha, de la promoción de la autonomía y el ejercicio efectivo de los derechos de las personas con discapacidad y es que, lo que reflejan las sentencias de incapacidad no se corresponde con la realidad. El 95% de las personas declaradas plenamente incapaces no son plenamente incapaces.

La verdad es que hoy nadie está conforme con el procedimiento de incapacitación y existen varias líneas de reforma, algunas tan radicales como las que solicitan la "desjudicialización" desplazando la declaración de incapacidad a otros ámbitos (administrativo, notarial)" ([16])

Asimismo en el ámbito doctrinal, destaca el Informe realizado por el **Instituto de Derechos Humanos Bartolomé de las Casas de la Universidad Carlos III de Madrid** sobre el impacto de la Convención en el ordenamiento jurídico español([17]), que parte de el cambio de modelo requerirá cambios graduales , en los que probablemente existan períodos en los que ambas instituciones –incapacitación y las nuevas medidas –deban coexistir , mostrándose partidario de que mientras ese mecanismo no esté articulado debe configurarse la curatela , entendida desde los presupuestos del modelo de apoyo y asistencia y desde el principio del mejor interés de la persona con discapacidad , como el mecanismo al que el juez deba acudir como regla general, quedando reservada la tutela –siempre a la espera de una reforma normativa que signifique su desaparición al estar directamente enfrentada a lo establecido por la convención –para aquellas tomas de decision en las que las circunstancias y necesidades de una persona con discapacidad impidan que se pueda conocer su voluntad en relación al tráfico (en relación con los actos patrimoniales) pero nunca en relación con los derechos fundamentales .

[16] Texto completo disponible a través de la web de Aequitas: http://www.aequitas.org/?do=contribucion&option=actividades (XXX Jornadas Aequitas-CEJ. "El Ingreso involuntario: Novedades y problemática" III 2009)

[17] Texto completo disponible a través de la web de la Universidad Carlos III

Frente a esta posición que lleva ínsita la provisionalidad , destaco las palabras de **Torcuato Recover**([18]):

"Estamos hablando de derechos fundamentales, y es un matiz sustancial, de Derechos Humanos . Es un matiz sustancial porque quiere decir que lo que establece el artículo 199 y siguientes del Código Civil no son normas de interpretación y conflicto de interese entre particulares, no . Cuando el Código Civil regula si una persona debe prestar o no su opinión ,su voluntad para arrendar o disponer de un bien patrimonial suyo , si se debe privar o se debe ignorar su voluntad , estamos hablando no de una colisión de derechos particulares sino de un derecho fundamental .Y hablo de cuestiones patrimoniales , pero si lo pasamos al ámbito más personal , si una persona debe estar en un centro , más aún , si una persona puede ejercitar sus derechos a la paternidad o maternidad , eso no puede ser resulto por terceros sin tener en cuenta su opinión , sino todo lo contrario , se ha de partir del derecho que la persona en cuestión tiene para ejercitar esos derechos ."

Después de recordar la cita de Luis Cayo Perez Bueno , presidente del Cermi "la Convención supone tal carga de profundidad para la visión más tradicional y adocenada de lo que venía siendo la discapacidad que pareciera que aún no somos conscientes de la dimensión y alcance de esta transformación y de lo que lleva a cabo en todas las esferas ", señala que" el planteamiento del artículo 12 es abiertamente contrario a lo que regulaba el Código civil , que decía lo contrario , las personas con discapacidad que se han de someter a un procedimiento y acababan en una sentencia que suponía su incapacitación , es abiertamente contrario , no sólo por la terminología sino por la naturaleza de los conceptos que subyacen detrás de palabras , es abiertamente contrario a esa definición del apartado 2 del artículo 12 ."

"No se puede , por lo tanto , hoy , seguir dictándose sentencias en las que se dice que la persona está incapacitada .

Este planteamiento ya de por sí choca con la práctica jurídica .

Los juzgados de familia están dictando sentencias que en sus términos son contrarios a una ley que ya es aplicable directamente como es la Convención Internacional . Es urgente ,

[18] Texto disponible en la web del Observatorio Estatal de la Discapacidad de España. Intervención en las Jornadas sobre capacidad jurídica del Observatorio Estatal de la Discapacidad celebradas en Diciembre de 2010

por tanto , una reforma que tiene que ser coherente con los propios postulados de la Convención “.

IV- REFORMAS LEGISLATIVAS TRAS LA CONVENCION .

En Diciembre del 2010, Carlos Ganzenmüller, en las Jornadas sobre capacidad jurídica y discapacidad: de la sustitución de la capacidad al modelo de apoyos, organizadas por el Observatorio Estatal de la Discapacidad de España, decía que “la actividad gubernamental, ya lo hemos indicado, es complicada en esta reforma, piensen ustedes que Finlandia no ha ratificado todavía la Convención, porque ha decidido que tiene que modificar toda su legislación interna, con lo cual el tema no es tan fácil como parece, sino mucho más complicado”.

Podemos destacar, no obstante, algunas reformas recientes; así por ejemplo:

Al respecto, es interesante el Analisis sobre la reforma de la legislación sobre capacidad legal en RUSIA, elaborado por el MDAC (Mental Disability Advocacy Center) con fecha 22 de Abril de 2011([19])

[19] http://mdac.info/content/analysis-legal-capacity-law-reform-russia

1. Los tribunales deben notificar a una persona de un caso de capacidad legal iniciado en su contra. Los procedimientos de capacidad jurídica siempre deben realizarse con la participación de la persona afectada. Si es necesario, la audiencia puede llevarse a cabo en las instalaciones de un hospital psiquiátrico (sección 284 (1) del Código de Procedimiento Civil).
En la actualidad los tribunales pueden privar a una persona de la capacidad jurídica sin siquiera notificarselo, como era la situación en el caso de Shtukaturov contra Rusia.

2. Una persona privada de la capacidad jurídica puede solicitar a los tribunales la restauración de la capacidad jurídica (sección 286 (1) del Código de Procedimiento Civil).
Actualmente una persona privada de la capacidad jurídica no puede incoar el procedimiento con el fin de que su capacidad jurídica sea restaurada.

3. Una persona privada de la capacidad jurídica podrá recurrir contra la sentencia de incapacidad personalmente o a través de su representante, como un abogado (artículo 284 (3) del Código de Procedimiento Civil).
En la actualidad, una vez transcurrido el plazo de diez días para recurrir, la sentencia privativa de la capacidad jurídica sólo puede ser apelada a través del tutor de la persona, y la persona no tiene derecho a elegir a un representante para que le ayuden en este asunto. El Tribunal Constitucional ruso dictaminó el 27 de febrero de 2009 en un período de tres casos (uno iniciado por MDAC), que una persona privada de la capacidad jurídica debe tener el derecho de apelar la decisión del tribunal. Cualquier otra cosa significaría una restricción sobre el derecho a un juicio justo.

En relación a la reforma de HUNGRIA, puede consultarse en la web del MDAC, estableciendo una regulación completa de la declaración preliminar, trata del concepto de apoyo al órgano decisorio, el acto del defensor profesional, entre otras.

En relación a ESPAÑA, destaca la reforma del Derecho foral catalán, específicamente la Ley de 29 de Julio de 2010, del libro segundo del Código Civil de Cataluña, relativo a la persona y la familia , invoca en su exposición de motivos a la Convención:

"la presente ley mantiene las instituciones de protección tradicionales vinculadas a la incapacitación , pero también regula otras que operan o pueden eventualmente operar al margen de ésta , ateniéndose a la constatación de que en muchos casos la persona con discapacidad o sus familias prefieren no promoverla .Esta diversidad de regímenes de protección sintoniza den el deber de respetar los derechos , voluntad y preferencias de la persona y con los principios de proporcionalidad y de adaptación a las circunstancias de las medidas de protección , tal y como preconiza la Convención …"

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4. Los tribunales pueden solicitar la participación de una persona privada de la capacidad jurídica en una audiencia sobre cualquier asunto (artículo 37 (5) del Código de Procedimiento Civil).
En la actualidad las personas privadas de capacidad jurídica no tienen derecho a participar en los procedimientos judiciales. El Tribunal Constitucional declaró en febrero de 2009 que el derecho para defender los propios derechos es imposible sin la participación real de la persona en el caso. El tribunal consideró que privar a una persona de esta posibilidad, viola los principios de un juicio justo, así como el carácter contradictorio y la igualdad de las partes en los procedimientos judiciales.

5. El consentimiento informado debe ser solicitado y obtenido de cualquiera de las intervenciones de salud mental, independientemente de la capacidad jurídica de la persona (artículo 11 de la Ley de Atención Psiquiátrica).
En la actualidad el tutor tiene poder ilimitado para enviar a la persona bajo tutela a un hospital psiquiátrico. En su resolución 27 de febrero 2009, el Tribunal Constitucional sostuvo que la detención psiquiátrica es sin duda, una privación de libertad que, de acuerdo con la Constitución rusa, es legal solamente a raíz de una decisión judicial.

6. Los tutores no pueden decidir enviar a una persona bajo su custodia a una institución de asistencia social. Tal internamiento ahora requiere el consentimiento de la persona que planea ir a la institución (artículo 41 de la Ley de atención psiquiátrica), y si esa persona carece de la capacidad funcional para decidir,
la autoridad local debe tomar una decisión.
En la actualidad, un tutor o el gobierno local puede enviar a la persona a una institución de asistencia social sobre la base del informe psiquiátrico, haciendo caso omiso de los deseos de la persona bajo tutela.

" Junto a la disposición que permite no constituir la tutela si se hubiese otorgado un poder en previsión de la pérdida de capacidad , los cambios en relación con la guarda de hecho son un reflejo del nuevo modelo de protección de la persona …Es por ello mismo que …incluye un nuevo instrumento de protección , la asistencia , dirigido al mayor de edad que lo necesita para cuidar de su persona o bienes debido a la disminución no incapacitante de sus facultades físicas o psíquicas . Se parte así de una concepción de la protección de la persona que no se vincula necesariamente a la falta de capacidad sino que incluye instrumentos que basándose en el libre desarrollo de la personalidad sirven para proteger a esas personas en situaciones como la vejez , la enfermedad psíquica o la discapacidad Este instrumento puede ser muy útil también para determinados colectivos especialmente vulnerables pero para los cuales la incapacitación y la aplicación de un régimen de tutela o curatela resultan desproporcionadas , como las personas afectadas por un retraso mental leve u otras para las que por el tipo de disminución que sufren los instrumentos tradicionales no son apropiados para atender sus necesidades. En linea con las directrices de la recomendación de 28 de febrero de 1999 de Comité de Ministros del Consejo de Europa y con los precedentes existentes en diferentes ordenamientos jurídicos del entorno de Cataluña se considera más adecuado este modelo de protección paralelo a la tutela o curatela . Además , esta tendencia es la misma que inspira la Convención sobre los derechos de las personas con discapacidad."

Además, en relación a España, el Parlamento, por Ley de 25 de marzo de 2009, daba al Gobierno el mandato de remitir a las cortes generales un Proyecto de reforma de la legislación reguladora de los procedimientos de incapacitación judicial, que con la denominación de procedimiento de modificación de la capacidad de obrar se adaptaran a las disposiciones de la Convención en el plazo de seis meses, que ha sido incumplido([20]).

[20] Al respecto, dice TORCUATO RECOVER que "los que hemos podido conocer de las posiciones que el Ministerio de Justicia tiene respecto del Proyecto..... se dice que las organizaciones sociales estamos ofreciendo y planteando un cambio de legislación excesivo que va más allá de lo que dice el articulo 12. En absoluto podemos asumir ese planteamiento, lo que nosotros pretendemos no puede satisfacer los planteamientos realizados con el articulo 12 con una mera modificación que mantenga la terminología o/e incluso modificando la terminología, mantenga el espíritu de lo que viene estableciendo el Código Civil. Observatorio Estatal de la Discapacidad, Jornada sobre capacidad jurídica, Diciembre 2010

Para concluir, destacamos la **Observación General del Comité para la Eliminación de Todas las formas de Discriminación contra las Personas con Discapacidad, sobre la necesidad de interpretar el artículo I.2, Inciso B) In fine de la Convención Interamericana** para la Eliminación de Todas las formas de Discriminación contra las Personas con Discapacidad, en el marco del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad", en su reunión extraordinaria de 4 y 5 de Mayo de 2011en El Salvador([21])

"Que la entrada en vigor de la Convención de la ONU a partir del 3 mayo del 2008 implica el cambio del paradigma de la sustitución de la voluntad (que caracteriza al modelo de protección de la mayoría de los Códigos Civiles de Latinoamérica) al nuevo paradigma basado en la toma de decisiones con apoyos y salvaguardas del artículo 12 de la Convención sobre los Derechos de las Personas con Discapacidad (ONU);

Que el artículo 12 de la Convención sobre reconocimiento de la personalidad jurídica, y de la capacidad jurídica y de obrar reviste un carácter central en la estructura del tratado, por su valor instrumental para el disfrute de los derechos humanos de las personas con discapacidad y su significación en el proceso de transformación de la legislación interna (de fondo y de forma, civil y penal) y que la mayoría de los países miembros de la OEA han suscripto la Convención de Naciones Unidas;

Por este motivo, y en el marco del artículo 4.1 inciso a) y b) citado y con la finalidad de aplicar adecuadamente la Convención una de las primeras medidas que deben adoptar los Estados es el necesario examen a fondo de la legislación y de las políticas nacionales locales, a la luz del instrumento ratificado, que habrá de considerarse no sólo artículo por artículo sino principalmente en su significado global como *corpus iuris* del derecho internacional, teniendo como guía sus propósitos (artículo 1 de la Convención citada) y sus principios generales (artículo 3), siempre en el marco de una concepción integral de los derechos humanos –civiles y políticos, económicos, sociales y culturales- reconociendo su interdependencia e indivisibilidad (Preámbulo de la Convención).

[21] http://pablorosales.com.ar/es/wp-content/uploads/2011/05/CEDDIS_RES-1-_I-E-11_-Observacion-general-sobre-artículo-I-2b_-de-la-Convencion-OEA-art-12-Res-ONU.dot_.pdf

De lo afirmado se sigue que, salvo en aquellos casos en que los derechos y principios del tratado ya estén protegidos por el Derecho interno, el Estado Parte tiene la obligación de introducir los cambios necesarios para garantizar su conformidad con la Convención de la ONU., en los planos normativo y operativo. Pues no basta con reformar la legislación sino que es preciso acompañarla con medidas en el plano judicial, administrativo, educativo, financiero y social, entre otros.

Por otra parte, el artículo 16 del Pacto Internacional de Derechos Civiles y Políticos –con anterioridad a la nueva Convención- reconoce “para todos” la personalidad jurídica, pero fue necesario un nuevo tratado específico referido a las personas con discapacidad con una disposición precisa (artículo 12) sobre tan trascendente cuestión, debido a la falta de efectividad y a la invisibilidad de las personas con discapacidad en el sistema de derechos humanos y en la sociedad.

El artículo12 reafirma que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su capacidad jurídica, en sus dos sentidos, es decir como capacidad goce y como capacidad de ejercicio. Los Estados Parte reconocen la personalidad jurídica de las personas con discapacidad, así como su capacidad jurídica y de obrar en igualdad de condiciones con los demás en todos los ámbitos de su vida. En los párrafos 3 y 4 los Estados se comprometen a proporcionar a las personas con discapacidad el apoyo o asistencia que puedan necesitar para ejercer su capacidad jurídica, así como salvaguardias adecuadas y efectivas para evitar abusos.

En contraposición al respeto al derecho humano a la capacidad jurídica de las personas con discapacidad se halla el “asistencialismo” –reconocido como uno de los más arraigados obstáculos para implementar la Convención- que se caracteriza por la acción de quienes asumen la representación de otros a los que no consultan ni hacen partícipes, los “sustituyen”, siempre con “las mejores intenciones”, asumiendo que pueden decidir sobre sus deseos, elecciones y necesidades.

Sin embargo, la lectura conjunta de la definición de discapacidad y la obligación de proporcionar apoyos conduce a la

conclusión de que la redacción del artículo 12 incluye a todas las personas con discapacidad.

Desde esta aseveración el artículo I.2 inciso b) in fine de la Convención Interamericana para la Eliminación de Todas las Formas de Discriminación contra las Personas con Discapacidad de la O.E.A necesita ser reinterpretado a la luz del nuevo paradigma del artículo 12 citado**.** No se trata solo de analizar la perspectiva de evaluar la legislación interna de cada Estado Parte en lo que respecta a la interdicción y curatela, sino también analizar, más allá de cuestiones jurídicas, las implicaciones prácticas de estas medidas estatales.

RESOLUCIÓN

En cuanto al mandato de naturaleza jurídica el Comité resuelve

1. Instar a los Estados partes a que efectúen un estudio comparativo entre su legislación interna y el Derecho nacional de los demás Estados parte en la Convención Interamericana, en lo que respecta a las disposiciones sobre la capacidad jurídica de la persona con discapacidad, a fin de asegurarse que efectivamente mantienen una regulación acorde con sus necesidades desde todos los estratos sociales, y con la realidad institucional del país, pero en el marco del artículo 12 de la Convención de la ONU.

En cuanto al mandato de naturaleza práctica el Comité resuelve:

2. Solicitar al Secretario General de la OEA disponer, a través de sus instancias jurídicas pertinentes, la revisión del artículo I.2 inciso b) in fine de la Convención Interamericana para la Eliminación de Todas las Formas de Discriminación contra las Personas con Discapacidad, con el objeto de armonizarlo con el artículo 12 de la Convención sobre los derechos de la persona con discapacidad de las Naciones Unidas, recomendando lo más conveniente, sea su inaplicación práctica, o su derogación

3. Instar a los Estados parte de la Convención Interamericana a tomar medidas, en consonancia con el artículo 12 de la Convención de Naciones Unidas, para garantizar el reconocimiento de la capacidad jurídica universal, incluyendo a

todas las personas con discapacidad, independientemente de su tipo y grado de discapacidad, y en consecuencia con ello, iniciar en el más breve plazo un proceso de sustitución de la práctica de la interdicción, curatela o cualquier otra forma de representación, que afecte la capacidad jurídica de las personas con discapacidad, a favor de la práctica de la toma de decisiones con apoyo.

Lo anterior significa tomar acciones en la siguiente dirección:

1. Capacitar a la población en general, con especial énfasis en los operadores del sistema judicial, sobre el nuevo paradigma vigente de la capacidad jurídica de todas las personas con discapacidad, incluso aquellas con discapacidades severas, mediante el recurso a sistemas de apoyo para la toma de decisiones.
2. Tomar medidas urgentes, de orden normativo, para asegurar que el sistema judicial no permita la aprobación de nuevos casos de interdicción, y para impulsar el desarrollo gradual de los sistemas de apoyo para la toma de decisiones así como para la regulación e implementación de instituciones y mecanismos de salvaguarda para prevenir los abusos
3. Tomar medidas para facilitar el proceso de revisión de los casos de interdicción de personas con discapacidad, con el objeto de adecuarse al nuevo paradigma, con especial énfasis en aquellos que se presenten dudas sobre la existencia de abusos, manipulación de intereses, o abusos.
4. Informar a este Comité acerca de las medidas tomadas y los avances que se vaya logrando en este proceso“

V-PRONUNCIAMIENTOS JUDICIALES

Diversas sentencias invocan o hacen referencia a la Convención .

En el ámbito europeo, se suele destacar la Sentencia del Tribunal europeo de Derechos Humanos, de 30 de abril de 2009, como la primera en su ámbito que hace referencia a la Convención .

En Italia, el decreto de 9 de Abril del Tribunal de Catanzaro se pronuncia sobre ella “administrazione di sostengo “ y la

Convención, una vez ratificada por el estado italiano el 3 de Marzo de 2009 ([22])

En Argentina, la Cámara Nacional de Apelaciones en lo Civil de la capital federal, se pronuncia el 29 de Marzo de 2010 sobre la exigencia de testigos para la firma de documentación hace referencia a la Convención([23]).

En Colombia, la Sala Plena de la Corte Constitucional, se pronuncia el 21 de Abril de 2010 sobre la Convención, diciendo que "tanto la Convención que se revisa como la generalidad de las medidas a cuya implementación se comprometen los Estados partes, tienen el caracter de acciones afirmativas ([24])

En España, el Tribunal Supremo, en sentencia de 29 de Abril de 2009 analiza las reglas interpretativas de la legislación vigente en materia de incapacitación .

La sentencia de 27 de abril de 2010 del juzgado 15 de las Palmas de Gran Canaria se pronuncia sobre el derecho al sufragio y sobre la figura del curador .

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[22] El texto completo puede consultarse en la web www.altalex.com

[23] El texto completo puede consultarse en http://el-observatorio.org/wp-content/uploads/2010/08/SENTENCIA-ARGENTINA-SOBRE-REQUISITOS-EXTRAS-EN-CONTRATO-DE-PRESTAMO-Y-DISCRIMINACION-CON-UN-BREVE-COMENTARIO.pdf
Trascribimos el comentario de Cristóbal Fábrega:
"No podemos estar de acuerdo con dicha solución si bien la sentencia es interesante en cuanto tiene en cuenta la Convención de 2006, derecho interno español y argentino. Si observamos la CONUDHPD 2006 el que acompañaba al actor era lo que llamamos un apoyo voluntario o informal, persona de su confianza que bastaría para dar a la otra parte garantías suficientes de que entendía la información que se le daba. Estamos ante un invidente que mantiene todas sus facultades intelectuales y que solo necesita a alguien de su confianza que le lea lo que consta escrito en el contrato para que el valore si ello coincide con la información que se le ha dado verbalmente y firme dicho documento. Las garantías que la empresa necesita se dan con esa mera actitud con la cual se apoya y reafirma la capacidad del solicitante del préstamo.
Por ello difiero de la sentencia. Creo que existe discriminación en la exigencia de los dos testigos por que coloca a la persona con discapacidad sensorial en una situación distinta al resto de los ciudadanos no discapacitados sin que dicha diferencia se encuentre justificada una vez existe el apoyo necesario. Podría afectar la diferencia de acceso al préstamo al artículo 12-5º de la CONUDHPD en cuanto establece un mecanismo añadido como consecuencia de la discapacidad (se le aplica a todas las personas con discapacidad que no puedan leer y a las personas analfabetas) con independencia de las circunstancias concretas del caso lo que supone una barrera diferenciadora que, en el caso concreto en el que, dadas las circunstancias, podía haberse obviado, constituye un requisito añadido carente de justificación que entiendo discriminatorio. El mismo puede estar justificado por los protocolos de empresa o por la ley nacional, pero estos deben ser interpretados y aplicados de acuerdo con la convención y en este caso bastaba el apoyo de confianza y voluntario que la persona con discapacidad había aportado".

[24] Texto completo en www.corteconstitucional.gov.co

La del juzgado número 8 de Gijón de 13 de Octubre de 2009 acude a la tutela parcial .([25])

La de 11 de Febrero de 2011 de la Audiencia Provincial de Guipuzcua se pronuncia sobre el derecho de sufragio, contraer matrimonio y disponer de sus bienes mortis causa, entre otras cuestiones .

Más que el contenido de las citadas sentencias, destaca la existencias ya de pronunciamientos concretos que hacen el esfuerzo necesario de plantear la adaptación o no, y sobre todo, el cómo hacerlo .

En este ámbito merece ser destacada la labor del Ministerio Fiscal en España.

Por su transcendencia, son destacables el contenido de las Instrucciones de la Fiscalía General del Estado 4/2008 sobre el control y vigilancia por el Ministrio Fiscal de las tutelas de personas discapaces . 4/2009 sobre la organización de las secciones de lo civil y del régimen especializado en materia de protección de personas con discapacidad y tutelas, y 3/2010 sobre la necesaria fundamentación individualizada de las medidas de protección o apoyo en los procedimientos sobre determinación de la capacidad de las personas, habiendose editado un manual de buenas prácticas que según palabras de Carlos Ganzenmüller “tiende a recoger lo que nosotros consideramos adecuado de nuestra legislación, de nuestra jurisprudencia, para introducirlo en la Convención y que podamos cumplirla desde este grado mínimo en espera de una legislación adecuada. Eso es lo que nos gustaría a todos los operadores jurídicos”.

Llegados a este punto, tras este repaso de la actualidad en torno a un aspecto clave de la Convención, como es la capacidad, retorno a la pregunta inicial, si estamos como muchos aseguran en el mismo sitio que hace cinco años o si se han dado pasos que hagan creer que ese muro grueso que encierra a las personas con discapacidad se van abriendo huecos .

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[25] Sobre esta sentencia es recomendable la lectura de la ponencia de Carlos Ganzenmüller, fiscal del Tribunal Supremo y miembro del Foro Justicia y Discapacidad, en las Jornada sobre capacidad jurídica y discapacidad del Observatorio Estatal de la Discapacidad, de Diciembre de 2010

Creo sinceramente que en este muro grueso se van abriendo huecos, que hay atisbos de luz, de esperanza.

Pero no estamos ante un reto, sino sobre todo ante una responsabilidad que no admite demora.

ANEXO

DECLARACIONES Y RESERVAS

De entre ellas, destacar:
Australia .
Momento de la ratificación .
Declaración .

Australia reconoce que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos las aspectos de la vida .

Australia declara su entendimiento de que la Convención permite por completo los apoyos o la sustitución en la toma de decisiones en nombre de una persona solamente cuando tales decisiones sean necesarias, como último recurso y sujeto a las salvaguardias .

Australia reconoce que toda persona con discapacidad tiene derecho a que se respete su integridad física y psíquica en igualdad de condiciones con los demás .

Australia declara su entendimiento de que la Convención permite la asistencia obligatoria o el tratamiento de las personas, incluidas las medidas adoptadas para el tratamiento de la discapacidad mental, cuando ese tratamiento sea necesario, como último recurso y sujeto a las salvaguardias .

Australia reconoce los derechos de las personas con discapacidad a la libertad de movimiento, a la libertad para elegir su residencia y a una nacionalidad, en igualdad de condiciones con los demás .

Australia además declara su entendimiento de que la convención no crea el derecho de toda persona a entrar o permanecer en un país en el que no es nacional, o se pueda incidir en los requisitos de salud de Australia por los extranjeros que intentan entrar o permanecer en Australia, donde estos requisitos se basan en criterios legítimos, objetivos y razonables .

CANADA.

Declaración y reserva .

El Canadá reconoce la presunción de que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con los demás en todos los aspectos de la vida .

Canadá declara su entendimiento de que el artículo 12 permite los mecanismos de apoyo y sustitución de toma de decisiones en circunstancias apropiadas y de conformidad con la ley .

En la medida en el artículo 12 puede interpretarse como una exigencia de eliminación de todos los mecanismos de sustitución en la toma de decisiones Canadá se reserva el derecho de continuar usándolos en circunstancias apropiadas y con las garantías adecuadas y efectivas .

Con respecto al artículo 12 . 4 . Canadá se reserva el derecho de no someter estas medidas a un a revisión periódica por una autoridad independiente, cuando esas medidas ya está sujetas a revisión o apelación .

EGIPTO

Declaración interpretativa hecha en el momento de la firma .

La república Arabe de Egipto declara que su interpretación del artículo 12 de la Convención Internacional sobre la protección y promoción de los derechos de las personas con discapacidad, que declara el reconocimiento de de las personas con discapacidad en igualdad de condiciones con los demás ante la ley, con relación al concepto de capacidad jurídica tratado en el apartado 2 de dicho artículo, es que las personas con discapacidad tienen capacidad para adquirir derechos y asumir responsabilidades, pero no la capacidad para ejercitarla (actuar) bajo la legislación egipcia .

FRANCIA

Declaración .

Con respecto al artículo 29 de la Convención, el ejercicio del derecho al voto es un componente de la capacidad jurídica que no puede ser restringido sino en las condiciones y de conformidad con las modalidades previstas en el artículo 12 de la Convención .

MEXICO

Declaración interpretativa .

El Estado mexicano reitera su compromiso de crear condiciones que permitan a todos los individuos desarrollar de manera integral el ejercicio de sus derechos y libertades plenamente y sin discriminación .

En consecuencia, afirmando su absoluta determinación de proteger los derechos y la dignidad de las personas con discapacidad los estados Mexicanos interpretan el párrafo 2 del artículo 12 de la convención en el sentido de que en caso de conflicto entre dicho párrafo y la legislación nacional la disposición que confiere la mayor protección jurídica al tiempo que garantizan la dignidad y garantizar la integridad física, psíquica y emocional de las personas y la protección de la integridad de sus bienes se aplicará en estricta conformidad con el principio pro homine .

REPUBLICA ARABE DE SIRIA.

En el momento de la firma .
Entendimiento.

Nuestra firma de la presente Convención no implica en modo alguno reconocimiento de Israel o la entrada en relaciones con Israel, en cualquier forma y manera, en conexión con la
Convención .

Hemos firmado hoy sobre la base del entendimiento que figura en la carta de fecha 5 de diciembre de 2006, dirigida por el representante permanente de Iraq acreditado ante las Naciones Unidas, en su calidad de presidente del grupo de estados arabes durante ese mes, al presidente del comité, que contiene la interpretación del grupo de estados árabes relativa al artículo 12 relativo a la interpretación del concepto de capacidad jurídica .

REINO UNIDO DE GRAN BRETAÑA Y NORTE DE IRLANDA.

Reservas .
Igual reconocimiento ante la ley -Convención artículo 12.4

Las disposiciones del Reino Unido, por el que el secretario de estado puede designar una persona para el ejercicio de derechos en relación a las demandas de seguridad social y los

pagos en nombre de una persona que es en ese momento incapaz de actuar no están actualmente sometidas a la salvaguardia de una regular revisión, como exige el artículo 12.4 de la convención y el Reino Unido se reserva el derecho de aplicar dicho régimen .El Reino Unido está por lo tanto trabajando hacia un sistema proporcional de revisión .

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.

Shivaun Quinlivan

Shivaun Quinlivan

Shivaun Quinlivan is a graduate of NUI, Galway, King's College London and King's Inns. Shivaun joined the Law Faculty in NUI, Galway in 2000 and currently teaches Constitutional Law, Tort Law and Disability Discrimination Law on various programmes offered by the Faculty.

She has worked as a stagiaire in the European Commission and a lecturer in Waterford Institute of Technology. Shivaun's research interests lie mainly in the field of equality and the law, with a particular interest in disability rights issues and is a founder member of the Law Faculty's Disability Law Policy and Research Unit.

In 2004 She was appointed as the Irish member on the EU Network or Legal Experts on Non-Discrimination, this project reviews the incorporation of the Race Directive and the Framework Directive on Equal Treatment at Work within all twenty-five Member States.

Shivaun was selected in 2005 for an Expert Consultative Panel on Discrimination and Gender Equality - this panel advises EU INTERREG on Public Sector Procurement and involves UCD and Trinity College Wales. She has been a project consultant for the European Project on Disability Discrimination (http://ww.euroddlaw.org) since 2004. This project is designed to provide training on the disability aspects of the Framework Directive on Equal Treatment at Work to NGOs representing people with disabilities. This training has so far been provided in Romania, Bulgaria and Lithuania and workshops will also take place in Estonia and Hungary during 2005/6.

In 2002 Shivaun was appointed as the Irish Legal Expert on the EU Network of Legal Experts on Disability Discrimination established by the European Commission. This Network completed their work in 2004.

Shivaun is also a member of the Board of the Association of Higher Education Access and Disability, an external examiner for The Honourable Society of King's Inns, an external lecturer to the Law Society of Ireland. She is also the Associate Director, University of Missouri-Kansas City, School of Law, Ireland Summer Law School. This American summer law school programme is accredited by the American Bar Association.

SPECIFIC SUBSTANTIVE OBLIGATIONS UNDER THE UNCRPD OR EU PROVISIONS (EDUCATION, HEALTH, ADEQUATE STANDARD OF LIVING AND SOCIAL PROTECTION, PARTICIPATION IN POLITICAL, PUBLIC AND CULTURAL LIFE, RECREATION, LEISURE AND SPORT, PRIVACY AND DATA PROTECTION): IS THERE ROOM FOR DIRECT EFFECT?

Shivaun Quinlivan
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Introduction

- UN CRPD is in its infancy
- EU ratifying human rights Treaties also new
- Two ways to go:
  - Minimalist and attempt to avoid implications of UN CRPD
  - Generous and attempt to fulfill human rights of all.

Direct Effect?

- Enables an individual to invoke a European provision before a national or European Court.
  - Was there an **express or implied intention** to give direct effect to this Treaty.
  - Are the provisions of the agreement **unconditional and sufficiently precise** to have direct effect.

Health – Article 25

- State Parties, recognize the right to attainable standard of health without discrimination
  - Same range, quality and standard of free or affordable health care
  - Provide disability specific services such as early intervention
  - Services close to peoples home
  - Requirement on health professionals
  - Prohibit and prevent discrimination

Education – Article 24

- 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 … directed to:
  - 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 ;
  - …

Direct Effect

- Can these articles be considered either:
  - As implying an intention to give the provisions direct effect, or
  - As sufficiently, unconditional and sufficiently precise to have direct effect
- Unlikely to have direct effect

Economic, Social and Cultural Rights

- Education
- Health
- Adequate Standard of Living

- Progressive realization
  - Minimum Core obligations
  - Some with immediate effect
  - Progressive realization measurement indicators

Interpretative Duty re UN CRPD?

- Case C-377/98 *Netherlands v. European Parliament and Council*
  - Even where an agreement does not have direct effect:
    - *… that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement.*
- See also Case C-61/94 *Commission v Germany* [1996] ECR I-3989.

UN CRPD

- 25 paragraphs in the preamble
- Article 1 – The purpose of the Convention
- Article 2 – Key Definition
- Articles 3-9 – Articles of general application
- Articles 10-30 – Substantive rights
- Articles 41-50 – Implementation and monitoring

General Obligations – Article 4

- 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:
  - To adopt all appropriate legislative, administrative and other measure for the implementation of the rights recognised in the present Convention.
  - ...

Competence?

- Directive 2000/43/EC Racial Equality Directive. This Directive prohibits discrimination in the area of employment, education, social protection including healthcare, social advantages, goods and services including housing.
- See also the Goods and Services Directive 2004/113/EC and
- Social Security Directive 79/7.

Agenda for Law Reform

- European Disability Strategy:
  - Implementation of the UN CRPD features strongly in the Strategy.
  - Areas for action include, Education, Social Protection and Health.
- COM (2008) 426 proposes Equal Treatment Directive – addressing areas such as healthcare, education, social protection, social advantages, …

What impact can this have?

- Case C-61/94 *Commission v. Germany*
  - Primacy of international agreements over secondary Community legislation
  - Secondary legislation must be interpreted in a manner consistent with international agreement

Equality and non-discrimination

- All equal before and under the law
- State Parties shall prohibit all discrimination and guarantee …equal and effective legal protection
- State Parties shall ensure reasonable accommodation is provided
- Positive action permissible

Reasonable Accommodation – A.2

- Failure to provide reasonable accommodation is discrimination
- A.2 – 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;

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PROFESSIONAL EXPERIENCE

January 2004 – present	Court of Justice of the EU, Luxembourg Référendaire, Chambers of Judge Konrad Schiemann
September 2003 – January 2004	White & Case law firm, Brussels Associate
March 2002 – September 2002	White & Case law firm, Brussels Legal trainee
October 2001 – January 2002	European Court of Justice, Luxembourg Legal trainee, Chambers of Judge David Edward
January 1998 – December 1999	European Integration Bureau, Riga Junior lawyer, PHARE project "Approximation of Latvian legislation to that of the EU"

EDUCATION

2002-2003	College of Europe (Bruges), LLM in European Community law
2000-2001	Riga Graduate School of Law, LLM in International and European law
1995-2000	University of Latvia, Bachelor's degree in Legal studies
1984-1995	Lycée français de Riga

LANGUAGE SKILLS

Russian (mother tongue), Latvian (fluent), English (fluent), French (fluent)

OTHER ACTIVITIES

From 2009 - present	Regular speaker at the seminars organised by the Academy of European Law (Trier) and European Institute of Public Administration (Luxembourg) on preliminary reference procedure and procedural aspects of Member states' interventions before the Court of Justice of the EU.
March 2010 - present	Speaker at the workshop "La question préjudicielle", École Nationale de Magistrature (Bordeaux).

THE ROLE OF THE NATIONAL JUDGE IN THE PRELIMINARY RULING PROCEDURE OF EU LAW

ALEKSANDRA MELESKO
CHAMBERS OF JUDGE KONRAD SCHIEMANN, COURT OF JUSTICE OF THE EU

PRESENTATION OUTLINE

1. Preliminary reference procedure is a form of cooperation between national courts and the Court of Justice.

a) Legal basis: article 267 TFUE

b) Purpose: to ensure uniform interpretation and application of EU law and prevent divergent interpretations by national courts; to enable the referring court to give judgment where a question on the interpretation or validity of EU legislation is raised in a case pending before it;

c) Court of Justice alone has jurisdiction to give preliminary rulings;

d) It is for the national court alone to decide whether to refer a question for a preliminary ruling, whether or not the parties to the main proceedings have requested it to do so.

2. In order to make effective cooperation with the Court, the task of the national judge is to provide the Court with all the relevant information about the case pending before it (for detailed practical guidance see Information Note on references from national courts for a preliminary ruling).

a) Suggested maximum of 10 pages for the order for reference;

b) The order for reference should provide the description of the facts of the case, applicable national / EU legislation, arguments of the parties, the referring judge's suggested answer to the question and the views on the legal issues which have been raised;

c) Be aware of the "lost in translation" effect - "owing to the need to translate the reference, it should be drafted simply, clearly and precisely, avoiding superfluous detail"[1].

[1] Point 21 of Information Note on references from national courts for a preliminary ruling

3. The role of the Court of Justice is to interpret EU law, **not** national law; the Court does **not** rule on validity of national legislation or legality of judgments of national courts. It is for the national court to apply the interpretation of EU law provided by the Court to the factual situation underlying the case pending before it.

4. Procedural steps of the preliminary reference procedure at the Court:

a) Notification of the national court's order for reference to all Member States / institutions of the EU[2];

b) Written and oral phase;

c) Possible post-reference scenarios:

- Request for clarification?[3]
- Inadmissible?
- The answer can be clearly deduced from the existing case-law?[4]
- Special forms of preliminary reference procedure: accelerated procedure and urgent preliminary reference procedure [5]

5. The effects of the judgment of the Court of Justice: binding upon the referring court and all Member states' courts whenever they deal with a similar legal issue. The Court of Justice welcomes information from the national court on the action taken upon its ruling in the national proceedings and, where appropriate, a copy of the national court's final decision!

[2] Article 23 of the Statute, Article 104 of the Rules of Procedure
[3] Article 104(5) of the Rules of Procedure
[4] Article 104(3) of the Rules of Procedure
[5] Article 23a of the Statute

THE ROLE OF THE NATIONAL JUDGE IN THE PRELIMINARY RULING PROCEDURE OF EU LAW

LEGAL SOURCES

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TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Article 267
(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 23

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court.

Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

Article 23a

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.

In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

RULES OF PROCEDURE OF THE COURT OF JUSTICE

Chapter 9

PRELIMINARY RULINGS AND OTHER REFERENCES FOR INTERPRETATION

Article 103

1. In cases governed by Article 23 of the Statute, the procedure shall be governed by the provisions of these Rules, subject to adaptations necessitated by the nature of the reference for a preliminary ruling.

2. The provisions of paragraph 1 shall apply to the references for a preliminary ruling provided for in the Protocol concerning the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and the Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Luxembourg on 3 June 1971, and to the references provided for by Article 4 of the latter Protocol.

The provisions of paragraph 1 shall apply also to references for interpretation provided for by other existing or future agreements.

Article 104

1. The decisions of national courts or tribunals referred to in Article 103 shall be communicated to the Member States in the original version, accompanied by a translation into the official language of the State to which they are addressed. Where appropriate on account of the length of the national court's decision, such translation shall be replaced by the translation into the official language of the State to which it is addressed of a summary of the decision, which will serve as a basis for the position to be adopted by that State. The summary shall include the full text of the question or questions referred for a preliminary ruling. That summary shall contain, in particular, in so far as that information appears in the national court's decision, the subject-matter of the main proceedings, the essential arguments of the parties in the main proceedings, a succinct presentation of the reasoning in the reference for a preliminary ruling and the case-law and the provisions of European Union and domestic law relied on.

In the cases governed by the third paragraph of Article 23 of the Statute, the decisions of national courts or tribunals shall be notified to the States, other than the Member States, which are parties to the EEA Agreement and also to the EFTA Surveillance Authority in the original version, accompanied by a translation of the decision, or where appropriate of a summary, into one of the languages mentioned in Article 29(1), to be chosen by the addressee of the notification.

Where a non-Member State has the right to take part in proceedings for a preliminary ruling pursuant to the fourth paragraph of Article 23 of the Statute, the original version of the decision of the national court or tribunal shall be communicated to it together with a

translation of the decision, or where appropriate of a summary, into one of the languages mentioned in Article 29(1), to be chosen by the non-Member State concerned.

2. As regards the representation and attendance of the parties to the main proceedings in the preliminary ruling procedure the Court shall take account of the rules of procedure of the national court or tribunal which made the reference.

3. Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law.

The Court may also give its decision by reasoned order, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the persons referred to in Article 23 of the Statute and after hearing the Advocate General, where the answer to the question referred to the Court for a preliminary ruling admits of no reasonable doubt.

4. Without prejudice to paragraph (3) of this Article, the procedure before the Court in the case of a reference for a preliminary ruling shall also include an oral part. However, after the statements of case or written observations referred to Article 23 of the Statute have been submitted, the Court, acting on a report from the Judge-Rapporteur, after informing the persons who under the aforementioned provisions are entitled to submit such statements or observations, may, after hearing the Advocate General, decide otherwise, provided that none of those persons has submitted an application setting out the reasons for which he wishes to be heard. The application shall be submitted within a period of three weeks from service on the party or person of the written statements of case or written observations which have been lodged. That period may be extended by the President.

5. The Court may, after hearing the Advocate General, request clarification from the national court.

6. It shall be for the national court or tribunal to decide as to the costs of the reference.

In special circumstances the Court may grant, by way of legal aid, assistance for the purpose of facilitating the representation or attendance of a party.

Article 104a

At the request of the national court, the President may exceptionally decide, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to apply an accelerated procedure derogating from the provisions of these Rules to a reference for a preliminary ruling, where the circumstances referred to establish that a ruling on the question put to the Court is a matter of exceptional urgency.

In that event, the President may immediately fix the date for the hearing, which shall be notified to the parties in the main proceedings and to the other persons referred to in Article 23 of the Statute when the decision making the reference is served.

The parties and other interested persons referred to in the preceding paragraph may lodge statements of case or written observations within a period prescribed by the President, which shall not be less than 15 days. The President may request the parties and other interested persons to restrict the matters addressed in their statement of case or written observations to the essential points of law raised by the question referred.

The statements of case or written observations, if any, shall be notified to the parties and to the other persons referred to above prior to the hearing.

The Court shall rule after hearing the Advocate General.

Article 104b

1. A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the national court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure which derogates from the provisions of these Rules.

The national court or tribunal shall set out, in its request, the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and shall, in so far as possible, indicate the answer it proposes to the questions referred.

