



A Guide to...

EC Public Procurement Related Infringement Cases

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EC Public Procurement Related Infringement Cases

EC Infringement Cases January 2007 to June 2009

Public procurement

Governments and other public authorities are major purchasers of goods and services, accounting for more than £500 billion worth of business in the European Union each year. European purchasing rules are intended to open such contracts to cross-border competition and to make sure that businesses across the EU find out about government procurement opportunities. Details of tenders are published online in the Official Journal of the European Communities (<http://europa.eu.int/eur-lex/en/oj>).

Unfortunately sometimes public authorities act unfairly. Individuals or organisations that think they are being unjustly excluded from bidding for a government contract, can take action under the EU's Public Purchasing Remedies and Compliance Directives, which give you the right to appeal to national courts where there is discrimination. Information about public procurement rules can be found at the European Procurement Service website (<http://simap.eu.int>). The European Commission also act to monitor the application of EU Public Procurement Legislation.

To keep up to date with current EU infringement cases, visit www.govopps.co.uk/infringements/

Monitoring the application of Community law

The task of monitoring the application of Community law is carried out by the European Commission as the guardian of the Treaties. Since the European Union is based on law, such monitoring is essential to ensure compliance with and proper application of Community law by and in the Member States. In exercising its monitoring function, the Commission also takes care to safeguard the role which is assigned to national authorities, particularly the courts, in this area.

The Commission gathers information and then warns and penalises Member States if they fail to comply with the Community Treaties. Poor compliance or non-compliance with the Treaties may result from administrative oversight, technical difficulties in applying the text, difficulties of implementation or from concerns over how certain sectors of public opinion may react.

If a Member State has failed to fulfil its obligations, the Commission may deliver a reasoned opinion after giving the State concerned an opportunity to submit its observations. If this opinion remains without effect, the Commission may bring the case before the Court of Justice (infringement proceedings against a State under Article 226 of the Treaty establishing the European Community).

In this connection, the Commission may ask the Court to impose a financial penalty on the Member State concerned if the latter has not complied with its reasoned opinion. This power greatly increases its ability to monitor proper application of Community law.

Complaining through the European Commission

If the bilateral approach proves unsuccessful, Action Single Market will help you to present your case to the Commission and will monitor its progress. This is known as the infraction or infringement procedure. Outlined under the EC Treaty, the infraction process involves a number of stages in which the Commission writes to the Member State concerned and acts as arbiter. Because the procedure is formal, it can take some time to resolve individual cases – even, in some of the worst cases, several years. This can be frustrating, but the involvement of the Commission can add considerable weight in fighting your cause. The final step in such an investigation is taking the case to the European

Court of Justice. Virtually all cases, however, are resolved before they reach this stage.

The following highlights recent action by the Commission in this regard.

Chapter 1 Competition Issues

GERMANY – waste disposal services and municipal cooperation

The Commission has decided to close a case against Germany concerning the direct award by four municipalities in North Rhine-Westphalia (Langerwehe, Inden, Linnich and Würselen) of waste disposal services to the special purpose association (Zweckverband) Regio Entsorgung established by them.

In the Commission's view, **the complete transfer of a public task from one public entity to another, to be performed by the transferee in full independence and under its own responsibility, does not imply the provision of services for remuneration within the meaning of Article 49 EC Treaty.** Such a transfer of public tasks constitutes an act of internal organisation of the public administration of the Member State in question. As such, it is not subject to the application of EU law and its basic freedoms.

GERMANY – procurement of group pension services by municipal authorities and undertakings in Germany

The European Commission has decided to refer Germany to the European Court of Justice over the practice of local authorities and municipal enterprises **to award contracts for group pension services without conducting competitive tendering procedures** required by EU public procurement law. Under a collective agreement for payment conversion for local civil servants, the pension services in question are reserved to three specific groups of service providers, excluding a large number of insurance companies from the market. The respect of the autonomy of social partners calls for a specific treatment under Community law of collective agreements aimed at improving employment and working conditions. The Commission considers however that, under the specific circumstances of the present case, **local authorities and municipal enterprises cannot rely on the collective agreement to justify the failure to apply Internal Market rules on the award of public contracts.**

Under German statutory law, employees are entitled to demand that their employer contributes up to a certain percentage of their claims to salary toward a supplementary old-age pension by way of salary conversion (Gesetz zur Verbesserung der betrieblichen Altersversorgung, Statute on the enhancement of occupational old-age pensions, § 1a). The employer may choose to provide the resulting pension benefits either directly by setting up a company occupational pension scheme or indirectly through the intermediary of outside bodies such as life insurance companies, provident funds (Unterstützungskassen) or pension funds (Pensionskassen). In the latter case, the employer does not pay any benefits, but makes provision for them by concluding a group pension services contract with a service provider. However, the employer remains liable for insurance benefits and may be obliged under certain circumstances to complement or substitute the benefits paid by the pension service provider.

A collective agreement concluded in 2003 between the Association of Municipal Employers (Vereinigung kommunaler Arbeitgeberverbände, VKA) and the trade union ver.di – Vereinigte

Dienstleistungsgewerkschaft e.V. states that salary conversion has to be provided by the municipal employers through the intermediary of public supplementary pension providers (öffentliche Zusatzversorgungseinrichtungen), members of the Sparkassen-Finanzgruppe (group of savings banks) or municipal insurance companies (Kommunalversicherer). This collective agreement has led to the general practice of German municipalities and municipal enterprises to award pension service contracts directly and without transparent contract award providers to service providers belonging to the groups mentioned in the agreement.

However, municipalities and municipal enterprises are public contracting authorities. They are obliged to award their contracts through competitive procedures complying with the EU law rules on public procurement. In the view of the Commission, this applies also to contracts for pension services concluded by municipal employers in favour of their employees under the statutory framework for salary conversion. Under the specific circumstances of the present case, municipal employers cannot invoke the limitation of service providers contained in the collective agreement to justify the direct award of pension contracts to individual service providers. They are obliged to award the pension services in compliance with the Internal Market rules on public procurement ensuring all service providers fair and equal access to the market.

ITALY – procurement of computer services and management consulting services in Puglia

This case concerns the direct award, by the region of Puglia, of several computer services and management consulting services as part of the implementation of the Regional Operational Programme 2000-2006, and other measures co-financed by EU funds. These services were entrusted to the company Tecnopolis without recourse to the required competitive procedure required by EU public procurement law. The Commission considers that no justification exists for derogation from the application of the procurement rules.

ITALY – national legislation on book-keeping and debt-collection services

Concerns legislation establishing the conditions for the carrying out book-keeping and debt-collection services for local authorities. The legislative decree No 446 of 15 December 1997 reserves the carrying out of these services, and the possibility of participating in competitive procedures for the award of public contracts for providing such services, to specific public or public-private entities set up under Italian law, and to undertakings registered in a special register. The ministerial decree No 289 of 11 September 2000 lays down the conditions requires for such registration. The Commission considers that some of the conditions required for registration are discriminatory and that, in any case, the obligation of registration itself has a restrictive effect on the freedom to provide services. The Commission considers that the information provided by the Italian authorities does not prove that such a restriction is justified by overriding reasons in the public interest. The Commission therefore takes the view that the legislation in question does not comply with Articles 43 and 49 of the Treaty on right of establishment and freedom to provide services.

ITALY – construction of state prisons

A decree issued by the Minister of Justice on 2 October 2003, authorising contracting for the construction of prisons without the obligation of applying the tendering procedures set out in the relevant public procurement Directives. On the basis of this decree, the contracts for the construction of four prisons in Sardegna were awarded without following the competitive procedures set out in the relevant EU Directive. The Italian authorities consider that public contracts that fall within the scope of the decree can be exempt from EU public procurement rules because of the security and confidentiality needs linked to the construction of the prisons and the urgency of the works. In the Commission's view, Italy has not proved that any of the strict conditions allowing derogations from procurement rules, and in particular those concerning contracts requiring special security measures and contracts concluded in case of extreme urgency, is fulfilled in this case.

ITALY – procurement of waste management services in the Municipality of Contigliano

The case concerns the direct award of waste management services by the Municipality of Contigliano in Lazio to a public-owned limited liability company, namely A.M.A. Servizi S.r.l., of which the town of Contigliano owns 0.5% of the capital. Italy maintains that the award of this contract to A.M.A. Servizi S.r.l., by the Municipality of Contigliano, is excluded from the application of EC public procurement rules since A.M.A. Servizi is an "in-house" structure of the awarding entity as set out in the case-law of the European Court of Justice. The Commission considers that the conditions required by the ECJ case-law for the application of the "in-house" exception are not met in this case. First of all, the powers entrusted to the Municipality of Contigliano as a minority owner are insufficient to confer to the latter a control which is similar to the one exercised over its own departments. Secondly, the undertaking is active in the market and it carries out a significant part of its activities with parties other than its controlling entities.

GERMANY – supply of software between public-law bodies

The Commission has decided to send a reasoned opinion to Germany concerning a contract for the supply of a software application concluded between Datenzentrale Baden-Württemberg and the Anstalt für Kommunale Datenverarbeitung in Bayern (AKDB), two public-law bodies responsible for procuring, developing and maintaining data processing systems for the use of municipalities. Under the contested contract, AKDB had to deliver and maintain a software application for the licensing of vehicles which had been developed by AKDB for the use by municipalities in Bavaria. The contract was awarded by the Datenzentrale directly to AKDB without conducting a competitive tendering procedure.

The Commission considers that a contracting authority, such as Datenzentrale, has to comply with EU rules on public procurement when it awards a supply contract to a third party even if that party is itself a public-law body subject to public procurement law. Since AKDB is acting as contractor under a purchase contract for pecuniary interest, the Datenzentrale would have been obliged to award the contract as a public supply contract in a competitive tendering procedure complying with EU Directives on public procurement, ensuring transparency and equal access for suppliers in the Internal Market.

GERMANY – legal database services

In 2006, the judicial authorities of 13 federal states awarded contracts for legal database services directly to juris without publishing calls for tenders. juris, a company partially owned by the Federal Republic of Germany, is the leading operator of legal databases in Germany. Under an agreement with the Federal Government, juris maintains and operates its legal information system while the Federal Government provides specific documentation such as consolidated documentation of federal legislation and judgments by the federal courts in a specially edited version for the exclusive use of juris.

The Commission considers that the contracts for database services concluded by the 13 states and the agreement between the Federal Government and juris might be public contracts which should have been awarded by competitive tendering procedures with publication of European-wide calls for tenders. It has therefore sent a letter of formal notice to the Federal Government inviting it to present its observations.

FRANCE – definition contracts procedure

The Commission has decided to make a referral to the Court of Justice of the European Communities against France concerning the provisions of the public procurement code relating to the "definition contracts procedure".

This procedure governed by French Law may be used when the public purchaser is not itself able to specify the extent and nature of its requirements. Definition contracts are study service contracts intended to define the requirements in question and hence to determine the subject of, and establish the specifications for, a subsequent contract.

However, where several definition contracts with the same subject have been performed simultaneously, the disputed

provisions of the public procurement code allow public purchasers, under certain conditions, to award a performance contract to one of the holders of the definition contracts either without a fresh call for tenders or, at the most, limiting the tender to such holders.

The Commission considers that this possibility conflicts with Public Contracts Directive 2004/18/EC, since it is not justified by any derogation in the Directive from the ordinary contract award procedures laid down therein.

ITALY – water contract

The case concerns the direct award of water and wastewater management services by the public entity "Autorità d'Ambito Territoriale Ottimale n.2 – Marche Centro Ancona" (ATO 2), to a public-owned company limited by shares, namely Multiservizi S.p.A. ATO 2 is a consortium of municipalities of the region Marche, responsible for the coordinated management of water and wastewater services in the territory of such municipalities. The latter are also the shareholders of Multiservizi.

The Commission considers that the conditions required by the European Court of Justice case-law for the application of the "in-house" exception are not met in this case. First, the powers entrusted to each municipality as a minority owner are insufficient to confer on them a control which is similar to the one exercised over their own departments. The Commission also excludes that the shareholders of Multiservizi can jointly control this company through ATO 2, since Multiservizi carries out a number of activities other than the management of the water service, which do not fall within the competence of ATO 2. Secondly, despite the additional competences conferred on the shareholders' meeting by the statute of Multiservizi, the management board of this company keeps considerable management autonomy.

GERMANY – public service contracts

The case concerns the direct award of public service contracts, this time for waste disposal services between the municipalities of Heidelberg and Mannheim and the administrative district Rhine-Neckar without a competitive tender procedure. The municipalities of Heidelberg and Mannheim and the administrative district Rhine-Neckar in Baden-Württemberg have cooperated in waste disposal matters since 1986. On the basis of a concept attributing to each partner the responsibility for a certain type of waste, the cooperating authorities concluded among them a series of contracts for waste disposal services. All these contracts were awarded directly without conducting a contract award procedure or publishing a call for tenders.

The Commission started infringement proceedings following a complaint by a private waste disposal undertaking. With respect to the waste disposal contracts, the above-mentioned local public authorities are acting as contracting authorities buying services from operators in the market. They can not rely on the so-called "in-house" exception, because the cooperation structure set up by the parties implies that the municipal companies involved carry out a significant part of their activities for authorities which are not their shareholders. Therefore, under Internal Market rules, the public authorities are obliged to apply transparent and competitive tendering proceedings, opening up the market to competition and ensuring that they get the best value for their citizens' money.

ITALY – compliance with Court of Justice judgment

The European Commission has decided, under Article 228 of the EC Treaty, to send a letter of formal notice to Italy requesting it to comply immediately with a 2007 European Court of Justice judgement concerning the award of concessions for horse-race betting services, without tender procedure.

On 13 September 2007, the European Court of Justice ruled in case C-260/04 that, by renewing 329 concessions for horse-race betting operations without inviting any competing bids, the Italian Republic had failed to fulfil its obligations under Articles 43 and 49 of EC Treaty and, in particular, had infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising.

The Commission considers that the measures taken until now by the Italian authorities are not sufficient to comply with the judgement of the Court. First, although the Commission welcomes the new legislation adopted by the Italian authorities in order to open up to competition the market of sports betting services, it notes that the concessions illegally awarded are still in force. Second, the Italian authorities announced that those concessions will be reattributed through a competitive procedure. However, this measure has not yet been adopted. The Commission therefore decided to send a letter of formal notice to Italy. If the Italian authorities still do not comply, the Commission will send a reasoned opinion to the Italian government and, ultimately, can ask the Court to impose a daily fine.

ITALY – public contracts awarded by City of Rocca Priora

The European Commission has decided to send a formal request to Italy regarding the procurement of waste management and pharmacies management services by the City of Rocca Priora.

The case concerns the direct award of waste management and pharmacies management services by the Municipality of Rocca Priora in Lazio, to a public-owned company limited by shares, namely Azienda Servizi Pubblici S.p.A., of which the town of Rocca Priora owns 0.038% of the capital.

Italy maintains that the award of these contracts of services to Azienda Servizi Pubblici S.p.A., by the Municipality of Rocca Priora, is excluded from the application of EU public procurement rules since Azienda Servizi Pubblici S.p.A., is an "in-house" structure of the awarding entity as set out in the case-law of the European Court of Justice.

The Commission considers that the first condition required by the ECJ case-law for the application of the "in-house" exception is not met in this case. First of all, the 0.038% holding in the share capital of Azienda Servizi Pubblici S.p.A. is so small as not to enable the Municipality of Rocca Priora to exercise a control which is similar to the one exercised over its own departments. Secondly, Azienda Servizi Pubblici S.p.A. is a company which is open, at least in part, to private capital, which precludes it from being regarded as a structure for the "in-house" management of public services on behalf of the municipalities which form part of it.

GERMANY – urban development project in Flensburg

The European Commission has decided to close an infringement case against Germany concerning a land sale for urban development purposes by the public utility company of the city of Flensburg.

The public utility company, a 100% affiliate of the city of Flensburg, had sold a piece of land to a private property developer for the construction of a building that would correspond to certain urban development needs. Apart from a simple statement of intent, the sales contract does not contain a legally binding obligation for the developer to realise the envisaged building; it only stipulates a right to purchase the land for the city of Flensburg, in case the building should not be constructed.

In the view of the Commission, such a land sale can neither be considered as a public works contract nor as a public works concession, because the contract in question did not contain a legally binding obligation to execute works specified by the contracting authorities. The mere right for the public authority to (re-)purchase the land in case of non-construction is not, in the Commission's view, a sufficient sanction that could give rise to a legal obligation to execute the works. Public procurement: Commission requests information on Greece's compliance with Court of Justice judgment

The European Commission has decided to ask the Greek Government for information on the measures taken to comply with the judgment delivered by the Court of Justice of the European Communities on 18 December 2007 (C-481/06). The judgment concerns the compliance of Greek rules allowing use of the negotiated procedure without a prior invitation to tender for public supply contracts relating to certain medical equipment.

The Commission takes the view that the measures notified by the Greek Republic in this connection are incomplete.

FRANCE – Law on public project contracting and its relationship to private project management ("Loi MOP")

The European Commission has decided to halt infringement proceedings against France arising out of a judgment of 20 October 2005 in which the Court of Justice held that, by reserving the task of delegated project contracting to a named list of legal entities under French law, France had failed to fulfil its obligations under Directive 92/50/EEC on public service contracts and under Article 49 of the EC Treaty.

