



EUROPEAN COMMISSION

**PUBLIC PROCUREMENT
IN THE EUROPEAN UNION**

**GUIDE TO THE COMMUNITY RULES ON
PUBLIC PROCUREMENT OF SERVICES**

**OTHER THAN IN THE WATER, ENERGY, TRANSPORT
AND TELECOMMUNICATIONS SECTORS**

DIRECTIVE 92/50/EEC

*This Guide has no legal value and does not necessarily
represent the official position of the Commission.*

CONTENTS

I.	Objectives and scope of the public procurement directives	1
1.	Objectives	1
2.	Legal effects of directives	3
II.	Public procurement of services: Council Directive 92/50/EEC ("the Services Directive")	5
1.	What is meant by public procurement of services?	5
1.1	Definition of a public service contract.....	5
1.1.1	Contracts in the water, energy, transport and telecommunications sectors	6
1.1.2	Other service activities excluded from the definition of a public service contract	7
1.1.3	Full application of the Services Directive - Services in Annex IA.....	7
1.1.4	Limited application of the Services Directive - Services in Annex IB	9
1.2	Service providers	9
1.3	Contracting authorities.....	10
1.3.1	The State	10
1.3.2	Body governed by public law	10
1.4	Types of contract.....	11
1.5	Borderline between the different directives and types of activity	12
1.5.1	Borderline between public service contracts and public supply contracts	13
1.5.2	Borderline between public service or supply contracts and public works contracts	13
1.5.3	Borderline between contracts for Annex IA services and contracts for Annex IB services.....	13
1.6	Service contracts subsidised by contracting authorities	14
2.	When public service contracts fall within the Services Directive	15
2.1	Value threshold	15
2.2	Calculation of the contract value	16
2.2.1	Methods.....	16

2.2.2	Split contracts.....	17
2.2.3	Division of the contract into lots.....	17
2.2.4	Intended repetition of similar services.....	17
2.3	Public service contracts excluded from the scope of the Services Directive.....	18
2.3.1	Exclusion of certain public service contracts in the field of defence	18
2.3.2	Public service contracts excluded on grounds of secrecy or public security	18
2.3.3	Exclusion of public service contracts governed by different procedural rules.....	18
3.	Contract award procedures	19
3.1	The open procedure.....	19
3.2	The restricted procedure	19
3.3	The negotiated procedure.....	20
3.3.1	Negotiated procedure with publication of a contract notice	20
3.3.1.1	Irregular or unacceptable offers	21
3.3.1.2	Overall pricing not possible	21
3.3.1.3	Contract conditions cannot be specified with precision	22
3.3.2	Negotiated procedure without publication of a contract notice.....	22
3.3.2.1	Absence of tenders	22
3.3.2.2	When, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider	22
3.3.2.3	Where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates must be invited to participate in the negotiations.	23

	3.3.2.4	Extreme urgency	23
	3.3.2.5	Additional services.....	24
	3.3.2.6	Repetition of services.....	24
3.4		Information about the contracting authority's decisions	25
	3.4.1	Rejection of candidatures and tenders	25
	3.4.2	Cancellation of a procurement procedure	25
	3.4.3	Report of contract award.....	25
4.		Common advertising rules	26
	4.1	Contract notices	26
		4.1.1. Annual indicative notice	26
		4.1.2. Individual contract notice	26
		4.1.3. Contract award notice	27
	4.2	Contents and layout of notices.....	27
		4.2.1 Individual contract notices.....	27
		4.2.2 Contract award notices.....	28
	4.3	Model notices.....	28
		4.3.1 Prior information - Annex IIIA of the Services Directive	28
		4.3.2. Individual contract notice	29
		4.3.3. Contract award notice - Annex III E of the Services Directive	32
	4.4	Determining the time limits	32
	4.5	Advertising of tenders at national level	33
	4.6	Who publishes the notices?.....	33
	4.7	Recommended standard format of contract notices.....	34
	4.8	Minimum and maximum deadlines to be respected.....	34
		4.8.1 Open Procedure.....	35
		4.8.2 Restricted Procedure	35
		4.8.3 Negotiated procedures with prior publication of a contract notice.....	36
		4.8.4 Summary tables.....	37
	4.9	Method of calculating time limits	41
	4.10	Means whereby service providers request to participate in restricted and negotiated procedures.....	42
	4.11	Means of inviting candidates to tender in restricted and negotiated procedures	42

5.	Common technical rules.....	43
5.1	Which technical specifications may be required?.....	43
5.2	Exceptions.....	44
5.3	Alternative specifications where there are no European standards, no European technical approvals and no common technical specifications.....	45
5.4	Discriminatory specifications are prohibited in all cases	46
6.	Participation in contract award procedure, and award of the contract.....	47
6.1	Common rules on participation in contract award procedures	47
6.1.1	Choice of the number of candidates in restricted and negotiated procedures	48
6.1.2	Invitations to service providers who are nationals of other Member States	49
6.1.3	Legal form of service providers.....	49
6.1.4	Offers containing variants.....	50
6.1.5	Sub-contracting.....	51
6.1.6	Obligations relating to employment protection provisions and the working conditions in force where the services are to be provided.....	51
6.1.7	Conditions not provided for in the Services Directive	51
6.2	Selection of candidates	52
6.2.1	Personal situation of service providers	52
6.2.2	Professional registration.....	53
6.2.3	Financial and economic standing.....	54
6.2.4	Ability and technical capacity	55
6.2.5	Supplementary information.....	57
6.2.6	Official lists of approved service providers.....	57
6.3	The award of the contract	59
6.3.1	Permitted award criteria.....	59
6.3.2	Abnormally low offers	59
7.	Public service contracts made with another government body by reason of an exclusive right held by the latter	61
8.	Design contests	62
8.1	When the Services Directive applies to a design contest - value threshold.....	62

8.2	Admission of participants	62
8.3	The jury and its decision or opinion	63
8.4	Advertising requirements for a design contest.....	63
8.4.1	Design contest notice - Annex IVA of the Services Directive	64
8.4.2	Results of a design contest - Annex IVB of the Services Directive.....	64

APPENDICES

I	Comparative Table of the provisions of Directives 92/50/EEC, 93/36/EEC and 93/37/EEC	69
II	CPA classification of services listed in Annexes IA and IB to Directive 92/50/EEC	77
III	List of bodies governed by public law as set out in Annex I to Directive 93/37/EEC	87
IV	Regulation No 1182/71 determining the rules applicable to periods, dates and time limits	99
	FOR FURTHER INFORMATION	101

I. Objectives and scope of the public procurement directives

1. Objectives

The creation of a common market for public-sector procurement and construction contracts was unlikely to come about entirely as a result of the obligations Member States had undertaken in the Treaties to remove restrictions on foreign goods, services and businesses. It was still likely to be frustrated by differences in national regulations. Community legislation was necessary to make sure that government contracts were open to all nationalities on equal terms and to make tendering procedures more transparent so that compliance with the principles laid down in the Treaties could be monitored and enforced.

Therefore, to back up the prohibition of import restrictions resulting from discriminatory public purchasing and to make it easier for resident and non-resident foreign firms to compete for public-sector contracts, the Council issued directives to coordinate procurement procedures in all public-sector procurement subject to the Treaties.

The public procurement directives are based on three main principles:

- Community-wide advertising of contracts so that firms in all Member States have an opportunity of bidding for them.
- The banning of technical specifications liable to discriminate against potential foreign bidders.
- Application of objective criteria in tendering and award procedures.

The latter principle is ensured by the following requirements:

- Contracts are to be put out to open tender (open to all interested parties) or restricted tender (open only to selected candidates), at the choice of the authority placing the contract. Authorities may have recourse to negotiated tendering only in specified *exceptional* circumstances.
- Interested parties may only be excluded from participating (in restricted or negotiated tenders) or from final selection (in open, restricted or negotiated tenders) on certain specified qualitative criteria.
- Contracts may be awarded only on economic or technical criteria, namely either the lowest price or the economically most advantageous tender overall.

The first directives which coordinated public procurement procedures for works (Directive 71/305/EEC¹) and supplies (Directives 77/62/EEC² and 80/767/EEC³) did not open markets to the extent hoped for. Community legislation did not provide sufficient guarantees and left several lacunae. Its application at national level reflected a long-standing protectionism typical of this sector.

In order to cure the deficiencies of the original rules, new directives were adopted: Council Directive 88/295/EEC⁴ of 22 March 1988 amending Directives 77/62/EEC and 80/767/EEC, and Council Directive 89/440/EEC⁵ of 18 July 1989 amending Directive 71/305/EEC.

The principal innovations concerned notably:

- the definition of the field of application of the public procurement directives;
- information and competitive conditions;
- transparency of award procedures;
- the definition of technical specifications.

It had also become necessary to remove the disparities between the earlier directive on works (71/305/EEC) and the later directive on supplies (77/62/EEC). The innovations introduced in Directive 71/305/EEC were, therefore, more numerous and more detailed than those made to Directive 77/62/EEC.

Subsequently it became necessary to coordinate the disparate legislative provisions into two codified versions so that citizens of the European Union could consult texts which were clear and transparent and rely more easily on the specific rights conferred on them.

The directives on works were coordinated in Council Directive 93/37/EEC ("the Works Directive") of 14 June 1993⁶ and the directives on supplies were consolidated in Council Directive 93/36/EEC ("the Supplies Directive") of 14 June 1993.⁷ The latter also aligned the text on Supplies with that on Works.

¹ OJ L185, 16.8.71, p. 5.

² OJ L13, 15.01.77, p. 1.

³ OJ L215, 18.08.80, p. 1. This Directive implemented the Community's obligations under the 1979 GATT Agreement on public procurement.

⁴ OJ L127, 20.5.88, p. 1.

⁵ OJ L210, 21.7.89, p. 1.

⁶ OJ L199, 9.8.93, p. 54.

⁷ OJ L199, 9.8.93, p. 1.

A year earlier the Council adopted Directive 92/50/EEC ("the Services Directive") of 18 June 1992⁸ on public procurement procedures for the award of public service contracts, thus completing the Community regulatory framework for the award of public procurement contracts. The Services Directive follows the same structure as the Works and the Supplies Directives but also contains special provisions on the conduct of design contests.

A tabular comparison of the operative provisions of the Supplies, Works and Services Directives is set out in Appendix I to this Guide.

It should be noted that public works, supplies and services contracts in the water, energy, transport and telecommunications sectors are covered by a separate Directive 93/38/EEC⁹ which is not discussed in this Guide.

2. Legal effects of directives

Article 189 of the EC Treaty provides that directives are binding on Member States as to the result to be achieved, but leaves to the national authorities the choice of forms and methods.

Member States are obliged to transpose the provisions of directives into their national laws. Since the Works Directive is merely a consolidation of earlier directives, the Community legislator has not laid down a period for implementation: the Directive is immediately applicable.

As far as services and supplies are concerned, Member States were obliged to adapt their legal, regulatory and administrative provisions to conform to the Services Directive by 1 July 1993, and to the Supplies Directive by 14 June 1994.

The effectiveness of directives is not necessarily dependent on the adoption of implementing measures by the Member States.

According to the Court of Justice's case law on direct effect, once the time limit for transposing a directive into national law has passed, any provisions of the directive which are capable of directly affecting the legal relationship between the Member State to which the directive was addressed and private individuals can be enforced by such individuals in the courts of the Member State, and the Member State cannot avoid such enforcement on the ground that the formalities for incorporating the directive into its national law have not been completed or that contrary provisions still exist in its national law.

To determine whether provisions are capable of having direct effect in this way, the Court has ruled that in each particular case the nature, background and wording of the provision in question must be considered. It is worth noting that the Court of Justice has already had occasion to declare the rules on participation and advertising as having direct effect.

⁸ OJ L209, 24.7.92, p. 1.

⁹ coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L199, 9.8.93, p. 84.

This is generally the case where the provision imposes a clear, precise and unconditional obligation not leaving the Member State any discretion.

Moreover, "when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions."¹⁰ In effect, the Court considers that it would be contradictory to rule that an individual may rely upon the provisions of a directive in proceedings before the national courts against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and to refrain from applying conflicting provisions of national law.

¹⁰ Case 103/88, *Fratelli Costanzo Spa v City of Milan*, [1989] ECR 1839, at paragraph 31.

II. Public procurement of services: Council Directive 92/50/EEC ("the Services Directive")

1. What is meant by public procurement of services?

1.1 Definition of a public service contract¹¹

A public service contract means broadly a contract in writing whereby a service provider (as defined in 1.2 below) provides services to a contracting authority (as defined in 1.3 below) in return for pecuniary consideration. The Services Directive does not define services. Article 60 of the EC Treaty gives, as examples, activities of an industrial or commercial character and activities of craftsmen or of the professions. Moreover, services are considered to be services within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to the freedom of movement for goods, capital and persons. For the purposes of the Services Directive, the meaning of services is very wide. It includes every activity not covered by the following:

- public supply contracts within the meaning of the Supplies Directive;
- public works contracts within the meaning of the Works Directive;
- any contracts in relation to activities falling within the scope of Directive 93/38/EEC (see 1.1.1 below);
- certain other defined activities excluded by reason of their nature (see 1.1.2 below).

In addition, certain contracts which fall within the definition of public service contracts are nevertheless excluded from the scope of the Services Directive on public policy grounds (see 2.3 below).

It should be noted that, for the purposes of the Services Directive, it is immaterial whether the benefit of the services is provided to the contracting authority or to a third party on behalf of the contracting authority.

The Commission's original proposal¹² contained provisions on public service concessions analogous to those existing in the Works Directive for public works concessions. However, the Member States in Council decided not to include this type of contract because of wide divergence of national practices in matters of public service concessions. Thus the Services Directive does not apply to public service concessions, which broadly means that the Directive does not apply to contracts whereby a public authority transfers the execution of a service to the public lying within its responsibility to an undertaking of its choice and the latter agrees to execute the activity in return for the right to exploit the service, or this right together with payment. Nevertheless, the award of such contracts is, of course, subject to the Treaty rules concerning the freedom to provide services and to the general principles of Community law such as non-discrimination, equality of treatment, transparency and mutual recognition.

¹¹ Article 1(a) of the Services Directive.

¹² COM(90)72; OJ C23, 31.1.93, p.1.

1.1.1 Contracts in the water, energy, transport and telecommunications sectors

Contracts of any kind awarded in the fields referred to in articles 2, 7, 8 and 9 of Council Directive 93/38/EEC¹³ or fulfilling the conditions of article 6(2) of that Directive are excluded from the definition of a public service contract for the purposes of the Services Directive.¹⁴ Where a contracting authority is also carrying out activities which confer on it the status of public utility or "contracting entity" within the meaning of Council Directive 93/38/EEC, all public service contracts which relate to its activities as a utility are excluded from the scope of the Services Directive. This exclusion applies even if Directive 93/38/EEC is not applicable by virtue of one of the exclusions in articles 7, 8 or 9 of that Directive. A detailed explanation of Directive 93/38/EEC will be set out in a separate guide.

It follows that the Services Directive does not apply to public service contracts in the following areas:

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:
 - (i) drinking water; or
 - (ii) electricity; or
 - (iii) gas or heat;or the supply of drinking water, electricity, gas or heat to such networks;
- (b) the exploitation of a geographical area for the purpose of:
 - (i) exploring for or extracting oil, gas, coal or other solid fuels, or
 - (ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;
- (c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable;
- (d) the provisions or operation of public telecommunications networks or the provision of one or more public telecommunications services.

Where the contracting authority carries out activities within (a)(i) above, the exclusion shall also apply to contracts which:

- are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by these projects or irrigation or drainage installations; or
- are connected with the disposal or treatment of sewage.

1.1.2 Other service activities excluded from the definition of a public service contract

¹³ coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L199, 9.8.93, p. 84.

¹⁴ Article 1 (a)(ii) of the Services Directive.

The following contracts are also excluded from the definition of a public service contract for the purposes of the Services Directive:¹⁵

- contracts for the acquisition or rental, by whatever means, of land, existing buildings, or other 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 the Directive;
- contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time;
- contracts for voice telephony, telex, radiotelephony, paging and satellite services;
- contracts for arbitration and conciliation services;
- contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services;
- employment contracts;
- research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.

1.1.3 Full application of the Services Directive - Services in Annex IA

Annex IA to the Services Directive lists 16 categories of services which are subject to all the provisions of the Directive.¹⁶ In effect, these services were identified as being of priority interest from the point of view of development of cross-border operations.

In Annex I to the Service Directive these services are identified by reference to the CPC classification. In the light of the Community system of classification of products by activity (CPA),¹⁷ Annex IA has been rewritten in Table 1 to show the CPA reference numbers. A detailed breakdown of these categories as well as the corresponding CPC numbers, is set out in Appendix II.

¹⁵ Article 1(a)(iii) to (ix) of the Services Directive.

¹⁶ Article 8 of the Services Directive.

¹⁷ Council Regulation (EEC) No 3696/93 of 29 October 1993 on the statistical classification of products by activity (CPA) in the European Economic Community, OJ L342, 31.12.93, p. 1.

Table 1
Annex IA services

Category No	Subject	CPA Reference No
1.	Maintenance and repair services	17.40.90, 17.52.90, 28.21.90, 28.22.90, 28.30.91, 28.30.92, 29.11.91, 29.11.92, 29.12.91, 29.12.92, 29.13.90, 29.21.91, 29.22.91, 29.21.92, 29.22.92, 29.23.91, 29.23.92, 29.24.91, 29.24.92, 29.32.91, 29.32.92, 29.40.91, 29.40.92, 29.51.91, 29.51.92, 29.52.91, 29.52.92, 29.53.91, 29.53.92, 29.54.91, 29.54.92, 29.55.91, 29.55.92, 29.56.91, 29.56.92, 29.60.91, 29.60.92, 30.01.90, 30.02.90, 31.10.91, 31.10.92, 31.20.91, 31.20.92, 31.62.91, 31.62.92, 32.20.91, 32.20.92, 32.30.91, 32.30.92, 33.10.91, 33.10.92, 33.20.91, 33.20.92, 33.40.90, 33.50.91, 33.50.92, 35.11.91, 35.11.92, 35.11.93, 35.12.90, 35.20.91, 35.20.92, 35.30.91, 35.30.92, 36.30.90, 50.2, 50.40.40, 52.7
2.	Land transport services ⁽¹⁾ , including armoured car services, and courier services, except transport of mail	60.21.2, 60.21.3, 60.21.4, 60.22, 60.23, 60.24.1, 60.24.22, 60.24.3, 64.12, 74.60.14
3.	Air transport services of passengers and freight, except transport of mail	62.10.10, 62.10.22, 62.10.23, 62.20.10, 62.20.20(part), 62.20.30, 62.30.10
4.	Transport of mail by land ⁽¹⁾ and by air	60.24.21, 62.10.21, 62.20.20(part)
5.	Telecommunications services ⁽²⁾	64.20.1, 64.20.2
6.	Financial services (a) Insurance services (b) Banking and investment services ⁽³⁾	66, 67.2 65, 67.1
7.	Computer and related services	72.10.10, 72.20.2, 72.20.3, 72.3, 72.4, 72.5, 72.6
8.	R&D services ⁽⁴⁾	73
9.	Accounting, auditing and book-keeping services	74.12.1, 74.12.2
10.	Market research and public opinion polling services	74.13
11.	Management consultant services ⁽⁵⁾ and related services	74.14, 74.15
12.	Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services	74.20.2, 74.20.3, 74.20.4, 74.20.5, 74.20.6, 74.20.7, 74.3
13.	Advertising services	74.4
14.	Building-cleaning services and property management services	70.3, 74.7
15.	Publishing and printing services on a fee or contract basis	22.21, 22.22.3, 22.23, 22.24.1, 22.25, 22.3
16.	Sewage and refuse disposal services; sanitation and similar services	90

- (1) Except for rail transport services covered by Category 18.
(2) Except voice telephony, telex, radiotelephony, paging and satellite services.
(3) Except contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services.
(4) Except research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.
(5) Except arbitration and conciliation services.

1.1.4 Limited application of the Services Directive - Services in Annex IB

Annex IB to the Services Directive lists 11 categories of services which are subject only to the provisions of the directive on technical specifications (see 5. below) and on the transmission to the Commission of a contract award notice (see 4.1.3 below). In these categories of services it was considered necessary merely to give service providers the minimum information necessary to explore the market, and to create an information base which would permit informed judgments to be made about possible application of the procedural and other rules of the Services Directive to some or all of these categories.