If the national court or tribunal has not submitted a request for the urgent procedure to be applied, the President of the Court may, if the application of that procedure appears, prima facie, to be required, ask the Chamber referred to below to consider whether it is necessary to deal with the reference under that procedure.

The decision to deal with a reference for a preliminary ruling under the urgent procedure shall be taken by the designated Chamber, acting on a report of the Judge-Rapporteur and after hearing the Advocate General. The composition of that Chamber shall be determined in accordance with Article 11c on the day on which the case is assigned to the Judge-Rapporteur if the application of the urgent procedure is requested by the national court or tribunal, or, if the application of that procedure is considered at the request of the President of the Court, on the day on which that request is made.

2. A reference for a preliminary ruling of the kind referred to in the preceding paragraph shall, where the national court or tribunal has requested the application of the urgent procedure or where the President has requested the designated Chamber to consider whether it is necessary to deal with the reference under that procedure, be notified forthwith by the Registrar to the parties to the action before the national court or tribunal, to the Member State from which the reference is made and to the institutions referred to in the first paragraph of Article 23 of the Statute, in accordance with that provision.

The decision as to whether or not to deal with the reference for a preliminary ruling under the urgent procedure shall be notified forthwith to the national court or tribunal and to the parties, Member State and institutions referred to in the preceding subparagraph. The decision to deal with the reference under the urgent procedure shall prescribe the period within which those parties or entities may lodge statements of case or written observations. The decision may specify the matters of law to which such statements of case or written observations must relate and may specify the maximum length of those documents.

As soon as the notification referred to in the first subparagraph above has been made, the reference for a preliminary ruling shall also be communicated to the interested persons referred to in Article 23 of the Statute, other than the persons notified, and the decision whether or not to deal with the reference for a preliminary ruling under the urgent procedure shall be communicated to those interested persons as soon as the notification referred to in the second subparagraph has been made.

The parties and other interested persons referred to in Article 23 of the Statute shall be informed as soon as may be possible of the foreseeable date of the hearing.

Where the reference is not to be dealt with under the urgent procedure, the proceedings shall continue in accordance with the provisions of Article 23 of the Statute and the applicable provisions of these Rules.

3. A reference for a preliminary ruling which is to be dealt with under an urgent procedure, together with the statements of case or written observations which have been lodged, shall be served on the persons referred to in Article 23 of the Statute other than the parties and the entities referred to in the first subparagraph of the preceding paragraph of this Article. The reference for a preliminary ruling shall be accompanied by a translation, where appropriate in summary form, in accordance with Article 104(1).

The statements of case or written observations which have been lodged shall also be served on the parties and the other persons referred to in the first subparagraph of Article 104b(2).

The date of the hearing shall be notified to the parties and those other persons at the same time as the documents referred to in the preceding paragraphs are served.

4. The Chamber may, in cases of extreme urgency, decide to omit the written part of the procedure referred to in the second subparagraph of paragraph 2 of this Article.

5. The designated Chamber shall rule after hearing the Advocate General.

It may decide to sit in a formation of three Judges. In that event, it shall be composed of the President of the designated Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 11c(2) on the date on which the composition of the designated Chamber is determined in accordance with the fourth subparagraph of paragraph 1 of this Article.

It may also decide to refer the case back to the Court in order for it to be assigned to a formation composed of a greater number of Judges. The urgent procedure shall continue before the new formation, where necessary after the reopening of the oral procedure.

6. The procedural documents referred to in this Article shall be deemed to have been lodged on the transmission to the Registry, by telefax or other technical means of communication available to the Court, of a copy of the signed original and the documents relied on in support of it, together with the schedule referred to in Article 37(4). The original of the document and the annexes referred to above shall be sent to the Registry.

Where this Article requires that a document be notified to or served on a person, such notification or service may be effected by the transmission of a copy of the document by telefax or other technical means of communication available to the Court and the addressee.

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

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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

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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.

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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

I

(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 not 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].'

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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.

I

(Legislative acts)

REGULATIONS

REGULATION (EU) No 181/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 February 2011

concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91(1) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure, in the light of the joint text approved by the Conciliation Committee on 24 January 2011 [2],

Whereas:

(1) Action by the Union in the field of bus and coach transport should aim, among other things, at ensuring a high level of protection for passengers, that is comparable with other modes of transport, wherever they travel. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Since the bus or coach passenger is the weaker party to the transport contract, all passengers should be granted a minimum level of protection.

(3) Union measures to improve passengers' rights in the bus and coach transport sector should take account of the specific characteristics of this sector, which consists largely of small- and medium-sized undertakings.

(4) Passengers and, as a minimum, persons whom the passenger had, or would have had, a legal duty to maintain should enjoy adequate protection in the event of accidents arising out of the use of the bus or coach, taking into account Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability [3].

(5) In choosing the national law applicable to compensation for death, including reasonable funeral expenses, or personal injury as well as for loss of or damage to luggage due to accidents arising out of the use of the bus or coach, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [4] and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [5] should be taken into account.

(6) Passengers should, in addition to compensation in accordance with applicable national law in the event of death or personal injury or loss of or damage to luggage due to accidents arising out of the use of the bus or coach, be entitled to assistance with regard to their immediate practical needs following an accident. Such assistance should include, where necessary, first aid, accommodation, food, clothes and transport.

[1] OJ C 317, 23.12.2009, p. 99.
[2] Position of the European Parliament of 23 April 2009 (OJ C 184 E, 8.7.2010, p. 312), position of the Council at first reading of 11 March 2010 (OJ C 122 E, 11.5.2010, p. 1), position of the European Parliament of 6 July 2010 (not yet published in the Official Journal), decision of the Council of 31 January 2011 and legislative resolution of the European Parliament of 15 February 2011 (not yet published in the Official Journal).
[3] OJ L 263, 7.10.2009, p. 11.
[4] OJ L 199, 31.7.2007, p. 40.
[5] OJ L 177, 4.7.2008, p. 6.

(7) Bus and coach passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for using bus and coach services that are comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same rights as all other citizens with regard to free movement, freedom of choice and non-discrimination.

(8) In the light of Article 9 of the United Nations Convention on the Rights of Persons with Disabilities and in order to give disabled persons and persons with reduced mobility opportunities for bus and coach travel comparable to those of other citizens, rules for non-discrimination and assistance during their journey should be established. Those persons should therefore be accepted for carriage and not refused transport on the grounds of their disability or reduced mobility, except for reasons which are justified on the grounds of safety or of the design of vehicles or infrastructure. Within the framework of relevant legislation for the protection of workers, disabled persons and persons with reduced mobility should enjoy the right to assistance at terminals and on board vehicles. In the interest of social inclusion, the persons concerned should receive the assistance free of charge. Carriers should establish access conditions, preferably using the European standardisation system.

(9) In deciding on the design of new terminals, and as part of major refurbishments, terminal managing bodies should endeavour to take into account the needs of disabled persons and persons with reduced mobility, in accordance with 'design for all' requirements. In any case, terminal managing bodies should designate points where such persons can notify their arrival and need for assistance.

(10) Similarly, without prejudice to current or future legislation on technical requirements for buses and coaches, carriers should, where possible, take those needs into account when deciding on the equipment of new and newly refurbished vehicles.

(11) Member States should endeavour to improve existing infrastructure where this is necessary to enable carriers to ensure access for disabled persons and persons with reduced mobility as well as to provide appropriate assistance.

(12) In order to respond to the needs of disabled persons and persons with reduced mobility, staff should be adequately trained. With a view to facilitating the mutual recognition of national qualifications of drivers, disability awareness training could be provided as a part of the initial qualification or periodic training as referred to in 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 [1]. In order to ensure coherence between the introduction of the training requirements and the time-limits set out in that Directive, a possibility for exemption during a limited period of time should be allowed.

(13) Organisations representative of disabled persons or persons with reduced mobility should be consulted or involved in preparing the content of the disability-related training.

(14) Rights of bus and coach passengers should include the receipt of information regarding the service before and during the journey. All essential information provided to bus and coach passengers should also be provided, upon request, in alternative formats accessible to disabled persons and persons with reduced mobility, such as large print, plain language, Braille, electronic communications that can be accessed with adaptive technology, or audio tapes.

(15) This Regulation should not restrict the rights of carriers to seek compensation from any person, including third parties, in accordance with the applicable national law.

(16) Inconvenience experienced by passengers due to cancellation or significant delay of their journey should be reduced. To this end, passengers departing from terminals should be adequately looked after and informed in a way which is accessible to all passengers. Passengers should also be able to cancel their journey and have their tickets reimbursed or to continue their journey or to obtain re-routing under satisfactory conditions. If carriers fail to provide passengers with the necessary assistance, passengers should have the right to obtain financial compensation.

(17) With the involvement of stakeholders, professional associations and associations of customers, passengers, disabled persons and persons with reduced mobility, carriers should cooperate in order to adopt arrangements at national or European level. Such arrangements should aim at improving the information, care and assistance offered to passengers whenever their travel is interrupted, in particular in the event of long delays or cancellation of travel, with a particular focus on passengers with special needs due to disability, reduced mobility, illness, elderly age and pregnancy, and including accompanying passengers and passengers travelling with young children. National enforcement bodies should be informed of those arrangements.

[1] OJ L 226, 10.9.2003, p. 4.

(18) This Regulation should not affect the rights of passengers established by Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1]. This Regulation should not apply in cases where a package tour is cancelled for reasons other than cancellation of the bus or coach transport service.

(19) Passengers should be fully informed of their rights under this Regulation, so that they can effectively exercise those rights.

(20) Passengers should be able to exercise their rights by means of appropriate complaint procedures implemented by carriers or, as the case may be, by submission of complaints to the body or bodies designated to that end by the relevant Member State.

(21) Member States should ensure compliance with this Regulation and designate a competent body or bodies to carry out supervision and enforcement tasks. This does not affect the rights of passengers to seek legal redress from courts under national law.

(22) Taking into account the procedures established by Member States for the submission of complaints, a complaint concerning assistance should preferably be addressed to the body or bodies designated for the enforcement of this Regulation in the Member State where the boarding point or alighting point is situated.

(23) Member States should promote the use of public transport and the use of integrated information and integrated tickets in order to optimise the use and interoperability of the various transport modes and operators.

(24) Member States should lay down penalties applicable to infringements of this Regulation and ensure that those penalties are applied. Those penalties should be effective, proportionate and dissuasive.

(25) Since the objective of this Regulation, namely to ensure an equivalent level of protection of and assistance to passengers in bus and coach transport throughout the Member States, cannot sufficiently be achieved by the Member States and can therefore by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(26) This Regulation should be without prejudice to 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 on the free movement of such data [2].

(27) The enforcement of this Regulation should be based on Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection law (the Regulation on consumer protection cooperation) [3]. That Regulation should therefore be amended accordingly.

(28) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, as referred to in Article 6 of the Treaty on European Union, bearing in mind also Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [4] and Council 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 [5],

HAVE ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation establishes rules for bus and coach transport as regards the following:

(a) non-discrimination between passengers with regard to transport conditions offered by carriers;

(b) rights of passengers in the event of accidents arising out of the use of the bus or coach resulting in death or personal injury or loss of or damage to luggage;

(c) non-discrimination and mandatory assistance for disabled persons and persons with reduced mobility;

(d) rights of passengers in cases of cancellation or delay;

(e) minimum information to be provided to passengers;

(f) handling of complaints;

(g) general rules on enforcement.

[1] OJ L 158, 23.6.1990, p. 59.

[2] OJ L 281, 23.11.1995, p. 31.
[3] OJ L 364, 9.12.2004, p. 1.
[4] OJ L 180, 19.7.2000, p. 22.
[5] OJ L 373, 21.12.2004, p. 37.

Article 2

Scope

1. This Regulation shall apply to passengers travelling with regular services for non-specified categories of passengers where the boarding or the alighting point of the passengers is situated in the territory of a Member State and where the scheduled distance of the service is 250 km or more.

2. As regards the services referred to in paragraph 1 but where the scheduled distance of the service is shorter than 250 km, Article 4(2), Article 9, Article 10(1), point (b) of Article 16(1), Article 16(2), Article 17(1) and (2), and Articles 24 to 28 shall apply.

3. In addition, with the exception of Articles 9 to 16, Article 17(3), and Chapters IV, V and VI, this Regulation shall apply to passengers travelling with occasional services where the initial boarding point or the final alighting point of the passenger is situated in the territory of a Member State.

4. With the exception of Article 4(2), Article 9, Article 10(1), point (b) of Article 16(1), Article 16(2), Article 17(1) and (2), and Articles 24 to 28, Member States may, on a transparent and non-discriminatory basis, exempt domestic regular services from the application of this Regulation. Such exemptions may be granted as from the date of application of this Regulation for a period no longer than 4 years, which may be renewed once.

5. For a maximum period of 4 years from the date of application of this Regulation, Member States may, on a transparent and non-discriminatory basis, exempt from the application of this Regulation particular regular services because a significant part of such regular services, including at least one scheduled stop, is operated outside the Union. Such exemptions may be renewed once.

6. Member States shall inform the Commission of exemptions of different types of services granted pursuant to paragraphs 4 and 5. The Commission shall take appropriate action if such an exemption is deemed not to be in accordance with the provisions of this Article. By 2 March 2018, the Commission shall submit to the European Parliament and the Council a report on exemptions granted pursuant to paragraphs 4 and 5.

7. Nothing in this Regulation shall be understood as conflicting with or introducing additional requirements to those in current legislation on technical requirements for buses or coaches or infrastructure or equipment at bus stops and terminals.

8. This Regulation shall not affect the rights of passengers under Directive 90/314/EEC and shall not apply in case where a package tour referred to in that Directive is cancelled for reasons other than cancellation of a regular service.

Article 3

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(a) 'regular services' means services which provide for the carriage of passengers by bus or coach at specified intervals along specified routes, passengers being picked up and set down at predetermined stopping points;

(b) 'occasional services' means services which do not fall within the definition of regular services and the main characteristic of which is the carriage by bus or coach of groups of passengers constituted on the initiative of the customer or the carrier himself;

(c) 'transport contract' means a contract of carriage between a carrier and a passenger for the provision of one or more regular or occasional services;

(d) 'ticket' means a valid document or other evidence of a transport contract;

(e) 'carrier' means a natural or legal person, other than a tour operator, travel agent or ticket vendor, offering transport by regular or occasional services to the general public;

(f) 'performing carrier' means a natural or legal person other than the carrier, who actually performs the carriage wholly or partially;

(g) 'ticket vendor' means any intermediary concluding transport contracts on behalf of a carrier;

(h) 'travel agent' means any intermediary acting on behalf of a passenger for the conclusion of transport contracts;

(i) 'tour operator' means an organiser or retailer, other than the carrier, within the meaning of Article 2(2) and (3) of Directive 90/314/EEC;

(j) 'disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced as a result of any physical disability (sensory or locomotory, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or as a result of age, and whose situation needs appropriate attention and adaptation to his particular needs of the services made available to all passengers;

(k) 'access conditions' means relevant standards, guidelines and information on the accessibility of buses and/or of designated terminals including their facilities for disabled persons or persons with reduced mobility;

(l) 'reservation' means a booking of a seat on board a bus or coach for a regular service at a specific departure time;

(m) 'terminal' means a staffed terminal where according to the specified route a regular service is scheduled to stop for passengers to board or alight, equipped with facilities such as a check-in counter, waiting room or ticket office;

(n) 'bus stop' means any point other than a terminal where according to the specified route a regular service is scheduled to stop for passengers to board or alight;

(o) 'terminal managing body' means an organisational entity in a Member State responsible for the management of a designated terminal;

(p) 'cancellation' means the non-operation of a regular service which was previously scheduled;

(q) 'delay' means a difference between the time the regular service was scheduled to depart in accordance with the published timetable and the time of its actual departure.

Article 4

Tickets and non-discriminatory contract conditions

1. Carriers shall issue a ticket to the passenger, unless other documents give entitlement to transport. A ticket may be issued in an electronic format.

2. Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of the carriers, or ticket vendors within the Union.

Article 5

Other performing parties

1. If the performance of the obligations under this Regulation has been entrusted to a performing carrier, ticket vendor or any other person, the carrier, travel agent, tour operator or terminal managing body, who has entrusted such obligations, shall nevertheless be liable for the acts and omissions of that performing party.

2. In addition, the party to whom the performance of an obligation has been entrusted by the carrier, travel agent, tour operator or terminal managing body shall be subject to the provisions of this Regulation with regard to the obligation entrusted.

Article 6

Exclusion of waiver

1. Obligations to passengers pursuant to this Regulation shall not be limited or waived, in particular by a derogation or restrictive clause in the transport contract.

2. Carriers may offer contract conditions that are more favourable for the passenger than the conditions laid down in this Regulation.

CHAPTER II

COMPENSATION AND ASSISTANCE IN THE EVENT OF ACCIDENTS

Article 7

Death or personal injury to passengers and loss of or damage to luggage

1. Passengers shall, in accordance with applicable national law, be entitled to compensation for death, including reasonable funeral expenses, or personal injury as well as to loss of or damage to luggage due to accidents arising out of the use of the bus or coach. In case of death of a passenger, this right shall as a minimum apply to persons whom the passenger had, or would have had, a legal duty to maintain.

2. The amount of compensation shall be calculated in accordance with applicable national law. Any maximum limit provided by national law to the compensation for death and personal injury or loss of or damage to luggage shall on each distinct occasion not be less than:

(a) EUR 220 000 per passenger;

(b) EUR 1 200 per item of luggage. In the event of damage to wheelchairs, other mobility equipment or assistive devices the amount of compensation shall always be equal to the cost of replacement or repair of the equipment lost or damaged.

Article 8

Immediate practical needs of passengers

In the event of an accident arising out of the use of the bus or coach, the carrier shall provide reasonable and proportionate assistance with regard to the passengers' immediate practical needs following the accident. Such assistance shall include, where necessary, accommodation, food, clothes, transport and the facilitation of first aid. Any assistance provided shall not constitute recognition of liability.

For each passenger, the carrier may limit the total cost of accommodation to EUR 80 per night and for a maximum of 2 nights.

CHAPTER III

RIGHTS OF DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

Article 9

Right to transport

1. Carriers, travel agents and tour operators shall not refuse to accept a reservation from, to issue or otherwise provide a ticket to, or to take on board, a person on the grounds of disability or of reduced mobility.

2. Reservations and tickets shall be offered to disabled persons and persons with reduced mobility at no additional cost.

Article 10

Exceptions and special conditions

1. Notwithstanding Article 9(1), carriers, travel agents and tour operators may refuse to accept a reservation from, to issue or otherwise provide a ticket to, or to take on board, a person on the grounds of disability or of reduced mobility:

(a) in order to meet applicable safety requirements established by international, Union or national law, or in order to meet health and safety requirements established by the competent authorities;

(b) where the design of the vehicle or the infrastructure, including bus stops and terminals, makes it physically impossible to take on board, alight or carry the disabled person or person with reduced mobility in a safe and operationally feasible manner.

2. In the event of a refusal to accept a reservation or to issue or otherwise provide a ticket on the grounds referred to in paragraph 1, carriers, travel agents and tour operators shall inform the person concerned about any acceptable alternative service operated by the carrier.

3. If a disabled person or a person with reduced mobility, who holds a reservation or has a ticket and has complied with the requirements of point (a) of Article 14(1), is nonetheless refused permission to board on the grounds of his disability or reduced mobility, that person and any accompanying person pursuant to paragraph 4 of this Article shall be offered the choice between:

(a) the right to reimbursement, and where relevant a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity; and

(b) except where not feasible, continuation of the journey or re-routing by reasonable alternative transport services to the place of destination set out in the transport contract.

The right to reimbursement of the money paid for the ticket shall not be affected by the failure to notify in accordance with point (a) of Article 14(1).

4. If a carrier, travel agent or tour operator refuses to accept a reservation from, to issue or otherwise provide a ticket to, or to take on board, a person on the grounds of disability or of reduced mobility for the reasons set out in paragraph 1, that person may request to be accompanied by another person of his own choosing who is capable of providing the assistance required by the disabled person or person with reduced mobility in order that the reasons set out in paragraph 1 no longer apply.

Such an accompanying person shall be transported free of charge and, where feasible, seated next to the disabled person or person with reduced mobility.

5. When carriers, travel agents or tour operators have recourse to paragraph 1, they shall immediately inform the disabled person or person with reduced mobility of the reasons therefor, and, upon request, inform the person in question in writing within 5 working days of the request.

Article 11

Accessibility and information

1. In cooperation with organisations representative of disabled persons or persons with reduced mobility, carriers and terminal managing bodies shall, where appropriate through their organisations, establish, or have in place, non-discriminatory access conditions for the transport of disabled persons and persons with reduced mobility.

2. The access conditions provided for in paragraph 1, including the text of international, Union or national laws establishing the safety requirements, on which these non-discriminatory access conditions are based, shall be made publicly available by carriers and terminal managing bodies physically or on the Internet, in accessible formats on request, in the same languages as those in which information is generally made available to all passengers. When providing this information particular attention shall be paid to the needs of disabled persons and persons with reduced mobility.

3. Tour operators shall make available the access conditions provided for in paragraph 1 which apply to journeys included in package travel, package holidays and package tours which they organise, sell or offer for sale.

4. The information on access conditions referred to in paragraphs 2 and 3 shall be physically distributed at the request of the passenger.

5. Carriers, travel agents and tour operators shall ensure that all relevant general information concerning the journey and the conditions of carriage is available in appropriate and accessible formats for disabled persons and persons with reduced mobility including, where applicable, online booking and information. The information shall be physically distributed at the request of the passenger.

Article 12

Designation of terminals

Member States shall designate bus and coach terminals where assistance for disabled persons and persons with reduced mobility shall be provided. Member States shall inform the Commission thereof. The Commission shall make available a list of the designated bus and coach terminals on the Internet.

Article 13

Right to assistance at designated terminals and on board buses and coaches

1. Subject to the access conditions provided for in Article 11(1), carriers and terminal managing bodies shall, within their respective areas of competence, at terminals designated by Member States, provide assistance free of charge to disabled persons and persons with reduced mobility, at least to the extent specified in part (a) of Annex I.

2. Subject to the access conditions provided for in Article 11(1), carriers shall, on board buses and coaches, provide assistance free of charge to disabled persons and persons with reduced mobility, at least to the extent specified in part (b) of Annex I.

Article 14

Conditions under which assistance is provided

1. Carriers and terminal managing bodies shall cooperate in order to provide assistance to disabled persons and persons with reduced mobility on condition that:

(a) the person's need for such assistance is notified to carriers, terminal managing bodies, travel agents or tour operators at the latest 36 hours before the assistance is needed; and

(b) the persons concerned present themselves at the designated point:

(i) at the time stipulated in advance by the carrier which shall be no more than 60 minutes before the published departure time, unless a shorter period is agreed between the carrier and the passenger; or

(ii) if no time is stipulated, no later than 30 minutes before the published departure time.

2. In addition to paragraph 1, disabled persons or persons with reduced mobility shall notify the carrier, travel agent or tour operator at the time of reservation or advance purchase of the ticket of their specific seating needs, provided that the need is known at that time.

3. Carriers, terminal managing bodies, travel agents and tour operators shall take all measures necessary to facilitate the receipt of notifications of the need for assistance made by disabled persons or persons with reduced mobility. This obligation shall apply at all designated terminals and their points of sale including sale by telephone and via the Internet.

4. If no notification is made in accordance with point (a) of paragraph 1 and paragraph 2, carriers, terminal managing bodies, travel agents and tour operators shall make every reasonable effort to ensure that the assistance is provided in such a way that the disabled person or person with reduced mobility is able to board the departing service, to change to the corresponding service or to alight from the arriving service for which he has purchased a ticket.

5. The terminal managing body shall designate a point inside or outside the terminal at which disabled persons or persons with reduced mobility can announce their arrival and request assistance. The point shall be clearly signposted and shall offer basic information about the terminal and assistance provided, in accessible formats.

Article 15

Transmission of information to a third party

If travel agents or tour operators receive a notification referred to in point (a) of Article 14(1) they shall, within their normal office hours, transfer the information to the carrier or terminal managing body as soon as possible.

Article 16

Training

1. Carriers and, where appropriate, terminal managing bodies shall establish disability-related training procedures, including instructions, and ensure that:

(a) their personnel, other than drivers, including those employed by any other performing party, providing direct assistance to disabled persons and persons with reduced mobility are trained or instructed as described in parts (a) and (b) of Annex II; and

(b) their personnel, including drivers, who deal directly with the travelling public or with issues related to the travelling public, are trained or instructed as described in part (a) of Annex II.

2. A Member State may for a maximum period of 5 years from 1 March 2013 grant an exemption from the application of point (b) of paragraph 1 with regard to training of drivers.

Article 17

Compensation in respect of wheelchairs and other mobility equipment

1. Carriers and terminal managing bodies shall be liable where they have caused loss of or damage to wheelchairs, other mobility equipment or assistive devices. The loss or damage shall be compensated by the carrier or terminal managing body liable for that loss or damage.

2. The compensation referred to in paragraph 1 shall be equal to the cost of replacement or repair of the equipment or devices lost or damaged.

3. Where necessary, every effort shall be undertaken to rapidly provide temporary replacement equipment or devices. The wheelchairs, other mobility equipment or assistive devices shall, where possible, have technical and functional features similar to those lost or damaged.

Article 18

Exemptions

1. Without prejudice to Article 2(2), Member States may exempt domestic regular services from the application of all or some of the provisions of this Chapter, provided that they ensure that the level of protection of disabled persons and persons with reduced mobility under their national rules is at least the same as under this Regulation.

2. Member States shall inform the Commission of exemptions granted pursuant to paragraph 1. The Commission shall take appropriate action if such an exemption is deemed not to be in accordance with the provisions of this Article. By 2 March 2018, the Commission shall submit to the European Parliament and the Council a report on exemptions granted pursuant to paragraph 1.

CHAPTER IV

PASSENGER RIGHTS IN THE EVENT OF CANCELLATION OR DELAY

Article 19

Continuation, re-routing and reimbursement

1. Where a carrier reasonably expects a regular service to be cancelled or delayed in departure from a terminal for more than 120 minutes or in the case of overbooking, the passenger shall immediately be offered the choice between:

(a) continuation or re-routing to the final destination, at no additional cost and under comparable conditions, as set out in the transport contract, at the earliest opportunity;

(b) reimbursement of the ticket price, and, where relevant, a return service by bus or coach free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity.

2. If the carrier fails to offer the passenger the choice referred to in paragraph 1, the passenger shall have the right to compensation amounting to 50 % of the ticket price, in addition to the reimbursement referred to in point (b) of paragraph 1. This sum shall be paid by the carrier within 1 month after the submission of the request for compensation.

3. Where the bus or coach becomes inoperable during the journey, the carrier shall provide either the continuation of the service with another vehicle from the location of the inoperable vehicle, or transport from the location of the inoperable vehicle to a suitable waiting point or terminal from where continuation of the journey becomes possible.

4. Where a regular service is cancelled or delayed in departure from a bus stop for more than 120 minutes, passengers shall have the right to the continuation or re-routing or reimbursement of the ticket price from the carrier, as referred to in paragraph 1.

5. The payment of reimbursement provided for in point (b) of paragraph 1 and paragraph 4 shall be made within 14 days after the offer has been made or request has been received. The payment shall cover the full cost of the ticket at the price at which it was purchased, for the part or parts of the journey not made, and for the part or parts already made if the journey no longer serves any purpose in relation to the passenger's original travel plan. In case of travel passes or season tickets the payment shall be equal to its proportional part of the full cost of the pass or ticket. The reimbursement shall be paid in money, unless the passenger accepts another form of reimbursement.

Article 20

Information

1. In the event of cancellation or delay in departure of a regular service, passengers departing from terminals shall be informed by the carrier or, where appropriate, the terminal managing body, of the situation as soon as possible and in any event no later than 30 minutes after the scheduled departure time, and of the estimated departure time as soon as this information is available.

2. If passengers miss, according to the timetable, a connecting service due to a cancellation or delay, the carrier or, where appropriate, the terminal managing body, shall make reasonable efforts to inform the passengers concerned of alternative connections.

3. The carrier or, where appropriate, the terminal managing body, shall ensure that disabled persons and persons with reduced mobility receive the information required under paragraphs 1 and 2 in accessible formats.

4. Where feasible, the information required under paragraphs 1 and 2 shall be provided by electronic means to all passengers, including those departing from bus stops, within the time-limit stipulated in paragraph 1, if the passenger has requested this and has provided the necessary contact details to the carrier.

Article 21

Assistance in case of cancelled or delayed departures

For a journey of a scheduled duration of more than 3 hours the carrier shall, in case of cancellation or delay in departure from a terminal of more than 90 minutes, offer the passenger free of charge:

(a) snacks, meals or refreshments in reasonable relation to the waiting time or delay, provided they are available on the bus or in the terminal, or can reasonably be supplied;

(b) a hotel room or other accommodation as well as assistance to arrange transport between the terminal and the place of accommodation in cases where a stay of 1 or more nights becomes necessary. For each passenger, the carrier may limit the total cost of accommodation, not including transport to and from the terminal and place of accommodation, to EUR 80 per night and for a maximum of 2 nights.

In applying this Article the carrier shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons.

Article 22

Further claims

Nothing in this Chapter shall preclude passengers from seeking damages in accordance with national law before national courts in respect of loss resulting from cancellation or delay of regular services.

Article 23

Exemptions

1. Articles 19 and 21 shall not apply to passengers with open tickets as long as the time of departure is not specified, except for passengers holding a travel pass or a season ticket.

2. Point (b) of Article 21 shall not apply where the carrier proves that the cancellation or delay is caused by severe weather conditions or major natural disasters endangering the safe operation of bus or coach services.

CHAPTER V

GENERAL RULES ON INFORMATION AND COMPLAINTS

Article 24

Right to travel information

Carriers and terminal managing bodies shall, within their respective areas of competence, provide passengers with adequate information throughout their travel. Where feasible, this information shall be provided in accessible formats upon request.

Article 25

Information on passenger rights

1. Carriers and terminal managing bodies shall, within their respective areas of competence, ensure that passengers are provided with appropriate and comprehensible information regarding their rights under this Regulation at the latest on departure. This information shall be provided at terminals and where applicable, on the Internet. At the request of a disabled person or person with reduced mobility the information shall be provided, where feasible, in an accessible format. This information shall include contact details of the enforcement body or bodies designated by the Member State pursuant to Article 28(1).

2. In order to comply with the information requirement referred to in paragraph 1, carriers and terminal managing bodies may use a summary of the provisions of this Regulation prepared by the Commission in all the official languages of the institutions of the European Union and made available to them.

Article 26

Complaints

Carriers shall set up or have in place a complaint handling mechanism for the rights and obligations set out in this Regulation.

Article 27

Submission of complaints

Without prejudice to claims for compensation in accordance with Article 7, if a passenger covered by this Regulation wants to make a complaint to the carrier, he shall submit it within 3 months from the date on which the regular service was performed or when a regular service should have been performed. Within 1 month of receiving the complaint, the carrier shall give notice to the passenger that his complaint has been substantiated, rejected or is still being considered. The time taken to provide the final reply shall not be longer than 3 months from the receipt of the complaint.

CHAPTER VI

ENFORCEMENT AND NATIONAL ENFORCEMENT BODIES

Article 28

National enforcement bodies

1. Each Member State shall designate a new or existing body or bodies responsible for the enforcement of this Regulation as regards regular services from points situated on its territory and regular services from a third country to such points. Each body shall take the measures necessary to ensure compliance with this Regulation.

Each body shall, in its organisation, funding decisions, legal structure and decision making, be independent of carriers, tour operators and terminal managing bodies.

2. Member States shall inform the Commission of the body or bodies designated in accordance with this Article.

3. Any passenger may submit a complaint, in accordance with national law, to the appropriate body designated under paragraph 1, or to any other appropriate body designated by a Member State, about an alleged infringement of this Regulation.

A Member State may decide that the passenger as a first step shall submit a complaint to the carrier in which case the national enforcement body or any other appropriate body designated by the Member State shall act as an appeal body for complaints not resolved under Article 27.

Article 29

Report on enforcement

By 1 June 2015 and every 2 years thereafter, the enforcement bodies designated pursuant to Article 28(1) shall publish a report on their activity in the previous 2 calendar years, containing in particular a description of actions taken in order to implement this Regulation and statistics on complaints and sanctions applied.

Article 30

Cooperation between enforcement bodies

National enforcement bodies as referred to in Article 28(1) shall, whenever appropriate, exchange information on their work and decision-making principles and practices. The Commission shall support them in this task.

Article 31

Penalties

Member States shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all the measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those rules and measures to the Commission by 1 March 2013 and shall notify it without delay of any subsequent amendment affecting them.

CHAPTER VII

FINAL PROVISIONS

Article 32

Report

The Commission shall report to the European Parliament and the Council by 2 March 2016 on the operation and effects of this Regulation. The report shall be accompanied, where necessary, by legislative proposals implementing in further detail the provisions of this Regulation, or amending it.

Article 33

Amendment to Regulation (EC) No 2006/2004

In the Annex to Regulation (EC) No 2006/2004 the following point is added:

'19. Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 on the rights of passengers in bus and coach transport (*).

(*) OJ L 55, 28.2.2011, p. 1'.

Article 34

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 1 March 2013.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 16 February 2011.

For the European Parliament
The President
J. BUZEK

For the Council
The President
MARTONYI J.

ANNEX I

ASSISTANCE PROVIDED TO DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

(a) **Assistance at designated terminals**

Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to:

— communicate their arrival at the terminal and their request for assistance at designated points,

— move from the designated point to the check-in counter, waiting room and embarkation area,

— board the vehicle, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

— load their luggage,

— retrieve their luggage,

— alight from the vehicle,

— carry a recognised assistance dog on board a bus or coach,

— proceed to the seat;

(b) **Assistance on board**

Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to:

— be provided with essential information on a journey in accessible formats subject to request made by the passenger,

— board/alight during pauses in a journey, if there are personnel other than the driver on board.

ANNEX II

DISABILITY-RELATED TRAINING

(a) **Disability-awareness training**

Training of staff that deal directly with the travelling public includes:

— awareness of and appropriate responses to passengers with physical, sensory (hearing and visual), hidden or learning disabilities, including how to distinguish between the different abilities of persons whose mobility, orientation, or communication may be reduced,

— barriers faced by disabled persons and persons with reduced mobility, including attitudinal, environmental/physical and organisational barriers,

— recognised assistance dogs, including the role and the needs of an assistance dog,

— dealing with unexpected occurrences,

— interpersonal skills and methods of communication with deaf people and people with hearing impairments, people with visual impairments, people with speech impairments, and people with a learning disability,

— how to handle wheelchairs and other mobility aids carefully so as to avoid damage (if any, for all staff who are responsible for luggage handling);

(b) **Disability-assistance training**

Training of staff directly assisting disabled persons and persons with reduced mobility includes:

— how to help wheelchair users make transfers into and out of a wheelchair,

— skills for providing assistance to disabled persons and persons with reduced mobility travelling with a recognised assistance dog, including the role and the needs of those dogs,

— techniques for escorting visually impaired passengers and for the handling and carriage of recognised assistance dogs,

— an understanding of the types of equipment which can assist disabled persons and persons with reduced mobility and a knowledge of how to handle such an equipment,

— the use of boarding and alighting assistance equipment used and knowledge of the appropriate boarding and alighting assistance procedures that safeguard the safety and dignity of disabled persons and persons with reduced mobility,

— understanding of the need for reliable and professional assistance. Also awareness of the potential of certain disabled passengers to experience feelings of vulnerability during travel because of their dependence on the assistance provided,

— a knowledge of first aid.

I

(Legislative acts)

REGULATIONS

REGULATION (EU) No 1177/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 24 November 2010

concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 91(1) and 100(2) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) Action by the Union in the field of maritime and inland waterway transport should aim, among other things, at ensuring a high level of protection for passengers that is comparable with other modes of transport. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Since the maritime and inland waterway passenger is the weaker party to the transport contract, all passengers should be granted a minimum level of protection. Nothing should prevent carriers from offering contract conditions more favourable for the passenger than the conditions laid down in this Regulation. At the same time, the aim of this Regulation is not to interfere in commercial business-to-business relationships concerning the transport of goods. In particular, agreements between a road haulier and a carrier should not be construed as transport contracts for the purposes of this Regulation and should therefore not give the road haulier or its employees the right to compensation under this Regulation in the case of delays.

(3) The protection of passengers should cover not only passenger services between ports situated in the territory of the Member States, but also passenger services between such ports and ports situated outside the territory of the Member States, taking into account the risk of distortion of competition on the passenger transport market. Therefore the term 'Union carrier' should, for the purposes of this Regulation, be interpreted as broadly as possible, but without affecting other legal acts of the Union, such as Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [3] and Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) [4].

[1] OJ C 317, 23.12.2009, p. 89.

[2] Position of the European Parliament of 23 April 2009 (OJ C 184 E, 8.7.2010, p. 293), position of the Council at first reading of 11 March 2010 (OJ C 122 E, 11.5.2010, p. 19), position of the European Parliament of 6 July 2010 (not yet published in the Official Journal) and decision of the Council of 11 October 2010.

[3] OJ L 378, 31.12.1986, p. 4.

[4] OJ L 364, 12.12.1992, p. 7.

(4) The internal market for maritime and inland waterway passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for using passenger services and cruises that are comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same rights as all other citizens with regard to free movement, freedom of choice and non-discrimination.

(5) Member States should promote the use of public transport and the use of integrated tickets in order to optimise the use and interoperability of the various transport modes and operators.

(6) In the light of Article 9 of the United Nations Convention on the Rights of Persons with Disabilities and in order to give disabled persons and persons with reduced mobility opportunities for maritime and inland waterway travel comparable to those of other citizens, rules for non-discrimination and assistance during their journey should be established. Those persons should therefore be accepted for carriage and not refused transport, except for reasons which are justified on the grounds of safety and established by the competent authorities. They should enjoy the right to assistance in ports and on board passenger ships. In the interests of social inclusion, the persons concerned should receive this assistance free of charge. Carriers should establish access conditions, preferably using the European standardisation system.

(7) In deciding on the design of new ports and terminals, and as part of major refurbishments, the bodies responsible for those facilities should take into account the needs of disabled persons and persons with reduced mobility, in particular with regard to accessibility, paying particular consideration to 'design for all' requirements. Carriers should take such needs into account when deciding on the design of new and newly refurbished passenger ships in accordance with Directive 2006/87/EC of the European Parliament and of the Council of 12 December 2006 laying down technical requirements for inland waterway vessels [1] and Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships [2].

(8) Assistance given at ports situated in the territory of a Member State should, among other things, enable disabled persons and persons with reduced mobility to proceed from a designated point of arrival at a port to a passenger ship and from a passenger ship to a designated point of departure at a port, including embarking and disembarking.

(9) In organising assistance to disabled persons and persons with reduced mobility, and the training of their personnel, carriers should cooperate with organisations representative of disabled persons or persons with reduced mobility. In that work they should also take into account the relevant provisions of the International Convention and Code on Standards of Training, Certification and Watchkeeping for Seafarers as well as the Recommendation of the International Maritime Organisation (IMO) on the design and operation of passenger ships to respond to elderly and disabled persons' needs.

(10) The provisions governing the embarkation of disabled persons or persons with reduced mobility should be without prejudice to the general provisions applicable to the embarkation of passengers laid down by the international, Union or national rules in force.

(11) Legal acts of the Union on passenger rights should take into account the needs of passengers, in particular those of disabled persons and persons with reduced mobility, to use different transport modes and to transfer smoothly between different modes, subject to the applicable safety regulations for the operation of ships.

(12) Passengers should be adequately informed in the event of cancellation or delay of any passenger service or cruise. That information should help passengers to make the necessary arrangements and, if needed, to obtain information about alternative connections.

(13) Inconvenience experienced by passengers due to the cancellation or long delay of their journey should be reduced. To this end, passengers should be adequately looked after and should be able to cancel their journey and have their tickets reimbursed or to obtain re-routing under satisfactory conditions. Adequate accommodation for passengers may not necessarily consist of hotel rooms but also of any other suitable accommodation that is available, depending in particular on the circumstances relating to each specific situation, the passengers' vehicles and the characteristics of the ship. In this respect and in duly justified cases of extraordinary and urgent circumstances, carriers should be able to take full advantage of the available relevant facilities, in cooperation with civil authorities.

[1] OJ L 389, 30.12.2006, p. 1.
[2] OJ L 163, 25.6.2009, p. 1.

(14) Carriers should provide for the payment of compensation for passengers in the event of the cancellation or delay of a passenger service based on a percentage of the ticket price, except when the cancellation or delay occurs due to weather conditions endangering the safe operation of the ship or to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

(15) Carriers should, in accordance with generally accepted principles, bear the burden of proving that the cancellation or delay was caused by such weather conditions or extraordinary circumstances.

(16) Weather conditions endangering the safe operation of the ship should include, but not be limited to, strong winds, heavy seas, strong currents, difficult ice conditions and extremely high or low water levels, hurricanes, tornados and floods.

(17) Extraordinary circumstances should include, but not be limited to, natural disasters such as fires and earthquakes, terrorist attacks, wars and military or civil armed conflicts, uprisings, military or illegal confiscations, labour conflicts, landing any sick, injured or dead person, search and rescue operations at sea or on inland waterways, measures necessary to protect the environment, decisions taken by traffic management bodies or port authorities, or decisions by the competent authorities with regard to public order and safety as well as to cover urgent transport needs.

(18) With the involvement of stakeholders, professional associations and associations of customers, passengers, disabled persons and persons with reduced mobility, carriers should cooperate in order to adopt arrangements at national or European level for improving care and assistance offered to passengers whenever their travel is interrupted, notably in the event of long delays or cancellation of travel. National enforcement bodies should be informed of those arrangements.

(19) The Court of Justice of the European Union has already ruled that problems leading to cancellations or delays can be covered by the concept of extraordinary circumstances only to the extent that they stem from events which are not inherent in the normal exercise of the activity of the carrier concerned and are beyond its actual control. It should be noted that weather conditions endangering the safe operation of the ship are indeed beyond the actual control of the carrier.

(20) This Regulation should not affect the rights of passengers established by Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1]. This Regulation should not apply in cases where a package tour is cancelled for reasons other than cancellation of the passenger service or the cruise.

(21) Passengers should be fully informed of their rights under this Regulation in formats which are accessible to everybody, so that they can effectively exercise those rights. Rights of passengers should include the receipt of information regarding the passenger service or cruise before and during the journey. All essential information provided to passengers should also be provided in formats accessible to disabled persons and persons with reduced mobility, with such accessible formats allowing passengers to access the same information using, for example, text, Braille, audio, video and/or electronic formats.

(22) Passengers should be able to exercise their rights by means of appropriate and accessible complaint procedures implemented by carriers and terminal operators within their respective areas of competence or, as the case may be, by the submission of complaints to the body or bodies designated to that end by the Member State concerned. Carriers and terminal operators should respond to complaints by passengers within a set period of time, bearing in mind that the non-reaction to a complaint could be held against them.