The infringement proceedings were started because the Commission considered that the French authorities, although they **had adopted an order amending the disputed provision** and authorising the task of project contracting to be assigned in future to any public or private entity, had not yet taken all appropriate measures to fully comply with the Court of Justice's judgment, since the rules on competitive tendering and advertising for the award of different types of delegated project contract deriving from Directive 92/50/EEC had still not been clearly laid down.

The Commission has concluded that the assurances since received from the French authorities and the clearer wording of some key texts demonstrate that the judgment has been fully complied with and that the legal framework for delegated project contracts now provides adequate legal certainty.

CZECH REPUBLIC – regional bus transport services

The European Commission decided to send a formal request to the Czech Republic concerning the procedure followed by the Czech Region of Usti nad Labem for the award of a contract to a private undertaking for the provision of regional bus transport services. This formal request takes the form of a "reasoned opinion", the second stage of the infringement procedure laid down in Article 226 of the EC Treaty.

The Commission considers that **the contract concluded between the Region and the private operator is a public service contract and that as such it should have been tendered according the detailed rules of Directive 2004/17/EC.**

However, the Region awarded the provision of the transport services in the Region as a service concession and thus without a European-wide tender procedure.

In case of a service concession, the concessionaire receives the right to exploit the service and must assume the economic risk related to the performance of the service. In the present case the major part of the operator's remuneration comes from the Region, because the income from passenger fares would not be sufficient for the provision of the service. This payment by the Region eliminates the exploitation risk. Consequently, the contract award does not concern a concession but a public contract, which requires the observation of the detailed rules of Directive 2004/17/EC.

AUSTRIA – waste services in Mödling

The Commission will refer Austria to the Court over the award of a contract for the collection and treatment of waste in the municipality of Mödling. The contract was **awarded on 15 September 1999 for an unlimited period directly to a company which was previously established and fully owned by the municipality** of Mödling. However, in parallel with the award of the service contract, the municipality sold 49% of the company's shares to a private undertaking.

The Austrian authorities have argued that the Court's case law on "in-house" awards applies in this case. That case law stipulates that the award to entities over which a contracting authority exercises control similar to that over its own internal departments does not fall under European public procurement law. The **Commission considers that the municipality of Mödling does not exercise such control over the said company**, of which it owns only 51% of the shares. Therefore, the municipality of Mödling should have put the contract out to tender in accordance with the Directive on the public procurement of services (92/50/EEC).

ITALY – renewal of contracts without tendering

In addition, the Commission has decided to send a reasoned opinion asking Italy to repeal Article 44 of Law 724/1994, which allows contracting authorities in Italy **to renew a public supply or service**

contract when it expires with the same contractor without applying the tendering rules laid down in the public-procurement Directives.

ITALY – construction of two motorways

The Commission will also refer Italy to the Court in two cases concerning the award by ANAS, a body governed by public law, of contracts for the construction and management of two motorways, the Valtrompia and "Pedemontana Veneta Ovest" routes, **without any prior invitation to tender at Community level.** The Public Works Directive (93/37/EEC) stipulates that when the value of the work is at least €5 million contracting authorities are required to publish a contract notice in the Official Journal of the European Union.

GREECE – improvement programme for the city of Serres

The case in Greece concerns the award by the Municipality of Serres, **without a prior call for tenders**, of a contract for the "Urban Improvement" of the city. Normally a contract for urban development **has to be tendered out in accordance with the rules of the services procurement Directive.** However, the detailed rules of the **Directive do not apply to the award of contracts that qualify as "Research and Development" contracts.** Greece maintains that the contract was indeed for R&D, the Commission considers that the contract constitutes a specialised and **innovative urbanistic study that should have been awarded through an appropriate call for tenders.**

GREECE – metro trains

On 26 July 2002 Attiko Metro AE (the Athens metro company, a public entity) signed a contract with Hanhwa Koros for the supply of four trains for a dual-voltage network, and the transformation of three trains from single voltage to dual voltage. Hanhwa Koros had already been awarded a contract for the supply of 17 single-voltage trains. The July 2002 contract was the subject of an option clause in that earlier contract, which was neither evaluated nor awarded during the first procedure. The **Commission believes that the award of the new contract without competition breaches the EU Directive** on the procurement of supplies (93/36/EEC). It has therefore decided to send Greece a reasoned opinion.

The Greek authorities **have not provided evidence to show that the contractor in question is the sole manufacturer or supplier** of the items concerned, which would be one possible ground for exemption from the rules in the Directive. Neither can they justify the absence of competition on the basis of urgency arising from unforeseen circumstances connected with the 2004 Olympic Games. The fact that the Games would be held in Athens has been known for many years, and the contracting authority should have scheduled the work accordingly. Besides, the inclusion of an option clause in the original tender for dual-voltage trains to be used on the suburban track suggests that the contracting authority considered such a development likely.

The new contract cannot be considered as a partial renewal of the existing supply contract which would be another potential basis for exemption – because the dual-voltage trains are different from the single-voltage ones.

Finally, problems regarding different spare parts and the need for additional training and for more personnel, do not constitute disproportionate technical difficulties within the meaning of the Directive.

GERMANY – rubber protection pads for military vehicles

The German Federal Office for military technology and public contracts regularly awards supply contracts for the purchase of rubber protection pads designed to reduce the noise produced by tracked military vehicles (e.g. tanks) and to prevent damage to roads to a group of suppliers without an invitation to tender at Community level by means of publication of a notice in the Official Journal of the European Communities. The Federal Office, which obtains in this way about a million pads a year, refers to Article 296 of the EC Treaty, which **states that the provisions of the Treaty do not apply to the production of or trade in arms, munitions and war material. The Office concludes from this that these contracts are not subject to the Community Directives** on public procurement. The Commission's view is that since these pads are used in peacetime for non-military purposes **they cannot be regarded as war material.** These contracts are thus subject to the Community rules on public procurement.

GREECE – use of standard forms

Furthermore, Greece has not notified the Commission of **the transposition into national law, as regards supplies and the special sectors, of the Commission Directive of September 2001** (see IP/01/1271) on the use of standard forms for public procurement notices. The Commission has therefore decided to send a reasoned opinion asking Greece to transpose the Directive. **The compulsory use of these forms improves the quality of the notices published, which promotes open markets, efficiency and transparency and facilitates the award of contracts electronically. In particular, using these forms makes it easier for potential suppliers to use automatic search tools to find the contract notices that interest them.** For contracting authorities the standard forms reduce the work and costs associated with complying with the European rules on public procurement works.

UK – registered social landlords

The Commission has decided to refer the UK to the Court because “registered social landlords”, the main providers of social housing in the UK, do not apply EU public procurement directives. These Directives impose strict procedural and other requirements on “bodies governed by public law” so as to ensure that their procurement of goods, works and services is transparent and non-discriminatory. **The Commission considers that the relationship between registered social landlords and the Housing Corporation, a public body sponsored by the central government** Department for Transport, Local Government and the Regions, is such that they should be treated as bodies governed by public law and thus comply with the public procurement Directives.

ITALY – IT services in Mantova

Italy is also to be brought before the Court with regard to the award by the municipality of Mantova of the management of a series of IT services. At the end of 1997, the management of these services was entrusted by negotiated procedure to the public limited company ASI, in which at the time the same municipality of Mantova had a majority interest. According to the Court’s case law, application of the tendering procedures provided for in the Directives can be waived only in cases where the contractor, even if formally separate from the contracting authority, is not essentially independent of it as regards decision-making. The Commission considers that the sole fact that a contracting authority has a majority holding in a company’s capital is not sufficient to deny that company’s decision-making independence and can thus not justify the failure to apply Community rules.

GERMANY – collection of household refuse in Coesfeld

This case, which was brought to the Commission’s attention by a complaint, concerns the contracts for the collection of household refuse in several municipalities in the district of Coesfeld (North Rhine-Westphalia). **These contracts were awarded to local firms without an invitation to tender at Community level by means of a notice in the Official Journal of the European Communities, as required by Directive 92/50/EEC on public procurement of services.** In spite of an earlier letter of formal notice that the Commission sent to the German authorities, these municipalities are still applying the contracts that were signed after being awarded in infringement of Community law on public procurement.

GERMANY – waste water disposal in Bockhorn

Another case where the Commission has 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 have admitted the infringement but the contract is still in force.

ITALY – supply of helicopters

The Commission has decided to take Italy to the Court over procedures used by the Government to buy helicopters for civilian use. This follows the failure of the Italian authorities to change these procedures, despite a request to do so in a reasoned opinion sent in February 2004 (IP/04/162).

The Italian Government has a longstanding practice of awarding contracts for the supply of these helicopters to the Italian company Agusta, without any form of competition. The helicopters involved are used by certain public services, including the forestry department (“Corpo Forestale dello Stato”), financial police (“Guardia di Finanza”), fire services (“Vigili del Fuoco”), police and security forces (“Polizia di Stato” and “Carabinieri”), coastguard (“Guardia Costiera”) and the civil defence department (“Dipartimento della Protezione Civile”).

Under Article 2 of the Directive, the Directive does not apply when “contracts which are declared secret or when 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 States concerned or when the protection of the basic interests of the Member State’s security so requires”. However, **Italy has not demonstrated that these grounds are met** in the case of the supply of these helicopters. The Commission has already referred Italy to the Court of Justice in connection with a government order authorising one of the services mentioned – “Corpo Forestale dello Stato” – **to purchase helicopters without any form of competition** (see IP/03/1037). The case in question at the moment, on the other hand, concerns the general practice followed by the Italian Government for the **purchase of all helicopters for civilian use by the services concerned.**

GERMANY – supply of heating in Freiburg

In 2001, the city of Freiburg awarded a 15-year contract worth €3.7 million to a private company, of which it owns 32%, for the supply of heating. **No Europe-wide tender procedure** was carried out as required by the Directive on public procurement of supplies (93/36/EEC).

Germany has acknowledged the breach of EU law. However, it claimed that the case constitutes an exceptional misinterpretation of the European Court of Justice’s case law on “in-house” awards. The city authority believed that the **contract would not require a tender as it was awarded to an entity controlled similarly to the authority’s own internal departments.** The city authority has awarded several other contracts since the one in question, in accordance with the procedures required by EU law.

However, the Commission’s view is that the breach of EU law is continuing and will do so until the end of the contract in 2016, unless steps are taken to remedy it. The fact that the city of Freiburg has fulfilled its obligations in other procurement activities does not mean Germany has remedied the breach. Consequently, the Commission has decided to send a reasoned opinion to the German authorities.

GERMANY – waste disposal in the district of Friesland

The Commission is referring Germany to the Court of Justice in connection with a waste disposal contract awarded by the district of Friesland **without the required Europe-wide tendering procedure** as provided for in the Directive on the award of public service contracts (92/50/EEC). The contract was awarded in 1994, for the period 1995-2004 and for a value of €29 million (€14.83 million).

Germany admitted the breach of Community law in answer to the letter of formal notice sent by the Commission in July 2000. However, it argued that an early termination of the contract was impossible without claims for damages and that the contract will not be extended beyond the closing date originally provided for. Future services will be awarded in compliance with Community law.

However, **this has not remedied the existing violation of EU law as the contract remains in force until the end of 2004.** Furthermore, similar cases continue to occur in Germany. The Commission is currently at an early stage of assessing a similar case in the district of Friesland, where the same contracting authority is concerned.

GERMANY – waste disposal in Landkreis Friesland

On 1 January 1995 the Landkreis Friesland signed a 10 year contract worth €29 million for the provision of waste disposal services, without carrying out an open and competitive public procurement procedure at EU level, as required by Article 8 of Directive 92/50/EEC on the public procurement of services.

In view of the fact that **no tender notice was published in relation to this contract, that no competition took place on the market and**

that as a consequence potential competitors in the Internal Market were excluded, the contracting authority could not decide to award the contract on the basis of the best value for money.

In answer to a letter of formal notice sent by the Commission in September 2000, the German authorities **admitted the breach of EU law**, announced that the contract in question would be terminated at the earliest possible date at the end of 2004 and that any new contract would be put out for public tender according to the public procurement rules in force.

However, the Commission concluded that because the contract in question would remain in force until 2004, the measures the German authorities promised to take **would not suffice to rectify the infringement**.

GERMANY – waste treatment in Donau Wald

In February 1998 the City of Munich won a public contract for the treatment of waste in the Donau Wald area of Bavaria, following submission of a successful bid to a public call for tender. In carrying out this contract, however, the City of Munich decided not to transport the waste itself **but to award a contract for this service to a private company for a period of 25 years without a public call for tender**. As a contracting authority in terms of EC public procurement law, the City of Munich was obliged to put this service out to tender. Since the City of Munich failed to publish this contract, there was no open European wide competition for this public service contract. The Federal Government has **acknowledged the infringement but, despite this, the City of Munich continues to operate the contract and exclude further competition**.

ITALY – purchase of helicopters for fire-fighting

Following a reasoned opinion sent in March 2003 (see IP/03/486), the Commission has decided to bring an action against Italy before the Court of Justice. According to an Order of the President of the Council of Ministers dated 24 July 2002 the Italian body responsible for the surveillance of woodland (Corpo forestale dello Stato) is authorised to purchase the most suitable aircraft for its purposes by means of a **direct agreement procedure outside the competition rules** laid down in the Community Directives on public contracts.

As the Court of Justice has repeatedly pointed out, the provisions which, under the Directive on public supply contracts (93/36/EEC), authorise **derogations from the competition requirement** must be interpreted strictly. It is for the contracting authority wishing to make use of them to demonstrate the existence circumstances that justify these derogations – for example, reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question. According to the Commission, **there are no such circumstances** in the present case.

GERMANY – waste management in Munich and Coesfeld

The Commission is referring Germany to the Court over two instances where waste management contracts were **awarded without the required Europe-wide tendering procedure**. In 1998, the city of Munich won a tender for the treatment of waste in the Donau Wald area of Bavaria for 25 years. Subsequently, without a tender procedure, it subcontracted part of these services, for transport of waste, to a private undertaking. In the view of the Commission, as a contracting authority in terms of EU procurement law, the city of Munich cannot, as the German authorities have argued, claim that **it acted outside its own field of public responsibilities when contracting these services** and therefore like any private contractor **should have been able to select its subcontractors freely**. If it could do that, it would be in a position to compete unfairly with the private sector by using its privileged situation in Munich where it can operate in its public domain without competition. The Commission maintains its position that **the contract should have been tendered**.

Meanwhile, in the region of **Coesfeld, two waste disposal contracts** for amounts of €14.6 million (€7.5 million) and DM4.1 million (€2.1 million) respectively were concluded in 1997 for the period until 31 December 2003 **without carrying out a Europe-wide tender procedure**. Germany has promised to ensure that in future cases of this sort, EU law is respected. However, this has not remedied the existing violation of EU law as the contracts in question remain in force until the end of 2003.

Furthermore, similar cases continue to occur in Germany and two cases are currently subject to a pending decision of the Court of Justice on the same legal issues (see IP/00/777).

FRANCE – management contracts for public works

The Commission is concerned that France may have **failed to ensure that competitive tendering** procedures are applied to management contracts for public works. The French law of 12 July 1985, concerning the management and supervision of public works and its relations to legislation on the management and supervision of private construction work is frequently applied to the construction of large scale works. The law stipulates that the assignment of management and construction supervision is exclusively restricted to legal entities under French law.

The Commission disagrees and considers that these **tasks constitute services contracts within the meaning of Directive 92/50/EEC** and therefore have to be assigned in accordance with the publicity and competition obligations set out in this Directive. The Commission has therefore sent the French authorities a formal request for information on this issue.

ITALY – waste processing contracts in Lombardy

The problem concerns a law applicable in the Lombardy region (No. 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 considers that this procedure violates 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 has decided to refer the case to the Court.

AUSTRIA – collection and treatment of waste

The Commission has asked Austria to rectify the breach of EU law that the Commission believes occurred when, four months after setting up a fully-owned company specifically aimed to provide waste disposal services (“AbfallGmbH”), the local authority in the town of Mödling sold a large part (49%) of that company to the private sector. The Commission believes the town thereby in effect **awarded a contract for the collection and treatment of waste without carrying out a procurement procedure**, contrary to the provisions of the Directive on the public procurement of services (92/50/EEC).

The case law of the European Court of Justice sets out as one of the criteria for exemption from the public procurement rules the existence of an in-house relationship. In other words **a public authority can, without a competitive procedure, allocate the provision of goods or services to an organisation over which it exercises control** similar to that which it has over its own departments.

However, in the Commission's view, that criterion is not met in this case, as **the local authority does not exercise such control over the now partly privatised “AbfallGmbH”** and as there is substantial evidence that the local authority intended to take a private partner on board from the very start. Therefore the waste treatment service should have been publicly tendered for from the outset.

The effect of the **lack of transparency in the award of this contract is that not all interested and qualified companies could submit their offers** and therefore the town of Mödling could not choose the offer representing the best value for money. Such behaviour restricts competition, distorts the market concerned and can cost taxpayers money unnecessarily.

GERMANY – sewage water treatment and gas and electricity supply in Jever

The Commission considers that the city of Jever breached EU law in awarding two contracts, one for the treatment of sewage water and the other for the supply of gas and electricity, **without undertaking a public tendering process** as required by the public procurement Directives (Directive 92/50/EEC on the procurement of services and Directive 93/36/EEC on the procurement of supplies).

In response to the Commission's letter of formal notice sent in September 2000, the German authorities admitted the infringement and announced that a solution complying with the public procurement rules

would be found for the water treatment contract at the earliest beginning of 2002 and that the existing electricity and gas contract would be terminated as of 31 December 2001 and a correct procurement procedure organised for the new contract.