These categories are set out in Table 2. In the same way for Table 1 above, the CPA reference numbers have been shown, but a detailed breakdown and the corresponding CPC numbers are given in Appendix II to this Guide.

Table 2
Annex IB services

Category N°	Subject	CPA Reference No
17.	Hotel and restaurant services	55
18.	Rail transport services	60.1, 60.21.1
19.	Water transport services	61
20.	Supporting and auxiliary transport services	63
21.	Legal services	74.11
22.	Personnel placement and supply services	74.5
23.	Investigation and security services, except armoured car services	74.60.11, 74.60.12, 74.60.13, 74.60.15, 74.60.16
24.	Education and vocational education services	80
25.	Health and social services	85
26.	Recreational, cultural and sporting services	92.11.3, 92.12, 92.13, 92.2, 92.31.2, 92.32.1, 92.33.1, 92.34, 92.4, 92.5, 92.6, 92.7
27.	Other services	

It should be noted that a service falls in the last category "other services" only in the exceptional case where it is not possible to place it in any of the categories 1 to 16 in Annex IA or categories 17 to 26 in Annex IB.

1.2 Service providers

A service provider is any natural or legal person which offers to provide services. A public body may also be a service provider within the meaning of the Services Directive.¹⁸

1.3 Contracting authorities

¹⁸ Article 1(c) of the Services Directive. As for groups of service providers, see 6.1.3 below.

For the purposes of the Services Directive, the following are all contracting authorities:¹⁹

- the State,
- regional and local authorities,
- bodies governed by public law as defined below,
- associations formed by one or more local or regional authorities or bodies governed by public law.

1.3.1 *The State*

For the purposes of the Directive, the State includes the administration of the State. However, where an organisation without legal personality²⁰ does not form part of the State's administration in the traditional sense but carries out functions which would normally fall within the competence of the State, it is also to be considered as part of the State for the purposes of the Directive.

This point was clarified by the Court in its judgment of 20 September 1988 in Case 31/87²¹ in which the question arose whether Directive 71/305/EEC applied to public works contracts placed by the local land consolidation committee, an organisation which did not have legal personality.

According to the Court's interpretation, which is equally valid for the Services Directive, the term "the state" must be interpreted from a functional point of view so as to include a body which, although not formally part of the State administration, is a vehicle which depends on, and through which, the state acts.

Consequently, a body whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public contracts which it is its task to award, must be regarded as falling within the notion of the State, even though it is not part of the State administration in formal terms.²²

The Commission considers that the principle stated by the Court in relation to the term 'the State' can be applied equally to the definition of all the other contracting authorities defined by the Service Directive, so as to include any entity created by legal, regulatory or administrative act of one such contracting authority.

1.3.2 *Body governed by public law*²³

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality, and
- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory

¹⁹ Article 1(b) of the Services Directive.

²⁰ If the organisation has legal personality it falls to be considered under the heading "Body governed by public law" below.

²¹ Case 31/87, *Gebroeders Beentjes B.V. v Netherlands*, [1988] ECR 4635

²² *loc. cit.*, at paragraph 12.

²³ Article 1(b) of the Services Directive.

board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

Thus the Services Directive applies to all public or private law entities whose activity and operational decisions are or can be influenced by a contracting authority by reason of one or more of the links described in the third indent above, and which were established with a public or general interest purpose.

The only entities established with a public or general interest purpose and fulfilling the other criteria but which the Services Directive does not consider as contracting authorities, are those which were established specifically to satisfy needs of an industrial or commercial character, that is to say, needs which such entities satisfy by carrying out economic activities of an industrial or commercial nature consisting in the supply of goods or services to private or public economic operators in open markets which are fully subject to competition. In effect, such entities carry out an activity which can be assimilated to that of a private undertaking.

It is important to emphasise that the exclusion for entities which carry out industrial or commercial activities of a private entrepreneurial nature applies only if the entity in question was set up with the specific object of carrying out such activities. Thus the exclusion does not apply to entities which, while carrying on industrial or commercial activities, were in fact established with a public or general interest purpose, for example, an entity established specifically to execute certain administrative tasks of general public interest in the social sphere but which also carries on a commercial activity in order to finance its budget.

Nevertheless, each individual case must be analysed on its particular facts to determine whether it is a case of a public law entity subject to the obligations of the directive.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to the Works Directive. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35 of that Directive. However, the obligation for a body governed by public law to comply with the Services Directive does not depend on the inclusion of that body in the list. The obligation arises when the body fulfils the criteria discussed above. Equally, where a body ceases to fulfil those criteria, it will cease to be subject to the Services Directive, even if its name is still on the list.

1.4 Types of contract

As far as the form of the public service contract is concerned, the Services Directive applies only to contracts in written form which, in practice, will include all contracts above the value threshold discussed below.²⁴

The Commission interprets the definition of the contracting parties obligations very widely. All forms of consideration moving from the contracting authority and capable of valuation in money terms satisfy the requirement of pecuniary consideration.²⁵ Equally,

²⁴ Article 1(a) of the Services Directive.

²⁵ “*A titre onéreux*” in the French text, “for pecuniary interest” in the English text, “*entgeltlichen*” in the German text, “*onder bezwarende titel*” in the Dutch text, “*gensidigt bebyrdende*” in the Danish text, i.e. not a contract which constitutes a unilateral promise by the service provider without consideration moving from the other party.

the Services Directive covers all arrangements whereby a services provider undertakes to provide services at any time to or on behalf of the contracting authority. The wide notion of services envisaged by the Directive cannot be limited by any narrower concepts of service contracts which may exist in national law.

Binding framework contracts concluded between a contracting authority and a service provider the purpose of which is to establish the terms, such as prices, quantities, conditions of supply, of services which may be ordered during a specified period, are public service contracts which must be valued in accordance with the Services Directive and awarded in accordance with its terms if the relevant threshold is attained.

Problems can arise in relation to certain practices which give rise to non-binding preliminary understandings between contracting authorities and service providers. It should be emphasised that no such practices (contractual, procedural, administrative or other) can have the effect of avoiding application of the Services Directive to the conclusion of contracts which the Services Directive treats as public service contracts and the estimated value of which exceeds the relevant threshold.

1.5 Borderline between the different directives and types of activity

As a general rule it is not possible to avoid the application of the Directives by including the service in a contract which for one reason or another is not subject to the Works, Supplies or Services Directive. In such cases it is necessary to examine whether the contracting authority could have split the transactions into separate contracts, one or more of which would have been subject to the Directives.

An illustration of this principle is to be found in the Court's judgment in Case C-3/88²⁶ in which the Italian Government argued that certain contracts for the purpose of computer hardware for a data processing system were not supply contracts because the principal object of the contract was the provision of services (at a time before the Services Directive was in force), namely the creation of software, the planning, installation, maintenance and technical commissioning of the system, and sometimes its operation. The Court rejected this argument because, on the facts of the case, the Italian Government could have approached companies specialising in software development for the design of the data-processing systems in question and, in compliance with Directive 77/62/EEC,²⁷ could have purchased hardware meeting the technical specifications laid down by such companies.

1.5.1 Borderline between public service contracts and public supply contracts²⁸

The Services Directive defines the borderline between a public service contract and a public supply contract by reference to the relative values of the service and supply elements. Where a public contract intended to cover both the supply of products within the meaning of the Supplies Directive, and the provision of services listed in the annexes to the Services Directive, it will fall within the scope of the Services Directive if the value

²⁶ Case C-3/88, *Commission v Italy* (data processing), [1989] ECR 4035.

²⁷ The then directive on supplies.

²⁸ Article 2 of the Services Directive.

of the services is greater than the value of the supplies; otherwise it will fall within the Supplies Directive.

For example, suppose that a local authority wishes to acquire certain telecommunications services, the value of which is estimated at ECU 240,000, together with certain telecommunication equipment the value of which is estimated at ECU 230,000. If the telecommunications services do not include voice telephony, telex, radiotelephony, paging or satellite services, the contract will qualify as a public service contract because the value of the services within Annex IA and Annex IB exceeds the value of the supplies. If, however, the telecommunications services include voice telephony services to an estimated value of ECU 100,000, the value of Annex IA and Annex IB services will not be greater than the value of the supplies, and so the contract will qualify as a public supply contract.

1.5.2 Borderline between public service or supply contracts and public works contracts

Provided a contract fulfils the definition of a works contract laid down in article 1(a) of the Works Directive, it is a works contract for the purposes of the public procurement directives irrespective of whether the contract includes supplies and/or services. The Works Directive applies in particular to those contracts where the contractor carries out the design and lets contracts for the execution of the works. Thus, there is no need for a value criterion to determine whether a contract is a services (or supplies) contract rather than a works contract.²⁹

1.5.3 Borderline between contracts for Annex IA services and contracts for Annex IB services³⁰

The Services Directive provides that where a contract has as its object services listed in both Annexes IA and IB, it shall be awarded in the same way as a contract for Annex IA services where the value of the services listed in Annex IA is greater than the value of services listed in Annex IB. Where this is not the case it shall be awarded in the same way as a contract for Annex IB services. This principle is nevertheless subject to the dissociation principle mentioned in 1.5 above in cases where Annex IB Services have been added to a contract in order to avoid the full rigours of the Services Directive.

1.6 Service contracts subsidised by contracting authorities

Where a contracting authority subsidises by more than 50% a service contract awarded by another entity in connection with any of the following works contracts:³¹

- Class 5, Group 502 of the NACE nomenclature (Civil engineering: construction of roads, bridges, railways, etc.)
- building works in relation to:
 - hospitals

²⁹ Note that in the case of a mixed contract for the performance of the works which are merely incidental to some other operation, such as an assignment of property, the contract will not fall within the scope of the Works Directive, see Case C-331/92, *Gestion Hotelera Internacional SA v Comunidad Autonoma de Canarias and others*, [1994] ECR I-1329.

³⁰ Article 10 of the Services Directive.

³¹ Article 3 (3) of the Services Directive

- sports facilities
- recreation and leisure facilities
- school and university buildings
- administrative buildings

the provisions of the Services Directive must be applied.

Three possibilities arise:-

- the subsidised entity is itself a contracting authority in which case it applies the Services Directive itself;
- the subsidised entity is not a contracting authority, and the contracting authority providing the subsidy chooses the service provider itself (even though the services are for the subsidised authority), in which case the contracting authority is obliged to respect the Directive;
- the subsidised entity is not a contracting authority, but chooses the service provider itself. In this case the contracting authority providing the subsidy must ensure that the subsidised entity respects the provisions of the Services Directive as though it were itself a contracting entity. The Services Directive leaves it to the Member States as to how this should be done, for example, by including the necessary rules in the conditions for the grant of the subsidy, and providing that the subsidy should be recovered if the conditions are not satisfied.

It should be observed that the list of the types of works to which this rule applies is exhaustive whereas the list of institutions - hospitals, sports, recreation and leisure facilities, school and university buildings, buildings used for administrative purposes - is generic. A restrictive interpretation of these categories would hinder the objectives of the Directive, namely to improve transparency in public procurement. Thus, for example, old peoples' houses and institutions for the physically handicapped should be assimilated to hospitals where the provisions of medical and surgical services to the old and the handicapped is a main objective of such institutions.

This provision has a parallel in the Works Directive where the same rules apply to works contracts in the above areas which are subsidised to more than 50% by a contracting authority. The parallelism stops there. The rule does not apply to a services contract which is not subsidised, even when connected with a works contract which is.

2. When public service contracts fall within the Services Directive

Not all public service contracts, as defined above, are subject to the procedural rules of the Services Directive. Assuming none of the exclusions examined above apply, the Services Directive is only applicable to public service contracts which exceed a certain value threshold.

2.1 Value threshold³²

A public service contract is subject to the provisions of the Services Directive if its estimated value, net of VAT, is greater than or equal to ECU 200,000.

The values of the ECU 200,000 threshold in national currencies is revised every two years with effect from 1 January 1994. The calculation of these values is based on the average daily values of the relevant currency expressed in ECUs over the 24 months terminating on the last day of August immediately preceding the 1 January revision. The values obtained are published in the *Official Journal of the European Communities* at the beginning of November.

The value of the thresholds in national currencies which are applicable until the next date for revision (31.12.97) are as follows:

Thresholds values in national currencies of ECU 200,000

Franc belge	7,898,547	Irish pound	160,564
Franc luxembourgeois	7,898,547	Lira italiana	397,087,000
Dansk krone	1,500,685	Oster. Schilling	2,681,443
Deutsche Mark	381,161	Pound sterling	158,018
Drachmi	58,015,458	Peseta	31,992,917
Franc français	1,316,439	Escudo	39,297,792
Markka	1,223,466	Svensk krona	1,865,157
Nederlandse gulden	427,359		

In relation to the provisions of the Directive referred to in the paragraph 2.1 above, one should point out that the European Parliament and the Council are currently examining a proposal for a Directive which will modify the provisions of Directive 92/50/EEC in order to take into account the new Government Procurement Agreement³³ signed by the European Union following the Uruguay Round Trade Negotiations undertaken within of the scope of the World Trade Organisation.

2.2 Calculation of the contract value

³² Article 7(1) of the Services Directive.

³³ OJ C 256, 3.9.96

2.2.1 *Methods*

The general rule is that the contracting authority must take into account the estimated total remuneration for the service net of VAT. For certain types of service contracts, the Services Directive specifies certain items which constitute remuneration, notably:³⁴

- the premium payable, in the case of insurance services;
- fees, commissions and interest, in the case of banking and other financial services;
- fees or commissions, in the case of design contracts.

The Commission considers this list to be illustrative and does not limit, in any way, the general principle that the total remuneration received must be taken into account.

In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value is:³⁵

- in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;
- in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.

In the case of regular contracts or of contracts which are to be renewed within a given time, the contract value may be established on the basis of:³⁶

- either the actual aggregate cost of similar contracts for the same categories of services awarded over the previous fiscal year of twelve months, adjusted, where possible, for anticipated changes in quantity or value over the twelve months following the initial contract,
- or the estimated aggregate cost during the twelve months following the first service performed or during the term of the contract, where this is greater than twelve months.

Where a proposed contract provides for options, the basis for calculating the contract value shall be the maximum total possible assuming that all the options will be exercised.³⁷

In any event, selection of the valuation method may not be made with the intention of avoiding the application of the Services Directive.³⁸

2.2.2 *Split contracts*³⁹

³⁴ Article 7(4) of the Services Directive.

³⁵ Article 7(5) of the Services Directive.

³⁶ Article 7(6) of the Services Directive.

³⁷ Article 7(8) of the Services Directive.

³⁸ Article 7(3) of the Services Directive.

The Services Directive prohibits any division of services with the intention of avoiding application of the value thresholds. This prohibition is directed at any division of a contract which is not justified by objective considerations and so is presumed to be designed to avoid application of the Directive.

2.2.3 *Division of the contract into lots*

Where the services are divided into several lots, each one the subject of a contract, the cumulative value of all the lots must be taken into account in determining whether the ECU 200,000 threshold has been reached. If the threshold is reached, the Services Directive must be applied to each contract, irrespective of the fact that its individual value may be less than ECU 200,000.⁴⁰

A contracting authority need not apply the provisions of the Services Directive to any lots which have an estimated individual value net of VAT of less than ECU 80,000, provided that the total value of such lots does not exceed 20% of the total value of all the lots. Exclusion of lots in this way does not prevent their value from being taken into account to determine whether the other lots must be awarded in accordance with the Services Directive.

Example:

A services contract for maintenance of buildings is divided into the following lots:

Lot 1	ECU 100,000
Lot 2	ECU 60,000
Lot 3	ECU 45,000
Lot 4	<u>ECU 45,000</u>
Total	ECU 240,000

The cumulative value is ECU 240,000 so the value threshold for application of the Services Directive has clearly been reached. Each of the lots 2, 3 and 4 is less than ECU 80,000 but the derogation is permitted only up to 20% of the cumulative value, namely ECU 48,000. The contracting authority therefore has the option of excluding Lot 3 or Lot 4, but not both, from application of the Services Directive. The three lots not excluded must be awarded in accordance with the Directive because their total value *including* the excluded lot, is not less than ECU 200,000.

2.2.4 *Intended repetition of similar services*

It should be remembered that when a contracting authority intends to have recourse to the negotiated procedure without publication of a notice for the purposes of procuring new services as a repetition of similar services (see 3.3.2.6), it must aggregate the value of the original services and the intended subsequent services in determining whether the threshold has been achieved.

2.3 **Public service contracts excluded from the scope of the Services Directive**

³⁹ Article 7(3) of the Services Directive.

⁴⁰ Article 7(4), 2nd and 3rd paragraphs, of the Services Directive.

Certain contracts which fall within the definition of a public service contract (see 1.1 above) are nevertheless excluded from the scope of the Services Directive for reasons of public policy.

2.3.1 *Exclusion of certain public service contracts in the field of defence*⁴¹

Assuming none of the exceptions described above apply, the Services Directive applies to public service contracts awarded by contracting authorities in the field of defence except those to which the provisions of Article 223(1)(b) of the EC Treaty apply. Article 223(1)(b) allows a Member State to take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material. By decision of 15 April 1958 the Council established a list of the products which, when destined for military purposes, fall within this provision. Thus public service contracts will fall within the exception if they are for services in relation to products on the list, e.g. services for their design, transport, maintenance, etc. The Commission considers that this exception applies only when the listed products are used *exclusively* for military purposes.

2.3.2 *Public service contracts excluded on grounds of secrecy or public security*⁴²

The Services Directive does not apply to public service contracts when:

- the services are declared to be secret; or
- the execution of the services must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned; or
- the protection of the basic interests of that State's security so requires.

2.3.3 *Exclusion of public service contracts governed by different procedural rules*⁴³

The Services Directive does not apply to public service contracts governed by different procedural rules and awarded:

- (a) in pursuance of an international agreement concluded between a Member State and one or more third countries and covering services intended for the joint implementation or exploitation of a project by the signatory States; any agreement shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts set up by Council Decision 71/306/EEC;
- (b) to undertakings in a Member State or a third country in pursuance of an international agreement relating to the stationing of troops;
- (c) pursuant to the particular procedure of an international organisation.

⁴¹ Article 4(1) of the Services Directive.

⁴² Article 4(2) of the Services Directive.

⁴³ Article 5 of the Services Directive.

3. Contract award procedures

Like the Works and the Supplies Directives, the Services Directive provides that contract procedures may be one of three types: the open procedure and the restricted procedure, which contracting authorities are free to choose, and the negotiated procedure, which can only be used in exceptional circumstances.⁴⁴

Important

In open and restricted procedures contracting authorities may request further information from tenderers in order to facilitate assessment of their offers, but it is forbidden to negotiate the terms of such offers. This important aspect of the transparency of open and restricted procedures has been stated clearly by the Council and the Commission in the following terms: "In open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities, and provided this does not involve discrimination."⁴⁵

3.1 The open procedure

In an open procedure any interested service provider may submit an offer in response to the publication of the contract notice.⁴⁶

3.2 The restricted procedure

In a restricted procedure there are two stages.⁴⁷ In the first stage any interested service provider may submit a request to participate in response to the publication of the contract notice. Such service provider is called a "candidate". In the second stage the contracting authority invites the submission of tenders from selected candidates. These candidates must be selected in accordance with the rules described in 6 below.

A restricted procedure may be accelerated⁴⁸ when urgency renders it impracticable to respect the normal deadlines for restricted procedures (see 4.8.2). Since this is an exception which may limit competition, it must be interpreted restrictively and limited to those cases where the contracting authority can prove the existence of objective circumstances giving rise to urgency and a real impossibility of respecting the normal deadlines for restricted procedures.

The reasons justifying recourse to the accelerated procedure must be set out in the contract notice published in the Official Journal (see 4.3.2).

3.3 The negotiated procedure

⁴⁴ Article 11 of the Services Directive.

⁴⁵ OJ L111, 30.4.94, p. 114

⁴⁶ Article 1(d) of the Services Directive.

⁴⁷ Article 1(e) of the Services Directive.

⁴⁸ Article 20 of the Services Directive.

Negotiated procedures are those procedures whereby contracting authorities consult the service providers of their choice and negotiate with one or more of them the contract conditions, for example, the technical, administrative or financial conditions.⁴⁹

In the negotiated procedure the contracting authority has the possibility of acting as a free economic operator not only in the award of the contract, but in the preliminary discussions. However, this procedure cannot be assimilated to one of complete freedom of contract. The contracting authority must respect certain rules of good administration when:

- setting the contractual conditions, notably as to price, deadlines and technical characteristics;
- comparing the offers and their respective advantages;
- applying the principle of equality of treatment among the candidates.