(23) Taking into account the procedures established by a Member State for the submission of complaints, a complaint concerning assistance in a port or on board a ship should preferably be addressed to the body or bodies designated for the enforcement of this Regulation in the Member State where the port of embarkation is situated and, for passenger services from a third country, where the port of disembarkation is situated.

(24) Member States should ensure compliance with this Regulation and designate a competent body or bodies to carry out supervision and enforcement tasks. This does not affect the rights of passengers to seek legal redress from courts under national law.

(25) The body or bodies designated for the enforcement of this Regulation should be independent of commercial interests. Each Member State should appoint at least one body which, when applicable, should have the power and capability to investigate individual complaints and

[1] OJ L 158, 23.6.1990, p. 59.

to facilitate dispute settlement. Passengers should be entitled to receive a substantiated reply from the designated body, within a reasonable period of time. Given the importance of reliable statistics for the enforcement of this Regulation, in particular to ensure coherent application throughout the Union, the reports prepared by those bodies should if possible include statistics on complaints and their outcome.

(26) Member States should lay down penalties applicable to infringements of this Regulation and ensure that those penalties are applied. Those penalties should be effective, proportionate and dissuasive.

(27) Since the objectives of this Regulation, namely to ensure a high level of protection of and assistance to passengers throughout the Member States and to ensure that economic agents operate under harmonised conditions in the internal market, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(28) The enforcement of this Regulation should be based on Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [1]. That Regulation should therefore be amended accordingly.

(29) 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 on the free movement of such data [2] should be strictly respected and enforced in order to guarantee respect for the privacy of natural and legal persons, and to ensure that the information and reports requested serve solely to fulfil the obligations laid down in this Regulation and are not used to the detriment of such persons.

(30) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, as referred to in Article 6 of the Treaty on European Union,

HAVE ADOPTED THIS REGULATION:

[1] OJ L 364, 9.12.2004, p. 1.
[2] OJ L 281, 23.11.1995, p. 31.

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation establishes rules for sea and inland waterway transport as regards the following:

(a) non-discrimination between passengers with regard to transport conditions offered by carriers;

(b) non-discrimination and assistance for disabled persons and persons with reduced mobility;

(c) the rights of passengers in cases of cancellation or delay;

(d) minimum information to be provided to passengers;

(e) the handling of complaints;

(f) general rules on enforcement.

Article 2

Scope

1. This Regulation shall apply in respect of passengers travelling:

(a) on passenger services where the port of embarkation is situated in the territory of a Member State;

(b) on passenger services where the port of embarkation is situated outside the territory of a Member State and the port of disembarkation is situated in the territory of a Member State, provided that the service is operated by a Union carrier as defined in Article 3(e);

(c) on a cruise where the port of embarkation is situated in the territory of a Member State. However, Articles 16(2), 18, 19 and 20(1) and (4) shall not apply to those passengers.

2. This Regulation shall not apply in respect of passengers travelling:

(a) on ships certified to carry up to 12 passengers;

(b) on ships which have a crew responsible for the operation of the ship composed of not more than three persons or where the distance of the overall passenger service is less than 500 metres, one way;

(c) on excursion and sightseeing tours other than cruises; or

(d) on ships not propelled by mechanical means as well as original, and individual replicas of, historical passenger ships designed before 1965, built predominantly with the original materials, certified to carry up to 36 passengers.

3. Member States may, for a period of 2 years from 18 December 2012, exempt from the application of this Regulation seagoing ships of less than 300 gross tons operated in domestic transport, provided that the rights of passengers under this Regulation are adequately ensured under national law.

4. Member States may exempt from the application of this Regulation passenger services covered by public service obligations, public service contracts or integrated services provided that the rights of passengers under this Regulation are comparably guaranteed under national law.

5. Without prejudice to Directive 2006/87/EC and to Directive 2009/45/EC, nothing in this Regulation shall be understood as constituting technical requirements imposing obligations on carriers, terminal operators or other entities to modify or replace ships, infrastructure, ports or port terminals.

Article 3

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(a) 'disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced as a result of any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or as a result of age, and whose situation needs appropriate attention and adaptation to his particular needs of the service made available to all passengers;

(b) 'territory of a Member State' means a territory to which the Treaty on the Functioning of the European Union applies as referred to in Article 355 thereof, under the conditions set out therein;

(c) 'access conditions' means relevant standards, guidelines and information on the accessibility of port terminals and ships including their facilities for disabled persons or persons with reduced mobility;

(d) 'carrier' means a natural or legal person, other than a tour operator, travel agent or ticket vendor, offering transport by passenger services or cruises to the general public;

(e) 'Union carrier' means a carrier established within the territory of a Member State or offering transport by passenger services operated to or from the territory of a Member State;

(f) 'passenger service' means a commercial passenger transport service by sea or inland waterways operated according to a published timetable;

(g) 'integrated services' means interconnected transport services within a determined geographical area with a single information service, ticketing scheme and timetable;

(h) 'performing carrier' means a person, other than the carrier, who actually performs the carriage wholly or partially;

(i) 'inland waterway' means a natural or artificial navigable inland body of water, or system of interconnected bodies of water, used for transport, such as lakes, rivers or canals or any combination of these;

(j) 'port' means a place or a geographical area made up of such improvement works and facilities as to permit the reception of ships from which passengers regularly embark or disembark;

(k) 'port terminal' means a terminal, staffed by a carrier or a terminal operator, in a port with facilities, such as check-in, ticket counters or lounges, and staff for the embarkation or disembarkation of passengers travelling on passenger services or on a cruise;

(l) 'ship' means a vessel used for navigation at sea or on inland waterways;

(m) 'transport contract' means a contract of carriage between a carrier and a passenger for the provision of one or more passenger services or cruises;

(n) 'ticket' means a valid document or other evidence of a transport contract;

(o) 'ticket vendor' means any retailer concluding transport contracts on behalf of a carrier;

(p) 'travel agent' means any retailer acting on behalf of a passenger or a tour operator for the conclusion of transport contracts;

(q) 'tour operator' means an organiser or retailer, other than a carrier, within the meaning of Article 2(2) and (3) of Directive 90/314/EEC;

(r) 'reservation' means a booking of a specific departure of a passenger service or a cruise;

(s) 'terminal operator' means a private or public body in the territory of a Member State responsible for the administration and management of a port terminal;

(t) 'cruise' means a transport service by sea or inland waterway, operated exclusively for the purpose of pleasure or recreation, supplemented by accommodation and other facilities, exceeding two overnight stays on board;

(u) 'shipping incident' means shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship.

Article 4

Tickets and non-discriminatory contract conditions

1. Carriers shall issue a ticket to the passenger, unless under national law other documents give entitlement to transport. A ticket may be issued in an electronic format.

2. Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers or ticket vendors shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of carriers or ticket vendors within the Union.

Article 5

Other performing parties

1. Where the performance of the obligations under this Regulation has been entrusted to a performing carrier, ticket vendor or any other person, the carrier, travel agent, tour operator or terminal operator who has entrusted such obligations shall nevertheless be liable for the acts and omissions of that performing party, acting within that party's scope of employment.

2. In addition to paragraph 1, the party to whom the performance of an obligation has been entrusted by the carrier, travel agent, tour operator or terminal operator shall be subject to the provisions of this Regulation, including provisions on liabilities and defences, with regard to the obligation entrusted.

Article 6

Exclusion of waiver

Rights and obligations pursuant to this Regulation shall not be waived or limited, in particular by a derogation or restrictive clause in the transport contract.

CHAPTER II

RIGHTS OF DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

Article 7

Right to transport

1. Carriers, travel agents and tour operators shall not refuse to accept a reservation, to issue or otherwise provide a ticket or to embark persons on the grounds of disability or of reduced mobility as such.

2. Reservations and tickets shall be offered to disabled persons and persons with reduced mobility at no additional cost under the same conditions that apply to all other passengers.

Article 8

Exceptions and special conditions

1. By way of derogation from Article 7(1), carriers, travel agents and tour operators may refuse to accept a reservation from, to issue or otherwise provide a ticket to or to embark a disabled person or person with reduced mobility:

(a) in order to meet applicable safety requirements established by international, Union or national law or in order to meet safety requirements established by the competent authorities;

(b) where the design of the passenger ship or port infrastructure and equipment, including port terminals, makes it impossible to carry out the embarkation, disembarkation or carriage of the said person in a safe or operationally feasible manner.

2. In the event of a refusal to accept a reservation or to issue or otherwise provide a ticket on the grounds referred to in paragraph 1, carriers, travel agents and tour operators shall make all reasonable efforts to propose to the person concerned an acceptable alternative transport on a passenger service or a cruise operated by the carrier.

3. Where a disabled person or a person with reduced mobility, who holds a reservation or has a ticket and has complied with the requirements referred to in Article 11(2), is nonetheless denied embarkation on the basis of this Regulation, that person, and any accompanying person referred to in paragraph 4 of this Article, shall be offered the choice between the right to reimbursement and re-routing as provided for in Annex I. The right to the option of a return journey or re-routing shall be conditional upon all safety requirements being met.

4. Where strictly necessary and under the same conditions set out in paragraph 1, carriers, travel agents and tour operators may require that a disabled person or person with reduced mobility be accompanied by another person who is capable of providing the assistance required by the disabled person or person with reduced mobility. As regards passenger services, such an accompanying person shall be carried free of charge.

5. When carriers, travel agents and tour operators have recourse to paragraphs 1 or 4, they shall immediately inform the disabled person or person with reduced mobility of the specific reasons therefor. On request, those reasons shall be notified to the disabled person or person with reduced mobility in writing, no later than five working days after the request. In the event of refusal according to paragraph 1(a), reference shall be made to the applicable safety requirements.

Article 9

Accessibility and information

1. In cooperation with organisations representative of disabled persons or persons with reduced mobility, carriers and terminal operators shall, where appropriate through their organisations, establish, or have in place, non-discriminatory access conditions for the transport of disabled persons and persons with reduced mobility and accompanying persons. The access conditions shall upon request be communicated to national enforcement bodies.

2. The access conditions provided for in paragraph 1 shall be made publicly available by carriers and terminal operators physically or on the Internet, in accessible formats on request, and in the same languages as those in which information is generally made available to all passengers. Particular attention shall be paid to the needs of disabled persons and persons with reduced mobility.

3. Tour operators shall make available the access conditions provided for in paragraph 1 which apply to journeys included in package travel, package holidays and package tours which they organise, sell or offer for sale.

4. Carriers, travel agents and tour operators shall ensure that all relevant information, including online reservation and information, concerning the conditions of carriage, journey information and access conditions is available in appropriate and accessible formats for disabled persons and persons with reduced mobility. Persons needing assistance shall receive confirmation of such assistance by any means available, including electronic means or Short Message Service (SMS).

Article 10

Right to assistance in ports and on board ships

Subject to the access conditions provided for in Article 9(1), carriers and terminal operators shall, within their respective areas of competence, provide assistance free of charge to disabled persons and persons with reduced mobility, as specified in Annexes II and III, in ports, including embarkation and disembarkation, and on board ships. The assistance shall, if possible, be adapted to the individual needs of the disabled person or person with reduced mobility.

Article 11

Conditions under which assistance is provided

1. Carriers and terminal operators shall, within their respective areas of competence, provide assistance to disabled persons and persons with reduced mobility as set out in Article 10 provided that:

(a) the carrier or the terminal operator is notified, by any means available, including electronic means or SMS, of the person's need for such assistance at the latest 48 hours before the assistance is needed, unless a shorter period is agreed between the passenger and the carrier or terminal operator; and

(b) the disabled person or person with reduced mobility presents himself at the port or at the designated point as referred to in Article 12(3):

(i) at a time stipulated in writing by the carrier which shall not be more than 60 minutes before the published embarkation time; or

(ii) if no embarkation time is stipulated, no later than 60 minutes before the published departure time, unless a shorter period is agreed between the passenger and the carrier or terminal operator.

2. In addition to paragraph 1, disabled persons or persons with reduced mobility shall notify the carrier, at the time of reservation or advance purchase of the ticket, of their specific needs with regard to accommodation, seating or services required or their need to bring medical equipment, provided the need is known at that time.

3. A notification made in accordance with paragraphs 1(a) and 2 may always be submitted to the travel agent or the tour operator from which the ticket was purchased. Where the ticket permits multiple journeys, one notification shall be sufficient provided that adequate information on the timing of subsequent journeys is provided. The passenger shall receive a confirmation stating that the assistance needs have been notified as required in accordance with paragraphs 1(a) and 2.

4. Where no notification is made in accordance with paragraphs 1(a) and 2, carriers and terminal operators shall nonetheless make all reasonable efforts to ensure that the assistance is provided in such a way that the disabled person or person with reduced mobility is able to embark, disembark and travel on the ship.

5. Where a disabled person or person with reduced mobility is accompanied by a recognised assistance dog, that dog shall be accommodated together with that person, provided that the carrier, travel agent or tour operator is notified in accordance with applicable national rules on the carriage of recognised assistance dogs on board passenger ships, where such rules exist.

Article 12

Reception of notifications and designation of meeting points

1. Carriers, terminal operators, travel agents and tour operators shall take all measures necessary for the request for notifications, and for the reception of notifications made in accordance with Article 11(1)(a) and 11(2). That obligation shall apply at all their points of sale, including sale by telephone and over the Internet.

2. If travel agents or tour operators receive the notification referred to in paragraph 1 they shall, within their normal office hours, transfer the information to the carrier or terminal operator without delay.

3. Carriers and terminal operators shall designate a point inside or outside port terminals at which disabled persons or persons with reduced mobility can announce their arrival and request assistance. That point shall be clearly signposted and shall offer basic information about the port terminal and assistance provided, in accessible formats.

Article 13

Quality standards for assistance

1. Terminal operators and carriers operating port terminals or passenger services with a total of more than 100 000 commercial passenger movements during the previous calendar year shall, within their respective areas of competence, set quality standards for the assistance specified in Annexes II and III and shall, where appropriate through their organisations, determine resource requirements for meeting those standards, in cooperation with organisations representative of disabled persons or persons with reduced mobility.

2. In setting quality standards, full account shall be taken of internationally recognised policies and codes of conduct concerning facilitation of the transport of disabled persons or persons with reduced mobility, notably the IMO's Recommendation on the design and operation of passenger ships to respond to elderly and disabled persons' needs.

3. The quality standards provided for in paragraph 1 shall be made publicly available by terminal operators and carriers physically or on the Internet in accessible formats and in the same languages as those in which information is generally made available to all passengers.

Article 14

Training and instructions

Without prejudice to the International Convention and Code on Standards of Training, Certification and Watchkeeping for Seafarers and to the regulations adopted under the Revised Convention for Rhine Navigation and the Convention regarding the Regime of Navigation on the Danube, carriers and, where appropriate, terminal operators shall establish disability-related training procedures, including instructions, and ensure that:

(a) their personnel, including those employed by any other performing party, providing direct assistance to disabled persons and persons with reduced mobility are trained or instructed as described in Annex IV, Parts A and B;

(b) their personnel who are otherwise responsible for the reservation and selling of tickets or embarkation and disembarkation, including those employed by any other performing party, are trained or instructed as described in Annex IV, Part A; and

(c) the categories of personnel referred to in points (a) and (b) maintain their competences, for example through instructions or refresher training courses when appropriate.

Article 15

Compensation in respect of mobility equipment or other specific equipment

1. Carriers and terminal operators shall be liable for loss suffered as a result of the loss of or damage to mobility equipment or other specific equipment, used by a disabled person or person with reduced mobility, if the incident which caused the loss was due to the fault or neglect of the carrier or the terminal operator. The fault or neglect of the carrier shall be presumed for loss caused by a shipping incident.

2. The compensation referred to in paragraph 1 shall correspond to the replacement value of the equipment concerned or, where applicable, to the costs relating to repairs.

3. Paragraphs 1 and 2 shall not apply if Article 4 of Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents [1] applies.

4. Moreover, every effort shall be undertaken to rapidly provide temporary replacement equipment which is a suitable alternative.

[1] OJ L 131, 28.5.2009, p. 24.

CHAPTER III

OBLIGATIONS OF CARRIERS AND TERMINAL OPERATORS IN THE EVENT OF INTERRUPTED TRAVEL

Article 16

Information in the event of cancelled or delayed departures

1. In the case of a cancellation or a delay in departure of a passenger service or a cruise, passengers departing from port terminals or, if possible, passengers departing from ports shall be informed by the carrier or, where appropriate, by the terminal operator, of the situation as soon as possible and in any event no later than 30 minutes after the scheduled time of departure, and of the estimated departure time and estimated arrival time as soon as that information is available.

2. If passengers miss a connecting transport service due to a cancellation or delay, the carrier and, where appropriate, the terminal operator shall make reasonable efforts to inform the passengers concerned of alternative connections.

3. The carrier or, where appropriate, the terminal operator, shall ensure that disabled persons or persons with reduced mobility receive the information required under paragraphs 1 and 2 in accessible formats.

Article 17

Assistance in the event of cancelled or delayed departures

1. Where a carrier reasonably expects the departure of a passenger service or a cruise to be cancelled or delayed for more than 90 minutes beyond its scheduled time of departure, passengers departing from port terminals shall be offered free of charge snacks, meals or refreshments in reasonable relation to the waiting time, provided they are available or can reasonably be supplied.

2. In the case of a cancellation or a delay in departure where a stay of one or more nights or a stay additional to that intended by the passenger becomes necessary, where and when physically possible, the carrier shall offer passengers departing from port terminals, free of charge, adequate accommodation on board, or ashore, and transport to and from the port terminal and place of accommodation in addition to the snacks, meals or refreshments provided for in paragraph 1. For each passenger, the carrier may limit the total cost of accommodation ashore, not including transport to and from the port terminal and place of accommodation, to EUR 80 per night, for a maximum of three nights.

3. In applying paragraphs 1 and 2, the carrier shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons.

Article 18

Re-routing and reimbursement in the event of cancelled or delayed departures

1. Where a carrier reasonably expects a passenger service to be cancelled or delayed in departure from a port terminal for more than 90 minutes, the passenger shall immediately be offered the choice between:

(a) re-routing to the final destination, under comparable conditions, as set out in the transport contract, at the earliest opportunity and at no additional cost;

(b) reimbursement of the ticket price and, where relevant, a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity.

2. Where a passenger service is cancelled or delayed in departure from a port for more than 90 minutes, passengers shall have the right to such re-routing or reimbursement of the ticket price from the carrier.

3. The payment of the reimbursement provided for in paragraphs 1(b) and 2 shall be made within 7 days, in cash, by electronic bank transfer, bank order or bank cheque, of the full cost of the ticket at the price at which it was purchased, for the part or parts of the journey not made, and for the part or parts already made where the journey no longer serves any purpose in relation to the passenger's original travel plan. Where the passenger agrees, the full reimbursement may also be paid in the form of vouchers and/or other services in an amount equivalent to the price for which the ticket was purchased, provided that the conditions are flexible, particularly regarding the period of validity and the destination.

Article 19

Compensation of the ticket price in the event of delay in arrival

1. Without losing the right to transport, passengers may request compensation from the carrier if they are facing a delay in arrival at the final destination as set out in the transport contract. The minimum level of compensation shall be 25 % of the ticket price for a delay of at least:

(a) 1 hour in the case of a scheduled journey of up to 4 hours;

(b) 2 hours in the case of a scheduled journey of more than 4 hours, but not exceeding 8 hours;

(c) 3 hours in the case of a scheduled journey of more than 8 hours, but not exceeding 24 hours; or

(d) 6 hours in the case of a scheduled journey of more than 24 hours.

If the delay exceeds double the time set out in points (a) to (d), the compensation shall be 50 % of the ticket price.

2. Passengers who hold a travel pass or a season ticket and who encounter recurrent delays in arrival during its period of validity may request adequate compensation in accordance with the carrier's compensation arrangements. These arrangements shall state the criteria for determining delay in arrival and for calculation of compensation.

3. Compensation shall be calculated in relation to the price which the passenger actually paid for the delayed passenger service.

4. Where the transport is for a return journey, compensation for delay in arrival on either the outward or the return leg shall be calculated in relation to half of the price paid for the transport by that passenger service.

5. The compensation shall be paid within 1 month after the submission of the request for compensation. The compensation may be paid in vouchers and/or other services, provided that the conditions are flexible, particularly regarding the period of validity and the destination. The compensation shall be paid in money at the request of the passenger.

6. The compensation of the ticket price shall not be reduced by financial transaction costs such as fees, telephone costs or stamps. Carriers may introduce a minimum threshold under which payments for compensation will not be paid. This threshold shall not exceed EUR 6.

Article 20

Exemptions

1. Articles 17, 18 and 19 shall not apply to passengers with open tickets as long as the time of departure is not specified, except for passengers holding a travel pass or a season ticket.

2. Articles 17 and 19 shall not apply if the passenger is informed of the cancellation or delay before the purchase of the ticket or if the cancellation or delay is caused by the fault of the passenger.

3. Article 17(2) shall not apply where the carrier proves that the cancellation or delay is caused by weather conditions endangering the safe operation of the ship.

4. Article 19 shall not apply where the carrier proves that the cancellation or delay is caused by weather conditions endangering the safe operation of the ship or by extraordinary circumstances hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken.

Article 21

Further claims

Nothing in this Regulation shall preclude passengers from seeking damages in accordance with national law in respect of loss resulting from cancellation or delay of transport services before national courts, including under Directive 90/314/EEC.

CHAPTER IV

GENERAL RULES ON INFORMATION AND COMPLAINTS

Article 22

Right to travel information

Carriers and terminal operators shall, within their respective areas of competence, provide passengers with adequate information throughout their travel in formats which are accessible to everybody and in the same languages as those in which information is generally made available to all passengers. Particular attention shall be paid to the needs of disabled persons and persons with reduced mobility.

Article 23

Information on passenger rights

1. Carriers, terminal operators and, when applicable, port authorities, shall, within their respective areas of competence, ensure that information on the rights of passengers under this Regulation is publicly available on board ships, in ports, if possible, and in port terminals. The information shall be provided as far as possible in accessible formats and in the same languages as those in which information is generally made available to all passengers. When that information is provided particular attention shall be paid to the needs of disabled persons and persons with reduced mobility.

2. In order to comply with the information requirement referred to in paragraph 1, carriers, terminal operators and, when applicable, port authorities, may use a summary of the provisions of this Regulation prepared by the Commission in all the official languages of the institutions of the European Union and made available to them.

3. Carriers, terminal operators and, when applicable, port authorities shall inform passengers in an appropriate manner on board ships, in ports, if possible, and in port terminals, of the contact details of the enforcement body designated by the Member State concerned pursuant to Article 25(1).

Article 24

Complaints

1. Carriers and terminal operators shall set up or have in place an accessible complaint-handling mechanism for rights and obligations covered by this Regulation.

2. Where a passenger covered by this Regulation wants to make a complaint to the carrier or terminal operator, he shall submit it within 2 months from the date on which the service was performed or when a service should have been performed. Within 1 month of receiving the complaint, the carrier or terminal operator shall give notice to the passenger that his complaint has been substantiated, rejected or is still being considered. The time taken to provide the final reply shall not be longer than 2 months from the receipt of a complaint.

CHAPTER V

ENFORCEMENT AND NATIONAL ENFORCEMENT BODIES

Article 25

National enforcement bodies

1. Each Member State shall designate a new or existing body or bodies responsible for the enforcement of this Regulation as regards passenger services and cruises from ports situated on its territory and passenger services from a third country to such ports. Each body shall take the measures necessary to ensure compliance with this Regulation.

Each body shall, in its organisation, funding decisions, legal structure and decision-making, be independent of commercial interests.

2. Member States shall inform the Commission of the body or bodies designated in accordance with this Article.

3. Any passenger may submit a complaint, in accordance with national law, to the competent body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation. The competent body shall provide passengers with a substantiated reply to their complaint within a reasonable period of time.

A Member State may decide:

(a) that the passenger as a first step shall submit the complaint covered by this Regulation to the carrier or terminal operator; and/or

(b) that the national enforcement body or any other competent body designated by the Member State shall act as an appeal body for complaints not resolved under Article 24.

4. Member States that have chosen to exempt certain services pursuant to Article 2(4) shall ensure that a comparable mechanism of enforcement of passenger rights is in place.

Article 26

Report on enforcement

By 1 June 2015 and every 2 years thereafter, the enforcement bodies designated pursuant to Article 25 shall publish a report on their activity in the previous two calendar years, containing in particular a description of actions taken in order to implement the provisions of this Regulation, details of sanctions applied and statistics on complaints and sanctions applied.

Article 27

Cooperation between enforcement bodies

National enforcement bodies referred to in Article 25(1) shall exchange information on their work and decision-making principles and practice to the extent necessary for the coherent application of this Regulation. The Commission shall support them in that task.

Article 28

Penalties

The Member States shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all the measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those rules and measures to the Commission by 18 December 2012 and shall notify it without delay of any subsequent amendment affecting them.

CHAPTER VI

FINAL PROVISIONS

Article 29

Report

The Commission shall report to the European Parliament and to the Council by 19 December 2015 on the operation and the effects of this Regulation. The report shall be accompanied where necessary by legislative proposals implementing in further detail the provisions of this Regulation, or amending it.

Article 30

Amendment to Regulation (EC) No 2006/2004

In the Annex to Regulation (EC) No 2006/2004 the following point shall be added:

'18. Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway (*).

(*) OJ L 334, 17.12.2010, p. 1.'

Article 31

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 18 December 2012.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 24 November 2010.

For the European Parliament
The President
J. BUZEK

For the Council
The President
O. CHASTEL

ANNEX I

RIGHT TO REIMBURSEMENT OR RE-ROUTING FOR DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY AS REFERRED TO IN ARTICLE 8

1. Where reference is made to this Annex, disabled persons and persons with reduced mobility shall be offered the choice between:

   (a) — reimbursement within 7 days, paid in cash, by electronic bank transfer, bank order or bank cheque, of the full cost of the ticket at the price at which it was purchased, for the part or parts of the journey not made, and for the part or parts already made if the journey no longer serves any purpose in relation to the passenger's original travel plan, plus, where relevant,

   — a return service to the first point of departure, at the earliest opportunity; or

   (b) re-routing to the final destination as set out in the transport contract, at no additional cost and under comparable conditions, at the earliest opportunity; or

   (c) re-routing to the final destination as set out in the transport contract, under comparable conditions, at a later date at the passenger's convenience, subject to availability of tickets.

2. Paragraph 1(a) shall also apply to passengers whose journeys form part of a package, except for the right to reimbursement where such a right arises under Directive 90/314/EEC.

3. When, in the case where a town, city or region is served by several ports, a carrier offers a passenger a journey to an alternative port to that for which the reservation was made, the carrier shall bear the cost of transferring the passenger from that alternative port either to that for which the reservation was made, or to another nearby destination agreed with the passenger.

ANNEX II

ASSISTANCE IN PORTS, INCLUDING EMBARKATION AND DISEMBARKATION, AS REFERRED TO IN ARTICLES 10 AND 13

1. Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to:

   — communicate their arrival at a port terminal or, if possible, a port and their request for assistance,

   — move from an entry point to the check-in counter, if any, or to the ship,

   — check in and register baggage, if necessary,

   — proceed from the check-in counter, if any, to the ship, through emigration and security points,

   — embark the ship, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

   — proceed from the ship door to their seats/area,

   — store and retrieve baggage on the ship,

   — proceed from their seats to the ship door,

   — disembark from the ship, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

   — retrieve baggage, if necessary, and proceed through immigration and customs points,

   — proceed from the baggage hall or the disembarkation point to a designated point of exit,

   — if required, make their way to the toilet facilities (if any).

2. Where a disabled person or person with reduced mobility is assisted by an accompanying person, that person must, if requested, be allowed to provide the necessary assistance in the port and with embarking and disembarking.

3. Handling of all necessary mobility equipment, including equipment such as electric wheelchairs.

4. Temporary replacement of damaged or lost mobility equipment with equipment which is a suitable alternative.

5. Ground handling of recognised assistance dogs, when relevant.

6. Communication in accessible formats of information needed to embark and disembark.

ANNEX III

ASSISTANCE ON BOARD SHIPS AS REFERRED TO IN ARTICLES 10 AND 13

1. Carriage of recognised assistance dogs on board the ship, subject to national regulations.

2. Carriage of medical equipment and of the mobility equipment necessary for the disabled person or person with reduced mobility, including electric wheelchairs.

3. Communication of essential information concerning a route in accessible formats.

4. Making all reasonable efforts to arrange seating to meet the needs of disabled persons or persons with reduced mobility on request and subject to safety requirements and availability.

5. If required, assistance in moving to toilet facilities (if any).

6. Where a disabled person or person with reduced mobility is assisted by an accompanying person, the carrier shall make all reasonable efforts to give such person a seat or a cabin next to the disabled person or person with reduced mobility.

ANNEX IV

DISABILITY-RELATED TRAINING, INCLUDING INSTRUCTIONS, AS REFERRED TO IN ARTICLE 14

A. Disability-awareness training, including instructions

Disability-awareness training, including instructions, includes:

— awareness of and appropriate responses to passengers with physical, sensory (hearing and visual), hidden or learning disabilities, including how to distinguish between the different abilities of persons whose mobility, orientation or communication may be reduced,

— barriers faced by disabled persons and persons with reduced mobility, including attitudinal, environmental/physical and organisational barriers,

— recognised assistance dogs, including the role and the needs of an assistance dog,

— dealing with unexpected occurrences,

— interpersonal skills and methods of communication with people with hearing impairments, visual impairments or speech impairments and people with a learning disability,

— general awareness of IMO guidelines relating to the Recommendation on the design and operation of passenger ships to respond to elderly and disabled persons' needs.

B. Disability-assistance training, including instructions

Disability-assistance training, including instructions, includes:

— how to help wheelchair users make transfers into and out of a wheelchair,

— skills for providing assistance to disabled persons and persons with reduced mobility travelling with a recognised assistance dog, including the role and the needs of those dogs,

— techniques for escorting passengers with visual impairments and for the handling and carriage of recognised assistance dogs,

— an understanding of the types of equipment which can assist disabled persons and persons with reduced mobility and a knowledge of how to carefully handle such equipment,

— the use of boarding and deboarding assistance equipment used and knowledge of the appropriate boarding and deboarding assistance procedures that safeguard the safety and dignity of disabled persons and persons with reduced mobility,

— understanding of the need for reliable and professional assistance. Also awareness of the potential of certain disabled persons and persons with reduced mobility to experience feelings of vulnerability during travel because of their dependence on the assistance provided,

— a knowledge of first aid.

REGULATION (EC) No 1371/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 23 October 2007

on rail passengers' rights and obligations

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71(1) 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, in the light of the joint text approved by the Conciliation Committee on 31 July 2007 [3],

Whereas:

(1) In the framework of the common transport policy, it is important to safeguard users' rights for rail passengers and to improve the quality and effectiveness of rail passenger services in order to help increase the share of rail transport in relation to other modes of transport.

(2) The Commission's communication 'Consumer Policy Strategy 2002-2006' [4] sets the aim of achieving a high level of consumer protection in the field of transport in accordance with Article 153(2) of the Treaty.

(3) Since the rail passenger is the weaker party to the transport contract, passengers' rights in this respect should be safeguarded.

(4) Users' rights to rail services include the receipt of information regarding the service both before and during the journey. Whenever possible, railway undertakings and ticket vendors should provide this information in advance and as soon as possible.

(5) More detailed requirements regarding the provision of travel information will be set out in the technical specifications for interoperability (TSIs) referred to in Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the conventional rail system [5].

(6) Strengthening of the rights of rail passengers should build on the existing system of international law on this subject contained in Appendix A — Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention concerning International Carriage by Rail of 3 June 1999 (1999 Protocol). However, it is desirable to extend the scope of this Regulation and protect not only international passengers but domestic passengers too.

(7) Railway undertakings should cooperate to facilitate the transfer of rail passengers from one operator to another by the provision of through tickets, whenever possible.

(8) The provision of information and tickets for rail passengers should be facilitated by the adaptation of computerised systems to a common specification.

(9) The further implementation of travel information and reservation systems should be executed in accordance with the TSIs.

(10) Rail passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for rail travel comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and to non-discrimination. *Inter alia*, special attention should be given to the provision of information to disabled persons and persons with reduced mobility concerning the accessibility of rail services, access conditions of rolling stock and the facilities on board. In order to provide passengers with sensory impairment with the best information on delays, visual and audible systems should be used, as appropriate. Disabled persons and persons with reduced mobility should be enabled to buy tickets on board a train without extra charges.

[1] OJ C 221, 8.9.2005, p. 8.

[2] OJ C 71, 22.3.2005, p. 26.

[3] Opinion of the European Parliament of 28 September 2005 (OJ C 227 E, 21.9.2006, p. 490), Council Common Position of 24 July 2006 (OJ C 289 E, 28.11.2006, p. 1), Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal), Legislative Resolution of the European Parliament of 25 September 2007 and Council Decision of 26 September 2007.

[4] OJ C 137, 8.6.2002, p. 2.

[5] OJ L 110, 20.4.2001, p. 1. Directive as last amended by Commission Directive 2007/32/EC (OJ L 141, 2.6.2007, p. 63).

(11) Railway undertakings and station managers should take into account the needs of disabled persons and persons with reduced mobility, through compliance with the TSI for persons with reduced mobility, so as to ensure that, in accordance with Community public procurement rules, all buildings and rolling stock are made accessible through the progressive elimination of physical obstacles and functional hindrances when acquiring new material or carrying out construction or major renovation work.

(12) Railway undertakings should be obliged to be insured, or to make equivalent arrangements, for their liability to rail passengers in the event of accident. The minimum amount of insurance for railway undertakings should be the subject of future review.

(13) Strengthened rights of compensation and assistance in the event of delay, missed connection or cancellation of a service should lead to greater incentives for the rail passenger market, to the benefit of passengers.

(14) It is desirable that this Regulation create a system of compensation for passengers in the case of delay which is linked to the liability of the railway undertaking, on the same basis as the international system provided by the COTIF and in particular appendix CIV thereto relating to passengers' rights.

(15) Where a Member State grants railway undertakings an exemption from the provisions of this Regulation, it should encourage railway undertakings, in consultation with organisations representing passengers, to put in place arrangements for compensation and assistance in the event of major disruption to a rail passenger service.

(16) It is also desirable to relieve accident victims and their dependants of short-term financial concerns in the period immediately after an accident.

(17) It is in the interests of rail passengers that adequate measures be taken, in agreement with public authorities, to ensure their personal security at stations as well as on board trains.

(18) Rail passengers should be able to submit a complaint to any railway undertaking involved regarding the rights and obligations conferred by this Regulation, and be entitled to receive a response within a reasonable period of time.

(19) Railway undertakings should define, manage and monitor service quality standards for rail passenger services.

(20) The contents of this Regulation should be reviewed in respect of the adjustment of financial amounts for inflation and in respect of information and service quality requirements in the light of market developments as well as in the light of the effects on service quality of this Regulation.

(21) This Regulation should be without prejudice to 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 on the free movement of such data [1].

(22) Member States should lay down penalties applicable to infringements of this Regulation and ensure that these penalties are applied. The penalties, which might include the payment of compensation to the person in question, should be effective, proportionate and dissuasive.

(23) Since the objectives of this Regulation, namely the development of the Community's railways and the introduction of passenger rights, 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 Regulation does not go beyond what is necessary in order to achieve those objectives.

(24) It is an aim of this Regulation to improve rail passenger services within the Community. Therefore, Member States should be able to grant exemptions for services in regions where a significant part of the service is operated outside the Community.

(25) Railway undertakings in some Member States may experience difficulty in applying the entirety of the provisions of this Regulation on its entry into force. Therefore, Member States should be able to grant temporary exemptions from the application of the provisions of this Regulation to long-distance domestic rail passenger services. The temporary exemption should, however, not apply to the provisions of this Regulation that grant disabled persons or persons with reduced mobility access to travel by rail, nor to the right of those wishing to purchase tickets for travel by rail to do so without undue difficulty, nor to the provisions on railway undertakings' liability in respect of passengers and their luggage, the requirement that undertakings be adequately insured, and the requirement that those undertakings take adequate measures to ensure passengers' personal security in railway stations and on trains and to manage risk.

[1] OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

(26) Urban, suburban and regional rail passenger services are different in character from long-distance services. Therefore, with the exception of certain provisions which should apply to all rail passenger services throughout the Community, Member States should be able to grant exemptions from the application of the provisions of this Regulation to urban, suburban and regional rail passenger services.

(27) The measures necessary for the implementation of this Regulation 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].

(28) In particular, the Commission should be empowered to adopt implementing measures. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation, or to supplement it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation establishes rules as regards the following:

(a) the information to be provided by railway undertakings, the conclusion of transport contracts, the issuing of tickets and the implementation of a Computerised Information and Reservation System for Rail Transport,

(b) the liability of railway undertakings and their insurance obligations for passengers and their luggage,

(c) the obligations of railway undertakings to passengers in cases of delay,

(d) the protection of, and assistance to, disabled persons and persons with reduced mobility travelling by rail,

(e) the definition and monitoring of service quality standards, the management of risks to the personal security of passengers and the handling of complaints, and

(f) general rules on enforcement.

[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).

Article 2

Scope

1. This Regulation shall apply to all rail journeys and services throughout the Community provided by one or more railway undertakings licensed in accordance with Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings [2].

2. This Regulation does not apply to railway undertakings and transport services which are not licensed under Directive 95/18/EC.

3. On the entry into force of this Regulation, Articles 9, 11, 12, 19, 20(1) and 26 shall apply to all rail passenger services throughout the Community.

4. With the exception of the provisions set out in paragraph 3, a Member State may, on a transparent and non-discriminatory basis, grant an exemption for a period no longer than five years, which may be renewed twice for a maximum period of five years on each occasion, from the application of the provisions of this Regulation to domestic rail passenger services.

5. With the exception of the provisions set out in paragraph 3 of this Article, a Member State may exempt from the application of the provisions of this Regulation urban, suburban and regional rail passenger services. In order to distinguish between urban, suburban and regional rail passenger services, Member States shall apply the definitions contained in Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways [3]. In applying these definitions, Member States shall take into account the following criteria: distance, frequency of services, number of scheduled stops, rolling stock employed, ticketing schemes, fluctuations in passenger numbers between services in peak and off-peak periods, train codes and timetables.

6. For a maximum period of five years, a Member State may, on a transparent and non-discriminatory basis, grant an exemption, which may be renewed, from the application of the provisions of this Regulation to particular services or journeys because a significant part of the rail passenger service, including at least one scheduled station stop, is operated outside the Community.

7. Member States shall inform the Commission of exemptions granted pursuant to paragraphs 4, 5 and 6. The Commission shall take appropriate action if such an exemption is deemed not to be in accordance with the provisions of this Article. No later than 3 December 2014, the Commission shall submit to the European Parliament and the Council a report on exemptions granted pursuant to paragraphs 4, 5 and 6.

[2] OJ L 143, 27.6.1995, p. 70. Directive as last amended by Directive 2004/49/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 44).

[3] OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344).

Article 3

Definitions

For the purposes of this Regulation the following definitions shall apply:

1. 'railway undertaking' means a railway undertaking as defined in Article 2 of Directive 2001/14/EC [1], and any other public or private undertaking the activity of which is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction; this also includes undertakings which provide traction only;

2. 'carrier' means the contractual railway undertaking with whom the passenger has concluded the transport contract or a series of successive railway undertakings which are liable on the basis of this contract;

3. 'substitute carrier' means a railway undertaking, which has not concluded a transport contract with the passenger, but to whom the railway undertaking party to the contract has entrusted, in whole or in part, the performance of the transport by rail;

4. 'infrastructure manager' means any body or undertaking that is responsible in particular for establishing and maintaining railway infrastructure, or a part thereof, as defined in Article 3 of Directive 91/440/EEC, which may also include the management of infrastructure control and safety systems; the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings;

5. 'station manager' means an organisational entity in a Member State, which has been made responsible for the management of a railway station and which may be the infrastructure manager;

6. 'tour operator' means an organiser or retailer, other than a railway undertaking, within the meaning of Article 2, points (2) and (3) of Directive 90/314/EEC [2];

7. 'ticket vendor' means any retailer of rail transport services concluding transport contracts and selling tickets on behalf of a railway undertaking or for its own account;

8. 'transport contract' means a contract of carriage for reward or free of charge between a railway undertaking or a ticket vendor and the passenger for the provision of one or more transport services;

9. 'reservation' means an authorisation, on paper or in electronic form, giving entitlement to transportation subject to previously confirmed personalised transport arrangements;

10. 'through ticket' means a ticket or tickets representing a transport contract for successive railway services operated by one or several railway undertakings;

11. 'domestic rail passenger service' means a rail passenger service which does not cross a border of a Member State;

12. 'delay' means the time difference between the time the passenger was scheduled to arrive in accordance with the published timetable and the time of his or her actual or expected arrival;

13. 'travel pass' or 'season ticket' means a ticket for an unlimited number of journeys which provides the authorised holder with rail travel on a particular route or network during a specified period;

14. 'Computerised Information and Reservation System for Rail Transport (CIRSRT)' means a computerised system containing information about rail services offered by railway undertakings; the information stored in the CIRSRT on passenger services shall include information on:

    (a) schedules and timetables of passenger services;

    (b) availability of seats on passenger services;

    (c) fares and special conditions;

    (d) accessibility of trains for disabled persons and persons with reduced mobility;

    (e) facilities through which reservations may be made or tickets or through tickets may be issued to the extent that some or all of these facilities are made available to users;

15. 'disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotory, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or as a result of age, and whose situation needs appropriate attention and adaptation to his or her particular needs of the service made available to all passengers;

16. 'General Conditions of Carriage' means the conditions of the carrier in the form of general conditions or tariffs legally in force in each Member State and which have become, by the conclusion of the contract of carriage, an integral part of it;

17. 'vehicle' means a motor vehicle or a trailer carried on the occasion of the carriage of passengers.

(1) Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ L 75, 15.3.2001, p. 29). Directive as last amended by Directive 2004/49/EC.

(2) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59).

CHAPTER II

TRANSPORT CONTRACT, INFORMATION AND TICKETS

Article 4

Transport contract

Subject to the provisions of this Chapter, the conclusion and performance of a transport contract and the provision of information and tickets shall be governed by the provisions of Title II and Title III of Annex I.

Article 5

Bicycles

Railway undertakings shall enable passengers to bring bicycles on to the train, where appropriate for a fee, if they are easy to handle, if this does not adversely affect the specific rail service, and if the rolling-stock so permits.

Article 6

Exclusion of waiver and stipulation of limits

1. Obligations towards passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the transport contract.

2. Railway undertakings may offer contract conditions more favourable for the passenger than the conditions laid down in this Regulation.

Article 7

Obligation to provide information concerning discontinuation of services

Railway undertakings or, where appropriate, competent authorities responsible for a public service railway contract shall make public by appropriate means, and before their implementation, decisions to discontinue services.

Article 8

Travel information

1. Without prejudice to Article 10, railway undertakings and ticket vendors offering transport contracts on behalf of one or more railway undertakings shall provide the passenger, upon request, with at least the information set out in Annex II, Part I in relation to the journeys for which a transport contract is offered by the railway undertaking concerned. Ticket vendors offering transport contracts on their own account, and tour operators, shall provide this information where available.