However, the authorities concerned **took no concrete steps with regard to the water treatment contract and subsequently stated that the electricity and gas contract would run until the end of 2003**. As a result, the breaches of EU law have so far continued.

GERMANY – project development

In 2001 the city of Limburg awarded a contract for the planning and development of municipally owned premises near the city's main railway station for a new "services park" and for the marketing and the sale of these premises. This contract, which amounts to €190,000 plus a success fee of 10% of the price of sold premises, **was awarded without carrying out a public procurement procedure**.

The German authorities have informed the Commission that in their view the contract in question does not fall under the European procurement rules since the services concerned are outside the scope of application of Directive 92/50/EEC on the procurement of services.

However, after detailed analysis of the contract, the Commission considers that **the services to be provided belong to those categories of services listed in Directive 92/50/EEC** and are therefore subject to the detailed procedural rules of the Directive. A call for tender should therefore have been published.

BELGIUM – architectural competition

The problem concerns an international architectural competition for the design of the area of Brussels where many of the EU institutions are situated. The Commission considers the procedures laid down by the Directive on procurement services (92/50/EEC) were not complied with. In particular, the Commission considers that **the jury assessing the bids violated the Directive's rules** concerning independence, the bidders' identity was revealed and the weighting of the criteria for evaluating the bids was not respected.

GERMANY – broadband

In November 2000, the Stadtwerke Eisenhüttenstadt GmbH awarded a service concession for the provision of broadband cable services in Eisenhüttenstadt. **No transparent award procedure was carried out**. Germany argues that the contract concluded concerns only the privatisation of the Telekommunikationsgesellschaft Eisenhüttenstadt mbH. **However, the opinion of the Commission is based on the fact that, with the contract, specific rights and obligations** relating to the service were assigned to the private service provider and thus principles of EU law on the freedom of establishment and the freedom of services have been breached.

GERMANY – consultancy services

The Federal State of Brandenburg set up four external platforms for its policy to support its foreign economic relations. In this context, four contracts for consultancy services, public relations services and advertising services were **directly awarded in 2001 without procurement procedures**. The German authorities claim that the contracts are not covered by EU procurement obligations. However, the **Commission considers that the contracts concern services provided for remuneration and fall under the scope of Directive 92/50/EEC**.

GREECE – technical assistance

The Commission has decided to refer Greece to the Court of Justice over irregularities in the award of several contracts to provide technical assistance to Greek farmers. To help farmers benefit from certain European Union support under the Common Agricultural Policy, the Greek Government signed technical assistance contracts with specialised firms every year, on the basis of a competitive procedure. However, in 2001 it departed from that approach and **directly awarded contracts** for the management of a framework programme and for the detailed implementation of that programme, **without following the procedures for notification and competitive tendering required by Directive 92/50/EEC**.

The Commission does not accept the Greek authorities' argument.

GREECE – construction

The Hellenic Public Power Corporation (DEI) launched a call for tenders for the construction of a thermoelectric plant in Lavrio.

The Commission considers that the **two companies** that reached the last phase of the procedure (submission of financial bids) **did not meet the conditions set out in the call for tenders**, despite the fact that in the announcement of the call and the invitation to tender it was **explicitly stated that any bid not meeting the specific requirements would be rejected**.

One of the companies concerned did not have the requisite experience, while the bid submitted by the second company, which was in the end awarded the contract, did not comply with one of the conditions concerning the long-term maintenance agreement. By accepting these two companies for the final stage of the procedure, and by awarding the contract to one of them, the **DEI infringed Article 4§2 of Directive 93/38/EEC (excluded sectors), as well as the principles of the equal treatment of participants and of transparency set out in the ECJ's case law**. Failure to apply these principles may be unjust not only to the companies that take part in a given procedure, but also to those who might have participated if they had known that the contracting entity would not apply the terms it had itself set in the tender.

ITALY – renewal of contracts without competition, waste treatment

The Commission has decided to bring an action against Italy before the European Court of Justice for infringement of Community law on public procurement if the Italian Parliament, before which the question is currently pending, fails, within three months, to withdraw the provision set out in Article 44 of Law 724/1994 (in conjunction with Article 6 of Law 573/1993), which has already, in December 2003, been the subject of a reasoned opinion addressed to the Italian Government (IP/03/1763). The Commission considered that this provision was contrary to the abovementioned Community rules to the extent that it authorises contracting authorities in Italy to renew a public supply or service contract **without any tendering procedure**.

ITALY – urban waste

Following a reasoned opinion sent to the Italian authorities in July 2004 (IP/04/951), the Commission also intends to bring Italy before the Court of Justice for **infringement of Directive 92/50/EEC** on public procurement in the choice, by the competent authorities, of operators to provide the service of processing all the urban waste produced in Sicily by converting it into electricity. This contract has been awarded for a period of twenty years. Even though the awarding authority published a notice in the Official Journal of the EU, this **did not contain the information required** under the Community directives with a view to enabling potential candidates to take part in the tendering procedure.

ITALY – fire brigade

The Commission has sent Italy a reasoned opinion on a decree issued by the Minister of the Interior on 11 July 2003 permitting the purchase of light helicopters for the Police and the National Fire Brigade without applying the tendering rules set out in Directive 93/36/EEC on public supply contracts. The Commission considers that this decree constitutes an infringement of that Directive, since Italy has not demonstrated that one of the strict conditions for derogations, and in particular the one concerning contracts the execution of which must be accompanied by special security measures, is met in this case. The Commission has already decided to bring Italy before the Court of Justice in two other cases, also concerning the procedures applied by the Italian Government for the purchase of helicopters for civilian use.

ITALY – ambulance services

A reasoned opinion has been sent to Italy for infringement of the rules on the award of public service contracts set out in Directive 92/50/EEC on the occasion of the award, by Tuscany, of a contract for transport services in connection with healthcare on the regional territory (essentially ambulance services) – more **specifically, the conclusion, between the regional authorities and several consortia** in 1999, 2003 and 2004, of agreements on these services **without applying the tendering procedures provided** for under Community law on public procurement.

UNITED KINGDOM – Scottish Parliament building at Holyrood

The Commission has decided to send a letter of formal notice to the United Kingdom over the way contracts **relating to the design and construction of the new Scottish Parliament building** at Holyrood were awarded.

In particular, the Commission is concerned at the way the United Kingdom authorities, through the Scottish Office, conducted a tender procedure to appoint the architect for the design of the new Scottish Parliament building. The Commission believes this tender procedure violated EU rules on public procurement and notably did not respect the principles of equal treatment and transparency. The UK authorities are now invited to submit their observations to the Commission.

The Commission also is concerned at the way the United Kingdom authorities conducted a tender procedure to appoint the construction manager for the new Scottish Parliament building. This issue is currently subject of private litigation before the Court of Session in Scotland. The Commission will follow the proceedings before the Court closely and with interest.

ITALY – hydraulic works in Stintino, Sardinia

The Commission has decided to bring Italy before the Court of Justice in connection with the award of a contract for a series of hydraulic works in the municipality of Stintino (Sassari). **A negotiated contract was concluded in 1991** for these works and was **followed by eleven further agreements, most recently in 2001. The Commission considers that the direct award of this contract without prior competition constitutes an infringement of Directive 71/305/EEC**, which was applicable at the time of the original contract.

GERMANY – waste disposal

In 2002, the Abfallverwertungsgesellschaft des Rhein-Neckar Kreises mbH (AVR) awarded a contract for waste disposal services in the Rhein-Neckar Kreis to the AVR Service GmbH, of which it owns 51% of the shares. Germany claims that the award is not subject to public procurement law, **in accordance with ECJ case law in the “Teckal” case (C-107/98), which establishes that EU procurement laws do not apply when contracts are awarded to an “in-house” entity within the authority awarding the contracts. However, the Commission has concluded that the “in-house” criteria were not met** in this case and that there was therefore a breach of the provisions of Directive 92/50/EEC on the award of public service contracts.

GERMANY – waste disposal

In 1995, the German Landkreise (districts) of Rotenburg (Wümme), Harburg, Soltau-Fallingb. and Stade, all in the Federal State of Lower Saxony, awarded a service contract for waste disposal services to be provided until the year 2019 directly to Stadtreinigung Hamburg. Germany **argues that the contract concerns cooperation between municipalities outside the scope** of the public procurement Directives. **As the ECJ has ruled that contracts between public bodies fall under EU law**, the Commission concludes that Directive 92/50/EEC was infringed.

GERMANY – maintenance services for district roads

Many administrative districts in Germany conclude contracts with the State entities responsible for the federal roads to entrust them with the maintenance of the district roads. The Road Acts of the States provide that the administrative districts are in principle responsible for the construction and maintenance of district roads, but that they can entrust the State entities with the maintenance of these roads against reimbursement of the costs incurred, without transfer of the responsibility itself. The contracts between the administrative districts and the State entities are mostly concluded without any prior call for tenders or execution of a contract award procedure.

The German Government claimed that the contested agreements do not concern public contracts but acts of internal State organisation which are not subject to the application of the European procurement rules. However, according to the case-law of the European Court of Justice, the fact that all parties to the contracts are public law bodies does not, as such, affect the applicability of the public procurement Directives. The contracts in question do not transfer the responsibility for the

maintenance of the district roads as such but only the maintenance services. They thus stipulate obligations for the State entities to provide services for a consideration. Therefore, the Commission held the view that these are public service contracts within the meaning of the public procurement Directives and have to be awarded pursuant to the procedures foreseen in the Directives.

GERMANY – award of flight measure services

The contract for the provision of flight measure services has been awarded by Deutsche Flugsicherung GmbH (DFS), the organisation that is responsible for flight traffic control in Germany. DFS is 100% owned by the Federal Republic of Germany and thus a contracting authority within the meaning of European procurement law. However, it has not carried out a public procurement procedure when awarding the service contract directly to an undertaking of which it holds 55% of the shares.

The German Federal Government argues that the award of flight measure services does not fall within the scope of application of European procurement law. According to the German Government, flight measure services are a public task connected with the exercise of official authority within the meaning of Article 45 of the EC Treaty. Furthermore, there is a close link between flight measure services and national security interests. Finally, the control of DFS over the contractor in the view of the German authorities is similar to that which it exercises over its own departments.

The Commission disagrees with the German argumentation. Flight measure services are a technical service, which is part of the periodical maintenance of navigation facilities to keep these facilities operational and to inspect them. There is no connection of this service with the exercise of official authority. Flight measure services are not services in the national interest, but rather services which serve the technical safety of air traffic. DFS can also not control the contractor in a similar way to its own departments as it holds only 55% of the shares of the contractor. Thus, in the view of the Commission, the reasons given for the non-application of European procurement law are not valid.

ITALY – helicopter purchase contracts

On 8 April 2008, the European Court of Justice ruled in case C-337/05 that Italy had failed to fulfil its obligations under EU Public Procurement Directives by following the long-standing practice of directly awarding, without any competitive tendering procedure, contracts for the purchase of Agusta and Agusta Bell helicopters to Agusta SpA, in order to meet the requirements of several military and civilian corps.

The Commission considers that the Italian authorities have not taken the measures needed to comply with the Court judgement, which obliges them to put an end to the illegal practice: First, the contracts directly awarded in the framework of the illegal practice are still in force. Second, despite the commitment of the Italian authorities to tender the supply contracts for the purchase of helicopters in the future, the information transmitted to the Commission seems to indicate that a new supply contract may be directly awarded to Agusta. Third, the Italian authorities have not provided sufficient information on the future purchases of helicopters that have been envisaged in the long term. The Commission considers that the monitoring of the procedures that will be followed in the future for the purchase of helicopters is necessary in order to verify whether the illegal practice has stopped. The Italian authorities are therefore requested to regularly provide the Commission with the information allowing such monitoring, for a period of time proportionate to that during which the illegal practice subsisted.

GERMANY – waste disposal

Under a combined waste disposal arrangement concluded in 1997 and running until 2016, the municipality has to dispose household waste furnished by the private partner in its incineration plant, while the private partner undertakes in turn to treat bio-waste furnished by the municipality in its composting plants. In the Commission's view, with respect to bio-waste, the municipality is acting as a contracting authority buying services from operators in the market. Under Internal Market rules, it is thus obliged to apply transparent and competitive tendering procedures, opening up the market to competition and ensuring that it obtains the best value for its citizens' money.

The Commission started infringement proceedings following a

complaint by a private waste disposal undertaking which claimed that it could dispose the bio-waste in much more competitive conditions. Since it was not possible to achieve a negotiated solution involving early termination of the contract, the Commission has decided to refer the matter to the European Court of Justice.

GERMANY – competition

While the city of Rostock directly or indirectly holds some of the shares of both EVG and SRG, both entities are mixed undertakings with a considerable part of their shares in private ownership. Contract awards by public contracting authorities to such entities require the execution of tender procedures pursuant to European Public Procurement Directives. Without the execution of such procedures the private undertakings with a capital presence in EVG and SRG would have an unjustified advantage over their competitors (see ECJ judgment of 11/01/2005 in case C-26/03, Stadt Halle, paragraphs 49-52).

The German authorities have pointed out that the alleged contracts have already been under discussion at the national level. The current establishment of the procurement law violations by the Commission might thus contribute to a rapid termination and subsequent European-wide tendering of the concerned contracts.

GERMANY – waste disposal

The German authorities claimed that no public contract was awarded in 2003 because the public task of waste water disposal has been transferred within the public administrative organisation of Germany from the city of Hamm to the Lippeverband, as the Lippeverband is an association set up by a specific law performing some tasks pursuant to the State Water Law of the State of North-Rhine-Westphalia.

The Lippeverband is an economic operator with a mixed public-private membership. As such it cannot be part of the organisation of the German public administration and thus cannot take over tasks by means of a transfer of competences. Furthermore, the city of Hamm remunerates the services provided by the Lippeverband. Such an award of a service against remuneration requires the execution of tender procedures pursuant to the European Public Procurement Directives. Without the execution of such procedures competition in the waste water sector would be unjustifiably restricted as the Lippeverband would enjoy an advantage over its competitors in this sector.

ITALY – helicopter supply

The Italian authorities argued that the supply contracts awarded in the framework of the illegal practice cannot be re-tendered, as they are almost entirely executed. As to future purchases of helicopters, the Italian authorities committed themselves to comply with the EU public procurement rules but they did not provide information on the purchases that have been planned or envisaged, even in the long term.

The Commission believes that the execution of the Court's judgment requires, at least, that Italy takes appropriate measures to ensure that EU public procurement rules will be complied with in the future and that the Commission is regularly provided with information on the procedures that will be followed in the future for the purchase of helicopters, for a period of time proportionate to that during which the illegal practice continued. The Commission considers that this information is necessary in order to verify whether such illegal practice has been stopped.

Therefore, the Commission has requested Italy to comply immediately with the Court judgement. The requests take the form of a 'reasoned opinion' under Article 228 of the EC Treaty. If the Italian authorities do not comply within two months, the Commission may refer the case to the Court and ask the Court to impose a lump sum or penalty payment on Italy.

UNITED KINGDOM – land development

The City of York Council awarded this contract without having carried out a tendering process. The Commission considers that the contract in question constitutes a public works concession contract and as such should have been awarded, on the basis of the public procurement Directive applicable at the time (93/37/EEC), following the publication of a concession notice in the Official Journal of the European Union and the completion of a tendering process. Such a tendering process would have to have been compatible with Treaty principles of freedom of

establishment and freedom to provide services as well as those of equal treatment, non-discrimination and transparency. The Commission therefore is of the opinion that in the absence of such a tendering process, the United Kingdom has failed to fulfil its obligations under EU public procurement rules.

Although the United Kingdom has changed its initial position and now accepts that the development agreement does constitute a works concession which should have been tendered out in accordance with EU rules, no measures have been introduced to bring to an end this infringement. Furthermore, no sufficient and adequate measures have been introduced to ensure that the award of future land development agreements will be compliant with the applicable EU rules.

GERMANY – waste disposal

Under a combined waste disposal arrangement concluded in 1997 and running until 2016, the municipality has to dispose household waste furnished by the private partner in its incineration plant, while the private partner undertakes in turn to treat bio-waste furnished by the municipality in its composting plants. In the Commission's view, with respect to bio-waste, the municipality is acting as a contracting authority buying services from operators in the market. Under Internal Market rules, it is thus obliged to apply transparent and competitive tendering procedures, opening up the market to competition and ensuring that it obtains the best value for its citizens' money.

The Commission started infringement proceedings following a complaint by a private waste disposal undertaking which claimed that it could dispose the bio-waste in much more competitive conditions. Since it was not possible to achieve a negotiated solution involving early termination of the contract, the Commission has decided to refer the matter to the European Court of Justice.

Chapter 2 Framework Law

CZECH REPUBLIC – forestry services

The Commission has decided to send a reasoned opinion to the Czech Republic regarding the public procurement practice of the state enterprise Lesy âeské Republiky (Forests of the Czech Republic). In the Commission's view, the state enterprise in question wrongly interpreted the definition of a contracting authority and consequently **awarded framework contracts for forestry services without following relevant public procurement rules** and without notifying the Commission.

The state enterprise in question has not yet made its public procurement practice fully compliant with EU public procurement rules, despite the commitment of the Czech Republic given to the Commission after the letter of formal notice.

The Commission therefore considers that the Czech Republic has failed to fulfil its obligations under EU public procurement legislation.