Recourse to the negotiated procedure is justified only in the exceptional cases set out exhaustively in the Services Directive.⁵⁰

In accordance with the case-law of the Court, these provisions must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.⁵¹

The cases where recourse to a negotiated procedure is justified fall into two categories: those where a contract notice must be published and those where a contract notice need not be published.

3.3.1 Negotiated procedure with publication of a contract notice⁵²

As in the restricted procedure, the contracting authority must publish a contract notice inviting expressions of interest (candidatures) and then select the candidates to be invited to negotiate on the basis of the qualification criteria set out in the contract notice. The only permitted criteria are those set out in articles 29 to 35 of the Services Directive (personal situation, professional registration, financial and economic standing, ability and technical capacity).

As with the restricted procedure, a negotiated procedure can be accelerated if the conditions of urgency set out in 3.2 above are satisfied.

There are three cases in which the Services Directive allows recourse to the negotiated procedure with prior publication of a contract notice.

3.3.1.1 Irregular or unacceptable offers⁵³

⁴⁹ Article 1(f) of the Services Directive.

⁵⁰ Article 11 of the Services Directive. See Case C-328/92, *Commission v Spain*, (pharmaceutical products), [1994] ECR I-1569 on supplies; and Case C-24/91, *Commission v Spain* (university buildings), [1992] ECR I-1989 on works.

⁵¹ Case 199/85, *Commission v Italy* (incinerator plant in Milan), [1987] ECR 1039, at paragraph 14.

⁵² Article 11(2) of the Services Directive.

A contracting authority may have recourse to the negotiated procedure with prior publication of a contract notice, where in an open or restricted procedure all the offers made are irregular⁵⁴ or unacceptable⁵⁵ having regard to the applicable national provisions that are in accordance with articles 23 to 28 of the Services Directive, insofar as the original terms of the contract are not substantially altered. The theory here is that since the original open or restricted procedure failed to produce regular acceptable tenders or requests to participate⁵⁶, it is necessary to close the procedure officially and start again, but this time recourse to the negotiated procedure is permitted so that the process of negotiation can be used to avoid the former irregular or unacceptable aspects of the tenders.

However, recourse to the negotiated procedure the second time round is only permitted if the contractual conditions are not substantially modified. The Commission considers that changes to the financial arrangements, the period for execution of the services, the technical specifications, etc. are substantial modifications which do not allow recourse to the negotiated procedure.

Since a new procedure is involved, a new contract notice must be published. However, the contract notice may be dispensed with provided all the parties invited to negotiate include the tenderers or candidates who, in the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the tendering procedure and satisfy the qualification criteria for selection set out in articles 29 to 35 of the Services Directive (personal situation, professional registration, financial and economic standing, ability and technical capacity). If any of these are excluded (whether or not additional parties are invited to negotiate) a contract notice must be published to enable the excluded parties to resubmit requests to participate.

3.3.1.2 Overall pricing not possible⁵⁷

The negotiated procedure, with publication of a contract notice, may be used in exceptional cases where the nature of the services or the risks involved do not permit prior overall pricing. The theory here is that tenderers would not be able to put in a fixed overall price for the services but would have to incorporate contingencies which render a straight-forward comparison of pricing impossible. An example might arise in the case of repair services where the extent of the repairs necessary would not become apparent until the work had commenced.

3.3.1.3 Contract conditions cannot be specified with precision⁵⁸

⁵³ Article 11(2)(a) of the Services Directive. This exception is also available under the Works and Supplies Directive.

⁵⁴ For example, tenders which do not comply with the rules of the procurement, tenders the prices of which are manifestly not the result of competitive bidding, or tenders which contain oppressive one-sided clauses.

⁵⁵ For example, tenders which are submitted after expiry of the deadline, or by tenderers who do not have the necessary qualifications, or which contain prices which are either too high having regard to the contracting authority's budget or which are abnormally low.

⁵⁶ i.e. a request made by the service provider that it be invited to submit a tender in a restricted procedure, or invited to negotiate in a negotiated procedure.

⁵⁷ Article 11 (2)(b) of the Services Directive. This exception is also available under the Works Directive.

The negotiated procedure, with publication of a contract notice, may be used when the nature of the services to be procured is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures. This may arise in particular, in the case of insurance, banking and investment services falling within category no. 6 of Annex IA to the Services Directive, as well as intellectual services generally.

3.3.2 *Negotiated procedure without publication of a contract notice*

A contracting authority may have recourse to the negotiated procedure without publication of a contract notice in the six cases⁵⁹ described below.

3.3.2.1 *Absence of tenders*⁶⁰

The negotiated procedure may be used without publication of a contract notice in the absence of tenders or of appropriate tenders in response to an open or restricted procedure, provided that the original terms of the contract are not substantially altered. The contracting authority must first terminate the prior open or restricted procedure and inform the Official Journal accordingly.⁶¹ The theory here is that no-one was interested in responding to the open or restricted procedure, and that any offer received can be assimilated to the absence of a tender because the offer had no relevance to the procurement requirements of the contracting authority, as defined in the contract documents.

The requirement that the terms of contract must not be substantially altered when put out for negotiation is the same as in case 3.3.1.1 above.

Tenders are considered not to be appropriate when they are unacceptable or irregular in the sense explained above, and, in addition, their content has no relevance to the procurement and are, therefore, totally inadequate for the contracting authority's purposes as defined in the contract documents. For this reason, the submission of such tenders is assimilated to the absence of tenders.

3.3.2.2 *When, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider*⁶²

This is a very narrow exception and applies only in those cases where it can be said that to invite tenders or expressions of interest would be abusive because there is only one service provider who can provide the particular service.⁶³ The safest cases where the exception can be used are those where a particular service provider has the exclusive right to carry out a particular service. However, the exception does not apply if the exclusive right is licensed to other parties or can reasonably be obtained on licence. Thus, for example, a sculptor would have the exclusive right to repair or remake a work of art sculpted by himself, but he would

⁵⁸ Article 11(2)(c) of the Services Directive.

⁵⁹ Article 11(3) of the Services Directive.

⁶⁰ Article 11(3)(a) of the Services Directive.

⁶¹ See Article 12(2) of the Services Directive.

⁶² Article 11(3)(b) of the Services Directive.

⁶³ Cf. Case C-328/92, *Commission v Spain* (pharmaceutical products), [1994] ECR I-1569, at paragraph 17.

not have the exclusive right to produce photographs of the work if he had already licensed other parties to produce such photographs.

The cases where, in the absence of exclusive rights, technical or artistic reasons justify recourse to a negotiated procedure are very narrow indeed. An example might be found where a local authority had already commissioned a work of art and later decided to commission a second work of art to make a "pair". In such circumstances it would be necessary to show for objective reasons that it could not be envisaged that the second work of art be provided by a different artist.

*3.3.2.3 Where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates must be invited to participate in the negotiations.*⁶⁴

Recourse to the negotiated procedure is permitted here because the design contest will already have been subject to publicity if the value of the contract is not less than the threshold of ECU 200,000 (see 8 below).

*3.3.2.4 Extreme urgency*⁶⁵

The negotiated procedure may be used without publication of a contract notice. In so far as strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be kept. The circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.

Unforeseeable events here means events which fall outside the field of normal economic and social activity, such as floods or earthquakes which necessitate urgent services to assist the victims.⁶⁶ It should be observed that recourse to this procedure is permitted by the Services Directive only to the extent necessary to procure services necessary to deal with the immediate urgent situation. Taking into account the minimum deadline imposed (see 4.8 below) this means for services covering a period of about one month. For services required after such period, the contracting authority has sufficient time to publish a contract notice and award a service contract in accordance with normal procedures, invoking urgency as a grounds for use of shorter deadlines.⁶⁷

*3.3.2.5 Additional services*⁶⁸

⁶⁴ Article 11(3)(c) of the Services Directive.

⁶⁵ Article 11(3)(d) of the Services Directive. This exception is also found in the Works and Supplies Directive.

⁶⁶ C-194/88R, *Commission v Italy* (incinerator), [1988] ECR 5647. The Court ordered the Italian Republic to suspend the award of a public works contract on the grounds that urgency was not due to unforeseeable events and, therefore, the contracting authority should have published a notice in the Official Journal of the EC.

⁶⁷ In Case C-24/91, *Commission v Spain*, [1992] ECR I-1989, the Court found that the extreme urgency relied on by the Spanish Government was not incompatible with the time limits provided for in the context of an accelerated procedure. Hence the award of contracts for the extension and renovation of the Faculty of Political Science without publication of a contract notice constituted a breach of Community law. See also Case C-107/92, *Commission v Italy* (avalanche barriers), [1994] ECR I-4655.

⁶⁸ Article 11(3)(e) of the Services Directive.

The negotiated procedure may be used without publication of a contract notice for additional services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the performance of the service described therein.

In such a case, recourse to the negotiated procedure without publication of a contract notice is permitted provided the following three conditions are satisfied:

- the contract for the new service is awarded to the service provider who supplied the original services;
- the additional services cannot be technically or economically separated from the main contract without great inconvenience for the contracting authority or such services, although separable from the performance of the original contract, are strictly necessary for its completion;
- the aggregate estimated value of contracts awarded for additional services does not exceed 50% of the amount of the main contract.

This exception is to be found also in the Works Directive.

3.3.2.6 Repetition of services⁶⁹

The negotiated procedure may be used without publication of a contract notice for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authority awarded an earlier contract. Four conditions must be satisfied:

- the new services must conform to a basic project for which a first contract was awarded by open or restricted procedure. Thus this condition is not satisfied if the first contract was awarded by negotiated procedure for any reason;
- when the first contract was put up for tender, notice was given that the negotiated procedure might be adopted for the procurement of additional services;
- the total estimated cost of the subsequent services must be taken into consideration in estimating the value of the contract for the purposes of determining the applicability of the Directive.
- recourse to the negotiated procedure without a contract notice takes place within three years of the original contract.

3.4 Information about the contracting authority's decisions

3.4.1 Rejection of candidatures and tenders⁷⁰

⁶⁹ Article 11(3)(f) of the Services Directive. This exception is also available under the Works Directive. This exception is also available under the Works Directive.

Any eliminated candidate or tenderer may request the contracting authority to inform him of the reasons for the rejection of his application or tender. In the case of a rejected tender he may also request the name of the successful tenderer.

The contracting authority is obliged to communicate the information requested within 15 days of receipt of the request.

3.4.2 Cancellation of a procurement procedure

A contracting authority which has commenced a procurement procedure may decide to cancel it or to begin a new procedure. In such cases it must communicate the grounds of its decision to the Office for Official Publications of the European Communities.⁷¹ It must also communicate such decision to any candidate or tenderer who so requests in writing.

3.4.3 Report of contract award

For each services contract awarded which falls within the Services Directive, the contracting authority must draw up a written report⁷² which includes at least the following:

- the name and address of the contracting authority, the subject and value of the contract;
- the names of the candidates or tenderers admitted and the reasons for their selection;
- the names of the candidates or tenderers rejected and the reasons for their rejection;
- the name of the successful tenderer and the reasons why his tender was selected and, if known, the part of the contract which the successful tenderer intends to subcontract to third parties;
- for negotiated procedures, with or without publication of a contract notice, the circumstances justifying recourse to such procedures. The permitted circumstances are described in 3.3 above.

The report, or the main features of it, must be communicated to the Commission if it so requests.

⁷⁰ Article 12 of the Services Directive.

⁷¹ Article 12(2) of the Services Directive.

⁷² Article 12(3) of the Services Directive.

4. Common advertising rules

4.1 Contract notices

One of the most important elements of the Community's public procurement rules is the establishment of transparent procedures which provide equal opportunities for all interested economic operators to tender in open procedures, or submit an expression of interest in restricted and negotiated procedures. Such transparency is achieved through the publication of a series of notices about the contract.

4.1.1. *Annual indicative notice*⁷³

The Directive requires contracting authorities to publish, as soon as possible after the beginning of their budgetary year, an indicative notice about their intended total procurement for the year in each of the service categories listed in Annex IA (i.e. the service categories for which all the rules of the Services Directive are applicable). Contracting authorities are released from this obligation only if the total estimated value of the envisaged contracts is less than ECU 750,000.

If a contracting authority fails to publish an annual indicative notice when so obliged, the Court of Justice can condemn the Member State concerned for failure to respect its obligations under the EC Treaty.⁷⁴ By such failure, the contracting authority could wrongly prevent a service provider from participating in an award procedure, or cause a service provider to incur abnormal costs. For example, where a contracting authority failed to include a complex study in its annual indicative notice, a tenderer would be unable to start preparing some of the basic documentation, with the result that, once the contract notice was published, he was obliged to employ extra staff to deal with the workload required to complete the tender within the deadline.

There is an obvious practical incentive for a contracting authority to publish an annual indicative notice, namely, to reduce the deadlines for the receipt of tenders in both open and restricted procedures (see 4.8 below). Such reduction is possible even if the annual indicative notice is published voluntarily.

4.1.2. *Individual contract notice*

The obligation of contracting authorities to publish a notice announcing the intention to award a contract constitutes a key element for the creation of the Single Market. It permits economic operators from all Member States to be fully informed about public contracts all over the Community. The number of possible tenderers increases together with the likelihood of better service at competitive prices.

An individual contract notice must be published before any open or restricted procedure or design contest.⁷⁵ The general rule is that it must also be published before negotiated procedures. However, in a number of cases exhaustively described in the Directive, contracting authorities may award a contract under a negotiated procedure without prior publication of a notice (see 3.3.2 above).

⁷³ Article 15 of the Services Directive.

⁷⁴ e.g. Case C-272/91, *Commission v Italy* (concession for lottery computerisation system), [1994] ECR I-1409.

⁷⁵ Article 15(2) of the Services Directive.

4.1.3. *Contract award notice*

Contracting authorities who have awarded a contract, regardless of the procedure used, or who have held a design contest, must send a notice of the results to the Office of the Official Publications of the EC.⁷⁶ This notice must be sent at the latest forty-eight days after the award of the contract in question or the closure of the design contest in question. This rule applies also to contracts for the services listed in Annex IB to the Directive. However, in the case of public contracts for services listed in Annex IB, contracting authorities are required to indicate in the notice whether or not they agree to its publication. All other notices concerning the award of a service contract or the holding of a design contest are published in full in the Official Journal of the European Communities and in the TED data bank in all the official languages of the Communities, although only the text in the original language will be considered authentic.

4.2 **Contents and layout of notices**

The Services Directive provides that the notices should be drawn in accordance with the models set out in Annexes III and IV of the Directive.⁷⁷

Most of the titles included in these notices are mandatory. As a result, a notice may not be valid unless all these titles have been specified. However, in the case of optional titles, a contracting authority may consider them irrelevant to the contract in question, and should simply indicate on the notice "Not applicable".

All notices should be clear and concise. Their length should not be greater than one page of the Official Journal, or approximately 650 words.⁷⁸

Some of the titles included in the various types of notices require further clarification.

4.2.1 *Individual contract notices*

One of the rubrics included in this type of notice concerns the economic and technical capacity required for the selection of service providers. According to the Services Directive, contracting authorities may not require any conditions other than those specified in Articles 31 and 32 when they request information concerning economic and technical capacity (see 6.2.3 and 6.2.4 below).

The rubric in the notice concerning the criteria for the award of the contract should indicate either:

- (a) that the award will be made to the economically most advantageous tender; or
- (b) that the award will be made to the tender with the lowest price; or
- (c) in a case of restricted procedure, the contracting authority may describe the criteria for the award of the contract in the invitation to tender. In such a case, the relevant title of the individual pre-contract notice should state that the award criteria will be set out in the invitation to tender.

⁷⁶ Article 16(1) of the Services Directive.

⁷⁷ Article 17(1) of the Services Directive.

⁷⁸ Article 17(8) of the Services Directive.

If the contract is to be awarded to the economically most advantageous offer the contracting authority must state the award criteria which it intends to apply either in the contract documents or in the tender notice. If it decides to state them in the contract documents it should be mentioned under the relevant title of the contract notice that the award criteria will be listed in the contract documents.

4.2.2 *Contract award notices*

As a general rule, contract award notices must be sent to the Office for Official Publication of the European Communities. The notice will be published in the case of public contracts for services listed in Annex IA to the Services Directive. In the case of contracts involving only Annex IB services, the award notice will be published only if the contracting authority has indicated its agreement.⁷⁹ However, as an exception to this general rule, publication is not necessary if:⁸⁰

- it would impede law enforcement;
- it would be contrary to public interest;
- it would prejudice the legitimate interests of a particular enterprise, public or private;
- it might prejudice fair competition between service providers.

4.3 **Model notices**⁸¹

The model notices for award procedures involving service contracts are set out in Annex III to the Services Directive and also below. All relevant rubrics must be completed in a material fashion. Thus, for example, persons authorised to be present at the opening of tenders, and the date, time and place of opening are material so as to enable potential suppliers to discuss the identity of their competitors, and to check whether they meet the criteria laid down for qualitative selection.⁸²

4.3.1 *Prior information - Annex IIIA of the Services Directive*

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority, and, if different, of the service from which additional information may be obtained.
2. Intended total procurement in each of the service categories listed in Annex I A.
3. Estimated date for initiating the award procedures, per category.
4. Other information.
5. Date of dispatch of the notice.
6. Date of receipt of the notice by the Office for Official Publications of the European Communities.

⁷⁹ Article 16(2) and (3) of the Services Directive.

⁸⁰ Article 16(5) of the Services Directive.

⁸¹ For the notices used in design contests, see section 8.4 below.

⁸² Case C-359/93, *Commission v Netherlands*, 24 January 1995.

4.3.2. *Individual contract notice*

Open procedures - Annex IIIB of the Services Directive

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority.
2. Category of service and description. CPC reference number.
3. Place of delivery.
4. (a) Indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.
(b) Reference of the law, regulation or administrative provision.
(c) Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.
5. Indication of whether service providers can tender for a part of the services concerned.
6. Where applicable, non-acceptance of variants.
7. Duration of contract or time limit for completion of the service.
8. (a) Name and address of the service from which the necessary documents may be requested.
(b) Final date for making such requests.
(c) Where applicable, the amount and terms of payment of any sum payable for such documents.
9. (a) Persons authorized to be present at the opening of tenders.
(b) Date, time and place of the opening.
10. Where applicable, any deposits and guarantees required.
11. Main terms concerning financing and payment and/or references to the relevant provisions.
12. Where applicable, the legal form to be taken by the grouping of service providers winning the contract.
13. Information concerning the service provider's own position, and information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.
14. Period during which the tenderer is bound to keep open his tender.
15. Criteria for the award of the contract and, if possible their order of importance. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents.
16. Other information.
17. Date of dispatch of the notice.
18. Date of receipt of the notice by the Office for Official Publications of the European Communities.

Restricted procedures - Annex IIIC of the Services Directive

1. Name, address, telegraphic address, telephone, telex and fax number of the contracting authority.
2. Category of service and description. CPC reference number.
3. Place of delivery.
4.
 - (a) Indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.
 - (b) Reference of the law, regulation or administrative provision.
 - (c) Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.
5. Indication of whether the service provider can tender for a part of the services concerned.
6. Envisaged number or range of service providers which will be invited to tender.
7. Where applicable, non-acceptance of variants.
8. Duration of contract, or time limit for completion of the service.
9. Where applicable, the legal form to be assumed by the grouping of service providers winning the contract.
10.
 - (a) Where applicable, justification for the use of the accelerated procedure.
 - (b) Final date for the receipt of requests to participate.
 - (c) Address to which they must be sent.
 - (d) Language(s) in which they must be drawn up.
11. Final date for the dispatch of invitations to tender.
12. Where applicable, any deposits and guarantees required.
13. Information concerning the service provider's own position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.
14. Criteria for the award of the contract and, if possible, their order of importance if these are not stated in the invitation to tender.
15. Other information.
16. Date of dispatch of the notice.
17. Date of receipt of the notice by the Office for Official Publications of the European Communities.