2. Railway undertakings shall provide the passenger during the journey with at least the information set out in Annex II, Part II.

3. The information referred to in paragraphs 1 and 2 shall be provided in the most appropriate format. Particular attention shall be paid in this regard to the needs of people with auditory and/or visual impairment.

Article 9

Availability of tickets, through tickets and reservations

1. Railway undertakings and ticket vendors shall offer, where available, tickets, through tickets and reservations.

2. Without prejudice to paragraph 4, railway undertakings shall distribute tickets to passengers via at least one of the following points of sale:

(a) ticket offices or selling machines;

(b) telephone, the Internet or any other widely available information technology;

(c) on board trains.

3. Without prejudice to paragraphs 4 and 5, railway undertakings shall distribute tickets for services provided under public service contracts via at least one of the following points of sale:

(a) ticket offices or selling machines;

(b) on board trains.

4. Railway undertakings shall offer the possibility to obtain tickets for the respective service on board the train, unless this is limited or denied on grounds relating to security or antifraud policy or compulsory train reservation or reasonable commercial grounds.

5. Where there is no ticket office or selling machine in the station of departure, passengers shall be informed at the station:

(a) of the possibility of purchasing tickets via telephone or the Internet or on board the train, and of the procedure for such purchase;

(b) of the nearest railway station or place at which ticket offices and/or selling machines are available.

Article 10

Travel information and reservation systems

1. In order to provide the information and to issue tickets referred to in this Regulation, railway undertakings and ticket vendors shall make use of CIRSRT, to be established by the procedures referred to in this Article.

2. The technical specifications for interoperability (TSIs) referred to in Directive 2001/16/EC shall be applied for the purposes of this Regulation.

3. The Commission shall, on a proposal to be submitted by the European Railway Agency (ERA), adopt the TSI of telematics applications for passengers by 3 December 2010. The TSI shall make possible the provision of the information, set out in Annex II, and the issuing of tickets as governed by this Regulation.

4. Railway undertakings shall adapt their CIRSRT according to the requirements set out in the TSI in accordance with a deployment plan set out in that TSI.

5. Subject to the provisions of Directive 95/46/EC, no railway undertaking or ticket vendor shall disclose personal information on individual bookings to other railway undertakings and/or ticket vendors.

CHAPTER III

LIABILITY OF RAILWAY UNDERTAKINGS FOR PASSENGERS AND THEIR LUGGAGE

Article 11

Liability for passengers and luggage

Subject to the provisions of this Chapter, and without prejudice to applicable national law granting passengers further compensation for damages, the liability of railway undertakings in respect of passengers and their luggage shall be governed by Chapters I, III and IV of Title IV, Title VI and Title VII of Annex I.

Article 12

Insurance

1. The obligation set out in Article 9 of Directive 95/18/EC as far as it relates to liability for passengers shall be understood as requiring a railway undertaking to be adequately insured or to make equivalent arrangements for cover of its liabilities under this Regulation.

2. The Commission shall submit to the European Parliament and the Council a report on the setting of a minimum amount of insurance for railway undertakings by 3 December 2010. If appropriate, that report shall be accompanied by suitable proposals or recommendations on this matter.

Article 13

Advance payments

1. If a passenger is killed or injured, the railway undertaking as referred to in Article 26(5) of Annex I shall without delay, and in any event not later than fifteen days after the establishment of the identity of the natural person entitled to compensation, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the damage suffered.

2. Without prejudice to paragraph 1, an advance payment shall not be less than EUR 21 000 per passenger in the event of death.

3. An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of this Regulation but is not returnable, except in the cases where damage was caused by the negligence or fault of the passenger or where the person who received the advance payment was not the person entitled to compensation.

Article 14

Contestation of liability

Even if the railway undertaking contests its responsibility for physical injury to a passenger whom it conveys, it shall make every reasonable effort to assist a passenger claiming compensation for damage from third parties.

CHAPTER IV

DELAYS, MISSED CONNECTIONS AND CANCELLATIONS

Article 15

Liability for delays, missed connections and cancellations

Subject to the provisions of this Chapter, the liability of railway undertakings in respect of delays, missed connections and cancellations shall be governed by Chapter II of Title IV of Annex I.

Article 16

Reimbursement and re-routing

Where it is reasonably to be expected that the delay in the arrival at the final destination under the transport contract will be more than 60 minutes, the passenger shall immediately have the choice between:

(a) reimbursement of the full cost of the ticket, under the conditions by which it was paid, for the part or parts of his or her journey not made and for the part or parts already made if the journey is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return service to the first point of departure at the earliest opportunity. The payment of the reimbursement shall be made under the same conditions as the payment for compensation referred to in Article 17; or

(b) continuation or re-routing, under comparable transport conditions, to the final destination at the earliest opportunity; or

(c) continuation or re-routing, under comparable transport conditions, to the final destination at a later date at the passenger's convenience.

Article 17

Compensation of the ticket price

1. Without losing the right of transport, a passenger may request compensation for delays from the railway undertaking if he or she is facing a delay between the places of departure and destination stated on the ticket for which the ticket has not been reimbursed in accordance with Article 16. The minimum compensations for delays shall be as follows:

(a) 25 % of the ticket price for a delay of 60 to 119 minutes,

(b) 50 % of the ticket price for a delay of 120 minutes or more.

Passengers who hold a travel pass or season ticket and who encounter recurrent delays or cancellations during its period of validity may request adequate compensation in accordance with the railway undertaking's compensation arrangements. These arrangements shall state the criteria for determining delay and for the calculation of the compensation.

Compensation for delay shall be calculated in relation to the price which the passenger actually paid for the delayed service.

Where the transport contract is for a return journey, compensation for delay on either the outward or the return leg shall be calculated in relation to half of the price paid for the ticket. In the same way the price for a delayed service under any other form of transport contract allowing travelling several subsequent legs shall be calculated in proportion to the full price.

The calculation of the period of delay shall not take into account any delay that the railway undertaking can demonstrate as having occurred outside the territories in which the Treaty establishing the European Community is applied.

2. The compensation of the ticket price shall be paid within one month after the submission of the request for compensation. The compensation may be paid in vouchers and/or other services if the terms are flexible (in particular regarding the validity period and destination). The compensation shall be paid in money at the request of the passenger.

3. The compensation of the ticket price shall not be reduced by financial transaction costs such as fees, telephone costs or stamps. Railway undertakings may introduce a minimum threshold under which payments for compensation will not be paid. This threshold shall not exceed EUR 4.

4. The passenger shall not have any right to compensation if he is informed of a delay before he buys a ticket, or if a delay due to continuation on a different service or re-routing remains below 60 minutes.

Article 18

Assistance

1. In the case of a delay in arrival or departure, passengers shall be kept informed of the situation and of the estimated departure time and estimated arrival time by the railway undertaking or by the station manager as soon as such information is available.

2. In the case of any delay as referred to in paragraph 1 of more than 60 minutes, passengers shall also be offered free of charge:

(a) meals and refreshments in reasonable relation to the waiting time, if they are available on the train or in the station, or can reasonably be supplied;

(b) hotel or other accommodation, and transport between the railway station and place of accommodation, in cases where a stay of one or more nights becomes necessary or an additional stay becomes necessary, where and when physically possible;

(c) if the train is blocked on the track, transport from the train to the railway station, to the alternative departure point or to the final destination of the service, where and when physically possible.

3. If the railway service cannot be continued anymore, railway undertakings shall organise as soon as possible alternative transport services for passengers.

4. Railway undertakings shall, at the request of the passenger, certify on the ticket that the rail service has suffered a delay, led to a missed connection or that it has been cancelled, as the case might be.

5. In applying paragraphs 1, 2 and 3, the operating railway undertaking shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons.

CHAPTER V

DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

Article 19

Right to transport

1. Railway undertakings and station managers shall, with the active involvement of representative organisations of disabled persons and persons with reduced mobility, establish, or shall have in place, non-discriminatory access rules for the transport of disabled persons and persons with reduced mobility.

2. Reservations and tickets shall be offered to disabled persons and persons with reduced mobility at no additional cost. A railway undertaking, ticket vendor or tour operator may not refuse to accept a reservation from, or issue a ticket to, a disabled person or a person with reduced mobility, or require that such person be accompanied by another person, unless this is strictly necessary in order to comply with the access rules referred to in paragraph 1.

Article 20

Information to disabled persons and persons with reduced mobility

1. Upon request, a railway undertaking, a ticket vendor or a tour operator shall provide disabled persons and persons with reduced mobility with information on the accessibility of rail services and on the access conditions of rolling stock in accordance with the access rules referred to in Article 19(1) and shall inform disabled persons and persons with reduced mobility about facilities on board.

2. When a railway undertaking, ticket vendor and/or tour operator exercises the derogation provided for in Article 19(2), it shall upon request inform in writing the disabled person or person with reduced mobility concerned of its reasons for doing so within five working days of the refusal to make the reservation or to issue the ticket or the imposition of the condition of being accompanied.

Article 21

Accessibility

1. Railway undertakings and station managers shall, through compliance with the TSI for persons with reduced mobility, ensure that the station, platforms, rolling stock and other facilities are accessible to disabled persons and persons with reduced mobility.

2. In the absence of accompanying staff on board a train or of staff at a station, railway undertakings and station managers shall make all reasonable efforts to enable disabled persons or persons with reduced mobility to have access to travel by rail.

Article 22

Assistance at railway stations

1. On departure from, transit through or arrival at, a staffed railway station of a disabled person or a person with reduced mobility, the station manager shall provide assistance free of charge in such a way that that person is able to board the departing service, or to disembark from the arriving service for which he or she purchased a ticket, without prejudice to the access rules referred to in Article 19(1).

2. Member States may provide for a derogation from paragraph 1 in the case of persons travelling on services which are the subject of a public service contract awarded in conformity with Community law, on condition that the competent authority has put in place alternative facilities or arrangements guaranteeing an equivalent or higher level of accessibility of transport services.

3. In unstaffed stations, railway undertakings and station managers shall ensure that easily accessible information is displayed in accordance with the access rules referred to in Article 19(1) regarding the nearest staffed stations and directly available assistance for disabled persons and persons with reduced mobility.

Article 23

Assistance on board

Without prejudice to the access rules as referred to in Article 19(1), railway undertakings shall provide disabled persons and persons with reduced mobility assistance free of charge on board a train and during boarding and disembarking from a train.

For the purposes of this Article, assistance on board shall consist of all reasonable efforts to offer assistance to a disabled person or a person with reduced mobility in order to allow that person to have access to the same services in the train as other passengers, should the extent of the person's disability or reduced mobility not allow him or her to have access to those services independently and in safety.

Article 24

Conditions on which assistance is provided

Railway undertakings, station managers, ticket vendors and tour operators shall cooperate in order to provide assistance to disabled persons and persons with reduced mobility in line with Articles 22 and 23 in accordance with the following points:

(a) assistance shall be provided on condition that the railway undertaking, the station manager, the ticket vendor or the tour operator with which the ticket was purchased is notified of the person's need for such assistance at least 48 hours before the assistance is needed. Where the ticket permits multiple journeys, one notification shall be sufficient provided that adequate information on the timing of subsequent journeys is provided;

(b) railway undertakings, station managers, ticket vendors and tour operators shall take all measures necessary for the reception of notifications;

(c) if no notification is made in accordance with point (a), the railway undertaking and the station manager shall make all reasonable efforts to provide assistance in such a way that the disabled person or person with reduced mobility may travel;

(d) without prejudice to the powers of other entities regarding areas located outside the railway station premises, the station manager or any other authorised person shall designate points, within and outside the railway station, at which disabled persons and persons with reduced mobility can announce their arrival at the railway station and, if need be, request assistance;

(e) assistance shall be provided on condition that the disabled person or person with reduced mobility present him or herself at the designated point at a time stipulated by the railway undertaking or station manager providing such assistance. Any time stipulated shall not be more than 60 minutes before the published departure time or the time at which all passengers are asked to check in. If no time is stipulated by which the disabled person or person with reduced mobility is required to present him or herself, the person shall present him or herself at the designated point at least 30 minutes before the published departure time or the time at which all passengers are asked to check in.

Article 25

Compensation in respect of mobility equipment or other specific equipment

If the railway undertaking is liable for the total or partial loss of, or damage to, mobility equipment or other specific equipment used by disabled persons or persons with reduced mobility, no financial limit shall be applicable.

CHAPTER VI

SECURITY, COMPLAINTS AND QUALITY OF SERVICE

Article 26

Personal security of passengers

In agreement with public authorities, railway undertakings, infrastructure managers and station managers shall take adequate measures in their respective fields of responsibility and adapt them to the level of security defined by the public authorities to ensure passengers' personal security in railway stations and on trains and to manage risks. They shall cooperate and exchange information on best practices concerning the prevention of acts, which are likely to deteriorate the level of security.

Article 27

Complaints

1. Railway undertakings shall set up a complaint handling mechanism for the rights and obligations covered in this Regulation. The railway undertaking shall make its contact details and working language(s) widely known to passengers.

2. Passengers may submit a complaint to any railway undertaking involved. Within one month, the addressee of the complaint shall either give a reasoned reply or, in justified cases, inform the passenger by what date within a period of less than three months from the date of the complaint a reply can be expected.

3. The railway undertaking shall publish in the annual report referred to in Article 28 the number and categories of received complaints, processed complaints, response time and possible improvement actions undertaken.

Article 28

Service quality standards

1. Railway undertakings shall define service quality standards and implement a quality management system to maintain service quality. The service quality standards shall at least cover the items listed in Annex III.

2. Railway undertakings shall monitor their own performance as reflected in the service quality standards. Railway undertakings shall each year publish a report on their service quality performance together with their annual report. The reports on service quality performance shall be published on the Internet website of the railway undertakings. In addition, these reports shall be made available on the Internet website of the ERA.

CHAPTER VII

INFORMATION AND ENFORCEMENT

Article 29

Information to passengers about their rights

1. When selling tickets for journeys by rail, railway undertakings, station managers and tour operators shall inform passengers of their rights and obligations under this Regulation. In order to comply with this information requirement, railway undertakings, station managers and tour operators may use a summary of the provisions of this Regulation prepared by the Commission in all official languages of the European Union institutions and made available to them.

2. Railway undertakings and station managers shall inform passengers in an appropriate manner, at the station and on the train, of the contact details of the body or bodies designated by Member States pursuant to Article 30.

Article 30

Enforcement

1. Each Member State shall designate a body or bodies responsible for the enforcement of this Regulation. Each body shall take the measures necessary to ensure that the rights of passengers are respected.

Each body shall be independent in its organisation, funding decisions, legal structure and decision-making of any infrastructure manager, charging body, allocation body or railway undertaking.

Member States shall inform the Commission of the body or bodies designated in accordance with this paragraph and of its or their respective responsibilities.

2. Each passenger may complain to the appropriate body designated under paragraph 1, or to any other appropriate body designated by a Member State, about an alleged infringement of this Regulation.

Article 31

Cooperation between enforcement bodies

Enforcement bodies as referred to in Article 30 shall exchange information on their work and decision-making principles and practice for the purpose of coordinating their decision-making principles across the Community. The Commission shall support them in this task.

CHAPTER VIII

FINAL PROVISIONS

Article 32

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those rules and measures to the Commission by 3 June 2010 and shall notify it without delay of any subsequent amendment affecting them.

Article 33

Annexes

Measures designed to amend non-essential elements of this Regulation by adapting the Annexes thereto, except Annex I, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 35(2).

Article 34

Amending provisions

1. Measures designed to amend non-essential elements of this Regulation by supplementing it and necessary for the implementation of Articles 2, 10 and 12 shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 35(2).

2. Measures designed to amend non-essential elements of this Regulation by adjusting the financial amounts referred to therein, other than in Annex I, in light of inflation shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 35(2).

Article 35

Committee procedure

1. The Commission shall be assisted by the Committee instituted by Article 11a of Directive 91/440/EEC.

2. Where reference is made to this paragraph, Articles 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 36

Report

The Commission shall report to the European Parliament and the Council on the implementation and the results of this Regulation by 3 December 2012, and in particular on the service quality standards.

The report shall be based on information to be provided pursuant to this Regulation and to Article 10b of Directive 91/440/EEC. The report shall be accompanied where necessary by appropriate proposals.

Article 37

Entry into force

This Regulation shall enter into force 24 months after the date of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 23 October 2007.

For the European Parliament
The President
H.-G. PÖTTERING

For the Council
The President
M. LOBO ANTUNES

ANNEX I

Extract from Uniform Rules concerning the contract for international carriage of passengers and luggage by rail (CIV)

Appendix A

to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention Concerning International Carriage by Rail of 3 June 1999

TITLE II

CONCLUSION AND PERFORMANCE OF THE CONTRACT OF CARRIAGE

Article 6

Contract of carriage

1. By the contract of carriage the carrier shall undertake to carry the passenger as well as, where appropriate, luggage and vehicles to the place of destination and to deliver the luggage and vehicles at the place of destination.

2. The contract of carriage must be confirmed by one or more tickets issued to the passenger. However, subject to Article 9 the absence, irregularity or loss of the ticket shall not affect the existence or validity of the contract which shall remain subject to these Uniform Rules.

3. The ticket shall be prima facie evidence of the conclusion and the contents of the contract of carriage.

Article 7

Ticket

1. The General Conditions of Carriage shall determine the form and content of tickets as well as the language and characters in which they are to be printed and made out.

2. The following, at least, must be entered on the ticket:

(a) the carrier or carriers;

(b) a statement that the carriage is subject, notwithstanding any clause to the contrary, to these Uniform Rules; this may be indicated by the acronym CIV;

(c) any other statement necessary to prove the conclusion and contents of the contract of carriage and enabling the passenger to assert the rights resulting from this contract.

3. The passenger must ensure, on receipt of the ticket, that it has been made out in accordance with his instructions.

4. The ticket shall be transferable if it has not been made out in the passenger's name and if the journey has not begun.

5. The ticket may be established in the form of electronic data registration, which can be transformed into legible written symbols. The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the ticket represented by those data.

Article 8

Payment and refund of the carriage charge

1. Subject to a contrary agreement between the passenger and the carrier, the carriage charge shall be payable in advance.

2. The General Conditions of Carriage shall determine under what conditions a refund of the carriage charge shall be made.

Article 9

Right to be carried. Exclusion from carriage

1. The passenger must, from the start of his journey, be in possession of a valid ticket and produce it on the inspection of tickets. The General Conditions of Carriage may provide:

(a) that a passenger who does not produce a valid ticket must pay, in addition to the carriage charge, a surcharge;

(b) that a passenger who refuses to pay the carriage charge or the surcharge upon demand may be required to discontinue his journey;

(c) if and under what conditions a refund of the surcharge shall be made.

2. The General Conditions of Carriage may provide that passengers who:

(a) present a danger for safety and the good functioning of the operations or for the safety of other passengers,

(b) inconvenience other passengers in an intolerable manner,

shall be excluded from carriage or may be required to discontinue their journey and that such persons shall not be entitled to a refund of their carriage charge or of any charge for the carriage of registered luggage they may have paid.

Article 10

Completion of administrative formalities

The passenger must comply with the formalities required by customs or other administrative authorities.

Article 11

Cancellation and late running of trains. Missed connections

The carrier must, where necessary, certify on the ticket that the train has been cancelled or the connection missed.

TITLE III

CARRIAGE OF HAND LUGGAGE, ANIMALS, REGISTERED LUGGAGE AND VEHICLES

Chapter I

Common provisions

Article 12

Acceptable articles and animals

1. The passenger may take with him articles which can be handled easily (hand luggage) and also live animals in accordance with the General Conditions of Carriage. Moreover, the passenger may take with him cumbersome articles in accordance with the special provisions, contained in the General Conditions of Carriage. Articles and animals likely to annoy or inconvenience passengers or cause damage shall not be allowed as hand luggage.

2. The passenger may consign articles and animals as registered luggage in accordance with the General Conditions of Carriage.

3. The carrier may allow the carriage of vehicles on the occasion of the carriage of passengers in accordance with special provisions, contained in the General Conditions of Carriage.

4. The carriage of dangerous goods as hand luggage, registered luggage as well as in or on vehicles which, in accordance with this Title are carried by rail, must comply with the Regulation concerning the Carriage of Dangerous Goods by Rail (RID).

Article 13

Examination

1. When there is good reason to suspect a failure to observe the conditions of carriage, the carrier shall have the right to examine whether the articles (hand luggage, registered luggage, vehicles including their loading) and animals carried comply with the conditions of carriage, unless the laws and prescriptions of the State in which the examination would take place prohibit such examination. The passenger must be invited to attend the examination. If he does not appear or cannot be reached, the carrier must require the presence of two independent witnesses.

2. If it is established that the conditions of carriage have not been respected, the carrier can require the passenger to pay the costs arising from the examination.

Article 14

Completion of administrative formalities

The passenger must comply with the formalities required by customs or other administrative authorities when, on being carried, he has articles (hand luggage, registered luggage, vehicles including their loading) or animals carried. He shall be present at the inspection of these articles save where otherwise provided by the laws and prescriptions of each State.

Chapter II

Hand luggage and animals

Article 15

Supervision

It shall be the passenger's responsibility to supervise the hand luggage and animals that he takes with him.

Chapter III

Registered luggage

Article 16

Consignment of registered luggage

1. The contractual obligations relating to the forwarding of registered luggage must be established by a luggage registration voucher issued to the passenger.

2. Subject to Article 22 the absence, irregularity or loss of the luggage registration voucher shall not affect the existence or the validity of the agreements concerning the forwarding of the registered luggage, which shall remain subject to these Uniform Rules.

3. The luggage registration voucher shall be prima facie evidence of the registration of the luggage and the conditions of its carriage.

4. Subject to evidence to the contrary, it shall be presumed that when the carrier took over the registered luggage it was apparently in a good condition, and that the number and the mass of the items of luggage corresponded to the entries on the luggage registration voucher.

Article 17

Luggage registration voucher

1. The General Conditions of Carriage shall determine the form and content of the luggage registration voucher as well as the language and characters in which it is to be printed and made out. Article 7(5) shall apply *mutatis mutandis*.

2. The following, at least, must be entered on the luggage registration voucher:

(a) the carrier or carriers;

(b) a statement that the carriage is subject, notwithstanding any clause to the contrary, to these Uniform Rules; this may be indicated by the acronym CIV;

(c) any other statement necessary to prove the contractual obligations relating to the forwarding of the registered luggage and enabling the passenger to assert the rights resulting from the contract of carriage.

3. The passenger must ensure, on receipt of the luggage registration voucher, that it has been made out in accordance with his instructions.

Article 18

Registration and carriage

1. Save where the General Conditions of Carriage otherwise provide, luggage shall be registered only on production of a ticket valid at least as far as the destination of the luggage. In other respects the registration of luggage shall be carried out in accordance with the prescriptions in force at the place of consignment.

2. When the General Conditions of Carriage provide that luggage may be accepted for carriage without production of a ticket, the provisions of these Uniform Rules determining the rights and obligations of the passenger in respect of his registered luggage shall apply *mutatis mutandis* to the consignor of registered luggage.

3. The carrier can forward the registered luggage by another train or by another mode of transport and by a different route from that taken by the passenger.

Article 19

Payment of charges for the carriage of registered luggage

Subject to a contrary agreement between the passenger and the carrier, the charge for the carriage of registered luggage shall be payable on registration.

Article 20

Marking of registered luggage

The passenger must indicate on each item of registered luggage in a clearly visible place, in a sufficiently durable and legible manner:

(a) his name and address;

(b) the place of destination.

Article 21

Right to dispose of registered luggage

1. If circumstances permit and if customs requirements or the requirements of other administrative authorities are not thereby contravened, the passenger can request luggage to be handed back at the place of consignment on surrender of the luggage registration voucher and, if the General Conditions of Carriage so require, on production of the ticket.

2. The General Conditions of Carriage may contain other provisions concerning the right to dispose of registered luggage, in particular modifications of the place of destination and the possible financial consequences to be borne by the passenger.

Article 22

Delivery

1. Registered luggage shall be delivered on surrender of the luggage registration voucher and, where appropriate, on payment of the amounts chargeable against the consignment.

The carrier shall be entitled, but not obliged, to examine whether the holder of the voucher is entitled to take delivery.

2. It shall be equivalent to delivery to the holder of the luggage registration voucher if, in accordance with the prescriptions in force at the place of destination:

(a) the luggage has been handed over to the customs or octroi authorities at their premises or warehouses, when these are not subject to the carrier's supervision;

(b) live animals have been handed over to third parties.

3. The holder of the luggage registration voucher may require delivery of the luggage at the place of destination as soon as the agreed time and, where appropriate, the time necessary for the operations carried out by customs or other administrative authorities, has elapsed.

4. Failing surrender of the luggage registration voucher, the carrier shall only be obliged to deliver the luggage to the person proving his right thereto; if the proof offered appears insufficient, the carrier may require security to be given.

5. Luggage shall be delivered at the place of destination for which it has been registered.

6. The holder of a luggage registration voucher whose luggage has not been delivered may require the day and time to be endorsed on the voucher when he requested delivery in accordance with paragraph 3.

7. The person entitled may refuse to accept the luggage if the carrier does not comply with his request to carry out an examination of the registered luggage in order to establish alleged damage.

8. In all other respects delivery of luggage shall be carried out in accordance with the prescriptions in force at the place of destination.

Chapter IV

Vehicles

Article 23

Conditions of carriage

The special provisions governing the carriage of vehicles, contained in the General Conditions of Carriage, shall specify in particular the conditions governing acceptance for carriage, registration, loading and carriage, unloading and delivery as well as the obligations of the passenger.

Article 24

Carriage voucher

1. The contractual obligations relating to the carriage of vehicles must be established by a carriage voucher issued to the passenger. The carriage voucher may be integrated into the passenger's ticket.

2. The special provisions governing the carriage of vehicles, contained in the General Conditions of Carriage, shall determine the form and content of the carriage voucher as well as the language and the characters in which it is to be printed and made out. Article 7(5) shall apply *mutatis mutandis*.

3. The following, at least, must be entered on the carriage voucher:

(a) the carrier or carriers;

(b) a statement that the carriage is subject, notwithstanding any clause to the contrary, to these Uniform Rules; this may be indicated by the acronym CIV;

(c) any other statement necessary to prove the contractual obligations relating to the carriage of vehicles and enabling the passenger to assert the rights resulting from the contract of carriage.

4. The passenger must ensure, on receipt of the carriage voucher, that it has been made out in accordance with his instructions.

Article 25

Applicable law

Subject to the provisions of this Chapter, the provisions of Chapter III relating to the carriage of luggage shall apply to vehicles.

TITLE IV

LIABILITY OF THE CARRIER

Chapter I

Liability in case of death of, or personal injury to, passengers

Article 26

Basis of liability

1. The carrier shall be liable for the loss or damage resulting from the death of, personal injuries to, or any other physical or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used.

2. The carrier shall be relieved of this liability

(a) if the accident has been caused by circumstances not connected with the operation of the railway and which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent;

(b) to the extent that the accident is due to the fault of the passenger;

(c) if the accident is due to the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent; another undertaking using the same railway infrastructure shall not be considered as a third party; the right of recourse shall not be affected.

3. If the accident is due to the behaviour of a third party and if, in spite of that, the carrier is not entirely relieved of his liability in accordance with paragraph 2, letter c), he shall be liable in full up to the limits laid down in these Uniform Rules but without prejudice to any right of recourse which the carrier may have against the third party.

4. These Uniform Rules shall not affect any liability which may be incurred by the carrier in cases not provided for in paragraph 1.

5. If carriage governed by a single contract of carriage is performed by successive carriers, the carrier bound pursuant to the contract of carriage to provide the service of carriage in the course of which the accident happened shall be liable in case of death of, and personal injuries to, passengers. When this service has not been provided by the carrier, but by a substitute carrier, the two carriers shall be jointly and severally liable in accordance with these Uniform Rules.

Article 27

Damages in case of death

1. In case of death of the passenger the damages shall comprise:

(a) any necessary costs following the death, in particular those of transport of the body and the funeral expenses;

(b) if death does not occur at once, the damages provided for in Article 28.

2. If, through the death of the passenger, persons whom he had, or would have had, a legal duty to maintain are deprived of their support, such persons shall also be compensated for that loss. Rights of action for damages of persons whom the passenger was maintaining without being legally bound to do so, shall be governed by national law.

Article 28

Damages in case of personal injury

In case of personal injury or any other physical or mental harm to the passenger the damages shall comprise:

(a) any necessary costs, in particular those of treatment and of transport;

(b) compensation for financial loss, due to total or partial incapacity to work, or to increased needs.

Article 29

Compensation for other bodily harm

National law shall determine whether and to what extent the carrier must pay damages for bodily harm other than that for which there is provision in Articles 27 and 28.

Article 30

Form and amount of damages in case of death and personal injury

1. The damages under Article 27(2) and Article 28(b) must be awarded in the form of a lump sum. However, if national law permits payment of an annuity, the damages shall be awarded in that form if so requested by the injured passenger or by the persons entitled referred to in Article 27(2).

2. The amount of damages to be awarded pursuant to paragraph 1 shall be determined in accordance with national law. However, for the purposes of these Uniform Rules, the upper limit per passenger shall be set at 175 000 units of account as a lump sum or as an annual annuity corresponding to that sum, where national law provides for an upper limit of less than that amount.

Article 31

Other modes of transport

1. Subject to paragraph 2, the provisions relating to the liability of the carrier in case of death of, or personal injury to, passengers shall not apply to loss or damage arising in the course of carriage which, in accordance with the contract of carriage, was not carriage by rail.

2. However, where railway vehicles are carried by ferry, the provisions relating to liability in case of death of, or personal injury to, passengers shall apply to loss or damage referred to in Article 26(1) and Article 33(1), caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from the said vehicles.

3. When, because of exceptional circumstances, the operation of the railway is temporarily suspended and the passengers are carried by another mode of transport, the carrier shall be liable pursuant to these Uniform Rules.

Chapter II

Liability in case of failure to keep to the timetable

Article 32

Liability in case of cancellation, late running of trains or missed connections

1. The carrier shall be liable to the passenger for loss or damage resulting from the fact that, by reason of cancellation, the late running of a train or a missed connection, his journey cannot be continued the same day, or that a continuation of the journey the same day could not reasonably be required because of given circumstances. The damages shall comprise the reasonable costs of accommodation as well as the reasonable costs occasioned by having to notify persons expecting the passenger.

2. The carrier shall be relieved of this liability, when the cancellation, late running or missed connection is attributable to one of the following causes:

(a) circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent;

(b) fault on the part of the passenger; or

(c) the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent; another undertaking using the same railway infrastructure shall not be considered as a third party; the right of recourse shall not be affected.

3. National law shall determine whether and to what extent the carrier must pay damages for harm other than that provided for in paragraph 1. This provision shall be without prejudice to Article 44.

Chapter III

Liability in respect of hand luggage, animals, registered luggage and vehicles

SECTION 1

Hand luggage and animals

Article 33

Liability

1. In case of death of, or personal injury to, passengers the carrier shall also be liable for the loss or damage resulting from the total or partial loss of, or damage to, articles which the passenger had on him or with him as hand luggage; this shall apply also to animals which the passenger had brought with him. Article 26 shall apply *mutatis mutandis*.

2. In other respects, the carrier shall not be liable for the total or partial loss of, or damage to, articles, hand luggage or animals the supervision of which is the responsibility of the passenger in accordance with Article 15, unless this loss or damage is caused by the fault of the carrier. The other Articles of Title IV, with exception of Article 51, and Title VI shall not apply in this case.

Article 34

Limit of damages in case of loss of or damage to articles

When the carrier is liable under Article 33(1), he must pay compensation up to a limit of 1 400 units of account per passenger.

Article 35

Exclusion of liability

The carrier shall not be liable to the passenger for loss or damage arising from the fact that the passenger does not conform to the formalities required by customs or other administrative authorities.

SECTION 2

Registered luggage

Article 36

Basis of liability

1. The carrier shall be liable for loss or damage resulting from the total or partial loss of, or damage to, registered luggage between the time of taking over by the carrier and the time of delivery as well as from delay in delivery.

2. The carrier shall be relieved of this liability to the extent that the loss, damage or delay in delivery was caused by a fault of the passenger, by an order given by the passenger other than as a result of the fault of the carrier, by an inherent defect in the registered luggage or by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

3. The carrier shall be relieved of this liability to the extent that the loss or damage arises from the special risks inherent in one or more of the following circumstances:

(a) the absence or inadequacy of packing;

(b) the special nature of the luggage;

(c) the consignment as luggage of articles not acceptable for carriage.

Article 37

Burden of proof

1. The burden of proving that the loss, damage or delay in delivery was due to one of the causes specified in Article 36(2) shall lie on the carrier.

2. When the carrier establishes that, having regard to the circumstances of a particular case, the loss or damage could have arisen from one or more of the special risks referred to in Article 36(3), it shall be presumed that it did so arise. The person entitled shall, however, have the right to prove that the loss or damage was not attributable either wholly or in part to one of those risks.

Article 38

Successive carriers

If carriage governed by a single contract is performed by several successive carriers, each carrier, by the very act of taking over the luggage with the luggage registration voucher or the vehicle with the carriage voucher, shall become a party to the contract of carriage in respect of the forwarding of luggage or the carriage of vehicles, in accordance with the terms of the luggage registration voucher or of the carriage voucher and shall assume the obligations arising therefrom. In such a case each carrier shall be responsible for the carriage over the entire route up to delivery.

Article 39

Substitute carrier

1. Where the carrier has entrusted the performance of the carriage, in whole or in part, to a substitute carrier, whether or not in pursuance of a right under the contract of carriage to do so, the carrier shall nevertheless remain liable in respect of the entire carriage.

2. All the provisions of these Uniform Rules governing the liability of the carrier shall apply also to the liability of the substitute carrier for the carriage performed by him. Articles 48 and 52 shall apply if an action is brought against the servants or any other persons whose services the substitute carrier makes use of for the performance of the carriage.

3. Any special agreement under which the carrier assumes obligations not imposed by these Uniform Rules or waives rights conferred by these Uniform Rules shall be of no effect in respect of the substitute carrier who has not accepted it expressly and in writing. Whether or not the substitute carrier has accepted it, the carrier shall nevertheless remain bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the substitute carrier are liable, their liability shall be joint and several.

5. The aggregate amount of compensation payable by the carrier, the substitute carrier and their servants and other persons whose services they make use of for the performance of the carriage shall not exceed the limits provided for in these Uniform Rules.

6. This Article shall not prejudice rights of recourse which may exist between the carrier and the substitute carrier.

Article 40

Presumption of loss

1. The person entitled may, without being required to furnish further proof, consider an item of luggage as lost when it has not been delivered or placed at his disposal within 14 days after a request for delivery has been made in accordance with Article 22(3).

2. If an item of luggage deemed to have been lost is recovered within one year after the request for delivery, the carrier must notify the person entitled if his address is known or can be ascertained.

3. Within thirty days after receipt of a notification referred to in paragraph 2, the person entitled may require the item of luggage to be delivered to him. In that case he must pay the charges in respect of carriage of the item from the place of consignment to the place where delivery is effected and refund the compensation received less, where appropriate, any costs included therein. Nevertheless he shall retain his rights to claim compensation for delay in delivery provided for in Article 43.

4. If the item of luggage recovered has not been claimed within the period stated in paragraph 3 or if it is recovered more than one year after the request for delivery, the carrier shall dispose of it in accordance with the laws and prescriptions in force at the place where the item of luggage is situated.

Article 41

Compensation for loss

1. In case of total or partial loss of registered luggage, the carrier must pay, to the exclusion of all other damages:

(a) if the amount of the loss or damage suffered is proved, compensation equal to that amount but not exceeding 80 units of account per kilogram of gross mass short or 1 200 units of account per item of luggage;

(b) if the amount of the loss or damage suffered is not established, liquidated damages of 20 units of account per kilogram of gross mass short or 300 units of account per item of luggage.

The method of compensation, by kilogram missing or by item of luggage, shall be determined by the General Conditions of Carriage.

2. The carrier must in addition refund the charge for the carriage of luggage and the other sums paid in relation to the carriage of the lost item as well as the customs duties and excise duties already paid.

Article 42

Compensation for damage

1. In case of damage to registered luggage, the carrier must pay compensation equivalent to the loss in value of the luggage, to the exclusion of all other damages.

2. The compensation shall not exceed:

(a) if all the luggage has lost value through damage, the amount which would have been payable in case of total loss;

(b) if only part of the luggage has lost value through damage, the amount which would have been payable had that part been lost.

Article 43

Compensation for delay in delivery

1. In case of delay in delivery of registered luggage, the carrier must pay in respect of each whole period of 24 hours after delivery has been requested, but subject to a maximum of 14 days:

(a) if the person entitled proves that loss or damage has been suffered thereby, compensation equal to the amount of the loss or damage, up to a maximum of 0,80 units of account per kilogram of gross mass of the luggage or 14 units of account per item of luggage, delivered late;

(b) if the person entitled does not prove that loss or damage has been suffered thereby, liquidated damages of 0,14 units of account per kilogram of gross mass of the luggage or 2,80 units of account per item of luggage, delivered late.

The methods of compensation, by kilogram missing or by item of luggage, shall be determined by the General Conditions of Carriage.

2. In case of total loss of luggage, the compensation provided for in paragraph 1 shall not be payable in addition to that provided for in Article 41.

3. In case of partial loss of luggage, the compensation provided for in paragraph 1 shall be payable in respect of that part of the luggage which has not been lost.

4. In case of damage to luggage not resulting from delay in delivery the compensation provided for in paragraph 1 shall, where appropriate, be payable in addition to that provided for in Article 42.

5. In no case shall the total of compensation provided for in paragraph 1 together with that payable under Articles 41 and 42 exceed the compensation which would be payable in case of total loss of the luggage.

SECTION 3

Vehicles

Article 44

Compensation for delay

1. In case of delay in loading for a reason attributable to the carrier or delay in delivery of a vehicle, the carrier must, if the person entitled proves that loss or damage has been suffered thereby, pay compensation not exceeding the amount of the carriage charge.

2. If, in case of delay in loading for a reason attributable to the carrier, the person entitled elects not to proceed with the contract of carriage, the carriage charge shall be refunded to him. In addition the person entitled may, if he proves that loss or damage has been suffered as a result of the delay, claim compensation not exceeding the carriage charge.

Article 45

Compensation for loss

In case of total or partial loss of a vehicle the compensation payable to the person entitled for the loss or damage proved shall be calculated on the basis of the usual value of the vehicle. It shall not exceed 8 000 units of account. A loaded or unloaded trailer shall be considered as a separate vehicle.

Article 46

Liability in respect of other articles

1. In respect of articles left inside the vehicle or situated in boxes (e.g. luggage or ski boxes) fixed to the vehicle, the carrier shall be liable only for loss or damage caused by his fault. The total compensation payable shall not exceed 1 400 units of account.

2. So far as concerns articles stowed on the outside of the vehicle, including the boxes referred to in paragraph 1, the carrier shall be liable in respect of articles placed on the outside of the vehicle only if it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such a loss or damage or recklessly and with knowledge that such loss or damage would probably result.

Article 47

Applicable law

Subject to the provisions of this Section, the provisions of Section 2 relating to liability for luggage shall apply to vehicles.

Chapter IV

Common provisions

Article 48

Loss of right to invoke the limits of liability

The limits of liability provided for in these Uniform Rules as well as the provisions of national law, which limit the compensation to a fixed amount, shall not apply if it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

Article 49

Conversion and interest

1. Where the calculation of compensation requires the conversion of sums expressed in foreign currency, conversion shall be at the exchange rate applicable on the day and at the place of payment of the compensation.

2. The person entitled may claim interest on compensation, calculated at five per cent per annum, from the day of the claim provided for in Article 55 or, if no such claim has been made, from the day on which legal proceedings were instituted.

3. However, in the case of compensation payable pursuant to Articles 27 and 28, interest shall accrue only from the day on which the events relevant to the assessment of the amount of compensation occurred, if that day is later than that of the claim or the day when legal proceedings were instituted.

4. In the case of luggage, interest shall only be payable if the compensation exceeds 16 units of account per luggage registration voucher.

5. In the case of luggage, if the person entitled does not submit to the carrier, within a reasonable time allotted to him, the supporting documents required for the amount of the claim to be finally settled, no interest shall accrue between the expiry of the time allotted and the actual submission of such documents.

Article 50

Liability in case of nuclear incidents

The carrier shall be relieved of liability pursuant to these Uniform Rules for loss or damage caused by a nuclear incident when the operator of a nuclear installation or another person who is substituted for him is liable for the loss or damage pursuant to the laws and prescriptions of a State governing liability in the field of nuclear energy.

Article 51

Persons for whom the carrier is liable

The carrier shall be liable for his servants and other persons whose services he makes use of for the performance of the carriage, when these servants and other persons are acting within the scope of their functions. The managers of the railway infrastructure on which the carriage is performed shall be considered as persons whose services the carrier makes use of for the performance of the carriage.

Article 52

Other actions

1. In all cases where these Uniform Rules shall apply, any action in respect of liability, on whatever grounds, may be brought against the carrier only subject to the conditions and limitations laid down in these Uniform Rules.

2. The same shall apply to any action brought against the servants and other persons for whom the carrier is liable pursuant to Article 51.

TITLE V

LIABILITY OF THE PASSENGER

Article 53

Special principles of liability

The passenger shall be liable to the carrier for any loss or damage:

(a) resulting from failure to fulfil his obligations pursuant to

1. Articles 10, 14 and 20,

2. the special provisions for the carriage of vehicles, contained in the General Conditions of Carriage, or

3. the Regulation concerning the International Carriage of Dangerous Goods by Rail (RID), or

(b) caused by articles and animals that he brings with him,

unless he proves that the loss or damage was caused by circumstances that he could not avoid and the consequences of which he was unable to prevent, despite the fact that he exercised the diligence required of a conscientious passenger. This provision shall not affect the liability of the carrier pursuant to Articles 26 and 33(1).

TITLE VI

ASSERTION OF RIGHTS

Article 54

Ascertainment of partial loss or damage

1. When partial loss of, or damage to, an article carried in the charge of the carrier (luggage, vehicles) is discovered or presumed by the carrier or alleged by the person entitled, the carrier must without delay, and if possible in the presence of the person entitled, draw up a report stating, according to the nature of the loss or damage, the condition of the article and, as far as possible, the extent of the loss or damage, its cause and the time of its occurrence.

2. A copy of the report must be supplied free of charge to the person entitled.

3. Should the person entitled not accept the findings in the report, he may request that the condition of the luggage or vehicle and the cause and amount of the loss or damage be ascertained by an expert appointed either by the parties to the contract of carriage or by a court or tribunal. The procedure to be followed shall be governed by the laws and prescriptions of the State in which such ascertainment takes place.

Article 55

Claims

1. Claims relating to the liability of the carrier in case of death of, or personal injury to, passengers must be addressed in writing to the carrier against whom an action may be brought. In the case of a carriage governed by a single contract and performed by successive carriers the claims may also be addressed to the first or the last carrier as well as to the carrier having his principal place of business or the branch or agency which concluded the contract of carriage in the State where the passenger is domiciled or habitually resident.

2. Other claims relating to the contract of carriage must be addressed in writing to the carrier specified in Article 56(2) and (3).

