

EC Infringement Proceedings - Public Procurement
Part 2

Germany and Italy - Implementation of Works, Supplies and Services Directives

13 January 2000

The Commission decided to refer Germany and Italy to the Court for failing to implement Directive 97/52/EC, which amends the Directives on public procurement of works, supplies and services to take account of the Government Procurement Agreement reached in the framework of the World Trade Organisation. The implementation deadline was 13 October 1998. Following receipt of a reasoned opinion in August of that year, the German authorities said they would implement the Directive during the second half of 1999, but the Commission had still not been informed of any steps yet taken to do so. Italy had notified the Commission of national laws implementing the Directive as regards the provision of supplies but not as regards public services or public works.

Germany - Waste Disposal Unit

13 January 2000

The problem concerned the award by the municipality of Flörsheim of a contract for planning the construction of a waste disposal unit. The contract was awarded under an accelerated procedure although the conditions specified by the Directive on public procurement of services (92/50/EC) for the use of this procedure were not fulfilled.

The Directive's requirement that the criteria for awarding the contract should be published was not respected either. The Commission did not regard the German authorities' explanations as satisfactory and so decided to refer the case to the Court.

Italy - Waste Processing Contracts

13 January 2000

The problem concerned a law applicable in the Lombardy region (N° 21 of 1.7.93) which allows contracts for treatment works and the treatment/recycling of urban waste to be awarded to public or private bodies without open and competitive procurement procedures. The Commission considered that this procedure violated Directive 93/37/EEC, which stipulates that public works contracts must be published and put out to tender. In the absence of a satisfactory response from the Italian authorities, the Commission decided to refer the case to the Court of Justice.

Germany, Austria and Italy - Water, Energy, Transport and Telecommunications

13 January 2000

The Commission decided to send reasoned opinions to Germany, Austria and Italy for failing to implement Directive 98/4/EC, which amends the Directive applying public procurement rules to the water, energy, transport and telecommunications sectors (93/38/EEC). In particular, the amendment takes account of the Government Procurement Agreement reached in the framework of the World Trade Organisation. The Directive should have been implemented into national law by 16 February 1999. As of January 2000, neither the authorities in Germany (despite notice that they intended to put implementing measures in place in the second half of 1999), Austria nor Italy had notified the Commission that they had done so.

Italy - Technical Assistance for the Treasury Ministry

13 January 2000

The Commission decided to send a reasoned opinion to Italy concerning a contract awarded by the Italian Treasury and Economic Planning Ministry for the provision of administrative and technical assistance to help in the drawing up of regional aid. The Commission considered that the Directive on public procurement of services (92/50/EEC) had been violated in three respects. First, the contract was awarded using an accelerated negotiated procedure whereas the conditions stipulated in the Directive for such a procedure were not fulfilled. Second, companies bidding were obliged to have a specific legal form (SA or Srl). Third, tenders more than 30% above or 25% below the average of all tenders submitted were automatically excluded from consideration.

Germany - Waste Incineration Contract

13 January 2000

The Commission decided to send Germany a reasoned opinion concerning the procedures followed by the town of Braunschweig when it awarded a 30-year contract for waste incineration to the BKB Kohlebergwerke company. The Commission considered that these procedures were in contravention of the Directive on public procurement of services (92/50/EEC). In particular, the contract was awarded under a negotiated procedure without prior publication of a notice despite the fact that the conditions for the use of such a procedure were not fulfilled.

Germany - Waste Water Disposal

13 January 2000

Another case where the Commission decided to send Germany a reasoned opinion concerns a 30-year contract awarded by the town of Bockhorn to the power company EWE for wastewater disposal. The contract was awarded without any invitation to tender, in violation of the Directive on public procurement of services (92/50/EEC), which covers sewerage collection and purification. The Federal Government authorities admitted the infringement but the contract was still in force.

