

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(90) 372 final - SYN 293

Brussels, 6 December 1990

Proposal for a
COUNCIL DIRECTIVE

relating to the coordination of procedures on the award
of public service contracts

(presented by the Commission)

TABLE OF CONTENTS

	page	§ N°
EXPLANATORY MEMORANDUM		
I. Summary introduction	3	1
II. The mandate of the White Paper on completion of the internal market	5	12
III. Fields of application	7	
(i) Definition of services	7	15
(ii) Priority and residual services	9	19
(iii) The Central Product Classification	10	21
(iv) Contracting authorities	10	22
(v) Definition of contracts	11	23
(vi) Derogations	13	28
(vii) Thresholds	15	37
IV. Procedural obligations	16	42
(i) The choice of award procedures	17	44
(ii) Design contests	17	45
(iii) Variants	18	47
(iv) Activities reserved for particular professions; legal persons;	19	49
(v) Registration and quality assurance matters	19	51
(vi) Ability and award criteria	20	54
(vii) Award of contracts for services listed in Annex IB	22	60
V. Technical standards	23	65
VI. Concessions	24	69
VII. In-house-performance and reserved activities	26	
(i) In-house-performance	26	76
(ii) Reserved activities	26	79
(iii) Distortions of competition and state aids	28	83
VIII. Record-keeping, reporting requirements and revision of the directive	30	89
IX. Contracts for intellectual/creative services	31	94
X. Relations with third countries	32	97
XI. Amendment to the remedies directive	35	108
XII. Transposition into national law	35	109
XIII. Correlation table on the articles and similar provisions in other directives	36	
XIV. Index on explanations to particular articles	40	
PROPOSAL FOR A COUNCIL DIRECTIVE		
Preamble	41	
Articles	45	
Annexes	69	

EXPLANATORY MEMORANDUM

1. In accordance with the programme for the realisation of the Internal market by the end of 1992, this proposal for a directive is designed to establish a Community framework for the purchasing of services by public authorities, central, regional and local. A separate proposal will be made concerning purchases of services by the utilities in the water, energy, transport and telecommunications sectors.
2. Purchases of services by public entities are considerable, accounting for in the region of 20% of total public purchasing(1). The services in question refer to a vast range of activities showing as much variety as the products bought by the public sector. From cleaning and maintenance, through various forms of consultancy and professional services to data processing, public entities are important clients of the service providers who have played such a dynamic role in the development of the economies of the Member States in recent years.
3. The gains to be derived from the liberalisation of procurement will be both financial and qualitative. Thus, although financial savings may be largest in sectors where prices can be set freely, and which lend themselves to economies of scale, dynamic effects are likely to be produced across the board, leading to cross-fertilisation of ideas, to higher mobility of service providers, and better quality of services provided. This, in turn, will further strengthen the Community's position in the world services market.
4. The proposed directive is designed to cover all such purchases provided the contracts are of a sufficient size to make cross-frontier operations a worthwhile proposition. In this way, the Community's legal framework for public procurement will be completed. Public contracts will be for supplies, works or services or fall within a defined exception. No space will be left for the development of a grey area in which it might be argued that there are types of contracts which are not covered by the system. At the same time, given the varied nature of service contracts, the procedural and other rules of the

(1) The economics of 1992, European Economy, N° 35, March 1988, p. 58

directive will apply only to services which are identified by the directive as being of priority interest from the point of view of the development of cross-frontier operations. The residual category of services will be subject only to basic transparency requirements designed, first, to provide service providers with the minimum information necessary to explore the market and, second, to create the information base which will permit informed judgements to be made about possible application of the procedural and other rules of the directive to other services in the future.

5. The services, which have been identified as being of priority interest include intellectual services of different kinds, including professional services in fields such as engineering and architecture; those telecommunications services which are in general open to competition; insurance and certain banking services; R&D services; certain transport services; publishing and printing services; and cleaning maintenance repair and similar services.
6. Public service concessions whereby a public authority delegates to an enterprise the provision of a service to the public are also subject to the publication requirements of the directive, given their undoubted and growing importance in many parts of the Community. Recent experience suggests that concessions of this kind provide considerable potential for cross-border operations.
7. As to the procedural and other rules, including provisions in the field of technical specifications, the proposal is based to a considerable extent on the public supplies and public works directives as recently amended in the context of the 1992 programme. In particular the flexibility found in the works directive as amended has been incorporated in the present proposal. At the same time, the particular characteristics of certain types of service contract have been taken into account through the incorporation of provisions which specifically address their requirements. For example, the specific character and needs of intellectual creative services are reflected in the provisions on choice of award procedure, including provisions on design contests, as well as those on selection and award criteria.

8. The reservation of the performance of certain services to certain public entities and the execution of certain service activities by public authorities themselves are also addressed by the proposed directive. The provisions are designed to ensure that these choices are made in a transparent manner and in conformity with the EEC Treaty. No attempt is made to further define or limit the circumstances in which such choices are made.
9. In order to ensure that effective action can be taken, where needed, to protect the Community's commercial interests in relation to third countries, provision is made for the Community to take action to secure access to markets closed to its enterprises along lines similar to those enacted by the second banking directive. This provision will also improve the Community's negotiating position in the GATT and other international contexts in which the opening up of procurement of services is currently being considered.
10. The remedies directive 89/665/EEC, adopted in December 1989, is applied to the service contracts covered by the proposal.
11. In the rapidly developing field of service procurement the need for changes in the medium term is to be anticipated. Therefore, provision is made for a report on the effects of the directive after its first three years of operation so that, if necessary, amendments can be made to the system, for example, as to its coverage and its provisions on technical standards.
11. The mandate of the White Paper on completion of the internal market
12. The White Paper on the completion of the internal market, in its chapter on public procurement, requires action on several subjects of which the intended directive on public service contracts is one of the last elements. In accordance with this objective, the Commission

proposes to extend Community procurement legislation to procurement of services, first by the contracting authorities in the sense of the "supplies" and "works directive" and subsequently by the public utilities. This proposal concerns the former. A proposal on the utilities will be submitted to the Council and the European Parliament before the end of the year.

The working hypotheses are that the service contracts covered will fall into two categories as in this proposal: identified 'priority' services will be subject to a full procurement regime, the residual category being subjected only to basic transparency requirements. The classification of service contracts into the priority or residual categories should be the same as in this proposal, unless there are compelling reasons to propose some differences. The procurement regime should enable utilities to apply similar procedures in their procurement of supplies, works and services. In this connection it should be recalled that the procedures applying to their purchases of supplies and works will not be the same as those applying to the public administration, there being in particular greater flexibility as to choice of procedure and the means for calling competition. Specific provision will nevertheless be needed, in accordance with this proposal, on issues such as design contests, variants, legal form of service suppliers, selection of suppliers of intellectual, creative services.

In addition, consideration will have to be given to the question whether the particular features of the utilities may call for other specific provisions such as on in-house-performance, contracts between affiliated enterprises, confidentiality, and concessions.

13. The rules on procurement of services for both the public administration and the utilities should complete the structure of the Community regime in the entire field of procurement. Service contracts should therefore

mean all contracts not yet covered by other EC procurement rules. In this way, once the directive is adopted, a contract concluded by one of the organisations covered will, in terms of procurement rules, be either (1) a supplies contract, or (2) a works contract, or (3) a service contract, or (4) fall within a clearly defined exception. No scope will be left for the development of a "gray" area which could allow contracts to escape the Community regime in an unpredictable manner.

14. However, within this overall concept, the step-by-step approach envisaged in the White Paper should also serve to avoid difficulties arising from the application of a detailed set of procurement rules to a broad range of widely varying activities, not all of which can be studied in depth at the present time. The directive therefore distinguishes between priority services and others. The priority services are subject to a relative complete procurement regime close to that in the directives already adopted or proposed. The residual group of other services are subject only to a basic transparency regime which, among other things, will provide a solid information base for future decisions on wider application of the full procurement regime.

III. Field of application

(i) Definition of services

15. In accordance with the objective of completing the system of EC procurement rules, the proposal starts with a broad definition of service contracts as covering all contracts which are not yet covered by existing directives unless they fall within certain well defined exceptions.
16. In doing so, the proposal leaves the coverage of the existing directives unchanged, including the extent to which these directives already cover services. The supplies directive, in particular, covers those services which aim at making available equipment or other goods to a client, such as contracts for lease, hire, rental purchase. Examples are the hiring of cranes or of aircraft. The works directive covers

services insofar as it applies to contracts for the design and execution of works. It applies therefore in particular to those contracts where the contractor carries out the design and lets subcontracts for the execution of the works. These contracts are covered by the existing directives for good reasons, in particular, their close economic and technical relationships to supplies and works contracts. Transferring them to the services directive would also run the risk of re-opening the debate on the directives which have just been modified. Accordingly, the Commission does not intend to modify the existing directives at this time. The matter can be reconsidered at a later stage probably in the context of a future codification of all the procurement directives.

17. The output of some sectors qualifies in part as products in the sense of the supplies directive, and in part as services. The provision of software (Category 7) is a good example. A distinction will have to be made according to the common understanding whereby standard software is considered a product and bespoke software a service. Another example is printing and similar activities in the field of publishing, which are generally considered to be supplies. However, they may also be services. They are covered in category 15. In cases of this kind, the classification of a given contract depends on an examination of its particular characteristics. The fact that such characteristics can in some cases be arranged to produce one or the other result underlines the importance of ensuring that the rules to apply to each category are broadly similar so as to avoid undue temptation to structure contracts in a particular way.

18. The proposed directive also addresses as a matter of priority public service concessions, that is, transactions whereby public authorities delegate to an external organisation the rendering of a service to the public. Such transactions can be of considerable economic importance, for example, in the field of transport, water supply and waste disposal.

(II) Priority and residual services

19. However, the directive needs to provide for more specific descriptions of its comprehensive field of application, for two reasons:

- the priority services need to be distinguished in a legally clear and practicable way from the category of residual services;
- categories must be established in particular for the group of residual services which reflect the reality of the procurement market as closely as possible and which allow particular characteristics of the markets to be identified. In this way, useful statistics and reports can be drawn up in order to prepare a sound basis for decisions on application of the full procurement regime at a later stage.

20. The classification of services into the priority or residual group has been made on the basis of a number of factors, including:

- the availability of experience concerning public contracting for the service in question;
- the current proportion of public contracts in the overall turnover of the industry concerned;
- the potential for increased cross-frontier transactions in the Community, including whether the Member States' markets are in general open, or will be so by 1992;
- the positive effects in terms of market opening and competition which application of EC procurement rules could yield;
- the appropriateness of the concepts of the directive;

- the relevance of particular Treaty provisions such as Articles 55, 56, 130 f-g, and 223.

The classification is contained in Annex IA (full application of the directive) and Annex IB (minimum requirements) of the directive. The priority group includes intellectual services of different kinds; non-reserved telecommunications services; insurance and certain banking services; R&D services; transport services with the exception of rail and water transport; publishing and printing services; and cleaning, maintenance, repair and similar services.

(iii) The Central Product Classification

21. The proposal refers for the purpose of defining categories of services, to the Central Product Classification (CPC). The CPC, developed by the relevant bodies of the United Nations is geared towards classifying commercial transactions; it is, therefore, closer to the objectives of EC procurement rules than other nomenclatures. It is the most suitable inventory for services for procurement purposes, the adaptations necessary in order to use it as a reference being only formal ones. Moreover, it has the advantage of being an international nomenclature, in particular with regard to the extension of the GATT Agreement on Public Procurement to the field of services. In addition, in the longer term, the CPC offers a chance ultimately to become the unique nomenclature to be used throughout the procurement field, covering supplies, works and services.