3. Documents which the person entitled thinks fit to submit with the claim shall be produced either in the original or as copies, where appropriate, the copies duly certified if the carrier so requires. On settlement of the claim, the carrier may require the surrender of the ticket, the luggage registration voucher and the carriage voucher.

Article 56

Carriers against whom an action may be brought

1. An action based on the liability of the carrier in case of death of, or personal injury to, passengers may only be brought against the carrier who is liable pursuant to Article 26(5).

2. Subject to paragraph 4 other actions brought by passengers based on the contract of carriage may be brought only against the first carrier, the last carrier or the carrier having performed the part of carriage on which the event giving rise to the proceedings occurred.

3. When, in the case of carriage performed by successive carriers, the carrier who must deliver the luggage or the vehicle is entered with his consent on the luggage registration voucher or the carriage voucher, an action may be brought against him in accordance with paragraph 2 even if he has not received the luggage or the vehicle.

4. An action for the recovery of a sum paid pursuant to the contract of carriage may be brought against the carrier who has collected that sum or against the carrier on whose behalf it was collected.

5. An action may be brought against a carrier other than those specified in paragraphs 2 and 4 when instituted by way of counter-claim or by way of exception in proceedings relating to a principal claim based on the same contract of carriage.

6. To the extent that these Uniform Rules apply to the substitute carrier, an action may also be brought against him.

7. If the plaintiff has a choice between several carriers, his right to choose shall be extinguished as soon as he brings an action against one of them; this shall also apply if the plaintiff has a choice between one or more carriers and a substitute carrier.

Article 58

Extinction of right of action in case of death or personal injury

1. Any right of action by the person entitled based on the liability of the carrier in case of death of, or personal injury to, passengers shall be extinguished if notice of the accident to the passenger is not given by the person entitled, within 12 months of his becoming aware of the loss or damage, to one of the carriers to whom a claim may be addressed in accordance with Article 55(1). Where the person entitled gives oral notice of the accident to the carrier, the carrier shall furnish him with an acknowledgement of such oral notice.

2. Nevertheless, the right of action shall not be extinguished if

(a) within the period provided for in paragraph 1 the person entitled has addressed a claim to one of the carriers designated in Article 55(1);

(b) within the period provided for in paragraph 1 the carrier who is liable has learned of the accident to the passenger in some other way;

(c) notice of the accident has not been given, or has been given late, as a result of circumstances not attributable to the person entitled;

(d) the person entitled proves that the accident was caused by fault on the part of the carrier.

Article 59

Extinction of right of action arising from carriage of luggage

1. Acceptance of the luggage by the person entitled shall extinguish all rights of action against the carrier arising from the contract of carriage in case of partial loss, damage or delay in delivery.

2. Nevertheless, the right of action shall not be extinguished:

(a) in case of partial loss or damage, if

   1. the loss or damage was ascertained in accordance with Article 54 before the acceptance of the luggage by the person entitled,

   2. the ascertainment which should have been carried out in accordance with Article 54 was omitted solely through the fault of the carrier;

(b) in case of loss or damage which is not apparent whose existence is ascertained after acceptance of the luggage by the person entitled, if he

   1. asks for ascertainment in accordance with Article 54 immediately after discovery of the loss or damage and not later than three days after the acceptance of the luggage, and

   2. in addition, proves that the loss or damage occurred between the time of taking over by the carrier and the time of delivery;

(c) in case of delay in delivery, if the person entitled has, within twenty-one days, asserted his rights against one of the carriers specified in Article 56(3);

(d) if the person entitled proves that the loss or damage was caused by fault on the part of the carrier.

Article 60

Limitation of actions

1. The period of limitation of actions for damages based on the liability of the carrier in case of death of, or personal injury to, passengers shall be:

(a) in the case of a passenger, three years from the day after the accident;

(b) in the case of other persons entitled, three years from the day after the death of the passenger, subject to a maximum of five years from the day after the accident.

2. The period of limitation for other actions arising from the contract of carriage shall be one year. Nevertheless, the period of limitation shall be two years in the case of an action for loss or damage resulting from an act or omission committed either with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

3. The period of limitation provided for in paragraph 2 shall run for actions:

(a) for compensation for total loss, from the fourteenth day after the expiry of the period of time provided for in Article 22(3);

(b) for compensation for partial loss, damage or delay in delivery, from the day when delivery took place;

(c) in all other cases involving the carriage of passengers, from the day of expiry of validity of the ticket.

The day indicated for the commencement of the period of limitation shall not be included in the period.

4. […]

5. […]

6. Otherwise, the suspension and interruption of periods of limitation shall be governed by national law.

TITLE VII

RELATIONS BETWEEN CARRIERS

Article 61

Apportionment of the carriage charge

1. Any carrier who has collected or ought to have collected a carriage charge must pay to the carriers concerned their respective shares of such a charge. The methods of payment shall be fixed by agreement between the carriers.

2. Article 6(3), Article 16(3) and Article 25 shall also apply to the relations between successive carriers.

Article 62

Right of recourse

1. A carrier who has paid compensation pursuant to these Uniform Rules shall have a right of recourse against the carriers who have taken part in the carriage in accordance with the following provisions:

(a) the carrier who has caused the loss or damage shall be solely liable for it;

(b) when the loss or damage has been caused by several carriers, each shall be liable for the loss or damage he has caused; if such distinction is impossible, the compensation shall be apportioned between them in accordance with letter c);

(c) if it cannot be proved which of the carriers has caused the loss or damage, the compensation shall be apportioned between all the carriers who have taken part in the carriage, except those who prove that the loss or damage was not caused by them; such apportionment shall be in proportion to their respective shares of the carriage charge.

2. In the case of insolvency of any one of these carriers, the unpaid share due from him shall be apportioned among all the other carriers who have taken part in the carriage, in proportion to their respective shares of the carriage charge.

Article 63

Procedure for recourse

1. The validity of the payment made by the carrier exercising a right of recourse pursuant to Article 62 may not be disputed by the carrier against whom the right to recourse is exercised, when compensation has been determined by a court or tribunal and when the latter carrier, duly served with notice of the proceedings, has been afforded an opportunity to intervene in the proceedings. The court or tribunal seized of the principal action shall determine what time shall be allowed for such notification of the proceedings and for intervention in the proceedings.

2. A carrier exercising his right of recourse must present his claim in one and the same proceedings against all the carriers with whom he has not reached a settlement, failing which he shall lose his right of recourse in the case of those against whom he has not taken proceedings.

3. The court or tribunal shall give its decision in one and the same judgment on all recourse claims brought before it.

4. The carrier wishing to enforce his right of recourse may bring his action in the courts or tribunals of the State on the territory of which one of the carriers participating in the carriage has his principal place of business, or the branch or agency which concluded the contract of carriage.

5. When the action must be brought against several carriers, the plaintiff carrier shall be entitled to choose the court or tribunal in which he will bring the proceedings from among those having competence pursuant to paragraph 4.

6. Recourse proceedings may not be joined with proceedings for compensation taken by the person entitled under the contract of carriage.

Article 64

Agreements concerning recourse

The carriers may conclude agreements which derogate from Articles 61 and 62.

ANNEX II

MINIMUM INFORMATION TO BE PROVIDED BY RAILWAY UNDERTAKINGS AND/OR BY TICKET VENDORS

Part I: Pre-journey information

General conditions applicable to the contract

Time schedules and conditions for the fastest trip

Time schedules and conditions for the lowest fares

Accessibility, access conditions and availability on board of facilities for disabled persons and persons with reduced mobility

Accessibility and access conditions for bicycles

Availability of seats in smoking and non-smoking, first and second class as well as couchettes and sleeping carriages

Any activities likely to disrupt or delay services

Availability of on-board services

Procedures for reclaiming lost luggage

Procedures for the submission of complaints.

Part II: Information during the journey

On-board services

Next station

Delays

Main connecting services

Security and safety issues.

ANNEX III

MINIMUM SERVICE QUALITY STANDARDS

Information and tickets

Punctuality of services, and general principles to cope with disruptions to services

Cancellations of services

Cleanliness of rolling stock and station facilities (air quality in carriages, hygiene of sanitary facilities, etc.)

Customer satisfaction survey

Complaint handling, refunds and compensation for non-compliance with service quality standards

Assistance provided to disabled persons and persons with reduced mobility.

I

(Acts whose publication is obligatory)

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Having consulted of the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([2]),

Whereas:

(1) The single market for air services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for air travel comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and non-discrimination. This applies to air travel as to other areas of life.

(2) Disabled persons and persons with reduced mobility should therefore be accepted for carriage and not refused transport on the grounds of their disability or lack of mobility, except for reasons which are justified on the grounds of safety and prescribed by law. Before accepting reservations from disabled persons or persons with reduced mobility, air carriers, their agents and tour operators should make all reasonable efforts to verify whether there is a reason which is justified on the grounds of safety and which would prevent such persons being accommodated on the flights concerned.

(3) This Regulation should not affect other rights of passengers established by Community legislation and notably Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ([3]) and 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 air passengers in the event of denied boarding and of cancellation or long delay of flights ([4]) **.** Where the same event would give rise to the same right of reimbursement or rebooking under either of those legislative acts as well as under this Regulation, the person so entitled should be allowed to exercise that right once only, at his or her discretion.

(4) In order to give disabled persons and persons with reduced mobility opportunities for air travel comparable to those of other citizens, assistance to meet their particular needs should be provided at the airport as well as on board aircraft, by employing the necessary staff and equipment. In the interests of social inclusion, the persons concerned should receive this assistance without additional charge.

(5) Assistance given at airports situated in the territory of a Member State to which the Treaty applies should, among other things, enable disabled persons and persons with reduced mobility to proceed from a designated point of arrival at an airport to an aircraft and from the aircraft to a designated point of departure from the airport, including embarking and disembarking. These points should be designated at least at the main entrances to terminal buildings, in areas with check-in counters, in train, light rail, metro and bus stations, at taxi ranks and other drop-off points, and in airport car parks. The assistance should be organised so as to avoid interruption and delay, while ensuring high and equivalent standards throughout the Community and making best use of resources, whatever airport or air carrier is involved.

([1]) OJ C 24, 31.1.2006, p. 12.

([2]) Opinion of the European Parliament of 15 December 2005 (not yet published in the Official Journal), and Council Decision of 9 June 2006.

([3]) OJ L 158, 23.6.1990, p. 59.

([4]) OJ L 46, 17.2.2004, p. 1.

(6) To achieve these aims, ensuring high quality assistance at airports should be the responsibility of a central body. As managing bodies of airports play a central role in providing services throughout their airports, they should be given this overall responsibility.

(7) Managing bodies of airports may provide the assistance to disabled persons and persons with reduced mobility themselves. Alternatively, in view of the positive role played in the past by certain operators and air carriers, managing bodies may contract with third parties for the supply of this assistance, without prejudice to the application of relevant rules of Community law, including those on public procurement.

(8) Assistance should be financed in such a way as to spread the burden equitably among all passengers using an airport and to avoid disincentives to the carriage of disabled persons and persons with reduced mobility. A charge levied on each air carrier using an airport, proportionate to the number of passengers it carries to or from the airport, appears to be the most effective way of funding.

(9) With a view to ensuring, in particular, that the charges levied on an air carrier are commensurate with the assistance provided to disabled persons and persons with reduced mobility, and that these charges do not serve to finance activities of the managing body other than those relating to the provision of such assistance, the charges should be adopted and applied in full transparency. Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports ([1]) and in particular the provisions on separation of accounts, should therefore apply where this does not conflict with this Regulation.

(10) In organising the provision of assistance to disabled persons and persons with reduced mobility, and the training of their personnel, airports and air carriers should have regard to document 30 of the European Civil Aviation Conference (ECAC), Part I, Section 5 and its associated annexes, in particular the Code of Good Conduct in Ground Handling for Persons with Reduced Mobility as set out in Annex J thereto at the time of adoption of this Regulation.

(11) In deciding on the design of new airports and terminals, and as part of major refurbishments, managing bodies of airports should, where possible, take into account the needs of disabled persons and persons with reduced mobility. Similarly, air carriers should, where possible, take such needs into account when deciding on the design of new and newly refurbished aircraft.

([1]) OJ L 272, 25.10.1996, p. 36. Directive as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

(12) 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 on the free movement of such data ([2]) should be strictly enforced in order to guarantee respect for the privacy of disabled persons and persons with reduced mobility, and ensure that the information requested serves merely to fulfil the assistance obligations laid down in this Regulation and is not used against passengers seeking the service in question.

(13) All essential information provided to air passengers should be provided in alternative formats accessible to disabled persons and persons with reduced mobility, and should be in at least the same languages as the information made available to other passengers.

(14) Where wheelchairs or other mobility equipment or assistive devices are lost or damaged during handling at the airport or during transport on board aircraft, the passenger to whom the equipment belongs should be compensated, in accordance with rules of international, Community and national law.

(15) Member States should supervise and ensure compliance with this Regulation and designate an appropriate body to carry out enforcement tasks. This supervision does not affect the rights of disabled persons and persons with reduced mobility to seek legal redress from courts under national law.

(16) It is important that a disabled person or person with reduced mobility who considers that this Regulation has been infringed be able to bring the matter to the attention of the managing body of the airport or to the attention of the air carrier concerned, as the case may be. If the disabled person or person with reduced mobility cannot obtain satisfaction in such way, he or she should be free to make a complaint to the body or bodies designated to that end by the relevant Member State.

(17) Complaints concerning assistance given at an airport should be addressed to the body or bodies designated for the enforcement of this Regulation by the Member State where the airport is situated. Complaints concerning assistance given by an air carrier should be addressed to the body or bodies designated for the enforcement of this Regulation by the Member State which has issued the operating licence to the air carrier.

([2]) OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003.

(18) Member States should lay down penalties applicable to infringements of this Regulation and ensure that those penalties are applied. The penalties, which could include ordering the payment of compensation to the person concerned, should be effective, proportionate and dissuasive.

(19) Since the objectives of this Regulation, namely to ensure high and equivalent levels of protection and assistance throughout the Member States and to ensure that economic agents operate under harmonised conditions in a single market, cannot sufficiently be achieved by the Member States and can therefore, by reason of the scale or effects of the action, 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 Regulation does not go beyond what is necessary in order to achieve those objectives.

(20) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(21) Arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland in a joint declaration by the Ministers of Foreign Affairs of the two countries. Such arrangements have yet to enter into operation,

HAVE ADOPTED THIS REGULATION:

Article 1

Purpose and scope

1. This Regulation establishes rules for the protection of and provision of assistance to disabled persons and persons with reduced mobility travelling by air, both to protect them against discrimination and to ensure that they receive assistance.

2. The provisions of this Regulation shall apply to disabled persons and persons with reduced mobility, using or intending to use commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated in the territory of a Member State to which the Treaty applies.

3. Articles 3, 4 and 10 shall also apply to passengers departing from an airport situated in a third country to an airport situated in the territory of a Member State to which the Treaty applies, if the operating carrier is a Community air carrier.

4. This Regulation shall not affect the rights of passengers established by Directive 90/314/EEC and under Regulation (EC) No 261/2004.

5. In so far as the provisions of this Regulation conflict with those of Directive 96/67/EC, this Regulation shall prevail.

6. Application of this Regulation to Gibraltar airport is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland with regard to the dispute over sovereignty over the territory in which the airport is situated.

7. Application of this Regulation to Gibraltar airport shall be suspended until the arrangements included in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland on 2 December 1987 enter into operation. The Governments of Spain and of the United Kingdom shall inform the Council of the date of entry into operation.

Article 2

Definitions

For the purposes of this Regulation the following definitions shall apply:

(a) 'disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers;

(b) 'air carrier' means an air transport undertaking with a valid operating licence;

(c) 'operating air carrier' means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;

(d) 'Community air carrier' means an air carrier with a valid operating licence granted by a Member State in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers [1];

(e) 'tour operator' means, with the exception of an air carrier, an organiser or retailer within the meaning of Article 2(2) and (3) of Directive 90/314/EEC;

(f) 'managing body of the airport' or 'managing body' means a body which notably has as its objective under national legislation the administration and management of airport infrastructures, and the coordination and control of the activities of the various operators present in an airport or airport system;

[1] OJ L 240, 24.8.1992, p. 1.

(g) 'airport user' means any natural or legal person responsible for the carriage of passengers by air from or to the airport in question;

(h) 'Airport Users Committee' means a committee of representatives of airport users or organisations representing them;

(i) 'reservation' means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;

(j) 'airport' means any area of land specially adapted for the landing, taking-off and manoeuvres of aircraft, including ancillary installations which these operations may involve for the requirements of aircraft traffic and services including installations needed to assist commercial air services;

(k) 'airport car park' means a car park, within the airport boundaries or under the direct control of the managing body of an airport, which directly serves the passengers using that airport;

(l) 'commercial passenger air service' means a passenger air transport service operated by an air carrier through a scheduled or non-scheduled flight offered to the general public for valuable consideration, whether on its own or as part of a package.

Article 3

Prevention of refusal of carriage

An air carrier or its agent or a tour operator shall not refuse, on the grounds of disability or of reduced mobility:

(a) to accept a reservation for a flight departing from or arriving at an airport to which this Regulation applies;

(b) to embark a disabled person or a person with reduced mobility at such an airport, provided that the person concerned has a valid ticket and reservation.

Article 4

Derogations, special conditions and information

1. Notwithstanding the provisions of Article 3, an air carrier or its agent or a tour operator may refuse, on the grounds of disability or of reduced mobility, to accept a reservation from or to embark a disabled person or a person with reduced mobility:

(a) in order to meet applicable safety requirements established by international, Community or national law or in order to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned;

(b) if the size of the aircraft or its doors makes the embarkation or carriage of that disabled person or person with reduced mobility physically impossible.

In the event of refusal to accept a reservation on the grounds referred to under points (a) or (b) of the first subparagraph, the air carrier, its agent or the tour operator shall make reasonable efforts to propose an acceptable alternative to the person in question.

A disabled person or a person with reduced mobility who has been denied embarkation on the grounds of his or her disability or reduced mobility and any person accompanying this person pursuant to paragraph 2 of this Article shall be offered the right to reimbursement or re-routing as provided for in Article 8 of Regulation (EC) No 261/2004. The right to the option of a return flight or re-routing shall be conditional upon all safety requirements being met.

2. Under the same conditions referred to in paragraph 1, first subparagraph, point (a), an air carrier or its agent or a tour operator may require that a disabled person or person with reduced mobility be accompanied by another person who is capable of providing the assistance required by that person.

3. An air carrier or its agent shall make publicly available, in accessible formats and in at least the same languages as the information made available to other passengers, the safety rules that it applies to the carriage of disabled persons and persons with reduced mobility, as well as any restrictions on their carriage or on that of mobility equipment due to the size of aircraft. A tour operator shall make such safety rules and restrictions available for flights included in package travel, package holidays and package tours which it organises, sells or offers for sale.

4. When an air carrier or its agent or a tour operator exercises a derogation under paragraphs 1 or 2, it shall immediately inform the disabled person or person with reduced mobility of the reasons therefor. On request, an air carrier, its agent or a tour operator shall communicate these reasons in writing to the disabled person or person with reduced mobility, within five working days of the request.

Article 5

Designation of points of arrival and departure

1. In cooperation with airport users, through the Airport Users Committee where one exists, and relevant organisations representing disabled persons and persons with reduced mobility, the managing body of an airport shall, taking account of local conditions, designate points of arrival and departure within the airport boundary or at a point under the direct control of the managing body, both inside and outside terminal

buildings, at which disabled persons or persons with reduced mobility can, with ease, announce their arrival at the airport and request assistance.

2. The points of arrival and departure referred to in paragraph 1, shall be clearly signed and shall offer basic information about the airport, in accessible formats.

Article 6

Transmission of information

1. Air carriers, their agents and tour operators shall take all measures necessary for the receipt, at all their points of sale in the territory of the Member States to which the Treaty applies, including sale by telephone and via the Internet, of notifications of the need for assistance made by disabled persons or persons with reduced mobility.

2. When an air carrier or its agent or a tour operator receives a notification of the need for assistance at least 48 hours before the published departure time for the flight, it shall transmit the information concerned at least 36 hours before the published departure time for the flight:

(a) to the managing bodies of the airports of departure, arrival and transit, and

(b) to the operating air carrier, if a reservation was not made with that carrier, unless the identity of the operating air carrier is not known at the time of notification, in which case the information shall be transmitted as soon as practicable.

3. In all cases other than those mentioned in paragraph 2, the air carrier or its agent or tour operator shall transmit the information as soon as possible.

4. As soon as possible after the departure of the flight, an operating air carrier shall inform the managing body of the airport of destination, if situated in the territory of a Member State to which the Treaty applies, of the number of disabled persons and persons with reduced mobility on that flight requiring assistance specified in Annex I and of the nature of that assistance.

Article 7

Right to assistance at airports

1. When a disabled person or person with reduced mobility arrives at an airport for travel by air, the managing body of the airport shall be responsible for ensuring the provision of the assistance specified in Annex I in such a way that the person is able to take the flight for which he or she holds a reservation, provided that the notification of the person's particular needs for such assistance has been made to the air carrier or its agent or the tour operator concerned at least 48 hours before the published time of departure of the flight. This notification shall also cover a return flight, if the outward flight and the return flight have been contracted with the same air carrier.

2. Where use of a recognised assistance dog is required, this shall be accommodated provided that notification of the same is made to the air carrier or its agent or the tour operator in accordance with applicable national rules covering the carriage of assistance dogs on board aircraft, where such rules exist.

3. If no notification is made in accordance with paragraph 1, the managing body shall make all reasonable efforts to provide the assistance specified in Annex I in such a way that the person concerned is able to take the flight for which he or she holds a reservation.

4. The provisions of paragraph 1 shall apply on condition that:

(a) the person presents himself or herself for check-in:

(i) at the time stipulated in advance and in writing (including by electronic means) by the air carrier or its agent or the tour operator, or

(ii) if no time is stipulated, not later than one hour before the published departure time, or

(b) the person arrives at a point within the airport boundary designated in accordance with Article 5:

(i) at the time stipulated in advance and in writing (including by electronic means) by the air carrier or its agent or the tour operator, or

(ii) if no time is stipulated, not later than two hours before the published departure time.

5. When a disabled person or person with reduced mobility transits through an airport to which this Regulation applies, or is transferred by an air carrier or a tour operator from the flight for which he or she holds a reservation to another flight, the managing body shall be responsible for ensuring the provision of the assistance specified in Annex I in such a way that the person is able to take the flight for which he or she holds a reservation.

6. On the arrival by air of a disabled person or person with reduced mobility at an airport to which this Regulation applies, the managing body of the airport shall be responsible for ensuring the provision of the assistance specified in Annex I in such a way that the person is able to reach his or her point of departure from the airport as referred to in Article 5.

7. The assistance provided shall, as far as possible, be appropriate to the particular needs of the individual passenger.

Article 8

Responsibility for assistance at airports

1. The managing body of an airport shall be responsible for ensuring the provision of the assistance specified in Annex I without additional charge to disabled persons and persons with reduced mobility.

2. The managing body may provide such assistance itself. Alternatively, in keeping with its responsibility, and subject always to compliance with the quality standards referred to in Article 9(1), the managing body may contract with one or more other parties for the supply of the assistance. In cooperation with airport users, through the Airport Users Committee where one exists, the managing body may enter into such a contract or contracts on its own initiative or on request, including from an air carrier, and taking into account the existing services at the airport concerned. In the event that it refuses such a request, the managing body shall provide written justification.

3. The managing body of an airport may, on a non-discriminatory basis, levy a specific charge on airport users for the purpose of funding this assistance.

4. This specific charge shall be reasonable, cost-related, transparent and established by the managing body of the airport in cooperation with airport users, through the Airport Users Committee where one exists or any other appropriate entity. It shall be shared among airport users in proportion to the total number of all passengers that each carries to and from that airport.

5. The managing body of an airport shall separate the accounts of its activities relating to the assistance provided to disabled persons and persons with reduced mobility from the accounts of its other activities, in accordance with current commercial practice.

6. The managing body of an airport shall make available to airport users, through the Airport Users Committee where one exists or any other appropriate entity, as well as to the enforcement body or bodies referred to in Article 14, an audited annual overview of charges received and expenses made in respect of the assistance provided to disabled persons and persons with reduced mobility.

Article 9

Quality standards for assistance

1. With the exception of airports whose annual traffic is less than 150 000 commercial passenger movements, the managing body shall set quality standards for the assistance specified in Annex I and determine resource requirements for meeting them, in cooperation with airport users, through the Airport Users Committee where one exists, and organisations representing disabled passengers and passengers with reduced mobility.

2. In the setting of such standards, full account shall be taken of internationally recognised policies and codes of conduct concerning facilitation of the transport of disabled persons or persons with reduced mobility, notably the ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility.

3. The managing body of an airport shall publish its quality standards.

4. An air carrier and the managing body of an airport may agree that, for the passengers whom that air carrier transports to and from the airport, the managing body shall provide assistance of a higher standard than the standards referred to in paragraph 1 or provide services additional to those specified in Annex I.

5. For the purpose of funding either of these, the managing body may levy a charge on the air carrier additional to that referred to in Article 8(3), which shall be transparent, cost-related and established after consultation of the air carrier concerned.

Article 10

Assistance by air carriers

An air carrier shall provide the assistance specified in Annex II without additional charge to a disabled person or person with reduced mobility departing from, arriving at or transiting through an airport to which this Regulation applies provided that the person in question fulfils the conditions set out in Article 7(1), (2) and (4).

Article 11

Training

Air carriers and airport managing bodies shall:

(a) ensure that all their personnel, including those employed by any sub-contractor, providing direct assistance to disabled persons and persons with reduced mobility have knowledge of how to meet the needs of persons having various disabilities or mobility impairments;

(b) provide disability-equality and disability-awareness training to all their personnel working at the airport who deal directly with the travelling public;

(c) ensure that, upon recruitment, all new employees attend disability-related training and that personnel receive refresher training courses when appropriate.

Article 12

Compensation for lost or damaged wheelchairs, other mobility equipment and assistive devices

Where wheelchairs or other mobility equipment or assistive devices are lost or damaged whilst being handled at the airport or

transported on board aircraft, the passenger to whom the equipment belongs shall be compensated, in accordance with rules of international, Community and national law.

Article 13

Exclusion of waiver

Obligations towards disabled persons and persons with reduced mobility pursuant to this Regulation shall not be limited or waived.

Article 14

Enforcement body and its tasks

1. Each Member State shall designate a body or bodies responsible for the enforcement of this Regulation as regards flights departing from or arriving at airports situated in its territory. Where appropriate, this body or bodies shall take the measures necessary to ensure that the rights of disabled persons and persons with reduced mobility are respected, including compliance with the quality standards referred to in Article 9(1). The Member States shall inform the Commission of the body or bodies designated.

2. Member States shall, where appropriate, provide that the enforcement body or bodies designated under paragraph 1 shall also ensure the satisfactory implementation of Article 8, including as regards the provisions on charges with a view to avoiding unfair competition. They may also designate a specific body to that effect.

Article 15

Complaint procedure

1. A disabled person or person with reduced mobility who considers that this Regulation has been infringed may bring the matter to the attention of the managing body of the airport or to the attention of the air carrier concerned, as the case may be.

2. If the disabled person or person with reduced mobility cannot obtain satisfaction in such way, complaints may be made to any body or bodies designated under Article 14(1), or to any other competent body designated by a Member State, about an alleged infringement of this Regulation.

3. A body in one Member State which receives a complaint concerning a matter that comes under the responsibility of a designated body of another Member State shall forward the complaint to the body of that other Member State.

4. The Member States shall take measures to inform disabled persons and persons with reduced mobility of their rights under this Regulation and of the possibility of complaint to this designated body or bodies.

Article 16

Penalties

The Member States shall lay down rules on penalties applicable to infringements of this Regulation and shall take all the measures necessary to ensure that those rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission and shall notify it without delay of any subsequent amendment affecting them.

Article 17

Report

The Commission shall report to the European Parliament and the Council by 1 January 2010 at the latest on the operation and the effects of this Regulation. The report shall be accompanied where necessary by legislative proposals implementing in further detail the provisions of this Regulation, or revising it.

Article 18

Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

It shall apply with effect from 26 July 2008, except Articles 3 and 4, which shall apply with effect from 26 July 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 5 July 2006.

For the European Parliament	*The President*
The President	*For the Council*
J. BORRELL FONTELLES	P. LEHTOMÄKI

ANNEX I

Assistance under the responsibility of the managing bodies of airports

Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to:

— communicate their arrival at an airport and their request for assistance at the designated points inside and outside terminal buildings mentioned in Article 5,

— move from a designated point to the check-in counter,

— check-in and register baggage,

— proceed from the check-in counter to the aircraft, with completion of emigration, customs and security procedures,

— board the aircraft, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

— proceed from the aircraft door to their seats,

— store and retrieve baggage on the aircraft,

— proceed from their seats to the aircraft door,

— disembark from the aircraft, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

— proceed from the aircraft to the baggage hall and retrieve baggage, with completion of immigration and customs procedures,

— proceed from the baggage hall to a designated point,

— reach connecting flights when in transit, with assistance on the air and land sides and within and between terminals as needed,

— move to the toilet facilities if required.

Where a disabled person or person with reduced mobility is assisted by an accompanying person, this person must, if requested, be allowed to provide the necessary assistance in the airport and with embarking and disembarking.

Ground handling of all necessary mobility equipment, including equipment such as electric wheelchairs subject to advance warning of 48 hours and to possible limitations of space on board the aircraft, and subject to the application of relevant legislation concerning dangerous goods.

Temporary replacement of damaged or lost mobility equipment, albeit not necessarily on a like-for-like basis.

Ground handling of recognised assistance dogs, when relevant.

Communication of information needed to take flights in accessible formats.

ANNEX II

Assistance by air carriers

Carriage of recognised assistance dogs in the cabin, subject to national regulations.

In addition to medical equipment, transport of up to two pieces of mobility equipment per disabled person or person with reduced mobility, including electric wheelchairs (subject to advance warning of 48 hours and to possible limitations of space on board the aircraft, and subject to the application of relevant legislation concerning dangerous goods.

Communication of essential information concerning a flight in accessible formats.

The making of all reasonable efforts to arrange seating to meet the needs of individuals with disability or reduced mobility on request and subject to safety requirements and availability.

Assistance in moving to toilet facilities if required.

Where a disabled person or person with reduced mobility is assisted by an accompanying person, the air carrier will make all reasonable efforts to give such person a seat next to the disabled person or person with reduced mobility.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7.8.2008
COM(2008) 510 final

COMMUNICATION FROM THE COMMISSION

Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air.

Text with EEA-relevance

COMMUNICATION FROM THE COMMISSION

Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air.

Text with EEA-relevance

1. BACKGROUND

On 5 July 2006, the Council and the European Parliament adopted the Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air[1] (hereinafter referred to as "the Regulation"). The overall objective of the Regulation is to ensure that disabled passengers and persons with reduced mobility (hereinafter referred to as PRM) are not discriminated against when travelling by air. On 30 November 2005, in the course of the political negotiation process on the Commission proposal, and in relation to the future Article 12 concerning 'Compensation for lost or damaged wheelchairs, other mobility equipment and assistive devices', the Commission presented an statement for the minutes[2], in which the Commission committed to launch an study and to report on it, regarding the possibility of enhancing the existing rights under Community, national or international law of air passengers whose wheelchairs or other mobility equipment are destroyed, damaged or lost during handling at an airport or during transport on-board aircraft.

The Commission published a contract notice[3] for a *"Study on the compensation thresholds for damaged or lost equipment and devices belonging to air passengers with reduced mobility"* (hereinafter referred as to "the Study"), which is available on the Commission website. The purpose of this Communication is to report on the outcome of the study and the possibility to enhance existing rights.

2. THE SCOPE OF THE PROBLEM.

"Damaged or lost luggage is annoying. Damaged or lost mobility equipment can destroy the whole journey and complicate life considerably for a long time. It is a loss of independence and dignity[4]."

A significant proportion of the current EU population has mobility problems which include needing a wheelchair other mobility equipment or assistive devices (hereinafter referred to as "mobility equipment"). The proportion of PRM within the population is likely to increase as the EU population ages.

The Commission does not wish to reproduce in this Communication the data already provided in the study, which should be read as a complement to this Communication. Nevertheless, on

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1 OJ L 204/1 of 26.07.2006

2 Council working document nº 15206/05 (COD 2005/007).

3 Contract notice 2006/S 111-118193 of 14.06.2006

4 From a PRM association's answer to the consultants.

the basis of those data, the Commission notes that there are clear indications that passengers with reduced mobility who require mobility equipment, are travelling by air less than the general population. It is quite likely that fear of loss, damage or destruction of their mobility equipment is a contributory factor in deterring them from travelling and, therefore, preventing their integration in society. This fear is based on several objective reasons:

(1) The loss or damage of wheelchairs or other mobility equipment takes away the independence of the PRM and affects every aspect of their daily lives until the matter is properly resolved.

(2) PRM face risks to their health and safety if their mobility equipment is lost, damaged or destroyed, as replacements are not always provided and, even when provided, replacements are not always suitable for the person's needs.

(3) The time taken by airlines or airports to resolve practical problems presented by the damage or loss of mobility equipment is inappropriate given the urgency of the need.

(4) The existing procedures and the average training level of the staff of most airlines and airports regarding how to act when confronted with a loss or damage of mobility equipment are deficient.

(5) The financial implications of the loss, damage or destruction of mobility equipment present an additional risk for PRM when travelling by air in comparison with other passengers.

(6) The provision of compensation for damaged, destroyed or lost mobility equipment varies from air carrier to air carrier, and for airports

3. OUTCOME OF THE STUDY: THE CHALLENGES

The actual number of accidents per year and per company involving incidents with mobility equipment is very low. The total number of relevant complaints is somewhere in the range between 600 and 1000 cases per year, compared to 706 million air passengers carried per year in the European Union[5]. That means a ratio between less than one and one and a half complaints as a maximum in a million of passengers.

The study analyses both the experience in the USA and the situation in Europe. The two analysis provide a reasonable basis for believing that this estimate is close to the actual number. The study has also concluded that there are a number of outstanding issues regarding both the quantitative aspects and the qualitative aspects of the problem worth to be highlighted:

3.1. Quantitative objective: to reduce the number of incidents

The number of events of destroyed, damages or lost mobility equipment of PRM is linked to the correct handling and stowage of mobility equipment onboard aircraft and storage at airports is a fundamental part of the conditions of transport of PRM in order to meet their needs, and a skill for which staff must be properly trained. The objective should remain to allow the PRM to use her/his personal device as long as possible. Ideally, the mobility

[5] 705.8 million air passengers carried in the EU in 2005.

equipment should be handed over by the PRM and back to him at the door of the aircraft in all those cases where the PRM cannot use their own mobility equipment onboard. Other procedures may be set up when required for safety, security or practical reasons.

The attachment to the 2001 Airline Passenger Service Commitment[6], signed by the majority of European national carriers (hereinafter referred as to the Airline Commitment) states that signatory airlines must take all reasonable steps to avoid loss or damage to mobility equipment or other disability assistive devices; they will develop their own individual service plans incorporating the Airline Commitment*;* They will establish staff training programmes and introduce changes to their computer systems to implement the Airline Commitment; and that *"PRM must be enabled to remain independent to the greatest possible extent"*.

The Airport Voluntary Commitment on Air Passenger Service (hereinafter referred to as "the Airport Commitment"), developed by European airports under the auspices of Airports Council International Europe[7] states that *"Staff will be given appropriate training in understanding and meeting the needs of PRMs"*. The aim for the signatories was to develop their own individual service plans on the basis of the Commitment and to incorporate the appropriate provisions of the European Civil Aviation Conference (ECAC) Document 30 (Section 5)[8], and the International Civil Aviation Organisation[9] (ICAO Annex 9).

Point 5.2.3.2 of ECAC document 30[10] states that *"Member States should promote the distribution of a booklet to airline and airport operator personnel on procedures and facilities to be provided to assist PRM, which would contain all the necessary information concerning the conditions of transport of such persons and the assistance to be provided to them, as well as the steps to be taken by them. They should ensure that airlines include in their manuals all procedures concerning PRM"*. Point 5.5 of the same document says "*Member States should ensure the provision at airports of a ground handling service for PRMs comprising: staff trained and qualified to meet their needs (…) the appropriate equipment to assist them."*

However, those voluntary agreements are not always properly honoured. Firstly, few companies and airports in the EU have actually developed their own plans or customer policies to implement those voluntary agreements. Secondly, those that have done so have adopted such different plans or policies that they result in widely differing levels of protection for PRM. Thirdly, those plans and customer policies are not always published, which makes it very difficult for PRM to know what to expect in advance.

In the context of the Airport Commitment, the majority of airports spontaneously provide assistance to passengers with reduced mobility. However, the procedures whereby the PRM is allowed to get to the door of the aircraft in their own wheelchair, or receive their own wheelchair on arrival, vary from airport to airport

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6 The Airline Passenger Service Commitment: see article 8 and attachment

7 ACI Europe (2001), Airport Voluntary Commitment on Air Passenger Service and its Special Protocol to Meet the Needs of People with Reduced Mobility.

8 ECAC Policy Statement in the Field of Civil Aviation Facilitation (ECAC.CEAC DOC No. 30 (PART I) 10th Edition/December 2006

9 Standards and Recommended Practices of the International Civil Aviation Organization (Annex 9 of the Chicago Convention).

10 See footnote 8.

3.2. Qualitative objective: to minimise the consequences of an incident.

3.2.1. The current lack of a common procedure leading to immediate solutions on the spot.

The extent of damage sustained to mobility equipment can have serious implications not just because of its cost. The issue is also about both the time during which the PRM will be unable to use their equipment, and the long period until compensation is finally paid to them. The difficulties of establishing where to send complaints about damage and appeals for assistance on arrival, in what is often an unfamiliar airport, adds to the time and stress involved in finding even a temporary solution to the practical problems of everyday life when without mobility equipment.

There are currently no international, Community or national legislation on offering immediate assistance to PRM whose mobility equipment has been lost, damaged or destroyed, or on how this immediate assistance should be provided, or what are the essential aspects of such assistance.

The Airline Commitment, does not give details of how related claims for compensation are to be dealt with or what action should be taken on the spot when a wheelchair or other mobility equipment is damaged or lost.

The majority of airports do not have a policy regarding claims for damaged or destroyed wheelchairs or mobility equipment. The provision of compensation and the procedures by which airports provide a replacement vary from airport to airport despite the existence of the Airport Commitment[11]. This may result in gaps and inconsistencies regarding replacement and compensation for PRM whose equipment was destroyed or damaged during the time when the airport is in charge. This certainly results in uncertainty and confusion for PRM, who never know how to act or to whom they should turn in the event of an accident involving their mobility equipment.

3.2.2. The difference between the nature and the limits of the liability of airlines and the liability of airports.

Traditionally there has been a difference between the nature and the limits of the liability of the airlines and the airports. This difference may cause confusion among stakeholders.

3.2.2.1. Transport of equipment on board an aircraft (airline liability)

Currently, assistance to PRM is provided by air carriers in the framework of the ground-handling. Air carriers can provide the assistance either directly, through a third company or through the airport when it acts as a service provider for the air carrier. Airline liability is currently limited by a miscellany of international conventions[12], Community Regulations

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11 See footnote 6.

12 Those conventions are: 1 -The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 10/1929, abbreviated: the Warsaw Convention (1929). 2 -The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929; signed in the Hague on 28/09/1955, abbreviated: The Hague Protocol (1955). 3 -The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28/05/1999, abbreviated: the Montreal Convention (1999).

implementing those international conventions within the EU[13], and legal or administrative procedures that other countries impose on EU companies that wish to enter their national markets. Companies may waive their limited liability and agree to compensate the full value of the lost mobility equipment or of its repair.

All these legal texts operate according to the same mechanism: presumption of liability of the carrier in case of checked baggage[14]. This means that the victim will not have to prove that the carrier was at fault in order for the carrier's liability to be incurred. The only thing the PRM needs to prove is the fact that the damage or loss occurred while the equipment was in the care of the carrier (also commonly referred to as the "period of transportation").

With regard to equipment that was checked in at the check-in counter (always by or on behalf of the carrier) and consequently labelled as luggage, it is quite clear that the period of transportation starts at the moment the check–in procedure starts. The same holds true for luggage that is "a delivery at cabin". Although the equipment can be labelled prior to being actually handed over to the carrier (at the gate or at the door of the aircraft), the liability of the carrier should only be triggered at the moment the equipment is physically handed over to the carrier (be it at the boarding gate or at the door of the aircraft).

3.2.2.2. Handling of the equipment at an airport (airport liability).

Airports have assumed the responsibility for providing assistance to PRM since the Regulation fully came into effect on 26 July 2008. Airport liability is, in principle, not limited[15] and it is established according to national liability/tort law. This fact that the applicable legal framework is different as between airports and airlines results in two big differences in the nature of their respective liability: First of all, as a rule, airport liability is based on a proven fault by the airport managing body. Secondly, whereas airport liability is not limited, airline liability definitely is. This means that, in the case of airports, the PRM will have to prove the fault of the wrongdoer before a court if the airport does not accept the claim (not so if the air carrier is responsible), but can recover the full damages (not so if the air carrier is liable, since its liability is normally limited).

3.2.3. Compensation: amount and procedure.

For a long time, PRM organisations have been pressing for unlimited liability in cases of incidents regarding mobility equipment both during handling at an airport or during transfer on-board aircraft. This approach is driven by the high cost of modern mobility equipment[16] and the relatively low limit of current liability for baggage under international conventions, and in particular the Montreal Convention[17], which indeed suggest that the amount of compensation under international conventions may not be adequate in all cases.

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13 Regulation (EC) Nº 889/2002 of the European Parliament and of the Council of 13 May 2002 (JO L 140/02 of 30.05.2002, amending Council Regulation (EC) Nº 2027/97 on air carrier liability in the event of accidents.

14 See Article 1.10 of the REGULATION (EC) Nº 889/2002.

15 Airport liability is not dealt with by any international convention or Community .

16 for example, electric wheelchairs can cost up to € 10000

17 Up to 1000 SDRs (approximate amount in euros based on the SDR value on 10/03/2008 according to the IMF SDR valuation: € 1060).

Most air carriers provide compensation in line with the Montreal Convention. Damages to the mobility equipment above 1000 SDR are at the passenger's own risk, unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires[18]. Special insurance for PRM mobility equipment is proposed by only a minority of companies and for a marginal number of airports. The majority of air carriers and of airports do not offer special insurance coverage for damaged or destroyed wheelchairs or mobility equipment.

According to the study, only a minority of EU companies allow PRM to declare that their mobility equipment has a higher value and that this can then be claimed accordingly. Among those companies, some limit the excess value declaration to a given amount above the level of compensation set by international and EU rules, but below the actual cost of the mobility equipment. Several carriers pointed out that declaring a special value involves “a supplement [that] has to be paid by the passenger”.

All stakeholders agree that the cost of providing for the needs of PRM must not be passed directly to PRM. However, only a few have drawn the logical conclusion and compensate the full cost of the damage or loss of the mobility equipment. The Regulation consolidates the principle that assistance shall be provided without additional charge to PRMs[19] , but its scope does not include the specific amount of compensation, which is left to be dealt with under the "rules of international, Community and national law[20]".