Germany - Supplies to the Federal Office for Military Procurement

13 January 2000

The Commission also decided to send a reasoned opinion to Germany about a contract for the supply of static converters (to transform alternating current to direct current and vice versa) to the Bundesamt für Wehrtechnik und Beschaffung (Federal Office for military technology and procurement). The Commission considered that the conditions under which the contract was awarded violated the Directive on public procurement of supplies (93/36/EEC) for two reasons. First, the contract was awarded by use of an accelerated procedure without the specific conditions foreseen by the Directive being fulfilled. Second, the contract notices specified that the static converters had to be manufactured by a specific company without allowing equivalent equipment to be offered.

The German authorities tried to justify the use of the accelerated procedure and the references to a particular supplier by the fact that the product must meet specific military requirements. However, according to the case law from the European Court of Justice, these arguments would only be justified if the German authorities could prove that a particular specified firm was the only supplier, rather than just the most efficient supplier, and that it was "absolutely essential" for the contract to be awarded to a specific supplier in order to meet the technical specifications. The Commission were not satisfied by the arguments put forward by the German authorities so far.

Reasoned opinions constitute the second stage of formal infringement procedures under Article 226 (ex 169) of the EC Treaty. In the absence of a satisfactory response from the Member State concerned within two months of receipt of a reasoned opinion, the Commission may decide to refer the case to the European Court of Justice.

United Kingdom - Radio Communications System for the Police

9 September 1999

The Commission sent a reasoned opinion to the UK because it considered that a framework arrangement for a Public Safety Communications Project for the police and rescue services launched by the UK Home Office violated a provision of the Directive on public procurement of services (92/50/EEC) and EC Treaty rules on the free movement of goods (Article 28, ex-30). This provision is also present in substantially the same terms in the Directives on public procurement of supplies (93/36/EEC) and works (93/37/EEC) and in the Directive on procurement in the water, energy, transport and telecommunications sectors (93/38/EEC). The contract in question was awarded by way of a negotiated procedure. The award covered an initial phase (carrying out a project definition study - PDS), to be followed by one or more contracts for the provision of telecommunications services for police and/or rescue services over a 15-year period. One or more contracts may also have been awarded for the supply of the necessary equipment, for instance terminals. The characteristics of the equipment and services to be procured were specified by reference to the TETRA European technical standard for mobile radio services.

The problem was that the UK interpreted the public procurement Directives in such a way that contracting authorities were not obliged to verify whether products or services not manufactured according to the European standards specified in the tender documents were nevertheless equivalent. Instead, contracting authorities would be allowed to reject products or services which were genuinely equivalent simply because they were not manufactured in accordance with the relevant European standard. The Commission, on the other hand, maintained that the public procurement Directives required reference to European standards where they exist, so as to ensure that technical specifications are defined by reference to standards which are common, transparent and publicly available (in all languages). Reference to such European standards should, however, simply offer a common yardstick against which the solutions proposed by suppliers can be measured. If contracting authorities refused to examine whether or not the products or services offered were genuinely equivalent to products or services manufactured in accordance with European standards, then this constituted a violation of the public procurement Directives and of EC Treaty rules on the free movement of goods.

France - Construction of Sewage Treatment Plant 9 September 1999

The Commission sent France a reasoned opinion concerning the procedures followed by the greater Nancy area authorities to select a firm to construct a sewage treatment plant at Maxéville. The Commission considered that the French authorities had violated the Directive on procurement of public works (93/37/EEC) and EC Treaty rules on the freedom to provide services (Article 49, ex 59). The contract was attributed following a restricted procedure (i.e. a limited number of firms were invited to tender). However, contrary to the requirements of the Directive, the contracting entity did not publish beforehand an indicative notice of the contracts it was intending to award. Moreover, in the call for expressions of interest, the contracting authority specified that those submitting bids had to be registered with the French national order of architects, thereby discriminating against potential bids from suppliers established in other Member States. This discrimination violated not only the public works Directive, but also EC Treaty rules on the freedom to provide services. Another problem with the procedures followed was that only four firms were invited to tender, whereas the Directive requires a minimum number of five bidders so as to try to ensure genuine competition between bidders.

France, Greece, Germany and Austria - Failure to Notify National Measures to Implement Directive 97/52/EC 9 August 1999

The European Commission decided to send a reasoned opinion to France, Greece, the Federal Republic of Germany and Austria for failing to transpose into national law Directive 97/52/EEC amending the Directives concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts.