Negotiated procedures - Annex IIID of the Services Directive

1. Name, address, telegraphic address, telephone, telex and fax number of the contracting authority.
2. Category of service and description. CPC reference number.
3. Place of delivery.
4.
 - (a) Indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.
 - (b) Reference of the law, regulation or administrative provision.
 - (c) Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.
5. Indication of whether the service provider can tender for a part of the services concerned.
6. Envisaged number or range of service providers which will be invited to tender.
7. Where applicable, non-acceptance of variants.
8. Duration of contract, or time limit for completion of the service.
9. Where applicable, the legal form to be assumed by the grouping of service providers winning the contract.
10.
 - (a) Where applicable, justification for the use of the accelerated procedure.
 - (b) Final date for the receipt of requests to participate.
 - (c) Address to which they must be sent.
 - (d) Language(s) in which they must be drawn up.
11. Where applicable, any deposits and guarantees required.
12. Information concerning the service provider's own position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.
13. Where applicable, the names and addresses of service providers already selected by the contracting authority.
14. Other information.
15. Date of dispatch of the notice.
16. Date of receipt of the notice by the Office for Official Publications of the European Communities.
17. Previous date(s) of publication in the *Official Journal of the European Communities*.

4.3.3. Contract award notice - Annex III E of the Services Directive

This notice is the same for open, restricted and negotiated procedures, *including negotiated procedures without prior publication of a contract notice*.

1. Name and address of the contracting authority.
2. Award procedure chosen. In the case of the negotiated procedure without prior publication of a tender notice, justification (Article 11(3)).
3. Category of service and description. CPC reference number.
4. Date of award of the contract.
5. Criteria for award of the contract.
6. Number of tenders received.
7. Name and address of service provider(s).
8. Price or range of prices (minimum/maximum) paid.
9. Where appropriate, value and proportion of the contract which may be subcontracted to third parties.
10. Other information.
11. Date of publication of the contract notice in the *Official Journal of the European Communities*.
12. Date of dispatch of the notice.
13. Date of receipt of the notice by the Official Publications of the European Communities.
14. In the case of contracts for services listed in Annex IB, agreement by the contracting authority to publication of the notice (Article 16(3)).

4.4 Determining the time limits

In order to ensure a non-discriminatory treatment of all tenderers, time limits should be fixed in such a way so as to be easily understood by all economic operators, irrespective of their Member State. The Commission does not accept that time limits be determined by referring to national holidays, or to the publication of the notice in the national or local press, because this would put foreign tenderers at a disadvantage.

4.5 Advertising of tenders at national level⁸³

The Directive provides that notices in the local press or in the national official journals must not contain information other than that published in the Official Journal of the European Communities. The objective of this provision is to ensure the same level of information for all economic operators, irrespective of their Member State.

For the same reason, notices cannot be published in national official journals or in the local press before the date of dispatch to the Office for Official Publications. Contracting authorities must be able to supply proof of the date of dispatch. This date should also be mentioned in the local publication.

4.6 Who publishes the notices?

Notices required by the Services Directive are published by the Office for Official Publications of the European Communities. Contracting authorities are required to send the notices to the Office as rapidly as possible and by the most appropriate channels.⁸⁴ This implies that contracting authorities should use all the modern means of communication in order to send the notices as quickly as possible. In particular, contracting authorities must fulfil the following obligations:

- send the annual indicative notice as soon as possible after the beginning of the budgetary year;
- in case of accelerated procedures, send the notice by telex, telegram or fax;
- send the contract award notice no later than forty-eight days after the award of the contract in question;
- be able to supply proof of the date of dispatch of the various notices to the Office of Official Publications.

The address for correspondence is:

Supplement to the Official Journal of the European Communities
Office of Official Publications of European Communities
2, rue Mercier
L -2985 Luxembourg
Tel: (352) 499 28 23 32
Telex: 1324 PUBOF LU/2731 pubof LU
Fax: (352) 49 00 03/(352) 49 57 19

⁸³ Article 17(6) of the Services Directive.

⁸⁴ Article 17(2) of the Services Directive.

The annual indicative notice and the contract award notice must be published in full in the Official Journal and in the TED data bank in all the official languages of the Community.⁸⁵ The contract notices and the notices for design contests are published in full in their original language with a summary of the important elements of each notice being published in the other official languages of the Communities.⁸⁶ The notices must be published in the Supplement of the Official Journal and in the TED data bank within 12 days after their dispatch.⁸⁷ In the case of accelerated procedure, this time limit should be reduced to 5 days.

The Office for Official Publications is responsible for carrying out the necessary translations and summaries⁸⁸. The cost for the publications is at present borne by the Communities.

4.7 Recommended standard format of contract notices

In its Recommendation 91/561/EEC the Commission initiated a new system for the standardisation of information contained in contract notices. This system has been perfected in order to contribute to a better realisation of public procurement policy objectives, notably through the use of a common terminology to facilitate competitors' comprehension of contract notices, while at the same time simplifying the task not only of contracting authorities in the preparation of notices, but also of the Office for Official Publications of the European Communities in their publication.

Standard forms for service contracts have yet to be worked out. For works and supplies contracts, standard forms are set out for the different Member States in the Supplement to the Official Journal, S217A to 217N⁸⁹ of 16 November 1991.

Under this standardised system, the task of the contracting entities is basically to select the appropriate words or phrases and to add any pertinent information to the standardised case. In its Recommendation 91/561/EEC the Commission has requested Member States to take the necessary measures to ensure that contracting authorities may make use of this method of drafting contract notices.

4.8 Minimum and maximum deadlines to be respected

One of the objectives of the Services Directive is to ensure that all potential tenderers get a fair opportunity to express their interest for the contract in question or submit their tenders. In order for this objective to be achieved, the Directive fixes minimum time limits for the receipt of tenders or expressions of interests, or maximum time limits for the dispatch of contract documents and other related documents necessary for submission.

⁸⁵ Article 17(3) of the Services Directive.

⁸⁶ Article 17(4) of the Services Directive.

⁸⁷ Article 17(3) and (5) of the Services Directive.

⁸⁸ Article 17(3) of the Services Directive.

⁸⁹ 217A, B and C (Belgium in German, French and Dutch), 217D (Denmark), 217E (Germany), 217F (Greece), 217G (Spain), 217H (France), 217I (Ireland), 217J (Italy), 217K (Luxembourg), 217L (Netherlands), 217M (Portugal) and 217N (United Kingdom).

Clearly, contracting authorities may extend the time limits for the receipt of tenders beyond the legal minimum or shorten the time limits for the dispatch of the contract documents if they consider it appropriate. Moreover, they have an obligation to extend the time limits for receipt of tenders in the cases where the contract documents are too bulky to be supplied within the minimum time limits or where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents.⁹⁰

4.8.1 *Open Procedure*

(a) *Minimum* deadline for receipt of tenders

- as a general rule, 52 days from the date of dispatch of the notice for publication in the Official Journal,⁹¹
- in cases where the contracting authority has published an annual indicative notice which includes the services in question, 36 days from the date of dispatch of the notice.⁹²

The above time limits must be extended in the circumstances outlined in 4.8 above.

(b) The *maximum* time limit for the dispatch of contract documents and other supporting documents is fixed by the Services Directive at 6 days after the receipt of the request (provided that the request has been sent in good time).⁹³

(c) Moreover, the *maximum* time limit for the dispatch of additional information relating to the contract documents is 6 days before the final date fixed for receipt of tenders, provided such information has been requested in good time.⁹⁴

4.8.2 *Restricted Procedure*

Minimum deadline for receipt of requests to participate:

- 37 days from the date of dispatch of the notice for publication in the Official Journal;⁹⁵
- 15 days in accelerated restricted procedures, i.e. where urgency renders impracticable the time limit of 37 days.⁹⁶

Minimum deadline for the receipt of tenders

⁹⁰ Articles 18(5) and 19(7) of the Services Directive

⁹¹ Article 18(1) of the Services Directive.

⁹² Article 18(2) of the Services Directive.

⁹³ Article 18(3) of the Services Directive.

⁹⁴ Article 18(4) of the Services Directive.

⁹⁵ Article 19(1) of the Services Directive.

⁹⁶ Article 20(1)(a) of the Services Directive.

- as a general rule, 40 days from the date of dispatch of the written invitation to tender;⁹⁷
- in cases where the services concerned were included in the annual indicative notice published by the contracting authority, 26 days from the date of dispatch of the written invitation to tender;⁹⁸
- 10 days from the date of dispatch of the written invitation to tender in accelerated restricted procedures, i.e. in cases where urgency renders impracticable the time limits of 40 or 26 days as the case may be.⁹⁹

Maximum deadline for dispatch of additional information relating to the contract documents:

- 6 days before the final date fixed for the receipt of tenders, provided such information has been requested in good time;¹⁰⁰
- 4 days in accelerated restricted procedures, i.e. where urgency renders impracticable the time limits of 40 (or 26) days for receipt of tenderers.¹⁰¹

The above time limits must be extended in the circumstances outlined in 4.8 above.

4.8.3 *Negotiated procedures with prior publication of a contract notice*¹⁰²

Minimum deadline for receipt of requests to participate

- 37 days from the date of dispatch of the notice for publication in the Official Journal;¹⁰³
- in accelerated negotiated procedures, i.e. where urgency renders impracticable the deadline of 37 days, 15 days from the date of dispatch of the notice for publication in the Official Journal.¹⁰⁴

⁹⁷ Article 19(3) of the Services Directive.

⁹⁸ Article 19(4) of the Services Directive.

⁹⁹ Article 20(1)(b) of the Services Directive.

¹⁰⁰ Article 19(6) of the Services Directive.

¹⁰¹ Article 20(2) of the Services Directive.

¹⁰² Articles 19 and 20 of the Services Directive.

¹⁰³ Article 19(1) of the Services Directive.

¹⁰⁴ Article 20(1)(a) of the Services Directive.

4.8.4 Summary tables

Open procedures

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC as rapidly as possible and by most appropriate channels	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+12
18(3)	Requests for contract and supporting documents	To be received in good time.
18(3)	Supply of contract documents and supporting documents	Within six days of receipt of request
18(4)	Supply of additional information	No later than six days before the date fixed for receipt of tenders
18(1)	The date fixed for receipt of tenders (where the contract was not the subject of an annual indicative notice for the current budgetary year)	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+52. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
18(2)	The date fixed for receipt of tenders (where the contract was included in an annual indicative notice for the current budgetary year)	As above except that Day D+52 becomes Day D+36
18(5)	Site visits and on the spot inspection of documents supporting the contract documents	The above limits of D+52 or D+36 should be extended accordingly

Restricted procedures

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC as rapidly as possible and by most appropriate channels	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+12
19(1) 19(5)	Time limit for receipt of requests to participate or <i>dispatch</i> of written confirmations of requests made by telegram, telex, fax or telephone	A specific date given in the notice, and which must be no earlier than the first working day on or after Day 37. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(2)	Dispatch of letters of invitation to tender	No legal deadline but as specified in contract notice.
19(2)(a)	Requests for supporting documents not included in the letter of invitation	To be received in good time
19(6)	Supply of additional information	No later than six days before the date fixed for receipt of tenders
19(3)	The date fixed for receipt of tenders (where the contract was not the subject of an annual indicative notice for the current budgetary year)	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+40. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(4)	The date fixed for receipt of tenders (where the contract was included in an annual indicative notice for the current budgetary year)	As above except that Day D+40 becomes Day D+26
19(7)	Site visits and on the spot inspection of documents supporting the contract documents	The above limits of D+40 or D+26 should be extended accordingly

Urgent restricted procedures

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC by telex, telegram or fax	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+5
19(1) 20(3)	Time limit for receipt of requests to participate or <i>dispatch</i> of written confirmations of requests made by telegram, telex, fax or telephone	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+15. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(2)	Dispatch of letters of invitation to tender	No legal deadline, but as specified in contract notice.
19(2)(a)	Requests for supporting documents not included in the letter of invitation	To be received in good time
20(2)	Supply of additional information	No later than four days before the date fixed for receipt of tenders
19(3)	The date fixed for receipt of tenders (whether or not the contract was the subject of an annual indicative notice for the current budgetary year)	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+10. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(7)	Site visits and on the spot inspection of the documents supporting the contract documents	The above limit of D+10 should be extended accordingly

Negotiated procedures (with publication of a contract notice)

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC as rapidly as possible and by most appropriate channels	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+12
19(1) 19(5)	Time limit for receipt of requests to participate or <i>dispatch</i> of written confirmations of requests made by telegram, telex, fax or telephone	A specific date given in the notice, and which must be no earlier than the first working day on or after Day 37. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(2)	Dispatch of letters of invitation to negotiate	No legal deadline, but as specified in the contract notice.

Urgent negotiated procedures (with publication of a contract notice)

Article	Action	Day
17(2)	Dispatch contract notice to the Office for Official Publications of the EC by telex, telegram or fax	Day D
17(6)	Publication in national press	Not before Day D
17(5)	Publication by the Office for Official Publications of the EC	In principle no later than Day D+5
19(1) 20(3)	Time limit for receipt of requests to participate or <i>dispatch</i> of written confirmations of requests made by telegram, telex, fax or telephone	A specific date given in the notice, and which must be no earlier than the first working day on or after Day D+15. If the earliest possible date is set under this rule, the time limit cannot be earlier than the last hour of such date.
19(2)	Dispatch of letters of invitation to negotiate	No legal deadline, but as specified in the contract notice.

4.9 Method of calculating time limits

Time limits must be calculated in accordance with the provisions of Council Regulation 1182/71 of 3 June 1971.

The relevant rules for the purposes of the Services Directive are:

- (a) Where actions must occur in a contracting authority's Member State within a period of D days after an event, the day after the day in which the event occurs is counted as day 1, the next day as day 2, and so on until day D. If day D is a working day* in the Member State, the action must be taken before the expiry of the last hour in day D. If day D is not a working day,* the action must be taken before expiry of the last hour of the next following working day.¹⁰⁵
- (b) Where a deadline fixed by a contracting authority for receipt of documents must not be less than D days from a given event, the day after the day in which the event occurs is counted as day 1 and so on until day D. If day D is a working day* in the contracting authority's Member State, such authority must fix the deadline no earlier than that day D (which means the last hour in that day D). If day D is not a working day,* the authority must fix the deadline as no earlier than the next following working day* (which means the last hour in such working day*).¹⁰⁶
- (c) Where a contracting authority is obliged to act no later than D days before a particular date, the day before such date is counted as day 1, the day before that as day 2 and so on until day D and the authority must act no later than the last hour on day D.¹⁰⁷
- (d) Where in a notice or other document, a contracting authority sets a pre-fixed date as the deadline for action, such action is valid if accomplished no later than the last hour on that date.¹⁰⁸
- (e) Where in a notice or other document, a contracting authority sets a pre-fixed date and hour as the deadline for action, such action is valid if accomplished no later than the prescribed hour on the prescribed date.¹⁰⁹

* A working day is any day other than a Saturday, Sunday or a day designated as a public holiday in the Member State and published as such by the Commission in the Official Journal of the EC.

¹⁰⁵ Regulation 1182/71, article 3.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, but see article 3(4), last sentence.

¹⁰⁸ By implication based on Regulation 1182/71, article 3.

¹⁰⁹ Regulation 1182/71, article 3(2).

4.10 Means whereby service providers request to participate in restricted and negotiated procedures

Requests to participate in a restricted procedure or in a negotiated procedure with a prior publication of a notice may be made by letter, telegram, fax, telex or telephone. However, in the case of a request by telegram, fax, telex or telephone, service providers must confirm their request by letter, dispatched before the end of the deadline.¹¹⁰

In case of an accelerated procedure, the Services Directive requires that requests for participation be made by the most rapid means of communication possible. However, requests made otherwise than by letter will not be valid unless they are confirmed by letter dispatched before the expiry of the deadline.¹¹¹

4.11 Means of inviting candidates to tender in restricted and negotiated procedures¹¹²

In both negotiated procedures with a prior publication of a notice and restricted procedures, contracting authorities must invite the selected candidates in writing to present their offers. These invitations must be sent simultaneously to all selected candidates.

The invitation letter must be accompanied by the contract documents and other supporting documentation. Moreover, it must include the following information:

- the address of the service from which contract documents may be requested, the final date for making such a request and the amount and terms of payment of any sum to be paid for such documents. (This is only required if the invitation letter is not accompanied by the contract documents and other supporting documentation.)
- the final date for the receipt of the tenders, the address to which they must be sent and the language or languages in which they must be drawn up.
- a reference to the contract notice published;
- and indication of any documents to be annexed, either to support verifiable statements or to supplement information provided for the purposes of proving his economic and financial standing and technical capacity and ability;
- the criteria for the award of the contract if these are not given in the notice.

¹¹⁰ Article 19(5) of the Services Directive.

¹¹¹ Article 20(3) of the Services Directive.

¹¹² Article 19(2) of the Services Directive.

5. Common technical rules

The rules discussed in this section apply to service contracts where the services involved fall within Annex IA or Annex IB of the Services Directive.

5.1 Which technical specifications may be required?

Contracting authorities must indicate in the general documents, or in the contract documents relating to each contract, the technical specifications to which the services must conform. The choice of these specifications is not unlimited. The Services Directive provides a set of rules to deter contracting authorities from favouring national service providers by choosing standards which, in practice, only the latter can meet.

Accordingly, contracting authorities have to define technical specifications by reference:

- to national standards implementing European standards or;
- to European technical approvals or;
- to common technical specifications.

However this general rule does not apply if legally binding national technical rules, which are compatible with Community law, provide otherwise.

The definitions of the various terms mentioned above are as follows:¹¹³

Technical specifications: the totality of the technical prescription contained in particular in the tender documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority.

These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling.

They shall also include rules relating to design and costing, the text, inspection and acceptance conditions for works, and methods or techniques or construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

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

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

¹¹³ See Annex II of the Services Directive.

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

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

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

5.2 Exceptions

In four categories of cases set out in the Services Directive,¹¹⁴ contracting authorities may derogate from the general rule set out above. These four categories are set out below.

- (a) where national standards implementing European standards, European technical approvals or common technical specifications do not include any provision for establishing conformity; or there are no technical means for satisfactorily establishing the conformity of a product with national standards, implementing European standards, European technical approvals or common technical specifications.

This exception may be invoked, in particular, where difficulties in establishing conformity with technical specifications defined in accordance with the general rule may give rise to legal uncertainty.

- (b) where the definition of technical specifications in accordance with the general rule would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment;¹¹⁵ or Council Decision 87/95/EC of 22 December 1986 on standardization in the field of information technology and telecommunications;¹¹⁶ or other Community instruments in specific service or product areas.

The absence of technical harmonisation at a European level with regard to any relevant products and services justifies recourse to this exception.

- (c) where the use of technical specifications defined in accordance with the general rule would oblige the contracting authority to use products or material incompatible with equipment already in use; or would entail disproportionate costs or disproportionate technical difficulties,

However this exception may only be invoked where there exists a clearly defined and recorded strategy with a view to the transition, within a given period, to

¹¹⁴ Article 14(3) of the Services Directive.

¹¹⁵ OJ L217, 5.8.86, p. 21, amended by Directive 91/263/EEC (OJ L128, 23.5.91, p. 1).

¹¹⁶ OJ L36, 7.2.87, p. 31.

European standards, European technical approvals or common technical specifications.

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

Contracting authorities who make use of one of these exceptions to the general rule must mention the reasons for doing so in their internal documentation, and they must supply such information on request to Member States and to the Commission. Wherever possible, contracting authorities should also mention their reasons for doing so in the contract notice or in the contract documents.¹¹⁷

5.3 Alternative specifications where there are no European standards, no European technical approvals and no common technical specifications

In the absence of European standards or European technical approvals or common technical specifications, the Services Directive provides that technical specifications should be defined on the basis of the following rules:

- (a) by reference to the national technical specifications when these are recognized as complying with the basic requirements listed in the Community directives on technical harmonization; such compliance should be established in accordance with procedures laid down in such directives, and in particular in accordance with the procedures laid down by Directive 89/106/EC;¹¹⁸
- (b) by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials;
- (c) by reference to other documents.

If, in the absence of European standards, European technical approvals and common technical specifications, a contracting authority decides to refer to other documents, it is appropriate to make reference in order of preference to:

- i) national standards implementing international standards accepted by the country of the contracting authority; or
- ii) other national standards and national technical approvals of the country of the contracting authority; or
- iii) any other standard.

However, all the rules in this section 5.3 must be applied in accordance with the decisions of the Court of Justice with regard to "measures having equivalent effect to quantitative restrictions".

It should be emphasised that the definition of technical specifications otherwise than by reference to national standards implementing European standards, European technical

¹¹⁷ Article 14(4) of the Services Directive.

¹¹⁸ OJ L40, 11.2.89, p. 12.

approvals or common technical specifications may account to a barrier to trade if it excludes the use of products manufactured in other Member States.¹¹⁹ Such a barrier will be compatible with Community law only if it is justified by mandatory requirements or it falls within Article 36 of the Treaty.