It is worth noticing that for railway transport, Community legislation imposes on railway companies the obligation of full compensation, if the railway undertaking is liable for the total or partial loss or damage of the mobility equipment[21].

3.2.4. The inclusion or exclusion of mobility equipment in the definition of "baggage".

The point of view of PRM organisations and the majority of the Civil Aviation Authorities responding to the survey linked to the study is that mobility equipment should not be regarded as baggage. The purpose of this exclusion is that mobility equipment should not be subject to the airline limited liability rules laid down by the international conventions. As a consequence, airlines and airports should compensate the full cost of the lost mobility equipment or the price of repairing it.

The US Air Carrier Access Act (ACAA) does not give a definition of mobility equipment and does not expressly exclude it from the definition of baggage; however, it does impose full, objective liability without financial limits in the event of an accident involving mobility equipment on all carriers wishing to cover domestic routes in the United States[22]. The U.S. Department of Transportation intends to amend soon its regulation implementing the US Air Carrier Access Act to make foreign air carriers operating to and from the United States

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18 in line with what it is stipulated by article 22.2 of the Montreal Convention and article 1.5 of Regulation 889/2002.

19 See Article 8 of Regulation nº 1107/2006.

20 See article 12 of Regulation nº 1107/2006.

21 REGULATION (EC) No 1371/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2007 on rail passengers’ rights and obligations, JO 315/14 of 31.12.2007, article 25.

22 The Air Carrier Access Act (ACAA) prohibits discrimination in air travel against individuals with disabilities. The U.S. Department of Transportation issued a regulation (14 CFR Part 382) implementing the ACAA which explicitly refers to the treatment of mobility aids and devices.

subject to most of the disability-related requirements currently available to U.S. carriers under Part 382, including treatment of mobility aids and assistive devices.

The current Canadian legislation in place concerning PRMs is *Part VII of the Air transport Regulations: Terms and Conditions of Carriage Regulations*[23]. The Canadian Transportation Agency seems to define mobility aids as priority checked items of a personal nature, even though the mobility equipment is not excluded from the baggage definition strictu sensu. By doing so the Canadian Transportation Agency does not allow companies working on their territory to apply the limited liability provisions in respect of destroyed, damaged or lost baggage in international conventions to mobility equipment. There is an understanding that to land in Canada, the carrier must respect the Canadian regulations. This understanding seems not to have been challenged by any foreign carrier.

4. AN ANSWER TO THE CHALLENGES: REGULATION Nº 1107/2006.

4.1. Quantitative objective: to reduce the number of accidents.

As has been demonstrated in point 3.1 of this Communication, the absence of specific procedures for handling wheelchairs or other mobility equipment and the fact that, training on handling wheelchairs and other mobility equipment is not being provided in all airports or by all airlines, indicate that improvements could easily be made. Regulation 1107/2006 has tackled this shortcoming in the current state of affairs by establishing legal obligations concerning both the necessary procedures and the necessary training for the staff to ensure adequate assistance to PRM[24].

Such legal obligations include, inter alia, the handling of mobility equipment at the airport or its transportation on board aircraft. Therefore, the quality and the adequacy of the assistance provided by airlines and air carriers should improve significantly. Specific procedures on check-in and training for staff in the handling of mobility equipment will raise awareness among employers and employees alike and help to reduce even further the number and the gravity of accidents, as well as the personal and economic costs.

4.2. Qualitative objective: to minimise the consequences of an incident.

Point 3.2.1 of this Communication highlights the shortcomings of the current lack of a common procedure which would provide immediate solutions on the spot, in the case of damaged or lost mobility equipment. Regulation 1107/2006 partly covers that legal vacuum. First of all, Annex I of Regulation 1107/2006 specifically includes in the definition of airport assistance the *"temporary replacement of damaged or lost mobility equipment, albeit not necessarily on a like for like basis"*[25]. Secondly, Article 9 establishes a legal obligation for airports to set up *"quality standards for the assistance specified in Annex I and determine resource requirements for meeting them".*

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23 The Terms and Conditions of Carriage Regulations issued under the authority of the Canada Transportation Act. Part V of the Act deals with the transportation of persons with disabilities. Section 155 of this Part V explains the provisions for a damaged or lost aid.

24 See articles 9 and 11 of the Regulation

25 See Annex I to Regulation nº 1107/2006.

As regards the difference between the nature and the limits of the liability of airlines and airports mentioned in point 3.2.2 of this Communication, article 12 of Regulation 1107/2006 establishes the obligation of compensation *"in accordance with rules of international, Community and national law"*.

The Commission will closely monitor how airports and airlines implement this responsibility in the new context laid down by the Regulation, in order to assess in the future whether the inclusion of a more precise definition of the airport's liability, along the lines of what it is laid down for air carriers in Regulation 889/2002, would be advisable.

With regard to the amount of compensation and the relevant procedure, dealt with in point 3.2.3 of this Communication, the number of incidents regarding mobility equipment is already small and the new protection offered by Regulation 1107/2006 should help to further reduce the number of incidents and their consequences. It therefore seems clear that, if the current rules applying to compensation were to be changed, any economic consequences which those accidents could involve for companies or airports would not have a major economic impact on carriers or airports.

Finally, point 3.2.4 of this Communication deals with the issue of whether mobility equipment should be deemed included in the notion of "baggage". This question is relevant because it is linked to the amount of the compensation, since the limits on liability imposed by international conventions only apply to baggage. Some of the Community's biggest air transport partners have already developed detailed administrative procedures regarding the rights of PRM on this issue. Broadly speaking, those administrative procedures impose objective liability and full compensation on air carriers and sometimes on airports. European air carriers covering transoceanic routes to Canada or domestic flights in the US or Canada do already comply with those rules outside the Community's borders. Some companies have already waived their limited liability through their own customer policy or their internal quality standards.

As these examples show, different options can be envisaged when dealing with the amount of the compensation paid in case of destroyed, damaged or lost mobility equipment in order to approximate it to the real value of such equipment. That goal can be achieved by seeking to interpret or define the notion of baggage so as to exclude mobility equipment, while still ensuring legal coverage of such equipment under the applicable international conventions, or alternatively by removing or reviewing the limits on financial compensation under those international conventions. Finally, airlines and airports might voluntarily waive their current limited liability regarding mobility equipment.

The Commission considers that it is worth addressing this issue at ICAO level with the aim of abolishing or reviewing any financial limit on lost, damaged or destroyed mobility equipment, laid down in the Montreal Convention. The Commission recognises the difficulties linked to re-negotiating an international Convention. However, the fact that some ICAO members have decided to unilaterally amend their rules and impose full compensation for their domestic routes regarding the mobility equipment indicates that such an EU initiative may receive political support.

In the mid-term, the Commission considers that the full application of Regulation 1107/2006 will improve both the monitoring and the enforcement of existing rights of PRM related to compensation and/or replacement of destroyed, damaged or lost mobility equipment, as well as the kind of assistance to be provided on the spot when an incident occurs. Before deciding

whether to put forward a legislative proposal on these issues, the Commission considers it prudent to allow Regulation 1107/2006 to become applicable, before assessing its impact on the likely decreasing of incidents. Whilst taking into account current practices in other countries and having regard to Community legislation governing railway transport, the Commission in the short term encourages airlines to voluntarily waive their limited liability.

5. CONCLUSIONS

(1) The Commission reminds airports and airlines of their obligation to put in place the quality standards and the necessary training and procedures regarding the handling of mobility equipment and the rights of PRM passengers in the case of an accident related to their mobility equipment, following in particular ECAC document nº 30 and its relevant annexes.

(2) As regards the amount of compensation and in order to bring it closer to the actual value of the equipment, the Commission will propose to the Council that, with the cooperation of the Member States, the Community launch an initiative within ICAO with the aim of clarifying or defining the term 'baggage' so as to exclude mobility equipment or, alternatively, of abolishing or reviewing any liability limits on lost, damaged or destroyed mobility equipment, in the framework of the Montreal Convention.

(3) The Commission encourages airlines in the UE to voluntarily waive their current liability limits in order to bring the amount of compensation closer to the actual value of the mobility equipment.

(4) The Commission will monitor in 2008-2009 the compliance of Member States, air carriers and airports with Community law, including Regulation 1107/2006.

(5) The Commission encourages the stakeholders to carry out a better and more systematic collection of data concerning claims related to mobility equipment.

(6) The Commission will include in the Report foreseen in Article 17 of Regulation 1107/2006 a chapter on the rights of PRM whose mobility equipment has been lost, damaged or destroyed. The Commission will then assess the actual developments following the entry into force of Regulation 1107/2006 and the progress of the initiative within ICAO mentioned in point (2) of these conclusions. If the assessment shows that necessary improvement has not been achieved, the Commissions will put forward an appropriate legislative proposal to enhance the existing rights under Community law of air passengers whose wheelchairs or other mobility equipment are destroyed, damaged or lost during handling at an airport or during transport on-board aircraft, including the revision of the current threshold for compensation and the need to better define airport liability.

EVALUATION OF REGULATION 1107/2006

Final report

Main report and Appendices A-B

June 2010

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EXECUTIVE SUMMARY

Background

1. Regulation 1107/2006, which took full effect in July 2008, introduced new protections for people with reduced mobility when travelling by air. Key provisions included:

   - The right, subject to certain derogations, not to be refused embarkation or reservation.
   - The right to be provided with assistance at airports, at no additional cost, in order to allow access to the flight.
   - Responsibility for provision of assistance to PRMs at airports is placed with the airport management company; previously, these services were usually contracted by airlines.
   - The costs of providing assistance at airports can be recovered from airlines through transparent and cost-reflective charges levied for all passengers.

2. The Regulation also required Member States to introduce sanctions into national law for non-compliance with the Regulation, and create National Enforcement Bodies (NEBs) responsible for enforcement of the Regulation. The Regulation applies to all flights from and within the European Union (EU), as well as to flights to the EU operated by EU-registered carriers.

3. The Regulation requires the Commission to report to the Council and the Parliament on its operation and results, and if appropriate to bring forward new legislative proposals. In order to inform this report, the Commission has asked Steer Davies Gleave to undertake an independent review of the Regulation.

Factual conclusions

4. Our review has gathered evidence on the implementation of the Regulation through in-depth discussions and consultation with stakeholders, supplemented by desk research. Stakeholders included airports, airlines, NEBs and PRM organisations. The evidence gathered shows that most of the airports and airlines examined for the study have implemented the requirements of the Regulation. However, there is significant variation in the quality of service provided by airports, and in the policies of airlines on carriage of PRMs. We also identified relatively little activity by NEBs to monitor the Regulation's implementation, or to promote awareness of the rights it grants.

5. Conclusions regarding each of the groups of stakeholders are set out below.

Airlines

6. The key issue we identified in the study is the lack of consistency in policies on carriage, and the significant variation between carriers. For example, Ryanair permits a maximum of 4 PRMs who require assistance on any flight, and Brussels Airlines permits at most 2 on most aircraft; in contrast, British Airways does not impose any restrictions. There is similar variation in policies on whether PRMs have to be accompanied. Approval of policies is the responsibility of national safety regulators, however typically airlines propose policies which are then approved with little or no challenge by the licensing authority (often the same organisation as the NEB).

Although the rationale for these restrictions is safety, there is limited evidence to justify them. Limitations on carriage of PRMs are specifically prohibited by the equivalent US regulation on carriage of PRMs[1].

7. All airlines in the study sample had published some information on carriage of PRMs, however 13 of the 21 did not publish on their websites all of the restrictions on carriage of PRMs that they imposed. Most stated in their Conditions of Carriage that PRMs would not be refused, but this was usually conditional on pre-notification; this may be an infringement of the Regulation.

8. The Regulation encourages PRMs to pre-notify their requirements for assistance to airlines, which are then required to pass on this information to the relevant airports. In theory this should both ensure that PRMs promptly receive the services they need, and allow airports to minimise resourcing costs through efficient rostering. However, our research found that levels of pre-notification too low to allow this: at 11 of 16 airports for which we were provided with information, pre-notification rates were lower than 60%.

9. PRM representative organisations informed us that loss or damage to mobility equipment could still be a significant issue. The Regulation requires airports to handle mobility equipment but does not introduce any new provisions which reduce the risk of loss or damage, or increase the amount of compensation payable, which is restricted by the limits defined in the Montreal Convention.

Airports

10. All airports in the study sample had implemented the Regulation, although we were informed that the Regulation had not been implemented at all at regional airports in Greece. Most had subcontracted the service through a competitive tender; several informed us that they were considering or were in the process of retendering the service, generally because service quality in the initial period had not been sufficient.

11. The frequency with which the PRM services are used varies considerably between airports: among the airports for which we have been able to obtain data use of services varies by a factor of 15, although in most cases between 0.2% and 0.7% of passengers requested assistance.

12. Most airports in the case study States had published quality standards, typically following the format of the minimum recommended standards in ECAC Document 30. Most undertook some form of internal monitoring of performance, however few used external checks of service such as ‘mystery shoppers’. Most stakeholders informed us that airports were providing an adequate level of service quality.

13. Variability in airport service quality (including safety) was reported by PRM organisations and some airlines, but this is subjective and hard to quantify. Airports reported variation in equipment and facilities provided, and we observed significant

[1] US Department of Transport 14 CFR part 382.

variation in the level of training given to personnel providing services to PRMs. In the sample examined, training varied between 3 and 14 days, ostensibly to provide the same services.

14. Charges levied by airports varied considerably (between €0.16 and €0.90 per departing passenger), and we were unable to identify any apparent link to frequency of service use, price differentials between States or service quality. Airports in Spain and mainland Portugal levied uniform charges across all airports managed by the national airport company; this may be an infringement of the Regulation. Many airlines believed consultation by airports regarding charges was poor; Cyprus, Spain and Portugal were identified as particular issues.

NEBs

15. All States except Slovenia have designated NEBs; in most cases the NEB is the CAA, and is the same organisation as the NEB for Regulation 261/2004. All States except Poland and Sweden have introduced penalties into national law for infringements of the Regulation, although several have not introduced sanctions for all possible infringements. The maximum sanction which can be imposed varies significantly, and in some States may not be at a high enough level to be dissuasive; for example, in Estonia, Lithuania and Romania the maximum sanction is lower than €1,000.

16. Most States have received very few complaints to date; in total 1,110 received to date, compared to a total of 3.2m passengers assisted in 2009 across 21 case study airports. 80% of all complaints regarding infringements of the Regulation had been submitted to the UK NEBs; this may be the result of national law in the UK which permits financial compensation to be claimed under the Regulation. No sanctions have yet been imposed, although the NEBs for France, Portugal and Spain have opened proceedings to impose fines. In a number of States we identified significant practical difficulties in imposing and collecting sanctions, typically in relation to imposing fines on carriers registered in other States. These issues are in most cases equivalent to those that apply in relation to Regulation 261/2004[2].

17. Although most case study NEBs had taken some action to monitor the services provided under the Regulation beyond the monitoring of complaints (14 out of 16 had undertaken at least one inspection of airports), in most cases this was limited. Most inspections focussed on checks of systems and procedures, and did not assess the experience of passengers using the services. Monitoring of PRM charges was also poor: NEBs in 9 of the 16 States had undertaken no direct monitoring of airport charges.

18. Few NEBs had made significant efforts to promote awareness of the Regulation by passengers, as required by the Regulation; only two informed us of national public awareness campaigns they had undertaken. This lack of promotion undermines the claims of some NEBs that reviewing complaints is sufficient to monitor the

[2] See Evaluation of Regulation 261/2004, February 2010: http://ec.europa.eu/transport/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf.

implementation of the Regulation. Awareness of the NEBs' performance appeared in general to be poor: most stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

Other issues

19. A particular issue raised by stakeholders was the conflict between the Regulation and the equivalent US legislation (14 CFR Part 382), which applies to European carriers operating flights to/from the US, and other flights where these are operated as codeshares with US carriers. The most significant conflict is the allocation of responsibilities for assistance: the Regulation requires airports to arrange the provision of services to PRMs, while under the US legislation it is the airlines that have this responsibility. The US legislation also prohibits airlines from imposing numerical limits on PRMs, and from requiring pre-notification from PRMs. This has caused issues for carriers who are required to comply with pieces of legislation that conflict, although the US legislation does allow carriers to apply for a waiver where there is a conflict of laws.

20. A number of other issues regarding specific Articles are discussed in the section below on recommended changes to the Regulation.

Recommendations

21. We have made a number of recommendations, addressing:

- improvements to the implementation of the Regulation which would not require any legislative changes; and
- further recommendations which could only be implemented through amendment to the text of the Regulation.

Measures to improve the operation of the Regulation

22. Several airlines argued in their submissions to the study that they should be permitted to provide or contract their own PRM assistance services, as they could provide this more cost-efficiently than airports. We believe that this could create an incentive to minimise the service provided and hence would risk a reduction in service quality. Whilst there were initially significant issues with the quality of PRM service provision at certain airports, most stakeholders believed that these issues had now been addressed, and our most important recommendation is therefore that allocation of responsibility for PRM services to airports should not be amended.

23. Many of the concerns raised regarding airports relate to inconsistency of application of the Regulation. To address this, we suggest that the Commission should:

- improve provision of information regarding accessibility of airports, through a centralised website listing factors such as maximum likely walking distance within an airport, means used for access to aircraft, and any facilities available for PRMs;
- develop and share best practice on contracting of PRM service providers, both to improve the content and structure of the contracts used and therefore reduce

the likelihood of unnecessary retendering, and to recommend methods of cooperation; and

- develop and share best practice advice on training of staff providing PRM services, so that a more consistent standard of service is provided.

24. Similarly, many of the concerns raised regarding airlines also relate to inconsistency of application of the Regulation, in particular to inconsistent policies on carriage of PRMs. We therefore suggest that the Commission should:

- work with EASA to determine safe policies on carriage of PRMs, in particular to address the wide and unjustifiable variation in airline policies on carriage of PRMs (in particular on numerical limits and circumstances under which PRMs are required to be accompanied); and
- ensure that the airlines we have identified as not publishing clear policies on carriage of PRMs do so, through actions by the relevant NEBs (which could also review airlines outside the study sample for the same reason).

25. Given the current low rates of rates pre-notification, we suggest that the Commission monitor this issue, through encouraging NEBs to collect rates of pre-notification. In future, the Commission should assess the situation and consider either eliminating the requirement for pre-notification or alternatively retaining it and providing passengers and carriers with more incentive to pre-notify.

26. An additional problem reported with pre-notification is where PRMs had pre-notified their requirements for assistance, but then found that this information had not been passed on to airport or airline staff. To address this, and to provide PRMs with evidence that they can use when making a complaint, we recommend that the Commission encourage airlines to provide PRMs with a receipt for pre-notification.

27. The greatest problem identified by the study regarding NEBs was the lack of pro-active measures taken to monitor or enforce the Regulation. In most cases this has not had significant detrimental effect, as most airports and airlines have implemented the provisions of the Regulation, but could become an issue if the situation changes in the future. We suggest that the Commission should encourage all Member States to:

- designate NEBs and introduce penalties for all infringements of the Regulation;
- take measures to inform PRMs of their rights under the Regulation and of the possibility of complaint to the relevant NEB, for example through national promotional campaigns; and
- pro-actively monitor the application of the Regulation (rather than relying on complaints), for example through increased interaction with PRM organisations, and through direct monitoring of quality of service provided.

28. We also recommend that the Commission should, in consultation with stakeholders, develop a detailed good practice guide regarding implementation of the Regulation. This could include sections regarding recommendations on safety limits, the format and content of policies on carriage, and consultation. It could also specify recommended minimum quality standards covering qualitative aspects of the services provided. Publishing voluntary policies such as these would allow potential future amendments to the Regulation to be tested in practice before adoption.

Changes to the Regulation

29. There are some areas where improvements can only be effected through changes to the text of the Regulation. These include minor amendments which we recommend should be implemented as soon as possible, and more significant amendments to be considered in the longer term.

30. The minor amendments we would suggest are:

- Extend Article 11 to require airlines to ensure that the personnel of their ground handling companies are trained to handle mobility equipment.
- Amend Article 8 to make specific PRM charges obligatory for airports wishing to recover costs from users, and therefore ensure costs are transparent, reasonable and cost-related.
- Amend Article 8 to make clear that that PRM charges are airport-specific and cannot be set at a network level.
- Amend Article 14 to require that NEBs must be independent of any bodies responsible for providing services under the Regulation (at present this is not the case in Greece).
- Amend Article 14 to clarify that NEBs are responsible for flights departing from (rather than both departing from and arriving at) airports in their territory, in addition to flights by Community carriers arriving at airports within the State's territory but departing from a third country.
- Amend Recital 17 to be consistent with Article 14, so that both state that complaints regarding the Regulation should be addressed to the NEB of the State where the flight departed, rather that of the State which issued the operating license to the carrier.

31. These changes would improve the functioning of the Regulation in its current form, without making significant changes to its overall approach.

32. A key issue with the Regulation is its lack of detail when compared to equivalent legislation (in particular, the equivalent US regulations on carriage of PRMs); in our view, as a result of this, it leaves too much scope for interpretation and variation in service provision. We suggest that, to ensure greater consistency, and that PRMs' rights are adequately respected, the Commission should consider making the text more detailed and specific about the requirements for airlines and airports. Some key areas in which we suggest that changes could be made are as follows:

- Specify the circumstances under which carriage of PRMs may be restricted (including any numerical limits) or where PRMs may be required to be accompanied[3].
- Clarify the definitions of 'PRM', 'mobility equipment' and 'cooperation'.

[3] This could be implemented either through amendment to this Regulation or through amendment to Commission Regulation (EC) 859/2008

- Clarify whether airlines may levy additional charges for supply of medical oxygen and for multiple seats where one seat is insufficient for the passenger (for example, in the case of obese or injured passengers).
- Extend the Regulation to include a provision requiring airports to publish information on the rights of PRMs (including the right to complain) at accessible points within the airport.

33. It would be necessary to consult with stakeholders about these changes and to undertake an impact assessment, and therefore these changes could not be introduced immediately.

34. We also suggest that the Commission and the Member States should work with other contracting States to amend the Montreal Convention so as to exclude mobility equipment from the definition of baggage. This would address the problem faced by users of technologically advanced wheelchairs, the values of which often substantially exceed the maximum compensation allowable under the Montreal Convention (1,131 SDRs, or €1,370). Although most airlines we contacted for the study informed us that they waived the Montreal limits in this type of situation, several PRM organisations informed us of cases where they did not, and even in the case that an airline voluntarily waives the limit the PRM is in a position of uncertainty.

►B 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)

Amended by:

		Official Journal		
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►M1	Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009	L 337	11	18.12.2009

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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)

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 ([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]),

Whereas:

(1) The liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service. The concept of universal service should evolve to reflect advances in technology, market developments and changes in user demand. The regulatory framework established for the full liberalisation of the telecommunications market in 1998 in the Community defined the minimum scope of universal service obligations and established rules for its costing and financing.

(2) Under Article 153 of the Treaty, the Community is to contribute to the protection of consumers.

(3) The Community and its Member States have undertaken commitments on the regulatory framework of telecommunications networks and services in the context of the World Trade Organisation (WTO) agreement on basic telecommunications. Any member of the WTO has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the member.

(4) Ensuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way.

([1]) OJ C 365 E, 19.12.2000, p. 238 and OJ C 332 E, 27.11.2001, p. 292.
([2]) OJ C 139, 11.5.2001, p. 15.
([3]) OJ C 144, 16.5.2001, p. 60.
([4]) Opinion of the European Parliament of 13 June 2001 (not yet published in the Official Journal), Council Common Position of 17 September 2001 (OJ C 337, 30.11.2001, p. 55) and Decision of the European Parliament of 12 December 2001 (not yet published in the Official Journal). Council Decision of 14 February 2002.

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(5) In a competitive market, certain obligations should apply to all undertakings providing publicly available telephone services at fixed locations and others should apply only to undertakings enjoying significant market power or which have been designated as a universal service operator.

(6) The network termination point represents a boundary for regulatory purposes between the regulatory framework for electronic communication networks and services and the regulation of telecommunication terminal equipment. Defining the location of the network termination point is the responsibility of the national regulatory authority, where necessary on the basis of a proposal by the relevant undertakings.

(7) Member States should continue to ensure that the services set out in Chapter II are made available with the quality specified to all end-users in their territory, irrespective of their geographical location, and, in the light of specific national conditions, at an affordable price. Member States may, in the context of universal service obligations and in the light of national conditions, take specific measures for consumers in rural or geographically isolated areas to ensure their access to the services set out in the Chapter II and the affordability of those services, as well as ensure under the same conditions this access, in particular for the elderly, the disabled and for people with special social needs. Such measures may also include measures directly targeted at consumers with special social needs providing support to identified consumers, for example by means of specific measures, taken after the examination of individual requests, such as the paying off of debts.

(8) A fundamental requirement of universal service is to provide users on request with a connection to the public telephone network at a fixed location, at an affordable price. The requirement is limited to a single narrowband network connection, the provision of which may be restricted by Member States to the end-user's primary location/residence, and does not extend to the Integrated Services Digital Network (ISDN) which provides two or more connections capable of being used simultaneously. There should be no constraints on the technical means by which the connection is provided, allowing for wired or wireless technologies, nor any constraints on which operators provide part or all of universal service obligations. Connections to the public telephone network at a fixed location should be capable of supporting speech and data communications at rates sufficient for access to online services such as those provided via the public Internet. The speed of Internet access experienced by a given user may depend on a number of factors including the provider(s) of Internet connectivity as well as the given application for which a connection is being used. The data rate that can be supported by a single narrowband connection to the public telephone network depends on the capabilities of the subscriber's terminal equipment as well as the connection. For this reason it is not appropriate to mandate a specific data or bit rate at Community level. Currently available voice band modems typically offer a data rate of 56 kbit/s and employ automatic data rate adaptation to cater for variable line quality, with the result that the achieved data rate may be lower than 56 kbit/s. Flexibility is required on the one hand to allow Member States to take measures where necessary to ensure that connections are capable of supporting such a data rate, and on the other hand to allow Member States where relevant to permit data rates below this upper limit of 56 kbits/s in order, for example, to exploit the capabilities of wireless technologies (including cellular wireless networks) to deliver universal service to a higher proportion of the population. This may be of particular importance in some accession countries where household pene-

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tration of traditional telephone connections remains relatively low. In specific cases where the connection to the public telephony network at a fixed location is clearly insufficient to support satisfactory Internet access, Member States should be able to require the connection to be brought up to the level enjoyed by the majority of subscribers so that it supports data rates sufficient for access to the Internet. Where such specific measures produce a net cost burden for those consumers concerned, the net effect may be included in any net cost calculation of universal service obligations.

(9) The provisions of this Directive do not preclude Member States from designating different undertakings to provide the network and service elements of universal service. Designated undertakings providing network elements may be required to ensure such construction and maintenance as are necessary and proportionate to meet all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location.

(10) Affordable price means a price defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure.

(11) Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ([1]) ensures the subscribers' right to privacy with regard to the inclusion of their personal information in a public directory.

(12) For the citizen, it is important for there to be adequate provision of public pay telephones, and for users to be able to call emergency telephone numbers and, in particular, the single European emergency call number (‘112’) free of charge from any telephone, including public pay telephones, without the use of any means of payment. Insufficient information about the existence of ‘112’ deprives citizens of the additional safety ensured by the existence of this number at European level especially during their travel in other Member States.

(13) Member States should take suitable measures in order to guarantee access to and affordability of all publicly available telephone services at a fixed location for disabled users and users with special social needs. Specific measures for disabled users could include, as appropriate, making available accessible public telephones, public text telephones or equivalent measures for deaf or speech-impaired people, providing services such as directory enquiry services or equivalent measures free of charge for blind or partially sighted people, and providing itemised bills in alternative format on request for blind or partially sighted people. Specific measures may also need to be taken to enable disabled users and users with special social needs to access emergency services ‘112’ and to give them a similar possibility to choose between different operators or service providers as other consumers. Quality of service standards have been

([1]) OJ L 24, 30.1.1998, p. 1.

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developed for a range of parameters to assess the quality of services received by subscribers and how well undertakings designated with universal service obligations perform in achieving these standards. Quality of service standards do not yet exist in respect of disabled users. Performance standards and relevant parameters should be developed for disabled users and are provided for in Article 11 of this Directive. Moreover, national regulatory authorities should be enabled to require publication of quality of service performance data if and when such standards and parameters are developed. The provider of universal service should not take measures to prevent users from benefiting fully from services offered by different operators or service providers, in combination with its own services offered as part of universal service.

(14) The importance of access to and use of the public telephone network at a fixed location is such that it should be available to anyone reasonably requesting it. In accordance with the principle of subsidiarity, it is for Member States to decide on the basis of objective criteria which undertakings have universal service obligations for the purposes of this Directive, where appropriate taking into account the ability and the willingness of undertakings to accept all or part of the universal service obligations. It is important that universal service obligations are fulfilled in the most efficient fashion so that users generally pay prices that correspond to efficient cost provision. It is likewise important that universal service operators maintain the integrity of the network as well as service continuity and quality. The development of greater competition and choice provide more possibilities for all or part of the universal service obligations to be provided by undertakings other than those with significant market power. Therefore, universal service obligations could in some cases be allocated to operators demonstrating the most cost-effective means of delivering access and services, including by competitive or comparative selection procedures. Corresponding obligations could be included as conditions in authorisations to provide publicly available services.

(15) Member States should monitor the situation of consumers with respect to their use of publicly available telephone services and in particular with respect to affordability. The affordability of telephone service is related to the information which users receive regarding telephone usage expenses as well as the relative cost of telephone usage compared to other services, and is also related to their ability to control expenditure. Affordability therefore means giving power to consumers through obligations imposed on undertakings designated as having universal service obligations. These obligations include a specified level of itemised billing, the possibility for consumers selectively to block certain calls (such as high-priced calls to premium services), the possibility for consumers to control expenditure via pre-payment means and the possibility for consumers to offset up-front connection fees. Such measures may need to be reviewed and changed in the light of market developments. Current conditions do not warrant a requirement for operators with universal service obligations to alert subscribers where a predetermined limit of expenditure is exceeded or an abnormal calling pattern occurs. Review of the relevant legislative provisions in future should consider whether there is a possible need to alert subscribers for these reasons.

(16) Except in cases of persistent late payment or non-payment of bills, consumers should be protected from immediate disconnection from the network on the grounds of an unpaid bill and, particularly in the case of disputes over high bills for premium rate services, should continue to have access to essential telephone services pending resolution of the dispute. Member

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States may decide that such access may continue to be provided only if the subscriber continues to pay line rental charges.

(17) Quality and price are key factors in a competitive market and national regulatory authorities should be able to monitor achieved quality of service for undertakings which have been designated as having universal service obligations. In relation to the quality of service attained by such undertakings, national regulatory authorities should be able to take appropriate measures where they deem it necessary. National regulatory authorities should also be able to monitor the achieved quality of services of other undertakings providing public telephone networks and/or publicly available telephone services to users at fixed locations.

(18) Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards. It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with minimum distortion to the market and to undertakings, and is compatible with the provisions of Articles 87 and 88 of the Treaty.

(19) Any calculation of the net cost of universal service should take due account of costs and revenues, as well as the intangible benefits resulting from providing universal service, but should not hinder the general aim of ensuring that pricing structures reflect costs. Any net costs of universal service obligations should be calculated on the basis of transparent procedures.

(20) Taking into account intangible benefits means that an estimate in monetary terms, of the indirect benefits that an undertaking derives by virtue of its position as provider of universal service, should be deducted from the direct net cost of universal service obligations in order to determine the overall cost burden.

(21) When a universal service obligation represents an unfair burden on an undertaking, it is appropriate to allow Member States to establish mechanisms for efficiently recovering net costs. Recovery via public funds constitutes one method of recovering the net costs of universal service obligations. It is also reasonable for established net costs to be recovered from all users in a transparent fashion by means of levies on undertakings. Member States should be able to finance the net costs of different elements of universal service through different mechanisms, and/or to finance the net costs of some or all elements from either of the mechanisms or a combination of both. In the case of cost recovery by means of levies on undertakings, Member States should ensure that that the method of allocation amongst them is based on objective and non-discriminatory criteria and is in accordance with the principle of proportionality. This principle does not prevent Member States from exempting new entrants which have not yet achieved any significant market presence. Any funding mechanism should ensure that market participants only contribute to the financing of universal service obligations and not to other activities which are not directly linked to the provision of the universal service obligations. Recovery mechanisms should in all cases respect the principles of Community law, and in particular in the case of sharing mechanisms those of non-discrimination and proportionality. Any funding mechanism should ensure that users in one Member State do not contribute to universal service costs in another Member State, for example when making calls from one Member State to another.

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(22) Where Member States decide to finance the net cost of universal service obligations from public funds, this should be understood to comprise funding from general government budgets including other public financing sources such as state lotteries.

(23) The net cost of universal service obligations may be shared between all or certain specified classes of undertaking. Member States should ensure that the sharing mechanism respects the principles of transparency, least market distortion, non-discrimination and proportionality. Least market distortion means that contributions should be recovered in a way that as far as possible minimises the impact of the financial burden falling on end-users, for example by spreading contributions as widely as possible.

(24) National regulatory authorities should satisfy themselves that those undertakings benefiting from universal service funding provide a sufficient level of detail of the specific elements requiring such funding in order to justify their request. Member States' schemes for the costing and financing of universal service obligations should be communicated to the Commission for verification of compatibility with the Treaty. There are incentives for designated operators to raise the assessed net cost of universal service obligations. Therefore Member States should ensure effective transparency and control of amounts charged to finance universal service obligations.

(25) Communications markets continue to evolve in terms of the services used and the technical means used to deliver them to users. The universal service obligations, which are defined at a Community level, should be periodically reviewed with a view to proposing that the scope be changed or redefined. Such a review should take account of evolving social, commercial and technological conditions and the fact that any change of scope should be subject to the twin test of services that become available to a substantial majority of the population, with a consequent risk of social exclusion for those who can not afford them. Care should be taken in any change of the scope of universal service obligations to ensure that certain technological choices are not artificially promoted above others, that a disproportionate financial burden is not imposed on sector undertakings (thereby endangering market developments and innovation) and that any financing burden does not fall unfairly on consumers with lower incomes. Any change of scope automatically means that any net cost can be financed via the methods permitted in this Directive. Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of universal service obligations. Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with Community law but not by means of contributions from market players.

(26) More effective competition across all access and service markets will give greater choice for users. The extent of effective competition and choice varies across the Community and varies within Member States between geographical areas and between access and service markets. Some users may be entirely dependent on the provision of access and services by an undertaking with significant market power. In general, for reasons of efficiency and to encourage effective competition, it is important that the services provided by an undertaking with significant market power reflect costs. For reasons of efficiency and social reasons, end-user tariffs should reflect demand conditions as well as cost conditions, provided that this does not result in distortions of competition. There is a risk that an undertaking with significant market power may act in various ways to inhibit entry or distort competition, for example by charging

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excessive prices, setting predatory prices, compulsory bundling of retail services or showing undue preference to certain customers. Therefore, national regulatory authorities should have powers to impose, as a last resort and after due consideration, retail regulation on an undertaking with significant market power. Price cap regulation, geographical averaging or similar instruments, as well as non-regulatory measures such as publicly available comparisons of retail tariffs, may be used to achieve the twin objectives of promoting effective competition whilst pursuing public interest needs, such as maintaining the affordability of publicly available telephone services for some consumers. Access to appropriate cost accounting information is necessary, in order for national regulatory authorities to fulfil their regulatory duties in this area, including the imposition of any tariff controls. However, regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or pre-selection would fail to achieve the objective of ensuring effective competition and public interest.

(27) Where a national regulatory authority imposes obligations to implement a cost accounting system in order to support price controls, it may itself undertake an annual audit to ensure compliance with that cost accounting system, provided that it has the necessary qualified staff, or it may require the audit to be carried out by another qualified body, independent of the operator concerned.

(28) It is considered necessary to ensure the continued application of the existing provisions relating to the minimum set of leased line services in Community telecommunications legislation, in particular in Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines ([1]), until such time as national regulatory authorities determine, in accordance with the market analysis procedures laid down in 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) ([2]), that such provisions are no longer needed because a sufficiently competitive market has developed in their territory. The degree of competition is likely to vary between different markets of leased lines in the minimum set, and in different parts of the territory. In undertaking the market analysis, national regulatory authorities should make separate assessments for each market of leased lines in the minimum set, taking into account their geographic dimension. Leased lines services constitute mandatory services to be provided without recourse to any compensation mechanisms. The provision of leased lines outside of the minimum set of leased lines should be covered by general retail regulatory provisions rather than specific requirements covering the supply of the minimum set.

(29) National regulatory authorities may also, in the light of an analysis of the relevant market, require mobile operators with significant market power to enable their subscribers to access the services of any interconnected provider of publicly available telephone services on a call-by-call basis or by means of pre-selection.

(30) Contracts are an important tool for users and consumers to ensure a minimum level of transparency of information and legal security. Most service providers in a competitive environment will conclude contracts with their customers for reasons of commercial desirability. In addition to the provisions of this

([1]) OJ L 165, 19.6.1992, p. 27. Directive as last amended by Commission Decision No 98/80/EC (OJ L 14, 20.1.1998, p. 27).

([2]) See page 33 of this Official Journal.

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Directive, the requirements of existing Community consumer protection legislation relating to contracts, in particular Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ([1]) and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts ([2]), apply to consumer transactions relating to electronic networks and services. Specifically, consumers should enjoy a minimum level of legal certainty in respect of their contractual relations with their direct telephone service provider, such that the contractual terms, conditions, quality of service, condition for termination of the contract and the service, compensation measures and dispute resolution are specified in their contracts. Where service providers other than direct telephone service providers conclude contracts with consumers, the same information should be included in those contracts as well. The measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition.

(31) End-users should have access to publicly available information on communications services. Member States should be able to monitor the quality of services which are offered in their territories. National regulatory authorities should be able systematically to collect information on the quality of services offered in their territories on the basis of criteria which allow comparability between service providers and between Member States. Undertakings providing communications services, operating in a competitive environment, are likely to make adequate and up-to-date information on their services publicly available for reasons of commercial advantage. National regulatory authorities should nonetheless be able to require publication of such information where it is demonstrated that such information is not effectively available to the public.

(32) End-users should be able to enjoy a guarantee of interoperability in respect of all equipment sold in the Community for the reception of digital television. Member States should be able to require minimum harmonised standards in respect of such equipment. Such standards could be adapted from time to time in the light of technological and market developments.

(33) It is desirable to enable consumers to achieve the fullest connectivity possible to digital television sets. Interoperability is an evolving concept in dynamic markets. Standards bodies should do their utmost to ensure that appropriate standards evolve along with the technologies concerned. It is likewise important to ensure that connectors are available on television sets that are capable of passing all the necessary elements of a digital signal, including the audio and video streams, conditional access information, service information, application program interface (API) information and copy protection information. This Directive therefore ensures that the functionality of the open interface for digital television sets is not limited by network operators, service providers or equipment manufacturers and continues to evolve in line with technological developments. For display and presentation of digital interactive television services, the realisation of a common standard through a market-driven mechanism is recognised as a consumer benefit. Member States and the Commission may take policy initiatives, consistent with the Treaty, to encourage this development.

(34) All end-users should continue to enjoy access to operator assistance services whatever organisation provides access to the public telephone network.

([1]) OJ L 95, 21.4.1993, p. 29.
([2]) OJ L 144, 4.6.1997, p. 19.

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(35) The provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving subscribers a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner.

(36) It is important that users should be able to call the single European emergency number '112', and any other national emergency telephone numbers, free of charge, from any telephone, including public pay telephones, without the use of any means of payment. Member States should have already made the necessary organisational arrangements best suited to the national organisation of the emergency systems, in order to ensure that calls to this number are adequately answered and handled. Caller location information, to be made available to the emergency services, will improve the level of protection and the security of users of '112' services and assist the emergency services, to the extent technically feasible, in the discharge of their duties, provided that the transfer of calls and associated data to the emergency services concerned is guaranteed. The reception and use of such information should comply with relevant Community law on the processing of personal data. Steady information technology improvements will progressively support the simultaneous handling of several languages over the networks at a reasonable cost. This in turn will ensure additional safety for European citizens using the '112' emergency call number.

(37) Easy access to international telephone services is vital for European citizens and European businesses. '00' has already been established as the standard international telephone access code for the Community. Special arrangements for making calls between adjacent locations across borders between Member States may be established or continued. The ITU has assigned, in accordance with ITU Recommendation E.164, code '3883' to the European Telephony Numbering Space (ETNS). In order to ensure connection of calls to the ETNS, undertakings operating public telephone networks should ensure that calls using '3883' are directly or indirectly interconnected to ETNS serving networks specified in the relevant European Telecommunications Standards Institute (ETSI) standards. Such interconnection arrangements should be governed by the provisions of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ([1]).

(38) Access by end-users to all numbering resources in the Community is a vital pre-condition for a single market. It should include freephone, premium rate, and other non-geographic numbers, except where the called subscriber has chosen, for commercial reasons, to limit access from certain geographical areas. Tariffs charged to parties calling from outside the Member State concerned need not be the same as for those parties calling from inside that Member State.

(39) Tone dialling and calling line identification facilities are normally available on modern telephone exchanges and can therefore increasingly be provided at little or no expense. Tone dialling is increasingly being used for user interaction with special services and facilities, including value added services, and the absence of this facility can prevent the user from making use

([1]) See page 7 of this Official Journal.

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of these services. Member States are not required to impose obligations to provide these facilities when they are already available. Directive 97/66/EC safeguards the privacy of users with regard to itemised billing, by giving them the means to protect their right to privacy when calling line identification is implemented. The development of these services on a pan-European basis would benefit consumers and is encouraged by this Directive.

(40) Number portability is a key facilitator of consumer choice and effective competition in a competitive telecommunications environment such that end-users who so request should be able to retain their number(s) on the public telephone network independently of the organisation providing service. The provision of this facility between connections to the public telephone network at fixed and non-fixed locations is not covered by this Directive. However, Member States may apply provisions for porting numbers between networks providing services at a fixed location and mobile networks.

(41) The impact of number portability is considerably strengthened when there is transparent tariff information, both for end-users who port their numbers and also for end-users who call those who have ported their numbers. National regulatory authorities should, where feasible, facilitate appropriate tariff transparency as part of the implementation of number portability.

(42) When ensuring that pricing for interconnection related to the provision of number portability is cost-oriented, national regulatory authorities may also take account of prices available in comparable markets.

(43) Currently, Member States impose certain 'must carry' obligations on networks for the distribution of radio or television broadcasts to the public. Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review. 'Must carry' obligations imposed by Member States should be reasonable, that is they should be proportionate and transparent in the light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration. Such 'must carry' obligations may include the transmission of services specifically designed to enable appropriate access by disabled users.

(44) Networks used for the distribution of radio or television broadcasts to the public include cable, satellite and terrestrial broadcasting networks. They might also include other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts.

(45) Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services. Providers of such services should not be subject to universal service obligations in respect of these activities. This Directive is without prejudice to measures taken at national level, in compliance with Community law, in respect of such services.