Directive 97/52/EEC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts adapted the abovementioned Directives to the Government Procurement Agreement (GPA), which is a part of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994). In Article 4(1) of Directive 97/52/EEC it is stated that the Member States should bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 13 October 1998.

Germany - University of Würzburg - Non-compliance 9 August 1999

The procurement procedure concerning the hospital of the Julius-Maximilian-University of Würzburg was brought to the attention of the Commission by a complaint. In September 1997 a contract for the planning, extension and refurbishment of the old dental clinic and another contract for the construction of operational units of the hospital of the University of Würzburg was published in the Supplement to the Official Journal. The contract notice referred under point 14 to a "negotiated procedure with prior publication in accordance with Article 11(2) of Council Directive 92/50/EEC".

The negotiated procedure is an exceptional procedure and therefore only applicable in certain limited cases. The Commission was of the opinion that the conditions of the provisions to award the contract under the negotiated procedure had not been fulfilled. The German authorities had not proved the existence of exceptional circumstances justifying a negotiated procedure with prior publication.

United Kingdom - Minimum Number of Candidates to be Invited to Participate in a Restricted Procedure
9 August 1999

The Commission decided to issue a reasoned opinion to the United Kingdom in relation to an official White Paper ("Setting New Standards: a strategy for Government Procurement"), which contained advice capable of being construed in such a way as to lead public purchasers to commit infringements against the public procurement rules.

The point at issue was that the advice appeared to indicate that the number of candidates to be invited to participate in a restricted procedure may always and in all circumstances be set as low as three participants, irrespective of the fact that under the public procurement rules, in certain circumstances, at least five candidates must be invited.

Italy - Public Procurement of Banking Services (Cash-Flow Management) for the SACE
9 August 1999

The Commission decided to send the Italian Government a reasoned opinion for violation of the provisions of Directive 92/50/EEC, and in particular Article 11 thereof. This reasoned opinion concerned the award of a banking services contract for cash-flow management for the SACE (Special Department for Export Credit Insurance) to the San Paolo Banking Institute in Turin at the beginning of 1997.

The failure to implement this provision resulted from the fact that the SACE, a body governed by public law and, as such, obliged to observe the Directives on public procurement, awarded the contract to the San Paolo Banking Institute in Turin without going through any public procedure.

The Commission found that none of the conditions laid down in Article 11(3) of Directive 92/50/EEC, which permit the use of the negotiated procedure without prior publication of a tender notice, had been fulfilled in this case.

Italy - Public Procurement of Design Services
9 August 1999

The Commission decided to send the Italian Government a reasoned opinion for infringement of the provisions of Directive 92/50/EEC, and in particular Article 11 thereof. This reasoned opinion related to the award by negotiated procedure, without prior publication of a tender notice, of design services for the Classe Archeological Museum by the Municipality of Ravenna.

The infringement resulted from the fact that the Municipality of Ravenna awarded the contract following a negotiated procedure, without prior publication and without an invitation to tender, despite the fact that the conditions laid down in Article 11 of Directive 92/50/EEC, which are the only ones justifying the use of the negotiated procedure, were not met.

Greece - Supply of Operational Leather Belts with Accessories by the Ministry for Development
9 August 1999

The Commission decided to send the Hellenic Republic a reasoned opinion relating to the procedure for the award of a contract for the supply of operational leather belts with accessories by the Ministry for Development.

The Commission's objections were based on the incorrect use by the Hellenic Republic of the accelerated restricted procedure and deficiencies in the publication of the tender notice in the OJEC, as well as the confusion of selection and award criteria.

The Commission considered that the awarding authority had infringed the provisions of Articles 11 and 12 of Directive 93/36/EEC by having recourse to the accelerated restricted procedure in a case where the conditions for the use of this procedure were not fulfilled. The Commission also took the view that Article 9(4) of Directive 93/36/EEC was infringed because publication of the tender notice in the OJEC was incomplete, inasmuch as it did not give reasons for the use of the accelerated procedure.

