

COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a
COUNCIL DIRECTIVE

amending Directive 90/531/EEC on the procurement procedures
of entities operating in the water, energy, transport and
telecommunications sectors

(presented by the Commission)

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EXPLANATORY MEMORANDUM

I. INTRODUCTION

1. In its communication to the Council on the public procurement in the excluded sectors⁽¹⁾, the Commission analyzed the industrial and economic aspects of procurement by the utilities in the water, energy, transport and telecommunications sectors. It was concluded that considerable gains could be expected from opening up the procurement of the utilities to Community-wide competition and that the benefits brought about by more transparent, non-discriminatory procurement in the four sectors concerned would spread throughout the economy, bringing sizeable budget savings to the utilities, along with better quality and a more efficient structure of the supply side. The opening up of public procurement in those sectors will thereby enhance the competitiveness of Community industry as a whole.

2. The procurement of services by the utilities, which can be estimated to be of the order of ECU 45 billions, is an important part of this picture, accounting for between 15 and 20 % of the utilities' total procurement. The importance of such large scale purchases for the service sectors concerned, which cover the whole range from relatively simple labour intensive services through to highly skilled capital-intensive services, is evident, even if it is somewhat less in value than the procurement of services by the public authorities. (This is the subject of the Commission's proposal for a Public services Directive⁽²⁾).

(1) COM (88) 376, 11.10.1988, published as Supplement 6/88 to the Bulletin of the European Communities.

(2) COM (91) 322, 30.8.1991.

3. The adoption of Directive 90/531 aimed to achieve the benefits of the internal market for the utilities' purchases of supplies and works. The present proposal aims to extend the provisions of that Directive to the utilities' purchases of services. In doing so, it takes account of the particular characteristics of service procurement, as was also the case in the proposal for a Public Services Directive. A correlation table indicating the parallels between the provisions of this proposal, the public services proposal and Directive 90/531/EEC is attached to this explanatory memorandum (Annex I).
4. With this proposal, the Commission has completed its legislative programme on public procurement under the White Paper on Completing the Internal Market⁽¹⁾.

II. SCOPE

5. The aim of this proposal is to extend, wherever possible, the procedural rules laid down in Directive 90/531/EEC to services. The scope is identical to that of Directive 90/531/EEC as regards the contracting entities and activities concerned in the four sectors (Article 2).
6. In line with the ultimate objective, which is to require contracting entities throughout the Community to operate a procurement system that is tailored to their particular characteristics and as consistent as possible, this proposal makes amendments to Directive 90/531/EEC only where:

(1) COM (85) 310 final, 14.6.1985.

(a) the specific nature of services or of design contests so requires;

(b) the existing provisions need to be extended to services and design contests.

7. Certain provisions can be applied to all three types of contract. Where Directive 90/531/EEC does not confine them to supply and works contracts, it has not been deemed necessary here to propose that they be amended. Consequently, once this proposal is adopted, many provisions of Directive 90/531/EEC will apply to services without requiring the slightest amendment.

8. These provisions relate to the following in particular:

- scope (Article 2);
- non-discrimination (Article 4(2) and (4));
- framework agreements (Article 5);
- contracts linked to telecommunications activities carried on under conditions of competition (Article 8);
- contracts declared to be secret (Article 10);
- contracts awarded pursuant to an international agreement (Article 11(2) and (3));
- technical specifications (Article 13);
- procedural obligations (Articles 19 to 22);
- qualification system (Article 24);
- selection criteria (Article 25);
- award criteria (Article 27(2) to (5));
- consultation of the Advisory Committee on Telecommunications Procurement (Article 31(2)(a) to (e));
- statistical reporting (Article 34).

III. DEFINITION OF SERVICE CONTRACTS

Definition of contracts

9. This proposal covers only services which are acquired under a contract for pecuniary interest concluded between two different legal persons.

On the other hand, services provided in house within a contracting entity that constitutes a single legal person are not regarded as service contracts and lie outside the scope of this proposal.

Definition of service contracts

10. Since the aim of the proposal is to supplement the existing rules, service contracts are defined in Article 1 so as to catch purchases made by contracting entities in the sectors concerned which are not covered by Directive 90/531/EEC. This proposal thus extends the coverage of the existing Directive, which, in addition to works contracts, already takes in certain service contracts. The services concerned are firstly those regarded by Directive 90/531/EEC as supplies, i.e.:

- (i) certain software services procured by entities operating in the telecommunications sector;
- (ii) services whose purpose is to make equipment available to the contracting entity (lease, rental or hire-purchase contracts).

The other services already covered by Directive 90/531/EEC are those which are included in a supply or works contract, and in particular:

- (i) siting and installation services for equipment covered by a supply contract;
- (ii) design services covered by a works contract whereby the contractor takes responsibility for both design and execution of the works;
- (iii) services included in a "turnkey" works contract.

11. Where services involving the design of works or siting and installation operations are the subject of a call for competition that is separate from the associated works or supply contract, they are regarded as services falling within the scope of this proposal.

Nevertheless, since this proposal lays down different rules only in so far as the specific nature of the services not covered by the existing rules so requires, classification of a contract in one category or the other will not face contracting entities with difficulties in applying the provisions.

Definition of service categories

12. The potential for cross-border trade in services is not uniform throughout the economy. The approach adopted in this proposal is consequently to distinguish between "priority" and other services.

Priority services are services to which it is desirable to apply immediately rules introducing Community-wide competition in order to reap the benefits of a larger market (greater cross-border trade, economies of scale, etc.); these are listed in Annex XVI A and are subject to rules similar to those laid down in Directive 90/531/EEC. For non-priority services, on the other hand, not enough is known about the transactions involved to conclude with certainty at this stage that Community rules are desirable. These services, which are listed in Annex XVI B, are therefore subject to transparency requirements only.

13. Services are defined here and classified in either Annex XVI A or Annex XVI B in exactly the same way as the public services proposal: their classification as priority or other services has more to do with their inherent characteristics than the status of the contracting entities purchasing them. Services are defined in Annexes XVI A and XVI B by reference to the United Nations' Central Product Classification, which offers the advantage of being an international nomenclature.

Design contests

14. This proposal also covers design contests, the purpose of which is to weigh up competing ideas rather than tenders in the conventional sense. Specific procedural rules are thus laid down

in Article 17a to ensure that such contests are held on a transparent and non-discriminatory basis.

Research and development contracts

15. Only transactions which are intended to provide the contracting entity with a result and are linked to the activities concerned are regarded as R&D service contracts for the purposes of this proposal. On the other hand, the financing of R&D by a contracting entity, e.g. for the benefit of society as a whole, is not regarded as a service contract. This approach is in line with that adopted in the public services proposal.

16. As in the case of R&D contracts which also involve the supply of products or the execution of works already covered by Directive 90/531/EEC, this proposal likewise affords contracting entities the option of not calling for Community-wide competition (Article 15(2)(b)). Nevertheless, the introduction of service contracts increases the scope of that possibility considerably. If particular firms are not to be given an unfair advantage as a result, steps need to be taken to ensure that reliance on this Article does not prejudice competitive tendering for subsequent contracts, and particularly those relating to series production.

Specific provisions are also included for protecting the confidentiality of R&D contracts (see points 25 to 28 below).

Contracts covered

17. The rules of Directive 90/531/EEC apply to supplies and works contracts awarded by covered entities only in the context of activities which are listed in Article 2 of that Directive. Thus contracts awarded by covered entities in the context of other activities are not subject to these rules. In the same way, the present proposal only concerns service contracts awarded by a covered entity in the context of a relevant activity.

IV. PROCEDURAL OBLIGATIONS

18. The procedural rules laid down in Titles IV and V of this proposal in respect of the services listed in Annex XVI A (see point 47 below) are based on those established by Directive 90/531/EEC for works and supply contracts.

In line with the approach described in points 12 and 13 above, services listed in Annex XVI B will be subject to only minimum requirements (Article 12b).

19. The procedural rules applicable to design contests are more specific. They relate to the call for competition (Article 16(4) and Annex XVII), the composition and decisions of the jury (Article 17a), the notice on the results of a design contest (Article 18 and Annex XVIII) and contracts awarded following a design contest (Article 15(2)(1)).

V. SPECIFIC POINTS CONCERNING SERVICES IN THE FOUR SECTORS IN QUESTION

Intra-group transactions (Article 11a)

20. Article 11a provides for the exclusion of certain service contracts awarded to a service provider which is affiliated to the contracting entity, or to a service provider which is affiliated to a contracting entity participating in a joint venture formed for the purpose of carrying on an activity covered by the Directive.

The service contracts excluded are those which are awarded to an affiliate whose essential purpose is to act as a central service provider to the group to which it belongs, rather than to sell its services commercially on the open market. In this way, the Directive seeks to recognize the particular role of certain service activities in establishing the commercial advantage and common character of undertakings. At the same times, it accepts the reality of the group structure under which many entities, both public and private, carry on their activities.

21. The provision relates, in particular, to three types of service provision within groups. These categories are not necessarily distinct:

- the provision of common services such as accounting, recruitment and management;
- the provision of specialized services embodying the know-how of the group;

- the provision of a specialized service to a joint venture.

The provision of such services is often concentrated in an affiliated company within the economic group. This is done for the same reasons which lead economic groups to establish separate affiliates for their different activities. These include limitation of liability, tax efficiency, separate cost control and efficient management in a general sense. However, the process of affiliation does not negate the unique character of the economic group.

Thus the provision of common services to affiliated entities is a matter of organizational convenience which there is no reason to undermine.

Further, the concentration of specialized know-how reflects the commercial and competitive advantage of the group. Particularly (but not exclusively) for private entities, direct access to such services is indispensable.

22. Finally, joint ventures for the carrying-on of a particular operation are frequently established in order that the particular project may benefit from the specialized knowledge of the groups forming the joint venture. To deprive them of this access would be to eliminate the reason for establishing the joint venture in the first place.

The provision of services within the group can differ from the provision of supplies in important respects. It is the availability of services which establishes the character of the group (common management, staffing, accounting) and its competitiveness (know-how to which the group has access and which it does not make available to others except through the activities of the group as a whole). It is in respect of these characteristics that exceptional treatment is justified.

The acquisition, on the other hand, by group affiliates of a service which is freely marketed is no different from the obtaining of supplies from a group affiliate. The obligation to procure either of these in an open, competitive context would not undermine the character and competitive advantage of the group.

23. The provision for exclusion of service contracts is therefore limited in two important respects, in that it is only available to affiliates :

- with which the contracting entity's accounts are consolidated under the provisions of the Seventh Directive on Company Law⁽¹⁾ or, in the case of entities which are not subject to that Directive, to situations where dominant influence, in the sense of competition law, is present; and
- which exist essentially to provide their services to the group and do not market them. In order to allow for some activity with minority affiliates (which would not be covered by the

(1) Council Directive 83/349/EEC, 13.6.1983, OJ No L 193, 18.7.1983.

exception) and for marginal commercial activities, the minimum intra-group provision has been set at 85% of turnover.

24. The Directive accordingly permits entities to award such contracts without their being subject to the rules of the Directive. However, it provides for the monitoring of such exceptions as required by the Commission and for the provision of such proofs as the Commission may consider necessary. Such proof may consist of consolidated accounts drawn up by parent undertakings pursuant to Directive 83/349/EEC. It could also include the verification by public audit bodies of shareholdings and of the share of turnover being generated in intra-group activity. (The Commission has been assured that, in the case of private entities subject to an independent audit, the group auditor would be in a position to verify compliance with these requirements.)

Confidentiality

25. In view of the industrial nature of the activities carried on by entities operating in the four sectors concerned, measures need to be taken to protect confidential or commercially sensitive information without doing away with the obligation to put contracts or design contests up for competition. The provisions of Directive 90/531/EEC concerning confidentiality are extended to services.

These relate to:

- (a) the protection of information in the transmission of technical specifications, in the qualification and selection of service providers and in the award of contracts (Article 4);
- (b) the free choice between contract award procedures (Article 15) and methods of calling for competition (Article 16), enabling the contracting entity to avoid publishing a notice on the service contract in question in the Official Journal and thus limit the dissemination of information thereon;
- (c) the obligation to publish, in the periodic indicative notice (Article 17 and Annex XIV), only the categories of services concerned and their respective total value (without necessarily having to disclose the ultimate objective of the service);
- (d) subdivision of the contract award notice (Annex XV) into two sections, only one of which is for publication in the Official Journal;
- (e) the possibility of withholding, in the contract award notice, information on the price paid, the award criteria and the value of the share of the contract to be subcontracted (point 11 of Annex XV);
- (f) the possibility of pointing out any sensitive commercial aspects of the information to be supplied in connection with points 6 and 9 (number of tenders received and name of

successful provider) of the contract award notice (Article 18(2)).

26. In the case of contracts for certain services listed in Annex XVI B or R&D or study contracts, the above provisions could prove insufficient in so far as publication of Section I of the contract award notice within two months of award of the contract could disseminate information that the contracting authority does not wish to disclose; the very outcome of a contract award procedure could reveal the internal strategy of the contracting entity or service provider and should be able to be kept confidential.
27. Article 18(3) thus provides that the description of service contracts listed in Annex XVI B and of contracts awarded without a prior call for competition in accordance with Article 15(2)(b) may be limited to an indication of the service category concerned according to the classification given in Annex XVI (R&D services, management consulting services and related services, etc.).
28. The other contracts for which the outcome of the award procedure should also remain confidential are above all contracts that fall outside the scope of the Directive, since although they are awarded by contracting entities, they are linked to activities other than those caught by the Directive or are excluded in pursuance of specific provisions such as Article 7.

VI. ADOPTION OF A CONSOLIDATED TEXT

29. Article 2 of this proposal stipulates that, when adopting this Directive, the Commission shall adopt a text which consolidates all the provisions relating to supplies, works and services.

There are many advantages to a single instrument being made available within a very brief period, the main one being that it would make it possible at national level to refer to a single Community instrument whatever the type of contract. It would also be easier for the interested parties to use a single document, particularly since, as explained in point 7 above, the provisions relating to supplies and works are also relevant to services and are not necessarily contained in this proposal.

VII. DETAILED ANALYSIS OF ARTICLES

30. The comments presented below relate to the amended or new provisions set out in Article 1 of this proposal.

Article 1(3)

31. The introduction of a definition for "affiliated undertaking" is necessary for the purposes of granting, pursuant to Article 11a, the exemption of certain service contracts which are the subject of transactions within a group (see points 20 to 24 above). In this definition reference is made to the Seventh Directive on Company Law (83/349/EEC) on consolidated accounts.