(46) Where a Member State seeks to ensure the provision of other specific services throughout its national territory, such obligations should be implemented on a cost efficient basis and outside the scope of universal service obligations. Accordingly, Member

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States may undertake additional measures (such as facilitating the development of infrastructure or services in circumstances where the market does not satisfactorily address the requirements of end-users or consumers), in conformity with Community law. As a reaction to the Commission's e-Europe initiative, the Lisbon European Council of 23 and 24 March 2000 called on Member States to ensure that all schools have access to the Internet and to multimedia resources.

(47) In the context of a competitive environment, the views of interested parties, including users and consumers, should be taken into account by national regulatory authorities when dealing with issues related to end-users' rights. Effective procedures should be available to deal with disputes between consumers, on the one hand, and undertakings providing publicly available communications services, on the other. Member States should take full account of Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes ([1]).

(48) Co-regulation could be an appropriate way of stimulating enhanced quality standards and improved service performance. Co-regulation should be guided by the same principles as formal regulation, i.e. it should be objective, justified, proportional, non-discriminatory and transparent.

(49) This Directive should provide for elements of consumer protection, including clear contract terms and dispute resolution, and tariff transparency for consumers. It should also encourage the extension of such benefits to other categories of end-users, in particular small and medium-sized enterprises.

(50) The provisions of this Directive do not prevent a Member State from taking measures justified on grounds set out in Articles 30 and 46 of the Treaty, and in particular on grounds of public security, public policy and public morality.

(51) Since the objectives of the proposed action, namely setting a common level of universal service for telecommunications for all European users and of harmonising conditions for access to and use of public telephone networks at a fixed location and related publicly available telephone services and also achieving a harmonised framework for the regulation of electronic communications services, electronic communications networks and associated facilities, cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the action be better achieved at Community level, the Community may adopt measures in accordance with the principles 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 those objectives.

(52) 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:

([1]) OJ L 115, 17.4.1998, p. 31.
([2]) OJ L 184, 17.7.1999, p. 23.

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CHAPTER I

SCOPE, AIMS AND DEFINITIONS

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Article 1

Subject-matter and scope

1. Within the framework of Directive 2002/21/EC (Framework Directive), this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. The Directive also includes provisions concerning certain aspects of terminal equipment, including provisions intended to facilitate access for disabled end-users.

2. This Directive establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This Directive also sets out obligations with regard to the provision of certain mandatory services.

3. This Directive neither mandates nor prohibits conditions, imposed by providers of publicly available electronic communications and services, limiting end-users' access to, and/or use of, services and applications, where allowed under national law and in conformity with Community law, but lays down an obligation to provide information regarding such conditions. National measures regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4. The provisions of this Directive concerning end-users' rights shall apply without prejudice to Community rules on consumer protection, in particular Directives 93/13/EEC and 97/7/EC, and national rules in conformity with Community law.

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Article 2

Definitions

For the purposes of this Directive, the definitions set out in Article 2 of Directive 2002/21/EC (Framework Directive) shall apply.

The following definitions shall also apply:

(a) 'public pay telephone' means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or pre-payment cards, including cards for use with dialling codes;

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(c) 'publicly available telephone service' means a service made available to the public for originating and receiving, directly or indirectly, national or national and international calls through a number or numbers in a national or international telephone numbering plan;

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(d) ‘geographic number’ means a number from the national telephone numbering plan where part of its digit structure contains geographic significance used for routing calls to the physical location of the network termination point (NTP);

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(f) ‘non-geographic number’ means a number from the national telephone numbering plan that is not a geographic number. It includes, inter alia, mobile, freephone and premium rate numbers.

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CHAPTER II

UNIVERSAL SERVICE OBLIGATIONS INCLUDING SOCIAL OBLIGATIONS

Article 3

Availability of universal service

1. Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.

2. Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.

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Article 4

Provision of access at a fixed location and provision of telephone services

1. Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking.

2. The connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.

3. Member States shall ensure that all reasonable requests for the provision of a publicly available telephone service over the network connection referred to in paragraph 1 that allows for originating and receiving national and international calls are met by at least one undertaking.

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Article 5

Directory enquiry services and directories

1. Member States shall ensure that:

(a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;

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(b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.

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2. The directories referred to in paragraph 1 shall comprise, subject to the provisions of Article 12 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) ([1]), all subscribers of publicly available telephone services.

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3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.

Article 6

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Public pay telephones and other publics voice telephony access points

1. Member States shall ensure that national regulatory authorities may impose obligations on undertakings in order to ensure that public pay telephones or other public voice telephony access points are provided to meet the reasonable needs of end-users in terms of the geographical coverage, the number of telephones or other access points, accessibility to disabled end-users and the quality of services.

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2. A Member State shall ensure that its national regulatory authority can decide not to impose obligations under paragraph 1 in all or part of its territory, if it is satisfied that these facilities or comparable services are widely available, on the basis of a consultation of interested parties as referred to in Article 33.

3. Member States shall ensure that it is possible to make emergency calls from public pay telephones using the single European emergency call number '112' and other national emergency numbers, all free of charge and without having to use any means of payment.

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Article 7

Measures for disabled end-users

1. Unless requirements have been specified under Chapter IV which achieve the equivalent effect, Member States shall take specific measures to ensure that access to, and affordability of, the services identified in Article 4(3) and Article 5 for disabled end-users is equivalent to the level enjoyed by other end-users. Member States may oblige national regulatory authorities to assess the general need and the specific requirements, including the extent and concrete form of such specific measures for disabled end-users.

2. Member States may take specific measures, in the light of national conditions, to ensure that disabled end-users can also take advantage of the choice of undertakings and service providers available to the majority of end-users.

3. In taking the measures referred to in paragraphs 1 and 2, Member States shall encourage compliance with the relevant standards or specifications published in accordance with Articles 17 and 18 of Directive 2002/21/EC (Framework Directive).

([1]) OJ L 201, 31.7.2002, p. 37.

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Article 8

Designation of undertakings

1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.

2. When Member States designate undertakings in part or all of the national territory as having universal service obligations, they shall do so using an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being designated. Such designation methods shall ensure that universal service is provided in a cost-effective manner and may be used as a means of determining the net cost of the universal service obligation in accordance with Article 12.

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3. When an undertaking designated in accordance with paragraph 1 intends to dispose of a substantial part or all of its local access network assets to a separate legal entity under different ownership, it shall inform in advance the national regulatory authority in a timely manner, in order to allow that authority to assess the effect of the intended transaction on the provision of access at a fixed location and of telephone services pursuant to Article 4. The national regulatory authority may impose, amend or withdraw specific obligations in accordance with Article 6(2) of Directive 2002/20/EC (Authorisation Directive).

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Article 9

Affordability of tariffs

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1. National regulatory authorities shall monitor the evolution and level of retail tariffs of the services identified in Articles 4 to 7 as falling under the universal service obligations and either provided by designated undertakings or available on the market, if no undertakings are designated in relation to those services, in particular in relation to national consumer prices and income.

2. Member States may, in the light of national conditions, require that designated undertakings provide to consumers tariff options or packages which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing the network referred to in Article 4(1) or from using the services identified in Article 4(3) and Articles 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings.

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3. Member States may, besides any provision for designated undertakings to provide special tariff options or to comply with price caps or geographical averaging or other similar schemes, ensure that support is provided to consumers identified as having low incomes or special social needs.

4. Member States may require undertakings with obligations under Articles 4, 5, 6 and 7 to apply common tariffs, including geographical averaging, throughout the territory, in the light of national conditions or to comply with price caps.

5. National regulatory authorities shall ensure that, where a designated undertaking has an obligation to provide special tariff

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options, common tariffs, including geographical averaging, or to comply with price caps, the conditions are fully transparent and are published and applied in accordance with the principle of non-discrimination. National regulatory authorities may require that specific schemes be modified or withdrawn.

Article 10

Control of expenditure

1. Member States shall ensure that designated undertakings, in providing facilities and services additional to those referred to in Articles 4, 5, 6, 7 and 9(2), establish terms and conditions in such a way that the subscriber is not obliged to pay for facilities or services which are not necessary or not required for the service requested.

2. Member States shall ensure that designated undertakings with obligations under Articles 4, 5, 6, 7 and 9(2) provide the specific facilities and services set out in Annex I, Part A, in order that subscribers can monitor and control expenditure and avoid unwarranted disconnection of service.

3. Member States shall ensure that the relevant authority is able to waive the requirements of paragraph 2 in all or part of its national territory if it is satisfied that the facility is widely available.

Article 11

Quality of service of designated undertakings

1. National regulatory authorities shall ensure that all designated undertakings with obligations under Articles 4, 5, 6, 7 and 9(2) publish adequate and up-to-date information concerning their performance in the provision of universal service, based on the quality of service parameters, definitions and measurement methods set out in Annex III. The published information shall also be supplied to the national regulatory authority.

2. National regulatory authorities may specify, *inter alia*, additional quality of service standards, where relevant parameters have been developed, to assess the performance of undertakings in the provision of services to disabled end-users and disabled consumers. National regulatory authorities shall ensure that information concerning the performance of undertakings in relation to these parameters is also published and made available to the national regulatory authority.

3. National regulatory authorities may, in addition, specify the content, form and manner of information to be published, in order to ensure that end-users and consumers have access to comprehensive, comparable and user-friendly information.

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4. National regulatory authorities shall be able to set performance targets for undertakings with universal service obligations. In so doing, national regulatory authorities shall take account of views of interested parties, in particular as referred to in Article 33.

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5. Member States shall ensure that national regulatory authorities are able to monitor compliance with these performance targets by designated undertakings.

6. Persistent failure by an undertaking to meet performance targets may result in specific measures being taken in accordance with Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ([1]). National regulatory

([1]) See page 21 of this Official Journal.

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authorities shall be able to order independent audits or similar reviews of the performance data, paid for by the undertaking concerned, in order to ensure the accuracy and comparability of the data made available by undertakings with universal service obligations.

Article 12

Costing of universal service obligations

1. Where national regulatory authorities consider that the provision of universal service as set out in Articles 3 to 10 may represent an unfair burden on undertakings designated to provide universal service, they shall calculate the net costs of its provision.

For that purpose, national regulatory authorities shall:

(a) calculate the net cost of the universal service obligation, taking into account any market benefit which accrues to an undertaking designated to provide universal service, in accordance with Annex IV, Part A; or

(b) make use of the net costs of providing universal service identified by a designation mechanism in accordance with Article 8(2).

2. The accounts and/or other information serving as the basis for the calculation of the net cost of universal service obligations under paragraph 1(a) shall be audited or verified by the national regulatory authority or a body independent of the relevant parties and approved by the national regulatory authority. The results of the cost calculation and the conclusions of the audit shall be publicly available.

Article 13

Financing of universal service obligations

1. Where, on the basis of the net cost calculation referred to in Article 12, national regulatory authorities find that an undertaking is subject to an unfair burden, Member States shall, upon request from a designated undertaking, decide:

(a) to introduce a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds; and/or

(b) to share the net cost of universal service obligations between providers of electronic communications networks and services.

2. Where the net cost is shared under paragraph 1(b), Member States shall establish a sharing mechanism administered by the national regulatory authority or a body independent from the beneficiaries under the supervision of the national regulatory authority. Only the net cost, as determined in accordance with Article 12, of the obligations laid down in Articles 3 to 10 may be financed.

3. A sharing mechanism shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles of Annex IV, Part B. Member States may choose not to require contributions from undertakings whose national turnover is less than a set limit.

4. Any charges related to the sharing of the cost of universal service obligations shall be unbundled and identified separately for each undertaking. Such charges shall not be imposed or collected from undertakings that are not providing services in the territory of the Member State that has established the sharing mechanism.

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Article 14

Transparency

1. Where a mechanism for sharing the net cost of universal service obligations as referred to in Article 13 is established, national regulatory authorities shall ensure that the principles for cost sharing, and details of the mechanism used, are publicly available.

2. Subject to Community and national rules on business confidentiality, national regulatory authorities shall ensure that an annual report is published giving the calculated cost of universal service obligations, identifying the contributions made by all the undertakings involved, and identifying any market benefits, that may have accrued to the undertaking(s) designated to provide universal service, where a fund is actually in place and working.

Article 15

Review of the scope of universal service

1. The Commission shall periodically review the scope of universal service, in particular with a view to proposing to the European Parliament and the Council that the scope be changed or redefined. A review shall be carried out, on the first occasion within two years after the date of application referred to in Article 38(1), second subparagraph, and subsequently every three years.

2. This review shall be undertaken in the light of social, economic and technological developments, taking into account, *inter alia*, mobility and data rates in the light of the prevailing technologies used by the majority of subscribers. The review process shall be undertaken in accordance with Annex V. The Commission shall submit a report to the European Parliament and the Council regarding the outcome of the review.

CHAPTER III

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REGULATORY CONTROLS ON UNDERTAKINGS WITH SIGNIFICANT MARKET POWER IN SPECIFIC RETAIL MARKETS

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Article 17

Regulatory controls on retail services

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1. Member States shall ensure that national regulatory authorities impose appropriate regulatory obligations on undertakings identified as having significant market power on a given retail market in accordance with Article 14 of Directive 2002/21/EC (Framework Directive) where:

(a) as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), a national regulatory authority determines that a given retail market identified in accordance with Article 15 of that Directive is not effectively competitive; and

(b) the national regulatory authority concludes that obligations imposed under Articles 9 to 13 of Directive 2002/19/EC (Access Directive) would not result in the achievement of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive).

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2. Obligations imposed under paragraph 1 shall be based on the nature of the problem identified and be proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). The obligations imposed may include requirements that the identified undertakings do not charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end-users or unreasonably bundle services. National regulatory authorities may apply to such undertakings appropriate retail price cap measures, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets, in order to protect end-user interests whilst promoting effective competition.

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4. National regulatory authorities shall ensure that, where an undertaking is subject to retail tariff regulation or other relevant retail controls, the necessary and appropriate cost accounting systems are implemented. National regulatory authorities may specify the format and accounting methodology to be used. Compliance with the cost accounting system shall be verified by a qualified independent body. National regulatory authorities shall ensure that a statement concerning compliance is published annually.

5. Without prejudice to Article 9(2) and Article 10, national regulatory authorities shall not apply retail control mechanisms under paragraph 1 of this Article to geographical or user markets where they are satisfied that there is effective competition.

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CHAPTER IV

END-USER INTERESTS AND RIGHTS

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Article 20

Contracts

1. Member States shall ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, have a right to a contract with an undertaking or undertakings providing such connection and/or services. The contract shall specify in a clear, comprehensive and easily accessible form at least:

(a) the identity and address of the undertaking;

(b) the services provided, including in particular,

— whether or not access to emergency services and caller location information is being provided, and any limitations on the provision of emergency services under Article 26,

— information on any other conditions limiting access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law,

— the minimum service quality levels offered, namely the time for the initial connection and, where appropriate, other quality of service parameters, as defined by the national regulatory authorities,

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— information on any procedures put in place by the undertaking to measure and shape traffic so as to avoid filling or overfilling a network link, and information on how those procedures could impact on service quality,

— the types of maintenance service offered and customer support services provided, as well as the means of contacting these services,

— any restrictions imposed by the provider on the use of terminal equipment supplied;

(c) where an obligation exists under Article 25, the subscriber's options as to whether or not to include his or her personal data in a directory, and the data concerned;

(d) details of prices and tariffs, the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained, payment methods offered and any differences in costs due to payment method;

(e) the duration of the contract and the conditions for renewal and termination of services and of the contract, including:

— any minimum usage or duration required to benefit from promotional terms,

— any charges related to portability of numbers and other identifiers,

— any charges due on termination of the contract, including any cost recovery with respect to terminal equipment,

(f) any compensation and the refund arrangements which apply if contracted service quality levels are not met;

(g) the means of initiating procedures for the settlement of disputes in accordance with Article 34;

(h) the type of action that might be taken by the undertaking in reaction to security or integrity incidents or threats and vulnerabilities.

Member States may also require that the contract include any information which may be provided by the relevant public authorities for this purpose on the use of electronic communications networks and services to engage in unlawful activities or to disseminate harmful content, and on the means of protection against risks to personal security, privacy and personal data, referred to in Article 21(4) and relevant to the service provided.

2. Member States shall ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by the undertakings providing electronic communications networks and/or services. Subscribers shall be given adequate notice, not shorter than one month, of any such modification, and shall be informed at the same time of their right to withdraw, without penalty, from their contract if they do not accept the new conditions. Member States shall ensure that national regulatory authorities are able to specify the format of such notifications.

Article 21

Transparency and publication of information

1. Member States shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to publish transparent, comparable, adequate and up-to-date information on applicable prices and tariffs, on any charges due on termination of a contract and on standard terms and conditions in respect of access to,

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and use of, services provided by them to end-users and consumers in accordance with Annex II. Such information shall be published in a clear, comprehensive and easily accessible form. National regulatory authorities may specify additional requirements regarding the form in which such information is to be published.

2. National regulatory authorities shall encourage the provision of comparable information to enable end-users and consumers to make an independent evaluation of the cost of alternative usage patterns, for instance by means of interactive guides or similar techniques. Where such facilities are not available on the market free of charge or at a reasonable price, Member States shall ensure that national regulatory authorities are able to make such guides or techniques available themselves or through third party procurement. Third parties shall have a right to use, free of charge, the information published by undertakings providing electronic communications networks and/or publicly available electronic communications services for the purposes of selling or making available such interactive guides or similar techniques.

3. Member States shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to inter alia:

(a) provide applicable tariff information to subscribers regarding any number or service subject to particular pricing conditions; with respect to individual categories of services, national regulatory authorities may require such information to be provided immediately prior to connecting the call;

(b) inform subscribers of any change to access to emergency services or caller location information in the service to which they have subscribed;

(c) inform subscribers of any change to conditions limiting access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law;

(d) provide information on any procedures put in place by the provider to measure and shape traffic so as to avoid filling or overfilling a network link, and on how those procedures could impact on service quality;

(e) inform subscribers of their right to determine whether or not to include their personal data in a directory, and of the types of data concerned, in accordance with Article 12 of Directive 2002/58/EC (Directive on privacy and electronic communications); and

(f) regularly inform disabled subscribers of details of products and services designed for them.

If deemed appropriate, national regulatory authorities may promote self- or co-regulatory measures prior to imposing any obligation.

4. Member States may require that the undertakings referred to in paragraph 3 distribute public interest information free of charge to existing and new subscribers, where appropriate, by the same means as those ordinarily used by them in their communications with subscribers. In such a case, that information shall be provided by the relevant public authorities in a standardised format and shall, inter alia, cover the following topics:

(a) the most common uses of electronic communications services to engage in unlawful activities or to disseminate harmful content, particularly where it may prejudice respect for the rights and freedoms of others, including infringements of copyright and related rights, and their legal consequences; and

(b) the means of protection against risks to personal security, privacy and personal data when using electronic communications services.

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Article 22

Quality of service

1. Member States shall ensure that national regulatory authorities are, after taking account of the views of interested parties, able to require undertakings that provide publicly available electronic communications networks and/or services to publish comparable, adequate and up-to-date information for end-users on the quality of their services and on measures taken to ensure equivalence in access for disabled end-users. That information shall, on request, be supplied to the national regulatory authority in advance of its publication.

2. National regulatory authorities may specify, inter alia, the quality of service parameters to be measured and the content, form and manner of the information to be published, including possible quality certification mechanisms, in order to ensure that end-users, including disabled end-users, have access to comprehensive, comparable, reliable and user-friendly information. Where appropriate, the parameters, definitions and measurement methods set out in Annex III may be used.

3. In order to prevent the degradation of service and the hindering or slowing down of traffic over networks, Member States shall ensure that national regulatory authorities are able to set minimum quality of service requirements on an undertaking or undertakings providing public communications networks.

National regulatory authorities shall provide the Commission, in good time before setting any such requirements, with a summary of the grounds for action, the envisaged requirements and the proposed course of action. This information shall also be made available to the Body of European Regulators for Electronic Communications (BEREC). The Commission may, having examined such information, make comments or recommendations thereupon, in particular to ensure that the envisaged requirements do not adversely affect the functioning of the internal market. National regulatory authorities shall take the utmost account of the Commission's comments or recommendations when deciding on the requirements.

Article 23

Availability of services

Member States shall take all necessary measures to ensure the fullest possible availability of publicly available telephone services provided over public communications networks in the event of catastrophic network breakdown or in cases of force majeure. Member States shall ensure that undertakings providing publicly available telephone services take all necessary measures to ensure uninterrupted access to emergency services.

Article 23a

Ensuring equivalence in access and choice for disabled end-users

1. Member States shall enable relevant national authorities to specify, where appropriate, requirements to be met by undertakings providing publicly available electronic communication services to ensure that disabled end-users:

(a) have access to electronic communications services equivalent to that enjoyed by the majority of end-users; and

(b) benefit from the choice of undertakings and services available to the majority of end-users.

2. In order to be able to adopt and implement specific arrangements for disabled end-users, Member States shall encourage the availability of terminal equipment offering the necessary services and functions.

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Article 24

Interoperability of consumer digital television equipment

In accordance with the provisions of Annex VI, Member States shall ensure the interoperability of the consumer digital television equipment referred to therein.

Article 25

►M1 Telephone directory enquiry services ◄

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1. Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in Article 5(1)(a) and to have their information made available to providers of directory enquiry services and/or directories in accordance with paragraph 2.

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2. Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.

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3. Member States shall ensure that all end-users provided with a publicly available telephone service can access directory enquiry services. National regulatory authorities shall be able to impose obligations and conditions on undertakings that control access of end-users for the provision of directory enquiry services in accordance with the provisions of Article 5 of Directive 2002/19/EC (Access Directive). Such obligations and conditions shall be objective, equitable, non-discriminatory and transparent.

4. Member States shall not maintain any regulatory restrictions which prevent end-users in one Member State from accessing directly the directory enquiry service in another Member State by voice call or SMS, and shall take measures to ensure such access in accordance with Article 28.

5. Paragraphs 1 to 4 shall apply subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 12 of Directive 2002/58/EC (Directive on privacy and electronic communications).

Article 26

Emergency services and the single European emergency call number

1. Member States shall ensure that all end-users of the service referred to in paragraph 2, including users of public pay telephones, are able to call the emergency services free of charge and without having to use any means of payment, by using the single European emergency call number ‘112’ and any national emergency call number specified by Member States.

2. Member States, in consultation with national regulatory authorities, emergency services and providers, shall ensure that undertakings providing end-users with an electronic communications service for originating national calls to a number or numbers in a national telephone numbering plan provide access to emergency services.

3. Member States shall ensure that calls to the single European emergency call number ‘112’ are appropriately answered and handled in the manner best suited to the national organisation of emergency

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systems. Such calls shall be answered and handled at least as expeditiously and effectively as calls to the national emergency number or numbers, where these continue to be in use.

4. Member States shall ensure that access for disabled end-users to emergency services is equivalent to that enjoyed by other end-users. Measures taken to ensure that disabled end-users are able to access emergency services whilst travelling in other Member States shall be based to the greatest extent possible on European standards or specifications published in accordance with the provisions of Article 17 of Directive 2002/21/EC (Framework Directive), and they shall not prevent Member States from adopting additional requirements in order to pursue the objectives set out in this Article.

5. Member States shall ensure that undertakings concerned make caller location information available free of charge to the authority handling emergency calls as soon as the call reaches that authority. This shall apply to all calls to the single European emergency call number '112'. Member States may extend this obligation to cover calls to national emergency numbers. Competent regulatory authorities shall lay down criteria for the accuracy and reliability of the caller location information provided.

6. Member States shall ensure that citizens are adequately informed about the existence and use of the single European emergency call number '112', in particular through initiatives specifically targeting persons travelling between Member States.

7. In order to ensure effective access to '112' services in the Member States, the Commission, having consulted BEREC, may adopt technical implementing measures. However, these technical implementing measures shall be adopted without prejudice to, and shall have no impact on, the organisation of emergency services, which remains of the exclusive competence of Member States.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2).

Article 27

European telephone access codes

1. Member States shall ensure that the '00' code is the standard international access code. Special arrangements for making calls between locations adjacent to one another across borders between Member States may be established or continued. End-users in the locations concerned shall be fully informed of such arrangements.

2. A legal entity, established within the Community and designated by the Commission, shall have sole responsibility for the management, including number assignment, and promotion of the European Telephony Numbering Space (ETNS). The Commission shall adopt the necessary implementing rules.

3. Member States shall ensure that all undertakings that provide publicly available telephone services allowing international calls handle all calls to and from the ETNS at rates similar to those applied for calls to and from other Member States.

Article 27a

Harmonised numbers for harmonised services of social value, including the missing children hotline number

1. Member States shall promote the specific numbers in the numbering range beginning with '116' identified by Commission Decision 2007/116/EC of 15 February 2007 on reserving the national numbering range beginning with '116' for harmonised numbers for

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harmonised services of social value [1]. They shall encourage the provision within their territory of the services for which such numbers are reserved.

2. Member States shall ensure that disabled end-users are able to access services provided under the '116' numbering range to the greatest extent possible. Measures taken to facilitate disabled end-users' access to such services whilst travelling in other Member States shall be based on compliance with relevant standards or specifications published in accordance with Article 17 of Directive 2002/21/EC (Framework Directive).

3. Member States shall ensure that citizens are adequately informed of the existence and use of services provided under the '116' numbering range, in particular through initiatives specifically targeting persons travelling between Member States.

4. Member States shall, in addition to measures of general applicability to all numbers in the '116' numbering range taken pursuant to paragraphs 1, 2, and 3, make every effort to ensure that citizens have access to a service operating a hotline to report cases of missing children. The hotline shall be available on the number '116000'.

5. In order to ensure the effective implementation of the '116' numbering range, in particular the missing children hotline number '116000', in the Member States, including access for disabled end-users when travelling in other Member States, the Commission, having consulted BEREC, may adopt technical implementing measures. However, these technical implementing measures shall be adopted without prejudice to, and shall have no impact on, the organisation of these services, which remains of the exclusive competence of Member States.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2).

Article 28

Access to numbers and services

1. Member States shall ensure that, where technically and economically feasible, and except where a called subscriber has chosen for commercial reasons to limit access by calling parties located in specific geographical areas, relevant national authorities take all necessary steps to ensure that end-users are able to:

(a) access and use services using non-geographic numbers within the Community; and

(b) access all numbers provided in the Community, regardless of the technology and devices used by the operator, including those in the national numbering plans of Member States, those from the ETNS and Universal International Freephone Numbers (UIFN).

2. Member States shall ensure that the relevant authorities are able to require undertakings providing public communications networks and/or publicly available electronic communications services to block, on a case-by-case basis, access to numbers or services where this is justified by reasons of fraud or misuse and to require that in such cases providers of electronic communications services withhold relevant interconnection or other service revenues.

[1] OJ L 49, 17.2.2007, p. 30.

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Article 29

Provision of additional facilities

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1. Without prejudice to Article 10(2), Member States shall ensure that national regulatory authorities are able to require all undertakings that provide publicly available telephone services and/or access to public communications networks to make available all or part of the additional facilities listed in Part B of Annex I, subject to technical feasibility and economic viability, as well as all or part of the additional facilities listed in Part A of Annex I.

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2. A Member State may decide to waive paragraph 1 in all or part of its territory if it considers, after taking into account the views of interested parties, that there is sufficient access to these facilities.

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Article 30

Facilitating change of provider

1. Member States shall ensure that all subscribers with numbers from the national telephone numbering plan who so request can retain their number(s) independently of the undertaking providing the service in accordance with the provisions of Part C of Annex I.

2. National regulatory authorities shall ensure that pricing between operators and/or service providers related to the provision of number portability is cost-oriented, and that direct charges to subscribers, if any, do not act as a disincentive for subscribers against changing service provider.

3. National regulatory authorities shall not impose retail tariffs for the porting of numbers in a manner that would distort competition, such as by setting specific or common retail tariffs.

4. Porting of numbers and their subsequent activation shall be carried out within the shortest possible time. In any case, subscribers who have concluded an agreement to port a number to a new undertaking shall have that number activated within one working day.

Without prejudice to the first subparagraph, competent national authorities may establish the global process of porting of numbers, taking into account national provisions on contracts, technical feasibility and the need to maintain continuity of service to the subscriber. In any event, loss of service during the process of porting shall not exceed one working day. Competent national authorities shall also take into account, where necessary, measures ensuring that subscribers are protected throughout the switching process and are not switched to another provider against their will.

Member States shall ensure that appropriate sanctions on undertakings are provided for, including an obligation to compensate subscribers in case of delay in porting or abuse of porting by them or on their behalf.

5. Member States shall ensure that contracts concluded between consumers and undertakings providing electronic communications services do not mandate an initial commitment period that exceeds 24 months. Member States shall also ensure that undertakings offer users the possibility to subscribe to a contract with a maximum duration of 12 months.

6. Without prejudice to any minimum contractual period, Member States shall ensure that conditions and procedures for contract termination do not act as a disincentive against changing service provider.

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Article 31

'Must carry' obligations

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1. Member States may impose reasonable 'must carry' obligations, for the transmission of specified radio and television broadcast channels and complementary services, particularly accessibility services to enable appropriate access for disabled end-users, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcast channels. Such obligations shall only be imposed where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent.

The obligations referred to in the first subparagraph shall be reviewed by the Member States at the latest within one year of 25 May 2011, except where Member States have carried out such a review within the previous two years.

Member States shall review 'must carry' obligations on a regular basis.

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2. Neither paragraph 1 of this Article nor Article 3(2) of Directive 2002/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner.

CHAPTER V

GENERAL AND FINAL PROVISIONS

Article 32

Additional mandatory services

Member States may decide to make additional services, apart from services within the universal service obligations as defined in Chapter II, publicly available in its own territory but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

Article 33

Consultation with interested parties

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1. Member States shall ensure as far as appropriate that national regulatory authorities take account of the views of end-users, consumers (including, in particular, disabled consumers), manufacturers and undertakings that provide electronic communications networks and/or services on issues related to all end-user and consumer rights concerning publicly available electronic communications services, in particular where they have a significant impact on the market.

In particular, Member States shall ensure that national regulatory authorities establish a consultation mechanism ensuring that in their decisions on issues related to end-user and consumer rights concerning publicly available electronic communications services, due consideration is given to consumer interests in electronic communications.

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2. Where appropriate, interested parties may develop, with the guidance of national regulatory authorities, mechanisms, involving consumers, user groups and service providers, to improve the general quality of service provision by, *inter alia*, developing and monitoring codes of conduct and operating standards.

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3. Without prejudice to national rules in conformity with Community law promoting cultural and media policy objectives, such as cultural and linguistic diversity and media pluralism, national regulatory authorities and other relevant authorities may promote cooperation between undertakings providing electronic communications networks and/or services and sectors interested in the promotion of lawful content in electronic communication networks and services. That cooperation may also include coordination of the public interest information to be provided pursuant to Article 21(4) and the second subparagraph of Article 20(1).

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Article 34

Out-of-court dispute resolution

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1. Member States shall ensure that transparent, non-discriminatory, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes between consumers and undertakings providing electronic communications networks and/or services arising under this Directive and relating to the contractual conditions and/or performance of contracts concerning the supply of those networks and/or services. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly and may, where warranted, adopt a system of reimbursement and/or compensation. Such procedures shall enable disputes to be settled impartially and shall not deprive the consumer of the legal protection afforded by national law. Member States may extend these obligations to cover disputes involving other end-users.

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2. Member States shall ensure that their legislation does not hamper the establishment of complaints offices and the provision of on-line services at the appropriate territorial level to facilitate access to dispute resolution by consumers and end-users.

3. Where such disputes involve parties in different Member States, Member States shall coordinate their efforts with a view to bringing about a resolution of the dispute.

4. This Article is without prejudice to national court procedures.

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Article 35

Adaptation of annexes

Measures designed to amend non-essential elements of this Directive and necessary to adapt Annexes I, II, III, and VI to technological developments or changes in market demand shall be adopted by the Commission in accordance with the regulatory procedure with scrutiny referred to in Article 37(2).

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Article 36

Notification, monitoring and review procedures

1. National regulatory authorities shall notify to the Commission by at the latest the date of application referred to in Article 38(1), second subparagraph, and immediately in the event of any change thereafter in

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the names of undertakings designated as having universal service obligations under Article 8(1).

The Commission shall make the information available in a readily accessible form, and shall distribute it to the Communications Committee referred to in Article 37.

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2. National regulatory authorities shall notify to the Commission the universal service obligations imposed upon undertakings designated as having universal service obligations. Any changes affecting these obligations or of the undertakings affected under the provisions of this Directive shall be notified to the Commission without delay.

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3. The Commission shall periodically review the functioning of this Directive and report to the European Parliament and to the Council, on the first occasion not later than three years after the date of application referred to in Article 38(1), second subparagraph. The Member States and national regulatory authorities shall supply the necessary information to the Commission for this purpose.

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Article 37

Committee procedure

1. The Commission shall be assisted by the Communications Committee set up under Article 22 of Directive 2002/21/EC (Framework Directive).

2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

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Article 38

Transposition

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 24 July 2003 at the latest. They shall forthwith inform the Commission thereof.

They shall apply those measures from 25 July 2003.

2. When Member States adopt these 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 a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent modifications to those provisions.

Article 39

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 40

Addressees

This Directive is addressed to the Member States.

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ANNEX I

DESCRIPTION OF FACILITIES AND SERVICES REFERRED TO IN ARTICLE 10 (CONTROL OF EXPENDITURE), ARTICLE 29 (ADDITIONAL FACILITIES) AND ARTICLE 30 (FACILITATING CHANGE OF PROVIDER)

Part A: Facilities and services referred to in Article 10

(a) *Itemised billing*

Member States are to ensure that national regulatory authorities, subject to the requirements of relevant legislation on the protection of personal data and privacy, may lay down the basic level of itemised bills which are to be provided by undertakings to subscribers free of charge in order that they can:

(i) allow verification and control of the charges incurred in using the public communications network at a fixed location and/or related publicly available telephone services; and

(ii) adequately monitor their usage and expenditure and thereby exercise a reasonable degree of control over their bills.

Where appropriate, additional levels of detail may be offered to subscribers at reasonable tariffs or at no charge.

Calls which are free of charge to the calling subscriber, including calls to helplines, are not to be identified in the calling subscriber's itemised bill.

(b) *Selective barring for outgoing calls or premium SMS or MMS, or, where technically feasible, other kinds of similar applications, free of charge*

i.e. the facility whereby the subscriber can, on request to the designated undertaking that provides telephone services, bar outgoing calls or premium SMS or MMS or other kinds of similar applications of defined types or to defined types of numbers free of charge.

(c) *Pre-payment systems*

Member States are to ensure that national regulatory authorities may require designated undertakings to provide means for consumers to pay for access to the public communications network and use of publicly available telephone services on pre-paid terms.

(d) *Phased payment of connection fees*

Member States are to ensure that national regulatory authorities may require designated undertakings to allow consumers to pay for connection to the public communications network on the basis of payments phased over time.

(e) *Non-payment of bills*

Member States are to authorise specified measures, which are to be proportionate, non-discriminatory and published, to cover non-payment of telephone bills issued by undertakings. These measures are to ensure that due warning of any consequent service interruption or disconnection is given to the subscriber beforehand. Except in cases of fraud, persistent late payment or non-payment, these measures are to ensure, as far as is technically feasible that any service interruption is confined to the service concerned. Disconnection for non-payment of bills should take place only after due warning is given to the subscriber. Member States may allow a period of limited service prior to complete disconnection, during which only calls that do not incur a charge to the subscriber (e.g. '112' calls) are permitted.

(f) *Tariff advice*

i.e. the facility whereby subscribers may request the undertaking to provide information regarding alternative lower-cost tariffs, if available.

(g) *Cost control*

i.e. the facility whereby undertakings offer other means, if determined to be appropriate by national regulatory authorities, to control the costs of publicly

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available telephone services, including free-of-charge alerts to consumers in case of abnormal or excessive consumption patterns.

Part B: Facilities referred to in Article 29

(a) *Tone dialling or DTMF (dual-tone multi-frequency operation)*

i.e. the public communications network and/or publicly available telephone services supports the use of DTMF tones as defined in ETSI ETR 207 for end-to-end signalling throughout the network both within a Member State and between Member States.

(b) *Calling-line identification*

i.e. the calling party's number is presented to the called party prior to the call being established.

This facility should be provided in accordance with relevant legislation on protection of personal data and privacy, in particular Directive 2002/58/EC (Directive on privacy and electronic communications).

To the extent technically feasible, operators should provide data and signals to facilitate the offering of calling-line identity and tone dialling across Member State boundaries.

Part C: Implementation of the number portability provisions referred to in Article 30

The requirement that all subscribers with numbers from the national numbering plan, who so request can retain their number(s) independently of the undertaking providing the service shall apply:

(a) in the case of geographic numbers, at a specific location; and

(b) in the case of non-geographic numbers, at any location.

This Part does not apply to the porting of numbers between networks providing services at a fixed location and mobile networks.

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ANNEX II

INFORMATION TO BE PUBLISHED IN ACCORDANCE WITH ARTICLE 21

(TRANSPARENCY AND PUBLICATION OF INFORMATION)

The national regulatory authority has a responsibility to ensure that the information in this Annex is published, in accordance with Article 21. It is for the national regulatory authority to decide which information is to be published by the undertakings providing public communications networks and/or publicly available telephone services and which information is to be published by the national regulatory authority itself, so as to ensure that consumers are able to make informed choices.

1. Name(s) and address(es) of undertaking(s)

   i.e. names and head office addresses of undertakings providing public communications networks and/or publicly available telephone services.

2. Description of services offered

2.1. Scope of services offered

2.2. Standard tariffs indicating the services provided and the content of each tariff element (e.g. charges for access, all types of usage charges, maintenance charges), and including details of standard discounts applied and special and targeted tariff schemes and any additional charges, as well as costs with respect to terminal equipment.

2.3. Compensation/refund policy, including specific details of any compensation/refund schemes offered.

2.4. Types of maintenance service offered.

2.5. Standard contract conditions, including any minimum contractual period, termination of the contract and procedures and direct charges related to the portability of numbers and other identifiers, if relevant.

3. Dispute settlement mechanisms, including those developed by the undertaking.

4. Information about rights as regards universal service, including, where appropriate, the facilities and services mentioned in Annex I.

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ANNEX III

QUALITY OF SERVICE PARAMETERS

Quality-of-Service Parameters, Definitions and Measurement Methods referred to in Articles 11 and 22

For undertakings providing access to a public communications network

PARAMETER (Note 1)	DEFINITION	MEASUREMENT METHOD
Supply time for initial connection	ETSI EG 202 057	ETSI EG 202 057
Fault rate per access line	ETSI EG 202 057	ETSI EG 202 057
Fault repair time	ETSI EG 202 057	ETSI EG 202 057

For undertakings providing a publicly available telephone service

Call set up time (Note 2)	ETSI EG 202 057	ETSI EG 202 057
Response times for directory enquiry services	ETSI EG 202 057	ETSI EG 202 057
Proportion of coin and card operated public pay-telephones in working order	ETSI EG 202 057	ETSI EG 202 057
Bill correctness complaints	ETSI EG 202 057	ETSI EG 202 057
Unsuccessful call ratio (Note 2)	ETSI EG 202 057	ETSI EG 202 057
Version number of ETSI EG 202 057-1 is 1.3.1 (July 2008)		

Note 1

Parameters should allow for performance to be analysed at a regional level (i.e. no less than level 2 in the Nomenclature of Territorial Units for Statistics (NUTS) established by Eurostat).

Note 2

Member States may decide not to require up-to-date information concerning the performance for these two parameters to be kept if evidence is available to show that performance in these two areas is satisfactory.

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ANNEX IV

CALCULATING THE NET COST, IF ANY, OF UNIVERSAL SERVICE OBLIGATIONS AND ESTABLISHING ANY RECOVERY OR SHARING MECHANISM IN ACCORDANCE WITH ARTICLES 12 AND 13

Part A: Calculation of net cost

Universal service obligations refer to those obligations placed upon an undertaking by a Member State which concern the provision of a network and service throughout a specified geographical area, including, where required, averaged prices in that geographical area for the provision of that service or provision of specific tariff options for consumers with low incomes or with special social needs.

National regulatory authorities are to consider all means to ensure appropriate incentives for undertakings (designated or not) to provide universal service obligations cost efficiently. In undertaking a calculation exercise, the net cost of universal service obligations is to be calculated as the difference between the net cost for a designated undertaking of operating with the universal service obligations and operating without the universal service obligations. This applies whether the network in a particular Member State is fully developed or is still undergoing development and expansion. Due attention is to be given to correctly assessing the costs that any designated undertaking would have chosen to avoid had there been no universal service obligation. The net cost calculation should assess the benefits, including intangible benefits, to the universal service operator.

The calculation is to be based upon the costs attributable to:

(i) elements of the identified services which can only be provided at a loss or provided under cost conditions falling outside normal commercial standards.

This category may include service elements such as access to emergency telephone services, provision of certain public pay telephones, provision of certain services or equipment for disabled people, etc;

(ii) specific end-users or groups of end-users who, taking into account the cost of providing the specified network and service, the revenue generated and any geographical averaging of prices imposed by the Member State, can only be served at a loss or under cost conditions falling outside normal commercial standards.

This category includes those end-users or groups of end-users which would not be served by a commercial operator which did not have an obligation to provide universal service.

The calculation of the net cost of specific aspects of universal service obligations is to be made separately and so as to avoid the double counting of any direct or indirect benefits and costs. The overall net cost of universal service obligations to any undertaking is to be calculated as the sum of the net costs arising from the specific components of universal service obligations, taking account of any intangible benefits. The responsibility for verifying the net cost lies with the national regulatory authority.

Part B: Recovery of any net costs of universal service obligations

The recovery or financing of any net costs of universal service obligations requires designated undertakings with universal service obligations to be compensated for the services they provide under non-commercial conditions. Because such a compensation involves financial transfers, Member States are to ensure that these are undertaken in an objective, transparent, non-discriminatory and proportionate manner. This means that the transfers result in the least distortion to competition and to user demand.

In accordance with Article 13(3), a sharing mechanism based on a fund should use a transparent and neutral means for collecting contributions that avoids the danger of a double imposition of contributions falling on both outputs and inputs of undertakings.

The independent body administering the fund is to be responsible for collecting contributions from undertakings which are assessed as liable to contribute to the net cost of universal service obligations in the Member State and is to oversee the transfer of sums due and/or administrative payments to the undertakings entitled to receive payments from the fund.

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ANNEX V

PROCESS FOR REVIEWING THE SCOPE OF UNIVERSAL SERVICE IN ACCORDANCE WITH ARTICLE 15

In considering whether a review of the scope of universal service obligations should be undertaken, the Commission is to take into consideration the following elements:

— social and market developments in terms of the services used by consumers,

— social and market developments in terms of the availability and choice of services to consumers,

— technological developments in terms of the way services are provided to consumers.

In considering whether the scope of universal service obligations be changed or redefined, the Commission is to take into consideration the following elements:

— are specific services available to and used by a majority of consumers and does the lack of availability or non-use by a minority of consumers result in social exclusion, and

— does the availability and use of specific services convey a general net benefit to all consumers such that public intervention is warranted in circumstances where the specific services are not provided to the public under normal commercial circumstances?