As a result, a contracting authority may not reject tenders solely on the grounds of non-compliance with national standards or other standards to which it refers for the definition of technical specifications. It may only reject a tender if it establishes that the relevant mandatory requirements, if any, were not met.¹²⁰

5.4 Discriminatory specifications are prohibited in all cases

The Services Directive prohibits Member States from introducing in the contractual clauses, technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain service providers. This is particularly the case of trade marks, patents or types of specific production or of specific origin. However, derogations from this general rule are permitted if the contracting authority establishes that:

- (a) they are justified by the subject of the contract; or
- (b) such indication is accompanied by the words "or equivalent", and the contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.¹²¹

¹¹⁹ See Case 45/87, *Commission v Ireland* (water pipes), [1988] ECR 1369.

¹²⁰ See e.g., Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, (Cassis de Dijon), [1981] ECR 649.

¹²¹ e.g., in Case C-359/93, *Commission v Netherlands*, 24 January 1995, the Court held that failure to put the words "or equivalent" after the specification "UNIX" for a software system amounted to a breach of the relevant procurement directive.

6. Participation in contract award procedure, and award of the contract

In order to achieve effective Community-wide competition and thereby a real liberalisation of intra-Community exchanges in the field of public procurement of services, it was necessary to prevent the selection of service providers and the evaluation of their offers on the basis of arbitrary criteria chosen by contracting authorities. For this reason, Title VI of the Services Directive lays down common rules on participation in contract procedures, criteria for quantitative selection of service providers and criteria for the award of contracts.

6.1 Common rules on participation in contract award procedures

Article 23 of the Services Directive provides that contracts must be awarded:

- on the basis of the criteria laid down in Chapter 3 of its Title VI (see 6.3 below);
- taking into account the requirements of article 24 in relation to variants (see 6.1.4 below);
- after exclusion of certain unsuitable categories of service providers (see 6.2.1 below);
- and after checking their suitability by reference to economic and financial standing (see 6.2.3 below) and technical capacity and ability (see 6.2.4 below).

The suitability of service providers must be checked in open procedures as well as restricted and negotiated procedures. It should be noted, however, that a favourable outcome of such check does not produce the same effects in the three procedures.

In an open procedure, the fact that a tenderer meets the predetermined selection criteria gives him an automatic right to participate in the award procedure. The contracting authority is, therefore, obliged to examine all the offers made by the qualifying tenderers.

In restricted and negotiated procedures, on the other hand, candidates who satisfy the predetermined selection criteria can be excluded from the award procedure because the contracting authority may limit the number of candidates to be invited to tender or to negotiate. It does not have an altogether free choice in the matter (see 6.1.1).

The logic of the Services Directive is that the verification of the suitability of service providers and the award of the contract are two distinct operations in a contract procedure. While not recognising a rigid and formal chronological separation of these two phases, the Court has emphasised the clear separation which must exist as to the rules used. As the Court said,¹²² "even though the Directive ... does not rule out the possibility that examination of the tenderers' suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules."

¹²² Case 31/87, *Gebroeders Beentjes BV v Netherlands*, [1988] ECR 4635, at paragraph 16.

It follows that, when awarding the contract, the contracting authority may not take into consideration a greater or lesser financial capacity of a tenderer. Equally in the light of a favourable offer, it may not bring back a tenderer who had been previously excluded as not satisfying the predetermined selection criteria as to suitability.

In all this, contracting authorities are obliged to respect confidentiality of information provided by candidates or tenderers.

6.1.1 Choice of the number of candidates in restricted and negotiated procedures

The selection of service providers who will be invited to tender or to negotiate can only be made from among those who submitted their candidatures in response to the contract notice and who have the necessary qualifications. Such qualifications must be based on the qualitative selection criteria discussed below in 6.2 below.

Article 27(1) of the Services Directive provides that "in restricted and negotiated procedures the contracting authorities shall, on the basis of information given relating to the service provider's position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Articles 29 to 35 those whom they will invite to submit a tender or to negotiate."

Important

Contracting authorities are not obliged to invite all the candidates who satisfy the qualification criteria. Those who are invited, on the other hand, can only be chosen on the basis of the objective transparent qualitative selection criteria laid down at the commencement of the procedure.

Thus contracting authorities can only limit the number of persons invited to tender or negotiate by taking the candidates who have the best qualifications having regard to the selection criteria laid down in the contract notice. Moreover, they can only do this if they indicated in the contract notice the number or range of candidates which would be selected to tender or negotiate. In the absence of such indication, all candidates who present correct candidatures and who have the required qualifications must be selected to tender or negotiate.

In restricted procedures the range of service providers invited to tender must be determined in the light of the nature of the service to be provided and must include at least five service providers. If the contracting authority intends to set an upper limit as well, it should state such upper limit in the contract notice, e.g. between 5 and 20 service providers.¹²³ Once stated in the contract notice, the range or minimum number cannot be changed.

Important

The Services Directive provides that the number of candidates invited to tender in restricted procedures shall be sufficient to ensure genuine competition. It may happen that, having fixed a minimum number of candidates in the contract notice, a contracting authority finds itself faced with an insufficient number of candidates having the

¹²³ Article 27(2) of the Services Directive.

qualifications required for the contract. In such a case the contracting authority has no choice but to invite tenders from all the candidates who meet the qualification criteria.

In negotiated procedures with prior publication of a contract notice, the number of candidates admitted to negotiate may not be less than three, provided that there is a sufficient number of candidates.¹²⁴

6.1.2 Invitations to service providers who are nationals of other Member States¹²⁵

In any event the Services Directive requires that Member States and contracting authorities ensure that invitations to tender or negotiate are issued without discrimination to nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals.¹²⁶

As a general rule the Commission considers that one may presume an absence of discrimination on the grounds of nationality if, in selecting candidates, the contracting authority maintains the proportion of national and non-national service providers who satisfied the qualification criteria. Thus, for example, if 20 candidatures were received, 15 of which meet the qualifications, and 3 of the 15 are from service providers in other Member States, one would expect at least one out of 5 candidates selected to tender to be from another Member State.

If for any reason the matter had to be investigated in depth, for example, in the case of a complaint, the above presumption does not prejudice the findings of a more detailed assessment of the elements taken into consideration by the contracting authority.

6.1.3 Legal form of service providers¹²⁷

Groups of service providers must be allowed to submit tenders without having to adopt any specific legal form. However, if a group of service providers is awarded the contract, it may be required to transpose itself into a specific legal form if such transformation is necessary for the performance of the contract.

Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity as natural persons, shall not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be a legal person. The rule applies equally in the reverse situation where the candidate or tenderer is a legal person and the law of the Member State in which the contract is awarded require that the service be provided by a natural person.

Since the identity of the individuals involved in providing a service is important, contracting authorities are entitled to require service providers who are legal persons to

¹²⁴ Article 27(3) of the Services Directive.

¹²⁵ Article 27(4) of the Services Directive.

¹²⁶ A provision which reserves a part of the works (or services) to tenderers having their registered office in the region where the works (or services) are to be carried out, amounts to a discrimination against tenderers from other Member States; Case C-360/89, *Commission v Italy*, [1992] ECR I-3401; Case C-21/88, *Du Pont de Nemours Italiana S.p.A. v Unità Sanitaria Locale No. 2 di Carrara*, [1990] ECR I-889.

¹²⁷ Article 26(1) of the Services Directive.

indicate in their tender or request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of their service.

6.1.4 *Offers containing variants*¹²⁸

As observed in 4 above, contracting authorities are obliged to state in the general or contractual documents the technical specifications of the services they are looking for. Nevertheless, it is important for economic operators and users that services may also be offered which do not correspond to those identified by the contracting authority but which satisfy its requirements. The existence of such a possibility stimulates research into new technologies and allows users to benefit from technical progress and a larger range of services.

Subject to certain conditions, the Services Directive allows tenderers to propose variants.

The first condition is that variants can only be permitted when the contract is awarded on the basis of the economically most advantageous offer. The assessment of a variant and its comparison with offers made in accordance with the technical specifications can only be carried out fairly by examining the offers under different aspects, which implies the existence of evaluation criteria other than merely the lowest price.

The Services Directive leaves it to the discretion of the contracting authority to prohibit or authorize variants, and, in the latter hypothesis, to establish the types of variants it will take into consideration and the manner in which service providers should present them. For example, the contracting authority could require that a basic offer be prepared at the same time as the variant.

The second condition is that, when variants are permitted, the contracting authority is not obliged to mention this fact in the contract notice,¹²⁹ but it is obliged to state in the contract documents the minimum conditions which variants must satisfy, and the manner of their presentation.

The third condition is that variants may only be taken into consideration if they meet the minimum requirements set out in the technical documents.¹³⁰

Contracting authorities may not reject the submission of a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals or to common technical specifications or even by reference to national technical specifications referred to in section 4 above.

Moreover, contracting authorities which have admitted variants may not reject a variant on the sole ground that it would lead, if successful, to a supply contract rather than a public service contract. This limitation applies in particular to variants which result in a supply of products the value of which exceeds the value of the services.

6.1.5 *Sub-contracting*¹³¹

¹²⁸ Article 24 of the Services Directive.

¹²⁹ If variants are prohibited, this fact must be indicated in the contract notice.

¹³⁰ Thus for example, it is not permitted to negotiate with a tenderer who has submitted an offer which is not in accordance with the contractual specifications, Case C-243/89, *Commission v Denmark* (Storebaelt Bridge), [1993] ECR I-3353.

¹³¹ Article 25 of the Services Directive.

Sub-contracting by service providers is not regulated by the Services Directive. However, in order to ensure transparency in the execution of public service contracts, the Services Directive requires that, in the contract documents, the contracting authority may require the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

6.1.6 Obligations relating to employment protection provisions and the working conditions in force where the services are to be provided¹³²

The contracting authority may state in the contract documents, or be obliged by a Member State so to state, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the services are to be performed and which shall be applicable to the services provided on site during the performance of the contract. In such a case the contracting authority must request service providers to indicate that they have taken account of such obligations when drawing up their offer.

6.1.7 Conditions not provided for in the Services Directive

As it appears from the principles stated by the Court in the *Beentjes* case¹³³ the participation of tenderers may be made subject to conditions which are not provided for by the Services Directive, and which would require the service provider to prove his capacity to satisfy certain contractual clauses if the contract were awarded to him. (In the *Beentjes* case the requirement was that the contractor was able to employ persons who had been unemployed for a long time.) Such conditions do not fall within the permitted criteria laid down by the Services Directive for qualitative selection or for award of the contract.

Such clauses must, of course, satisfy all the relevant requirements of Community law, notably the freedom of establishment, the freedom to provide services and the prohibition against any discrimination based on nationality.

As far as concerns compatibility with the Services Directive, such clauses must not have any direct or indirect discriminatory effect vis-à-vis tenderers from other Member States. In other words, it must not be the case that such condition can be satisfied, in practice, only by national tenderers, or can be satisfied only with great difficulty by tenderers from other Member States.

Supplementary conditions must in any event be indicated by the contracting authority in the contract notice so that service providers are able to assess whether a public contract containing such conditions interests them.¹³⁴

6.2 Selection of candidates

It is essential to avoid the use of discriminatory criteria for the exclusion of service providers from a public procurement procedure. The Services Directive does not limit

¹³² Article 28 of the Services Directive.

¹³³ Case 31/87, *Gebroeders Beentjes BV v Netherlands*, [1988] ECR 4635.

¹³⁴ For a more detailed analysis of the *Beentjes* case and its possible applications, see Commission Communication of 22 September 1989 - Public Procurement, Regional and Social Aspects, OJ C311, 12.12.89, p. 11 at paragraphs 44 ff.

itself "to stating the criteria for selection on the basis of which contractors may be excluded from participation by the authority awarding the contract. It also prescribes the manner in which contractors may furnish proof that they satisfy these criteria."¹³⁵ These criteria, discussed below, are the personal situation of the service provider (article 29) as well as his professional qualifications, namely professional registration (article 30), economic and financial standing (article 31) and ability and technical capacity (article 32).

Important

The purpose of the Directive is not to limit the competence of Member States to fix the level of economic and financial standing or ability and technical capacity necessary for a particular contract, but to determine the references or means of proof which may be produced by the service provider to establish such level of standing and capacity. Nevertheless, such competence is not unlimited because Member States are obliged to respect all the provisions of Community law, and notably those which flow from the principles of the Treaty in relation to the freedom of establishment and the freedom to provide services.

6.2.1 Personal situation of service providers

Article 29 provides an exhaustive list of the cases where the personal situation of the service provider can lead to his exclusion from the contract procedure.

Thus a service provider may be excluded if he:

- (a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;
- (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding-up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;
- (c) has been convicted of an offence concerning his professional conduct by a judgement which has the force of *res judicata*;
- (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;
- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;
- (g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under Chapter 2 of title VI of the Services Directive (criteria for quantitative selection).

In the cases (d) and (g) it is for the contracting authority to prove the existence of the grounds for exclusion. In the other cases the contracting authority may require the service provider to provide proof that he does not fall within the grounds of exclusion.

¹³⁵ Case 76/81, *S.A. Transporoute v Ministry of Public Works*, [1982] ECR 417, at 429, paragraph 8.

The contracting authority is not free to specify the means of proof to be produced by service providers. It is obliged to accept as sufficient evidence:

- for (a), (b) or (c), the production of an extract from the 'judicial record' or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or in the country whence that person comes showing that these requirements have been met,
- for (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country concerned does not issue such documents or certificates, they may be replaced by a declaration on oath made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

6.2.2 Professional registration¹³⁶

Unlike the Works or the Supplies Directive, the Services Directive allows a contracting authority to require service providers to prove that they possess the necessary authorisation or membership of a professional organisation in order to provide the relevant services in the home state. Thus, for example, a contracting authority inviting tenders for architectural services is entitled to require the tenderers to produce a certificate of admission to practise the profession of architect in the home state.

As far as concerns professional status in the broad sense, a contracting authority can require service providers to prove that they hold a professional registration issued in accordance with the legislation of the Member State where they are established. The relevant professional and trade registers or declarations or certificates are:

- in Belgium, the 'registre du commerce - Handelsregister' and the 'ordres professionnels - Beroepsorden';
- in Denmark, the 'Erhvervs- og Selskabstyrelsen';
- in Germany, the 'Handelsregister', the 'Handwerksrolle' and the 'Vereinsregister';
- in Greece, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in the cases provided for by existing national legislation, for the provision of research services as mentioned in Annex IA, the professional register 'Μητρομο Μελετητην' and 'Μητρομο Γραφεων Μελετην';
- in Spain, the 'Registro Central de Empresas Consultoras y de Servicios del Ministerio de Economia y Hacienda';
- in France, the 'registre du commerce' and the 'répertoire des métiers';
- in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato', the 'Registro delle commissioni provinciali per l'artigianato' or the 'Consiglio nazionale degli ordini professionali';
- in Luxembourg, the 'registre aux firmes' and the 'rôle de la Chambre des métiers';

¹³⁶ Article 30 of the Services Directive.

- in the Netherlands, the 'Handelsregister';
- in Austria, the Firmenbuch, the Gewerberegister, the Mitgliederverzeichnisse der Landeskammern;
- in Portugal, the 'Registo nacional das Pessoas Colectivas';
- in the United Kingdom and Ireland, the service provider may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name;
- in Finland, Kaupparekisteri/Handelsregistret;
- in Sweden, aktiebolags-, handels- eller föreningsregistren.

It goes without saying that to require a service provider established in another Member State to possess a general or specific professional registration in the contracting authority's state could not only be contrary to the Services Directive, but would also amount to a serious infringement of the freedom to provide services within the Community.¹³⁷

It should also be emphasised that to state such a requirement in the contract notice, even if the contracting authority does not subsequently enforce the requirement, amounts to an infringement of the freedom to provide services due to the dissuasive effect which such a notice could have on service providers in other Member States.

6.2.3 *Financial and economic standing*

Article 31 of the Services Directive provides that, as a general rule, a service provider may be required to prove his financial and economic standing by furnishing one or more of the following references:

- (a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;
- (b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;
- (c) a statement of the undertaking's overall turnover and its turnover in respect of the services to which the contract relates for the previous three financial years.

This list is not exhaustive. The Services Directive allows a contracting authority to state in the contract notice which of the above references it has chosen and which other references of financial and economic standing are to be produced by the service provider. In so doing, the contracting authority must confine the information requested to the subject of the contract and shall take into account the legitimate interests of the service providers as regards the protection of their technical or trade secrets.¹³⁸

¹³⁷ cf. Case 76/81, *SA Transporoute et Travaux v Minister of Public Works*, [1982] ECR 417, a case in which the contracting authority wrongfully required that the contractor possess an establishment permit in the contracting authority's state.

¹³⁸ Article 32(4) of the Services Directive.

It follows that a contracting authority is allowed not only to fix the level of financial and economic standing in order to participate in a given contract procedure, but also the means of proof of such level. Any requirements which go beyond those indicated by the Services Directive must be pertinent means of proof, that is to say, they must serve the objective purpose of proving the required financial and economic standing in relation to the importance of the services to be provided. In particular, they must not discriminate between national service providers, on the one hand, and service providers from other Member States, on the other.

For example, in its judgment of 9 July 1987 the Court accepted that, in assessing a party's financial and economic standing, it may fix a maximum value of works which may be carried out at any one time.¹³⁹

If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, the Services Directive obliges the contracting authority to allow the service provider to prove by any other document that he meets the necessary level of financial and economic standing. The contracting authority must assess, in such cases, whether the documents actually produced are appropriate.

6.2.4 *Ability and technical capacity*

As far as concerns proof of ability and technical capacity, article 32 of the Services Directive sets out an exhaustive list of the means of proof that a contracting authority may require, according to the nature, quantity and purpose of the services to be provided:

- (a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;
- (b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided;
 - where provided to contracting authorities, evidence to be in the form of certificates issued or countersigned by the competent authority,
 - where provided to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected;
- (c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;
- (d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;
- (e) a statement of the tools, plant or technical equipment available to the service provider for carrying out the services;¹⁴⁰

¹³⁹ Joined Cases 27, 28 and 29/86, *Construction et Entreprises Industrielles S.A. v Association Intercommunale pour les Autoroutes des Ardennes; Ing. A. Bellini & Co SpA v Régie des Bâtiments and Belgian State*, [1987] ECR 3368.

- (f) a description of the service provider's measures for ensuring quality and his study and research facilities;
- (g) where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in which the service provider is established, subject to that body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;
- (h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

Information requested by the contracting authority must be confined to the subject of the contract and due consideration shall be given to the legitimate interests of the service providers as regards the protection of their technical or trade secrets.¹⁴¹

The contracting authority is obliged to state in the contract notice (or the invitation to tender in restricted procedures) those references in the above exhaustive list which it wishes to receive.

Where contracting authorities require the production of certificates drawn up by independent bodies for attesting conformity of the service with certain quality assurance standards, they are obliged to refer to quality assurance systems based on the relevant EN 29 000 European standards series certified by bodies conforming to the EN 45 000 European standards series.¹⁴² They are also obliged to recognize equivalent certificates from bodies established in other Member States. Where service providers have no access to such certificates, or no possibility of obtaining them within the relevant time limits, contracting authorities must allow service providers to prove that they meet the required standards by producing evidence of equivalent quality assurance measures, although it is open to contracting authorities to assess whether any documents produced are appropriate.

6.2.5 *Supplementary information*¹⁴³

The selection of candidates and the award of contracts must be transparent. It follows that any fixing of quality standards after publication of the contract notice is prohibited. All that the contracting authority may do after publication of the contract notice is to request service providers to supplement the certificates and documents submitted or to clarify them.

¹⁴⁰ It is not permissible for the contracting authority to require proof that such tools, plant, etc. are situated in the contracting authority's state (Case C-71/92, *Commission v Spain* (pharmaceutical products), [1993] ECR I-5923.

¹⁴¹ Article 32(4) of the Services Directive

¹⁴² Article 33 of the Services Directive

¹⁴³ Article 34 of the Services Directive.

While this possibly is left to the discretion of the contracting authority, it may not be used in a discriminatory manner.

The service provider, however, has no right to be invited by the contracting authority to correct any mistakes which he may have made when responding to the contract notice.

6.2.6 *Official lists of approved service providers*

Article 35 of the Services Directive sets out the rules in accordance with which Member States may set up and operate official lists of approved service providers, and lays down the probative value arising out of registration in the official lists kept by contracting authorities in other Member States.