(iv) Contracting authorities

22. The proposal covers all contracting authorities covered by either the "supplies" or the "public works" directive. The more recent

definition of the contracting authorities for the purposes of Community legislation on public procurement is to be found in the new public works directive adopted in July 1989. As a consequence, this new proposal also concerns those contracting authorities which have to apply the new works directive from July 1990 onwards. They are

- the State, regional and local authorities, bodies governed by public law, associations formed by such authorities or bodies, as described in Art. 1(b) and Annex I of the works directive. The proposal works by way of cross-reference to these provisions, including the procedure for modification of Annex I of the works directive;
- holders of concessions;
- undertakings which let contracts in connection with certain public infrastructure projects which are subsidised by more than 50% from public budgets (Article 1a of the new works directive).

In addition, the "supplies" directive as applicable since 1.1.1989 covers the entities which have to apply the GATT Agreement on Government Procurement, as defined by directive 80/767/EEC. Some of these entities do not fall into any of the above mentioned categories. Article 1(b) clarifies that these, too, are contracting authorities in the sense of this directive.

(v) Definition of contract

23. The acquisition of services is covered by this proposal only insofar as it takes place on the basis of contracts for consideration. Contracts for consideration are all contracts according to which the supplier receives a remuneration for the execution of a particular activity which he may perform either for the contracting authority or for third parties, and where the benefits of that activity fully accrue to the authority or the third parties. Service concessions are covered by this definition. (For details see below VI).

24. The appointment of a supplier for the rendering of specific services in the future must also be considered as a contract for consideration provided both parties are sure that services will have to be performed if requested. Thus, the appointment of travel agencies, hotels, taxi or air-taxi undertakings is in principle covered by the directive.

25. There is no contract for consideration, on the other hand, in the case of unilateral allocations, such as State subsidies, capital endowments, or budgetary transfers which enable the recipient to carry out certain functions in the public interest. National procurement rules provide for the necessary distinctions in many cases. There is no need at this stage for the proposed directive to deal with the matter.

26. There is also no contract where an authority performs services with its own staff. The proposed directive does not deal with this matter because there is no contract. However, the effects of in-house-performance of services on the effective EC-wide opening up of procurement of services shall be taken into account in the context of the revision of the directive after three years.

27. Research and development presents particular characteristics in that there are differences in the objectives and consequently in the type of instruments used by national and Community public authorities to promote the technological base. The Directive only covers public procurement contracts: financing R&D activities may take the form of a contract. However, in many cases such contracts may not be for consideration as implicitly required by the notion of procurement. This is the case, for example, when the results of the research accrue in the first instance to the research bodies (enterprises, research institutes or universities) and not to the contracting authority. Furthermore, R&D activities may be considered to be service transactions only in so far as the contract in question relates specifically to the acquisition of particular results for the benefit of identifiable beneficiaries. Financing of research of general interest concerning society as a whole or a substantial part of society may, on the other hand, be considered not to be a R&D service in this sense.

The Directive does not cover other means of governments' support for R&D such as research grants. It clearly does not apply to fiscal measures, or to the ownership and financing of research institutions.

However, "contract R&D" is gaining importance in general as demonstrated by the recent foundation of the European Association of Contract Research Organisations. It is, therefore, appropriate to cover contract R&D for clients which are contracting authorities in the sense of the Directive within the priority group of services. This would in no way prejudice the balance between national and EC R&D policies.

(vi) Derogations

28. The directive provides for the standard derogations known in the existing directives concerning secrecy and State security (Article 4(1)) and contracts governed by special procurement rules (Article 5).
29. It is applicable in the field of defence within, however, the limits established by Article 223 of the Treaty (Article 4(1)).
30. The exclusion of real estate contracts (Article 1(a)(ii)) is desirable for clarification purposes. Such contracts constitute neither supplies nor works contracts. On the other hand, since they relate to immovable property in particular geographical locations, such contracts take place in essentially local markets and their object rules out any real prospect for cross-frontier competition. The contracts to be excluded are, however, only those concerning the purchase of land or buildings, or rights in immovable property. Contracts to provide services in connection with such purchases, for example contracts with real estate agents, are covered by the Directive (Annex 1b, category 28).
31. Other derogations from the directive are necessary in the field of audio-visual services. The main objects of acquisition in this field are on the one hand services producing audio-visual works such as films, videos and sound recording, including advertising, and on the other hand

broadcasting time: transmission by air, satellite or cable. Contracts in both groups are normally service contracts; it follows that they would normally be covered by the directive unless some provision is made to the contrary.

32. As a matter of principle, the contracting out of audio-visual production, such as for information, training and advertising purposes, should be covered. However, the operations of broadcasters need special attention. Their activities should be covered by this directive only as far as they are not specific to their broadcasting operations. In particular, their freedom to procure programme material from whom they wish and in accordance with procedures that they fix freely for themselves is of considerable cultural and social significance. Also, only those broadcasters which are contracting authorities in the sense of the directive, being legal persons subject to public law, would be covered. For these reasons, the acquisition of programme material by broadcasters should be excluded from the directive (Article 1(a)(iii)). The award of rights for broadcasting activities is explicitly excluded from the definition of public service concessions, for the same reasons.

33. Second, the provision of broadcasting time is, as a matter of principle, also covered by the directive. However, in some contexts the acquisition of broadcasting time may have implications in the fields of public security or health protection. Broadcast information on crime prevention and detection, traffic conditions, civil emergencies and communicable diseases may need to be broadcast as widely as possible. In some situations, broadcasting time for such matters will in any case not be provided on a contractual basis at all. It would accordingly not be covered by a procurement directive. In other situations, the contract mechanism could be used, not to find the best offer, but simply as a matter of convenience. In order to cope with this situation, explicit provision should be made to the effect that Member States may depart from the requirements of the directive in the case of contracts for broadcasting time to the extent and under the conditions spelled out in the case law of the Court of Justice on the exceptions implicit in Art. 59 of the Treaty (freedom to provide services) as "reasonable restrictions in the public interest". The award of broadcasting licences is dealt with in paragraph 73 below.

34. A specific derogation is also necessary in the field of telecommunication services, in order to make this directive conform to the overall liberalisation of the telecommunications services market. The Commission's directive 90/388/EEC on competition in the markets for telecommunications services⁽¹⁾ requires liberalisation of that market, with the exception, however, of voice telephony and some other services. As those particular markets will not become competitive, it would be pointless if public contracts for such services were covered by this directive. Article 1(a)(iv) contains the necessary derogation.
35. A further specific derogation is necessary for arbitration and conciliation services. The bodies or individuals which may provide such services are normally designated by parties to a contract who want to avoid Court proceedings, in case of dispute. Or they need to be jointly selected by the parties when dispute arises. Bidding for such services would be inappropriate under both circumstances.
36. Finally, it cannot, at the present time, be contemplated to apply the directive to certain types of financial services: primary issuing of government bonds and activities related to public debt management. These services are closely connected with monetary policies; they are heavily regulated and reserved to a small number of qualified, registered undertakings. It is frequently required, in this area, to conclude an agreement and to have the necessary operation carried out within very short time limits.

(vii) Thresholds

37. As regards most of the service categories concerned, this proposal requires, in Article 8(4), the same minimum contract value as the supplies directive (ECU 200 000). In this way, a fair compromise between the interest in avoiding unnecessary formalities for small contracts and in making procurement as transparent as possible can be realised. In any case, the risk of artificial reclassification of contracts, in order to avoid the directives altogether or to obtain application of a regime perceived as more favourable, does not arise.

(1) OJ L 192 of 24.7.1990, p. 10.

38. Given the diversity of services covered by the directive, and the possibility of different approaches to calculating the contract value, a clarification is appropriate to the effect that the value of the contract is basically the total remuneration of the supplier (Article 8(5)). For contracts which do not specify a total price, the same method of calculation of contract value as in the supplies directive has been used; as a consequence, contracts of indefinite duration are covered by the directive when they provide for monthly installments of approximately ECU 4 000.

39. Two special problems have to be addressed, however.

40. First, the planning of public works should be covered to the same extent as the execution of public works is covered by Directive 71/305/EEC, according to its threshold of ECU 5m (Article 8(2)).

41. Second, certain financial services have special characteristics which make it necessary to adapt the general rules on thresholds.

Concerning insurance services, the annual premiums present an obvious point of reference (Article 8(1, first indent)).

The value of those financial services which are listed in Category 21 of Annex IB is difficult to identify, because there are no fees, commissions, or comparable remuneration. In this case, a figure relating to the interest to be yielded can be used in order to exclude small contracts from the directive (Article 8(3)).

IV. Procedural obligations

42. As explained above, the directive provides for a full procurement regime for priority services along the lines of the existing directives.

43. The requirements of the directive which are identical, or similar, to those of the existing directives do not call for much further

explanation. These requirements can easily be identified by way of the attached correlation table (Chapter XIII below) which states, for each Article or paragraph of the directive, the reference text concerned.

More detailed explanations are needed, however, as regards those specific provisions which take account of certain particular characteristics in the field of service procurement.

(I) The choice of award procedures

44. The directive includes, in particular, a derogation permitting the use of the negotiated procedure with publication of a notice in the case of complex services which cannot be fully specified from the outset (Article 13(2c)). The derogation is based on objective criteria: the nature of the service and the objective impossibility of laying down contract specifications in a way detailed enough to permit the selection of the best tender from among those that will be presented. These conditions may be fulfilled in particular in the area of intellectual, creative services. Article 13(2c) allows negotiations also in the case of contracts for financial services.

(II) Design contests

45. Design contests may, according to the relevant national rules or practices, constitute a measure upstream of the award of contracts or form part of the procurement procedures themselves. The directive concentrates on some key aspects for making sure that design contests are open to EC-wide participation. When contests are independent from procurement procedures, these rules apply only if the total amount of prizes and payments exceeds ECU 200 000. The directive does not regulate the question of when a design contest is appropriate. In accordance with the Treaty principle of non-discrimination on grounds of nationality, it does not admit regional restrictions in access to design contests. Contests cannot, therefore, be conducted with only part of the Community as a geographical sphere of admission. The directive

requires publication of the intention to carry out design contests, as well as of the results. Follow-up contracts may be awarded to one of the winners by negotiated procedure without prior publication of a notice, if the relevant national rules reserve follow-up contracts for them.

46. The relevant provisions are Article 1(g), definition; Article 13(3c), follow-up contracts; Article 15, participation in contests and operation of the jury; Articles 17(4), 18(1) and Annex IV, publication requirements. It should be noted that these provisions of the directive establish minimum rules. National rules may be more explicit.

(III) Variants

47. Variants may occur particularly often, in those fields where the tenderers can be creative in finding a solution to the contracting authorities' needs. The range of possible solutions can be very broad, and it can in some areas extend into performance which would no longer qualify as a service but rather as a delivery of a product. This could occur particularly often in areas where the dividing line between the provision of a service or the delivery of a product is difficult to establish, for example, when a contracting authority perceives the need of bespoke software (a service contract), but when a tenderer feels that he can offer an effective solution by means of selling a piece of standard software (a supply contract). In order to keep all options open, Article 21(2) declares the form of contract not to be a sufficient reason for the rejection of variants.
48. Article 21(2) does not extend this rule, however, to variants which are by their nature works contracts, for example, when a tender includes both the design and the execution of works. The reason is that the directive should be neutral as to the use of such integrated contracts. By not mentioning works contracts in Article 21(2), it leaves freedom to the national rules to ensure that competition for design contracts is separate from any aspect of the construction itself.