Austria - Construction of a Bypass

9 August 1999

The contract for the construction of a bypass of Linz was brought to the attention of the Commission by a complaint. The City of Linz concluded two contracts, one with a local bank for the financing and a second with a subsidiary undertaking of the local bank for the construction of this bypass, without a prior public procurement procedure.

The Commission took the view that the abovementioned contracts were public works contracts as defined in Article 1(a) of Directive 93/37/EEC and that the City of Linz was a contracting authority under the terms of Article 1(b) of the same Directive. On the basis of these considerations the contracts for the financing and construction of the bypass of Linz should have been awarded via a procurement procedure.

Spain - Works at the Experimental Penitentiary Centre

9 August 1999

The call for tenders to carry out works at the experimental penitentiary centre in Segovia, published in the national press but not in the OJEC, was launched in violation of the provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. The Spanish authorities contested the application of this Directive to the Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios on the grounds that it is a public commercial company governed by private law. The fact remained that the SEIEPSA was a contracting authority within the meaning of the Directive, inasmuch as it fulfilled the conditions of Article 1 thereof, in particular the condition that it had been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

France - Subsidised Housing

18 January 1999

The Commission decided to bring proceedings before the Court of Justice against France on the grounds that several subsidised housing bodies had launched a number of invitations to tender for construction work without first publishing them in the Official Journal of the European Communities, as stipulated in the Directive on public works contracts (93/37/EEC). On the basis of the concept of "public body" established by the Court in its case law, the Commission considered that these bodies were awarding authorities within the meaning of the abovementioned Directive and were consequently subject to the rules of that Directive, particularly as regards publication.

Italy - Integrated Computerised System for the General National Accounts Department

18 January 1999

The Commission decided to bring proceedings before the Court of Justice against Italy for infringement of the Directive on public service contracts (92/50/EEC), and in particular Article 11 thereof, on the grounds that the contracts for the maintenance, management and development of the integrated computerised system for the general national accounts department/Ministry of the Treasury (Ragioneria Generale dello Stato) and the Court of Auditors, originally concluded in 1987 and 1988, were renewed with the same company on several occasions without competition. Decree Law No 414 of 19 November 1997 authorised the negotiated procedure for a further period of eighteen months. However, the circumstances specified in Directive 92/50/EEC did not obtain (for example, after publication of a contract notice, when prior pricing is not possible or when the specifications cannot be established precisely), and it is only under such circumstances that a negotiated procedure may be justified. Italy's reply to the reasoned opinion of 11 June 1998 was not satisfactory.

Italy - Radiographic Equipment

18 January 1999

The Commission decided to issue a reasoned opinion against Italy for infringement of the Directive on public supply contracts (93/36/EEC) in connection with the contract for the supply of sterile sutures for operating theatres, radiographic equipment and developing fluids awarded by a Rome hospital (Azienda Complesso ospedaliero San Filippo Neri), on the grounds that the contract was awarded by accelerated restricted procedure although the conditions set out in the Directive for use of the accelerated procedure were not fulfilled, since supply of these products should have been possible simply by launching the procedure well before the previous contract expired, on the basis of expected consumption. The previous contract had also been the subject of an infringement procedure, since it had been concluded following a negotiated procedure in infringement of Directive 93/36/EEC and its performance should not have been completed.

The Netherlands – Safety Barriers for Roads
18 January 1999

The Commission decided to send a reasoned opinion to the Netherlands for misapplication of the Directives on public supply and works contracts (93/36/EEC and 93/37/EEC) in a case involving the purchase of safety barriers for roads. The Commission also thought the Netherlands had infringed the rules of the EC Treaty on obstacles to the free movement of goods (Article 30). The reasoned opinion concerned the methods used for purchasing safety barriers by the ministry department responsible for road maintenance, which bought exclusively from a single supplier without putting the contract up for competition by publishing notices in the Official Journal of the European Communities. This supplier also had a monopoly on supplying safety barriers in connection with works contracts awarded by the ministry department.