For undertakings not subject to that Directive, the exercise of dominant influence in the sense of point 2 of this Article is the decisive criterium.

Article 1(4)

32. Article 1(4) incorporates the definition of service contracts into that for the other types of contract. In accordance with this proposal's aim, which is to complete the existing rules, service contracts are defined in such a way as to cover all services purchased in the sectors in question which do not fall within the definition of supply and works contracts already covered by Directive 90/531/EEC.

33. However, some contracts should not be made subject to Community rules owing either to their specific characteristics or to the absence of any likelihood of competition existing in their respect in the near future. These are identified in points (i), (ii) and (iii), i.e. telecommunications services which, under Directive 90/388/EEC, will not be liberalized, contracts for arbitration and conciliation services, the suppliers of which are normally appointed by common agreement between the parties concerned, and contracts for the acquisition of immovable property which are neither supply nor works contracts. Services linked to such acquisition are, however, covered by this Directive.

Article 1(5), (6), (7) and (8)

34. Each of these definitions is amended to include the notion of "services" or "service provider". In addition, paragraph 6 makes it clear that service providers may not be rejected on the grounds of their legal form (see point 63 below).

Article 1(16)

35. This provision introduces a definition of design contests. These differ from service contracts in that they are not concerned with the supply of a service per se but are intended as a means of exploring the possibilities for a future project which might ultimately be the subject of a service, works or supply contract: contests may be held, for example, in the fields of data processing (project to computerize the organization of an authority), civil engineering or architecture (project for the construction of headquarters).

Article 3(2)(a)

36. The alternative rules of Directive 90/531/EEC are extended in their entirety to service contracts; where a Member State is authorized, following a decision by the Commission, to apply the alternative rules for the award of supply and works contracts by entities operating in the oil and gas sectors in question, it is vital that the latter also comply with these rules. Only paragraph 2(a) has had to be amended to include "service contracts".

Article 4

37. The amendments to Article 4 take account of the extension of the scope of Directive 90/531/EEC to service contracts and design contests and of the principle of non-discrimination between service providers.

Article 6(1) and (2)

38. Only the award of contracts or the organization of design contests in the areas covered by the Directive should be referred to by the Directive. The new version of Article 6(1) and (2) extends this principle, which already exists in Directive 90/531/EEC, to services and design contests.

Article 7

39. Directive 90/531/EEC excludes purchases of supplies which are to be re-sold or hired to third parties under competitive conditions. The new version of Article 7 thus excludes service contracts awarded for the purposes of such re-sale or hire activities. This is because, when a contracting entity awards service contracts in order to pursue such activities, any associated services (e.g. advertising) should not be made subject to the Directive's procedural rules: the pressure of competition on the price at which the product is sold or hired should force the contracting entity to obtain all the elements of which this price is composed on the best possible terms.

Article 10a

40. Some Member States' laws reserve the right to provide certain services for public authorities. The new Article 10a excludes such contracts under certain conditions. The Article does not, however, aim to exclude contracts which a contracting entity

reserved by contractual means for one or more suppliers, on the basis, for example, of a framework agreement.

Article 11

41. The new version of this Article extends the exemption already provided for by Directive 90/531/EEC to services and design contests where contracts in their respect are awarded pursuant to an international agreement.

Article 11a

42. This new Article applies solely to service contracts
- between the contracting entity and "affiliated undertakings", as defined in Article 1(3), or
 - awarded by a joint venture formed by a contracting entity and its "affiliated undertakings".

It offers an exemption from application of the Directive where the contracting entity awards service contracts among its subsidiaries (see points 20 to 24 above).

Article 12

43. The new version of Article 12 incorporates the thresholds

applicable to services (paragraph 1) and adapts the provisions for calculating the estimated value of a contract to the specific characteristics of services (paragraphs 2 and 3).

44. The thresholds are fixed at the same levels laid down for supply contracts in Directive 90/531/EEC, i.e. ECU 400 000 for contracts awarded by entities operating in the water, energy and transport sectors, and ECU 600 000 for contracts awarded by entities operating in the telecommunications sector.

Fixing a common threshold avoids any difficulty linked to the classification of contracts within one category or another and thus prevents entities from circumventing application of the Directive by artificially classifying a contract within a category to which a higher threshold applies.

Since many contracts include both services and supplies, it is also important that the contracting entity should, when estimating the contract value, add the respective parts together to determine whether the total value of the contract is greater than the threshold (paragraph 7).

45. These levels also allow a not insubstantial proportion, in terms of value, of contracts to be covered and to eliminate many low-value contracts which are unlikely to be the subject of cross-border transactions.

Articles 12a, 12b and 12c

46. These Articles introduce the application of different procedural rules depending on whether the services concerned are priority (listed in Annex XVI A) or other (listed in Annex XVI B) services.
47. Priority services are subject to the full procedure set out by the proposal (Article 12a) in the same way as works and supplies contracts. These rules correspond to those of Directive 90/531/EEC.
48. Other services will be subject to minimum rules (Article 12b). These relate on the one hand to technical specifications, which must be as transparent as possible so as not to obstruct trade. Contracting entities are also required to draw up a contract award notice (see also point 57). These notices will enable the Commission to establish a solid basis of information on transactions involving the services in question and to examine whether it would be appropriate subsequently to extend the full procedure to them (see also point 12).

Article 14

49. The new version of this Article merely extends to services the provisions on the communication of technical specifications regularly referred to by the contracting entities.

Article 15

50. Paragraph 2(b) stipulates that the award of research, experiment, study or development contracts without prior call for competition must not prejudice the competitive award of subsequent contracts, in particular where the latter are aimed, for example, at the series production of the result of the research, experiment, study or development work in question.
51. Paragraph 2(f) extends the existing provisions for works contracts to services.
52. Paragraph 2(1) authorizes entities not to issue a call for competition when contracts must, under national law, be awarded to the winner of a design contest. This does not apply, however, where the contest in question has not been organized according to the rules of this Directive (prizes lower than the threshold, for example).

Article 16

53. Article 16 deals with the methods by which a call for competition may be made. The new version takes account of the inclusion of services.
54. In the case of design contests (paragraph 4), the publication of a notice in the Official Journal is required. The very nature of

this method of opening a contract up to competition separates it from the other methods of calling for competition provided for.

Article 17

55. The new paragraph 1(c) introduces the necessary provisions to ensure that entities, when publishing the periodic indicative notice, indicate their intentions as far as the purchase of services is concerned. The amount above which they are required to make such an indication is identical to that laid down for supplies, irrespective of the type of services in question.

Article 17a

56. This new Article deals solely with design contests.

Where they are organized as part of the procedure for awarding supply, works or service contracts, contracting entities are required to comply with the rules on non-discrimination (paragraphs 2 and 3) and the organization of juries (paragraph 4) irrespective of the amount of prizes or payments to participants, including where no payment is to be made.

In contrast, when design contests are held as a separate procedure, it seems appropriate to require that they be held on a European scale and that publication take place only in cases where prizes amount to more than ECU 200 000, thereby limiting the administrative workload of the contracting entities. Paragraph 5

allows the Member States, by dint of national rules, to oblige contracting entities to award subsequent contracts to the winners of a design contest.

Article 18

57. The new version of Article 18 applies to all award notices, whether they relate to supply, works or service contracts, or a design contest.

The provisions of Directive 90/531/EEC have thus been extended to services and design contests.

However, for reasons of confidentiality, it is also stipulated that the contracting entities applying Article 15(2)(b) in order to award certain contracts for the purpose of research, experiment, study or development without prior call for competition may decide not to supply a description of the content of the contract, as referred to in point 3 of Annex XV, but merely to mention the main title thereof within the meaning of the classification of Annex XVI.

Article 19(5)

58. Paragraph 5 is adapted to take account of the introduction of the new design contest notice.

Article 22(1)

59. The provisions of Article 22 apply in their entirety to services;

the new version of paragraph 1 merely introduces the notion of "service provider".

Article 23

60. The new version of Article 23 merely extends its provisions to services.

Articles 24 and 25

61. Articles 24 and 25 are applicable in their entirety to service contracts; the amendments which have been introduced merely add the notion of "service provider".

Article 25a

62. It is in some cases necessary in the area of services to demand proof from service providers of their capacity as such on the basis of certificates drawn up by independent bodies.

Article 25a acknowledges the existence of quality assurance systems and invites contracting entities to refer to the EN 29000 and EN 45000 European Standards series.

To prevent such proof from obstructing trade, and in compliance with the judgment of the Court of Justice in the "Dundalk" Case, (1) Article 25a also stipulates that the contracting

(1) Case 45/87 - R, 13.3.1987.

entities must recognize equivalent certificates issued in other Member States, unless they are able to indicate the reasons why such certificates are unsuitable for the purposes of the contract in question.

Article 26

63. Some national laws prohibit legal persons from providing services or impose restrictive conditions on such persons (either regarding the establishment itself or the activities pursued). The new provisions of Article 26(2) and (3) correspond to those of the public services proposal. In line with the case law of the Court of Justice, in particular its judgment in the "Webb" Case,¹ they require contracting authorities to take account also of tenders submitted by legal persons provided they comply with the rules of the country in which they are established. This does not prevent the contracting entity from demanding a given level of training on the part of service providers or from assessing the content of each offer.

Article 27

64. This Article is concerned with award criteria. The two main criteria already adopted for works and supply contracts, i.e. the lowest price or the most economically advantageous tender, are applied to services.

¹ Case 279/80, [1981] ECR 3304.

Although price is not normally the most determining factor in the area of services, it has proved necessary to ensure (in paragraph 1) that these provisions do not prejudice national regulations which impose compulsory scales of remuneration. Even if price competition cannot operate fully in all the Member States, these differences do not apparently constitute an obstacle to cross-border trade.

65. Some suppliers in the area of services are public authorities or public undertakings. These might therefore exploit the competitive advantages accruing from their status. The purpose of paragraph 6 is not to have contracting entities check the conduct of public authorities or undertakings, but rather to guarantee that the contracting entity is fully informed of the importance of public funds in a tender submitted by a public supplier.

Article 29a

66. Opening the contracts covered by this Directive up to competition will make it easier for non-Community firms to gain access to the European market. However, in the absence of specific international rules governing trade in services, there is no guarantee that third countries will grant Community firms comparable access to their markets.

It should be remembered that, although there is a risk that trade will be distorted to the Community's detriment, this risk is less great in the case of services than in that of supply contracts since a sizeable proportion of the services concerned will often have to be provided on the Community's actual territory.

For this reason, and because of the absence of Community rules defining the origin of all services, it does not seem warranted to extend the provisions of Article 29 of Directive 90/531/EEC to the service contracts covered by this Directive. However, in order to avoid opening up service contracts unilaterally to the Community's detriment, Article 29a introduces arrangements applicable solely to the services covered by this Directive which enable the Commission to attempt to solve by negotiation any problems of access to third-country markets which may arise. Paragraph 4 also allows the Commission, acting in consultation with the Advisory Committee, to take measures to limit access by third-country firms where it is established that the countries in question prevent Community firms from entering their markets. The Council may, by a qualified majority, decide to amend these measures.

Article 30(1)

67. Deletion of the word "software" does not alter the scope of the provisions of Article 30 applicable to the contracts covered by Directive 90/531/EEC, but allows them to be extended to service contracts.

Article 33(1)(a)

68. The provisions of Article 33 are applicable in their entirety to services; point (a) simply incorporates the notion of "providers of services".

Article 37

69. These Articles set out the deadlines for implementation of this Directive. In view of the transitional periods retained in Directive 90/531/EEC for 3 Member States, it would clearly be impractical for the present Directive to enter into force any earlier and the time limits have been adapted accordingly.

Correlation table

EXCLUDED SECTORS SERVICES DIRECTIVE	SERVICES DIRECTIVE COM (90) 372	DIRECTIVE 90/531/EEC
<u>Article 1</u> (3) affiliated undertaking (4) service contracts (5) framework agreements (6) tenderer (7) procedures (8) specifications (16) design contests	-- 1(a) 1(g)	-- adaptation of Article 1(4) adaptation of Article 1(5) adaptation of Article 1(6) adaptation of Article 1(7) adaptation of Article 1(6)
<u>Article 3 (2) (a)</u> alternative arrangements applicable to oil/gas/coal		adapt. of Article 3(2)(a)
<u>Article 4</u> application of the non- discrimination procedures		adaptation of Article 4
<u>Article 6</u> contracts & design contests linked to the activity mentioned		adaptation of Article 6
<u>Article 7</u> (a) exclusion of services linked to competing products (b) exclusion of contracts intended for competing services		adaptation of Article 7 (1)
<u>Article 10 a</u> single source of supply	7	
<u>Article 11</u> special procurement rules		adaptation of Article 11
<u>Article 11 a</u> intra-group transactions	--	--
<u>Article 12</u> (1) thresholds (2) calculation of the value of contracts (3) services (4.12) calculation of the value of contracts	8(2) 8(4)	adapt. of Article 12 (1) adaptation of Article 12(2 to 9)
<u>Articles 12 a , 12 b and 12 c</u> two-tier application	9, 10 and 11	
<u>Article 14</u> communication of technical specifications		adaptation of Article 14

<p><u>Article 15</u> (2) procedures without call for competition (b) R & D contracts (c) contracts with technical specifications (f) additional service contracts (1) contract following a design contest</p>	<p>12 (3) (c)</p>	<p>adaptation of Art 15(2)(b) adaptation of Article 15 (2). (c) adaptation of Article 15 (2) (f)</p>
<p><u>Article 16</u> (1) means of making calls for competition (4) calls for competition of design contests</p>	<p>16 (4)</p>	<p>adaptation of Article 16</p>
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<p><u>Article 23 (1)</u> social clause</p>		<p>adapt. of Article 23 (1)</p>
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Proposal for a
COUNCIL DIRECTIVE

amending Directive 90/531/EEC
on the procurement procedures of entities
operating in the water, energy, transport
and telecommunications sectors

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular the last sentence of Article 57(2), Article 66, Article 100a and Article 113 thereof,

Having regard to the proposal from the Commission⁽¹⁾,

In cooperation with the European Parliament⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

Whereas restrictions on the free movement of goods and on the freedom to provide services in respect of supply and service contracts awarded in the water, energy, transport and telecommunications sectors are prohibited by the terms of Articles 30 and 59 of the Treaty;

(1) OJ No C

(2) OJ No C

(3) OJ No C

Whereas Article 97 of the Euratom Treaty prohibits any restrictions based on nationality as regards companies under the jurisdiction of a Member State where they desire to participate in the construction of nuclear installations of a scientific or industrial nature or provide the relevant services in the Community;

Whereas the White Paper on the completion of the internal market contains an action programme and a time-table for opening up procurement markets in services;

Whereas the awarding procedures of service contracts should be as similar as possible to the procedures applicable to the works and supply contracts covered by Council Directive 90/531/EEC⁽¹⁾;

Whereas service providers may be natural or legal persons without prejudice to the national rules of their country of establishment that are compatible with the Treaty;

Whereas the field of services is best described, for the purpose of application of procurement rules, and for monitoring purposes, by subdividing it into categories corresponding to particular positions of the Central Product Classification (CPC);

Whereas the provision of services is covered by Directive 90/531/EEC only in so far as it is based on contracts; whereas the provision of services on other bases, such as law or regulations, or employment contracts, is not covered;

Whereas as far as research and development (R&D) is concerned, Directive 90/531/EEC only covers R&D services whose results accrue exclusively to the contracting entity;

(1) OJ No L 297, 29.10.1990, p. 1.