(iv) Activities reserved for particular professions: legal persons

49. The provision of certain services may, according to certain national regulations, be reserved to particular professions. Procurement rules must recognise such rules insofar as they are compatible with the Treaty. However, in order to inform potentially interested suppliers of any relevant restrictions, the existence of such rules and the reference should be indicated in the tender notices (point 4 of the model notices in Annex III B,C,D and point 7 in Annex IV).

50. In certain service sectors national regulations prohibit access of legal persons, or allow only particular forms of legal persons or establish requirements to the effect that the owners and management must be members of a particular profession. Such requirements are of general application; they are not confined to the field of public procurement. As a first step in the elimination of barriers to cross-frontier activities in this field, Article 23(2) requires purchasing authorities to accept offers from firms whether they are natural or legal persons. This provision does not in itself oblige Member States to change their regulations as regards firms or persons governed by their law. However, Article 23(3) gives priority to the regulations of the country of origin of legal persons. Paragraph 2 confirms the right of contracting authorities to request evidence of the professional qualification of the persons responsible for execution of the service.

(v) Registration and quality assurance matters

51. The field of registration and quality assurance is relevant for the purposes of the directive as part of the question of what evidence may be required on the suppliers' legal, economic, financial, professional and technical standing. The directive deals with the matter as regards the contents, form and sources of the required information. The directive refers in various provisions to the means recognised in the existing directives, such as: extracts from judicial records (Article

26), trade registers (Article 27), statements from banks (Article 28(a)), and certificates of registration in official lists of recognised suppliers (Article 32). In addition, as some service suppliers benefiting from the directive are independent professionals, proof of their membership in the relevant professional organisations may be required insofar as it is obligatory (Article 27(2)).

52. The quality of the performance of services is difficult to measure. Although quality assurance systems are available, within the series of EN 29 000 and EN 45 000 standards, it would be premature to make them obligatory. There are not yet enough service suppliers who take advantage of them, and ways and means for certification according to EN 45 000 are still being built up. Article 30 includes, therefore, a recommendation, instead of an obligation. Making its use mandatory will be further examined in the course of the legislative procedure. The revision of the directive will after three years according to Article 42 also deal with the issue.

53. Quality control certification also exists at national level in particular service sectors such as the field of engineering. It has been observed that contracting authorities tend to require such certificates whenever a quality assurance body exists in their country. This may have the effect of discriminating against foreign suppliers because they may have more difficulties than local suppliers in obtaining the certificates or they may simply be denied access to the certificates. On the other hand, the value of evidence of the quality of suppliers through certificates established by independent bodies is beyond doubt. The directive therefore recognises the existence of quality assurance schemes and reconciles the way in which they are used with the need to grant a fair chance to suppliers from other countries (Article 30).

(vi) Ability and award criteria

54. The provisions concerning participation and selection of participants (in particular Articles 28 and 29) follow the corresponding provisions of the works directive and the supplies directive very closely.

However, the particular characteristics of services performed by the free professions are taken into account in two respects. First, as regards the suppliers' financial standing, reference is made to their professional risk indemnity insurance (Article 28(1a)). Second, as regards evaluation of suppliers' abilities, reference is made to their skills, efficiency, experience and reliability (Article 29(1)). In addition, the provisions concerning the evidence needed to prove such qualifications are applicable.

55. As regards the award criteria the concept of the "economically most advantageous tender" (Article 33(1a)) is an appropriate framework for bringing to bear any pertinent criteria for the choosing between tenders. This is particularly true for the field of intellectual, creative services. In order to demonstrate the broad range of possible criteria, Article 33(1a) points inter alia to esthetic and functional characteristics.
56. Another important aspect concerns the issue of price competition.
57. The situation in the Member States varies considerably in this respect, mainly in the field of architecture and engineering. Several Member States operate fee regulations or other forms of fixed fees, thereby making quality of performance the main award criteria. Others, however, are in the process of price liberalisation, and in some even full price competition exists.
58. Irrespective of the arguments for or against price competition, the relevant questions for the purposes of the directive are whether the difference in national situations results in barriers to the opening of the procurement markets concerned. Analysis of the national situations concerned has not led to any evidence of trade barriers. Moreover, a sufficient degree of competition can be introduced by requiring publication of tender notices and non-discriminatory selection and award procedures and criteria. Article 33(1), accordingly, leaves untouched any formal price fixing instruments.

59. Another important item is that of abnormally low tenders. The main reasons why tenders can appear to be abnormally low are, first, State aids, and second, cost advantages enjoyed by suppliers which are public entities. The relevant provisions are explained in section VII(III) below.

(VII) Award of contracts for other services, listed in Annex IB

60. Annex IB describes the services for which full application of the directive can be decided on a sound basis only when better information is available on the procurement markets concerned. Contracts for such services should therefore be brought under a monitoring system which should involve only minimal requirements to minimize the bureaucratic burden involved.
61. There is no better instrument for monitoring procurement markets in the field of services than registration of the award of individual contracts. Articles 10 and 18 provide, therefore, that post award notices are the key element to achieve this end. The contract-specific information will be used in order to establish a general market information system. The idea is to compile regular reports on the basis of post award notices and, if appropriate, to make such reports available to the public.
62. The directive attributes an important role to the Advisory Committee on Public contracts in this area. Article 18(4) requires details on structure and presentation of the reports including their availability to the public to be fixed in consultation with the Advisory Committees.
63. The post award notice is a common requirement for both Annex IA services and Annex IB services as regards the obligation to send such notices to the EC Publication Office (Article 18(1)).

64. The way in which they are processed may be different. Whereas post awarded notices will be automatically published in the case of Annex IA services, this is not automatically the case as regards Annex IB services. In the latter case, the contracting authority has the choice as to whether the notice will be published or not (Article 18(2) and (3)). The Commission expects contracting authorities to become more and more favorable to publication. As a result, contract-specific information to the market place on contracts for Annex IB services is likely to grow.

V. Technical standards

65. The services to be performed under public service contracts will in many cases need to be specified in full detail. As in the case of public supplies contracts and public works contracts the place to do so should be the general documents or the contractual documents relating to each contract (Article 16(1)).
66. Many service contracts involve the use, or the delivery to the contracting authority, of physical products : spare parts for repair services, information media such as tapes, discs, etc., food, and many other items. The requirements for laying down technical descriptions of products should as much as possible be in line with the existing directives.
67. The relevant provisions from the existing directives on the use of harmonised standards are, therefore, applicable. However, it must be borne in mind that products used, or indeed delivered, according to service contracts, are often of no more than marginal interest to the contracting authority : cleaning products, paper, relatively small material, installations, and the like. It would go too far, therefore, to oblige authorities to always lay down the specifications of all products by reference to European or other standards. Article 16(2) is relevant therefore only when the contracting authority sees the need to specify technical characteristics of products.

68. European standards for the services themselves are also under active consideration, for example in the field of software services. It is, therefore, appropriate to envisage application of the relevant rules, subject to a review of the situation at the moment when revisions to the directives must be examined. Article 42 accordingly contains a specific reference to the issue of technical standards for services.

VI. Concessions

69. The directive deals with public service concessions along the same lines as the works directive does with public works concessions.

70. As regards the definition of public service concessions, the directive is again based on the principle of complementarity to existing rules. Public works concessions as defined in the new works directive are, therefore, not affected (Article 1(h), the definition of public service concessions). Any concession involving an element of public works is a public works concession in the sense of Article 1 (d) of the works directive as modified by directive 89/440/EEC. Public service concessions are, therefore, by definition only those concessions which involve no element of works. Concessions for activities which require the construction of a network, such as for water or energy, would therefore not normally qualify as public service concessions but as works concessions. Concessions for the management of an existing installation would do so. However, public service concessions may also exist in fields as diverse as transport, catering, retail sales, luggage handling, waste removal and street cleansing, and so on.

71. Second, public service concessions in the sense of the directive do not include the award of rights which must automatically be granted when the applicant fulfills certain conditions. It is a constituent element of the definition given in Article 1(h) that the contracting authority has a certain discretion in awarding the right concerned.

72. Third, the activity concerned must be a service to be provided to the public. Exclusive rights for the performance of other activities, such as the exploration and exploitation of oil and gas, are not public service concessions in the sense of this directive.
73. Finally, public service concessions are defined as operations by which contracting authorities delegate an activity which they would otherwise have executed themselves, under conditions which allow them to continue, if indirectly, to control certain aspects of the service rendered to the public. It is indeed because of the delegation of activities that service concessions involve a service not only to the public, but to the contracting authority at the same time. Broadcasting licences should be excluded from this definition, in accordance with the overall approach of not applying the directive to broadcasting activities as such.
74. As regards the rules to be applied, the directive distinguishes between those rules concerning the award of concessions by public authorities, (Article 12, Article 17(3), Article 18(1), Article 22(2), Annex V, concerning the publication of notices), and the rules concerning the award of service contracts by the concessionaires themselves (Article 3).
75. Although the directive deals with contracts awarded by concessionaires, it does not affect the rules on procurement procedures of entities operating in the "excluded sectors", which are in certain cases holders of concessions. The risk of overlap between the services directive (requiring only publication of a notice) and the "excluded sectors" directive (requiring its full application to software service contracts in the field of telecommunications) does not occur as Article 6 specifically gives the priority to the "excluded sectors" directive.

VII. In-house-performance and reserved activities

(I) In-house-performance

76. Many contracting authorities are in a position to satisfy their needs for certain services by performing the activities concerned with their own means. This is particularly so in those areas where the authorities already employ the necessary experts, such as computer specialists, architects, engineers, economists, scientists, and so on. In such cases, the choice between buying the relevant services from outside and in-house-performance is relatively open.
77. Community procurement rules do not interfere with public authorities' decisions as to buying in the market place or satisfying their needs with their own means. This is a matter of fundamental economic policies within the competence of the Member States. Services rendered inside an organisation which has a single legal personality, for example, where one division performs services for another division, are not procurement operations, even though there may be identifiable budgetary consequences.
78. On the other hand, it cannot be denied that the burden of applying EC procurement rules is relatively easy to avoid, simply by refraining from contracting out the service concerned. Under these circumstances, the directive could have the effect of diminishing the procurement market, rather than liberalising it. The effects of in-house-performance have to be taken into account in the review of the directive after three years (Article 42).

(II) Reserved activities

79. The directive needs to be clear on its application to those cases where services are provided by suppliers who have some form of special affiliation with the contracting authority, such as where service

suppliers are themselves part of the public sector or have exclusive rights to perform their services for contracting authorities. The existence of such special relationships is a particular characteristic of the field of services; supplies of goods are less often in the hands of exclusive suppliers and the public sector is itself less often involved in the production of goods than in the production of services.