GERMANY – award of discount contracts by statutory sickness insurance funds

The European Commission has decided to send a formal request to Germany concerning the **award of discount contracts by some 240 German statutory sickness insurance funds**. The framework contracts concluded by these sickness insurance funds concern the supply of pharmaceuticals via pharmacies and specify the discount levels that suppliers give to the sickness insurance funds which pay for the pharmaceuticals delivered to the insured population. They are either concluded for groups of pharmaceutical products containing specific medical substances or for the entire portfolio of pharmaceutical products of a supplier. Contractors are mainly large pharmaceutical suppliers. This formal request takes the form of a "reasoned opinion", the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may refer the matter to the European Court of Justice.

Statutory sickness insurance funds use different procedures for awarding these framework contracts. These procedures range from direct awards to competitive procedures without European-wide tender. Most procedures do not comply with the standards required by the European public procurement Directives.

Economic operators who do not obtain these framework contracts are effectively excluded with their products from the German market for the duration of these contracts. This is based on a German law in force since April 2007 which obliges pharmacies to provide only products that are covered by the discount contracts to the insured population. The incorrect award procedures thus do not only disadvantage small and medium pharmaceutical suppliers but also effectively put them at risk being permanently forced out of the market. The economic impact of the alleged contracts is huge: annually, German Statutory sickness insurance funds spend 16 billion Euros on pharmaceuticals.

SPAIN – contracts for the supply of helicopters

The European Commission has decided to send a formal request to Spain concerning the conclusion of two framework agreements with the company Eurocopter for the supply of helicopters respectively to the Ministry of the Interior for national police and "Guardia Civil" and to the Ministry of Agriculture, Fisheries and Food for missions of surveillance and support of the national fishing fleet. Based on these framework agreements both Ministries have already awarded two contracts for the supply of helicopters: This formal request takes the form of a "reasoned opinion", the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may refer the matter to the European Court of Justice.

The Commission **considers that the two framework agreements have been concluded in violation of the European public procurement Directives: the framework agreement concluded by the Ministry of Agriculture, Fisheries and Food was not advertised in the Official Journal of the European Union and both framework agreements allow for the subsequent amendment, by the parties, of several of their substantial terms**, such as the extension of the duration of the agreement.

Economic operators who were not able to participate in the tender procedure for the framework agreement of the Ministry of Agriculture, Fisheries and Food are effectively excluded with their products from this market for the duration of the framework agreement.

Additionally, the subsequent modification of the substantial terms of the framework agreement provides an advantage to the winner of the tender and harms the interests of other tenderers and of all the undertakings interested in taking part in the procurement procedure, by placing them on an unequal footing when formulating their respective tenders.

Furthermore, in both cases, the Spanish authorities made use of a negotiated procedure to award specific contracts in an instance – the award of contracts based on a framework agreement – that is not foreseen in the Directives.

Public procurement: infringement proceedings against Austria concerning award of planning services in Güssing.

The European Commission has decided to send a formal request to Austria concerning the award of planning services in 2007 in the context of the extension of the Montecuccoli barracks in Güssing. The services amount to 2.5 million Euros and their value is thus more than 10 times higher than the threshold for the application of the European procurement Directive 2004/18/EC. This formal request takes the form of a "reasoned opinion", the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may refer the matter to the European Court of Justice.

The tender carried out by the Defence Ministry of the Austrian Government contained a pre-selection criterion favouring undertakings from the geographical area of Güssing and its surroundings. The application of this criterion led to the exclusion of undertakings operating from further away. These undertakings were excluded before they could actually submit offers.

The Austrian Government claimed that the use of the criterion was justified to ensure the execution of the project without delay. **The Commission does not question the possibility to apply award criteria relevant for the execution of a contract which are justified in view of the subject matter of the contract, for example the need to ensure**

that supervisors of the works have rapid access to the place of execution of the works. However, bidders not yet fulfilling such requirements at the beginning of the procedure have to be invited to provide evidence of how they will ensure that these requirements are met during contract implementation.

GREECE – repair and cleaning of electricity generating stations

The Commission has decided to send Greece a reasoned opinion concerning the signing by the DEH public power corporation of framework contracts for the repair, renovation and cleaning of steam-powered electricity generating stations in the north of Greece. **The Commission considers that the conditions of the invitation that the DEH sent to firms that might be interested in the framework contracts were such that they restricted the contract to local firms** and were also discriminatory and contrary to the freedom to provide services.

ITALY – framework law on public works

The Commission has decided to bring Italy before the European Court of Justice over certain **provisions of its framework law on public works**, No. 109/94, as last amended by Law No. 166/2002. A reasoned opinion was sent to the Italian authorities in October 2003 (see IP/03/1415).

The procedure is designed to bring about legislative amendments which **will bring this framework law into line with the Directives** on public contracts and therefore more fully to open those contracts to intra-Community competition.

In particular, the Commission's action is designed:

- to avoid situations where national rules on the scope of the Directive on public works contracts which are not in conformity with Community law result in non-publication at Community level of public contracts which should be published in accordance with the "supplies" and "services" Directives, whose application thresholds are much lower than that laid down in the "works" Directive";
- to ensure that the rules of competition of Community Directives on public contracts are applied in all cases or, where they are not applicable, to ensure that the obligation to issue notification of the contract is applied in accordance with the general principle of transparency. This applies, for example, to work performed by way of payment in kind for planning permission and engineering, architectural and project assessment services falling below the thresholds of the Community Directives, and to management services and technical inspection services ("collaudo");
- to avoid situations where national rules such as that on the right of pre-emption ("prelazione") of the promoter within the framework of project-financing procedures constitute discrimination against non-nationals who bid for public contracts.

ITALY – framework law on public works

The Commission has decided to send Italy a reasoned opinion concerning certain provisions of the **framework law on public works**, No. 109/94, as last amended by Law No. 166/2002.

The Commission wants Italy to amend its legislation to **bring this framework law into line** with the Directives on public contracts and therefore make those contracts open to intra-EU competition.

In particular, the Commission's action is designed:

- to avoid situations where national rules on the scope of the Directive on public work contracts which are not in conformity with EU law result in public contracts not being published at EU level in accordance with the "supplies" and "services" Directives, whose application thresholds are much lower than those in the "works" Directive;
- to ensure that the competition rules of EU Directives on public contracts are applied in all cases or, where they are not applicable, to ensure that the contract is sufficiently advertised in accordance with the general principle of transparency. This applies, for example, to work performed by way of payment for planning permission and engineering, architectural and project assessment

services falling below the thresholds of the EU Directives, and to management services and technical inspection services (“collaudo”);

- to avoid situations where national rules such as that on the right of pre-emption (“prelazione”) of the promoter within the framework of project-financing procedures discriminate against non-nationals who bid for public contracts.

SWEDEN – framework contract for public works in Eskilstuna

The Commission has decided to issue a reasoned opinion against Sweden concerning a decision by the municipality of Eskilstuna to **award a framework contract covering several works** worth at least €19.6 million without applying the tendering rules in the Directive on the procurement of public works (93/37/EEC).

Although the Swedish authorities have acknowledged the infringement and announced that some of the works have already been finished, the Commission **considers that the works as a whole are still on-going and has decided to issue this reasoned opinion.**

If the works Directive is not properly applied, there is a risk that EU companies will be deprived of a fair chance to bid and the public entity in question, and thus the taxpayer, may pay a higher price than necessary for the works.

FRANCE – town planning rules

In response to a formal complaint, the Commission has decided to send a formal request for information to the French Authorities concerning the terms and conditions for concluding local development agreements (“conventions d’aménagement”), as set out in Article L300-4 of the French Town Planning Code. France uses these agreements for all major local development projects such as implementing urban development projects, the definition of local housing policy, or for the organisation and stimulation of local economic development. But the local development agreement, as it currently exists in French law, **provides no framework for the procedure of granting these agreements** and exempts this type of agreement from any publicity or competition requirements, both at the national level and at the European Union level.

The Commission considers that **these agreements may fall within the European Union definition of a “concession”** in which case they should be subject either to the relevant provisions of the works procurement Directive (93/37/EEC) or, when they are concerned with provision of services, to the relevant provisions of the EC Treaty (in particular Article 49). Moreover, when a local authority decides to apply a local development agreement to an urban planning or land development project and decides to assume the economic risks associated with the project by guaranteeing to cover any losses, the Commission considers that the agreement may have to be **classified under European Union law as a public works contract** and therefore subject to the relevant provisions of Directive 93/37/EEC.

Limiting the work on preparatory studies (provision of services), prior to drawing up a local development agreement, to a restricted category of public or semi-public bodies under French law, **without ensuring competition**, appears to be contrary to the rules of the services procurement Directive (92/50/EEC), as well as **the principle of freedom to provide services** as described in Article 49 of the EC Treaty.

The Commission clarified how European Union law should be applied to concessions in an interpretative Communication of 14 April 2000 (see IP/00/436).

FINLAND – air-travel services for government officials

The Commission has decided to issue a reasoned opinion against Finland concerning a decision by the Ministry of Finance to award a framework contract for air-travel services for government officials using discriminatory award criteria and thus infringing the public services Directive 92/50/EC. The Ministry of Finance had awarded the contract on the basis of non-published criteria, compared ticket prices that were not based on equal or similar terms, and included a destination among the routes to be served that was already reserved for a certain Finnish air-line company thus making it impossible for others to tender for this route. The estimated value of the contract was €30 million. The Finnish authorities have not acknowledged the infringement.

If the national authorities do not give a satisfactory reply to the reasoned opinion within two months, indicating a change in their pattern of procurement for such contracts in the future, the Commission may refer the matter to the Court of Justice.

Chapter 3 Advertising Requirements

CZECH REPUBLIC – non-competition

The European Commission has sent a formal request to Germany regarding the long-standing practice of German public broadcasting organisations to **award works, supply and service contracts without conducting European-wide competitive tendering procedures**. The Commission has also sent a formal request to the Czech Republic regarding the award of contracts for forestry services. These formal requests take the form of “reasoned opinions”, the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may refer the matter to the European Court of Justice.

GERMANY – contract awards by public broadcasting organisations

The Commission has decided to send a reasoned opinion to Germany concerning the long-standing practice of German public broadcasting organisations (Rundfunkanstalten) to award works, **supply and service contracts without conducting European-wide competitive tendering procedures** in accordance with the Directives on the award of public contracts.

The German Government argued that these organisations are not bound to comply with public procurement rules because they are not financed by the State. In Germany, public broadcasting organisations are financed for more than 80 % of their financial needs by broadcasting fees based on State treaties and laws. These fees are levied directly from the citizens by the broadcasting organisations themselves through the exercise of public powers.

In the view of the Commission, the fee-based funding of the German public broadcasting organisations has to be considered as financing by the State. The organisations are therefore public contracting authorities and have to apply EC procurement rules, making sure that the fees paid by the German public are spent in an efficient, transparent and economical manner.

GERMANY – transport of works of art

The Commission is closing a case concerning the award of service contracts for the transport of works of art for temporary exhibitions by public museums. The Commission decided in July 2005 to bring Germany before the Court of Justice in this case (IP/05/949). Since then, increased efforts to improve procurement practice in this field have been taken jointly by the German authorities and the Commission, and agreement has now been reached. **Public museums in Germany have been instructed that they must award contracts in this field competitively and refrain from accepting that other public entities require them to award the services to a specific transport undertaking of their choice.** The implementation of the agreements reached with the German authorities will be monitored closely.

GERMANY – legal services in Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen

The Commission is also closing a case concerning the direct award of legal services provided in the context of liability cases against public authorities at the national courts in several German States. The complaint concerned the award of service contracts by municipalities which are members of the Kommunalen Schadensausgleich, KSA, a non-legal association of public authorities in the German States of Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen. While more than 3,000 contracts for legal services are concluded per year, they are not concluded jointly but individually by the municipalities concerned, and **the average contract value is around 5,000 Euros per contract. Such low contract values are not covered by EU procurement law.**

GERMANY – granting of bus route licences

The Commission is closing a case concerning the granting of bus

route licences (Linienverkehrsgenehmigungen) under the German Statute on Passenger Transport (Personenbeförderungsgesetz). It had received a complaint that the Rheinisch-Bergischer Kreis, a regional authority in the state of North Rhine-Westphalia, awarded in a long-standing practice bus route licences to a restricted number of providers without publishing prior information.

In the view of the Commission, **bus route licences under the Statute on Passenger Transport are service concessions since** they entail an obligation to provide bus transport services on the licensed lines in return for the right to exploit these services. According to the ECJ case-law, public authorities granting bus route licences are therefore obliged to ensure, for the benefit of any potential tenderer, a sufficient degree of advertising in order for the market to be opened up to competition.

In negotiations between the Commission and the German authorities it was agreed that the Bezirksregierung (Regional Administration) of Cologne that is responsible for the granting and renewal of the licenses will increase transparency by publishing information on the existing licenses together with instructions on how and when to apply for them on a dedicated website (<http://www.bezregoeln.nrw.de/html/organisation/abt6/dez67/06670600.html>).

This measure shows the advantages of the Internet as a medium for advertising of public contracts and concessions. It is flexible and cost-effective for the public authorities and at the same time allows easy access for potential contractors, increasing transparency and competitiveness of the awarding procedure.

FRANCE – provisions of the town planning code

The European Commission has decided to terminate an infringement proceeding that it had initiated against France under Article 226 of the EC Treaty relating to certain provisions of the town planning code which allowed the contracting authorities to **award development contracts (in the form of agreements) without prior advertising or competitive tendering**. This situation constituted a breach of Community law with regard to public procurement.

Within the framework of these proceedings, the Commission had taken, on 13 October 2004, a decision to refer the matter to the Court of Justice. However, this decision was never carried out in view of the stated intention of the French authorities to adopt legislation instituting a legal procedure for the award of development agreements which would conform to Community law.

This legislation was in fact adopted (Act 2005-809 of 20 July 2005 relating to development concessions and Decree 2006-959 of 31 July 2006 relating to the conditions governing the award of development concessions and contracts concluded by concessionaires and amending the town planning code).

The abovementioned legislation does, however, raise **doubts in the Commission's mind regarding the methods chosen for the calculation of the contract value (which determines the procedural rules to be complied with) as well as the procedural rules relating to advertising and competitive tendering**. The recent judgment of 18 January 2007 (Case C-220/05 "Auroux") that the Court of Justice delivered following a preliminary question raised by a French court also confirmed the Commission's doubts and the non-conformity of certain provisions of the new legislation with Community law.

Noting, however, that the objection in question concerned only the direct award of the development agreements (and therefore the absence of any provisions) and that this objection had been removed by the adoption of the new provisions, the Commission decided to terminate this case for purely procedural reasons, since the continuation of the proceedings would have meant resuming it from an initial stage. The Commission plans to initiate a new case on its own initiative to deal with the non-conformities detected in the French legislation in question.

IRELAND – aerial fertilisation of forests

The Commission has also decided to send a reasoned opinion to the Irish authorities asking them to put right non-compliance with EU public procurement rules in the **award, without competition**, by the Irish Forestry Board of contracts for the aerial fertilisation of forests by helicopter.

The **Irish authorities classify the Irish Forestry Board as a private entity** not subject to the public procurement rules, despite the fact that it has the important role of maintaining national forests and assisting the development of the forestry industry.

However, the **Commission takes the view that the Board is a body governed by public law**, as defined in Article 1 b) of the Directive on the public procurement of services (92/50/EEC), and therefore subject to EU procurement rules. A previous judgement of the European Court of Justice (17th December 1998, case C-353/96) already classified the Irish Forestry Board as a contracting authority.

As a result, the Commission considers that, even if the specific contracts in question are not covered by the detailed procedural requirements for the advertising and award of contracts laid down in Directive 92/50/EEC, they do **fall under the general provisions of that Directive and under EU Treaty principles**. The contracts should therefore have been adequately advertised.

IRELAND – contract with An Post for social welfare payment services

The Commission has decided to refer Ireland to the European Court of Justice over **the extension, without competition, of the contractual arrangements** with An Post (the national Post Office) for the provision of social welfare payment services.

The Commission sent a reasoned opinion, to which the Irish authorities did not reply satisfactorily, in December 2002 (see IP/03/266). The case is not specifically covered by the detailed procedural requirements for the advertising and award of contracts laid down in the Directive on the public procurement of services (92/50/EEC). However, it is **covered by the general provisions of that Directive, by general EU law obligations such as non-discrimination, equal treatment and transparency** and by the principles covering the free movement of services laid down in the Treaty.

The Irish authorities concerned should therefore have ensured, for the benefit of any potential tenderer, a **degree of advertising necessary and sufficient to ensure competition**.

The **precise scope and form of the advertising required depends on the nature of the services** in question and the extent to which the contract is of interest to purely regional, national or EU-wide potential providers of the service. The contract to An Post, for example, amounts to around €40 million and could have interested a number of suppliers outside Ireland. Advertising would therefore have to be more than simply national.

FINLAND – kitchen equipment

The Finnish contracting authority in charge of government real estate, Senaatti-kiinteistöt, awarded a contract for kitchen equipment worth 1.050.000 Finnish marks (€176.000) **without advertising it**. The sum involved is below the threshold above which the full procedural requirements of the public procurement Directives apply. However, the case law of the European Court of Justice confirms that the contracting authority in such cases **must ensure a degree of advertising sufficient to ensure competition**, to avoid discrimination on the grounds of nationality and to allow the impartiality of procurement procedures to be reviewed. The Commission has therefore sent Finland a reasoned opinion.