Whereas contracts relating to the acquisition or rental of immovable property have particular characteristics, which make the application of procurement rules inappropriate;

Whereas arbitration and conciliation services are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules;

Whereas contracts with a designated single source of supply may under certain conditions be fully or partly exempted from Directive 90/531/EEC;

Whereas full application of Directive 90/531/EEC must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realised; whereas contracts for other services need to be monitored for a certain period before taking a decision on the full application of the said Directive; whereas the mechanism for such monitoring needs to be set up by the said Directive; whereas it should at the same time enable those interested to share the relevant information;

Whereas the relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in an award procedure or a design contest;

Whereas Community undertakings should be granted access to the award of service contracts in non-member countries; whereas negotiations may be initiated to that effect when such access, in law or in fact, is found to be restricted; whereas the possibility should exist under certain conditions to take measures as regards access to service contracts subject to Directive 90/531/EEC by undertakings of the non-member country concerned or by tenders originating in that country;

HAS ADOPTED THIS DIRECTIVE :

Article 1

Directive 90/531/EEC is hereby amended as follows:

1. In Article 1, point 3 is replaced by the following:

"3) "affiliated undertaking" shall mean any undertaking whose annual accounts are consolidated with those of the contracting entity in accordance with the requirements of Council Directive 83/349/EEC* or, in case of contracting entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of point 2, or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

*OJ No L 193, 18.7.1983, p. 1."

2. In Article 1, former points 3 to 7 are replaced by the following:

"4) "supply, works and service contracts" shall mean contracts for pecuniary interest concluded in writing between a supplier, a contractor or a service provider and one of the contracting entities defined in Article 2, to the exclusion of

- i) contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights therein;
- ii) contracts for voice telephony, telex, radiotelephony, paging and satellite services ;
- iii) contracts for arbitration and conciliation services.

These contracts have as their object :

- a) in the case of supply contracts, the purchase, lease, rental or hire purchase, with or without options to buy, of products;
- b) in the case of works contracts, either the execution, or both the execution and design or the realization, by whatever means, of building or civil engineering activities referred to in Annex XI. These contracts may, in addition, cover supplies and services necessary for their execution;
- c) in the case of service contracts, any other provision.

Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract;

- 5) "framework agreement" shall mean an agreement between one of the contracting entities defined in Article 2 and one or more suppliers, contractors or service providers the purpose of

which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period;

- 6) "tenderer" shall mean a supplier, contractor or service provider who submits a tender and "candidate" shall mean a person who has sought an invitation to take part in a restricted or negotiated procedure ; service providers may be either natural or legal persons, including contracting entities within the meaning of Article 2;
- 7) "open, restricted and negotiated procedures" shall mean the award procedures applied by contracting entities whereby:
 - a) in the case of open procedures, all interested suppliers, contractors or service providers may submit tenders;
 - b) in the case of the restricted procedures, only candidates invited by the contracting entity may submit tenders;
 - c) in the case of negotiated procedures, the contracting entity consults suppliers, contractors or service providers of its choice and negotiates the terms of the contract with one or more of them;
- 8) "technical specifications" shall mean the technical requirements contained in particular in the tender documents, defining the characteristics of a set of works, material, product, supply or a service, and enabling a piece of work, a material, a product, a supply or a service to be objectively described in a manner such that it fulfils the use for which

it is intended by the contracting entity. These technical prescriptions may include quality, performance, safety or dimensions, as well as requirements applicable to the material, product, supply or a service as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. In the case of works contracts, they may also include rules for the design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting entity 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;"

3. In Article 1, points 8 to 14 become points 9 to 15.

4. The following paragraph is added to Article 1:

"16) "design contests" shall mean the procedures which aim at providing the contracting entity with a plan or design, mainly in the fields of architecture, civil engineering or data processing, and which are selected by a jury on the basis of competition with or without the award of prizes."

5. Article 3(2)(a) is replaced by the following:

"a) observes the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information that the entity makes available to undertakings concerning its procurement intentions;"

6. Article 4 is replaced by the following:

"Article 4

- 1) When awarding supply, works or service contracts, or organizing design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.
- 2) Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.
- 3) In the context of provision of technical specifications to interested suppliers, contractors or service providers of qualification and selection of suppliers, contractors or service providers and of award of contracts, contracting entities may impose requirements with a view to protecting the confidential nature of information which they make available.
- 4) The provisions of this Directive shall not limit the right of suppliers, contractors or service providers to require a contracting entity, in conformity with national law, to respect the confidential nature of information which they make available."

7. Article 6(1) and (2) are replaced by the following:

- "1) This Directive shall not apply to contracts or design contests which the contracting entities award or organize for purposes other than the pursuit of their activities as

described in Article 2(2) or for the pursuit of such activities in a non-member country, in conditions not involving the physical use of a network or geographical area within the Community.

2) However, this Directive shall apply to contracts or design contests awarded or organized on behalf of the entities which exercise an activity referred to in Article 2(2)(a)(i) and which :

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

(b) are connected with the disposal or treatment of sewage."

8. Article 7(1) is replaced by the following:

"1) The provisions of this Directive shall not apply to :

a) contracts awarded for purposes of re-sale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity;

b) service contracts directly relating to the re-sale or hire mentioned under a)."

9. The following Article 10a is inserted:

"Article 10a

The provisions of this Directive shall not apply to the award of service contracts which contracting entities have to award to an entity which is itself a contracting entity within the meaning of Article 1(b) of Directive ../.../EEC(*) pursuant to an exclusive right established by a published law, regulation or administrative provision which is compatible with the Treaty.

(*) OJ No C 23, 31.1.1991, p. 1."

10. Point 1 of Article 11 is replaced by the following:

"1. pursuant to an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering supplies, works, services or design contests intended for the joint implementation or exploitation of a project by the signatory States; every agreement shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts set up by Council Decision 71/306/EEC⁽¹⁾, as last amended by Decision 77/63/EEC⁽²⁾, or, in the case of agreements governing contracts awarded by entities exercising an activity defined in Article 2(2)(d), the Advisory Committee on Telecommunications Procurement referred to in Article 31;

(1) OJ No L 185, 16.8.1971, p. 15.

(2) OJ No L 13, 15.1.1977, p. 15."

11. The following Article 11a is inserted:

"Article 11a

1. This Directive shall not apply to contracts for services which

- a) a contracting entity awards to an affiliated undertaking;
- b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2(2) to an undertaking which is affiliated with one of these contracting entities;

provided that at least 85% of the average turnover of that undertaking arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

2. The contracting entities notify the Commission, at its request, the following information regarding the application of the provisions of paragraph 1 :

- the names of the undertakings concerned;
- the nature and value of the service contracts involved;
- such proof as may be deemed necessary by the Commission that the relationship between the undertaking to which the contracts are awarded and the contracting entity is in conformity with the requirements of this Article."

12. Article 12 is replaced by the following:

"Article 12

- 1) This Directive shall apply to contracts whose estimated value, net of VAT, is not less than :
 - a) ECU 400 000 in the case of supply and service contracts awarded by entities carrying out an activity defined in Article 2(2)(a), (b) and (c);
 - b) ECU 600 000 in the case of supply and service contracts awarded by entities carrying out an activity defined in Article 2(2)(d);
 - c) ECU 5 000 000 in the case of works contracts.
- 2) The estimated value of a service contract shall include the total remuneration of the service provider taking account of the elements specified in paragraphs 3 to 12.
- 3) In assessing the estimated contract value of financial services, the following amounts shall be taken into account:
 - as regards insurance services, the premium payable;
 - as regards banking and other financial services, fees, commissions, interest and other types of remuneration.
- 4) In the case of supply contracts for lease, rental or hire-purchase, or of service contracts not indicating the total cost, the basis for calculating the contract value shall be:

- a) in the case of fixed-term contracts, where their term is twelve months or less, the estimated total value for the contract's duration, or, where their term exceeds twelve months, the contract's total value including the estimated residual value;
 - b) in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the anticipated total instalments to be paid in the first four years.
- 5) Where a proposed supply or service contract expressly specifies option clauses, the basis for calculating the contract value shall be the highest possible total purchase, lease, rental or hire-purchase permissible, inclusive of the option clauses.
- 6) In the case of a procurement of supplies or services over a given period by means of a series of contracts to be awarded to one or more suppliers or of contracts which are to be renewed, the contract value shall be calculated on the basis of:
- a) the total value of contracts which had similar characteristics awarded over the previous fiscal year or twelve months, adjusted where possible for anticipated changes in quantity or value over the subsequent twelve months;
 - b) or the aggregate value of contracts to be awarded during the twelve months following the first award or during the whole term of the contract, where this is longer than twelve months.

- 7) The basis for calculating the estimated value of a contract including both supplies and services, shall be the total value of the supplies and services regardless of their respective values.
- 8) The basis for calculating the value of a framework agreement shall be the estimated maximum value of all the contracts envisaged for the period in question.
- 9) The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. "Work" shall mean the building and engineering activities taken as a whole that are intended to fulfil an economic function by themselves.

In particular, where a supply, work or service is the subject of several lots, the value of each lot shall be taken into account when assessing the value referred to in paragraph 1. Where the aggregate value of the lots equals or exceeds the value laid down in paragraph 1, that paragraph shall apply to all the lots. However, in the case of works contracts, contracting entities may derogate from paragraph 1 in respect of lots whose estimated value net of VAT is less than ECU 1 million, provided that the aggregate value of those lots does not exceed 20% of the overall value of the lots.

- 10) For the purposes of paragraph 1, contracting entities shall include in the estimated value of a works contract the value of any supplies or services necessary for the execution of the works which they make available to the contractor.

- 11) The value of supplies or services which are not necessary for the execution of a particular works contract may not be added to that of the contract with the result of avoiding application of this Directive to the procurement of those supplies.
- 12) Contracting entities may not circumvent this Directive by splitting contracts or using special methods of calculating the value of contracts."
13. The following Title Ia is inserted:

"Title Ia

TWO-TIER APPLICATION

Article 12a

Supply and works contracts and contracts which have as their object services listed in Annex XVIA shall be awarded in accordance with the provisions of Titles II, III and IV.

Article 12b

Contracts which have as their object services listed in Annex XVIB shall be awarded in accordance with Articles 13 and 18.

Article 12c

Contracts which have as their object services listed in both Annexes XVIA and XVIB shall be awarded in accordance with the provisions of Titles II, III and IV where the value of the services listed in Annex XVIA is greater than the value of the services listed in Annex XVIB.

Where this is not the case, they shall be awarded in accordance with Articles 13 and 18."

14. Article 14 is replaced by the following:

"Article 14

- 1) Contracting entities shall make available on demand to suppliers, contractors or service providers interested in obtaining a contract the technical specifications regularly referred to in their supply, works or service contracts or the technical specifications which they intend to apply to contracts covered by periodic information notices within the meaning of Article 17.
- 2) Where such technical specifications are based on documents available to interested suppliers, contractors or service providers a reference to those documents shall be sufficient".

15. Article 15(2)(b) is replaced by the following:

"b) where a contract is purely for the purpose of research, experiment, study or development and not for the purpose of ensuring profit or of recovering research and development costs and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which have in particular these purposes;"

16. Article 15(2)(c) is replaced by the following:

"c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier, contractor or service provider;"

17. Article 15(2)(f) is replaced by the following:

"f) for additional works or services not included in the project initially awarded or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the execution of the contract, on condition that the award is made to the contractor executing the original contract:

- when such additional works or services cannot be technically or economically separated from the main contract without great inconvenience to the contracting entities;

- or when such additional works or services, although separable from the execution of the original contract, are strictly necessary to its later stages;"

18. The following point is added to Article 15(2):

"1) when the service contract concerned is part of the follow-up to a design contest organized in conformity with the provisions of this Directive and must, in accordance with the relevant rules, be awarded to one of the winners of that contest, provided that all the winners are included in the procedure."

19. Article 16(1) is replaced by the following:

"1) In the case of supply, works or service contracts, the call for competition may be made:

a) by means of a notice drawn up in accordance with Annex XII A, B or C; or

b) by means of a periodic indicative notice drawn up in accordance with Annex XIV; or

c) by means of a notice on the existence of a qualification system drawn up in accordance with Annex XIII."

20. Article 16(2)(a) is replaced by the following:

"a) the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;"

21. In Article 16, paragraph 4 is replaced by the following:

"4) in the case of design contests, the call for competition shall be made by means of a notice drawn up in accordance with Annex XVII."

22. In Article 16, former paragraph 4 becomes paragraph 5.

23. The following paragraph (c) is added to Article 17(1):

"c) in the case of service contracts, the estimated total value of the service contracts in each of the categories of services listed in Annex XVIA which they intend to award

over the following 12 months, where such estimated total value, taking into account the provisions of Article 12, is equal to or greater than ECU 750.000."