80. The directive in principle covers all situations in which the client and the service supplier are legally separate entities, and in which their relationship for the purpose of supply of services is of contractual nature. Some exceptions from this principle are based on the Treaty itself, for example, Article 223 as referred to in Article 4(1) of the directive and Articles 55 and 56 as referred to in the recitals. Such exceptions will be interpreted in a narrow sense. They do not affect the application of the directive to the above mentioned cases in any general way.
81. The directive itself provides for another limited exception in Article 7. This Article exempts contracts from the directive when services are to be supplied between contracting authorities, provided the supplier has a formal and transparent exclusive right, compatible with the Treaty, to provide the service. It must be noted that this exception concerns the requirements of the directive only. The principles of the Treaty concerning the freedom to provide services throughout the Community do, of course, apply in these cases and the Commission will give early consideration to any incompatible exclusive rights which would come to its attention. The exception from the directive is not meant to be definitive either. The Commission's review of the manner in which the directive has operated, after its first three years (Article 42), may take account of the extent and the characteristics of such contracts, and appropriate proposals for modification of the directive may then be made. On the other hand, information is not at present available as to the nature and scale of these activities which would permit motivated proposals to be made now.

82. On the whole, the situation concerning exclusive suppliers is, therefore, as follows:

(a) as regards the creation of exclusive rights, the directive applies to the appointment of suppliers by way of contracts, as explained in paragraph 24 above. The creation of exclusive rights by public service concessions is covered in the sense that notices on the intended award, and after the award, must be published. The creation of exclusive rights by law, regulation or administrative provision is not covered by the directive, but the Treaty principles on free movement to provide services are, of course, applicable;

(b) service contracts to be awarded to exclusive suppliers are fully covered by the directive in all cases when the exclusive supplier is a private undertaking. They are also fully covered when the exclusive supplier is a public authority, except where the exclusive rights are created in a formal and transparent way.

(iii) Distortions of competition and State aids

83. Where contracting authorities have the means to carry out services, they can in some cases be observed offering these services in the open market, and indeed across intra-EC borders. In doing so they may be in a position to exploit particular competitive advantages as a consequence of their public status. It is alleged that their prices do not always reflect their economic costs.

84. Any necessary action for avoiding distortions of competition would have to be initiated first of all according to EC competition law. Its application with regard to public entities is possible due to the functional definition of undertakings as confirmed by the European

Court of Justice in its decision on case 118/85, of 16 June 1987, concerning the Italian Tobacco Monopoly. Furthermore, any problems relating to the payment of VAT would be governed by the provisions of the Sixth VAT Directive (77/388/EEC, O.J. L 145 of 13 June 1977), dealing with government authorities as taxable persons. The Commission will, if necessary, take the appropriate measures for ensuring compliance with these rules.

85. EC procurement rules are not the right instrument to solve problems of this nature; however, they can help to facilitate the examination of any such problems in the appropriate context. Article 34 of the directive works to that effect in that it requires that the Commission must be informed when contracting authorities intend to deal with abnormally low tenders in particular ways.

86. According to Article 34 paragraph 1 contracting authorities must make enquiries into the cost calculation of tenders which appear abnormally low.

When abnormally low tenders are submitted by public entities, these would be without risk for contracting authorities and their acceptance might result in distortions of competition. In order to deal with this situation, the enquiry shall, according to paragraph 2, concern the particular cost elements identified in Article 3 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195 of 29.7.1980, p. 35) as amended by Directive 85/412/EEC of 29 July 1985 (OJ L 229 of 29 July 1985). These rules address the problem that Member States may, through public undertakings, seek ends other than commercial ones and compensate for financial burdens assumed by them as a result. Tenders might be influenced by such transfers of public resources.

87. Where a tender is influenced by any of these characteristics, the Commission must be informed of the intention to award the contract to

It. The Commission will thereby be in a position to start examinations from the point of view notably of Article 90 EEC Treaty in connection with Article 92.

88. Article 34 of the directive also deals with tenders submitted by private undertakings which are abnormally low due to the receipt, by the tenderer, of State aids. Paragraph 3 is identical to the text of the reexamined proposal concerning the utilities directive. It permits the rejection of such tenders subject to the authority informing the Commission accordingly.

VIII. Record-keeping, reporting requirements and revision of the directive

89. The directive includes provisions in Article 14(3) for recording the execution of individual award procedures. Such information may be relevant for the purposes of any complaints or other remedies introduced at national level or at the Commission. It serves, therefore, mainly to allow examination of individual cases.
90. In addition, the directive is geared towards preparing the ground for its future modification by way of minimal reporting requirements. As already explained, the contents of post-award notices are a major source of information to that end. According to Article 18(4), the Commission will, in consultation with the Advisory Committee, establish the structure of reports on this basis. It will do so in due course before the coming into effect of the directive, in order to enable the aggregation of information to be made, from the outset, coherently and in a meaningful way.
91. As, however, the contents of post award notices are not in themselves sufficient to establish the overall effect on liberalisation of the procurement market, the Member States will also have to provide statistical reports containing other information. Article 38(1) specifies as a necessary part of such other information the overall

procurement of services below the threshold; the proportion of the procurement market covered by the directive would thereby become transparent. There may be a need for additional information. Article 38(2) obliges the Commission to identify such needs and determine the way to satisfy it, in consultation with the Advisory Committee. The matter will be examined before the directive comes into effect.

92. The role of the Advisory Committee in this context, and whenever else the directive requires its consultation, is determined in Article 39, in accordance with Council Decision 87/373/EEC of 13 July 1987 (OJ L 197 of 18.7.1987, p. 33).

93. An interim report on the effects of the directive is envisaged after its first three years of application in order to assess the need for its modification (Article 42). The review is necessary in particular because of the possible application in the future of the proposed procurement rules to contracts for services listed in Annex IB. The review will also deal with the issue of technical standards. Moreover, the extent and evolution of in-house-performance of services will be taken into account on this occasion.

IX. Contracts for intellectual, creative services

94. As a consequence of its comprehensive field of application, the directive needs to offer a certain degree of flexibility. A choice exists for example as far as the award procedures are concerned, from which the open and the restricted procedure, and - under certain conditions - the negotiated procedures may be chosen; also as regards the selection criteria (in particular Article 28 and 29) which provide the framework for acceptable criteria and related evidence; finally, as regards the award criteria which may comprise all pertinent objective criteria under the concept of the "economically most advantageous tender".

95. Concerning contracts for intellectual, creative services, the appropriate form of action can hence be chosen within the defined limits. As regards award procedures, the negotiated procedure with prior publication of a notice may be chosen insofar as the service to

be performed cannot be specified with sufficient precision to permit use of another procedure. Concerning selection criteria, the directive provides in particular professional skills, efficiency, experience and reliability (Article 29(1)). The rules on award criteria refer for illustrative purposes to certain factors which may play a particular role as regards intellectual, creative services, such as aesthetic and functional characteristics (Article 33(1b)).

96. The directive thereby provides an appropriate and practicable regime for the award of intellectual, creative services.

X. Relations with third countries

97. The opening up of procurement of services by the public administration pursuant to a Community directive will improve the market access of firms of non-Community origin because the efforts to be made for them to benefit from the provisions of the directive on transparency, procedural regularity, technical specifications and award of contracts on the basis of objective, non-discriminatory criteria are fairly small.
98. Access of Community firms to public contracts in the services field in third countries is not at present guaranteed by specific international rules, in the GATT or elsewhere. Some third countries indeed explicitly restrict access of foreign firms under certain conditions. For example, US "Buy America" legislation prohibits federal agencies from procuring services from firms from third countries identified by decisions taken on an annual basis as pursuing protectionist policies or practices.
99. However, the 1980 GATT Government Procurement Code (OJ L 71 of 17.3.1980) specifically provides for the early exploration of "the possibilities of expanding coverage of this Agreement to include

service contracts". Discussions on this matter have already started and negotiations should begin in the course of 1990. Discussions are also under way with the EFTA countries concerning broader mutual opening of procurement markets, including those for services.

100. There is a risk that, in some fields, where basic barriers to market entry are low, the Community's commercial interests could be harmed if its public service contracts were opened erga omnes while similar contracts in the markets of its competitors remained artificially closed. This risk is small where the service by its nature requires a considerable and stable implantation of equipment and personnel on the territory where the service is rendered. In such circumstances, a high proportion of value added is in any event likely to be generated in the host country and any negative effects on trade are accordingly minimised. The risk is greater, however, where services can be rendered at a distance (telecommunications, data processing) or through a local presence which is temporary or very limited in character (consultancy, software services). In these situations, continuing barriers to Community firms' access to third country public service contracts could distort trade flows to the Community's disadvantage in an unacceptable fashion.
101. Moreover, the Community's negotiating position in the GATT and elsewhere will be stronger to the extent that it is, at one and the same time, clearly pursuing the objective of liberalising access to procurement of services and also arming itself to take effective action in relation to competitors which do not propose to do likewise.
102. As regards the type of provision to be made the following considerations must be taken into account.
103. First, means must be found to provide the assurance that measures will not be taken against enterprises from third countries which are prepared to agree to reciprocal market access or do so in fact. It is noteworthy that in the context of the second banking directive (89/646/EEC; OJ L 386 of 30.12.1989), the Council's solution to the

problem of basic access by third country firms to banking markets does not make that access dependent on a prior determination of reciprocal access for Community firms. On the contrary, the directive provides for access on the same basis as for Community firms together with a procedures which may lead to that access being restricted or withdrawn where it is shown that a third country pursues policies or practices which restrict access of Community firms.

104. Second, the services field being vast and heterogeneous, it is difficult at this stage to demonstrate in advance that measures will indeed be needed in relation to particular countries or types of services. All these considerations suggest that an approach is needed to services procurement which differs from that contained in the utilities directive.
105. Finally, whenever there are specific problems, action should be possible on two levels. A more balanced solution should be sought through negotiations. In addition, the directive should provide for a procedure whereby action can be taken to restrict market access for third country undertakings where it is shown that those countries restrict the access of Community undertakings to their markets in particular ways.
106. Article 40 reflects these principles. Paragraphs 1 and 2 concern the way in which the basis for action should be established. Paragraph 3 provides the general mandate for a solution through negotiations in cases where non-EC countries do not grant comparable market access, national treatment, or most favoured nation treatment. Paragraph 4 establishes the procedure for decisions restricting the access to public service contracts or concessions in the EC market for undertakings established outside the Community and letter box companies established in the Community as defined in the general programme for the abolition of restrictions to provide services (OJ N° 2 of 15.1.1962). It also refers to tenders originating in third countries. As there are no generally applicable rules of origin for services, this option can be used only once such rules have been

introduced at international or EC level, or where the Council would decide origin criteria in the context of the decision concerned. It is, however, a necessary provision since access to the Community service market may be obtained through a firm generally established in the Community though particular services provided by it will be rendered from outside the Community or with only very limited activity within it.

107. Decisions in this field are part of the implementation of this directive. They therefore fall under the Council decision 87/373/EEC(1) which establishes the Commission's power to take the necessary decisions. The provisions concerning the role of the Member States and that of the Council reflect the link of the decision concerned with the field of commercial policy.

XI. Amendment of the remedies directive

108. The remedies directive 89/665/EEC as adopted in December 1989 (OJ L 395 of 30.12.1989, p. 33) ensures application of the public works directive and the supplies directive. The introduction of this directive leads to the need to guarantee its application also in providing the same level of legal protection which the remedies directive requires as a minimum standard for the Community as a whole. Article 41 contains the necessary amendment clause.