NETHERLANDS – renovation of Hoogezand-Sappemeer

The Commission has decided to refer the Netherlands to the Court of Justice concerning works contracts relating to the renovation of the city centre of Hoogezand-Sappemeer. The Commission sent a reasoned opinion, to which the Dutch authorities did not reply satisfactorily, in December 2003 (see IP/03/1763). The municipality of Hoogezand-Sappemeer signed an agreement giving a particular company **the exclusive right to carry out several types of work and then awarded it several contracts without competition**. The Commission considers that **such direct awards constitute a violation of EU public procurement law**, even in cases where the value of the contract does not reach the threshold for the application of the Public Works Directive 93/37/EEC (€5 million). Even if that threshold is not reached, the principles of the EC Treaty require an **adequate degree of advertising to enable different businesses to compete**.

GREECE – technical assistance for farmers

The Commission also decided to send Greece a reasoned opinion with regard to contracts for technical assistance to farmers. To help farmers take full advantage of certain Community aid measures under the common agricultural policy, the Greek Government used to conclude technical assistance contracts each year with specialist firms for each region, following suitable tendering procedures. In 2001, **contrary to the approach followed previously, a framework programme was drawn up and the implementing contracts were awarded by negotiation.**

The Commission considers that all the implementing contracts fulfil the same purpose and therefore have to be considered together, which means that they exceed the threshold in the Directive on public service contracts (92/50/EEC) and thus come within its scope. **The detailed advertising and tendering procedures laid down in the Directive should therefore apply.** Lastly, the argument put forward by the Greek authorities that only the chosen contractors had the technical capacity to carry out the contracts was at odds with the facts, since up to 2001 these contracts were subject to tender and they would be again from 2003 onwards.

IRELAND – welfare payments and ambulance services

In Ireland, the Government extended without competition contractual arrangements for the **provision of social welfare payment services** by An Post (the national Post Office). In a separate case, existing arrangements for Dublin City Council (former Dublin Corporation Fire Brigade) to **provide emergency ambulance services** to the Eastern Regional Health Authority were also **not subject to competition.**

These cases are **not specifically covered by the detailed procedural requirements for the advertising** and award of contracts laid down in the Directive on the public procurement of services (92/50/EEC). However, the Commission considers both cases are covered **by the general provisions of that Directive, by general EU law obligations** such as non-discrimination, equal treatment and transparency and by the principles covering the free movement of services laid down in the Treaty.

The Commission's view is that in both cases, the Irish authorities concerned **should have ensured, for the benefit of any potential tenderer, a degree of advertising necessary** and sufficient to ensure competition. The precise scope and form of the advertising required depends on the nature of the services in question and the extent to which the contract is of interest to purely regional, national or EU-wide potential providers of the service. The contract to An Post, for example, amounts to around €40 million and would have interested a number of suppliers outside Ireland. Therefore, **advertising would have to be more than simply national.** The Commission has sent Ireland reasoned opinions on both cases.

NETHERLANDS – supply of household refuse containers in Assen

The Commission has decided to send the Netherlands a reasoned opinion on the contracts for the supply of household refuse containers. The Assen local authority **awarded these contracts to a supplier under a direct agreement.**

The Directive on public supply contracts (Directive 93/36/EEC) does not apply to these contracts, as the amounts involved were below the threshold for the application of that Directive. The Commission considers, however, that the fact of awarding these contracts directly to a supplier without competition constitutes a violation of the general principle of the EC Treaty concerning equality of treatment deriving from the principle of non-discrimination on grounds of nationality. There should have been an adequate degree of advertising in order to enable different businesses to compete so that the contract could be awarded to the tenderer submitting the best bid, thus guaranteeing that public money is well spent.

ITALY – waste management in Sicily

The Commission has decided to send a reasoned opinion to Italy concerning the way in which the competent Italian authorities have chosen operators to handle the processing of urban waste produced over the entire territory of Sicily over a period of 20 years. The President of the Region of Sicily, in his capacity as Government Commissioner, launched an invitation to tender in 2002 to select the operators in

question, **but did not comply with the advertising requirements** laid down concerning the award of public services contracts by Directive 92/50/CEE, which is applicable in this particular case. Even though the awarding authority published a notice in the Official Journal of the European Union, that **notice did not contain the information** which is required under the Community Directives with a view to enabling economic operators who could be interested to take part in the invitation to tender.

IRELAND – provision of ambulance services

Ireland has not complied with a reasoned opinion sent to it over the **renewal of the contract** for Dublin City Council (formerly Dublin Corporation Fire Brigade) to provide emergency ambulance services to the Eastern Regional Health Authority (see IP/03/266). The Commission will now take the case to the European Court of Justice.

The case is not specifically covered by the detailed procedural requirements for the advertising and award of contracts laid down in Directive 92/50/EEC on the public procurement of services. However, it is covered by the general provisions of that Directive, by general EU law obligations such as non-discrimination, equal treatment and transparency and by the principles covering the free movement of services laid down in the Treaty.

The Commission therefore considers that, in line with those obligations, the Irish authorities should **have ensured, for the benefit of any potential tenderer, a degree of advertising necessary and sufficient to ensure competition.**

SPAIN – construction work at Segovia educational penitentiary centre

The Commission has referred Spain to the Court of Justice concerning incorrect procedures followed during selection of a firm to carry out construction work at an experimental penitentiary centre in Segovia. In particular, the call for **tenders was published in the national press but not in the EC Official Journal** and violated the Directive on public works (93/37/EEC). The Spanish authorities maintain that the Directive does not apply to the “Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios” (S.E.I.E.P.S.A.) on the grounds that it is a public commercial company governed by private law. However, the Commission considers that S.E.I.E.P.S.A. is a **contracting authority within the meaning of the Directive**, in particular because the company has been established for the specific purpose of meeting public interest needs, and so is not a conventional industrial or commercial firm.

GERMANY – transport of works of art

Several German museums regularly award service contracts for the transport of works of art for temporary exhibitions to specifically qualified transport companies without carrying out transparent award procedures. Germany claims that the transparency **obligation is reduced in these cases, which it argues – because of their low contract values – are not covered by the EC Procurement Directive.** Furthermore, Germany maintains that direct awards are objectively justified because of the quality requirements for these services and the need to comply with conditions stipulated by lenders of the works of art. However, as a developed market for the transport of works of art exists in Europe, the Commission considers that the non-application of internal market rules is not justified in this field.

GERMANY – planning services

In 2003, the City of Oestrich-Winkel **awarded a service contract for planning services directly without any form of advertising. The contract was below the threshold value** above which 92/50/EEC applies, but services below that threshold nevertheless have to be awarded in compliance with the principles of the EC Treaty. The **German authorities** acknowledge that, but **argue that the award procedure was sufficiently transparent.** The Commission disagrees with this view. **As the service contract was directly awarded without any form of advertising or publicity, the principles stemming from the EC Treaty were clearly breached.**

ITALY – construction

The Commission has also addressed a reasoned opinion to Italy on the direct **award, without prior competition at Community level,** of the

construction and operation of the motorway linking the Ospitaletto toll-area (A4), the new Poncarale toll-area (A21) and Montichiari Airport in Lombardy. The Commission considers that this direct award constitutes a infringement of Directive 93/37/EEC, which stipulates that contracting authorities wishing to conclude a public-works concession contract must announce their intention by means of a notice published in the Official Journal of the European Union. The Commission also considers that the justifications adduced by Italy for the legality of this direct award are not tenable.

SPAIN – development of the Santa Catalina isthmus in Las Palmas

The Commission has sent a letter of formal notice for infringement of Directives 92/50/EEC and 89/665/EEC in connection with the architectural design competition for the development of the Santa Catalina isthmus in Las Palmas organised in 2004 by the Comisión Mixta Puerto-Ciudad de Las Palmas de Gran Canaria [Las Palmas joint port and local-authority board].

The Commission considers that the award procedure for this competition **was not in line with Directive 92/50/EEC, since it was not published in the Official Journal of the EU**. Moreover, the architects directly invited by the contracting authority were selected on the basis of unknown criteria that were not published in the tender documents or the invitation to tender. Finally, the proposals by each candidate were **not presented or evaluated by the selection board anonymously**, given that the competition rules provided for an oral presentation of each proposal by each candidate and exhibition to the public before the board made its decision.

The Commission also considers that Spain's system of interim measures did not make it possible to suspend the award procedure. The Spanish court took three and a half months to reject the request for suspension submitted by the complainant (the rejection decision was made on the same day as the selection board's decision).

It also rejected the highly urgent (provisionalísima) request for suspension on the grounds that there were no circumstances warranting special urgency (such circumstances are hardly ever admitted by the Spanish courts in connection with public procurement), which is contrary to the purpose and the urgency requirements of Directive 89/665/EEC.

ITALY – consultancy services

Two Italian Communes directly awarded in 1998 and in 2002 a service concession for the supply of management consulting services concerning their pharmacies, in one case for ten years and in the other for an indefinite term. They had neither any management relationships with the concessionaire nor any power of control over it.

The Italian Authorities claimed that the Communes would have enacted a series of modifications in the statutes and rules of the concessionaire in order to establish an "in-house" relationship with it, even though they did not acquire any participation in its share capital. Moreover, the Italian Government pointed out that on the basis of Italian law the Communes concerned had to carry out a general economic analysis in order to decide whether to keep the direct award or to launch a call for tenders or to award the concession to a public-private company.

The Commission disagreed with the arguments of the Italian Government, pointing out that the direct award at issue is contrary to the general principles of the EC Treaty, pursuant to which an adequate level of transparency and publicity has always to be ensured towards all economic operators potentially interested, namely through a call for tenders.

In fact, according to the case-law of the European Court of Justice, a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority, only where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities (so called "in-house providing"). This is not the case in the infringement procedure at issue, because none of the Communes concerned had any relationship with the concessionaire.

Furthermore, as to the justification based on Italian law, the Commission rejected it and referred to the case-law of the European Court of Justice, according to which a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with European law.

GERMANY – construction

The case concerns a works contract concluded in 2008 between the German State (Land) of Saxony-Anhalt and a private investor without previous execution of a tender procedure. The State has purchased from the investor a piece of land on which an administrative building was to be constructed by the investor, for an overall value of roughly 7.4 million Euros. The investor himself had bought the land from the previous owner in view of the realisation of the works.

The German Government claimed that the main subject of the contract was not the construction of the building but the sale of the land, and that the contract could therefore not be qualified as a public works contract. Furthermore, in the opinion of the German Government, the owner of the land, who would only sell the land if he was also commissioned with the construction works, had an exclusive position which allowed the direct award of the works contract.

As regards the first argument, the Commission held the view that the main purpose of the region was not to buy a piece of land, but to get a building for its tax administration, and that the value of the works amounted to more than 6 million euros. Under these circumstances the works could not be considered as purely secondary compared to the purchasing of the land, and the procurement of the works therefore falls within the scope of application of the European Public Procurement Directives. As to the second argument, the Commission held the view that the mere ownership of the land on which public works are carried out does not automatically confer to the land owner an exclusive position justifying the direct award of the works contract. Therefore, the Commission held the view that the contract had to be awarded pursuant to the procedures foreseen in the European Public Procurement Directives.

GERMANY – database services

juris GmbH is the leading provider of legal database services in Germany. It operates the popular juris database which contains huge libraries of Federal and State law, administrative provisions, case-law and legal journal articles. Under a cooperation agreement with the Federal Government, juris GmbH has to maintain and operate the legal information system and to provide all federal authorities with full access to the database, in exchange for an annual remuneration. Under the same agreement, juris GmbH receives legislative documentation and court judgments in a specially edited form for its exclusive use.

After a partial privatisation in 2001, the Federal Republic of Germany owns currently just over 50% of juris GmbH. In the course of that privatisation, the cooperation agreement with the Federal Government has been thoroughly revised and amended, in particular regarding its provisions on remuneration. The Commission held the view that this amendment modified the essential terms of the cooperation agreement. Therefore, it has to be considered as a new contract which should have been awarded by contract award procedure complying with Directive 92/50/EEC on the award of public service contracts. Such a procedure could have been combined with the selection of the private partner for the Public-Private Partnership to be established through the partial privatisation of juris GmbH. This would have ensured that the selection of the private partner and the award of the new cooperation agreement to the jointly owned company are done in a transparent and competitive manner, complying with the Internal Market rules on the award of public contracts.

In 2006, judicial authorities of the States Baden-Württemberg, Brandenburg, Hamburg, Hesse, Mecklenburg-Vorpommern, Lower Saxony, North Rhine-Westphalia, Rheinland-Pfalz, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein und Thüringen awarded contracts for legal database services to juris GmbH, providing database access for their courts and judicial authorities. This award was made by a negotiated procedure without prior publication of a call for tenders.

The German government claimed that, on the basis of a "competitive

market enquiry”, the services of juris GmbH turned out to be ideally suited for the needs of the judicial authorities. In the view of the German government, it was therefore justified to award the contract by a procedure without publication of a call for tenders on the ground that juris GmbH was the only conceivable service provider.

The Commission did not follow this line. It took the view that the award procedures conducted by the judicial authorities were biased in favour of juris GmbH and that the authorities would have been obliged to award the contracts by open or restricted procedures with publication of a European-wide call for tenders.

Chapter 4 Review Procedures (Alcatel)

FRANCE, IRELAND AND BELGIUM – Remedies

The European Commission has decided to refer France and Ireland to the European Court of Justice over their respective national rules implementing the Remedies Directive in the field of public procurement. The Commission has also decided to send an additional reasoned opinion to Belgium concerning its national legislation in the same field.

The French and Belgian national rules contain an exception to the standstill period after the notification of an award decision, which in the Commission's view is too wide and not sufficiently specific. Therefore, **the national legislation in question does not sufficiently ensure that unsuccessful tenderers can find effective legal protection against the award of a public contract at a stage where infringements can still be rectified**, i.e. before the conclusion of the contract. This obligation flows from the Remedies Directives 89/665/EEC and 92/13/EEC, as interpreted by the European Court of Justice in its Alcatel judgement (C-81/98).

The Irish and Belgian national rules do not ensure that unsuccessful tenderers are informed in time by contracting authorities or entities of the motivation of the award of the contract, in order to be able to take a well reasoned decision on whether to make an application for interim measures. It is thus not guaranteed that an unsuccessful tenderer has, under all circumstances, the possibility to make a 'meaningful' application for interim measures against the award of public contracts. **Therefore the Irish and Belgian rules do not ensure complete legal protection against award decisions at a stage where infringements can still be rectified.**

The Commission considers that the relevant provisions of the national rules of Belgium, France and Ireland do not implement correctly the Remedies Directives and are, consequently, contrary to Community law.

AUSTRIA – incorrect implementation of Remedies Directives

The Commission believes that Austria has **incorrectly implemented the so-called Remedies Directives**, 89/665/EEC and 92/13/EEC, particularly with regard to the decision of the EU's Court of Justice in the "Alcatel" case (28 October 1999, ECR 1999, I-7671). These Directives require Member States to put in place the means to ensure rapid and effective redress for suppliers to prevent and correct possible violations of European Union rules on public procurement.

The Commission's services carried out an extensive analysis of the review procedures and the instruments that were set up to guarantee an effective, efficient and independent review system of the national procurement decisions. It concluded that a number of provisions of the Remedies Directives 89/665/EEC and 92/13/EEC were wrongly implemented or not implemented into the nine procurement laws of the Austrian Länder. For example, the procurement law of the Tirol and Burgenland Land **fails to provide, in the case of a review procedure, that the contracting authority is not authorised to award the contract during a certain period**. If, on the other hand, the authority awards a contract before the review procedure has been completed, the contract becomes null and void.

The Commission criticises Austria for the fact that the decision of the Court of Justice in the "Alcatel" case has not been implemented by all Austrian Länder. Salzburg, Steiermark, Kärnten, Niederösterreich and Tirol have not yet adopted a provision that guarantees that the award

decision can be the subject of a review procedure before the competent review bodies.

SPAIN, THE NETHERLANDS AND FINLAND – review procedures for tenderers

The Commission has sent reasoned opinions to Spain, the Netherlands and Finland requesting them to comply with the obligations of the "Remedies" Directive 89/665/EEC on public procurement. In its "Alcatel" judgment (Case C-81/98), the European Court of Justice stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified. This should allow an aggrieved tenderer to have a contracting authority's decision suspended by way of interim measures and set aside, notwithstanding the possibility once the contract has been concluded of obtaining an award of damages. In the Commission's view, **neither Spanish, Dutch nor Finnish legislation currently complies with these requirements. In the Netherlands and Finland the law does not require a clear separation between the decision awarding a public contract and the conclusion of the contract**. In Spain, despite separation, there is no mandatory standstill period between the award and the conclusion of the contract. In all three cases, there is consequently no guarantee of a sufficient interval between the award decision and the conclusion of the contract to allow a decision to be rectified in time.

LUXEMBOURG – appeals

The Luxembourg legislation, insofar as it stipulated that the award involved an amount which was sufficient to justify a competitive procedure, **did not allow a meaningful appeal against a decision** (that is to say, at a stage where infringements could still be corrected by starting the procedure again, i.e. prior to the contract being signed).

In these circumstances, the Commission considered this legislation to be contrary to Directive 89/665/EEC as interpreted by the Court of Justice in the "Alcatel" judgment of 28 October 1999, which requires the Member States, as part of the award procedure, to enable tenderers to apply for cancellation of a decision. Accordingly, the Commission sent a letter of formal notice in October 2002.