24. The following Article 17a is inserted:

"Article 17a

- 1) Design contests shall be subject to the rules set out below. However, when design contests are held as a separate procedure, these rules are applicable only when the total amount of contest prizes and payments to participants is not less than ECU 200 000.
- 2) The admission of participants to design contests shall not be limited by reference to the territory or part of the territory of a Member State.
- 3) In the case of design contests with a limited number of participants, contracting entities shall apply the rules of Article 25.
- 4) The jury shall be composed only of persons who have no financial connections or special relationships with participants in the contest. Whenever a particular professional qualification is required from participants in a contest, the majority of the jury members shall have the same qualifications. The jury shall be autonomous in its decisions. It shall take its decisions based on projects presented in an anonymous way, and solely on the grounds of the criteria indicated in the invitation for projects within the meaning of Annex XVII.

- 5) Member States may oblige contracting entities to award subsequent contracts to one of the winners of a design contest."

25. Article 18 is replaced by the following:

"Article 18

- 1) Contracting entities which have awarded a contract or organised a design contest shall communicate to the Commission, within two months of the award of the contract and under conditions to be laid down by the Commission in accordance with the procedure laid down in Article 32, the results of the awarding procedure by means of a notice drawn up in accordance with Annex XV or Annex XVIII.
- 2) Information provided under Section I of Annex XV or under Annex XVIII shall be published in the Official Journal of the European Communities. In this connection the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information in connection with points 6 and 9 of Annex XV.
- 3) The contracting entities applying the provisions of Article 15(2)(b) or awarding service contracts listed in Annex XVIB, may, concerning point 3 of Annex XV, only mention the main title thereof within the meaning of the classification of Annex XVI.
- 4) Information provided under Section II of Annex XV must not be published or mentioned in the periodic reports except, in aggregated form, for statistical purposes."

26. Article 19(5) is replaced by the following:

"5) Contracts or design contests in respect of which a notice is published in the Official Journal of the European Communities pursuant to Article 16(1) or Article 16(4) shall not be published in any other way before that notice has been dispatched to the Office for Official Publications of the European Communities. Such publication shall not contain information other than that published in the Official Journal of the European Communities."

27. Article 22(1) is replaced by the following:

"1. Provided they have been requested in good time, the contract documents and supporting documents must be sent to the suppliers, contractors or service providers by the contracting entities as a general rule within six days of receipt of the application."

28. Article 23 is replaced by the following:

"Article 23

1. The contracting entity may state in the contract documents, or be obliged by a Member State so to do, 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 works or services are to be executed or performed and which shall be applicable to the works carried out or the services performed on site during the performance of the contract.
- 2) A contracting entity which supplies the information referred to in paragraph 1 shall request the tenderers or those

participating in the contract procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the work or the service is to be carried out or performed. This shall be without prejudice to the application of the provisions of Article 27 (5) concerning the examination of abnormally low tenders".

29. In Article 24, paragraphs (1), (3), (5), (7) and (8) are replaced by the following:

"1) Contracting entities which so wish may establish and operate a system of qualification of suppliers, contractors or service providers."

"3) The rules and criteria for qualification shall be made available on request to interested suppliers, contractors or service providers. The updating of these criteria and rules shall be communicated to the interested suppliers, contractors and service providers. Where a contracting entity considers that the qualification system of certain third entities or bodies meet its requirements, it shall communicate to interested suppliers, contractors and service providers the names of such third entities or bodies."

"5) In reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities may not:

- impose conditions of an administrative, technical or financial nature on some suppliers, contractors or service providers that are not imposed on others;
- require tests or proof that duplicate objective evidence already available."

"7) A written record of qualified suppliers, contractors or service providers shall be kept, and it may be divided into categories according to the type of contract for which the qualification is valid.

8) Contracting entities may bring the qualification of a supplier, contractor or service provider to an end only for reasons based on the criteria referred to in paragraph 2. The intention to bring qualification to an end must be notified in writing to the supplier, contractor or service provider beforehand, together with the reason or reasons justifying the proposed action."

30. Article 25(1) is replaced by the following:

"1) Contracting entities which select candidates to tender in restricted procedures or to participate in negotiated procedures shall do so according to objective criteria and rules which they lay down and which they shall make available to interested suppliers, contractors or service providers."

31. The following Article 25a is inserted:

"Article 25a

Should entities require the production of certificates drawn up by independent bodies for attesting conformity of the service provider to certain quality assurance standards, they shall refer to quality assurance systems based on the relevant EN 29000 European standards series certified by bodies conforming to the EN 45000 European standards series. Entities shall recognise equivalent certificates from bodies established in other Member States.

They shall also accept other evidence of equivalent quality assurance measures from service providers who have no access to such certificates, or no possibility of obtaining them within the relevant time limits."

32. Article 26 is replaced by the following:

"Article 26

- 1) Groupings of suppliers, contractors or service providers shall be permitted to tender or negotiate. The conversion of such groupings into a specific legal form shall not be required in order to submit a tender or to negotiate, but the grouping selected may be required so to convert itself once it has been awarded the contract where such conversion is necessary for the proper performance of the contract.
- 2) 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, shall not be rejected on the sole grounds that under the law of the Member State in which the contract is awarded they would have been required to be either a natural or a legal person.
- 3) Legal persons may be required to indicate in the tender or the request for participation, the names and relevant professional qualifications of the staff to be responsible for the performance of the service."

33. Article 27(1) is replaced by the following:

- "1) Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:

a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

b) the lowest price only."

34. The following paragraph 6 is added to Article 27:

"6) In the case of a tender for the award of a service contract submitted by a public authority or a public undertaking, the contracting entity shall in particular enquire whether the tender is influenced by public funds allocated for

- a) the setting-off of operating losses;
- b) the provision of capital;
- c) non-refundable grants, or loans on privileged terms;
- d) the granting of financial advantages by foregoing profits or the recovery of sums due;
- e) the foregoing of a normal return on public funds used;
- f) compensation for financial burdens imposed by the public authorities.

It shall inform the Commission if it intends to award a contract to a tenderer whose tender is influenced by any of these characteristics."

35. The following Article 29a is inserted:

"Article 29a

- 1) The Member States shall inform the Commission of any general difficulties encountered, in law or in fact, by their undertakings in securing the award of service contracts in third countries.

- 2) The Commission shall report to the Council before 31 December 1992 and periodically thereafter on the opening-up of service contracts in third countries and on the state of negotiations with these countries on this subject, particularly within the GATT framework.

- 3) Whenever the Commission establishes, either on the basis of the reports referred to in paragraph 2, or on the basis of other information, that a third country as regards the award of service contracts,
 - a) does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country,

 - b) does not grant Community undertakings national treatment or the same competitive opportunities as are available to national undertakings, or

 - c) grants undertakings from other third countries more favorable treatment than Community undertakings,

the Commission may initiate negotiations in order to remedy the situation.

4) Under the conditions referred to in paragraph 3, the Commission may decide, in addition to action taken pursuant to that paragraph, that the award of service contracts to

a) undertakings governed by the law of the third country in question,

b) undertakings affiliated to the undertakings specified in (a) and having their registered office in the Community but having no effective and continuous link with the economy of a Member State,

c) undertakings submitting tenders which have as their object services originating in the third country in question,

may be suspended or restricted during a period to be determined in the decision. The Commission may decide on the appropriate measures either on its own initiative or at the request of a Member State, after consulting the Member States in accordance with the procedure laid down in Article 32(5), (6) and (7). Where the Commission is asked to take action by a Member State, it shall take a decision within a maximum period of three months of receipt of the request.

It shall notify the Council and the Member States of the decisions taken.

Any Member State may refer the Commission's decision to the Council within a maximum period of four weeks from the date of the decision.

The Council, acting by qualified majority, may take a different decision within a maximum period of three months of such referral.

5) This Article is without prejudice to the obligations of the Community in relation to non-member countries."

36. In Article 30(1) the word "software" is deleted.

37. Article 33(1)(a) is replaced by the following:

"a) the qualification and selection of contractors, suppliers or of providers of services and award of contracts"

38. Article 37 is replaced by the following:

"Article 37

1) Member States shall adopt the measures necessary to comply with the provisions relating to works and supply contracts of this Directive by 1 July 1992. They shall forthwith inform the Commission thereof.

Member States may stipulate that the measures referred to shall apply only from 1 January 1993.

2) The Member States shall apply the measures relating to service contracts by 1 January 1993.

3) Nevertheless, in the case of the Kingdom of Spain, 1 January 1993 shall be replaced by 1 January 1996. As regards the Hellenic Republic and the Portuguese Republic, 1 January 1993 shall be replaced by 1 January 1998.

- 4) Council Recommendation 84/550/EEC of 12 November 1984 concerning the first phase of opening up access to public telecommunications contracts(1) shall cease to have effect as from the date on which this Directive is applied by the Member States.

(1) OJ No L 298, 16.11.1984, p. 51."

39. The following Article 37a is inserted :

"Article 37a

When Member States adopt the provisions referred to in Article 37, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by the Member States."

40. The list of Annexes and Annexes XII, XIV and XV are replaced by the list of Annexes and Annexes XII, XIV and XV of this Directive.

41. Annexes XVI, XVII and XVIII hereto are added.

Article 2

The Commission shall adopt before 1 January 1993, a Directive which consolidates the provisions of Directive 90/531/EEC and of this Directive in conformity with the procedure referred to in Article 32(4) to (7).

Article 3

- 1) Member States shall adopt the measures necessary to comply with this Directive by 1 January 1993. They shall forthwith inform the Commission thereof.

- 2) Nevertheless, the Kingdom of Spain may stipulate that the measures referred to in paragraph 1 shall apply only from 1 January 1996. The Hellenic Republic and the Portuguese Republic may stipulate that the measures referred to in paragraph 1 shall apply only from 1 January 1998.

- 3) When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Article 4

Member States shall communicate to the Commission the text of the main provisions of national law, whether laws, regulations or administrative provisions, which they adopt in the field governed by this Directive.

Article 5

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

ANNEXES

- Annex I : production, transport or distribution of drinking water
- Annex II : production, transport or distribution of electricity
- Annex III : transport or distribution of gas or heat
- Annex IV : exploration for and extraction of oil or gas
- Annex V : exploration for and extraction of coal or other solid fuels
- Annex VI : Contracting entities in the field of railway services
- Annex VII : Contracting entities in the field of urban railway, tramway, trolley bus or bus services
- Annex VIII : Contracting entities in the field of airport facilities
- Annex IX : Contracting entities in the field of maritime or inland port or other terminal facilities
- Annex X : Operation of telecommunications networks or provision of telecommunications services
- Annex XI : List of professional activities as set out in the general industrial classification of economic activities within the European Communities
- Annex XII :
 - A. open procedures
 - B. restricted procedures
 - C. negotiated procedures
- Annex XIII : Notice on the existence of a qualification system
- Annex XIV : Periodic information notice
 - A. For supply contracts
 - B. For works contracts
 - C. For service contracts
- Annex XV : Notice on contracts awarded
 - I. Information for publication in the Official Journal of the European Communities
 - II. Information not intended for publication
- Annex XVI :
 - A. Services in the sense of Article 12a
 - B. Services in the sense of Article 12b
- Annex XVII : Design contest notices
- Annex XVIII : Results of design contests

ANNEX XII

A. OPEN PROCEDURES

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.
2. Nature of the contract (supply, works or service, where appropriate, state if it is a framework agreement).
Category of service within the sense of annex XVIA or XVIB and description (CPC classification).
3. Place of delivery, site or place of performance of service.
4. For supplies and works :
 - (a) Nature and quantity of the goods to be supplied;
or
the nature and extent of the services to be provided and general nature of the work.
 - (b) Indication of whether the suppliers can tender for some and/or all the goods required. If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots.
 - (c) For works contracts :
Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.
5. For services :
 - (a) Indication whether the execution of the service is by law, regulation, or administrative provision reserved to a particular profession;
 - (b) Reference of the law, regulation or administrative provision;
 - (c) Indication whether legal persons should indicate the names and professional qualification of the staff to be responsible for the execution of the services;
 - (d) Indication whether suppliers can tender for a part of the services concerned;
6. Authorization to submit variants.
7. Derogation from the use of European Specifications, in accordance with Article 13 (6).
8. Time limits for delivery or completion or duration of service contract.
9. (a) Address from which the contract documents and additional documents may be requested.
(b) Where appropriate, the amount and terms of payment of the sum to be paid to obtain such documents.
10. (a) The final date for receipt of tenders.
(b) The address to which they must be sent.
(c) The language or languages in which they must be drawn up.
11. (a) Where appropriate, the persons authorized to be present at the opening of tenders.
(b) The date, hour and place of such opening.
12. Where appropriate, any deposits and guarantees required.
13. Main terms concerning financing and payment and/or references to the provisions in which are contained.

14. Where appropriate, the legal form to be taken by the grouping of suppliers, contractors or service providers to whom the contract is awarded.
15. Minimum economic and technical conditions required of the supplier, contractor or provider to whom the contract is awarded.
16. Period during which the tenderer is bound to keep open his tender.
17. The criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents.
18. Other information.
19. Where appropriate, the reference to publication of the periodic information notice in the Official Journal to which the contract refers.
20. Date of dispatch of the notice by the contacting entities.
21. Date of receipt of the notice by the Office for Official Publications of the European Communities (to be supplied by the said Office).

ANNEX XII

B. RESTRICTED PROCEDURES

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.
2. Nature of the contract (supply, works or service, where appropriate, state if it is a framework agreement).
Category of service within the sense of annex XVIA or XVIB and description (CPC classification).
3. Place of delivery, site or place of performance of service.
4. For supplies and works :
 - (a) Nature and quantity of the goods to be supplied;
or
the nature and extent of the services to be provided and general nature of the work.
 - (b) Indication of whether the suppliers can tender for some and/or all the goods required. If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots.
 - (c) For works contracts :
Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.
5. For services :
 - (a) Indication whether the execution of the service is by law, regulation, or administrative provision reserved to a particular profession;
 - (b) Reference of the law, regulation or administrative provision;
 - (c) Indication whether legal persons should indicate the names and professional qualification of the staff to be responsible for the execution of the services;
 - (d) Indication whether suppliers can tender for a part of the services concerned;
6. Authorization to submit variants.
7. Derogation from the use of European Specifications, in accordance with Article 13 (6).
8. Time limits for delivery or completion or duration of service contract.
9. Where appropriate, the legal form to be taken by the grouping of suppliers, contractors or providers to whom the contract is awarded.
10. (a) The final date for receipt of requests to participate.
(b) The address to which they must be sent.
(c) The language or languages in which they must be drawn up.
11. The final date for dispatch of invitations to tender.
12. Where appropriate, any deposits and guarantees required.
13. Main terms concerning financing and payment and/or references to the texts in which these are contained.
14. Information concerning the supplier's, contractor's or provider's position and minimum economic and technical conditions required of him.
15. The criteria for the award of the contract where they are not mentioned in the invitation to tender.