Member States are not obliged to have official lists of service providers, but if they do, they must adapt them to the provisions of the Services Directive. In deciding whether to register a company, the Member State may take into account subsidiary companies belonging to the first company but only if the latter actually has available the resources of its subsidiaries.¹⁴⁴

A service provider registered in an official list kept by the Member State where he is established may only rely upon such registration to prove that he satisfies the qualitative criteria as to personal situation, professional registration, financial and economic standing, ability and technical capacity, subject to the limitation set out below.

The Court of Justice has stated clearly that a contracting authority may not require that service providers established in other Member States obtain a registration in an official list of the contracting authority's state.¹⁴⁵ Such a requirement would nullify the effect of article 59 EC which is to remove restrictions on the freedom to provide services by persons established in a Member State other than that in which the service is to be provided.

A service provider who chooses to use an official list registration as a means of proof must produce to the contracting authority a certificate of registration delivered by the competent authority in his home Member State which mentions the references which enabled the service provider to be registered in the list and the classification given in this list.

A certificate of registration establishes a presumption of suitability corresponding to the service provider's classification only in respect of the following matters:-

- honorability within the meaning of paragraphs (a) to (d) and (g) of article 29 (see 6.2.1 above);
- possession of the necessary authorisation or membership within the meaning of article 30(1) in order to be able to provide the service in the home state (see 6.2.2 above);
- possession of a professional or trade registration, declaration or certificate within the meaning of article 30(1) and (2) (see 6.2.2 above);

¹⁴⁴ Case C-389/92, *Ballast Nedam Groep NV v Belgian State*, [1994] ECR I-1289.

¹⁴⁵ Case 76/81, *S.A. Transporoute et Travaux v Ministère des Travaux publics*, [1982] ECR 417; see also Case C-71/92, *Commission v Spain*, [1993] ECR I-5923.

- balance sheet or extract therefrom within the meaning of article 31(1)(b) (see 6.2.3 above);
- statement of the service provider's turnover and his turnover in respect of the services to which the contract relates for the previous three financial years within the meaning of article 31(1)(c) (see 6.2.3 above);
- the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services within the meaning of article 32(2)(a) (see 6.2.4 above).

The contracting authority to whom the certificate is produced:

- must accept the certificate as evidence that the service provider does not fall within the grounds of exclusion specified in paragraphs (a) to (d) and (g) of article 29 and shall not be entitled to require the service provider to supply information relating to those grounds;
- shall not be entitled to require the service provider to provide information specified in articles 31(1)(b) and (c) and 32(2)(a);
- shall not question any information which can be deduced from the certificate.

As the Court of Justice has confirmed,¹⁴⁶ the probative value of a certificate of registration in an official list of approved service providers in one Member State vis-à-vis a contracting authority in another Member State is limited to the objective elements on which such registration was based and does not extend to the classification which follows from such elements. While a contracting authority may not question any information which can be deduced from the certificate, it may nevertheless predetermine the level of financial and economic standing and technical knowledge and ability required in order to participate in a given contract procedure.

Consequently a contracting authority is required to accept that a contractor's economic and financial standing and technical knowledge and ability are sufficient for works corresponding to his classification only in so far as that classification is based on equivalent criteria in regard to the capacities required. If that is not the case, however, the contracting authority is entitled to reject a tender submitted by a service provider who does not fulfil the required conditions.

6.3 The award of the contract

6.3.1 Permitted award criteria¹⁴⁷

The contracting authority must award the contract either on the basis of the lowest price only, or on the basis of the economically most advantageous tender.

The criterion of the lowest price only does not raise any difficulties of interpretation. Only the prices offered by the tenderers may be taken into consideration, and the contract must be awarded to the tender who asks for the lowest price.

¹⁴⁶ Joined Cases 27 to 29/86, above.

¹⁴⁷ Article 36 of the Services Directive.

The criterion of the economically most advantageous tender, on the other hand, requires further explanation in order to determine the components capable of defining such offer. The Services Directive indicates that the contracting authority may base itself on various criteria depending on the contract in question: for example, quality technical merit, aesthetic and functional characteristics, technical assistance and after sales service, delivery date, delivery period or period of completion, price.

This list is not exhaustive, but the examples given show that the criteria used must be objective and strictly limited to the purpose of the contract. The criteria permitted are various and non-exhaustive in order to be able to meet all the requirements of the many different types of service contracts.¹⁴⁸

Where a contracting authority intends to award a contract on the basis of the economically most advantageous tender, it must state in the contract documents or in the contract notice the award criteria which it intends to apply. This obligation is not satisfied by merely making a general reference to a provision of national legislation.¹⁴⁹

The Services Directive provides, moreover, that these award criteria should, where possible, be stated in descending order of importance which the contracting authority attributes to them. It is important that the participants be informed in effect of the basis on which their offers will be evaluated.

6.3.2 *Abnormally low offers*¹⁵⁰

If the contracting authority considers that there is a level below which an offer cannot be considered as being serious having regard to the services provided, it may only reject such offer for this reason if it first respects the following procedure.

The contracting authority must first request in writing that the tenders concerned provide details of the constituent elements of the tender which it considers relevant and verify those elements taking account of the explanations received.

The Services Directive provides that the contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the method by which the service is provided, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer for the provision of the service, or the originality of the service proposed by the tender. It is implicit in this that, when considering the explanations given, the contracting authority may not take account of subjective considerations and it must treat all the abnormally low tenders equally without discriminating on the grounds of nationality.

The purpose of this procedure is to protect the tenderers concerned from arbitrary assessments on the part of the contracting authority by guaranteeing that, at whatever level this procedure is invoked, the tenderers will have the possibility of proving that their offers are serious before they can be rejected.

¹⁴⁸ In Case 274/83, *Commission v Italy*, [1985] ECR 1057, the Court ruled that, in order to determine the most economically advantageous tender, the authority making the decision cannot rely solely on the quantitative criterion of the price which is closest to the average price quoted in all the tenders.

¹⁴⁹ Case 31/87, *Gebroeders Beentjes BV v Netherlands*, [1988] ECR 4635.

¹⁵⁰ Article 37 of the Services Directive.

It follows that, although the contracting authority has the express right to determine whether the justifications provided by a tenderer are unacceptable, it may not prejudge the issue by rejecting the offer out of hand and without asking the tenderer to justify it. This objective would not be achieved if the contracting authority was free to choose whether or not it was appropriate to seek justifications, or was permitted to reject tenders which were abnormally low on a purely arithmetic criteria.¹⁵¹

¹⁵¹ See Case 76/81, *SA Transporoute et Travaux v Ministère des Travaux publics*, [1982] ECR 417; Case 103/88, *Fratelli Costanzo SpA v Commune de Milan*, [1989] ECR 1839; Case C-295/89, *Impresa Dona Alfonso di Dona Alfonso & Figli s.n.c. v Consorzio per lo sviluppo industriale del Comune di Monfalcone*, [1991] ECR I-2967.

7. Public service contracts made with another government body by reason of an exclusive right held by the latter¹⁵²

The Services Directive does not apply to public service contracts awarded to an entity which is itself a contracting authority, on the basis of an exclusive right which the latter enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

¹⁵² Article 6 of the Services Directive.

8. Design contests

A design contest is defined as a national procedure used by a contracting authority to acquire a plan or design selected by a jury after being put out to competition.¹⁵³ The main areas in which design contests are used include area planning, town planning, architecture, civil engineering and data processing.

8.1 When the Services Directive applies to a design contest - value threshold

A design contest can, but need not necessarily, comprise the award of prizes.

If prizes are not envisaged, but the design contest will lead to the award of a service contract, the contest must be conducted in accordance with the rules described below if the value of the service contract, net of VAT, is not less than ECU 200,000.¹⁵⁴ The rules explained in section 2 above on the valuation of the service contract apply.

If prizes are envisaged, the design contest must be conducted in accordance with the rules described below if the total amount (i.e. value) of contest prizes and payments to participants is not less than ECU 200,000. In applying this rule account must be taken of *all* prizes and payments made to participants.¹⁵⁵

8.2 Admission of participants¹⁵⁶

As a general principle of Community law, qualification to participate in any design contest, whatever the value of the prizes, must be determined on criteria which do not amount to obstacles to the free movement of goods or the freedom to provide services. In the case of design contests which fall within the scope of the Services Directive, it is provided expressly that, where the number of participants is limited, the contracting authority shall lay down clear non-discriminatory admission criteria. In any event, the number of candidates invited to participate must be sufficient to ensure genuine competition. Thus, for example, it would not be possible to circumvent the provisions on the award of a public services contract by holding a design contest to which they admit less than the minimum number - necessary to ensure genuine competition. Thus, where the prize is the award of a public service contract, the number of participants admitted should be at least as many as would have been required if the service contract had been awarded by invitation to tender.¹⁵⁷

¹⁵³ Article 1(g) of the Services Directive.

¹⁵⁴ Article 13(1) of the Services Directive.

¹⁵⁵ Article 13(2) of the Services Directive.

¹⁵⁶ Article 13(4) and (5) of the Services Directive.

¹⁵⁷ Cf. article 27(2), 2nd paragraph of the Services Directive.

It is not permitted to limit participants by reference to the territory or part of a territory of a Member State. Thus, for example, local authority could not limit participants to "all ratepayers". It is also prohibited to require that the participants be natural or legal persons.

8.3 The jury and its decision or opinion¹⁵⁸

The jury must be composed exclusively of natural persons who are independent of participants in the contest. Thus, for example, it would not be possible to appoint to the jury a director of a consulting company where some of the company's employees were participating in the contest.

Where a particular professional qualification is required of participants in the contest, at least a third of the members of the jury must have the same qualification or its equivalent (for example, as determined by the relevant Council Directive on the mutual recognition of diplomas and qualifications).

Projects must be submitted to the jury anonymously. The jury must deliberate and come to its decision or opinion autonomously, i.e. free from outside influence, and solely on the criteria set out in the design contest notice (see 8.4.1 below).

8.4 Advertising requirements for a design contest

Where a contracting authority wishes to hold a design contest it must publish a notice in the Official Journal in the form set out in 8.4.1 below.¹⁵⁹ The general provisions on publication of contract notices apply here (see section 4 above). In particular the notice must contain the name and address, telephone, telex and fax numbers of the service from which rules of the contest can be obtained.

The results of a design contest must also be published in the Official Journal using the form set out in 8.4.2 below.

¹⁵⁸ Article 13(6) of the Services Directive.

¹⁵⁹ Article 15(3) of the Services Directive.

8.4.1 *Design contest notice - Annex IVA of the Services Directive*

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority and of the service from which additional documents may be obtained.
2. Project description.
3. Nature of the contest: open or restricted.
4. In the case of open contests: final date for receipt of projects.
5. In the case of restricted contests:
 - (a) the number of participants envisaged;
 - (b) where applicable, names of participants already selected;
 - (c) criteria for the selection of participants;
 - (d) final date for receipt of requests to participate.
6. Where applicable, indication of whether participation is reserved to a particular profession.
7. Criteria to be applied in the evaluation of projects.
8. Where applicable, names of the selected members of the jury.
9. Indication of whether the decision of the jury is binding on the contracting authority.
10. Where applicable, number and value of prizes.
11. Where applicable, details of payments to all participants.
12. Indication of whether the prize-winners are permitted any follow-up contracts.
13. Other information.
14. Date of dispatch of the notice.
15. Date of receipt of the notice by the Office for Official Publications of the European Communities.

8.4.2 *Results of a design contest - Annex IVB of the Services Directive*

1. Name, address, telegraphic address, telex and fax numbers of the contracting authority.
2. Project description.
3. Total number of participants.
4. Number of foreign participants.
5. Winner(s) of the contest.
6. Where applicable, the prize(s).
7. Other information.
8. Reference of the design contest notice.
9. Date of dispatch of the notice.
10. Date of the receipt of the notice by the Office for Official Publications of the European Communities.

APPENDICES

- I Comparative Table of the provisions of Directives 92/50/EEC, 93/36/EEC and 93/37/EEC.**

- II CPA classification of services listed in Annexes IA and IB to Directive 92/50/EEC.**

- III List of bodies governed by public law as set out in Annex I to Directive 93/37/EEC.**

- IV Regulation No 1182/71 determining the rules applicable to periods, dates and time limits.**

APPENDIX I

COMPARATIVE TABLE OF THE PROVISIONS OF DIRECTIVES 92/50/EEC, 93/36/EEC AND 93/37/EEC

**Comparative table of the provisions of the Directives
on Works (93/37/EEC), Supplies (93/36/EEC) and Services (92/50/EEC)**

SUBJECT	Article of the Directive		
	Works	Supplies	Services
GENERAL PROVISIONS - Definitions			
Definition of contract	1(a)	1(a)	1(a)(i)
Exclusion of utilities contracts	4(a)	2(1)(a)	1(a)(ii)
Exclusion of other contracts			1(a)(iii)-(ix)
Definition of contracting authorities	1(b)	1(b)	1(b)
Definition of contractor/supplier/service provider	1(c)	1(c)	1(c)
Definition of open procedure	1(e)	1(d)	1(d)
Definition of restricted procedure	1(f)	1(e)	1(e)
Definition of negotiated procedure	1(g)	1(f)	1(f)
Definition of a work/supply/service	1(c)	None	None
Definition of public works concession	1(d)	N.A.	N.A.
Definition of contractor/supplier/service provider	None	None	1(c)(1)
Definition of tenderer and candidate	1(h)	1(c)	1(c)(2)
Definition of design contest	N.A.	N.A.	1(g)
GENERAL PROVISIONS - Scope			
Procedures to be adapted to the provisions of the Directive	None	None	3(1)
Non discrimination rule	Not express	Not express	3(2)
Application to Annex IA services	N.A.	N.A.	8
Application to Annex IB services	N.A.	N.A.	9
Mixed Annex IA and IB services	N.A.	N.A.	10
Mixed services/supplies rule	N.A.	N.A.	2
Subsidised contracts	2	None	3(3)
Exclusion of certain defence contracts	N.A.	3	4(1)
Exclusion on grounds of secrecy/special security	4(b)	2(1)(b)	4(2)
Exclusion for alternative international procedures	5	4	5
Exclusion of contracts with a contracting authority on the basis of an exclusive right	N.A.	2(2)	6
GENERAL PROVISIONS - Thresholds			
Basic threshold	6(1)	5(1)(a)(i)	7(1)
GATT threshold	N.A.	5(1)(a)(ii)	N.A.
Total remuneration rule	Not express	Not express	7(2)
Value of supplies provided for works or services	6(5)	N.A.	None
Time of valuation	Not express	5(1)(b)	Not express

Prohibition on choice of valuation method to avoid application of Directive	N.A.	5(3)(2)	7(3)
Prohibition on splitting contract with intention to avoid application of the Directive	6(4)	5(6)	7(3)
Valuation of certain nominate service contracts	N.A.	N.A.	7(4)(1)
Division of the contract into lots	6(3)	5(4) contra	7(4)(2)
48 month rule where no total price	None	5(2)	7(5)
12 month rule where regular or renewable contracts	None	5(3)	7(6)
Options	None	5(5)	7(7)
Revision of thresholds	6(2)	5(1)(c) and (d)	7(8)
GENERAL PROVISIONS - Choice of procedure			
Procedures to be applied	7(1)	6(1)	11(1)
Negotiated procedure with contract notice	7(2)	6(2)	11(2)
Irregular tenders	7(2)(a)	6(2)	11(2)(a)
R and D	7(2)(b)	See below	None
Overall pricing not possible	7(2)(c)	N.A.	11(2)(b)
Precision not possible in contract specifications	None	N.A.	11(2)(c)
Negotiated procedure without contract notice	7(3)	6(3)	11(3)
Absence of tenders	7(3)(a)	6(3)(a)	11(3)(a)
R and D	See above	6(3)(b)	None
Technical and artistic reasons	7(3)(b)	6(3)(c)	11(3)(b)
Prior design contest	None	N.A.	11(3)(c)
Extreme urgency	7(3)(c)	6(3)(d)	11(3)(d)
Additional works/supplies/services	7(3)(d)	6(3)(e)	11(3)(e)
Repetition of works/supplies/services	7(3)(e)	None	11(3)(f)
Open or restricted procedure in all other cases	7(4)	6(4)	11(4)
GENERAL PROVISIONS - Information/Reporting			
Information for eliminated candidates or rejected tenderers	8(1)	7(1)	12(1)
Reasons for not awarding the contract/recommencing the procedure	8(2)	7(2)	12(2)
Written report of the contract procedure	8(3)	7(3)	12(3)
COMMON RULES IN THE TECHNICAL FIELD			
Technical specifications to be given in the contract documents	10(1)	8(1)	14(1)
Basic rule - European standards/European technical approvals/common technical specifications	10(2)	8(2)	14(2)
No provisions for establishing conformity	10(3)(a)	8(3)(a)	14(3)(a)
Prejudice directives on telecommunications	N.A.	8(3)(b)	14(3)(b)
Incompatible products/disproportionate cost	10(3)(b)	8(3)(c)	14(3)(c)

Genuinely innovative project	10(3)(c)	8(3)(d)	14(3)(d)
Reasons for departures to be stated in OJ	10(4)	8(4)	14(4)
Absence of European standards etc	10(5)	8(5)	14(5)
As a general rule, no mention of specific products	10(6)	8(6)	14(6)
COMMON ADVERTISING RULES - Notices			
Annual indicative notice	11(1)	9(1)	15(1)
Contract notice	11(2)	9(2)	15(2)
Contract award notice	11(5)	9(3)	16(1)
Publication of service contract/design contract notices	N.A.	N.A.	16(2)
Notices for Annex IB service contracts	N.A.	N.A.	16(3)
Protection of public interest and legitimate commercial interests	11(5)	9(3)	16(5)
Notices to be drawn up in accordance with models	11(6)	9(4)	17(1)
Notices to be sent to OJ	11(7)	9(5)	17(2)
Publication of annual indicative and post award notices in OJ and TED data bank	11(8)	9(6)	17(3)
Publication of contract notices in OJ and TED data bank	11(9)	9(7)	17(4)
Delay for publication by OJ	11(10)	9(8)	17(5)
Notices not to be published in national press before date of dispatch to OJ	11(11)	9(9)	17(6)
Proof of dispatch	11(12)	9(10)	17(7)
Length of notices and cost of publication	11(13)	9(11)	17(8)
COMMON ADVERTISING RULES - Open procedures			
Time limits - open procedures	12(1)	10(1)	18(1)
Reduction of time limits when a relevant annual indicative notice published	12(2)		18(2)
Latest date for supply of supporting documents if requested in good time	12(3)	10(2)	18(3)
Latest date for supply of additional information if requested in good time	12(4)	10(3)	18(4)
Bulky documents and on the spot investigations	12(5)	10(4)	18(5)
COMMON ADVERTISING RULES - Restricted and negotiated procedures			
Time limits for requests to participate in restricted and negotiated procedures	13(1)	11(1)	19(1)
Invitations to tender in restricted and negotiated procedures	13(2)	11(2)	19(2)
Time limit for receipt of tenders in restricted procedures	13(3)	11(3)	19(3)
Reduction of time limit for tenders when a relevant annual indicative notice published	13(4)		19(4)
Requests to participate may be made by letter, telegram, telex, fax or telephone	13(5)	11(4)	19(5)

Latest date for supply of additional information if requested in good time	13(6)	11(5)	19(6)
Time limit to be adjusted for on site inspections	13(7)	11(6)	19(7)
COMMON ADVERTISING RULES - Accelerated procedures			
Accelerated restricted and negotiated procedures - reduction in time limits	14(1)	12(1)	20(1)
Additional information	14(2)	12(2)	20(2)
Requests to participate and invitations to tender	14(3)	12(3)	20(3)
COMMON ADVERTISING RULES - Miscellaneous			
Optional publication in the OJ	17	13	21
Procedure for modification of drawing up, transmission, etc of notices	35(2)	14	22
COMMON RULES ON PARTICIPATION			
Contracts to be awarded on basis of criteria	18	15(1)	23
When variants may be taken into account	19(1) and (2)	16(1)(1)	24(1)(1)
Variant may not be refused on grounds of specifications	19(3)	16(1)(2)	24(2)(2)
Variant may not be rejected if it would lead to a services/supply contract	N.A.	16(2)	24(3)
Sub-contracting to be indicated by tenderer	20	17	25
Tenders by groups	21	18	26(1)
Legal personality not a ground for rejection	None	None	26(2)
Indication of relevant professional qualifications of responsible staff	None	None	26(3)
Selection of invitees in restricted and negotiated procedures	22(1)	19(1)	27(1)
Range of candidates in restricted procedures	22(2)	19(2)	27(2)
Minimum number in negotiated procedures	22(3)	19(3)	27(3)
Invitations without discrimination	22(4)	19(4)	27(4)
Information about worker protection provisions	23(1)	N.A.	28(1)
Worker protection provisions to be taken in to account	23(2)	N.A.	28(2)
CRITERIA FOR QUALITATIVE SELECTION			
Honorability	24	20	29
Authorisation/membership in home state for the purposes of providing the services	N.A.	N.A.	30(1)
Request to prove enrolment in professional register	25	21(1)	30(2)
The relevant professional registers	25	21(2)	30(3)
Proof of financial and economic standing	26(1)	22(1)	31(1)
Specify in invitation to tender	26(2)	22(2)	31(2)
Alternative means of proof	26(3)	22(3)	31(3)
Ability of service providers	None	None	32(1)