Greece and Portugal – Failure to Transpose Directives in the Water, Energy, Transport and Telecommunications Sectors
18 January 1999

The Commission decided to issue two reasoned opinions against Greece and two against Portugal on the grounds that these two Member States had failed to transpose the Directives on public contracts in the water, energy, transport and telecommunications sectors (93/38/EEC) and Directive on review procedures in the same sectors (92/13/EEC). Directive 93/38/EEC entered into force on 1 January 1998 in Greece and Portugal (compared with 1 January 1997 in Spain and 1 January 1993 in the other Member States). Directive 92/13/EEC entered into force on 30 June 1998 in Greece and Portugal, compared with 30 June 1995 in Spain and 1 January 1993 in the other Member States.

Contracts for Architectural Services - Karrer Decree
31 July 1998

The Commission decided to deliver a reasoned opinion to Italy for improper transposition of Directive 92/50/EEC on the award of public service contracts. It raised the three objections set out below concerning Order No 116 of the Prime Minister of 27 February 1997, which establishes rules for determining the economically most advantageous tender in the award of contracts for architectural, engineering and other technical services.

(a) Order No 116 was not notified, so that Italy had infringed the obligation in Directive 92/50/EEC under which Member States must communicate to the Commission the main provisions of national law which they adopt in the field governed by the Directive.

(b) It included in the criteria for assessing tenders at the award stage (i.e. criteria for determining the economically most advantageous tender) criteria referred to in Directive 92/50/EEC for the selection stage. Examples are quality certification and the other factors fixed by the contracting authority to establish that a tenderer is particularly qualified to provide the service in question, which can be taken into consideration at the selection stage but not at the award stage.

(c) Order No 116 allows the committee assessing the tenders to determine subsidiary award criteria after drawing up the specifications, which is contrary to the principle of transparency established by Directive 92/50/EEC. Since this is a general measure, it cannot ensure that the subsidiary criteria only constitute refinements of the criteria set out in the specifications and that the final determination of all factors used in the assessment is systematically effected after transmission of the specifications.

Lombardy - Public Works - Non-compliance

31 July 1998

The Commission decided to deliver a reasoned opinion to Italy for infringing Directive 93/37/EEC concerning public works contracts through Lombard Regional Law No 21 of 1 July 1993. Under that Law, public works concessions could be awarded without fulfilling the advertising requirements laid down in the Directive; public works contracts might also be awarded on the basis of negotiated procedures without prior publication of a contract notice although the conditions in the Directive had not been fulfilled. Those provisions of the Law had already been relied upon, for example in awarding a public works concession for establishing waste-disposal facilities in Monza, although the rules on advertising were not complied with.

Italy - IT Services for the Association of Local Authorities

31 July 1998

The third reasoned opinion which the Commission decided to deliver to Italy concerned an infringement of Directive 92/50/EEC on the award of public service contracts. The Commission's objection related to the award of a contract for work on the design and establishment of a territorial tax system for the local authorities of Valli del Taro e del Ceno to a company on the basis of the negotiated procedure without prior publication of a contract notice although the conditions in the Directive were not fulfilled.

France - Automatic Light Rail Transit System

3 July 1998

The Commission decided to bring an action before the Court of Justice against France for failing to comply with Directive 93/38/EEC on procurement in the water, energy, transport and telecommunications sectors when awarding the main supply contract for an automatic light rail transit system in Rennes. It took this decision because the explanations given by the French authorities concerning the conditions under which the contract was awarded, in response to an informal request for information made in January 1997, a letter of formal notice issued on 17 June 1997 and a reasoned opinion delivered on 5 March 1998, were not satisfactory.

Notwithstanding the French authorities' explanations, the Commission took the view that no award of the contract at issue took place before the entry into force of Directive 93/38/EEC and that the award of the contract by direct agreement on 22 November 1996, after the previous procedure conducted between 1989 and 1993 had been abandoned in 1995, was incompatible with the Directive, although the contract lay fully within its scope.