16. Other information.
17. Where appropriate, the reference to publication of the periodic information notice in the Official Journal to which the contract refers.
18. Date of dispatch of the notice by the contracting entities.
19. Date of receipt of the notice by the Office for Official Publications of the European Communities (to be supplied by the said Office).

ANNEX XII

C. NEGOTIATED PROCEDURES

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.
2. Nature of the contract (supply, works or service, where appropriate, state if it is a framework agreement).
Category of service within the sense of annex XVIA or XVIB and description (CPC classification).
3. Place of delivery, site or place of performance of service.
4. For supplies and works :
 - (a) Nature and quantity of the goods to be supplied;
or
the nature and extent of the services to be provided and general nature of the work.
 - (b) Indication of whether the suppliers can tender for some and/or all the goods required. If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots.
 - (c) For works contracts :
Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.
5. For services :
 - (a) Indication whether the execution of the service is by law, regulation, or administrative provision reserved to a particular profession;
 - (b) Reference of the law, regulation or administrative provision;
 - (c) Indication whether legal persons should indicate the names and professional qualification of the staff to be responsible for the execution of the services;
 - (d) Indication whether suppliers can tender for a part of the services concerned;
6. Derogation from the use of European specifications, in accordance with article 13 (6).
7. Time limits for delivery or completion or duration of service contract.
8.
 - (a) The final date for receipt of tenders.
 - (b) The address to which they must be sent.
 - (c) The language or languages in which they must be drawn up.
9. Where appropriate, any deposits and guarantees required.
10. Main terms concerning financing and payment and/or references to the texts in which these are contained.
11. Where appropriate, the legal form to be taken by the grouping of suppliers, contractors or providers to whom the contract is awarded.
12. Information concerning the supplier's, contractor's or provider's position and minimum economic and technical conditions required of him.
13. Where appropriate, the names and addresses of suppliers, contractors or providers already selected by the contracting entity.
14. Where applicable, date(s) of previous publications in the Official Journal of the European Communities.
15. Other information.

16. Where appropriate, the reference to publication of the periodic information notice in the Official Journal to which the contract refers.
17. Date of dispatch of the notice by the contracting entities.
18. Date of receipt of the notice by the Office for Official Publications of the European Communities (to be supplied by the said Office).

ANNEX XIV

Periodic Information Notice

C. For service contracts.

1. Name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity or the service from which additional information may be obtained.
2. Intended total procurement in each of the service categories listed in Annex XVIA;
3. (a) Estimated date of the commencement of the procedures of the award of the contract(s) (if known).

(b) Type of award procedure to be used.
4. Other information (for example, indicate if a call for competition will be published later).
5. Date of dispatch of the notice by the contracting entities.
6. Date of receipt of the notice by the Office for Official Publications of the European Communities (to be supplied by the said Office).

ANNEX XV

Notice on contracts awarded

I. INFORMATION FOR PUBLICATION IN THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES

1. Name and address of the contracting entity
2. Nature of the contract (supplies, works or services; where appropriate state if it is a framework agreement)
3. At least a summary indication of the nature of the products, works or services provided
4. (a) Form of the call for competition (notice on the existence of a qualification procedure; periodic information notice; call for tenders)
(b) Reference of publication of the notice in the Official Journal of the European Communities
(c) In the case of contracts awarded without a prior call for competition, indication of the relevant provision of Article 15(2), or Article 12b.
5. Award procedure (open, restricted or negotiated)
6. Number of tenders received
7. Date of award of the contract
8. Price paid for bargain purchases under Article 15(2)(j)
9. Name and address of successful supplier(s), contractor(s) or service provider(s)
10. State, where appropriate, whether the contract has been, or may be, sub-contracted.
11. Optional information:
 - value and share of the contract which may be sub-contracted to third parties;
 - award criteria;
 - price paid (or range of prices).

II. INFORMATION NOT INTENDED FOR PUBLICATION

12. Number of contracts awarded (where an award has been split between more than one supplier)
13. Value of each contract awarded
14. Country of origin of the product or service (EEC origin or non-Community origin; if the latter, broken down by third country)
15. Was recourse made to the exceptions to the use of European specifications provided for under Article 13(6). If so, which?
16. Which award criteria was used (most economically advantageous; lowest price; criteria permitted under Article 28)?
17. Was the contract awarded to a bidder who submitted a variant, in accordance with Article 27(3)?
18. Were any tenders excluded on the grounds that they were abnormally low, in accordance with Article 27(5)?
19. Date of transmission of the notice by the contracting entities.

ANNEX XVI A

Services in the sense of Article 12a

1	Maintenance and repair services	6112, 6122, 633, 886
2	Land transport services, including armoured car services, and courier services, except transport of mail	712 (except 71235) 7512 87304
3	Air transport services of passengers and freight, except transport of mail	73 (except 7321)
4	Transport of mail by land, except rail, and by air	71235, 7321
5	Telecommunications services	752*
6	Financial services	ex 81
	a) Insurance services	812, 814
	b) Banking and investment services	
7	Computer and related services	84
8	R&D services**	85
9	Accounting, auditing and book-keeping services	862
10	Market research and public opinion polling services	864
11	Management consulting services and related services	865, 866***
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	867
13	Advertising services	871
14	Building-cleaning services and property management services	874 82201, 82202
15	Publishing and printing services on a fee or contract basis	88442
16	Sewage and refuse disposal; sanitation and similar services	94

* except voice telephony, telex, radiotelephony, paging and satellite services

** as defined in the eighth recital

*** except arbitration and conciliation services

ANNEX XVI B

Services in the sense of Article 12b

Cat.	Title	CPC Division, Group, Class or Sub-Class
17	Hotel and restaurant services	64
18	Transport services by rail	711
19	Water transport services	72
20	Supporting and auxiliary transport services	74
21	Legal services	861
22	Placement and supply services of personnel	872
23	Investigation and security services (except armoured car services)	873 (except 87304)
24	Education and vocational educational services	92
25	Health and social services	93
26	Recreational, cultural and sporting services	96
27	Other services	

ANNEX XVII

Design Contest Notices

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority and of the service from which the relevant 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 envisaged number of participants, or range;
 - b) where applicable, names of already selected participants;
 - c) the criteria to be applied in the selection of participants;
 - d) final date for receipt of requests to participate;
6. Where applicable, indication whether participation is reserved to a particular profession;
7. The criteria to be applied in the evaluation of projects;
8. Where applicable, names of selected members of the jury;
9. Indication whether the decision of the jury is binding for the authority;
10. Where applicable, the number and value of the prizes to be awarded;
11. Where applicable, details on payments to all participants;
12. Indication whether the prize-winners are entitled to be awarded 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.

ANNEX XVIII

Results of Design contests

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the 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 receipt of the notice by the Office for Official Publications of the European Communities.

WORKING DOCUMENT

OF THE SERVICES OF THE COMMISSION

Consolidated text integrating the provisions of the

proposal for a Directive COM (91)...

(service contracts) into Directive 90/531/EEC

(supply and works contracts)

NOTE

The attached consolidated text aims at facilitating the reading and understanding of the proposal for a Directive concerning service contracts awarded in the water, energy, transport and telecommunications sectors(1).

This text integrates all the modifications relating to contracts for services into Directive 90/531/EEC which is applicable only to supply and works contracts.

The underlined text corresponds to the modified or new provisions which are to be found in the formal proposal; where the provisions do not specify that they only apply to supply or works contracts, it means that the provision concerned also applies to service contracts.

(1) COM (91)...of ...1991; proposal for a Council Directive amending Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

ANNEX CONSOLIDATED TEXT

TITLE I

GENERAL PROVISIONS

Article 1

For the purposes of this Directive:

- 1) "public authorities" shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

A body is considered to be governed by public law where it:

- is established for the specific purpose of meeting needs in the general interest, not being of a commercial or industrial nature, and

- has legal personality, and
 - is financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or other bodies governed by public law;
- 2) "public undertaking" shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:
- hold the major part of the undertaking's subscribed capital, or
 - control the majority of the votes attaching to shares issued by the undertaking, or
 - can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body;
- 3) "affiliated undertaking" shall mean any undertaking whose annual accounts are consolidated with those of the contracting entity in accordance with the requirements of Directive 83/349/EEC of 13 June 1983⁽¹⁾ or, in case of contracting entities not subject to that Directive, any undertaking over which the contracting

(1) OJ No L 193, 18.7.1983, p. 1.

entity may exercise, directly or indirectly, a dominant influence within the meaning of point 2, or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

- 4) "supply, works and service contracts" shall mean contracts for pecuniary interest concluded in writing between a supplier, a contractor or a service provider and one of the contracting entities defined in Article 2, to the exclusion of
- i) contracts for the acquisition or rental by whatever financial means, of land, existing buildings, or other immovable property or concerning rights therein;
 - ii) contracts for voice telephony, telex, radiotelephony, paging and satellite services ;
 - iii) contracts for arbitration and conciliation services.

These contracts have as their object :

- a) in the case of supply contracts, the purchase, lease, rental or hire purchase, with or without options to buy, of products;
- b) in the case of works contracts, either the execution, or both the execution and design or the realization, by whatever means, of building or civil engineering activities referred to in Annex XI. These contracts may, in addition, cover supplies and services necessary for their execution;

c) in the case of service contracts, any other provision.

Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract;

- 5) "framework agreement" shall mean an agreement between one of the contracting entities defined in Article 2 and one or more suppliers, contractors or service providers the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period;

- 6) "tenderer" shall mean a supplier, contractor or service provider who submits a tender and "candidate" shall mean a person who has sought an invitation to take part in a restricted or negotiated procedure ; service providers may be either natural or legal persons, including contracting entities within the meaning of Article 2;

- 7) "open, restricted and negotiated procedures" shall mean the award procedures applied by contracting entities whereby:
 - a) in the case of open procedures, all interested suppliers, contractors or service providers may submit tenders;

 - b) in the case of the restricted procedures, only candidates invited by the contracting entity may submit tenders;

- c) in the case of negotiated procedures, the contracting entity consults suppliers, contractors or service providers of its choice and negotiates the terms of the contract with one or more of them;
- 8) "technical specifications" shall mean the technical requirements contained in particular in the tender documents, defining the characteristics of a set of works, material, product, supply or a service, and enabling a piece of work, a material, a product, a supply or a service to be objectively described in a manner such that it fulfils the use for which it is intended by the contracting entity. These technical prescriptions may include quality, performance, safety or dimensions, as well as requirements applicable to the material, product, supply or a service as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. In the case of works contracts, they may also include rules for the design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting entity 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;
- 9) "standard" shall mean a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory;
- 10) "European standard" shall mean a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (CENELEC) as a

"European Standard (EN)" or "Harmonization Document (HD)", according to the common rules of those organizations, or by the European Telecommunications Standards Institute (ETSI) according to its own rules as a "European Telecommunications Standard (ETS)";

- 11) "common technical specification" shall mean a technical specification drawn up in accordance with a procedure recognized by the Member States with a view to uniform application in all Member States and published in the Official Journal of the European Communities;
- 12) "European technical approval" shall mean a favourable technical assessment of the fitness for use of a product for a particular purpose, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use, as provided for in Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products ⁽¹⁾. European technical approval shall be issued by an approval body designated for this purpose by the Member State;
- 13) "European specification" shall mean a common technical specification, a European technical approval or a national standard implementing a European standard;
- 14) "public telecommunications network" shall mean the public telecommunications infrastructure which enables signals to be conveyed between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means.

(1) OJ No L 40, 11.2.1989, p. 12.

"Network termination point" shall mean all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to, and efficient communication through, that public network;

- 15) "public telecommunications services" shall mean telecommunications services the provision of which the Member States have specifically assigned notably to one or more telecommunications entities.

"Telecommunications services" shall mean services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television.

- 16) "design contests" shall mean the procedures which aim at providing the contracting entity with a plan or design, mainly in the fields of architecture, civil engineering or data processing, and which are selected by a jury on the basis of competition with or without the award of prizes.

Article 2

- 1) This Directive shall apply to contracting entities which:
- a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;
 - b) or, when they are not public authorities or public undertakings, have as one of their activities any of those referred to in

paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2) Relevant activities for the purposes of this Directive shall be:

a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water; or

(ii) electricity; or

(iii) gas or heat;

or the supply of drinking water, electricity, gas or heat to such networks;

b) the exploitation of a geographical area for the purpose of:

(i) exploring for or extracting oil, gas, coal or other solid fuels, or

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

3) For the purpose of applying paragraph 1(b), special or exclusive rights shall mean rights deriving from authorizations granted by a competent authority of the Member State concerned, by law, regulation or administrative action, having as their result the reservation for one or more entities of the exploitation of an activity defined in paragraph 2.

A contracting entity shall be considered to enjoy special or exclusive rights in particular where:

a) for the purpose of constructing the networks or facilities referred to in paragraph 2, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway;

b) in the case of paragraph 2(a), the entity supplies with drinking water, electricity, gas or heat a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned.

4) The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of

paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the contracting entities.

5) The supply of drinking water, electricity, gas or heat to networks which provide a service to the public by a contracting entity other than a public authority shall not be considered as a relevant activity within the meaning of paragraph 2(a) where:

a) in the case of drinking water or electricity:

- the production of drinking water or electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than that referred to in paragraph 2, and
- supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of drinking water or energy, having regard to the average for the preceding three years, including the current year;

b) in the case of gas or heat:

- the production of gas or heat by the entity concerned is the unavoidable consequence of carrying on an activity other than that referred to in paragraph 2, and
- supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the entity's turnover having regard to the average for the preceding 3 years, including the current year.

- 6) The contracting entities listed in Annexes I to X shall fulfil the criteria set out above. In order to ensure that the lists are as exhaustive as possible, Member States shall notify the Commission of amendments to their lists. The Commission shall revise Annexes I to X in accordance with the procedure in Article 32.