XII. Transposition into national law

109. The coming into effect of this directive can be envisaged for 1 March 1992. On this basis, there would be a common date for application of EC procurement rules to public authorities in Greece, Spain and Portugal who benefit from a transitional period until that date as regards application of the amended "supplies" and "works" directive.

(1) Council Decision 87/373/EEC of 14 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 197 of 18.7.1987, p. 33)

XIII. CORRELATION TABLE

on the articles and similar provisions in other directives

THIS DIRECTIVE		REFERENCE	
Art.	Subject	Works Directive	Supplies Directive
1	<u>Definitions</u>		
(a)	Public service contracts		
(b)	contracting authorities		1(b)
(c)	tenderer, candidates		1(c)
(d)-(f)	procedures		1(e-g)
(g)	design contests		
(h)	public service concession		
2	<u>Application by contracting authorities and other bodies</u>		
(1)	general principle		
(2)	non-discrimination		
(3)	subsidised infrastructure	1a(2)	
3	<u>Contracts awarded by concessionnaires</u>		
(1)	award of subcontracts	1b(3)	
(2)	award of subcontracts by private bodies	1b(4)	
(3)	groups of undertakings	1b(4)	
4	<u>Defense/State Security</u>		
(1)	Defense		2a
(2)	State security	3(4c)	
5	<u>Special procurement rules</u>	4	
6	<u>Priority for the proposal on the excluded sectors</u>		"utilities directive"(1)
7	<u>Single source of supply</u>		
8	<u>Thresholds</u>		
(1)	thresholds		
(2)	thresholds	4a(1)	
(3)	thresholds		
(4)	thresholds		5(1a)
(5)	value of contracts		
(6-9)	calculation method		5(2)-(6)
(10)	supplies made available by the contracting authority	4a(5)	
(11)	national currency; revisions		5(1c,d)

THIS DIRECTIVE		REFERENCE	
Art.	Subject	Works Directive	Supplies Directive
9	<u>Priority I services</u>		
10	<u>Residual services</u>		
11	<u>Mixed contracts</u>		
12	<u>Public service concessions</u>		
13	<u>Choice of award procedures</u>		
(1)	general principles	5	
(2a,b)	negotiated procedure with prior publication	5(2a,c)	
(2c)	unprecise contract specifications		
(3a,b)	absence of tender, technical or artistic reasons	5(3a,b)	
(3c)	follow-up to design contests		
(3d-f)	urgency, additional services, new services	5(3c-e)	
(4)	open or restricted procedure	5(4)	
14	<u>Debriefings, Internal records</u>	5a	
15	<u>Design contests</u>		
16	<u>Common rules in the technical field</u>		
(1-3a)	use of harmonised standards	10	
(3b)	derogation in the IT field		7(3b)
(3c-6)	derogations etc.	10	
17	<u>Publication of Notices</u>		
(1a)	indicative notice		9(1)
(1b)	incl. in-house-performance		
(2,3)	award notice, concession notice	12(2,3)	
(4)	design contest notice		
18	<u>Post award notice</u>		
(1-4)	mandatory/voluntary publication		
(5)	confidentiality	12(5)	

THIS DIRECTIVE		REFERENCE	
Art.	Subject	Works Directive	Supplies Directive
19	<u>Formalities of publication</u>		
(1,2)	formalities	12-15, 19	
(3)	computerised tender notices	"utilities directive"(1)	
20	<u>Application of specified criteria</u>	20	
21	<u>Variants</u>		
(1)	when and how to admit	20a	
(2)	variants leading to other types of contracts		
22	<u>Subcontracts</u>		
(1)	Indication in contract documents	20b	
(2)	Subcontracting by concessionnaires	1b(2)	
23	<u>Legal form of suppliers</u>		
(1)	groups	21	
(2)	natural or legal persons		1(a)
(3)	national rules		
24	<u>Participants in restricted and negotiated procedures</u>	22	
25	<u>Employment/Working conditions</u>	22a	
26	<u>Exclusion criteria</u>	23	
27	<u>Trade registers</u>		
(1)	undertakings	24	
(2)	free practitioners		
(3)	list of registers	24	
28	<u>Financial and economic standing</u>		
(1a,b)	references	26	
(1c)	other references		22(1c)
(2,3)	notices, etc.	26	

THIS DIRECTIVE		REFERENCE	
Art.	Subject	Works Directive	Supplies Directive
29	<u>Technical capacity</u>		
(1) (2-4)	Ability criteria Evidence	27	23
30	<u>Certification, Quality assurance</u>		
31	<u>Supplementary information</u>	27	
32	<u>List of recognized suppliers</u>	28	
33	<u>Regular award criteria</u>	29	
34	<u>Abnormally low tenders</u>	29(4)	
(1)	obligations to verify cost basis	29(4)	
(2)	tenders submitted by public entities		
(3)	rejection of abnormally low tenders	"utilities directive"(1)	
35	<u>Regional preferences</u>	29a	
36	<u>Information on preference schemes</u>	29b	
37	<u>Time limits</u>	30	
38	<u>Statistical reports</u>		
39	<u>Committee procedure</u>	30b	
40	<u>Relations with third countries</u>		
41	<u>Amendment of the remedies directive</u>		
42	<u>Revision clause</u>		
43-45	<u>Formalities</u>		

(1) COM(90)301 final of 12 July 1990. Reexamined proposal for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

XIV. INDEX
on explanations to particular articles

<u>Article</u>	<u>paragraph of explanatory memorandum</u>
1	15-18, 22-35, 69-75
2	22
3	74
4	28/29, 80
5	27
6	75
7	81
8	37-41
9	14
10	61
11	14
12	74
13	44, 46
14	89
15	46
16	65-68
17	46, 74, 76-78, 81
18	46, 60-63, 74, 90
19	43
20	43
21	47/48
22	74
23	48
24	43
25	43
26	51-53
27	51-53
28	51, 54, 94-96
29	54, 94-96
30	52
31	43
32	51-53
33	54-57, 95
34	83-88
35	43
36	43
37	43
38	91
39	92
40	97-107
41	108
42	52, 68, 81, 93
43	109
44	43
45	43
<u>Annex</u>	
I	19, 21, 30, 60, 63/64, 93
II	65-68
III	48
IV	46
V	74

II

(Preparatory Acts)

COMMISSION

Proposal for a Council Directive relating to the coordination of procedures on the award of public service contracts

COM(90) 372 final — SYN 293

(Submitted by the Commission on 13 December 1990)

(91/C 23/01)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the European Council has concluded in successive meetings on the need to complete the internal market;

Whereas measures aimed at progressively establishing the internal market during the period up to 31 December 1992 need to be taken; whereas the internal market is an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;

Whereas these objectives require the coordination of the procurement procedures on the award of public service contracts;

Whereas the White Paper on the completion of the internal market contains an action programme and a timetable for opening up public procurement markets, including in the

field of services in so far as this is not already covered by Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts ⁽¹⁾, as last amended by Directive 89/440/EEC ⁽²⁾, and Council Directive 77/62/EEC of 21 December 1986 coordinating procedures for the award of public supply contracts ⁽³⁾, as last amended by Directive 88/295/EEC ⁽⁴⁾;

Whereas this Directive should be applied by all contracting authorities in the sense of the aforementioned Directives;

Whereas suppliers may be natural persons; whereas without prejudice to national rules compatible with the Treaty suppliers may also be legal persons;

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 this Directive only in so far as it is based on contracts; whereas

⁽¹⁾ OJ No L 185, 16. 8. 1971, p. 5.

⁽²⁾ OJ No L 210, 21. 7. 1989, p. 1.

⁽³⁾ OJ No L 13, 15. 1. 1977, p. 1.

⁽⁴⁾ OJ No L 127, 20. 5. 1988, p. 1.

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, this Directive only covers R&D services whose results accrue exclusively to the contracting authority;

Whereas, in order to ensure coherent award procedures, public service concessions should be covered by this Directive in the same way as Directive 71/305/EEC applies to public works concessions;

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

Whereas the award of contracts for certain audio-visual services in the broadcasting field is governed by considerations 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 the financial services sector includes activities in connection with the application of instruments of monetary policy; the particular characteristics of this area require their exclusion from this Directive;

Whereas in the field of services the same derogations as in the aforementioned Directives should apply, as regards State security or secrecy and the priority of other procurement rules such as those pursuant to international agreements, the stationing of troops, or the rules of international organisations;

Whereas this Directive does not prejudice the application of, in particular, Articles 55, 56 and 66 of the Treaty;

Whereas the rules concerning service contracts as contained in Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ⁽¹⁾ should remain unaffected by this Directive;

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

Whereas this Directive should not apply to small contracts below a certain threshold, in order to avoid unnecessary formalities; whereas the threshold may in principle be the same as that for public supply contracts; whereas the threshold for design contracts concerning a complete work within the meaning of Directive 71/305/EEC should correspond to the threshold concerning works contracts as established by that Directive; whereas the calculation of contract value, the publication and the method of adaptation of the thresholds should be the same as in the other Community procurement directives;

Whereas, to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of suppliers to procedures for the award of contracts;

Whereas full application of the Directive must be limited, for a transitional period, to contracts for those services where the market is genuinely open or will be so by the time this Directive comes into effect, and where the provisions of the Directive will enable the full potential for increased cross-frontier trade to be realized; whereas contracts for other services need to be monitored for a certain period before taking a decision on the full application of the Directive; whereas the mechanism for such monitoring needs to be set up by the Directive; whereas it should at the same time enable those interested to share the relevant information;

Whereas the rules for the award of public service contracts should be as close as possible to those concerning public supply contracts and public works contracts;

Whereas the procurement rules contained in Directives 71/305/EEC and 77/62/EEC can be applied, with necessary adaptations so as to take into account special aspects of procurement of services such as the choice of the negotiated procedure, design contests, variants, the legal form of suppliers, the reservation of certain activities to certain professions, registration and quality assurance matters;

Whereas the particular conditions for use of the negotiated procedure with prior publication of a notice when the service to be performed cannot be specified with sufficient

⁽¹⁾ OJ No L 297, 29. 10. 1990, p. 1.

precision should be fulfilled in particular in the field of intellectual, creative services;

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 the objectives of this Directive do not require any changes in the current state at national level, as regards the admission, or regulation, of price competition between suppliers of certain services;

Whereas contracting authorities must be able to reject tenders which, because they are based on State aids, are unreliable; whereas tenders which are submitted by public bodies may create the risk of distortions of competition when they are influenced by the availability of public financing; whereas contracting authorities shall, under particular conditions, inform the Commission of their attitude towards such tenders; whereas this Directive does not prejudice the application of Articles 92 *et seq.*, of the Treaty;

Whereas Community undertakings should be granted access to the award of public service contracts and concessions in non-Community 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 public service contracts or concessions in the Community, of undertakings or of tenders originating in the non-Community country concerned;

Whereas the operation of this Directive should be reviewed at the latest three years after the date for compliance of national procurement rules; whereas the review should extend in particular to the possibility of making the Directive fully applicable to a wider range of service contracts,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

GENERAL PROVISIONS

Article 1

For the purpose of this Directive:

- (a) 'public service contracts' are contracts for pecuniary interest concluded in writing between a supplier and a contracting authority, to the exclusion of
 - (i) public supply contracts within the meaning of Article 1 (a) of Directive 77/62/EEC and public works contracts within the meaning of Article 1 (a) of Directive 71/305/EEC;
 - (ii) contracts for the purchase, lease or rental of, or concerning rights on land, existing buildings or other immovable property;
 - (iii) contracts for the acquisition of programme material by broadcasters within the meaning of Council Directive 89/552/EEC ⁽¹⁾, and contracts for broadcasting time pursuing public interest objectives such as information to the population in case of civil disasters;
 - (vi) contracts for voice telephony, telex, radiotelephony, paging and satellite services;
 - (v) contracts for arbitration and conciliation services;
 - (vi) public service concessions in the sense of point (h);
 - (vii) contracts concerning primary issues of government bonds and other activities in the area of public debt management;
- (b) 'contracting authorities' (hereafter 'authorities') shall be the bodies described in Article 1 (b) of Directive 71/305/EEC, and any other bodies listed in Annex I to Directive 80/767/EEC;
- (c) 'suppliers' are natural or legal persons, including public bodies which offer services. A supplier who submits a tender shall be designated by the term 'tenderer', and one who has sought an invitation to take part in a restricted or negotiated procedure by the term 'candidate';
- (d) 'open procedures' are those national procedures whereby all interested suppliers may submit a tender;
- (e) 'restricted procedures' are those national procedures whereby only those suppliers invited by the authority may submit a tender;
- (f) 'negotiated procedures' are those national procedures whereby authorities consult suppliers of their choice and negotiate the terms of the contract with one or more of them;

⁽¹⁾ OJ No L 298, 17. 10. 1989, p. 23.