By adopting the Grand-Ducal Regulation of 7 July 2003, **the Luxembourg authorities have ended the infringement. Article 90 of the Grand-Ducal Regulation introduces a 15-day period between notification (to the unsuccessful tenderers) of the contracting authority's decision and signature of the contract**.

IRELAND AND UK – review procedures for unsuccessful tenderers

The Commission has decided to issue reasoned opinions against Ireland and the UK owing to their failure to comply with the obligations of the "Remedies" Directive 89/665/EEC on public procurement. **In its "Alcatel" judgment (Case C-81/98), the European Court of Justice stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified**. This should allow an aggrieved tenderer to have a contracting authority's decision suspended by way of interim measures and set aside, notwithstanding the possibility once the contract has been concluded of obtaining an award of damages.

In the Commission's view, neither Irish nor UK legislation currently complies in full with these requirements. The UK authorities are proposing amendments to their current remedies system, but the Commission does not consider these sufficient to comply with the Alcatel judgement.

BELGIUM – effective review procedures for unsuccessful tenderers

The Commission has decided to issue a reasoned opinion against Belgium owing to its **failure to comply with the obligations of the "Remedies" Directive on public procurement**. In its Alcatel judgment (Case C-81/98), the Court stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified.

The result of this judgment with regard to the applicable Belgian law

is that a reasonable period must be allowed between unsuccessful tenderers being notified of the decision awarding a contract and the signing of the contract. However, under Belgian law there is no obligation to allow such a period.

PORTUGAL – implementation of Remedies Directive

The Portuguese law implementing Directive 89/665 on remedies for tenderers who demonstrate that their bids have been unfairly rejected does not, in the Commission's view, fully meet the provision in the Directive requiring that the *"decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible"*.

For damages to be awarded, the current law – Decreto 48 051 still requires rejected tenderers to prove that there was wilful wrongdoing by the contracting officer(s), even if a violation of EU public procurement law is established by the Court. This entails lengthy proceedings and, because such evidence is very difficult to provide, actions for damages are seldom effective. In the absence of a satisfactory response to a 'reasoned opinion', the Commission has decided to refer the case to the Court.

FRANCE – Court ruling on Redress Directive

Directive 92/13/EEC requires Member States to put in place the means to ensure rapid and effective redress for suppliers to prevent and correct possible violations of Community rules on public procurement in the water, energy, transport and telecommunications sectors. It was due to be implemented no later than 1 January 1993.

France has still not complied with a 19 May 1999 judgement of the Court of Justice (Case C-225/97) concerning incomplete implementation into French law of Directive 92/13/EEC. In its ruling, **the Court condemned France for its incomplete implementation of the above-mentioned Directive** and, more particularly, the absence of national measures to implement Chapters 2 and 4 of the Directive relating to the certification and conciliation mechanisms. Since the Commission has received no notification from France that it has now conformed to the judgement of the Court, the Commission has decided to send a reasoned opinion on the basis of Article 228 of the EC Treaty.

SPAIN – inadequate review procedures

The Commission has decided to bring Spain before the Court of Justice in connection with a **case of incorrect implementation of Directive 89/665/EEC on the application of review procedures** to the award of public supply and public works contracts. The Commission considers that Spanish law is not in line with the Directive on the grounds that by allowing the award to coincide with the conclusion of the contract it denies unsuccessful tenderers the possibility of challenging, in good time, the validity of the award decision and taking legal action against it at a stage when infringements can still be rectified. The Commission considers that allowing reasonable time for unsuccessful tenderers to challenge the award decision would be the solution that would, in legal terms, best meet the requirement of the Directive on review procedures as interpreted in ECJ case law.

SPAIN – Remedies

On the 3rd of April 2008 the European Court of Justice ruled on case C-444/06 Commission v. Spain. The judgment stated that Spain had failed to fulfil its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC, by failing to lay down a mandatory period for the contracting authority to notify the decision on the award of the contract to all the tenderers and by failing to provide for a mandatory waiting period between the award of the contract and its conclusion.

According to the Spanish authorities, the new Spanish system of remedies in the field of public procurement, as governed by the Law on Contracts of the Public Sector (Law 30/2007) since 1 May 2008, fully complies with the requirements of Directive 89/668/EEC as interpreted by the ECJ in C-444/06.

The Commission still holds some doubts as to the whether this new system of remedies actually guarantees the existence of a period between award and conclusion of the contract, providing all rejected bidders with the necessary elements which would allow them to effectively institute review proceedings.

Chapter 5 Directive Implementation

PORTUGAL – water, energy, transport and telecommunications

The Commission has decided to send Portugal two reasoned opinions for incorrect implementation of Directive 93/38/EEC, coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, and of Directive 92/13/EEC, **aimed at guaranteeing the effective implementation of the previous Directive** by ensuring that effective and rapid remedies are available to suppliers, contractors and service providers in the event of infringement of the relevant EU law or national rules implementing that law.

The Commission takes the view that the **Portuguese legislation does not comply with EU law, particularly in relation to the scope and application thresholds of the Directive, time limits for receipt of tenders, design competitions and abnormally low tenders.**

FRANCE – public procurement code

The Commission has decided to take France to the Court of Justice for the non-compliance of its public procurement code with the Directives on public contracts and with the EC Treaty. The Commission found that the new code adopted on 7 January 2004 **did not take into account the 11 complaints which the Commission had made in its reasoned opinion** of 23 October 2002 regarding the earlier version of the code dated 7 March 2001 (see IP/02/1507).

Firstly, the new code, like the March 2001 version, provides "simplified" procedures for certain service contracts listed in Annex B of Directive 92/50/EEC. These are primarily legal services, social and health services, recreational, cultural and sporting services, education services and vocational training and placement services.

For these services, the public authorities are not required by the French code to ensure a proper degree of advertising, which according **to the Telaustria judgement by the Court of Justice (Case C-324/98) is in fact absolutely necessary for the award of a contract to comply with the principle of transparency required by the Treaty.**

Secondly, the code continues to exclude loan contracts from advertising and competition requirements, whereas the Commission considers that generally contracts concerning loans or other financial commitments are covered by Annex IA of Directive 92/50/EEC (public service contracts) and Annex XVII of Directive 93/38/EEC (public contracts in the water, energy, transport and telecommunications sectors) and are **thus subject to the requirements of transparency laid down by the Directives.**

Lastly, the Commission considers that the **new code continues to infringe the Directives on public contracts with regard to the minimum number of participants to be invited** in a restricted procedure (i.e. not open to every tenderer wishing to submit a bid). Indeed, according to the case law of the Court of Justice, even if there is no range laid down in the contract notice published in the Official Journal of the European Union, **the minimum number of applicants invited to tender should not be less than five (see judgement, Commission v France, Case C-225/98).** The code in fact applies this minimum number only if a range has been indicated in the contract notice.

SPAIN – award procedures for public supply contracts

The Commission has decided to refer Spain to the Court of Justice concerning the incorrect implementation into Spanish law of Directives 93/36/EEC and 93/37/EEC, concerning the award of supply and works contracts. Spanish law '13/1995' ("Contratos de las Administraciones Públicas") implements into Spanish law the public procurement Directives on supply contracts (93/36/EEC), works contracts, (93/37/EEC) and service contracts (92/50/EEC). However, the Commission considers that this law, which has since been modified and recast (12 May 2000), includes some aspects which are incompatible with European Union law, in particular with regard to the notion of a "body governed by public law", as used in the EU's public procurement Directives.

Under the aforementioned Spanish law, **private law companies would, under no circumstances, be subject to the public**

procurement rules (except for the principles of publicity and competition), even if they satisfied the definition of a “body governed by public law” contained in the Directives (in particular the requirement to have been created to pursue activities in the public interest other than those of an industrial or commercial nature). **The Commission also objects to the intended scope of application of the law (collaboration agreements are excluded), two of the conditions which must be met before a negotiated procedure without prior publication and prior information notices can be used.**

AUSTRIA – implement Directive 97/52/CEE

Austria has failed to notify all necessary measures to implement Directive 97/52/CEE, which amends the Directives on public procurement of works, supplies and services to take account of the Government Procurement Agreement (GPA) reached in the framework of the World Trade Organisation. The implementation deadline for the Directive was 13th October 1998. Nor has Austria notified all necessary measures to implement Directive 98/4/EC, which amends the rules for public procurement in the water, energy, transport and telecommunications sectors, also to take account of the GPA. The implementation deadline for the Directive was 16th February 1999. The Austrian authorities notified the Commission in June 1999 that both Directives had been implemented at federal level. In August of the same year, further notifications followed concerning implementation of the two Directives in the Land Vienna, in January 2000 for the Tyrol and in June 2000 for Carinthia. However, despite assurances from the Austrian authorities of plans to implement both Directives in the remaining Austrian regions, **no relevant legislation has been notified to the Commission.**

SPAIN – implementation

The Commission has also decided to send Spain a reasoned opinion on **incorrect implementation of Directive 92/50/EEC** relating to the coordination of procedures for the award of public service contracts. The Commission considers that Spanish law^[1], even after an amendment in 2003, does not correctly implement the concept of bodies governed by public law within the meaning of the Directive, since it excludes certain bodies governed by private law, such as foundations, from the definition and hence from the scope of the Directive.

PORTUGAL – non-conformity of national law

The Commission has decided to bring two **cases of incorrect implementation** by Portugal of Directives 93/38/EEC and 92/13/EEC before the Court of Justice. The first of these Directives concerns the coordination of procurement procedures in the water, energy, transport and telecommunications sectors, while the second is aimed at ensuring effective application of the first by providing suppliers, entrepreneurs and service providers with effective and rapid remedies in the event of infringement of Community law in that field or national rules implementing that law.

The Commission considers that Portuguese law is not in conformity with Community legislation, particularly as regards its scope and application thresholds, deadlines for receipt of bids, competition and abnormally low bids.

PORTUGAL – appeal procedures

The Commission has decided to send a letter of formal notice to Portugal, having observed that the Portuguese authorities have failed to adopt the measures necessary to comply with the Court of Justice's judgment of 14 October 2004 in case C-275/03 (Commission/Portugal) within the three-month deadline and to **correctly implement Council Directive 89/665/EEC** on the application of review procedures to the award of public supply and public works contracts.

In its judgment, the Court of Justice ruled that, contrary to what is laid down in the Directive on review procedures, **Portuguese law makes the award of damages for violations of Community rules on public contracts subject to the production of evidence by the aggrieved parties that the State or legal persons under public law were at fault in committing the illegal acts.**

The difficulty of producing such evidence may in practice result in review procedures for the award of damages being slow and very probably ineffective.

GREECE – law on the mass media

The Commission has sent a letter of formal notice asking the Greek Government for its observations on the compatibility with Community law of the national provisions banning the award of public contracts to companies “interconnected” with Greek mass-media companies.

Article 14(9) of the Greek Constitution and the implementing law (3310/2005) declare a virtually total and absolute incompatibility between any activity or shareholding above a certain level in mass-media companies and the performance of public contracts. The Commission considers that this is contrary to both secondary Community law (the Directives on public procurement), in that it lays down exclusion criteria that are not provided for in the Directives, and primary Community law (the EC Treaty), in that it lays down measures that impede, or render less attractive, the exercise of almost all the fundamental freedoms acknowledged by the EC Treaty.

Chapter 6 EC Treaty Principles

GREECE – legislation excluding certain companies from public procurement

Having sent the Greek Government a letter of formal notice on 18 October 2006 and a reasoned opinion on 15 December 2006, the European Commission has decided to take legal action against Greece before the European Court of Justice concerning the compatibility of Joint Ministerial Decision No 24014/2005 on the evidence required for the application of Law No 3310/2005, as amended by Law No 3414/2005. That act provides that both participants and other so-called “interconnected” persons operating in the media market must systematically submit to the Greek National Council for Radio and Television a series of ‘extracts from the judicial record’ as well as other certificates and statements, otherwise they will be disqualified.

The Commission takes the view that, as presently worded, the decision in question introduces grounds for exclusion from public procurement in Greece which are incompatible with the Community directives and that it makes the exercise of most of the fundamental freedoms more difficult or, at the very least, less attractive. The decision in question is therefore contrary to the Community law – both secondary law (the directives) and primary law (the EC Treaty) – applicable to public procurement.

Greece's reply of 29 January 2006 (in the form of a new draft decision) was not deemed to be satisfactory. Instead of the above documents, the new draft requires tenderers – who must not have been convicted of any charge of corruption by means of a final judgment which has the force of *res judicata* – to make an official declaration. However, it still provides for the intervention of the Greek National Council for Radio and Television (an institution which does not conduct tendering procedures), failing which the tenderer will be disqualified, before the signature of the contract and before any such decision has been taken with regard to the participant concerned. This draft decision is contrary to Article 51 of Directive 2004/17 and Article 44 of Directive 2004/18 since it provides a fresh reason for exclusion, namely in the event that the tenderer fails to submit the necessary documents to the Greek National Council for Radio and Television so that it can decide whether the tenderer may sign the contract. This reason is not provided for in the Community directives.

SPAIN – compliance with previous Court of Justice judgment on health service contracts

The European Commission has decided, under Article 228 of the EC Treaty, to send Spain a further reasoned opinion **requesting it to comply immediately with a 2005 European Court of Justice judgment concerning the award of contracts for health services relating to home respiratory treatments and other assisted breathing techniques.** If there is no response within two months, the Commission may refer the case to the Court of Justice.

In its judgment of 27 October 2005 (case C-158/03 Commission v. Spain), the ECJ ruled that Spain had infringed Article 49 of the EC Treaty, which guarantees the free movement of services, because of the inclusion in the relevant tender specifications of the following: **(i) an**

admission condition which requires tenderers, at the time of submitting a tender, to have offices open to the public in the province where the service is to be supplied, or in its capital; (ii) evaluation criteria which reward with extra points that the tenderer has, at the time of submitting the offer, oxygen conditioning and bottling plants which, depending on the case, must be located in Spain or within less than 1000 Km of the province in question, or offices open to the public in other specified towns; and (iii) a criterion which, in the case of a tie between two or more tenders, favours the undertaking that was previously providing the service.

The contracts examined by the Court, which were awarded in 2000, concern essential health services. According to the position of the Spanish authorities, to avoid service interruptions, the contracting authorities cannot cancel them without first launching a tender procedure and awarding a new contract. In these circumstances, the Commission considers that **re-tendering the contracts in compliance with EU procurement law would be an adequate measure to execute the judgement**. Nonetheless, it is still necessary that this is done as soon as possible after the judgment, so that the existing contracts can be cancelled.

However, over a year and a half after the judgment, three out of the five contracts examined by the Court have still not been re-tendered. A call for tenders for one of the contracts was published nearly a year ago, but no award decision appears to have been taken. No calls for tenders have been published for the other two contracts. **The Commission considers that this delay is irreconcilable with the obligations that fall on Member states under Article 228 of the EC Treaty.**

FRANCE – definition contracts procedure

The Commission has decided to send a reasoned opinion under Article 226 of the EC Treaty as part of infringement proceedings against France concerning the provisions of the public procurement code relating to the "definition contracts procedure".

This procedure may be used only where the public procurer is not itself able to specify the extent and nature of its requirements. Definition contracts are study service contracts intended to define the requirements in question and hence to determine the subject of, and establish the specifications for, a later contract. The procedure can be used, for example, in urban projects.

However, where several definition contracts with the same subject have been performed simultaneously, the disputed provisions of the public procurement code allow public procurers, under certain conditions, to award a performance contract to one of the holders of the definition contracts either without organising a fresh invitation to tender or, at the most, restricting the tender to those holders.

The Commission considers that this direct award conflicts with Public Contracts Directive 2004/18/EC, since it is not justified by any derogation in the Directive from the ordinary contract award procedures laid down in it.

Municipal services provided to public establishments for cooperation between local authorities (EPCI) and joint local authority associations ("syndicats mixtes")

The Commission has decided to send a reasoned opinion under Article 226 of the EC Treaty as part of infringement proceedings against France concerning certain provisions of the Local Authority Code. The provisions allow the services of a municipality which is a member of a public establishment for cooperation between local authorities (EPCI) to be made available to the latter so that it can fulfil its responsibilities.

Similarly, the services of a local authority which is a member of a joint association may be made available to that association. The Commission considers that **making services available in this way, where the details and, in particular, the remuneration are determined by agreement between the municipality or other local authority and the EPCI or joint association of local authorities, is tantamount to awarding a public contract for municipal or other local authority services privately without following the procedures laid down by Community law** on public contracts and, in particular, the Public Contracts Directives 2004/18/EC and 2004/17/EC.

FRANCE – Law on public project contracting and its relationship to private project management ("Loi MOP")

The Commission has decided to send a reasoned opinion under Article 228 of the EC Treaty as part of infringement proceedings against France following a judgment of 20 October 2005 in which the Court of Justice held that, by reserving the task of delegated project contracting to an exhaustive list of legal persons created under French law, France has failed to fulfil its obligations under Directive 92/50/EEC relating to the award of public service contracts and under Article 49 of the EC Treaty.