Article 3

- 1) Member States may request the Commission to provide that exploitation of geographical areas for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels shall not be considered to be an activity defined in Article 2(2)(b)(i) and that entities shall not be considered as operating under special or exclusive rights within the meaning of Article 2(3)(b) by virtue of carrying on one or more of these activities, provided that all the following conditions are satisfied with respect to the relevant national provisions concerning such activities:
 - a) at the time when authorization to exploit such a geographical area is requested, other entities shall be free to seek authorization for that purpose under the same conditions as the contracting entities;
 - b) the technical and financial capacity of entities to engage in particular activities shall be established prior to any evaluation of the merits of competing applications for authorization;
 - c) authorization to engage in those activities shall be granted on the basis of objective criteria concerning the way in which it is intended to carry out the exploitation or extraction, which shall be established and published prior to the requests and applied in a non-discriminatory manner;

- d) all conditions and requirements concerning the carrying out or termination of the activity, including provisions on operating obligations, royalties, and participation in the capital or revenue of the entities, shall be established and made available prior to the requests for authorization being made and then applied in a non-discriminatory manner; every change concerning these conditions and requirements shall be applied to all the entities concerned, or else amendments must be made in a non-discriminatory manner; however, operating obligations need not be established until immediately before the authorization is granted; and
 - e) contracting entities shall not be required by any law, regulation, administrative requirement, agreement or understanding to provide information on a contracting entity's intended or actual sources of procurement, except at the request of national authorities and exclusively with a view to the objectives mentioned in Article 36 of the Treaty.
- 2) Member States which apply the provisions of paragraph 1 shall ensure, through the conditions of the authorization or other appropriate measures, that any entity:
- a) observes the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information that the entity makes available to undertakings concerning its procurement intentions;
 - b) communicates to the Commission, under conditions to be defined by the latter in accordance with Article 32, information relating to the award of contracts.

- 3) As regards individual concessions or authorizations granted before the date on which Member States apply this Directive in accordance with Article 37, paragraphs 1(a), (b) and (c) shall not apply, provided that at that date other entities are free to seek authorization for the exploitation of geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels, on a non-discriminatory basis and in the light of objective criteria. Paragraph 1(d) shall not apply as regards conditions or requirements established, applied or amended before the date referred to above.

- 4) A Member State which wishes to apply paragraph 1 shall inform the Commission accordingly. In doing so, it shall inform the Commission of any law, regulation or administrative provision, agreement or understanding relating to compliance with the conditions referred to in paragraphs 1 and 2.

The Commission shall take a decision in accordance with the procedure laid down in Article 32(4) to (7). It shall publish its decision, giving its reasons, in the Official Journal of the European Communities.

It shall forward to the Council each year a report on the implementation of this Article and review its application in the framework of the report provided for in Article 36.

Article 4

- 1) When awarding supply, works or service contracts, or organizing design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.

- 2) Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.
- 3) In the context of provision of technical specifications to interested suppliers, contractors or service providers of qualification and selection of suppliers, contractors or service providers and of award of contracts, contracting entities may impose requirements with a view to protecting the confidential nature of information which they make available.
- 4) The provisions of this Directive shall not limit the right of suppliers, contractors or service providers to require a contracting entity, in conformity with national law, to respect the confidential nature of information which they make available.

Article 5

- 1) Contracting entities may regard a framework agreement as a contract within the meaning of Article 1(3) and award it in accordance with this Directive.
- 2) Where contracting entities have awarded a framework agreement in accordance with this Directive, they may avail themselves of Article 15(2)(i) when awarding contracts based on that agreement.
- 3) Where a framework agreement has not been awarded in accordance with this Directive, contracting entities may not avail themselves of Article 15(2)(i).
- 4) Contracting entities may not misuse framework agreements in order to hinder, limit or distort competition.

Article 6

- 1) This Directive shall not apply to contracts or design contests which the contracting entities award or organize for purposes other than the pursuit of their activities as described in Article 2(2) or for the pursuit of such activities in a non-member country, in conditions not involving the physical use of a network or geographical area within the Community.

- 2) However, this Directive shall apply to contracts or design contests awarded or organized on behalf of the entities which exercise an activity referred to in Article 2(2)(a)(i) and which:
 - a) are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by these projects or irrigation or drainage installations, or

 - b) are connected with the disposal or treatment of sewage.

- 3) The contracting entities shall notify the Commission at its request of any activities they regard as excluded under paragraph 1. The Commission may periodically publish lists of the categories of activities which it considers to be covered by this exclusion, for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 7

- 1) The provisions of this Directive shall not apply to :
 - a) contracts awarded for purposes of re-sale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity;
 - b) service contracts directly relating to the re-sale or hire mentioned under a).

- 2) The contracting entities shall notify the Commission at its request of all the categories of products they regard as excluded under paragraph 1. The Commission may periodically publish lists of the categories of activities which it considers to be covered by this exclusion, for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 8

- 1) This Directive shall not apply to contracts which contracting entities exercising an activity described in Article 2(2)(d) award for purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions.

- 2) The contracting entities shall notify the Commission at its request of any services they regard as covered by the exclusion referred to in paragraph 1. The Commission may periodically publish the list of services which it considers to be covered by this exclusion, for information in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.

Article 9

- 1) This Directive shall not apply to:
 - a) contracts which the contracting entities listed in Annex I award for the purchase of water;
 - b) contracts which the contracting entities specified in Annexes II, III, IV and V award for the supply of energy or of fuels for the production of energy.
- 2) The Council shall re-examine the provisions of paragraph 1 when it has before it a report from the Commission together with appropriate proposals.

Article 10

This Directive shall not apply to contracts when they are declared to be secret by the Member State, when their execution must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic security interests of that State so requires.

Article 10a

The provisions of this Directive shall not apply to the award of service contracts which contracting entities have to award to an entity which is itself a contracting entity within the meaning of Article 1(b) of Directive ../.../EEC (*) pursuant to an exclusive right established by a published law, regulation or administrative provision which is compatible with the Treaty.

*) OJ No C 23, 31.1.1991, p. 1.

Article 11

This Directive shall not apply to contracts governed by different procedural rules and awarded:

- 1) pursuant to an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering supplies, works, services or design contests intended for the joint implementation or exploitation of a project by the signatory States; every agreement shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts set up by Council Decision 71/306/EEC (1), as last amended by Decision 77/63/EEC (2), or, in the case of agreements governing contracts awarded by entities exercising an activity defined in Article 2(2)(d), the Advisory Committee on Telecommunications Procurement referred to in Article 31;
- 2) to undertakings in a Member State or a third country in pursuance of an international agreement relating to the stationing of troops;
- 3) pursuant to the particular procedure of an international organization

(1) OJ No L 185, 16.8.1971, p. 15.

(2) OJ No L 13, 15.1.1977, p. 15.

Article 11a

1. This Directive shall not apply to contracts for services which
 - a) a contracting entity awards to affiliated undertaking;
 - b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2(2) to an undertaking which is affiliated with one of these contracting entities;

provided that at least 85 % of the average turnover of that undertaking arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

2. The contracting entities notify the Commission, at its request, the following information regarding the application of the provisions of paragraph 1 :
 - the names of the undertakings concerned;
 - the nature and value of the service contracts involved;
 - such proof as may be deemed necessary by the Commission that the relationship between the undertaking to which the contracts are awarded and the contracting entity is in conformity with the requirements of this Article.

Article 12

- 1) This Directive shall apply to contracts whose estimated value, net of VAT, is not less than :

- a) ECU 400 000 in the case of supply and service contracts awarded by entities carrying out an activity defined in Article 2(2)(a), (b) and (c);
 - b) ECU 600 000 in the case of supply and service contracts awarded by entities carrying out an activity defined in Article 2(2)(d);
 - c) ECU 5 000 000 in the case of works contracts
- 2) The estimated value of a service contract shall include the total remuneration of the service provider taking account of the elements specified in paragraphs 3 to 12.
 - 3) In assessing the estimated contract value of financial services, the following amounts shall be taken into account:
 - as regards insurance services, the premium payable;
 - as regards banking and other financial services, fees, commissions, interest and other types of remuneration.
 - 4) In the case of supply contracts for lease, rental or hire-purchase, or of service contracts not indicating the total cost, the basis for calculating the contract value shall be:
 - a) in the case of fixed-term contracts, where their term is twelve months or less, the estimated total value for the contract's duration, or, where their term exceeds twelve months, the contract's total value including the estimated residual value;

b) in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the anticipated total instalments to be paid in the first four years.

5) Where a proposed supply or service contract expressly specifies option clauses, the basis for calculating the contract value shall be the highest possible total purchase, lease, rental or hire-purchase permissible, inclusive of the option clauses.

6) In the case of a procurement of supplies or services over a given period by means of a series of contracts to be awarded to one or more suppliers or of contracts which are to be renewed, the contract value shall be calculated on the basis of:

a) the total value of contracts which had similar characteristics awarded over the previous fiscal year or twelve months, adjusted where possible for anticipated changes in quantity or value over the subsequent twelve months;

b) or the aggregate value of contracts to be awarded during the twelve months following the first award or during the whole term of the contract, where this is longer than twelve months.

7) The basis for calculating the estimated value of a contract including both supplies and services, shall be the total value of the supplies and services regardless of their respective values.

- 8) The basis for calculating the value of a framework agreement shall be the estimated maximum value of all the contracts envisaged for the period in question.
- 9) The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. "Work" shall mean the building and engineering activities taken as a whole that are intended to fulfil an economic function by themselves.

In particular, where a supply, work or service is the subject of several lots, the value of each lot shall be taken into account when assessing the value referred to in paragraph 1. Where the aggregate value of the lots equals or exceeds the value laid down in paragraph 1, that paragraph shall apply to all the lots. However, in the case of works contracts, contracting entities may derogate from paragraph 1 in respect of lots whose estimated value net of VAT is less than ECU 1 million, provided that the aggregate value of those lots does not exceed 20% of the overall value of the lots.

- 10) For the purposes of paragraph 1, contracting entities shall include in the estimated value of a works contract the value of any supplies or services necessary for the execution of the works which they make available to the contractor.
- 11) The value of supplies or services which are not necessary for the execution of a particular works contract may not be added to that of the contract with the result of avoiding application of this Directive to the procurement of those supplies.

- 12) Contracting entities may not circumvent this Directive by splitting contracts or using special methods of calculating the value of contracts.

Title Ia

TWO-TIER APPLICATION

Article 12a

Supply and works contracts and contracts which have as their object services listed in Annex XVIA shall be awarded in accordance with the provisions of Titles II, III and IV.

Article 12b

Contracts which have as their object services listed in Annex XVIB shall be awarded in accordance with Articles 13 and 18.

Article 12c

Contracts which have as their object services listed in both Annexes XVIA and XVIB shall be awarded in accordance with the provisions of Titles II, III and IV where the value of the services listed in Annex XVIA is greater than the value of the services listed in Annex XVIB. Where this is not the case, they shall be awarded in accordance with Articles 13 and 18.

TITLE II

TECHNICAL SPECIFICATIONS AND STANDARDS

Article 13

- 1) Contracting entities shall include the technical specifications in the general documents or the contract documents relating to each contract.
- 2) The technical specifications shall be defined by reference to European specifications where these exist.
- 3) In the absence of European specifications, the technical specifications should as far as possible be defined by reference to other standards having currency within the Community.
- 4) Contracting entities shall define such further requirements as are necessary to complement European specifications or other standards. In doing so, they shall prefer specifications that indicate performance requirements rather than design or description characteristics unless the contracting entity has objective reasons for considering that such specifications are inadequate for the purposes of the contract.
- 5) Technical specifications which mention goods of a specific make or source or of a particular process, and which have the effect of favouring or eliminating certain undertakings, shall not be used unless such specifications are indispensable for the subject of the contract. In particular, the indication of trade marks, patents,

types, or specific origin or production shall be prohibited; however, such an indication accompanied by the words "or equivalent" shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.

- 6) Contracting entities may derogate from paragraph 2 if:
- a) it is technically impossible to establish satisfactorily that a product conforms to the European specifications;
 - b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment⁽¹⁾, or of Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications⁽²⁾;
 - c) in the context of adapting existing practice to take account of European specifications, use of these specifications would oblige the contracting entity to acquire supplies incompatible with equipment already in use or would entail disproportionate cost or disproportionate technical difficulty. Contracting entities which have recourse to this derogation shall do so only as part of a clearly defined and recorded strategy with a view to a change-over to European specifications;
 - d) the relevant European specification is inappropriate for the particular application or does not take account of technical developments which have come about since its adoption.

(1) OJ No L 217, 5.8.1986, p. 21.

(2) OJ No L 36, 7.2.1987, p. 31.

Contracting entities which have recourse to this derogation shall inform the appropriate standardizing organization, or any other body empowered to review the European specification, of the reasons why they consider the European specification to be inappropriate and shall request its revision;

- e) the project is of a genuinely innovative nature for which use of European specifications would not be appropriate.
- 7) Notices published pursuant to Article 16(1)(a) shall indicate any recourse to the derogations referred to in paragraph 6.
 - 8) This Article shall be without prejudice to compulsory technical rules insofar as these are compatible with Community law.

Article 14

- 1) Contracting entities shall make available on demand to suppliers, contractors or service providers interested in obtaining a contract the technical specifications regularly referred to in their supply, works or service contracts or the technical specifications which they intend to apply to contracts covered by periodic information notices within the meaning of Article 17.
- 2) Where such technical specifications are based on documents available to interested suppliers, contractors or service providers a reference to those documents shall be sufficient.

TITLE III

PROCEDURES FOR THE AWARD OF CONTRACTS

Article 15

- 1) Contracting entities may choose any of the procedures described in Article 1(6), provided, subject to paragraph 2, a call for competition has been made in accordance with Article 16.