- (g) 'design contests' are those national procedures which aim at providing the authority with a plan or design, mainly in the fields of area planning, town planning, architecture and civil engineering, or data processing, and which are selected by a jury on the basis of competition with or without the award of prizes;
- (h) a 'public service concession' is a contract other than a public works concession within the meaning of Article 1 (d) of Directive 71/305/EEC, concluded between an authority and another entity of its choice whereby the former transfers the execution of a service to the public lying within its responsibility to the latter and the latter accepts to execute the activity in return for the right to exploit the service or this right together with payment. Contracts for the award of rights to perform broadcasting activities are excluded from this definition.

Article 2

1. Member States shall take the necessary measures to ensure that authorities comply with this Directive when they award public service contracts or public service concessions, or hold design contests.
2. Authorities shall ensure that there is no discrimination between different suppliers.
3. Member States shall take the necessary measures to ensure that the authorities comply or ensure compliance with this Directive where they subsidize directly by more than 50 % service contracts awarded by an entity other than themselves in connection with projects to which Article 1a (2) of Directive 71/305/EEC relates.

Article 3

1. When a concessionaire is himself an authority within the meaning of Article 1 (b), he shall comply with the provisions of this Directive in the case of services to be carried out by third parties.
2. Member States shall take the necessary steps to ensure that a concessionaire which is not itself an authority shall apply the advertising rules as set out in Articles 17, 18 and 19 to contracts for services listed in Annex I.A which it

intends to award to third parties when the value of the contract is above the thresholds fixed in Article 8 (1).

Advertising rules need not be applied when the contract meets the conditions laid down in Article 13 (3).

3. Undertakings which have formed a group in order to obtain the concession, or undertakings affiliated to them, shall not be regarded as third parties within the meaning of paragraph 2 under the conditions specified in Article 1b (4) of Directive 71/305/EEC.

Article 4

1. This Directive shall apply to service contracts awarded by authorities in the field of defence, except for contracts to which the provisions of Article 223 of the Treaty apply.
2. This Directive shall not apply to services which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.

Article 5

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

- (a) pursuant to an international agreement concluded between a Member State and one or more non-member countries and covering services 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 (2);
- (b) to undertakings in a Member State or a non-member country in pursuance of an international agreement relating to the stationing of troops;
- (c) pursuant to the particular procedure of an international organization.

Article 6

This Directive shall not apply to the award of public service contracts or concessions or the execution of design contests by contracting entities within the meaning of Article 2 of Directive 90/531/EEC.

(1) OJ No L 185, 16. 8. 1971, p. 15.

Article 7

Without prejudice to Article 17 (1), the provisions of this Directive shall not apply to the award of public service contracts which authorities have to award to an entity which is itself a contracting authority within the meaning of Article 1 (b) pursuant to an exclusive right established by a published law, regulation or administrative provision which is compatible with the Treaty.

Article 8

1. The provisions of this Directive shall apply to contracts for services falling within category 6 of Annex I.A which:

- (a) as regards insurance services, provide for annual premiums of not less than ECU 100 000;
- (b) as regards banking and other financial services, provide for fees, commissions or other types of remuneration of not less than ECU 200 000.

2. The provisions of this Directive shall apply to contracts for services falling within category 12 of Annex I.A which have as their object the complete design of a work within the meaning of Article 1 (c) of Directive 71/305/EEC, when the estimated cost net of VAT of the execution of the work is not less than ECU 5 000 000.

Where the design of a work is subdivided into several lots, each one the subject of a contract, the value of execution of each lot must be taken into account for the purpose of calculating the amount referred to above. Where the aggregate value of the execution of the lots is not less than the amount referred to above, the provisions of this Directive shall apply to all lots. Authorities shall be permitted to depart from this provision for lots the execution of which has an estimated value net of VAT of less than ECU 1 000 000, provided that the total estimated value of the execution of all the lots exempted does not, in consequence, exceed 20 % of the total estimated value of all lots.

3. The provisions of this Directive shall apply to contracts for services falling within the category 21 of Annex I.B which provide for expected annual benefits from interest of not less than ECU 200 000.

4. The provisions of this Directive shall apply to all other service contracts whose estimated value net of VAT is not less than ECU 200 000.

5. The value of a contract within the meaning of paragraphs 1, 2 and 4 includes the total remuneration of

the supplier as estimated at the time of publication of the notice in accordance with Article 17, along with the elements specified in paragraphs 6 to 10.

6. In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be:

- in the case of fixed term contracts, the total contract value for its duration,
- in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the monthly instalment multiplied by 48.

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

- either the aggregate cost of similar contracts for the same category of services concluded over the previous fiscal year or 12 months, adjusted, where possible, for anticipated changes in quantity or value over the subsequent 12 months,

or

- the estimated aggregate cost during the 12 months following first performance or during the term of the contract, where this is greater than 12 months.

The selection of the valuation method shall not be used with the intention of avoiding the application of this Directive.

8. In cases where a proposed contract specifies option clauses, the basis for calculating the contract value shall be the highest possible total inclusive of the option clauses.

9. No procurement requirement for a given amount of services may be split up with the intention of avoiding the application of this Article.

10. When calculating the amounts referred to in paragraphs 1 to 4, account shall be taken not only of the value of the services but also of the estimated value of the supplies needed to carry out the services which are made available to the supplier by the authorities.

11. Article 5 (1) (c) and (1) (d) of Directive 77/62/EEC are applicable as regards the value in national currency of the thresholds laid down in paragraphs 1 to 4 of this Article, the calculation of these values, and the revision of the method of calculation.

TITLE II

TWO-TIER APPLICATION

Article 9

Contracts which have as their object services listed in Annex I.A shall be awarded in accordance with the provisions of Titles III to VI.

Article 10

Contracts which have as their object services listed in Annex I.B shall be awarded in accordance with Articles 16 and 18.

Article 11

Contracts which have as their object services listed in both Annexes I.A and I.B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I.A is greater than the value of the services listed in Annex I.B. Where this is not the case, they shall be awarded in accordance with Articles 16 and 18.

Article 12

Where authorities conclude a public service concession contract within the meaning of Article 1 (h), the advertising rules as described in Articles 17, 18 and 19 shall apply irrespective of whether the object of the concession is a service within the meaning of Annex I.A or Annex I.B, when its value is not less than ECU 5 000 000.

TITLE III

CHOICE OF AWARD PROCEDURES, AND RULES ON DESIGN CONTESTS

Article 13

1. In awarding public service contracts the authorities shall apply the procedures defined in Article 1, adapted to this Directive.

2. The authorities may award their public service contracts by negotiated procedure, with prior publication of a tender notice in the following cases:

(a) in the event of irregular tenders in response to an open or restricted procedure or in the event of tenders

which are unacceptable under national provisions that are in accordance with the provisions of Title VI Chapter 1, in so far as the original terms of the contract are not substantially altered. The authority may not, in such a case, publish a tender notice where it includes in such negotiated procedure all the tenderers satisfying the criteria of Articles 26 to 32 which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure;

(b) in exceptional cases, when the nature of the services or the risks attaching thereto do not permit overall pricing;

(c) when the nature of the services to be procured, in particular in the case of intellectual services and services falling within category 6 of Annex IA, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures.

3. The authorities may award public service contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

(a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure in so far as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission at its request;

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may only be carried out by a particular supplier;

(c) when the contract concerned is part of the follow-up to a design contest and must, according to the relevant rules, be awarded to one of the winners of that contest;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the authorities in question, the time limit for the open, restricted or negotiated procedures referred to in Article 19 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the authorities;

(e) for additional services not included in the project initially considered or in the contract first concluded

but which have, through unforeseen circumstances, become necessary for the carrying out of the service described therein, on condition that the award is made to the supplier carrying out such service:

- when such services cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities,

or

- when such services, although separable from the execution of the original contract, are strictly necessary to the later stages.

However, the aggregate estimated value of contracts awarded for additional services may not exceed 50 % of the amount of the main contract;

- (f) for new services consisting of the repetition of similar services entrusted to the supplier to which the same authorities awarded an earlier contract, provided that such services conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4. 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 services shall be taken into consideration by the authorities when they apply the provisions of Article 8. This procedure may be applied solely during the three years following the conclusion of the original contract.

4. In all other cases, the authorities shall award their public service contracts by the open procedure or by the restricted procedure.

Article 14

1. This authority shall, within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer who so requests in writing of the reasons for rejection of his application or his tender, and, in the case of a tender, the name of the successful tenderer.

2. The authority shall inform candidates or tenderers who so request of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure. It shall also inform the Office for Official Publications of the European Communities of that decision.

3. For each contract awarded the authorities shall draw up a written report which shall include at least the following:

- its name and address, the subject and value of the contract,
- the names of the candidates or tenderers admitted and the reasons for their selection,
- the names of the candidates or tenderers rejected and the reasons for their rejection,
- the name of the successful tenderer and the reasons for his tender having been selected and, if known, any share of the contract the successful tenderer may intend to subcontract to a third party,
- for negotiated procedures, the circumstances referred to in Article 13 which justify the use of these procedures.

This report, or the main features of it, shall be communicated to the Commission at its request.

Article 15

1. Design contests shall be subject to the rules set out below. 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, authorities shall apply the rules laid down in Article 24.

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 in the sense of Annex IV.

5. Member States may oblige authorities to award subsequent contracts to one of the winners of a design contest.

TITLE IV

COMMON RULES IN THE TECHNICAL FIELD

Article 16

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

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

3. An authority may depart from paragraph 2 if:

- (a) the standards, European technical approvals or common technical specifications do not include any provisions for establishing conformity, or technical means do not exist for establishing satisfactorily the conformity of a product to these standards, European technical approvals or common technical specifications;
- (b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment⁽¹⁾, or Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications⁽²⁾ or other Community instruments in specific service or product areas;
- (c) use of these standards, European technical approvals or common technical specifications would oblige the authority to acquire products or materials incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to change-over, within a given period, to European standards, European technical approvals or common technical specifications;

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

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

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

- (a) shall be defined by reference to the national technical specifications recognized as complying with the basic requirements listed in the Community Directives on technical harmonization, in accordance with the procedures laid down in those Directives, and in particular in accordance with the procedures laid down in Council Directive 89/106/EEC⁽³⁾;
- (b) may be defined by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials;
- (c) may be defined by reference to other documents.