GERMANY – rescue transport services

The Commission has decided to refer Germany to the European Court of Justice over the practice followed by local and regional authorities in the states of North Rhine-Westphalia, Lower Saxony, Saxony and Saxony-Anhalt to award contracts for rescue transport services without applying transparent contract award procedures. The German authorities recognised that these contracts are routinely awarded in procedures that do not comply with EU rules. They argued that rescue transport services are not subject to EU law since they are part of the public tasks of the states and involve the exercise of official authority. **However, according to the ECJ case-law rescue services are not connected with such exercise of official authority and Member States are obliged to ensure that rescue transport services are awarded in compliance with EU rules on public procurement.**

GERMANY – contract awards by public broadcasting organisations

The Commission has decided to refer Germany to the European Court of Justice over the long-standing practice of German public broadcasting organisations to award works, supply and service contracts without conducting European-wide competitive tendering procedures in accordance with the EU Directives on the award of public contracts.

The German Government argues that public broadcasting organisations are not subject to EU rules on public procurement because they are not financed by the State but by fees that are levied directly from the citizens by the broadcasting organisations through the exercises of public powers conferred upon them by the State.

The Commission maintains that this fee-based funding system has to be considered as financing by the State. The public broadcasting organisations are therefore public contracting authorities and have to apply EU procurement rules, ensuring that the fees paid by the viewing public in Germany are spent in an efficient, transparent and economical manner.

ITALY – public-public cooperation outside the scope of application of EU public procurement rules

- 1) Waste management services within the Province of Trapani
In this case concerning waste management services within the ATO TP 2 ("Ambito Territoriale Ottimale" or territorial units within the Province of Trapani), the Municipalities falling within the territory of the ATO TP2 in Sicily and the Province of Trapani set up a company, namely Belice Ambiente S.p.a., to which they have decided to transfer all competences regarding the management of urban waste, in virtue of the regional emergency regulation on waste disposal. The said company subsequently decided to execute waste management services within the ATO TP2 by its own means, without offering this possibility on the open market. **The Commission considers that this transfer of competences constitutes an internal reorganisation of the administration which does not fall within the scope of application of EU rules on public procurement and concessions.**
- 2) Water management services in Basilicata
The Commission is closing a case on water management services in the region of Basilicata. The case concerns the direct award of the services related to the integrated water management in the ATO (best territorial division) of Basilicata to Acquedotto Lucano, a public company limited by shares totally owned by the local authorities competent in this field. These authorities jointly exercise their competencies through a common entity, namely the authority of the ATO.

Following the remarks made by the Commission, the Italian authorities concerned have modified the statute of Acquedotto Lucano. The statute now limits the object of this company to the water management services in Basilicata; explicitly excludes the opening of the capital to private shareholders and reinforces the powers of control of the controlling authorities.

Taking into account the legal framework regulating the water management in Basilicata, the Commission considers that the competent authorities jointly exercise, over Acquedotto Lucano, a control which is similar to that which they exercise over their own departments. Therefore, the Commission takes the view that Acquedotto Lucano is to be regarded as a structure for the "in-house" management of water services on behalf of authorities which form part of it.

SLOVENIA – implementation of public procurement Directives in national law

The Commission has decided to close three cases against Slovenia following its notification of a "package of laws" implementing in national law Directive 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2004/17/EC, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2005/51/CE amending certain Annexes to Directive 2004/17/EC and Directive 2004/18/EC on public procurement.

FINLAND – implementation of public procurement Directives in national law

The Commission is closing three ongoing infringement cases against Finland as its government has notified the implementation in national law of Directive 2004/17/EC, Directive 2004/18/EC and Directive 2005/51/EC. The Commission understands that Finland intends to implement the remaining optional features of the mentioned Directives, i.e. dynamic purchasing systems and electronic auctions, at a later date.

GERMANY – Commission refers to Court of Justice over the construction of new trade fair halls in Cologne

The European Commission has decided to refer Germany to the European Court of Justice over a contract for the construction of four trade fair halls awarded by the city of Cologne to a private investment company without conducting a transparent and competitive procedure. The Commission considers that this is a public works contract which should have been awarded in a competitive procedure with European-wide call for tenders complying with the EU Directives on the award of public contracts.

Under the contested contract, the investment company has to build the new trade fair halls and additional premises in accordance with detailed specifications. The city rents the buildings for a fixed period of 30 years paying a total rent of more than 600m Euros. Under a sub-lease agreement the city will, in turn, let the premises to the trade fair company Koelnmesse GmbH.

The German Government maintains that the agreement between the city and the investment company is a simple rental contract which is not subject to EU rules on public procurement. It argues further that under the agreement the investment company retains the property of the land and the buildings; all the city obtains is the right to use the premises for a limited period of time.

However, **in the view of the Commission, the contract between the city and the investors is clearly a public works contract because the city, which is a contracting authority, obtains works executed in accordance with its requirements in return for a remuneration to be paid over a period of 30 years.** From the viewpoint of public procurement law it is immaterial whether the city becomes owner of the buildings or not. Neither does it matter that the buildings are ultimately to be used by the trade fair company and not by the city itself.

This results from Article 1 (2) of Directive 2004/18/EC which defines a "public works contract" as a public contract having as its object the "realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority".

Therefore, a contracting authority that intends to have buildings

constructed or other works executed according to its specifications by a third party against a remuneration that exceeds the threshold for application of Directive 2004/18/EC has to conduct a European-wide contract award procedure. This applies independently of the legal nature of the contractual arrangement – be it a works, sales, rental, leasing or any other contract – and without regard to the ownership and the final utilisation of the premises constructed under the contract.

In the present case, the Commission will seek a confirmation by the Court that the conclusion of the contract between the city of Cologne and the investment company without conducting a proper contract award procedure infringed the EU Directives on the award of public contracts. If the Court grants this application, the German Government and ultimately the city of Cologne will be obliged to take the necessary measures to comply with this judgment.

GERMANY – waste disposal and waste water collection (closures)

The Commission is closing cases concerning the waste disposal in the city of Braunschweig and waste water collection in the municipality of Bockhorn. The European Court of Justice ruled on 10 April 2003 that Germany failed to fulfil its obligations under the services procurement Directive 92/50/EEC when local authorities awarded service contracts without competitive tendering procedures. **As the German authorities subsequently failed to terminate the Community law violation, the Commission decided in October 2004 to refer the case a second time to the Court of Justice (IP/04/1294).**

The Court of Justice ruled on 18 July 2007 that by having failed to adopt all the necessary measures to comply with the judgment of 10 April 2003, Germany had failed to fulfil its obligations under Article 228 EC-Treaty. The Court confirmed that Germany cannot rely on the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda* ('pacts must be respected') and the right to property to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC.

As the contracts in question were terminated before the rendering of its judgement, no penalty payments were imposed by the Court and the cases have been closed.

AUSTRIA – works at hospital in Spittal/Drau, Carinthia

The Commission is sending a reasoned opinion to Austria concerning the award of a works contract by the Krankenhaus Spittal/Drau GmbH. The contract, with a value of approximately 32 million Euro, was financed 90% by the State of Carinthia and will continue to be executed at least until the end of 2008 with an important part of the works still to be performed. Some of the works have not even started yet. The Austrian authorities originally disputed that the Krankenhaus Spittal/Drau GmbH is a public contracting authority. Subsequently they acknowledged the breach of Community law. **However, their efforts in the present case to ensure compliance with Community law have not been sufficient.**

GERMANY – supply of software between public-law bodies

The Commission has decided to refer Germany to the European Court of Justice over a contract for the supply of a software application that was concluded directly between two public-law bodies responsible for data processing services for the use of municipalities without conducting a competitive tendering procedure. Under the contested contract, the Anstalt für Kommunale Datenverarbeitung in Bayern (AKDB) had to furnish vehicle-licensing software, developed for use by municipalities in Bavaria, to Datenzentrale Baden-Württemberg, which intended to use it in its data centres serving the municipalities of Baden-Württemberg.

The Commission has been made aware of the contract by private undertakings offering comparable software products for municipalities. As a contracting authority, **the Datenzentrale has to comply with the Internal Market rules on public procurement when it awards a supply contract to a third party even if that party is itself a public-law body subject to public procurement law.** Since AKDB is acting as contractor under a purchase contract for pecuniary interest, the Datenzentrale would have been obliged to award the contract as a public supply contract in a competitive tendering procedure complying with EU Directives on public procurement, ensuring transparency and equal access for suppliers in the Internal Market.

GERMANY – bio-waste disposal

The Commission has decided to send a reasoned opinion to Germany concerning the award of a public service contract for the disposal of biodegradable and green wastes by the municipality of Bonn to a private undertaking without a competitive tender procedure. Under a combined contract concluded in 1997 the municipality has to dispose household waste furnished by the private partner in its incineration plant while the private partner undertakes in turn to dispose bio-waste furnished by the municipality in its composting plants.

The Commission started infringement proceedings following a complaint by a private waste disposal undertaking which claimed that it could dispose the bio-waste from Bonn in much more competitive conditions. With respect to the bio-waste disposal services, the municipality is acting as a contracting authority buying services from operators in the market. **Under Internal Market rules, it is obliged to apply transparent and competitive tendering proceedings, opening up the market to competition and ensuring that it gets the best value for its citizens' money.**

ITALY – waste management

The European Commission has decided to refer Italy to the European Court of Justice over the procurement of waste management services by the city of Contigliano.

The case concerns the direct award of waste management services by the Municipality of Contigliano in Lazio to a public-owned limited liability company, namely A.M.A. Servizi S.r.l., of which the town of Contigliano owns 0,5% of the capital. **Italy maintains that the award of this contract of services to A.M.A. Servizi S.r.l., by the Municipality of Contigliano, is excluded from the application of EC public procurement rules since A.M.A. Servizi is an "in-house" structure of the awarding entity as set out in the case-law of the European Court of Justice.**

The Commission considers that the conditions required by the ECJ case-law for the application of the "in-house" exception are not met in this case. First of all, the powers entrusted to the Municipality of Contigliano as a minority owner are insufficient to confer on the latter a control which is similar to the one exercised over its own departments. Secondly, the undertaking is active in the market and it carries out a significant part of its activities with parties other than its controlling entities.

SPAIN – joint ventures set up by IVVSA and AUMSA

The European Commission has decided to send a formal request to Spain regarding the joint ventures set up by the publicly owned companies IVVSA and AUMSA. In this instance, the Commission considers that, **by setting up joint ventures, IVVSA and AUMSA have, in some cases, awarded public procurement contracts to those joint ventures in contravention of certain provisions of Directives 92/50/EEC, 93/37/EEC and 93/36/EEC (now consolidated and amended by Directive 2004/18/EC) and in violation of the principle of equal treatment referred to in those Directives and in Articles 43 and 49 of the EC Treaty.**

IVVSA (Instituto Valenciano de Vivienda, S.A.) and AUMSA (Actuaciones Urbanas de Valencia, S.A) are limited companies wholly owned by the regional government of Valencia and the city of Valencia respectively. Among other things, they conduct urban planning studies and carry out infrastructure and management activities in the field of urban planning, including the renovation and promotion of social housing.

IVVSA and AUMSA have set up joint ventures with private shareholders. The purpose of those joint ventures is to perform tasks similar to those set out above (conducting studies, infrastructure projects, urban planning management, preparing restructuring (reparcelación) or compulsory purchase projects, purchasing sites or buildings and the acquisition, transfer, creation, modification and termination of rights to movable or immovable property, etc.).

The Commission considers that, by setting up certain joint ventures and giving them responsibility for carrying out various tasks in the field of urban planning, IVVSA and AUMSA have awarded public procurement

contracts. The Commission is of the opinion that, when awarding those contracts, IVVSA and AUMSA did not comply with the Public Procurement Directives, particularly as regards advertising and the principle of equal treatment, which also derives from Articles 43 and 49 of the EC Treaty.

IRELAND – interpretation services by Department of Justice

The European Commission has formally requested the Irish government to submit its observations on the compatibility with Community law of the procedure for awarding a contract for the provision of interpretation services by the Department of Justice.

The Commission considers that by modifying the emphasis between the award criteria following the submission **and an initial review of the bids, Ireland has failed to fulfil its obligations under the principles of equal treatment and transparency as interpreted by the European Court of Justice in its judgments handed down in cases C-92/00 HI Krankenhausstechnik, C-19/00 SIAC Construction Ltd and C-448/01 EVN.**

ITALY – high-speed railway lines

The Commission has decided to send Italy a reasoned opinion concerning the procedures used by its national railway administration, Ferrovie dello Stato (FS), to award the company TAV contracts for the construction of high-speed railway lines. In 1991, FS decided to contract TAV to build these lines in accordance with criteria to be set out in a performance agreement, which stipulated that TAV **had to use general contractors to be chosen among Italy's leading industrial groupings.**

After considering the arguments put forward by the Italian authorities, the Commission took the view that this provision **effectively reserved the contracts for the lines in question for Italian companies, in breach of the principles of freedom of establishment and freedom to provide services enshrined in Articles 43 and 49 of the EC Treaty.** The Commission's action under this procedure is primarily aimed at opening up to EU-wide competition work on lines (particularly those between Milan and Verona and Milan and Genoa) whose construction phase has not yet commenced.

ITALY – printing of documents for the Municipality of Rome

The Commission has decided to send Italy a reasoned opinion **for infringing the freedom to provide services** in the European Union and Directive 92/50/EEC on public procurement services. The matter refers to a contract awarded by the Municipality of Rome for the printing of publications.

The Commission considers that the procedure followed by the Municipality of Rome is tainted by several infringements of Community law. On the one hand, **the notice published in the Official Journal of the European Communities contained inadequate information** and referred to a notice previously published in the Italian Official Journal, which is contrary to the Directive in question.

In addition, **the notice published in the Italian Official Journal required documents issued by a foreign authority and submitted for admittance to the procedure to be legalised by the Italian authorities; this is an infringement of the principle of mutual recognition.** Lastly, the invitation to tender and the specifications required the successful tenderer to establish an operational structure in the Lazio Region, which is an infringement of the freedom to provide services.

BELGIUM – recognition of public works contractors

There is a horizontal problem in Belgium concerning the recognition of public works contractors certified in other Member States. The Directive on public procurement of works (93/37/EEC) provides that a **contractor who is registered in the official list of recognised contractors in one Member State should be presumed to be capable of carrying out that same work in another Member State.**

However, Belgian legislation (arrêté royal of 26.9.91 and arrêté ministeriel of 27.9.98) provides that a public works contract may only be awarded to a contractor not on a list of recognised contractors in Belgium once the competent Minister has decided, on the request of the

contract awarder and on advice of a special commission, that all conditions for recognition or the requirements for equivalence of recognition in another Member State are fulfilled. Since the legislation does not provide for a standstill of the procedure pending the decision on the recognition of each candidate bidder not certified in Belgium and since this recognition procedure is lengthy, it can encourage a contracting authority to choose a candidate that is already registered on the Belgian official list of recognised contractors and thus discriminate against non-recognised contractors or contractors who are registered on the official list of recognised contractors in other Member States. The Commission considers that this practice in **Belgium not only violates the public works Directive but also EC Treaty rules on the freedom to provide services** (Article 49). Previous Belgian legislation on certification of contractors was already condemned by the Court of Justice on 9 July 1987 (joined cases 27/86, 28/86 and 29/86).

DENMARK – accounting services

Denmark has issued ministerial guidelines which interpret the Directive on the procurement of services (92/50/EEC) as providing a complete exemption from requirements to put services out to tender, where contracts for accounting and auditing services linked to criminal trials on financial matters are concerned. **The Commission considers that the ministerial guidelines are disproportionate** in the sense that less restrictive measures could be applied on a case by case basis to ensure the necessary level of confidentiality and secrecy without exempting such services completely from the scope of the Directive. The Commission therefore considers the Danish guidelines not to be in accordance with current EU law.

ITALY – distribution of gas in the municipality of Naples

The Commission has also sent Italy a reasoned opinion because of a breach of the principle of non-discrimination on grounds of nationality provided for in Articles 43 and 49 of the Treaty as regards the **freedom of establishment and the freedom to provide services**, in connection with the renewal of the concession for the distribution of gas in the municipality of Naples.

At present, gas is distributed in Naples by the company known as 'Napoletanagas', on the basis of an agreement that expires in 2005. In 2000 the municipal authorities in Naples decided to extend this concession for a period of thirty years, or for any shorter period that may be laid down by Italian legislation.

In any event, in terms of Community law, **when a concession of this type expires the national authorities are not allowed to extend it for the benefit of the same operator**. They must organise a competitive tendering procedure, in order to allow any service provider in the European Union who could carry out the activity in question to put in a bid.

GREECE – public works contracts

Presidential Decree 334/2000 (OJ 279, 21.12.2000) imposed restrictions on the building firms which could take part in procedures for the award of public contracts. In the absence of official national registers of contractors, the Decree only allowed companies to produce references to similar works constructed in their country of origin and other EU or EEA Member States.

The Commission considered that this provision infringed Directive 93/37/EEC, because it constituted, without any technical justification, **discrimination against tenderers who had carried out works outside EU and EEA territory**, who were consequently automatically eliminated from procedures for the award of public contracts in Greece.

Following the Commission's intervention, the Greek authorities acknowledged the illegal nature of the disputed provision and, on 9 December 2002, communicated the regulatory text (Article 2 of Presidential Decree 336/2002, published in the Official Journal of the Hellenic Republic, Vol. I, No. 281, 20.11.2002) which amends the disputed provision by allowing companies or physical persons from EU or EEA Member States in which official registers of contractors are not held, to take part in competitions for the construction of works similar to those that they have already built, irrespective of where such works are located.