Evidence of technical capability	27(1)	23(1)	32(2)
Specify in notice or in invitation to tender	27(2)	23(2)	32(3)
Protection of technical or trade secrets	None	23(3)	32(4)
EN 29000/EN45000	None	None	33
Supplementary information	28	24	34
Official lists	29(1)	25(1)	35(1)
Certification of registration in official list	29(2)	25(2)	35(2)
Effect of certificate	29(3)	25(3)	35(3)
No additional proof to be required	29(4)	25(4)	35(4)
Address of body for registration in official list	29(5)	25(5)	35(5)
CRITERIA FOR AWARD OF CONTRACTS			
Economically most advantageous tender/lowest price	30(1)	26(1)	36(1)
Economically most advantageous criterion to be stated in contract documents	30(2)	26(2)	36(2)
Exception for preferential rules	30(3)	None	None
Abnormally low tenders	30(4)	27	37
FINAL PROVISIONS			
Calculation of time limits	33	30	38
SPECIAL PROVISIONS IN CERTAIN SECTORS			
MFN treatment for other Member States	None	28	None
Special provisions for housing schemes	9	N.A.	None
CONCESSION CONTRACTS			
General provisions	3	N.A.	None
Concession contract notice	11(3)	N.A.	None
Concessionaires contract notice	11(4)	N.A.	None
Time limit for receipt of candidatures	15	N.A.	None
Time limit for requests to participate in works contracts placed by concessionaires	16	N.A.	None
DESIGN CONTESTS			
Scope of application	None	None	13(1) and (2)
Communication of rules	None	None	13(3)
Admission of participants	None	None	13(4) and (5)
Jury	None	None	13(6)
Publication of notice of intention to hold	None	None	15(3)
Publication of results	None	None	16(1)
Form and manner of publication	None	None	17

N.A. = Not applicable

APPENDIX II

**CPA CLASSIFICATION OF SERVICES LISTED
IN ANNEXES IA AND IB TO DIRECTIVE 92/50/EEC**

Details of Services included in Annex 1A

CPA Reference No	Subject	CPC Reference No
	1. Maintenance and Repair Services	
17.40.90	Repair services of tarpaulins and camping equipment	88690.1
17.52.90	Repair services of nets and ropework	88690.2
28.21.90	Repair and maintenance services of tanks, reservoirs and containers of metal	88610.1
28.22.90	Repair and maintenance services of central heating boilers	88610.2
28.30.91	Installation services of steam generators, except central heating hot water boilers, including related pipe system	88610.3
28.30.92	Repair and maintenance services of steam generators, except central heating hot water boilers	88610.4
29.11.91	Installation services of engines and turbines, except aircraft, vehicle and cycle engines	88620.1
29.11.92	Repair and maintenance services of engines and turbines, except aircraft, vehicle and cycle engines	88620.2
29.12.91	Installation services of pumps and compressors	88620.3
29.12.92	Repair and maintenance services of pumps and compressors	88620.4
29.13.90	Repair and maintenance services of taps and valves	88620.5
29.21.91	Installation services of furnaces and furnace burners	88620.6
29.22.91	Installation services of lifting and handling equipment, except of lifts and escalators	88620.8
29.21.92	Repair and maintenance services of furnaces and furnace burners	88620.7
29.22.92	Repair and maintenance services of lifting and handling equipment	88620.9a
29.23.91	Installation services of non-domestic cooling and ventilation equipment	88620.9b
29.23.92	Repair and maintenance services of non-domestic cooling and ventilation equipment	88620.9c
29.24.91	Installation services of other general purpose machinery n.e.c.	88620.9d
29.24.92	Repair and maintenance services of other general purpose machinery n.e.c.	88620.9e
29.32.91	Installation services of agricultural and forestry machinery	88620.9f
29.32.92	Repair and maintenance services of agricultural and forestry machinery	88620.9g
29.40.91	Installation services of machine-tools	88620.9h

29.40.92	Repair and maintenance services of machine-tools	88620.9i
29.51.91	Installation services of machinery for metallurgy	88620.9j
29.51.92	Repair and maintenance services of machinery for metallurgy	88620.9k
29.52.91	Installation services of machinery for mining, quarrying and construction	88620.9l
29.52.92	Repair and maintenance services of machinery for mining, quarrying and construction	88620.9m
29.53.91	Installation services of machinery for food, beverage and tobacco processing	88620.9n
29.53.92	Repair and maintenance services of machinery for food, beverage and tobacco processing	88620.9o
29.54.91	Installation services of machinery for textile, apparel and leather production	88620.9p
29.54.92	Repair and maintenance services of machinery for textile, apparel and leather production	88620.9q
29.55.91	Installation services of machinery for paper and paperboard production	88620.9r
29.55.92	Repair and maintenance services of machinery for paper and paperboard production	88620.9s
29.56.91	Installation services of other special purpose machinery n.e.c.	88620.9t
29.56.92	Repair and maintenance services of other special purpose machinery n.e.c.	88620.9u
29.60.91	Installation services of weapons and weapons systems	88620.9v
29.60.92	Repair and maintenance services of weapons and weapons systems	88620.9w
30.01.90	Installation services of office machinery	88630.1
30.02.90	Installation services of computers and other information processing equipment	88630.2
31.10.91	Installation services of electric motors, generators and transformers	88640.1
31.10.92	Repair, maintenance and rewinding services of electric motors, generators and transformers	88640.2
31.20.91	Installation services of electricity distribution and control apparatus	88640.3
31.20.92	Repair and maintenance services of electricity distribution and control apparatus	88640.4
31.62.91	Installation services of other electrical equipment n.e.c., except electrical signalling equipment for motorways, roads and airports	88640.5
31.62.92	Repair and maintenance services of other electrical equipment n.e.c.	88640.6
32.20.91	Installation services of television and radio transmitters	88650.1

32.20.92	Repair and maintenance services of television and radio transmitters	88650.2
32.30.91	Installation services of professional radio, television, sound and video equipment	88650.3
32.30.92	Repair and maintenance services of professional radio, television, sound and video equipment	88650.4
33.10.91	Installation services of medical and surgical equipment and apparatus	88660.1
33.10.92	Repair and maintenance services of medical and surgical equipment and apparatus	88660.2
33.20.91	Installation services of instruments and apparatus for measuring, checking, testing, navigating and other purposes	88660.3
33.20.92	Repair and maintenance services of instruments and apparatus for measuring, checking, testing, navigating	88660.4
33.40.90	Repair and maintenance services of professional photographic, cinematographic and optical instruments	88660.5
33.50.91	Installation services of industrial time measure instruments and apparatus	88660.6
33.50.92	Repair and maintenance services of industrial time measure instruments and apparatus	88660.7
35.11.91	Repair and maintenance services of ships and floating platforms and structures	88680.1
35.11.92	Reconditioning of ships	88680.2
35.11.93	Demolition of ships	88680.3
35.12.90	Repair and maintenance services of pleasure and sporting boats	88680.4
35.20.91	Repair and maintenance services of railway and tramway locomotives and rolling stock	88680.5
35.20.92	Reconditioning of railway and tramway locomotives and rolling stock	88680.6
35.30.91	Repair and maintenance services of aircraft and aircraft engines	88680.7
35.30.92	Reconditioning of aircraft	88680.8
36.30.90	Repair and maintenance services of musical instruments	88690.3
50.2	Maintenance and repair services of motor vehicles	611d 611e 611f
50.40.40	Maintenance and repair services of motorcycles	61220
52.7	Repair services of personal and household goods	633a 633b 633c 633d

	2. Land transportation services,⁽¹⁾ including armoured car services and courier services, except transport of mail	
60.21.2	Urban and suburban regular passenger transportation, other than by railways	712a
60.21.3	Inter-urban passenger transportation, other than by railways	712b
60.21.4	Other scheduled passenger land transportation	712c
60.22	Taxi services and rental services of passenger cars with operator	712d
60.23	Other land passenger transportation services	712e
60.24.1	Freight transportation services by road, specialized vehicles	712f
60.24.22	Transportation of other freight	71239.3
60.24.3	Rental services of commercial freight vehicles with operator	712h
64.12	Courier services other than national post services	751b
74.60.14	Armoured car services	87304
	3. Air transport services of passengers and freight, except transport of mail	
62.10.10	Scheduled passenger transportation services by air	73110
62.10.22	Transportation of containerized freight, scheduled	73220.1
62.10.23	Transportation of other freight by air, scheduled	73290.1
62.20.10	Non-scheduled passenger transportation services by air	73120
62.20.20(part)	Non-scheduled freight transportation services by air	73210.1 73290.2
62.20.30	Rental services of aircrafts with crew	73400
62.30.10	Space transportation services	73300
	4. Transport of mail by land and air	
60.24.21	Mail transportation	71235
62.10.21	Mail transportation by air, scheduled	73210.1
62.20.20(part)	Non-scheduled freight transportation services by air	73210.1 73290.2
	5. Telecommunications services⁽²⁾	
64.20.1	Data and message transmitting services	752a
64.20.2	Other telecommunications services	752b

	6. Financial services: (a) insurance services (b) banking and investment services⁽³⁾	
66	Insurance and pension funding services, except compulsory social security services	812a 812b 812c
67.2	Services auxiliary to insurance and pension funding	814
65	Financial intermediation services, except insurance and pension funding services	811a 811d 811b 811e 811c
67.1	Services auxiliary to financial intermediation, except to insurance and pension funding	813a 813b 813c
	7. Computer and related services	
72.10.10	Hardware consultancy services	84100
72.20.2	Programming services of packaged software products	841b
72.20.3	Software consultancy and other supply services	842a
72.3	Data processing services	842b 843
72.4	Database services	844
72.5	Maintenance and repair services of office, accounting and computing machinery	845
72.6	Other computer-related services	849
	8. R&D services⁽⁴⁾	
73	Research and development services	851 852
	9. Accounting, auditing and book-keeping services	
74.12.1	Accounting and auditing services	862a
74.12.2	Book-keeping services, except tax returns	862b
	10. Market research and public opinion polling services	
74.13	Market research and public opinion polling services	864

	11. Management consultant services⁽⁵⁾ and related services	
74.14	Business and management consultancy services	865, 866a
74.15	Management holdings services	866b
	12. Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services	
74.20.2	Architectural services	867a
74.20.3	Engineering services	867b
74.20.4	Integrated engineering services for turnkey projects	867c
74.20.5	Urban planning and landscape architectural services	867d
74.20.6	Project management services related to construction and civil engineering works	--
74.20.7	Engineering-related scientific and technical consulting services	867e
74.3	Technical testing and analysis services	867f
	13. Advertising Services	
74.4	Advertising services	871
	14. Building-cleaning services and property management services	
70.3	Real estate agency services on a fee or contract basis	822a 822b
74.7	Industrial cleaning services	874
	15. Publishing and printing services on a fee or contract basis	
22.21	Newspaper printing services	884h
22.22.3	Printing services, other than printing of newspaper	884i
22.23	Bookbinding and finishing services	884j
22.24.1	Composition and plate-making services	884k
22.25	Other services related to printing	884l

22.3	Reproduction services of recorded media	884m 884n 884o
	16. Sewage and refuse disposal services; sanitation and similar services	
90	Sewage and Refuse disposal services, sanitation and similar services	940a 940b 940c

- (1) Except for rail transport services covered by Category 18.
- (2) Except voice telephony, telex, radiotelephony, paging and satellite services.
- (3) Except contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services.
- (4) Except research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.
- (5) Except arbitration and conciliation services.

Details of services included in Annex 1B

	17. Hotel and restaurant services	
55	Hotel and restaurant services	64
	18. Rail transport services	
60.1	Railway transportation services	711a 711b 711c
60.21.1	Urban and suburban passenger railway transportation	711d
	19. Water transport services	
61	Water transport services	72
	20. Supporting and auxiliary transport services	
63	Supporting and auxiliary transport services; travel agency services	74
	21. Legal Services	
74.11	Legal services	861
	22. Personnel placement and supply services	
74.5	Labour recruitment and provision of personnel services	872

	23. Investigation and security services except armoured car services	
74.60.11	Investigation services	87301
74.60.12	Security consultation services	87302
74.60.13	Alarm monitoring services	87303
74.60.15	Guard services	87305
74.60.16	Other security services	87309
	24. Education and vocational education services	
80	Education services	92
	25. Health and social services	
85	Health and social work services	93
	26. Recreational, cultural and sporting services	
92.11.3	Motion picture and video tape production and related services	961a
92.12	Motion picture or video tape distribution services	961b
92.13	Motion picture projection services	961c
92.2	Radio and television services	961d
92.31.2	Artistic and literary creation and interpretation services	961e
92.32.1	Arts facilities operation services	961f
92.33.1	Fair and amusement park services	961g
92.34	Other entertainment services	961h
92.4	News agency services	962
92.5	Library, archives, museums and other cultural services	963a 963b 963c
92.6	Sporting services	964a 964b
92.7	Other recreational services	964c 964d
	27. Other services	

APPENDIX III

**LIST OF BODIES GOVERNED BY PUBLIC LAW AS SET OUT
IN ANNEX I TO DIRECTIVE 93/37/EEC**

**LISTS OF BODIES AND CATEGORIES OF BODIES GOVERNED
BY PUBLIC LAW REFERRED TO IN ARTICLE 1 (b)**

I. BELGIUM

Bodies

- Archives générales du Royaume et Archives de l'État dans les Provinces - Algemeen Rijksarchief en Rijksarchief in de Provinciën,
- Conseil autonome de l'enseignement communautaire - Autonome Raad van het Gemeenschapsonderwijs,
- Radio et télévision belges, émissions néerlandaises - Belgische Radio en Televisie, Nederlandse uitzendingen,
- Belgisches Rundfunk- und Fernsehzentrum der Deutschsprachigen Gemeinschaft (Centre de radio et télévision belge de la Communauté de langue allemande - Centrum voor Belgische Radio en Televisie voor de Duitstalige Gemeenschap),
- Bibliothèque royale Albert Ier - Koninklijke Bibliotheek Albert I,
- Caisse auxiliaire de paiement des allocations de chômage - Hulpkas voor Werkloosheidsuitkeringen,
- Caisse auxiliaire d'assurance maladie-invalidité - Hulpkas voor Ziekte- en Invaliditeitsverzekeringen,
- Caisse nationale des pensions de retraite et de survie - Rijkskas voor Rust- en Overlevingspensioenen,
- Caisse de secours et de prévoyance en faveur des marins naviguant sous pavillon belge - Hulp- en Voorzorgskas voor Zeevarenden onder Belgische Vlag,
- Caisse nationale des calamités - Nationale Kas voor de Rampenschade,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie diamantaire - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders der Diamantnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs de l'industrie du bois - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders in de Houtnijverheid,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de batellerie - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van Arbeiders der Ondernemingen voor Binnenscheepvaart,
- Caisse spéciale de compensation pour allocations familiales en faveur des travailleurs occupés dans les entreprises de chargement, déchargement et manutention de marchandises dans les ports débarcadères, entrepôts et stations (appelée habituellement «Caisse spéciale de compensation pour allocations familiales des régions maritimes») - Bijzondere Verrekenkas voor Gezinsvergoedingen ten bate van de Arbeiders gebezigd door Ladings- en Lossingsondernemingen en door de Stuwadoors in de Havens, Losplaatsen, Stapelplaatsen en Stations (gewoonlijk genoemd: "Bijzondere Compensatiekas voor kindertoelagen van de zeevaartgewesten"),
- Centre informatique pour la Région bruxelloise - Centrum voor Informatica voor het Brusselse Gewest,
- Commissariat général de la Communauté flamande pour la coopération internationale - Commissariaat-generaal voor Internationale Samenwerking van de Vlaamse Gemeenschap,
- Commissariat général pour les relations internationales de la Communauté française de Belgique - Commissariaat-generaal bij de Internationale Betrekkingen van de Franse Gemeenschap van België,
- Conseil central de l'économie - Centrale Raad voor het Bedrijfsleven,
- Conseil économique et social de la Région wallonne - Sociaal-economische Raad van het Waals Gewest,
- Conseil national du travail - Nationale Arbeidsraad,
- Conseil supérieur des classes moyennes - Hoge Raad voor de Middenstand,
- Office pour les travaux d'infrastructure de l'enseignement subsidié - Dienst voor Infrastructuurwerken van het Gesubsidieerd Onderwijs,
- Fondation royale - Koninklijke Schenking,
- Fonds communautaire de garantie des bâtiments scolaires - Gemeenschappelijk Waarborgfonds voor Schoolgebouwen,
- Fonds d'aide médicale urgente - Fonds voor Dringende Geneeskundige Hulp,
- Fonds des accidents du travail - Fonds voor Arbeidsongevallen,
- Fonds des maladies professionnelles - Fonds voor Beroepsziekten,
- Fonds des routes - Wegenfonds,
- Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises - Fonds tot Vergoeding van de in geval van Sluiting van Ondernemingen Ontslagen Werknemers,

- Fonds national de garantie pour la réparation des dégâts houillers - Nationaal Waarborgfonds inzake Kolenmijnschade,
- Fonds national de retraite des ouvriers mineurs - Nationaal Pensioenfonds voor Mijnwerkers,
- Fonds pour le financement des prêts à des États étrangers - Fonds voor Financiering van de Leningen aan Vreemde Staten,
- Fonds pour la rémunération des mousses enrôlés à bord des bâtiments de pêche - Fonds voor Scheepsjongens aan Boord van Vissersvaartuigen,
- Fonds wallon d'avances pour la réparation des dommages provoqués par des pompages et des prises d'eau souterraine - Waals Fonds van Voorschotten voor het Herstel van de Schade veroorzaakt door Grondwaterzuiveringen en Afpompingen,
- Institut d'aéronomie spatiale - Instituut voor Ruimte-aëronomie,
- Institut belge de normalisation - Belgisch Instituut voor Normalisatie,
- Institut bruxellois de l'environnement - Brussels Instituut voor Milieubeheer,
- Institut d'expertise vétérinaire - Instituut voor Veterinaire Keuring,
- Institut économique et social des classes moyennes - Economisch en Sociaal Instituut voor de Middenstand,
- Institut d'hygiène et d'épidémiologie - Instituut voor Hygiëne en Epidemiologie,
- Institut francophone pour la formation permanente des classes moyennes - Franstalig Instituut voor Permanente Vorming voor de Middenstand,
- Institut géographique national - Nationaal Geografisch Instituut,
- Institut géotechnique de l'État - Rijksinstituut voor Grondmechanica,
- Institut national d'assurance maladie-invalidité - Rijksinstituut voor Ziekte- en Invaliditeitsverzekering,
- Institut national d'assurances sociales pour travailleurs indépendants - Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen,
- Institut national des industries extractives - Nationaal Instituut voor de Extractiebedrijven,
- Institut national des invalides de guerre, anciens combattants et victimes de guerre - Nationaal Instituut voor Oorlogsinvaliden, Oudstrijders en Oorlogsslachtoffers,
- Institut pour l'amélioration des conditions de travail - Instituut voor Verbetering van de Arbeidsvoorwaarden,
- Institut pour l'encouragement de la recherche scientifique dans l'industrie et l'agriculture - Instituut tot Aanmoediging van het Wetenschappelijk Onderzoek in Nijverheid en Landbouw,
- Institut royal belge des sciences naturelles - Koninklijk Belgisch Instituut voor Natuurwetenschappen,
- Institut royal belge du patrimoine artistique - Koninklijk Belgisch Instituut voor het Kunstpatrimonium,
- Institut royal de météorologie - Koninklijk Meteorologisch Instituut,
- Enfance et famille - Kind en Gezin,
- Compagnie des installations maritimes de Bruges - Maatschappij der Brugse Zeevaartinrichtingen,
- Mémorial national du fort de Breendonck - Nationaal Gedenkteken van het Fort van Breendonck,
- Musée royal de l'Afrique centrale - Koninklijk Museum voor Midden-Afrika,
- Musées royaux d'art et d'histoire - Koninklijke Musea voor Kunst en Geschiedenis,
- Musées royaux des beaux-arts de Belgique - Koninklijke Musea voor Schone Kunsten van België,
- Observatoire royal de Belgique - Koninklijke Sterrenwacht van België,
- Office belge de l'économie et de l'agriculture - Belgische Dienst voor Bedrijfsleven en Landbouw,
- Office belge du commerce extérieur - Belgische Dienst voor Buitenlandse Handel,
- Office central d'action sociale et culturelle au profit des membres de la communauté militaire - Centrale Dienst voor Sociale en Culturele Actie ten behoeve van de Leden van de Militaire Gemeenschap,
- Office de la naissance et de l'enfance - Dienst voor Borelingen en Kinderen,
- Office de la navigation - Dienst voor de Scheepvaart,
- Office de promotion du tourisme de la Communauté française - Dienst voor de Promotie van het Toerisme van de Franse Gemeenschap,
- Office de renseignements et d'aide aux familles des militaires - Hulp- en Informatiebureau voor Gezinnen van Militairen,
- Office de sécurité sociale d'outre-mer - Dienst voor Overzeese Sociale Zekerheid,