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

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

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

⁽¹⁾ OJ No L 217, 5. 8. 1986, p. 21.

⁽²⁾ OJ No L 36, 7. 2. 1987, p. 31.

⁽³⁾ OJ No L 40, 11. 2. 1989, p. 12.

TITLE V

COMMON ADVERTISING RULES

Article 17

1. Authorities shall make known, by means of an indicative notice to be published as soon as possible after the beginning of their budgetary year, the intended total procurement in each of the service categories listed in Annex I.A which they envisage awarding during the coming 12 months where the total estimated value, taking account of the provisions of Article 8, is equal to or greater than ECU 750 000. Intended contracts for the design of a work within the meaning of Article 1 (c) of Directive 71/305/EEC and of which the estimated value is not less than the threshold laid down in Article 8 (2) shall be indicated separately in the notice.

2. Authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 13, negotiated procedure, shall make known their intention by means of a notice.

3. Authorities who wish to award a public service concession shall make known their intention by means of a notice.

4. Authorities who wish to carry out a design contest shall make known their intention by means of a notice.

Article 18

1. Authorities who have awarded a contract or a public service concession, or which have held a design contest shall send a notice of the results of the award procedure to the Office for Official Publications of the European Communities.

2. In cases of public service contracts for services listed in Annex I.A, public service concessions and design contests, the notice shall be published in accordance with the provisions referred to in Article 19.

3. In the case of public service contracts for services listed in Annex I.B, the authorities shall indicate in the notice whether they agree on its publication.

4. The Commission shall draw up the rules for establishing regular reports on the basis of such notices, and for the publication of such reports in accordance with the procedure laid down in Article 39 (3).

5. In so far as release of information on the contract award would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular enterprise, public or private, or might prejudice fair competition between suppliers, such information may not be published.

Article 19

1. The notices shall be drawn up in accordance with the models set out in Annexes III, IV and V, and shall specify the information requested in those models. The authorities may not require any conditions but those specified in Articles 28 and 29 when requesting information concerning the economic and technical standards which they require of suppliers for their selection (Point 13 of Annex III.B, point 12 of Annex III.C, and point 11 of Annex III.D).

2. The following provisions of Directive 71/305/EEC shall apply:

- (i) Article 12 (6), (8) and (13) concerning publication of notices;
- (ii) Articles 13 to 15 concerning minimum time limits for the phases of award procedures and communications between authorities and candidates;
- (iii) Articles 15a and 15b concerning minimum time limits for the award of public service concessions and contracts to be awarded by concessionaires;
- (vi) Article 19 concerning voluntary publication of notices in the *Official Journal of the European Communities*.

3. The conditions for the establishment, transmission, reception, translation, accumulation and distribution of the notices referred to in paragraphs 1 and 2 and in Articles 17 and 18, and of the statistical reports provided for in Articles 18 (4) and 38 and the reference in the notices to particular CPC positions within the categories of services listed in Annexes I.A and I.B may be modified in accordance with the procedure laid down in Article 39 (3).

TITLE VI

Chapter 1

Common rules on participation

Article 20

Contracts shall be awarded on the basis of the criteria laid down in Chapter 3, taking into account Article 21, after

the suitability of the suppliers not excluded under Article 26 has been checked by the authorities in accordance with the criteria referred to in Articles 28 and 29.

Article 21

1. Authorities may take account of variants where the criterion for the award of the contract is that of the economically most advantageous tender. They shall indicate in the tender notice whether or not variants will be considered. Where applicable, any specific requirements for the presentation of variants shall be stated in the tender notice or in the contract documents.

Variants must not deviate from minimum specifications which the authority may have established. Minimum specifications shall be stated in the tender notice or in the contract documents.

2. Authorities which have admitted variants pursuant to paragraph 1 may not reject a variant on the sole grounds that it would lead, if successful, to a supply contract rather than a public service contract within the meaning of this Directive.

Article 22

1. In the contract documents, the authority 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 supplier's liability.

2. Where authorities intend to award a public service concession, they may:

- either require the concessionaire to award contracts representing a minimum of 30 % of the total value of the services for which the concession contract is to be awarded, to third parties, at the same time providing the option for candidates to increase this percentage. This minimum percentage shall be specified in the concession contract,
- or request the candidates for concession contracts to specify in their tenders the percentage, if any, of the total value of the concession contract which they intend to assign to third parties.

Article 23

1. Tenders may be submitted by groups of suppliers. These groups may not be required to assume a specific legal

form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.

2. Candidates or tenderers may not be rejected on the grounds that they are either natural or legal persons. Legal persons, however, may be required to indicate in the tender or the request for participation the names and relevant professional qualification of the staff to be responsible for the performance of the service.

3. Paragraph 2 is without prejudice to national rules which establish conditions for the setting up of, or the carrying out of particular activities by, legal persons governed by the law of the Member States concerned.

Article 24

1. In restricted and negotiated procedures the authorities shall, on the basis of information given relating to the supplier's position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Articles 26 to 32 those whom they will invite to submit a tender or to negotiate.

2. Where the authorities award a contract by restricted procedure, they may prescribe the range within which the number of suppliers which they intend to invite will fall. In this case the range shall be indicated in the contract notice. The range shall be determined in the light of the nature of the service to be carried out. The range must number at least five suppliers and may be up to 20.

In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.

3. Where the authorities award a contract by negotiated procedure as referred to in Article 13, the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.

4. Each Member State shall ensure that authorities issue invitations without discrimination to those nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals.

Article 25

1. The authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a candidate may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the services are to be performed and which shall be applicable to the services provided on site during the performance of the contract.

2. The authority 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 service is to be carried out. This shall be without prejudice to the application of the provisions of Article 34 concerning the examination of abnormally low tenders.

Chapter 2

Criteria for qualitative selection

Article 26

Any supplier may be excluded from participation in the contract who:

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

- (g) is guilty of serious misrepresentation in supplying the information required under this chapter.

Where the authority requires of the supplier proof that none of the cases quoted in (a), (b), (c), (e), or (f) applies to him, it shall accept as sufficient evidence:

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

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

Member States shall, within the time limit referred to in Article 19, designate the authorities and bodies competent to issue these documents and shall forthwith inform the other Member States and the Commission thereof.

Article 27

1. Any candidate or tenderer may be requested to prove his enrolment, as prescribed in his country of establishment, in one of the professional or trade registers or to provide a declaration or certificate as described in paragraph 3.
2. In so far as candidates for a public contract have to possess a particular authorization or to be members of a particular organization in their home country in order to be able to perform the service concerned, the authority may require them to prove that authorization or membership.
3. The relevant professional or trade registers or declarations or certificates are:
 - in Belgium, the 'registre du commerce — Handelsregister',
 - in Denmark, the 'Erhvervs-og Selskabsstyrelsen' (the 'Aktieselskabsregistret'; 'Foreningsregistret', or 'Handelsregistret'),
 - in Germany, the 'Handelsregister' and the 'Handwerksrolle',
 - in Greece, a declaration on the exercise of the profession concerned made on oath before a notary may be required,

- in Spain, the 'Registro Oficial de Contratistas del Ministerio de Industria y Energia',
- in France, the 'registre du commerce', and the 'répertoire des métiers',
- in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato' or the 'Registro delle commissioni provinciali per l'artigianato',
- in Luxembourg, the 'registre aux firmes' and the 'rôle de la Chambre des métiers',
- in the Netherlands, the 'Handelsregister',
- in Portugal, the 'Comissão de Alvarás de Empresas de Obras Públicas e Particulares' (CAEOPP) or the 'Registo Nacional das Pessoas Colectivas',
- in the United Kingdom and Ireland, the supplier may be requested to provide a certificate from the 'Registrar of Companies' or the 'Registrar of Friendly Societies' or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name.

Article 28

1. Proof of the supplier's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

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

2. The authorities shall specify in the notice or in the invitation to tender which reference or references they have chosen and which references other than those mentioned under paragraph 1 are to be produced.

3. If, for any valid reason, the supplier is unable to provide the references requested by the authority, he may prove his economic and financial standing by any other document which the authority considers appropriate.

Article 29

1. The ability of suppliers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the suppliers' technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be supplied:

- (a) the suppliers' educational and professional qualifications and/or those of the firm's managerial staff, and in particular, those of the person or persons responsible for performing the services;
- (b) a list of the principal services supplied in the past three years, with the sums, dates and recipients, public or private, involved;
 - where supplied to authorities, evidence to be in the form of certificates issued or countersigned by the competent authority,
 - where supplied to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected;
- (c) indication of the technicians or technical bodies involved, whether or not belonging directly to the supplier, especially those responsible for quality control;
- (d) a statement of the suppliers' average annual manpower and the number of managerial staff for the last three years;
- (e) a statement of the tool, plant or technical equipment available to the supplier for carrying out the services;
- (f) a description of the suppliers' measures for ensuring quality, and his study and research facilities;
- (g) where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the authority or on its behalf by a competent official body of the country in which the supplier is established, subject to that body's agreement, on the technical capacities of the supplier and, if necessary, on his study and research facilities and quality control measures.
- (h) indication of the share of the contract which the supplier may intend to sub-contract.

3. The authority shall specify in the notice or in the invitation to tender which references it wishes to receive.

4. The extent of the information referred to in Article 28 and paragraphs 1 to 3 of this Article must be confined to the subject of the contract. Authorities shall take into consideration the legitimate interests of the suppliers as regards the protection of their technical or trade-related secrets.

The authorities of other Member States shall apply the above provisions only in favour of suppliers who are established in the country holding the official list.

Article 30

Should authorities require the production of certificates drawn up by independent bodies for attesting conformity of the supplier to certain quality assurance standards, reference should be made to quality assurance systems based on the relevant EN 29000 European standards series certified by bodies conforming to the EN 45000 European standards series. Authorities shall recognize equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from suppliers who have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

Article 31

Within the limits of Articles 26 to 29, the authority may invite the suppliers to supplement the certificates and documents submitted or to clarify them.

Article 32

1. Member States who have official lists of recognized suppliers must adapt them to the provisions of Articles 26 (a) to (d) and (g) and of Articles 27 to 29.

2. Suppliers registered in these lists may, for each contract, submit to the authority a certificate of registration issued by the competent authority. This certificate shall state the references which enabled them to be registered in the list and the classification given in this list.

3. Certified registration in such lists by the competent bodies shall, for the authorities of other Member States, constitute a presumption of suitability corresponding to the supplier's classification only as regards Articles 26 (a) to (d) and (g), 27, 28 (b) and (c) and 29 (a).

Information which can be deduced from registration in official lists may not be questioned. However, with regard to the payment of social security contributions, an additional certificate may be required of any registered supplier whenever a contract is offered.

Chapter 3

Criteria for the award of contracts

Article 33

1. Without prejudice to national law, regulation or administrative provision on the remuneration of certain services, the criteria on which the authority shall base the award of contracts may be:

- (a) when the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and service, delivery date and period of completion, price; or
- (b) the lowest price only.