Neither were there any technical reasons justifying the failure to open up the contract to competition. Lastly, the Commission were challenging the contracting entity's use of the possibility, provided for in the French public procurement code, of exempting itself from the normal competitive tendering rules on the grounds that it had already carried out major investment. Such a circumstance is not one of the exceptions allowed by Directive 93/38/EEC. Since the French authorities had not taken appropriate measures to remedy this situation within the time-limit laid down in the reasoned opinion, the Commission decided to refer the matter to the Court of Justice.

Germany - Mail Sorting Equipment

3 July 1998

The Commission decided to bring an action before the Court of Justice against Germany for failing to fulfil its obligations under Directive 77/62/EEC on public supply contracts. In 1993 DBP Postdienst put out to tender a contract for the supply of mail sorting equipment under the negotiated procedure, although the conditions for the use of that procedure were not met; it also set a shorter deadline for participation than that stipulated by the Directive, failed to adhere to the minimum requirements laid down in its tender specifications and failed to indicate the contract award criteria. In 1996 the German Government informed the Commission that Postdienst had been privatised and that proceedings were under way in a national administrative court to determine whether the new company, Post AG, had to apply the public procurement rules. Since no hearing had been announced as part of those proceedings, the Commission decided to bring the matter before the Court of Justice.

Austria - Transposal of the Directives

3 July 1998

The Commission decided to initiate proceedings in the Court of Justice against Austria for failing to transpose all the Directives on public procurement. Directives 92/50/EEC, 93/36/EEC and 93/38/EEC on public service contracts, on public works contracts and on procurement in the water, energy, transport and telecommunications sectors, and Directive 92/13/EEC on remedies to be introduced by the Member State for procurement in the water, energy, transport and telecommunications sectors should have been transposed into national law by 1 July 1994. Although the Commission had received transposal measures from the Federal Government and most of the Länder, the texts for the Länder of Niederösterreich (Lower Austria) and Steiermark (Styria) had still not been notified.

Greece - Supplies for Public Hospitals

3 July 1998

The Commission decided to address a reasoned opinion to Greece, which had not replied to the letter of formal notice it issued on 16 February 1998 concerning the obligation on firms supplying public hospitals to submit invoices relating to previous contracts they had concluded with private hospitals in Greece and in other Member States.

The aim pursued by the Greek authorities through this obligation, which is imposed by Article of Law No 2303/95, was apparently to combat agreements between suppliers on the prices they tendered for contracts awarded by public hospitals and thereby to ensure genuine, healthy competition in the sector.

Although such an aim is perfectly legitimate and is in line with the spirit of the Directive on public supply contracts (93/36/EEC), the Commission had misgivings about the methods adopted by the Greek authorities for achieving it and about the conditions in which the obligation is applied in practice. The possibility of excluding supplies originating in other Member States from a contract award procedure on the grounds that they are being offered at a higher price than that at which they were sold in another Member State furthermore constitutes, in the Commission's view, a restriction on the free movement of goods in breach of the Treaty (Article 30).

Italy - Supplies of Oil for Food Aid

3 July 1998

The Commission decided to send Italy a reasoned opinion for breaching the EC rules on the free movement of goods (Article 30 et seq.) and services (Article 59 et seq.) and the Directive on public supply contracts (93/36/EEC) in connection with public contracts awarded by the AIMA (a public enterprise which intervenes on the agricultural market) to obtain supplies of food products for donation to countries in difficulty as part of the Italian Government's food aid initiatives.

The infringement stemmed from the fact that the notices and the letters of invitation to tender for these contracts required the products to be loaded and shipped from an Italian port and also stipulated that, even if the contract was awarded to the lowest bid, the contracting authority was nevertheless entitled to ask the successful bidder to improve his offer in line with market conditions. The requirement that the goods be shipped from an Italian port prevented the use of goods originating in other Member States and was therefore incompatible with the rules of the EC Treaty on the free movement of goods; it also prevented tenderers using carriers operating ships from ports elsewhere in the Community and was consequently also contrary to the provisions on the freedom to provide services.

Lastly, the possibility of negotiating with tenderers after the contract had been awarded was a serious violation of Directive 93/36/EEC, under which the negotiated procedure may be used only in specific cases. Negotiating after a contract award is also contrary to the principle of equal treatment, which the Court of Justice has recognised as one of the foundations of the Directives on public procurement, as well as the principles of transparency and legal certainty.