- Office national d'allocations familiales pour travailleurs salariés - Rijksdienst voor Kinderbijslag voor Werknemers,
- Office national de l'emploi - Rijksdienst voor de Arbeidsvoorziening,
- Office national des débouchés agricoles et horticoles - Nationale Dienst voor Afzet van Land- en Tuinbouwprodukten,
- Office national de sécurité sociale - Rijksdienst voor Sociale Zekerheid,
- Office national de sécurité sociale des administrations provinciales et locales - Rijksdienst voor Sociale Zekerheid van de Provinciale en Plaatselijke Overheidsdiensten,
- Office national des pensions - Rijksdienst voor Pensioenen,
- Office national des vacances annuelles - Rijksdienst voor de Jaarlijkse Vakantie,
- Office national du lait - Nationale Zuiveldienst,
- Office régional bruxellois de l'emploi - Brusselse Gewestelijke Dienst voor Arbeidsbemiddeling,
- Office régional et communautaire de l'emploi et de la formation - Gewestelijke en Gemeenschappelijke Dienst voor Arbeidsvoorziening en Vorming,
- Office régulateur de la navigation intérieure - Dienst voor Regeling der Binnenvaart,
- Société publique des déchets pour la Région flamande - Openbare Afvalstoffenmaatschappij voor het Vlaams Gewest,
- Orchestre national de Belgique - Nationaal Orkest van België,
- Organisme national des déchets radioactifs et des matières fissiles - Nationale Instelling voor Radioactief Afval en Spleijstoffen,
- Palais des beaux-arts - Paleis voor Schone Kunsten,
- Pool des marins de la marine marchande - Pool van de Zeelieden ter Koopvaardij,
- Port autonome de Charleroi - Autonome Haven van Charleroi,
- Port autonome de Liège - Autonome Haven van Luik,
- Port autonome de Namur - Autonome Haven van Namen,
- Radio et télévision belges de la Communauté française - Belgische Radio en Televisie van de Franse Gemeenschap,
- Régie des bâtiments - Regie der Gebouwen,
- Régie des voies aériennes - Regie der Luchtwegen,
- Régie des postes - Regie der Posterijen,
- Régie des télégraphes et des téléphones - Regie van Telegraaf en Telefoon,
- Conseil économique et social pour la Flandre - Sociaal-economische Raad voor Vlaanderen,
- Société anonyme du canal et des installations maritimes de Bruxelles - Naamloze Vennootschap "Zeekanaal en Haveninrichtingen van Brussel",
- Société du logement de la Région bruxelloise et sociétés agréées - Brusselse Gewestelijke Huisvestingsmaatschappij en erkende maatschappijen,
- Société nationale terrienne - Nationale Landmaatschappij,
- Théâtre royal de la Monnaie - De Koninklijke Muntchouwburg,
- Universités relevant de la Communauté flamande - Universiteiten ahangende van de Vlaamse Gemeenschap,
- universités relevant de la Communauté française - Universiteiten ahangende van de Franse Gemeenschap,
- Office flamand de l'emploi et de la formation professionnelle - Vlaamse Dienst voor Arbeidsvoorziening en Beroepsopleiding,
- Fonds flamand de construction d'institutions hospitalières et médico-sociales - Vlaams Fonds voor de Bouw van Ziekenhuizen en Medisch-Sociale Instellingen,
- Société flamande du logement et sociétés agréées - Vlaamse Huisvestingsmaatschappij en erkende maatschappijen,
- Société régionale wallonne du logement et sociétés agréées - Waalse Gewestelijke Maatschappij voor de Huisvesting en erkende maatschappijen,
- Société flamande d'épuration des eaux - Vlaamse Maatschappij voor Waterzuivering,
- Fonds flamand du logement des familles nombreuses - Vlaams Woningfonds van de Grote Gezinnen.

Categories

- les centres publics d'aide sociale,

- les fabriques d'église (church councils).

II. DENMARK

Bodies

- Københavns Havn,
- Danmarks Radio,
- TV 2/Danmark,
- TV2 Reklame A/S,
- Danmarks Nationalbank,
- A/S Storebaeltsforbindelsen,
- A/S Øresundsforbindelsen (alene tilslutningsanlaeg i Danmark),
- Københavns Lufthavn A/S,
- Byfornyelsesselskabet København,
- Tele Danmark A/S avec ses filiales,
- Fyns Telefon A/S,
- Jydsk Telefon Aktieselskab A/S,
- Københavns Telefon Aktieselskab,
- Tele Sønderjylland A/S,
- Telecom A/S,
- Tele Danmark Mobil A/S.

Categories

- De kommunale havne (municipal ports),
- Andre Forvaltningssubjekter (other public administrative bodies).

III. GERMANY

1. Legal persons governed by public law

Authorities, establishments and foundations governed by public law and created by federal, State or local authorities in particular in the following sectors:

1.1. Authorities

- Wissenschaftliche Hochschulen und verfasste Studentenschaften (universities and established student bodies),
- berufsstaendige Vereinigungen (Rechtsanwalts-, Notar-, Steuerberater-, Wirtschaftspruefer-, Architekten-, AErzte- und Apothekerkammern) (professional associations representing lawyers, notaries, tax consultants, accountants, architects, medical practitioners and pharmacists),
- Wirtschaftsvereinigungen (Landwirtschafts-, Handwerks-, Industrie- und Handelskammern, Handwerksinnungen, Handwerkerschaften) (business and trade associations: agricultural and craft associations, chambers of industry and commerce, craftsmen's guilds, tradesmen's associations),
- Sozialversicherungen (Krankenkassen, Unfall- und Rentenversicherungstraeger) (social security institutions: health, accident and pension insurance funds),
- kassenaerztliche Vereinigungen (associations of panel doctors),
- Genossenschaften und Verbaende (cooperatives and other associations).

1.2. Establishments and foundations

Non-industrial and non-commercial establishments subject to state control and operating in the general interest, particularly in the following fields:

- Rechtsfaehige Bundesanstalten (federal institutions having legal capacity),
- Versorgungsanstalten und Studentenwerke (pension organizations and students' unions),

- Kultur-, Wohlfahrts- und Hilfsstiftungen (cultural, welfare and relief foundations).

2. Legal persons governed by private law

Non-industrial and non-commercial establishments subject to State control and operating in the general interest (including 'kommunale Versorgungsunternehmen' - municipal utilities), particularly in the following fields:

- Gesundheitswesen (Krankenhaeuser, Kurmittelbetriebe, medizinische Forschungseinrichtungen, Untersuchungs- und Tierkoerperbeseitigungsanstalten) (health: hospitals, health resort establishments, medical research institutes, testing and carcass-disposal establishments),
- Kultur (oeffentliche Buehnen, Orchester, Museen, Bibliotheken, Archive, zoologische und botanische Gaerten) (culture: public theatres, orchestras, museums, libraries, archives, zoological and botanical gardens),
- Soziales (Kindergaerten, Kindertagesheime, Erholungseinrichtungen, Kinder- und Jugendheime, Freizeiteinrichtungen, Gemeinschafts- und Buergerhaeuser, Frauenhaeuser, Altersheime, Obdachlosenunterkuenfte) (social welfare: nursery schools, children's playschools, rest-homes, children's homes, hostels for young people, leisure centres, community and civic centres, homes for battered wives, old people's homes, accommodation for the homeless),
- Sport (Schwimmbaeder, Sportanlagen und -einrichtungen) (sport: swimming baths, sports facilities),
- Sicherheit (Feuerwehren, Rettungsdienste) (safety: fire brigades, other emergency services),
- Bildung (Umschulungs-, Aus-, Fort- und Weiterbildungseinrichtungen, Volkshochschulen) (education: training, further training and retraining establishments, adult evening classes),
- Wissenschaft, Forschung und Entwicklung (Grossforschungseinrichtungen, wissenschaftliche Gesellschaften und Vereine, Wissenschaftsfoerderung) (science, research and development: large-scale research institutes, scientific societies and associations, bodies promoting science),
- Entsorgung (Strassenreinigung, Abfall- und Abwasserbeseitigung) (refuse and garbage disposal services: street cleaning, waste and sewage disposal),
- Bauwesen und Wohnungswirtschaft (Stadtplanung, Stadtentwicklung, Wohnungsunternehmen, Wohnraumvermittlung) (building, civil engineering and housing: town planning, urban development, housing enterprises, housing agency services),
- Wirtschaft (Wirtschaftsfoerderungsgesellschaften) (economy: organizations promoting economic development),
- Friedhofs- und Bestattungswesen (cemeteries and burial services),
- Zusammenarbeit mit den Entwicklungslaendern (Finanzierung, technische Zusammenarbeit, Entwicklungshilfe, Ausbildung) (cooperation with developing countries: financing, technical cooperation, development aid, training).

IV. GREECE

Categories

Other legal persons governed by public law whose public works contracts are subject to State control.

V. SPAIN

Categories

- Entidades Gestoras y Servicios Comunes de la Seguridad Social (administrative entities and common services of the health and social services)
- Organismos Autónomos de la Administración del Estado (independent bodies of the national administration)
- Organismos Autónomos de las Comunidades Autónomas (independent bodies of the autonomous communities)
- Organismos Autónomos de las Entidades Locales (independent bodies of local authorities)
- Otras entidades sometidas a la legislación de contratos del Estado español (other entities subject to Spanish State legislation on procurement).

VI. FRANCE

Bodies

1. National public bodies:

1.1. with scientific, cultural and professional character:

- Collège de France,
- Conservatoire national des arts et métiers,
- Observatoire de Paris.

1.2. Scientific and technological:

- Centre national de la recherche scientifique (CNRS),
- Institut national de la recherche agronomique,
- Institut national de la santé et de la recherche médicale,
- Institut français de recherche scientifique pour le développement en coopération (ORSTOM).

1.3. with administrative character:

- Agence nationale pour l'emploi,
- Caisse nationale des allocations familiales,
- Caisse nationale d'assurance maladie des travailleurs salariés,
- Caisse nationale d'assurance vieillesse des travailleurs salariés,
- Office national des anciens combattants et victimes de la guerre,
- Agences financières de bassins.

Categories

1. National public bodies:

- universités (universities),
- écoles normales d'instituteurs (teacher training colleges).

2. Administrative public bodies at regional, departmental and local level:

- collèges (secondary schools),
- lycées (secondary schools),
- établissements publics hospitaliers (public hospitals),
- offices publics d'habitations à loyer modéré (OPHLM) (public offices for low-cost housing).

3. Groupings of territorial authorities:

- syndicats de communes (associations of local authorities),
- districts (districts),
- communautés urbaines (municipalities),
- institutions interdépartementales et interrégionales (institutions common to more than one Département and interregional institutions).

VII. IRELAND

Bodies

- Shannon Free Airport Development Company Ltd,
- Local Government Computer Services Board,
- Local Government Staff Negotiations Board,

- C  ras Tr  cht  la (Irish Export Board),
- Industrial Development Authority,
- Irish Goods Council (Promotion of Irish Goods),
- C  ras Beostoic agus Feola (CBF) (Irish Meat Board),
- Bord F  ilte   ireann (Irish Tourism Board),
-   dar  s na Gaeltachta (Development Authority for Gaeltacht Regions),
- An Bord Plean  la (Irish Planning Board).

Categories

- Third level Educational Bodies of a Public Character,
- National Training, Cultural or Research Agencies,
- Hospital Boards of a Public Character,
- National Health & Social Agencies of a Public Character,
- Central & Regional Fishery Boards.

VIII. ITALY

Bodies

- Agenzia per la promozione dello sviluppo nel Mezzogiorno.

Categories

- Enti portuali e aeroportuali (port and airport authorities),
- Consorzi per le opere idrauliche (consortia for water engineering works),
- Le universit   statali, gli istituti universitari statali, i consorzi per i lavori interessanti le universit   (State universities, State university institutes, consortia for university development work),
- Gli istituti superiori scientifici e culturali, gli osservatori astronomici, astrofisici, geofisici o vulcanologici (higher scientific and cultural institutes, astronomical, astrophysical, geophysical or vulcanological observatories),
- Enti di ricerca e sperimentazione (organizations conducting research and experimental work),
- Le istituzioni pubbliche di assistenza e di beneficenza (public welfare and benevolent institutions),
- Enti che gestiscono forme obbligatorie di previdenza e di assistenza (agencies administering compulsory social security and welfare schemes),
- Consorzi di bonifica (land reclamation consortia),
- Enti di sviluppo o di irrigazione (development or irrigation agencies),
- Consorzi per le aree industriali (associations for industrial areas),
- Comunit   montane (groupings of municipalities in mountain areas),
- Enti preposti a servizi di pubblico interesse (organizations providing services in the public interest),
- Enti pubblici preposti ad attivit   di spettacolo, sportive, turistiche e del tempo libero (public bodies engaged in entertainment, sport, tourism and leisure activities),
- Enti culturali e di promozione artistica (organizations promoting culture and artistic activities)

IX. LUXEMBOURG

Categories

- Les   tablissements publics de l'  tat plac  s sous la surveillance d'un membre du gouvernement (public establishments of the State placed under the supervision of a member of the Government),
- Les   tablissements publics plac  s sous la surveillance des communes (public establishments placed under the supervision of the communes),

- Les syndicats de communes créés en vertu de la loi du 14 février 1900 telle qu'elle a été modifiée par la suite (associations of communes created under the law of 14 February 1900 as subsequently modified).

X. THE NETHERLANDS

Bodies

- De Nederlandse Centrale Organisatie voor Toegepast Natuurwetenschappelijk Onderzoek (TNO) en de daaronder ressorterende organisaties.

Categories

- De waterschappen (administration of water engineering works),
- De instellingen van wetenschappelijk onderwijs vermeld in artikel 8 van de Wet op het Wetenschappelijk Onderwijs (1985), de academische ziekenhuizen (Institutions for scientific education, as listed in Article 8 of the Scientific Education Act (1985)) wet op het Wetenschappelijk Onderwijs (1985) (teaching hospitals).

XI. PORTUGAL

Categories

- Estabelecimentos públicos de ensino investigação científica e saúde (public establishments for education, scientific research and health), - Institutos públicos sem carácter comercial ou industrial (public institutions without commercial or industrial character),
- Fundações públicas (public foundations),
- Administrações gerais e juntas autónomas (general administration bodies and independent councils).

XII. THE UNITED KINGDOM

Bodies

- Central Blood Laboratories Authority,
- Design Council,
- Health and Safety Executive,
- National Research Development Corporation,
- Public Health Laboratory Services Board,
- Advisory, Conciliation and Arbitration Service,
- Commission for the New Towns,
- Development Board For Rural Wales,
- English Industrial Estates Corporation,
- National Rivers Authority,
- Northern Ireland Housing Executive,
- Scottish Enterprise,
- Scottish Homes,
- Welsh Development Agency.

Categories

- Universities and polytechnics, maintained schools and colleges,
- National Museums and Galleries,
- Research Councils,
- Fire Authorities,
- National Health Service Authorities,
- Police Authorities,
- New Town Development Corporations,
- Urban Development Corporations.

XIII. AUSTRIA

All bodies subject to budgetary supervision by the “Rechnungshof” (audit authority) not having an industrial or commercial character.

XIV. FINLAND

Public or publicly controlled entities or undertakings not having an industrial or commercial character.

XV. SWEDEN

All non-commercial bodies whose procurement is subject to supervision by the National Board for Public Procurement.

APPENDIX IV

**REGULATION NO 1182/71 DETERMINING THE RULES
APPLICABLE TO PERIODS, DATES AND TIME LIMITS**

**REGULATION (EEC , EURATOM) N 1182/71 OF THE COUNCIL
OF 3 JUNE 1971
determining the rules applicable to periods , dates and time limits**

THE COUNCIL OF THE EUROPEAN COMMUNITIES ,

CHAPTER I

Periods

Having regard to the Treaty establishing the European Economic Community , and in particular Article 235 thereof ;

Having regard to the Treaty establishing the European Atomic Energy Community , and in particular Article 203 thereof ;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament (1);

Whereas numerous acts of the Council and of the Commission determine periods , dates or time limits and employ the terms " working days " or " public holidays " ;

Whereas it is necessary to establish uniform general rules on the subject ;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules ;

Whereas , to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods , dates and time limits ;

Whereas no authority to establish such rules is provided for in the Treaties ;

HAS ADOPTED THIS REGULATION :

Article 1

Save as otherwise provided , this Regulation shall apply to acts of the Council or Commission which have been or will be passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community .

(1) OJ N° C51, 29.4.1970, p.25.

(c) a period expressed in weeks , months or years shall start at the beginning of the first hour of the

Article 2

1. For the purposes of this Regulation , " public holidays " means all days designated as such in the Member State or in the Community institution in which action is to be taken .

To this end , each Member State shall transmit to the Commission the list of days designated as public holidays in its laws . The Commission shall publish in the *Official Journal of the European Communities* the lists transmitted by the Member States , to which shall be added the days designated as public holidays in the Community institutions .

2. For the purposes of this Regulation , " working days " means all days other than public holidays , Sundays and Saturdays .

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place , the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question .

Where a period expressed in days , weeks , months or years is to be calculated from the moment at which an event occurs or an action takes place , the day during which that event occurs or that action takes place shall not be considered as falling within the period in question .

2. Subject to the provisions of paragraphs 1 and 4 :

- (a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period ;
- (b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period ;

provisions of such acts - fixed at a given date shall occur at the beginning of the first hour of the day

first day of the period , and shall end with the expiry of the last hour of whichever day in the last week , month or year is the same day of the week , or falls on the same date , as the day from which the period runs . if , in a period expressed in months or in years , the day on which it should expire does not occur in the last month , the period shall end with the expiry of the last hour of the last day of that month ;

(d) if a period includes parts of months , the month shall , for the purpose of calculating such parts , be considered as having thirty days .

3. The periods concerned shall include public holidays , Sundays and Saturdays , save where these are expressly excepted or where the periods are expressed in working days .

4. Where the last day of a period expressed otherwise than in hours is a public holiday , Sunday or Saturday , the period shall end with the expiry of the last hour of the following working day .

This provision shall not apply to periods calculated retroactively from a given date or event .

5. Any period of two days or more shall include at least two working days.

CHAPTER II

Dates and time limits

Article 4

1. Subject to the provisions of this Article , the provisions of Article 3 shall , with the exception of paragraphs 4 and 5 , apply to the times and periods of entry into force , taking effect , application , expiry of validity , termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts .

2. Entry into force , taking effect or application of acts of the Council or Commission - or of

falling on that date .

This provision shall also apply when entry into force, taking effect or application of the aforementioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place .

3. Expiry of validity , the termination of effect or the cessation of application of acts of the Council or Commission - or of any provisions of such acts - fixed at a given date shall occur on the expiry of the last hour of the day falling on that date .

This provision shall also apply when expiry of validity , termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place .

Article 5

1. Subject to the provisions of this Article , the provisions of Article 3 shall , with the exception of paragraphs 4 and 5 , apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment .

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date , it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date .

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place .

Article 6

This Regulation shall enter into force on 1 July 1971.

This Regulation shall be binding in its entirety and directly applicable in all Member States .

Done at Luxembourg , 3 June 1971 .

For the Council
The President
R . PLEVEN

FOR FURTHER INFORMATION

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