2. Where the contract is to be awarded to the economically most advantageous offer, authorities shall state in the contract documents or in the tender notice the award criteria which they intend to apply and the intended ranking or weighting they intend to use.

3. Paragraph 1 shall not apply when a Member State bases the award of contracts on other criteria, within the framework of rules in force at the time of the adoption of this Directive whose aim it is to give preference to certain tenderers, on condition that the rules invoked are compatible with the Treaty.

Article 34

1. If, for a given contract, tenders appear to be abnormally low in relation to the transaction, the authority shall request, in writing, details of the constituent elements of the tender concerned. It shall, in particular, enquire whether the tenderer is an authority within the meaning of Article 1 (b), whether the tenderer is in receipt of any form of State aid and whether the aid has been notified to and received the approval from the Commission pursuant to Article 93 (3) of the Treaty.

Authorities shall verify the constituent elements of the tenders concerned, taking account of any explanations received, before deciding on the award of the contract or on the rejection of a tender.

2. In the case of a tender submitted by a public authority or a public enterprise, the authority 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.

3. Authorities 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. Authorities which reject a tender under these circumstances shall inform the Commission thereof.

4. If the contract documents provide for its award at the lowest price tendered, the authority must communicate to the Commission the rejection of tenders which it considers to be too low.

TITLE VII

Final provisions

Article 35

Until 31 December 1992, this Directive shall not prevent the application of existing national provisions on the award of public service contracts which have as their objective the reduction of regional disparities and the promotion of job creation in regions whose development is lagging behind and in declining industrial regions, on condition that the provisions concerned are compatible with the Treaty, in particular with the principles of non-discrimination on ground of nationality, freedom of establishment and freedom to provide services, and with the Community's international obligations.

Article 36

1. Member States shall inform the Commission of national provisions covered by Articles 33 (3) and 35 and of the rules for applying them.

2. Member States concerned shall forward to the Commission, every year, a report describing the implementation of these provisions. The reports shall be submitted to the Advisory Committee for Public Contracts.

Article 37

The calculation of time limits shall be made in accordance with Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971, determining the rules applicable to periods, dates and time limits ⁽¹⁾.

Article 38

1. In order to complete the information obtained on the basis of the award notices under Article 18, Member States shall each year, at the latest by 31 October, forward to the Commission a statistical report for the preceding year concerning *inter alia* the total value of contracts awarded which are below the thresholds laid down in Article 8 and which would otherwise have been covered by this Directive. Details shall be fixed according to the procedure laid down in Article 39 (3).

2. The Commission shall determine the nature of any additional statistical information, which is required in accordance with this Directive, in accordance with the procedure laid down in Article 39 (3).

Article 39

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Decision 71/306/EEC.

2. As regards procurement of telecommunications services falling within category 5 of Annex I.A, the Commission shall be assisted by the Advisory Committee on Telecommunications Procurement set up by Directive 90/531/EEC.

3. Where reference is made to the procedure laid down in this paragraph, the representative of the Commission shall submit to the Committee a draft of the measures 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.

⁽¹⁾ OJ No L 124, 8. 6. 1971, p. 1.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

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.

4. The Committees shall examine, on the initiative of the Commission or at the request of a Member State, any question relating to the application of this Directive.

Article 40

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 public service contracts or public service concessions in third countries.

2. The Commission shall report to the Council, before 31 December 1991 and then periodically, on the opening up of public service contracts and concessions in third countries and on the state of negotiations with these countries on this subject in the GATT framework or elsewhere.

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 public service contracts or concessions,

(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 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 (b) and (c), the Commission may decide, in addition to action taken pursuant to that paragraph, that the award of public service contracts or concessions to:

(a) undertakings governed by the law of the 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) tenders which have as their object services originating in the 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 39 (3). 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.

Article 41

Article 1 (1) of Directive 89/665/EEC⁽¹⁾ is replaced by the following:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and .../.../EEC (*), decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2 (7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

(*) OJ No L 00, 00. 00. 0000, p. 0.'

⁽¹⁾ OJ No L 395, 30. 12. 1989, p. 33.

Article 42

Not later than three years after the time limit for compliance with this Directive the Commission, acting in close cooperation with the Committees referred to in Article 39, shall review the manner in which this Directive has operated including, in particular, the effects of the application of the Directive to procurement of services listed in Annex I.A and the provisions concerning technical standards. It shall evaluate, in particular, the prospects for the full application of the Directive to procurement of other services listed in Annex I.B, and the effects of in-house performance of services on the effective opening-up of the market in this area. It shall make the necessary proposals to adapt the Directive accordingly.

Article 43

Member States shall implement the laws, regulations and administrative provisions necessary to comply with this

Directive by 1 March 1992. They shall forthwith inform the Commission thereof.

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 the Member States.

Article 44

Member States ensure that the texts of the basic provisions of domestic law, whether laws, regulations or administrative provisions, which they adopt to implement this Directive, are communicated to the Commission.

Article 45

This Directive is addressed to the Member States.

ANNEX I.A

Services in the sense of Article 9

Category	Title	CPC division, group, class or sub-class
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 ⁽¹⁾
6	Financial services: (a) Insurance services (b) Banking and investment services remunerated by fees, commissions, or comparable types of remuneration ⁽²⁾	ex 81, 812, 814
7	Computer and related services	84
8	R&D services ⁽³⁾	85
9	Accounting, auditing and bookkeeping services	862
10	Market research and public opinion polling services	864
11	Management consulting services and related services	865, 866 ⁽⁴⁾
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

⁽¹⁾ Except voice telephony, telex, radiotelephony, paging and satellite services.

⁽²⁾ Except activities involving primary government bonds and activities involving public debt management.

⁽³⁾ As defined in the ninth recital.

⁽⁴⁾ Except arbitration and conciliation services.

ANNEX I.B

Services in the sense of Article 10

Category	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	Financial services Banking and investment services not remunerated by fees, commissions, or comparable types of remuneration	ex 81
22	Legal services	861
23	Placement and supply services of personnel	872
24	Investigation and security services (except armoured car services)	873 (except 87304)
25	Education and vocational educational services	92
26	Health and social services	93
27	Recreational, cultural and sporting services	96
28	Other services	

ANNEX II

Definition of certain technical specifications

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

1. 'Technical specifications': the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. They shall also include rules relating to design and costing, the test, inspection and acceptances for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.
2. 'Standard': a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory.
3. 'European standard': a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as 'European Standards' or 'Harmonization documents (HD)' according to the common rules of these organizations or by the European Telecommunications Standards Institute (ETSI) as a 'European Telecommunication Standard' (ETS).
4. 'European technical approval': a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of applications and use. The European agreement shall be issued by an approval body designated for this purpose by the Member State.
5. 'Common technical specification': a technical specification laid down in accordance with a procedure recognized by the Member States to ensure uniform application in all Member States which has been published in the *Official Journal of the European Communities*.
6. 'Essential requirements': requirements regarding safety, health and certain other aspects in the general interest, that the construction works can meet.

ANNEX III

MODEL CONTRACT NOTICES

A. Prior information

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

B. Open procedure

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority.
2. Category of service and description. CPC classification.
3. Place of delivery.
4. (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 qualifications of the staff to be responsible for the execution of the service.
5. Indication whether suppliers can tender for a part of the services concerned.
6. Variants:
 - (a) minimum specifications;
 - (b) desirable elements;
 - (c) where applicable, prohibition on variants.
7. Duration of contract or time limit for completion of the service.
8. (a) Name and address of the service from which the relevant documents may be requested.
(b) Final date for making such requests.
(c) Where applicable, the amount and terms of payment of any sum payable for such documents.
9. (a) Persons authorized to be present at the opening of tenders.
(b) Date, time and place of the opening.
10. Where applicable, any deposits and guarantees required.
11. The main terms concerning financing and payment and/or references to the relevant provisions.

12. Where applicable, the legal form to be taken by the grouping of suppliers winning the contract.
13. Information concerning the suppliers' own position, and information and formalities necessary for an appraisal of the minimum economic and technical standards required of the supplier.
14. Period during which the tenderer is bound to keep open his tender.
15. Criteria for the award of the contract and their ranking. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents.
16. Other information.
17. Date of dispatch of the notice.
18. Date of receipt of the notice by the Office for Official Publications of the European Communities.

C. Restricted procedure

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the authority.
2. Category of service and description. CPC classification.
3. Place of delivery.
4. (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 qualifications of the staff to be responsible for the execution of the service.
5. Indication of whether the supplier can tender for a part of the services concerned.
6. Envisaged number of suppliers, or range, which will be invited to tender.
7. Variants:
 - (a) minimum specifications;
 - (b) desirable elements;
 - (c) where applicable, prohibition on variants.
8. Duration of contract, or time limit for completion of the service.
9. Where applicable, the legal form to be assumed by the grouping of suppliers winning the contract.
10. (a) Where applicable, justification for the use of the accelerated procedure.
(b) Final date for the receipt of requests to participate.
(c) Address to which they must be sent.
(d) Language(s) in which they must be drawn up.
11. Final date for the dispatch of invitations to tender.
12. Any deposits and guarantees required.
13. Information concerning the supplier's own position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.

14. Criteria for the award of the contract and their ranking if these are not stated in the invitation to tender.
15. Other information.
16. Date of dispatch of the notice.
17. Date of receipt of the notice by the Office for Official Publications of the European Communities.

D. Negotiated procedure

1. The name, address, telegraphic address, telephone, telex and facsimile number of the authority.
2. Category of service and description. CPC classification.
3. Place of delivery.
4. (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 qualifications of the staff to be responsible for the execution of the service.
5. Indication of whether the supplier can tender for a part of the services concerned.
6. Envisaged number of suppliers, or range, which will be invited to tender.
7. Variants:
 - (a) minimum specifications;
 - (b) desirable elements;
 - (c) where applicable, prohibition on variants.
8. Duration of contract, or time limit for completion of the service.
9. Where applicable, the legal form to be assumed by the grouping of suppliers winning the contract.
10. (a) Where applicable, justification for the use of the accelerated procedure.
(b) Final date for the receipt of requests to participate.
(c) Address to which they must be sent.
(d) Language(s) in which they must be drawn up.
11. Any deposits and guarantees required.
12. Information concerning the supplier's own position, and the information and formalities necessary for an appraisal of the minimum economic and technical standards required of him.
13. Where applicable, the names and addresses of suppliers already selected by the awarding authority.
14. Other information.
15. Date of dispatch of the notice.
16. Date of receipt of the notice by the Office for Official Publications of the European Communities.
17. Date(s) of previous publications in the *Official Journal of the European Communities*.

E. Contract awards

1. Name and address of the authority.
 2. Award procedure chosen; in case of negotiated procedure without prior publication of a tender notice, justification (Article 13 (3)). CPC classification.
 3. Category of service and description.
 4. Date of award of contract.
 5. Criteria for award of contract.
 6. Number of tenders received.
 7. Name and address of supplier(s).
 8. Price or range of prices (minimum/maximum) paid.
 9. Where appropriate, value and proportion of contract likely to be sub-contracted to third parties.
 10. Other information.
 11. Date of publication of the tender notice in the *Official Journal of the European Communities*.
 12. Date of dispatch of the notice.
 13. Date of receipt of the notice by the Office for Official Publications of the European Communities.
 14. In the case of contracts for services listed in Annex I.B, agreement, by the contracting authority, on publication of the notice (Article 18 (3)).
-

ANNEX IV

A. 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.

B. 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.