Italy - Town Planning Services

3 July 1998

The Commission decided to address a reasoned opinion to Italy for breaching the Directive on public service contracts (92/50/EEC) and the Treaty rules on the freedom to provide services (Article 59). The infringement concerned a public contract awarded by the Municipality of Jesolo for the preparation of a preliminary draft of the general regulating plan (PRG): the contract was awarded by negotiated procedure with prior publication of a notice; the tender notice allowed only architects and engineers to participate in the procedure; and the award criteria included assessment of the professional calibre and organisation of the team.

The Italian authorities argued that the use of the negotiated procedure with publication of a contract notice was justified under Directive 92/50/EEC, which allows that procedure to be used "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 I A, 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". The Commission did not share this interpretation, because the impossibility of establishing contract specifications must be construed strictly.

The clause reserving the contract exclusively for architects and engineers constituted an unjustified restriction of competition and was incompatible with Directive 92/50/EEC. Neither did it appear to meet the criterion of proportionality, because it excluded from the award procedure professionals (e.g. town planners) who could be equally well qualified to provide the services covered by the contract, i.e. the preparation of a preliminary planning instrument. Consequently, this condition was not objectively justified and was contrary to Article 59 of the Treaty.

As regards the inclusion in the award criteria of an assessment of the professional calibre and organisation of the team, Directive 92/50/EEC allows such criteria to be taken into account only during the selection of tenderers and not in the contract award phase.

Italy - Municipal Waste Collection
3 July 1998

The Commission decided to send Italy a reasoned opinion for breaching the Directive on public service contracts (92/50/EEC) and the Treaty rules on the freedom to provide services (Article 59) in connection with a public contract awarded by the Assemini town council for municipal waste collection services. The infringement stemmed from the fact that the contract was awarded by accelerated restricted procedure and that the contract notice included, among the minimum qualifying conditions, membership of the Italian national register of firms providing waste treatment services.

The Commission took the view that there was no urgency rendering impracticable compliance with the normal time-limits laid down for restricted procedures, in other words that the conditions in which the Directive allows recourse to the accelerated restricted procedure were not met in this case. Limiting the right to bid to firms on the national register is contrary to the principle of the freedom to provide services enshrined in Article 59 et seq. of the EC Treaty: making participation in a service contract in one Member State by an enterprise established in another Member State conditional on membership of the first country's national register would remove all practical effectiveness from Article 59 of the Treaty, the purpose of which is precisely to eliminate restrictions on the freedom to provide services of persons who are not established in the Member State where the service is to be provided.

Greece - Directive on Procurement of Services
26 June 1998

The Directive on public procurement of services (92/50/EEC) establishes rules requiring open and competitive procedures to be followed for the procurement of services. Although the Directive required Member States to implement its provisions in national law no later than 1 July 1993, Greece had not done so. The Court of Justice condemned Greece in a ruling handed down on 2 May 1996 for failing to fulfil its obligations to implement the Directive. Greece failed to respond to either the letter of formal notice or the reasoned opinion sent by the Commission under infringement procedures foreseen by Article 171 of the Treaty.

Italy – Directive on Procurement of Supplies

26 June 1998

Italy had not fully implemented the supplies Directive (93/36/EEC), which requires contracts for the public procurement of supplies to be subject to open and competitive procedures. The deadline for entry into force of the Directive's provisions was

14 June 1994. Moreover, the Court of Justice condemned Italy in its ruling of

17 July 1997 for failure to fulfil its obligations to implement the Directive. Despite this, the Italian authorities had still not adopted the legislative decree necessary to apply the Directive's provisions. The Commission therefore decided to send Italy a letter of formal notice under infringement procedures foreseen by Article 171 of the Treaty for failure to take measures to respect the July 1997 Court ruling. In the absence of an appropriate response by the Italian authorities, the Commission may continue Article 171 infringement procedures, ultimately leading to a referral back to the Court of Justice with a request for financial penalties.