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ANNEX VI

INTEROPERABILITY OF DIGITAL CONSUMER EQUIPMENT REFERRED TO IN ARTICLE 24

1. *Common scrambling algorithm and free-to-air reception*

   All consumer equipment intended for the reception of conventional digital television signals (i.e. broadcasting via terrestrial, cable or satellite transmission which is primarily intended for fixed reception, such as DVB-T, DVB-C or DVB-S), for sale or rent or otherwise made available in the Community, capable of descrambling digital television signals, is to possess the capability to:

   — allow the descrambling of such signals according to a common European scrambling algorithm as administered by a recognised European standards organisation, currently ETSI,

   — display signals that have been transmitted in the clear provided that, in the event that such equipment is rented, the renter is in compliance with the relevant rental agreement.

2. *Interoperability for analogue and digital television sets*

   Any analogue television set with an integral screen of visible diagonal greater than 42 cm which is put on the market for sale or rent in the Community is to be fitted with at least one open interface socket, as standardised by a recognised European standards organisation, e.g. as given in the Cenelec EN 50 049-1:1997 standard, permitting simple connection of peripherals, especially additional decoders and digital receivers.

   Any digital television set with an integral screen of visible diagonal greater than 30 cm which is put on the market for sale or rent in the Community is to be fitted with at least one open interface socket (either standardised by, or conforming to a standard adopted by, a recognised European standards organisation, or conforming to an industry-wide specification) e.g. the DVB common interface connector, permitting simple connection of peripherals, and able to pass all the elements of a digital television signal, including information relating to interactive and conditionally accessed services.

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EU Stakeholders Dialogue Memorandum of Understanding (MOU) on access to works by people with print disabilities

Dan Pescod (on behalf of the European Blind Union) and Alicia Wise (on behalf of the Federation of European Publishers

1. About this MOU

The undersigned

- Recognise the need for people with print disabilities to read, and the need to increase the number of accessible publications.
- Are mindful that disabled people's right to read is enshrined in the UN Convention on the Rights of Persons With Disabilities
- Appreciate the need to find pragmatic solutions, and endorse a system of mutual recognition of Trusted Intermediaries in the EU.
- Emphasise that publishers' efforts to produce accessible works in the normal course of publishing processes must be supported.
- Consider that Trusted Intermediaries should be enabled to provide access to works across borders.
- Commit to develop a network of Trusted Intermediaries in EU Member States.
- Commit to stimulate the creation of an online European accessible e-books service.

Have agreed on the following:

1. That our shared goal is to increase the access to works for people with print disabilities and, in the meanwhile, ensure that works converted into Braille or another accessible format, are available in other EU Member States through a network of Trusted Intermediaries.

2. Consent to the cross border transfer in the EU of accessible copies created under copyright exceptions or under licenses, through the network of Trusted Intermediaries and under appropriate conditions.

3. Recommend specific licenses allowing the cross border transfer in the EU of licensed accessible copies, through the network of Trusted Intermediaries.

The rest of this MOU sets out in detail our agreement about how all of this is to be achieved.

2. Definition of person with a print disability (i.e. the end-user)

For accessible copies of works lawfully made under a copyright exception, embodied in a physical medium such as a book or CD, that are to be supplied across borders, the terms of the copyright exception (or other relevant legislation) in the Member State where the accessible copy was first made apply. For the avoidance of doubt, the definition of the persons benefitting from the exception should be the one used in the copyright exception of the Member State where the accessible copy is first made.

For accessible copies of works to be supplied under licence, the following 3-part definition will apply to the extent that it is incorporated either verbatim or by reference in such licence:

Any person

(a) who is blind; or

(b) who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light; or

(c) who is unable, through physical disability, to hold or manipulate a work; or

(d) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading; or

(e) who is dyslexic.

- **- and –**

whose disability results in an inability to read commercially available standard editions of works.

- **and -**

who can be helped to read by reformatting the content (but, for avoidance of doubt, requires only a change to the graphic presentation of the original text and does not require the text itself to be re-written in simpler terms to facilitate comprehension).

This definition will be reviewed annually and may be extended with the consent of all interested parties to cover other beneficiaries with a view to including them as additional categories of persons with print disabilities.

3. Definition of rightsholder

Rightsholders are the creators and/or publishers of published works who own and/or control the copyright subsisting in such works. Reproduction Rights Organisations (RROs) and other rights management organisations may be authorized by the rightsholders to represent rightsholders in dealings with Trusted Intermediaries in order to assist by facilitating the clearance of the necessary rights to other Trusted Intermediaries and persons with print disabilities registered with a Trusted Intermediary.

4. Definition of accessible content

Accessible content is the term used to describe works whose format is usable by a print disabled person. This term can be used to:

- describe works that are originally published in accessible formats
- describe copies of works whose format is modified after publication in order to enable a print disabled person to read the work
- describe works or copies of works that can be adjusted by the user to facilitate accessibility – for example by providing a reader with the tools to increase font size, style or colour.

It is acknowledged that to make some visual content accessible it will be necessary to add information to the accessible version of the work (i.e. a description of the visual content).

5. Definition of Trusted Intermediary

A Trusted Intermediary (TI) is generally any entity that facilitates interactions between two parties who both trust the third party.

The objective of a TI in the context of this MoU is the controlled distribution of accessible copies of works, when these are not commercially available, to persons with a print disability. The rights holders will give their permission provided that the TI can certify that the recipient of an accessible work falls within the definition of person with a print disability above.

These TIs must have the trust of representatives of both persons with a print disability and rights holders and be formally and specifically accredited by the signatories.

The characteristics of an accredited TI are the following:

- They operate on a not-for-profit basis unless otherwise agreed;
- They keep a register of the people they serve under this MoU; and require qualifying service recipients to adhere to appropriate end-user agreements
- They have as part of their mission the provision of accessible content to print disabled people. They might also be providers of specialised services relating to training, education, or adaptive reading or information access needs of persons with a print disability;
- They maintain policies and procedures to establish the bona fide nature of the persons with a print disability that they serve, as well as ensuring full and complete compliance with copyright law.
- They enter into a licence with rightsholder representatives concerning the cross-border distribution of accessible works legally created as envisaged under 6d of this MoU.
- They agree to the dispute settlement procedures to address concerns of rightsholders regarding the proper distribution or transfer of accessible works as envisaged under 8.

If the accredited Trusted Intermediary is a network of organisations, then all organisations which are members of this network must adhere to all of the above mentioned characteristics.

6. Aim

The MOU should foster a pragmatic approach, recommending a system of mutual recognition of Trusted Intermediaries in the EU. The MOU provides a practical solution to improving accessibility for the print disabled that is in line with the Berne 3-step test, and does nothing to undermine publishers' own activities to increase the accessibility of publications.

Specifically, the Stakeholder Dialogue aims to do the following

a) Support publishers' efforts to produce accessible content in the normal course of their publishing processes.

b) Identify a rightsholder representative body in each Member State to act as the point of liaison between the Trusted Intermediary (or Intermediaries) and the rightsholder community.

c) Develop a network of Trusted Intermediaries in EU Member States and/or regions.

d) Enable these Trusted Intermediaries to create and provide accessible works across borders.

e) Stimulate the creation of an online European accessible e-books service.

6a) Support publishers' efforts to produce accessible content in the normal course of their publishing processes

It is important to support publishers' efforts to make publications readily accessible from the outset. Our shared objective is to have the vast majority of works accessible, and for that accessibility needs to become mainstream.

Signatories to this MOU will encourage training and support for rightsholders and TIs in Europe to implement WIPO's Enabling Technologies Framework and the outputs of WIPO's Trusted Intermediaries Pilot Project. Rights holders and user groups in Europe will also build on work that has been done in this field already, for example the EUAIN platform and the PROACCESS project.

Publishers are committed to a market where people with a print disability can access the same work at the same time and same price as other readers. However it is neither easy nor cost-free for publishers to transform their processes and formats to achieve this goal. Support and recognition for this investment to improve document accessibility would be helpful, and could take the form of specific calls for projects.

A particular barrier is that electronic works and other digital publications attract VAT while print works do not. It would be helpful if in Europe electronic works and other digital publications attracted reduced VAT to facilitate purchase by people with print disabilities.

6b) Identify a rightsholder representative body in each Member State to act as the point of liaison between the Trusted Intermediary (or Intermediaries) and the rightsholder community

Organisations that provide support to people with print disabilities would find it helpful to liaise with a single point of contact to the rightsholder community in each country. Rightsholders may appoint any organisation to provide this single point of contact, for example an RRO or other rights management organisation or a trade body. The representative body would assist in facilitating the clearance of the necessary rights for TIs and persons with print disabilities registered with a TI. TIs wish that information on the single point of contact be widely available to the network of TIs.

Signatories will work together to identify a rightsholder representative for each Member State, as well as model agreements to appoint representatives and best practices and model agreements to be followed by them.

6c) Develop a network of Trusted Intermediaries in EU member states and/or regions

Signatories will develop specific Guidelines for Trusted Intermediaries to include:

- a description of a system of accreditation and removal of accredited status of TIs with a set of procedures
- rules on transparency
- a description of the role of the TI
- guidelines for data collection and content security

Signatories will also identify the group that will provide accreditation and removal of accredited status – which should include a balance of representatives of the main stakeholders (publishers, publishing trade associations, collecting societies, authors associations, national organisations supporting persons with a print disability, the European Blind Union, European Disability Forum).

A list of the different scenarios which could be carried out by TIs should be drawn up as a parallel exercise.

To be clear, there could be more than one TI per Member State subject to specific accreditation.

6d) Enable these Trusted Intermediaries to create and provide accessible works across borders

If commercially available in an appropriate accessible format, it is accepted by all signatories that the work should be purchased through commercial channels by persons with print disabilities.

It is accepted by all signatories that a commercially available abridged accessible version of a work cannot be considered a fully accessible version of that work.

Responsibility for ensuring the legality of the creation and transfer of accessible formats of works under EU single market rules rests with the supplying organisation.

A TI may supply accessible formats of works that were made legally.

In line with current transcription practices the producer of an accessible version of a work will not re-write its content in simpler terms to facilitate comprehension, or eliminate parts of the work, or translate the work into a language different from the original source of the work used to produce accessible content. To do so would undermine the integrity of the work and the creator's other moral rights. For the avoidance of doubt, the transcriber may make small changes to the work purely to ensure its accessibility. For example, exclusion of images if, for example, they either can not be captioned or can not be affordably captioned.

The purposes for which the copies will be used must be strictly non-commercial.

It is the responsibility of the TI which delivers the accessible copy to the end-user to ensure that works go to individuals certified as persons with a print disability.

TIs are responsible for ensuring that there is an appropriate end-user agreement in place to ensure that the copy is to be used by that individual user only.

In case an end-user is in breach of his or her obligations, the TI would be required to act diligently to secure compliance.

Creation, distribution and use of the accessible copies of the work must comply with the terms of the licence in the country where the first accessible copy of the work is produced.

6e) Stimulate the creation of an online European accessible e-books service

To aid the discovery of accessible works, the signatories agree to support the establishment of an online European catalogue of works available in accessible formats. This service shall include a database of commercially available accessible publications, public domain works, and works created under a national copyright exception or licence.

It is intended in the first instance that this is a catalogue, but it could evolve to be a distributed service to facilitate the discovery *and* delivery of accessible ebooks to

authorised users. The Signatories acknowledge that this is a major undertaking, and will work in good faith together to secure funding and other resources to move forward to realise this objective.

This objective is shared with the WIPO Stakeholders Platform projects, and the signatories will work together to avoid duplication of effort by building on existing work.

7. Measures of Success

- The following are seen by this MOU as measures of success:
    - Identify rightsholders representative bodies in a majority of Member States
    - Evidence of a flow of accessible works between TIs in Europe
    - An online database of accessible works investigated and costed plan developed

8. Safeguarding Measures and Settlement of Disputes

The signatories agree it is important to safeguard trust between rightsholders and Trusted Intermediaries and will agree appropriate dispute resolution mechanisms.

9. Implementation

The signatories agree to work together to finalise an activity plan, trusted intermediary guidelines, model licenses, and other tools as needed to support the implementation of this MOU.

10. Signatures

Signed by representatives of rightsholders and print disabled people/Trusted Intermediaries:

Federation of European Publishers ***European Blind Union***

European Writers Council ***European Dyslexia Association***

International Federation of Reproduction Rights Organisations

International Association of Scientific, Technical and Medical Publishers

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 1.12.2008
COM(2008) 804 final

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

"Towards an accessible information society"

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

"Towards an accessible information society"

[SEC(2008) 2915]

[SEC(2008) 2916]

1. EXECUTIVE SUMMARY

As our society is evolving to an 'information society', we are becoming intrinsically more dependent on technology-based products and services in our daily lives. Yet poor e-accessibility means many Europeans with a disability are still unable to access the benefits of the information society.

This issue of e-accessibility has received high policy visibility and attention in recent years. In 2006, European Ministers agreed targets in their 'Riga Declaration' to deliver significant progress by 2010. In 2007, benchmarking showed that the pace of progress was still insufficient and that further efforts were needed in order to achieve the Riga targets. Web accessibility, especially the accessibility of public administration websites, has emerged as a high priority due to the growing importance of the Internet in everyday life.

The Commission considers it is now urgent to achieve a more **coherent, common and effective approach to e-accessibility, in particular web accessibility,** to hasten the advent of an accessible information society, as announced in the Renewed Social Agenda[1]. Through this Communication, the Commission describes the current state of play, establishes the rationale for European action and sets out key steps to be taken.

To achieve a common and coherent **e-accessibility approach**:

- European Standardisation Organisations (ESOs) should **pursue wider e-accessibility standardisation** activities to reduce market fragmentation and facilitate increased adoption of ICT-enabled goods and services.

- Member States, stakeholders and the Commission should **stimulate greater levels of innovation and deployment** in e-accessibility, in particular through the use of the EU research and innovation programmes and the Structural Funds.

- All stakeholders should **make full use of** the opportunities to address e-accessibility within **existing EU legislation**. The Commission will include appropriate e-accessibility requirements in revisions or new legislative developments.

- The Commission will **boost stakeholder cooperation activities** to enhance the coherence, coordination and impact of the actions. In particular, a new high-level ad hoc group will be mandated to provide guidance on the overall coherent approach to e-accessibility (including web accessibility) and propose priority actions to overcome e-accessibility barriers.

[1] COM(2008)412.

To speed up progress in the special case of **web accessibility**:

- ESOs should **rapidly adopt European standards** for web accessibility, following the establishment of updated web guidelines (WCAG 2.0) by the World Wide Web Consortium.

- Member States should **step up work** on making public web sites **accessible** and **jointly prepare for swift adoption** of European web accessibility standards.

- The Commission will **monitor and publish progress** and may follow up at a later stage with legislative action.

2. E-ACCESSIBILITY

E-accessibility means overcoming the technical barriers and difficulties that people with disabilities, including many elderly people, experience when trying to participate on equal terms in the information society.

If everyone is to have equal opportunities for participation in today's society, the full range of ICT goods, products and services need to be accessible. This includes computers, telephones, TVs, online government, online shopping, call centres, self-service terminals such as automatic teller machines (ATMs) and ticket machines.

2.1. State of play

The scale of the accessibility challenge is huge and growing: around 15% of Europe's population has a disability and up to one in five working-age Europeans have impairments requiring accessible solutions. Overall, three out of every five people stand to benefit from e-accessibility, as it improves general usability[2].

E-accessibility has socio-economic implications for both individuals and Europe as a whole. For example, accessible ICT-enabled solutions can help older workers to stay in employment and enhance the take-up of online public services such as e-Government and e-Health. Lack of e-accessibility excludes significant sectors of the population and prevents them from fully carrying out their professional, education, leisure, democratic participation and social activities. Strengthening e-accessibility will contribute to both economic and social inclusion goals.

Many countries have adopted at least some legislative or support measures to promote e-accessibility and parts of the ICT industry are making significant efforts to improve the accessibility of their products and services[3].

E-accessibility is also a key element in the European e-Inclusion policy[4]. In a broader context, ICT falls within the scope of the proposed Directive on equal treatment that refers to access to and supply of goods and services available to the public[5]. The European Community and the

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2 The Demographic Change — Impacts of New Technologies and Information Society.

3 See details in accompanying Staff Working Paper.

4 i2010 Communication COM(2005) 229, Communication on e-accessibility COM(2005) 425, and Communication on e-Inclusion COM(2007) 694.

5 COM(2008) 426.

Member States also have to fulfil obligations under the United Nations Convention on the Rights of Persons with Disabilities in relation to accessibility of ICT goods and services. Some pieces of EU legislation already directly or indirectly address e-accessibility issues.

2.2. Rationale for further action

Despite the benefits and political attention, progress in e-accessibility is still unsatisfactory. There are many striking examples of accessibility deficits. E.g. text relay services, essential for deaf and speech-impaired people, are only available in half of the Member States; emergency services are directly accessible by text telephone in only seven Member States; broadcasting with audio description, subtitled TV programming and TV sign-language programming remains very poor; only 8% of ATMs installed by the two main European retail banks provide 'talking' output[6].

The existing EU *acquis* relating to e-accessibility is limited. At Member State level, there is considerable fragmentation in the treatment of e-accessibility, both in the issues addressed (usually fixed telephony services, TV broadcast services and public website accessibility) and the completeness of policy instruments used. Faced with divergent requirements and uncertainties, the ICT industry suffers from this market fragmentation, making it difficult to achieve the economies of scale necessary to sustain widespread innovation and market growth. Parts of the industry are actively engaged and cooperating with users (e.g. on accessible digital television) but too many are watching from the sidelines.

The key issue in e-accessibility is that current efforts have insufficient impact due to a lack of coherence, unclear priority setting, and poor legislative and financial support.

A common and coherent European approach to e-accessibility is therefore key to achieving significant improvements.

2.3. Proposed actions

(1) Delivering the change — strengthening policy priorities, coordination and stakeholder cooperation

At European level several activities have been put in place in recent years. Now is the time to increase synergies between these and reinforce individual areas of action for greater and more consistent impact.

Member States, users and industry need to step up their efforts and seek more impact through greater cooperation at European level and better exploitation of existing EU policy instruments. To support and strengthen coherence and effectiveness of a common approach and to help define priorities, the Commission will establish an **ad hoc high-level group on e-accessibility**, reporting to the i2010 high level group, involving consumer organisations and representatives of disabled and elderly users, ICT and assistive technology and service industries, academia and relevant authorities.

Early in 2009, the Commission will establish an **ad hoc high-level group** to provide guidance on priorities and a more coherent approach to e-accessibility. Stakeholders are called upon to commit to this cooperation.

[6] For details, see the MeAC study (Measuring progress of e-accessibility in Europe).

The Commission will **boost its existing support for cooperation** with and between stakeholders. In particular the groups following the implementation of i2010, standardisation matters, telecommunication issues and the disability action plan should use the guidance of the high-level group to inform their priorities. It is also important that users, relevant authorities, and industry reinforce their commitment and cooperation on e-accessibility matters.

Priorities for e-accessibility need to be selected. The first is web accessibility, where the proposed coherent and common approach can be applied. Next are the accessibility of digital television and electronic communications, including accessibility of the single European emergency number. For these, cooperation of users and industry should be increased and, with the help of the high-level group, better linked to the EU-level legislative and innovation support.

Self-service terminals and electronic banking is another high priority[7]. The closer cooperation of stakeholders will help to obtain guidance on further priorities and define a common programme of future work.

The Commission has already addressed e-accessibility in its proposal for a new version of the e-government European Interoperability Framework[8], and will do so in its follow-up to the i2010 initiative and the disability action plan.

The Commission will ensure e-accessibility remains a **policy priority** in the follow-up to i2010 and disability action plan.

This closer coordination and cooperation will be further strengthened through enhanced exploitation of the activities mentioned below.

(2) Monitoring progress and reinforcing good practice

The Commission will launch a study in 2009 to continue monitoring general e-accessibility and web accessibility progress and implementation, following up two studies conducted in 2006-2008[9].

Under the 2009 Competitiveness and Innovation Programme (CIP), the Commission will propose a new thematic network on e-accessibility and web accessibility to further enhance stakeholder cooperation and the building up of experience and collection of good practices. It will also seek to reinforce the *ePractice* good practice exchange network on e-government, e-health and e-Inclusion, which has already amassed a vast amount of expertise on e-accessibility.

The Commission will monitor web-accessibility and e-accessibility progress and implementation, support cooperation and exchange of good practices via **studies** and a **CIP thematic network**, to be launched in 2009.

(3) Supporting innovation and deployment

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7 See report on the public consultation.

8 http://ec.europa.eu/idabc/en/document/7728

9 MeAC and study on accessibility of ICT products and services for disabled and elderly people.

There is already extensive support for e-accessibility research and innovation. In 2008, 13 new projects were funded with some €43m from the EU research programme. The Commission will continue to actively support e-accessibility and ICT for independent living of elderly people through the EU research programmes with a further call for proposals in 2009.

The Commission will **ensure e-accessibility is a strong research and innovation priority** in 2009 and beyond.

Member States and the Commission will use the Ambient Assisted Living joint research programme, launched in 2008, to stimulate innovative ICT-based solutions for independent living and the prevention and management of chronic conditions of elderly people.

Under the 2008 CIP, the Commission funded a pilot project on accessible TV and pilots on ICT for elderly people to accelerate technology deployment. In 2009, the Commission will fund a pilot on 'total conversation' (the combination of audio, text and video communications to support people with disabilities), which will help hearing- and speech-impaired persons to access the European '112' emergency number.

Member States and stakeholders are urged to **stimulate e-accessibility innovation and deployment** via the Structural Funds, FP7, the AAL programme and national programmes.

The Structural Funds Regulation[10] requires that the Member States consider accessibility for disabled persons as one of the criteria to receive funding. In this context, the Commission will provide a 'disability toolkit' in 2009, applicable to ICTs, and encourage Member States and Regions to ensure that ICT accessibility is incorporated in their procurement and funding criteria.

The Commission will provide a **disability toolkit** applicable to ICTs in 2009 for use in Structural Funds and other programmes.

(4) Facilitating standardisation activities

The Commission continues its strong support for e-accessibility in its standardisation work programme. In particular, Mandate 376 issued to the European Standardisation Organisations is an important standardisation activity to foster e-accessibility.[11] The Commission will promote the use of the results from this standardisation work and will seek a rapid continuation of Mandate 376 to deliver the actual standards and related conformity assessment schemes. This process will be complemented and supported by stakeholders' dialogue, exchange of good practices and deployment pilots, as referred to in the proposed actions of this Communication.

Under Mandate 376, ESOs should **rapidly develop EU standards** for e-accessibility, in cooperation with relevant stakeholders during 2009 and beyond.

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10 Council Regulation (EC) 1083/2006

11 The aim of Mandate 376 is to enable the use of public procurement and practice for ICT´s to remove barriers to participation in the Information Society by disabled and older people. The Mandate was given by the European Commission to the ESOs to come up with a solution for common requirements (for example for text sizes, screen contrast, keypad sizes etc) and conformance assessment.

(5) Exploiting current and considering new legislation

There is a clear correlation at national level between the existence of legislation and the actual level of progress on e-accessibility[12]. Research points to the risks of legal fragmentation in the EU due to divergent legislative measures. Based on this, and building on the 2005 and 2007 Communications, the Commission has started exploring a more general legislative approach to e-accessibility.

However, given the vast, complex and evolving nature of the e-accessibility field, there is not yet a clear consensus on possible EU legislation dedicated to e-accessibility[13], e.g. on elements such as scope, standards, compliance mechanisms and links to existing legislation. Furthermore, although there is a clear consensus on the need to act jointly to improve e-accessibility, there are different views on the next priorities to address. The Commission has therefore concluded that the time is not yet right for a specific e-accessibility legislative proposal, but will continue to assess its feasibility and relevance, taking into account actual progress in the field.

Nevertheless, there are provisions under current EU legislation that remain under-exploited, in particular for radio telecommunications equipment, electronic communications, public procurement, copyright in the information society, equality in employment, value added tax and state aid exemptions[14]. Making full use of these provisions would already significantly improve e-accessibility in Member States. The Commission therefore encourages Member States to make the most of these before new legislation is considered.

Several of the above pieces of EU legislation are under review or will be reviewed soon[15]. The Commission will work to ensure that, where appropriate, e-accessibility requirements are considered and reinforced in these revisions. Moreover, legislative proposals for electronic communications significantly strengthen provisions on disabled users under the current framework. The Commission will also carefully monitor the transposition and implementation of the audiovisual media services Directive[16] in particular its Article 3c that provides that Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.

The Commission will **ensure that appropriate e-accessibility provisions are integrated in revisions** of EU legislation. Member States, stakeholders and the Commission should **make full use of opportunities in current legislation** to strengthen e-accessibility.

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12 See MeAC and study on accessibility of ICT products and services for disabled and elderly people.

13 In the public consultation 90% of user organisations considered binding legislation a high priority, versus 33% of industry and public authorities.

14 Directives 2000/78/EC, 2002/21/EC, 1999/5/EC, 2004/18/EC, 2001/29/CE, 2007/65/EC.

15 For example, Directive 1999/5/EC on terminal equipment is under review: in this context, the Commission will make sure to maintain the possibility to activate the relevant Article 3(3)(f).

16 Directive 2007/65/EC.

3. WEB ACCESSIBILITY

Web accessibility is an important aspect of e-accessibility which offers disabled people the possibility to perceive, understand, navigate, interact with and contribute to the Web. It also benefits other people confronted with visual, dexterity or cognitive limitations, such as elderly people. Web accessibility has become particularly important because of the explosive growth in online information and interactive services: online banking, shopping, government and public services, and communicating with distant relatives or friends.

3.1. State of play

Despite its importance, the overall level of web accessibility remains poor across the EU. Several national and European surveys conducted over the last few years have found that the majority of websites, public and private, do not comply even with the most basic internationally accepted guidelines for accessibility. A recent survey found that only 5.3% of government websites and hardly any of the commercial websites surveyed were fully compliant with the basic accessibility guidelines[17]. This confirms why many people find important websites difficult to use and are therefore at risk of being partially or totally excluded from the information society.

The accessibility of public websites has received increasing policy attention in recent years in Member States[18]. At European level, a 2001 Communication on web accessibility encouraged Member States to endorse the Web Content Accessibility Guidelines (WCAG)[19]. In two Resolutions[20], the Council stressed the need to speed up accessibility to the web and its content. The European Parliament suggested in 2002 that all public websites be fully accessible to disabled persons by 2003[21]. In 2006, the Riga Ministerial Declaration on an inclusive Information Society included a commitment that 100% of public websites be accessible by 2010.

Internationally, WCAG version 1 was adopted in 1999 by the World Wide Web Consortium (W3C). However, ambiguities led to fragmented implementations by Member States, and in view of new internet developments, WCAG 1.0 is becoming outdated. W3C has been working on a new version of the specifications (WCAG 2.0) for several years; these are now in the final stages of adoption. The challenge this time is to avoid a fragmented implementation.

3.2. Rationale for further action

Making websites more accessible may be challenging in some cases, involving certain costs and expertise. However, there is increasing evidence and documented examples that making a website accessible delivers real benefits not only for disabled users, but also for website owners and users in general. Services are easier to use, simpler to maintain and accessed by more users[22]. As a result, improving website accessibility improves the situation for people

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17 MeAC study.
18 See related Staff Working Paper.
19 COM(2001) 529.
20 2002/C 86/02 and 2003/C 39/03.
21 C5-0074/2002-2002/2032(COS).
22 Staff Working Paper.

with disabilities and also for others and can thus strengthen the competitiveness of European companies.

Case study: benefits of an accessible website

After making their website accessible, a financial services business in the UK identified as benefits:

- Customers found information more quickly and stayed on the site longer.

- New customers used the service, increasing online sales.

- Website maintenance was simpler, quicker and cheaper.

- The website achieved significantly higher search engine rankings.

- Compatibility problems were eliminated and mobile device access improved.

- 100% return on investment in less than 12 months.

Even so, persistent legislative fragmentation across Member States combined with the lack of clear legislative action at European level continues to hamper the internal market, constitutes barriers to consumers and citizens in this cross-border environment, and hinders industry development. The United Nations Convention on the Rights of Persons With Disabilities foresees obligations related to the internet which State Parties have to comply with. Further action at European level is therefore appropriate.

3.3. Proposed actions

The primary responsibility for improving web accessibility rests with Member States and individual service providers. Nevertheless, there are actions that the Commission can undertake or facilitate that will help accelerate the improvement in web accessibility in Europe, even without specific EU legislative provisions on web accessibility. Overall success will be achieved through a common and consistent approach. The key action areas are:

(1) Facilitate the rapid adoption and implementation of international guidelines in Europe

There is broad consensus that WCAG 2.0 guidelines are the technical specifications to be closely adhered to for web accessibility. Once W3C reaches agreement on the guidelines, expected in the near future, Mandate 376 will be able to complete its harmonisation work at European level. In the meantime, Member States should undertake actions to ensure the Riga target for accessible public websites is achieved and prepare for the rapid incorporation of new web-accessibility specifications into national rules in a common and coherent way by:

– Publishing during 2009-2010 updated technical guidance and, where appropriate, translating relevant W3C specifications;

– Identifying during 2009 the public websites and intranets[23] concerned and achieving their accessibility by 2010.

[23] In accordance with the Employment Equality Directive 2000/78/EC.

The Commission will continue its work to improve the accessibility of its own websites, updating its internal guidance to reflect the new specifications.

Non-public service providers, in particular owners of websites providing services of general interest[24], and providers of commercial websites that are essential for participation in the economy and society are also encouraged to improve web accessibility (2008 onwards).

Member States should **achieve 100%** accessibility of public websites by 2010 and prepare for rapid transition to updated web accessibility specifications **in a common and coherent way.**

Websites owners providing services of general interest and other relevant website owners should improve the accessibility of their websites.

The European Standardisation Organisations, in cooperation with stakeholders, should rapidly develop **EU standards for web accessibility** building on WCAG 2.0.

The Commission is improving the accessibility of Commission websites, updating internal guidance to reflect the new specifications.

The Commission will monitor and support these developments, encouraging Member States to take rapid action on the key aspects of implementation and facilitating the collection and exchange of practical experience, primarily through the ePractice platform[25]. Depending on progress and when the standards are in place, the Commission will consider the need for common EU guidance, including legislative action[26].

The Commission will monitor and publish progress and consider the need for common EU guidance, including legislative action (2009 onwards).

(2) Improve the understanding of and promote web accessibility

There is a strong need for increased visibility, understanding and awareness of the needs and solutions for web accessibility. Member States should take a leading role in achieving this by:

– Widely promoting accessibility of websites by providing clear information and guidance on website accessibility, including assistive technologies[27], and encouraging the use of accessibility statements[28];

– Supporting training schemes, knowledge sharing and good practice exchange;

– Purchasing accessible tools and websites in their public procurement;

– Assigning a national contact point for web accessibility, e.g. via a website, in 2009;

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24 As referred to in COM(2007) 725.

25 www.epractice.eu.

26 See Impact Assessment of COM 2007 (694)

27 Pieces of ICT equipment that support functional capabilities of people with disabilities.

28 Providing supporting information such as accessibility policy of the website, compliance with relevant specifications, support for persons with disabilities, complaint mechanisms.

– monitoring and reporting progress on compliance, user satisfaction and implementation costs for web accessibility on both public and other websites to the proposed high-level group and general public.

Member States should **lead in improving the awareness and understanding** of web accessibility in a coherent, efficient and effective manner and **report progress** to the high-level group.

4. CONCLUSION

Common and coherent action is required on many fronts to achieve e-accessibility. In particular, immediate and rapid progress on web accessibility is essential. All stakeholders have decisive roles to play to achieve the common goal of a truly inclusive information society.

The Commission invites the Council, the European Parliament, the Committee of the Regions, and the Economic and Social Committee to express their views on the actions to be taken to make the information society accessible to all.

Annex – Summary of actions

E-accessibility

Actions	*Date*	*Responsible*
Establish an ad hoc **high-level group** to provide guidance on priorities and a more coherent approach to e-accessibility. Stakeholders are called upon to commit to this cooperation.	Early 2009	EC, stakeholders
Ensure e-accessibility remains a **policy priority** in the follow-up to i2010 and disability action plan.	2009-	EC
Monitor web-accessibility and e-accessibility progress and implementation, support cooperation and exchange of good practices via **studies** and a **CIP thematic network**.	2009-	EC, industry and stakeholders
Ensure e-accessibility is a strong **research and innovation priority.**	2009 -	EC
Stimulate **e-accessibility innovation and deployment** via the Structural Funds, FP7, the AAL programme and national programmes.	2009 -	MS, other stakeholders
Provide a **disability toolkit** applicable to ICTs for use in Structural Funds and other programmes.	2009	EC
Under Mandate 376, **rapidly develop EU standards** for e-accessibility, in cooperation with relevant stakeholders.	2009-	ESOs
Ensure appropriate **e-accessibility provisions are integrated in revisions** of EU legislation.	2008-	EC
Make full use of opportunities in current legislation to strengthen e-accessibility.	2008-	MS, EC industry and stakeholders

Web-accessibility

Achieve 100% **accessibility of public websites** and prepare for rapid transition to updated web accessibility specifications in a **common and coherent way**.	2009-2010	MS
Rapidly develop **EU standards for web accessibility** building on WCAG 2.0.	2009-	ESOs (and stakeholders)
Improve the accessibility of **Commission websites**, updating internal guidance to reflect the new specifications.	2009-	EC
Websites owners providing services of general interest and other relevant website owners to improve the accessibility of their websites.	2009-	Other stakeholders
Monitor and publish progress and consider the need for common EU guidance, including legislative action.	2009-	EC
Lead in improving the **awareness and understanding** of web accessibility in a coherent, efficient and effective manner and report progress to the high-level group**.**	2008-	MS

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**

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COURT OF JUSTICE

Following the entry into force of the Treaty of Lisbon, this note replaces the information note published in OJ 2005 C 143, p. 1 and the supplement to that note published in OJ 2008 C 64.

INFORMATION NOTE

on references from national courts for a preliminary ruling

(2009/C 297/01)

I. General

1. The preliminary ruling system is a fundamental mechanism of European Union law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States.

2. The Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of European Union law and on the validity of acts of the institutions, bodies, offices or agencies of the Union. That general jurisdiction is conferred on it by Article 19(3)(b) of the Treaty on European Union (OJEU 2008 C 115, p. 13) ('the TEU') and Article 267 of the Treaty on the Functioning of the European Union (OJEU 2008 C 115, p. 47) ('the TFEU').

3. Article 256(3) TFEU provides that the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute. Since no provisions have been introduced into the Statute in that regard, the Court of Justice alone has jurisdiction to give preliminary rulings.

4. While Article 267 TFEU confers on the Court of Justice a general jurisdiction, a number of provisions exist which lay down exceptions to or restrictions on that jurisdiction. This is true in particular of Articles 275 and 276 TFEU and Article 10 of Protocol (No 36) on Transitional Provisions of the Treaty of Lisbon (OJEU 2008 C 115, p. 322).

5. The preliminary ruling procedure being based on cooperation between the Court of Justice and national courts, it may be helpful, in order to ensure that that cooperation is effective, to provide the national courts with the following information.

6. This practical information, which is in no way binding, is intended to provide guidance to national courts as to whether it is appropriate to make a reference for a preliminary ruling and, should they proceed, to help them formulate and submit questions to the Court.

The role of the Court of Justice in the preliminary ruling procedure

7. Under the preliminary ruling procedure, the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

8. In ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by disapplying the rule of national law in question.

The decision to submit a question to the Court

The originator of the question

9. Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule refer a question to the Court of Justice for a preliminary ruling ([1]). Status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law.

10. It is for the national court alone to decide whether to refer a question to the Court of Justice for a preliminary ruling, whether or not the parties to the main proceedings have requested it to do so.

References on interpretation

11. Any court or tribunal **may** refer a question to the Court of Justice on the interpretation of a rule of European Union law if it considers it necessary to do so in order to resolve a dispute brought before it.

12. However, courts or tribunals against whose decisions there is no judicial remedy under national law **must, as a rule**, refer such a question to the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied), or unless the correct interpretation of the rule of law in question is obvious.

13. Thus, a court or tribunal against whose decisions there is a judicial remedy may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful, at an appropriate stage of the proceedings, when there is a new question of interpretation of general interest for the uniform application of European Union law in all the Member States, or where the existing case-law does not appear to be applicable to a new set of facts.

14. It is for the national court to explain why the interpretation sought is necessary to enable it to give judgment.

([1]) Article 10(1) to (3) of Protocol No 36 provides that the powers of the Court of Justice in relation to acts adopted before the entry into force of the Treaty of Lisbon (OJ 2007 C 306, p. 1) under Title VI of the TEU, in the field of police cooperation and judicial cooperation in criminal matters, and which have not since been amended, are, however, to remain the same for a maximum period of five years from the date of entry into force of the Treaty of Lisbon (1 December 2009). During that period, such acts may, therefore, form the subject-matter of a reference for a preliminary ruling only where the order for reference is made by a court of a Member State which has accepted the jurisdiction of the Court of Justice, it being a matter for each State to determine whether the right to refer a question to the Court is to be available to all of its national courts or is to be reserved to the courts of last instance.

References on determination of validity

15. Although national courts may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.

16. All national courts **must** therefore refer a question to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that that act may be invalid.

17. However, if a national court has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

The stage at which to submit a question for a preliminary ruling

18. A national court or tribunal may refer a question to the Court for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment; it is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred.

19. It is, however, desirable that a decision to seek a preliminary ruling should be taken when the national proceedings have reached a stage at which the national court is able to define the factual and legal context of the question, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. It may also be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard.

The form of the reference for a preliminary ruling

20. The decision by which a national court or tribunal refers a question to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps. It must however be borne in mind that it is that document which serves as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the latter to give a reply which is of assistance to the national court. Moreover, it is only the actual reference for a preliminary ruling which is notified to the interested persons entitled to submit observations to the Court, in particular the Member States and the institutions, and which is translated.

21. Owing to the need to translate the reference, it should be drafted simply, clearly and precisely, avoiding superfluous detail.

22. A maximum of about 10 pages is often sufficient to set out in a proper manner the context of a reference for a preliminary ruling. The order for reference must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In particular, the order for reference must:

— include a brief account of the subject-matter of the dispute and the relevant findings of fact, or, at least, set out the factual situation on which the question referred is based;

— set out the tenor of any applicable national provisions and identify, where necessary, the relevant national case-law, giving in each case precise references (for example, a page of an official journal or specific law report, with any internet reference);

— identify the European Union law provisions relevant to the case as accurately as possible;

— explain the reasons which prompted the national court to raise the question of the interpretation or validity of the European Union law provisions, and the relationship between those provisions and the national provisions applicable to the main proceedings;

— include, if need be, a summary of the main relevant arguments of the parties to the main proceedings.

In order to make it easier to read and refer to the document, it is helpful if the different points or paragraphs of the order for reference are numbered.

23. Finally, the referring court may, if it considers itself able, briefly state its view on the answer to be given to the questions referred for a preliminary ruling.

24. The question or questions themselves should appear in a separate and clearly identified section of the order for reference, generally at the beginning or the end. It must be possible to understand them without referring to the statement of the grounds for the reference, which will however provide the necessary background for a proper assessment.

The effects of the reference for a preliminary ruling on the national proceedings

25. A reference for a preliminary ruling calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

26. However, the national court may still order protective measures, particularly in connection with a reference on determination of validity (see point 17 above).

Costs and legal aid

27. Preliminary ruling proceedings before the Court of Justice are free of charge and the Court does not rule on the costs of the parties to the main proceedings; it is for the national court to rule on those costs.

28. If a party has insufficient means and where it is possible under national rules, the national court may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of legal aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court.

Communication between the national court and the Court of Justice

29. The order for reference and the relevant documents (including, where applicable, the case file or a copy of the case file) are to be sent by the national court directly to the Court of Justice, by registered post (addressed to the Registry of the Court of Justice, L-2925 Luxembourg, telephone +352 4303-1).

30. The Court Registry will stay in contact with the national court until a ruling is given, and will send it copies of the procedural documents.

31. The Court of Justice will send its ruling to the national court. It would welcome information from the national court on the action taken upon its ruling in the national proceedings and, where appropriate, a copy of the national court's final decision.

II. **The Urgent preliminary ruling procedure (PPU)**

32. This part of the note provides practical information on the urgent preliminary ruling procedure applicable to references relating to the area of freedom, security and justice. The procedure is governed by Article 23a of Protocol (No 3) on the Statute of the Court of Justice of the European Union (OJEU 2008 C 115, p. 210) and Article 104b of the Rules of Procedure of the Court of Justice. National courts may request that this procedure be applied or request the application of the accelerated procedure under the conditions laid down in Article 23a of the Protocol and Article 104a of the Rules of Procedure.

Conditions for the application of the urgent preliminary ruling procedure

33. The urgent preliminary ruling procedure is applicable only in the areas covered by Title V of Part Three of the TFEU, which relates to the area of freedom, security and justice.

34. The Court of Justice decides whether this procedure is to be applied. Such a decision is generally taken only on a reasoned request from the referring court. Exceptionally, the Court may decide of its own motion to deal with a reference under the urgent preliminary ruling procedure, where that appears to be required.

35. The urgent preliminary ruling procedure simplifies the various stages of the proceedings before the Court, but its application entails significant constraints for the Court and for the parties and other interested persons participating in the procedure, particularly the Member States.

36. It should therefore be requested only where it is absolutely necessary for the Court to give its ruling on the reference as quickly as possible. Although it is not possible to provide an exhaustive list of such situations, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the following situations: in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

The request for application of the urgent preliminary ruling procedure

37. To enable the Court to decide quickly whether the urgent preliminary ruling procedure should be applied, the request must set out the matters of fact and law which establish the urgency and, in particular, the risks involved in following the normal preliminary ruling procedure.

38. In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the question(s) referred. Such a statement makes it easier for the parties and other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure.

39. The request for the urgent preliminary ruling procedure must be submitted in a form that enables the Court Registry to establish immediately that the file must be dealt with in a particular way. Accordingly, the request should be submitted in a document separate from the order for reference itself, or in a covering letter expressly setting out the request.

40. As regards the order for reference itself, it is particularly important that it should be succinct where the matter is urgent, as this will help to ensure the rapidity of the procedure.

Communication between the Court of Justice, the national court and the parties

41. As regards communication with the national court or tribunal and the parties before it, national courts or tribunals which submit a request for an urgent preliminary ruling procedure are requested to state the e-mail address or any fax number which may be used by the Court of Justice, together with the e-mail addresses or any fax numbers of the representatives of the parties to the proceedings.

42. A copy of the signed order for reference together with a request for the urgent preliminary ruling procedure can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

(2009/C 297/02)

Last publication of the Court of Justice in the *Official Journal of the European Union*

OJ C 282, 21.11.2009

Past publications

OJ C 267, 7.11.2009

OJ C 256, 24.10.2009

OJ C 244, 10.10.2009

OJ C 233, 26.9.2009

OJ C 220, 12.9.2009

OJ C 205, 29.8.2009

These texts are available on:

EUR-Lex: http://eur-lex.europa.eu

Notes