- 2) Contracting entities may use a procedure without prior call for competition in the following cases:
 - a) in the absence of tenders or suitable tenders in response to a procedure with a prior call for competition, provided that the original contract conditions have not been substantially changed;

 - b) where a contract is purely for the purpose of research, experiment, study or development and not for the purpose of ensuring profit or of recovering research and development costs and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which have in particular these purposes;

 - c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier, contractor or service provider;

- d) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for open and restricted procedures cannot be adhered to;
- e) in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- f) for additional works or services not included in the project initially awarded or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the execution of the contract, on condition that the award is made to the contractor executing the original contract:
- when such additional works or services cannot be technically or economically separated from the main contract without great inconvenience to the contracting entities;
 - or when such additional works or services, although separable from the execution of the original contract, are strictly necessary to its later stages;
- g) in the case of works contracts, for new works consisting of the repetition of similar works entrusted to the contractor to which the same contracting entities awarded an earlier contract, provided that such works conform to a basic project for which a

first contract was awarded after a call for competition. As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting entities when they apply the provisions of Article 12;

- h) for supplies quoted and purchased on a commodity market;
- i) for contracts to be awarded on the basis of a framework agreement, provided that the condition referred to in Article 5(2) is fulfilled;
- j) for bargain purchases, where it is possible to procure supplies taking advantage of a particularly advantageous opportunity available for a very short space of time at a price considerably lower than normal market prices;
- k) for purchases of goods under particularly advantageous conditions either from a supplier definitively winding up his business activities or from the receivers or liquidators of a bankruptcy, an arrangement with creditors or a similar procedure under national laws or regulations.
- l) when the service contract concerned is part of the follow-up to a design contest organized in conformity with the provisions of this Directive and must, in accordance with the relevant rules, be awarded to one of the winners of that contest, provided that all the winners are included in the procedure.

Article 16

- 1) In the case of supply, works or service contracts, the call for competition may be made:
 - a) by means of a notice drawn up in accordance with Annex XII A, B or C; or
 - b) by means of a periodic indicative notice drawn up in accordance with Annex XIV; or
 - c) by means of a notice on the existence of a qualification system drawn up in accordance with Annex XIII.
- 2) When a call for competition is made by means of a periodic indicative notice:
 - a) the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;
 - b) the notice must indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested undertakings to express their interest in writing;
 - c) contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations.

- 3) When a call for competition is made by means of a notice on the existence of a qualification system, tenderers in a restricted procedure or participants in a negotiated procedure shall be selected from the qualified candidates in accordance with such a system.
- 4) in the case of design contests, the call for competition shall be made by means of a notice drawn up in accordance with Annex XVII.
- 5) The notices referred to in this Article shall be published in the Official Journal of the European Communities.

Article 17

- 1) Contracting entities shall make known at least once a year, by means of a periodic indicative notice:
 - a) in the case of supply contracts, the total of the contracts for each product area of which the estimated value, taking into account the provisions of Article 12, is equal to or greater than ECU 750 000, and which they intend to award over the following twelve months;
 - b) in the case of works contracts, the essential characteristics of the works contracts which the contracting entities intend to award, the estimated value of which is not less than the threshold laid down in Article 12(1).
 - c) in the case of service contracts, the estimated total value of the service contracts in each of the categories of services listed in Annex XVI A which they intend to award over the

following 12 months, where such estimated total value, taking into account the provisions of Article 12, is equal to or greater than ECU 750 000.

- 2) The notice shall be drawn up in accordance with Annex XIV and published in the Official Journal of the European Communities.
- 3) Where the notice is used as a means of calling for competition in accordance with Article 16(1)(b), it must have been published not more than 12 months prior to the date on which the invitation referred to in Article 16(2)(c) is sent. Moreover the contracting entity shall meet the deadlines laid down in Article 20(2).
- 4) Contracting entities may, in particular, publish periodic indicative notices relating to major projects without repeating information previously included in a periodic indicative notice, provided it is clearly stated that such notices are additional notices.

Article 17a

- 1) Design contests shall be subject to the rules set out below. However, when design contests are held as a separate procedure, these rules are applicable only when the total amount of prizes and payments to participants is not less than ECU 200 000.
- 2) The admission of participants to design contests shall not be limited by reference to the territory or part of the territory of a Member State.
- 3) In the case of design contests with a limited number of participants, contracting entities shall apply the rules of Article 25.

- 4) The jury shall be composed only of persons who have no financial connections or special relationships with participants in the contest. Whenever a particular professional qualification is required from participants in a contest, the majority of the jury members shall have the same qualifications. The jury shall be autonomous in its decisions. It shall take its decisions based on projects presented in an anonymous way, and solely on the grounds of the criteria indicated in the invitation for projects within the meaning of Annex XVII.

- 5) Member States may oblige contracting entities to award subsequent contracts to one of the winners of a design contest.

Article 18.

- 1) Contracting entities which have awarded a contract or organised a design contest shall communicate to the Commission, within two months of the award of the contract and under conditions to be laid down by the Commission in accordance with the procedure laid down in Article 32, the results of the awarding procedure by means of a notice drawn up in accordance with Annex XV or Annex XVIII.

- 2) Except where paragraph 4 is applied, information provided under Section I of Annex XV or under Annex XVIII shall be published in the Official Journal of the European Communities. In this connection the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information in connection with points 6 and 9 of Annex XV.

- 3) The contracting entities applying the provisions of Article 15(2)(b) or awarding service contracts listed in

Annex XVI B, may, concerning point 3 of Annex XV, only mention the main title thereof within the meaning of the classification of Annex XVI A.

- 4) Information provided under Section II of Annex XV must not be published or mentioned in the periodic reports except, in aggregated form, for statistical purposes.

Article 19

- 1) The contracting entities must be able to supply proof of the date of dispatch of the notices referred to in Articles 15 to 18.
- 2) The notices shall be published in full in their original language in the Official Journal of the European Communities and in the TED data bank. A summary of the important elements of each notice shall be published in the other official languages of the Community, the original text alone being authentic.
- 3) The Office for Official Publications of the European Communities shall publish the notices not later than twelve days after their dispatch. In exceptional cases it shall endeavour to publish the notice referred to in Article 16(1)(a) within five days in response to a request by the contracting entity and provided the notice has been sent to the Office by electronic mail, telex or telefax. Each edition of the Official Journal of the European Communities which contains one or more notices shall reproduce the model notice or notices on which the published notice or notices are based.
- 4) The cost of publication of the notices in the Official Journal of the European Communities shall be borne by the Communities.
- 5) Contracts or design contests in respect of which a notice is

published in the Official Journal of the European Communities pursuant to Article 16(1) or Article 16(4) shall not be published in any other way before that notice has been dispatched to the Office for Official Publications of the European Communities. Such publication shall not contain information other than that published in the Official Journal of the European Communities.

Article 20

- 1) In open procedures the time limit for the receipt of tenders shall be fixed by contracting entities at not less than 52 days from the date of dispatch of the notice. This time limit may be shortened to 36 days where contracting entities have published a notice in accordance with Article 17(1).
- 2) In restricted procedures and in negotiated procedures with a prior call for competition, the following arrangements shall apply:
 - a) the time limit for receipt of requests to participate, in response to a notice published in accordance with Article 16(1)(a) or in response to an invitation from a contracting entity in accordance with Article 16(2)(c), shall, as a general rule, be at least five weeks from the date of dispatch of the notice and shall in any case not be less than the time limit for publication laid down in Article 19(3) plus 10 days;
 - b) the time limit for receipt of tenders may be fixed by mutual agreement between the contracting entity and the selected candidates, provided that all tenderers are given equal time to prepare and submit tenders;

c) where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall, as a general rule, be at least three weeks and shall in any case not be less than 10 days from the date of the invitation to tender; the time allowed shall be sufficiently long to take account in particular of the factors mentioned in Article 22(3).

Article 21

In the contract documents, the contracting entity may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal contractor's responsibility.

Article 22

- 1) Provided they have been requested in good time, the contract documents and supporting documents must be sent to the suppliers, contractors or service providers by the contracting entities as a general rule within six days of receipt of the application.
- 2) Provided it has been requested in good time, additional information relating to the contract documents shall be supplied by the contracting entities not later than six days before the final date fixed for receipt of tenders.
- 3) Where tenders require the examination of voluminous documentation such as lengthy technical specifications, a visit to the site or an

on-the-spot inspection of the documents supporting the contract documents, this shall be taken into account in fixing the appropriate time limits.

4) Contracting entities shall invite the selected candidates simultaneously and in writing. The letter of invitation shall be accompanied by the contract documents and supporting documents. It shall include at least the following information:

a) the address from which any additional documents can be requested, the final date for such requests and the amount and methods of payment of any sum to be paid for such documents;

b) the final date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;

c) a reference to any tender notice published;

d) an indication of any document to be annexed;

e) the criteria for the award of the contract if these are not given in the notice;

f) any other special condition for participation in the contract.

5) requests for participation in contracts and invitations to tender must be made by the most rapid means of communication possible. When requests to participate are made by telegram, telex, telefax, telephone or any electronic means, they must be confirmed by letter dispatched before the expiry of the time limit referred to in Article 20(1) or of the time limit set by contracting entities pursuant to Article 20(2).

Article 23

- 1) The contracting entity may state in the contract documents, or be obliged by a Member State so to do, 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 works or services are to be executed or performed and which shall be applicable to the works carried out or the services performed on site during the performance of the contract.

- 2) A contracting entity which supplies the information referred to in paragraph 1 shall request the tenderers or those participating in the contract procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the work or the service is to be carried out or performed. This shall be without prejudice to the application of the provisions of Article 27(5) concerning the examination of abnormally low tenders.

TITLE IV

QUALIFICATION, SELECTION AND AWARD

Article 24

- 1) Contracting entities which so wish may establish and operate a system of qualification of suppliers, contractors or service providers.

- 2) The system, which may involve different qualification stages, shall operate on the basis of objective rules and criteria to be established by the contracting entity. The contracting entity shall use European standards as a reference where they are appropriate. The rules and criteria may be updated as required.
- 3) The rules and criteria for qualification shall be made available on request to interested suppliers, contractors or service providers. The updating of these criteria and rules shall be communicated to the interested suppliers, contractors and service providers. Where a contracting entity considers that the qualification system of certain third entities or bodies meet its requirements, it shall communicate to interested suppliers, contractors and service providers the names of such third entities or bodies.
- 4) Contracting entities shall inform applicants of their decision as to qualification within a reasonable period. If the decision will take longer than six months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying a longer period and of the date by which its application will be accepted or refused.
- 5) In reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities may not:
 - impose conditions of an administrative, technical or financial nature on some suppliers, contractors or service providers that are not imposed on others;
 - require tests or proof that duplicate objective evidence already available.

- 6) Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal. The reasons must be based on the criteria for qualification referred to in paragraph 2.
- 7) A written record of qualified suppliers, contractors or service providers shall be kept, and it may be divided into categories according to the type of contract for which the qualification is valid.
- 8) Contracting entities may bring the qualification of a supplier, contractor or service provider to an end only for reasons based on the criteria referred to in paragraph 2. The intention to bring qualification to an end must be notified in writing to the supplier, contractor or service provider beforehand, together with the reason or reasons justifying the proposed action.
- 9) The qualification system shall be the subject of a notice drawn up in accordance with Annex XIII and published in the Official Journal of the European Communities, indicating the purpose of the qualification system and the availability of the rules concerning its operation. Where the system is of a duration greater than three years, the notice shall be published annually. Where the system is of a shorter duration, an initial notice shall suffice.

Article 25

- 1) Contracting entities which select candidates to tender in restricted procedures or to participate in negotiated procedures shall do so according to objective criteria and rules which they lay down and which they shall make available to interested suppliers, contractors or service providers.

- 2) The criteria used may include the criteria for exclusion specified in Article 23 of Directive 71/305/EEC and in Article 20 of Directive 77/62/EEC.
- 3) The criteria may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the contract award procedure and the resources required to complete it. The number of candidates selected must, however, take account of the need to ensure adequate competition.

Article 25a

Should entities require the production of certificates drawn up by independent bodies for attesting conformity of the service provider to certain quality assurance standards, they shall refer to quality assurance systems based on the relevant EN 29000 European standards series certified by bodies conforming to the EN 45000 European Standards series. Entities shall recognise equivalent certificates from bodies established in other Member States.

They shall also accept other evidence of equivalent quality assurance measures from service providers who have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

Article 26

- 1) Groupings of suppliers, contractors or service providers shall be permitted to tender or negotiate. The conversion of such groupings into a specific legal form shall not be required in order to submit

a tender or to negotiate, but the grouping selected may be required so to convert itself once it has been awarded the contract where such conversion is necessary for the proper performance of the contract.

- 2) 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, shall not be rejected on the sole grounds that under the law of the Member State in which the contract is awarded they would have been required to be either a natural or a legal person.
- 3) Legal persons may be required to indicate in the tender or the request for participation, the names and relevant professional qualifications of the staff to be responsible for the performance of the service.

Article 27

- 1) Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:
 - a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or
 - b) the lowest price only.

- 2) the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance.
- 3) Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting entities. Contracting entities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. Where variants are not permitted, they shall so indicate in the contract documents.
- 4) Contracting entities may not reject the presentation of a variant on the sole ground that it was drawn up on the basis of technical specifications defined with reference to European specifications or to national technical specifications recognized as complying with the essential requirements within the meaning of Directive 89/106/EEC.
- 5) If, for a given contract, tenders appear abnormally low in relation to the services, the contracting entity shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received. It may set a reasonable period within which to reply.

The contracting entity may take into consideration explanations which are justified on objective grounds relating to the economy of the construction or production method, or the technical solutions

chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the contract, or the originality of the product or the work proposed by the tenderer.

Contracting entities may reject tenders which are abnormally low owing to the receipt of State aid only if they have consulted the tenderer and if the tenderer has not been able to show that the aid in question has been notified to the Commission pursuant to Article 93(3) of the Treaty or has received the Commission's approval. Contracting entities which reject a tender under these circumstances shall inform the Commission thereof.

- 6) In the case of a tender for the award of a service contract submitted by a public authority or a public undertaking, the contracting entity shall in particular enquire whether the tender is influenced by public funds allocated for
- a) the setting-off of operating losses ;
 - b) the provision of capital ;
 - c) non-refundable grants, or loans on privileged terms;
 - d) the granting of financial advantages by foregoing profits or the recovery of sums due ;
 - e) the foregoing of a normal return on public funds used ;
 - f) compensation for financial burdens imposed by the public authorities.

It shall inform the Commission if it intends to award a contract to a tenderer whose tender is influenced by any of these characteristics.

Article 28

- 1) Article 27(1) shall not apply where a Member State bases the award of contracts on other criteria within the framework of rules in force at the time of adoption of this Directive whose aim is to give preference to certain tenderers, provided the rules invoked are compatible with the Treaty.
- 2) Without prejudice to paragraph 1, this Directive shall not prevent, until 31 December 1992, the application of national provisions in force on the award of supply or works contracts which have as their objective the reduction of regional disparities and the promotion of job creation in disadvantaged regions or those suffering from industrial decline, provided that the provisions concerned are compatible with the Treaty and with the Community's international obligations.

Article 29

- 1) This Article shall apply to tenders comprising products originating in third countries with which the Community has not concluded, multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Community or its Member States in respect of third countries.
- 2) Any tender made for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 802/68 of 27 June 1968 on the common definition of the concept of the origin of goods (1), as last amended by

(1) OJ No L 148, 28. 6.1968, p. 1.

Regulation (EEC) No 3860/87 (1) exceeds 50% of the total value of the products constituting the tender. For the purposes of this Article, software used in the equipment of telecommunications networks shall be considered as products.

- 3) Subject to paragraph 4, where two or more tenders are equivalent in the light of the award criteria defined in Article 27, preference shall be given to the tenders which may not be rejected pursuant to paragraph 2. The prices of these tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3%.
- 4) However, a tender shall not be preferred to another pursuant to paragraph 3 where its acceptance would oblige the contracting entity to acquire material having technical characteristics different from those of existing material, resulting in incompatibility or technical difficulties in operation and maintenance or disproportionate costs.
- 5) For the purposes in this Article, of determining the proportion referred to in paragraph 2 of products originating in third countries, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account.
- 6) The Commission shall submit an annual report to the Council (for the first time in the second half of 1991) on progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

(1) OJ No L 363, 23.12.1987, p. 30.

The Council, acting by a qualified majority on a proposal from the Commission, may amend the provisions of this Article in the light of such developments.

Article 29a

- 1) The Member States shall inform the Commission of any general difficulties encountered, in law or in fact, by their undertakings in securing the award of service contracts in third countries.
- 2) The Commission shall report to the Council before 31 December 1992 and periodically thereafter on the opening-up of service contracts in third countries and on the state of negotiations with these countries on this subject, particularly within the GATT framework.
- 3) Whenever the Commission establishes, either on the basis of the reports referred to in paragraph 2, or on the basis of other information, that a third country as regards the award of service contracts,
 - a) does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country,
 - b) does not grant Community undertakings national treatment or the same competitive opportunities as are available to national undertakings, or
 - c) grants undertakings from other third countries more favorable treatment than Community undertakings,

the Commission may initiate negotiations in order to remedy the situation.

4) Under the conditions referred to in paragraph 3, the Commission may decide, in addition to action taken pursuant to that paragraph, that the award of service contracts to

a) undertakings governed by the law of the third country in question,

b) undertakings affiliated to the undertakings specified in (a) and having their registered office in the Community but having no effective and continuous link with the economy of a Member State,

c) undertakings submitting tenders which have as their object services originating in the third country in question,

may be suspended or restricted during a period to be determined in the decision. The Commission may decide on the appropriate measures either on its own initiative or at the request of a Member State, after consulting the Member States in accordance with the procedure laid down in Article 32(5), (6) and (7). Where the Commission is asked to take action by a Member State, it shall take a decision within a maximum period of three months of receipt of the request.

It shall notify the Council and the Member States of the decisions taken.

Any Member State may refer the Commission's decision to the Council within a maximum period of four weeks from the date of the decision.

The Council, acting by qualified majority, may take a different decision within a maximum period of three months of such referral.

- 5) This Article is without prejudice to the obligations of the Community in relation to non-member countries.

TITLE V

FINAL PROVISIONS

Article 30

- 1) The value in national currencies of the thresholds specified in Article 12 shall, in principle be revised every two years with effect from the date provided for in Directive 77/62/EEC as far as the thresholds for supply and service contracts are concerned and from the date provided for in Directive 71/305/EEC as far as the thresholds for works contracts are concerned. The calculation of such value shall be based on the average daily values of those currencies expressed in ECU over the 24 months terminating on the last day of October preceding the revision with effect from 1 January. The values shall be published in the Official Journal of the European Communities at the beginning of November.
- 2) The method of calculation laid down in paragraph 1 shall be examined pursuant to the provisions of Directive 77/62/EEC.

Article 31

- 1) The Commission shall be assisted, as regards procurement by the contracting entities exercising an activity defined in Article 2(2)(d), by a Committee of an advisory nature which shall be the

Advisory Committee on Telecommunications Procurement. The Committee shall be composed of representatives of the Member States and chaired by a representative of the Commission.

- 2) The Commission shall consult this Committee on:
 - a) amendments to Annex X;
 - b) revision of the currency values of the thresholds;
 - c) the rules concerning contracts awarded under international agreements;
 - d) the review of the application of this Directive;
 - e) the procedures described in Article 32(2) relating to notices and statistical accounts;

Article 32

- 1) Annexes I to X shall be revised in accordance with the procedure laid down in paragraphs 3 to 7 with a view to ensuring that they fulfill the criteria of Article 2.
- 2) The conditions for the presentation, dispatch, reception, translation, keeping and distribution of the notices referred to in Articles 16, 17, and 18 and of the statistical reports provided for in Article 34, shall be established, for the purposes of simplification, in accordance with the procedure laid down in paragraphs 3 to 7.
- 3) The revised Annexes and the conditions referred to in paragraphs 1 and 2 shall be published in the Official Journal of the European Communities.

- 4) The Commission shall be assisted by the Advisory Committee for Public Contracts and, in the case of the revision of Annex X, by the Advisory Committee on Telecommunications Procurement provided for in Article 31 of this Directive.
- 5) The Commission representative shall submit to the Committee a draft of the decisions to be taken. The Committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter, if necessary by taking a vote.
- 6) The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask for its position to be recorded in the minutes.
- 7) The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

Article 33

- 1) Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:
 - a) the qualification and selection of contractors, suppliers or of providers of services and award of contracts;
 - b) recourse to derogations from the use of European specifications in accordance with Article 13(6);
 - c) use of procedures without prior call for competition in accordance with Article 15(2);

- d) non-application of Titles II, III and IV in accordance with the derogations provided for in Title I.
- 2) The information shall be kept for at least 4 years from the date of award of the contract so that the contracting entity will be able, during that period, to provide the necessary information to the Commission if it so requests.

Article 34

- 1) The Member States shall ensure that each year, in accordance with the arrangements to be laid down under the procedure provided for in Article 32(3) to (7), the Commission receives a statistical report concerning the total value, broken down by Member State and each category of activity to which Annexes I to X refer, of the contracts awarded below the thresholds defined in Article 12 which would, if they were not below those thresholds, be covered by this Directive.
- 2) Arrangements shall be fixed in accordance with the procedure referred to in Article 32 to ensure that:
- a) in the interests of administrative simplification, contracts of lesser value may be excluded, provided that the usefulness of the statistics is not jeopardized;
- b) the confidential nature of the information provided is respected.

Article 35

- 1) Article 2(2) of Directive 77/62/EEC is hereby replaced by the following:

"2.This Directive shall not apply to:

- a) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors(*) or fulfilling the conditions in Article 6(2) of the said Directive;
- b) supplies which are declared secret or when their delivery must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.

(*) OJ No L 297, 29.10.1990, p.1."

2) Article 3(4) and (5) of Directive 71/305/EEC is hereby replaced by the following:

"4.This Directive shall not apply to contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (*) or fulfilling the conditions in Article 6(2) of the said Directive.

(*) OJ No L 297, 29.10.1990, p.1."

Article 36

Not later than four years after the application of this Directive, the Commission, acting in close cooperation with the Advisory Committee for Public Contracts, shall review the manner in which this Directive has operated and its field of application and if necessary, it shall make further proposals to adapt it, in the light of developments and the level of competition. In the case of entities exercising an activity defined in Article 2(2)(d), the Commission shall act in close cooperation with the Advisory Committee on Telecommunications Procurement.

Article 37

- 1) Member States shall adopt the measures necessary to comply with the provisions relating to works and supply contracts of this Directive by 1 July 1992. They shall forthwith inform the Commission thereof.

Member States may stipulate that the measures referred to shall apply only from 1 January 1993.

- 2) Member States shall apply the measures relating to service contracts by 1 January 1993.
- 3) Nevertheless, in the case of the Kingdom of Spain, 1 January 1993 shall be replaced by 1 January 1996. As regards the Hellenic Republic and the Portuguese Republic, 1 January 1993 shall be replaced by 1 January 1998.

- 4) Council Recommendation 84/550/EEC of 12 November 1984 concerning the first phase of opening up access to public telecommunications contracts⁽¹⁾ shall cease to have effect as from the date on which this Directive is applied by the Member States.

Article 37a

When Member States adopt the provisions referred to in Article 37 these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by the Member States.

Article 38

Member States shall communicate to the Commission the text of the main provisions of national law, whether laws, regulations or administrative provisions, which they adopt in the field governed by this Directive.

Article 39

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

(1) OJ No L 298, 16.11.1984, p. 51.

FINANCIAL STATEMENT

1. Title of operation

Proposal for a Council Directive amending Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

2. Budget heading involved: B5-304

3. Legal basis

Articles 52, 57(2), 66, 100a and 113 of the EEC Treaty.

4. Description of operation

4.1 Specific objectives of operation

Opening up of public procurement in services through the harmonization of national rules for the award of contracts; transparency of procedures as regards the preparation of contracts, advertising of tenders and the results of the award procedures.

4.2 Duration

Indefinite, although decisions are taken specifically every year.

4.3 Target population

Operators inside and outside the Community.

5. Classification of expenditure

Non-compulsory.
Non-differentiated appropriations.

6. Type of expenditure

See point 7.1.

7. Financial impact

7.1 Method of calculation

The figures mentioned below show the cost of approximately 1 500 notices in 1993, especially notices on the existence of a qualification system and notices on contracts awarded (tender notices to a lesser extent)

and approximately 10 000 notices in 1994 (increase in the number of periodic information notices and notices on contracts awarded). In the Supplement to the Official Journal of the European Communities (Series S), each page will contain two notices. The Directive will therefore mean an extra 750 pages in 1993 and 5 000 in 1994. Since each page costs ECU 160.48, the expenditure entailed by the Directive will be:

ECU in 1993, and
ECU in 1994.

However, it is difficult to quantify the additional expenditure resulting from the implementation of the Directive. The programme for opening up public procurement comprises several measures which will enter into force progressively and which involve additional expenditure. Moreover, contracting authorities covered by the directives already in force are tending increasingly to fulfil their advertising obligations. Compliance with the advertising rules will also be improved in the years ahead by the implementation in all Member States of Community rules ensuring a minimum of legal protection for firms which believe they have been discriminated against by contracting authorities' decisions.

In addition, the Commission is in the process of launching important measures to reduce further the costs of the Supplement, e.g. by introducing fully standardized notices.

The additional expenditure described above will be taken into account in the budget forecasts submitted under the annual budget procedure.

7.2 Proportion of mini-budget in total cost of operation

No mini-budget.

7.3 Indicative schedule (commitment appropriations)

Not applicable (specific measure).

8. Anti-fraud provisions planned in the proposal for the operation

The usual general provisions laid down by Financial Control.

9. Elements of cost-effectiveness analysis

9.1 Assessment and analysis of objectives

Public supply, works and services contract notices communicated by the Member States pursuant to Community directives or by certain

non-member countries (in particular, Japan, the United States and the EFTA countries) under the protocol concluded within the GATT are published in the S series of the OJ (Supplement) after adaptation and translation.

The Supplement will be considerably expanded in the years ahead, since public procurement is an essential part of the large single market (1992). The Community directives will be improved and extended to new sectors.

Because of the large single market, the Supplement will expand faster than the other series of the Official Journal. It therefore seemed appropriate to enter the appropriations for the Supplement in Part B of the budget (Chapter 5-30, which is devoted to the internal market).

9.2 Grounds for the operation

Explicit consequence of Council directives.

9.3 Evaluation

See point 7.1.

FICHE D'IMPACT SUR LA COMPETITIVE ET L'EMPLOI

I. Titre de la proposition

Proposition de Directive modifiant la Directive 90/531/CEE relative aux procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications.

II. Quelle est la justification principale de la mesure?

La proposition de directive étend le régime de la directive 90/531/CEE aux services et vise à ce que les procédures de passation de marchés de services soient transparentes, et que les soumissionnaires de tous les Etats membres soient traités d'une manière non-discriminatoire.

III. Caractéristiques des entreprises concernées

En particulier:

Y-a-t-il un grand nombre de PME?

Les prestataires de certains services sont dans de nombreux cas des PME. Certains marchés couverts par la directive visent des services qui sont réservés, dans certains Etats membres, à des professions libérales comme les architectes.

Note-t-on des concentrations dans des régions

- éligibles aux aides régionales des E.M.?
Non
- éligibles au Feder?
Non

IV. Quelles sont les obligations imposées directement aux entreprises?

Aucune obligation n'est imposée aux prestataires de services.

V. Quelles sont les obligations susceptibles d'être imposées indirectement aux entreprises via les autorités locales?

Néant

VI. Y-a-t-il des mesures spéciales pour les PME? Lesquelles?

La proposition contient des éléments importants visant à:

- encourager la sous-traitance par une clause permettant aux entités adjudicatrices de tenir compte de la sous-traitance prévue par les soumissionnaires (Article 21)

- restreindre la concurrence de la part des grandes entreprises, en ce qui concerne la prestation de services réservés à des professions déterminées (Article 26 paragraphe 2), et en ce qui concerne la prise en compte de variantes (Article 27 paragraphe 3).

En ce qui concerne les critères de sélection, la directive prévoit, en outre les dispositions également prévues pour les travaux et les fournitures, des critères particulièrement favorables aux PME et aux professions libérales: le savoir faire intellectuel, l'efficacité, l'expérience et la fiabilité.

VII. Quel est l'effet prévisible

a) sur la compétitivité des entreprises?

La mesure vise à renforcer la compétitivité des prestataires de services de l'ensemble des Etats membres.

b) sur l'emploi?

Les conséquences sur l'emploi, sont susceptibles de varier d'un secteur de services à l'autre, mais peuvent toutefois être considérées comme limitées.

VIII. Les partenaires sociaux ont-ils été consultés? Quels sont leurs avis?

Les consultations ont lieu par la voie du Comité consultatif pour l'ouverture des marchés publics, au sein duquel sont représentés et l'industrie et la Confédération Européenne des Syndicats. Les avis énoncés par les membres du Comité sont largement favorables.

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