BELGIUM – Belgian bluestone [pierres bleues]

The specifications for the works contracts awarded in Wallonia specified that all quarrying of bluestone would have to take place in Belgium. **Prescription of origin is prohibited in principle under European law**. The Commission sent a letter of formal notice dated 16 October 2002, and the specifications will henceforth state that equivalent natural stone from other countries will also be acceptable. The Commission has therefore decided to close the case.

GREECE – Commission gives green light to Thessaloniki metro contract

In the Commission's view, the contract does not breach the principle of equal treatment for all bidders, does not depart unacceptably from the original tender documents and is a legitimate concession contract where the holder of the concession bears part of the risk.

The principal grounds for the Commission's decision are as follows.

- Firstly, **the Commission considers that the principle of equal treatment of all bidders is not infringed by the contract. Any successful bidder for the contract could have negotiated the final contract on similar terms, without incompatibility** with the tender documents, which left a wide margin for interpretation with regard to clauses that could be negotiated by the preferred bidder.
- Secondly, **the Commission's view is that the concession holder – Thessaloniki Metro – will bear risk. For example, its income from the project remains uncertain. It is therefore appropriate, in the Commission's view, for the contract to be defined as a concession contract**, rather than a public works contract, which would be subject to tougher procurement rules.
- Thirdly, the Commission considers that the fact that, in the final version of the contract, the defined depth of the tunnels is different from that set out in the tender documents does not constitute an unacceptable modification given that the tender documents specifically foresaw the possibility of such amendments.
- Fourthly, following verifications made with the Greek authorities and on the basis of the available documentation, the Commission considers that the financial guarantees submitted by Thessaloniki Metro were adequate in the light of EU public procurement rules.

FRANCE – law on major construction projects

Under a French law (Loi M.O.P) frequently applied to **major construction projects, only enterprises included in a pre-established list are eligible to take on the roles of deputy controller of works and of operation control. In the Commission's view, this restriction on open tendering and competition violates both the 1992 Directive on the public procurement of services (92/50/EC) and EU Treaty rules on non-discrimination**. The French authorities recognised in their response to the Commission's reasoned opinion sent in June 2002 that operation control indeed falls under the scope of the Directive, but continue to maintain that the function of deputy controller of works does not. The Commission has therefore referred the case to the Court.

SPAIN – health services

In Spain, the Instituto Nacional de Salud (national health service) imposed discriminatory conditions on bidders for contracts to provide respiratory therapy in patients' homes. For example, **tenderers were required to have some offices already open in the regions where the services were to be supplied**. In evaluating bids, the authorities took into account the existence of additional offices in those regions, ownership of other existing operations in Spain and previous provision of the service under contract. The Commission considers that **these conditions discriminate against non-Spanish suppliers and restrict the freedom to provide services** and the freedom of enterprises to base themselves wherever in the EU they choose. It has therefore decided to refer Spain to the Court.

FRANCE – construction of the Maxéville/Nancy sewage treatment plant

The Commission has decided to refer France to the Court concerning the procedures followed by the greater Nancy area authorities to select a firm to construct a sewage treatment plant at Maxéville. The Commission

considers that the French authorities have 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 **violates 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.

SPAIN – terms of contract

In this instance, the Commission considers that the regime of modifications of contracts after award, as governed in LCSP, is not in line with the principles of equal treatment, non discrimination and transparency as derived from article 2 of Directive 2008/14/EC on public procurement and from Articles 12, 43 and 49 of the Treaty of the European Community.

The LCSP gives contracting authorities a wide power to modify essential terms of public contracts after award, without the conditions for modification having been provided for in the contract documents in a clear, precise and unequivocal manner.

The Commission also considers that the LCSP makes it possible for the contracting authority to resort to the use of negotiated procedures without publication, outside the circumstances foreseen in article 31 of Directive 2004/18/EC.

ITALY – bank services

The University of Parma awarded a three-year contract for banking services and cash management, which included particularly restrictive participation requirements, such as the need for the supplier to currently perform a cash management activity for Italian Universities reaching a level of bank transfers higher than €250 million, and the need to have at least 12 offices in the commune of Parma.

The Italian Government claimed that these requirements were necessary due to the specificity and complexity of the services at stake, since they involve a significant number of different operations. With regards to the need for the service provider to have at least 12 offices in the commune of Parma, the Italian authorities maintained that this condition was necessary to fully provide the banking services also in the more peripheral areas, and to facilitate access to the service by those who already had contacts with the University, such as students living in Parma or University staff.

The Commission disagreed with the arguments of the Italian Government because the requirements laid down are contrary to the provisions of Directive 2004/18/EC. More precisely, the requirement relating to the need for the supplier to currently perform a cash management activity for Italian Universities could discourage foreign economic operators from submitting an offer to provide banking services for the University of Parma. Similarly, the need of having at least 12 offices in the commune of Parma is a discriminatory condition with respect to economic operators established in other Member States of the European Union. In fact, this second condition favours local operators, which would already have such a number of offices in Parma and, therefore, it could be more easily met by Italian enterprises than by foreign operators. Furthermore, this second condition is also disproportionate with regards to the subject-matter of the contract, insofar as there is no clear reason why the same service could not be supplied by another operator, which does not have the required minimum 12 offices in the commune of Parma.

PORTUGAL – treaty principles

The Commission considers that article 35 (2) (b) and (4) of Law no 12-A/2008 favours legal persons over individuals in the award of certain

public services contracts to the extent that it sets out that these contracts should be awarded, as a general rule, to legal persons. The award of such contracts to individuals is only possible under exceptional circumstances and is subject to the previous approval of the Minister of Finances. In other words, such provision makes it extremely difficult for individuals to have access to those contracts.

The above restriction breaches article 11 (1) of Directive 2004/17/EC and article 4 (1) of 2004/18/EC which provide that tenderers shall not be rejected solely on the ground that under the law of the Member State in which the contract is awarded, they would be required to be either a natural or a legal person. The restriction also violates the principles of equal treatment, non-discrimination and transparency of the EC Treaty for contracts whose value is below the Directives thresholds.

In view of the economic importance of the contracts at stake, which have as their subject-matter the performance of some specific tasks ("tarefa") or the continued provision of liberal profession services ("avença") and the high number of contracting authorities and economic operators concerned by the law, the Commission considers that the potential economic fallout of this discrimination to the Internal Market is substantial.

ITALY – award of public service contracts concerning the treatment of municipal waste in Sicily

In its judgment of 18 July 2007 (case C-382/05, Commission v. Italy), the European Court of Justice ruled that Italy had infringed the Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, because of the conclusion of public contracts concerning the use of municipal waste produced in the municipalities of the Region of Sicily, without following the procedures laid down by the said Directives, and, in particular, without publishing the appropriate contract notice in the Official Journal of the European Communities.

The contracts examined by the Court, concluded in 2003, concern essential waste treatment services. According to the position of the Italian authorities, to avoid service interruptions, the contracting authorities cannot cancel the aforementioned contracts without first launching a tender procedure and awarding a new contract. In these circumstances, the Commission considers that re-tendering the contracts in compliance with EU procurement law would be an adequate measure to execute the judgement.

However, over a year and a half has passed since the judgment and the contracts examined by the Court have still not been re-tendered. The Commission considers that this delay is irreconcilable with the obligations that fall on Member states under Article 228 of the EC Treaty.

FRANCE – vocational training

Since the management of financial aid is an economic activity which falls under the public procurement Directive (2004/18/EC), the Commission considers that this delegation of aid management – the procedures and particularly the remuneration for which are laid down by an agreement between the regional or local authority and the CNASEA – amounts to awarding the CNASEA a public services contract by mutual agreement without complying with the award procedures laid down by Community public procurement legislation and in particular by Directive 2004/18/EC.

SLOVAKIA – collection services

In this case, the Slovak contracting authority excluded three tenderers from the tender procedure. Based on the information available to the Commission, the Slovak authorities could have violated the principles of equal treatment and non-discrimination, as stipulated in the Public Procurement Directive 2004/18/EC and the EC Treaty.

This formal request takes the form of a 'letter of formal notice', the first stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may proceed to the second stage of the procedure in the form of the 'reasoned opinion'. Ultimately the Commission may refer the matter to the European Court of Justice.

Chapter 7 Accelerated

ITALY – technical assistance for the Treasury Ministry

The Commission has 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 considers that the **Directive on public procurement of services (92/50/EEC) has 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.

GREECE – supply of automatic weather stations

The Commission has decided to send Greece a reasoned opinion on the award by the airforce of a contract for the supply of 14 automatic weather stations **without publication of a notice** in the Official Journal (OJ) of the EU. Since the contract exceeds the threshold laid down in the Directive on public supply contracts (93/36/EEC), a notice should have been published in the OJ.

The Commission considers that the contract cannot be covered by the exception provided for in the case of the supply of certain equipment in the field of defence, since the supplies in question are not primarily destined for military use.

These weather stations should permit the modernisation of the system used by the National Meteorological Agency and will principally be used for the Olympic Games, and subsequently by the Agency to meet the needs of civil, and possibly military, aviation.

Nor does it seem possible to invoke another **exception in connection with reasons of extreme urgency brought about by events unforeseeable** by the contracting authorities. The **need to have operational weather stations for the 2004 Olympic Games cannot be regarded as an unforeseeable** event. Finally, the need would not appear to be so urgent that the deadlines required under the open and restricted procedures could not be respected.

ITALY – purchase of helicopters for firefighting

An order by the Italian Prime Minister dated 24 July 2002 laid down that the Italian organisation responsible for monitoring forests ('Corpo forestale dello Stato') was authorised to purchase the aircraft most suitable for carrying out its duties by a negotiated procedure outside the rules on competitive tendering laid down in the Community Directives on public procurement.

Under the Directive on public supply contracts (93/36/EEC), **exemptions from the tendering obligations are allowed only under strictly defined conditions**. These conditions include in particular extreme urgency resulting from events that the awarding authority could not foresee and for which it is not responsible, making it impossible to meet the deadlines involved in a tendering procedure preceded by the publication of a contract notice.

However, as the Court of Justice has pointed out on a number of occasions, the provisions allowing such exemptions must be interpreted strictly, and it is up to the awarding authority intending to make use of them to prove that there are justifying circumstances. In the Commission's view there are no such circumstances in the present case.

Firstly, the Commission considers that the need to increase the number of the aircraft concerned cannot be regarded as a circumstance that the Italian **authorities could not have foreseen**, given that forest fires are unfortunately a common, endemic phenomenon during the summer in Italy and provision had been made for a substantial increase in airborne firefighting equipment as long ago as 1998, in other words all of four and a half years before the adoption of the above-mentioned order. Nor has the Italian Government shown that there was any exceptional, unforeseeable increase in the number of fires in the 2002 summer season.

GREECE – printing and publication of schoolbooks

The Commission is sending a reasoned opinion to Greece for non-compliance with Directive 92/50 (public service contracts) in relation to the printing and publications of schoolbooks in Greece.

The Organisation for the Publication of Schoolbooks co-operates with approximately 80-90 relevant companies, based in the region of Attika, to **which it awards the publication and printing of the schoolbooks every year, without launching a tender**, on the basis of the companies' personnel, equipment and productivity.

The Greek authorities argue that there are time-constraints **as the books need to be ready for the beginning of every school year. Although the Directive (Article 11 (3) (d)) allows agreements to be negotiated directly with suppliers without publishing a general invitation to tender in justifiable cases of extreme urgency**, the Commission does not consider that these conditions are met in this case. First, there is no evidence that these time-constraints are tight enough to prevent adhering to even the reduced time limits for accelerated restricted procedures provided for in Article 20 of the Directive. Furthermore, the reasons of urgency invoked by the Greek authorities are not brought about by events unforeseeable by the contracting authorities or by events which are not within the latter's control, as the Directive would require if the circumstances were to be considered of extreme urgency. After all, the school year begins every year, on a date set by the Greek authorities themselves. Therefore, the approximate number of books to be published and edited every year, as well as the expected delivery date, are known beforehand by the contracting authority.

GERMANY – Flörsheim waste disposal unit

The problem concerns 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 does not regard the German authorities' explanations as satisfactory and so has decided to refer the case to the Court.

GERMANY – supplies to the Federal Office for military procurement

The Commission has 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 considers 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 has not been satisfied by the arguments put forward by the German authorities so far.

Chapter 8 Concessions

GERMANY – bus transport services in the city of Worms

The Commission has decided to close a case concerning the award of a bus transport service concession in the city of Worms about which it had previously sent a reasoned opinion to Germany (IP/06/886). The complaint concerned the **direct award of a concession with a value of**

about Euro 3 million per year. The general principles of the EC Treaty (transparency, non-discrimination) have not been observed. **Negotiations with the German authorities resulted in the decision in December 2006 to terminate the concession contract.** Furthermore, a follow-up regime in full compliance with EU law is currently being negotiated with the German authorities.

ITALY – sports betting

Although the Italian Government is pursuing a legitimate objective, namely to rule out the risk of concession holders becoming involved in fraudulent or other criminal activities, **the Commission takes the view that excluding share-capital companies listed on the regulated markets** of the EU from obtaining concessions for sports betting operations is not a proportionate measure.

The Commission feels that **corporate integrity can be verified by obtaining relevant information on the representatives and principal shareholders of these companies.** The present exclusion is thus in breach of the EC Treaty rules on freedom to provide services and freedom of establishment (Articles 49 and 43).

The Commission further finds that Italy has failed to comply with both the general principle of transparency enshrined in the EC Treaty and the associated publication requirement established in the case-law of the Court of Justice. The renewal – up to 1 January 2006 – of **around three hundred concessions for horse-race betting operations discriminated in favour of existing concession holders**, with no call for competition being issued.

ITALY – construction and management of motorways

The Commission has decided to send Italy a reasoned opinion on **the award procedures applied for the construction and management of the Valtrompia and the “Pedemontana Veneta Ovest” motorways.**

The competent authority in Italy for the granting of national-level motorway concessions (ANAS – a body governed by public law) awarded a concession for the construction and management of the motorways in question by means of a direct agreement without prior competition at Community level.

Under the Directive on the coordination of public works contracts (93/37/EEC), contracting authorities **wishing to award a concession for public works** must, if the value of the works is €5 million or more, **announce their intention by means of a notice to be published** in the Official Journal of the European Union.

FRANCE – local development agreements

The Commission has sent the French authorities a reasoned opinion in connection with the incompatibility of Article L.300-4 of the French town planning code with European law. This **article allows local development agreements and appointment contracts for the follow-up of preliminary studies for a development project to be concluded without being advertised and without competition.**

France makes use of local development agreements primarily for global projects including the construction of public amenities to be handed over to the awarding authority and for buildings to be resold or rented, e.g. as part of the implementation of a town planning project and local housing policy or urban renewal.

The Commission considers that the main purpose of these agreements concerns works, even if they are not actually performed by the planner but by a builder selected by the planner. These types of local development agreements must in principle be concluded in accordance with the advertising and competition rules laid down in Directive 93/37/EEC on public works contracts.

When these local development agreements are concluded with a restricted category of public or semi-public bodies defined in Article L.300-4 of the town planning code (e.g. semi-public companies), these bodies may also be given the right to perform the procedures for the expropriation decided by the State of the land to be developed. In this case, the Commission feels that granting this right to “public” planners, when there is nothing to prevent it from being granted to private individuals, **does not provide grounds for exemption from the rules of the EC Treaty.** Indeed, the application of this right is not an activity

involving the exercise of official authority, as referred to in Article 45 of the EC Treaty.

Other types of local development agreement may refer to the management of economic activities or the development of recreation and tourism, in which case the Commission takes the view that they **must be regarded in the same light as service concessions, which according to the Treaty must be awarded with a proper degree of advertising for the benefit of all potential applicants** (see Court of Justice judgement, Telaustria, Case C-324/98).

As for appointment contracts for preliminary studies needed to define the features of a development project, the Commission considers that such contracts **must be awarded in accordance with the advertising and competition rules laid down in Directive 92/50/EEC** on public service contracts.

SPAIN – concession on the A6 motorway

The call for tenders related exclusively to the work and services set out above. However, when the concession was awarded, a further package of infrastructure works for a sum more or less equivalent to that of the work on the two sections which were the subject of the call for tenders was also awarded.

This additional package was not provided for in the concession notice or the administrative specifications. The extra infrastructure works concern, in particular, the construction of a new reversible lane (including a new tunnel) between San Rafael and El Valle de los Caídos, the construction of new lanes on two other sections – one of them toll-free – and the construction of a new tollgate area, as well as other works.

Subsequent to the despatch of a letter of formal notice from the Commission (the first stage in infringement proceedings), the Spanish authorities replied in a letter of 27 June 2001, in which they affirmed, in particular, that the changes made when awarding the concession were based on two clauses in the specifications which lay down that tenderers must indicate in their bids the measures to be taken for the overall management of the traffic in the area concerned by the construction of the new stretches.

The Commission, however, considers that the aforementioned clauses cannot themselves allow a substantial change in the subject of the concession – particularly as these clauses always refer to the area concerned by the construction of the two new sections. What is more, nothing in the specifications led one to conclude that tenderers could submit proposals relating to work other than the two sections referred to.

Potential tenderers could have thus been led not to submit bids, and the principles of transparency and equality were infringed. The Commission has therefore decided to send a reasoned opinion.

AUSTRIA – waste disposal

In 2001, the City of Villach concluded a waste disposal service contract for a minimum period of 15 years after selecting a service provider from a limited number of companies operating in Austria that already had an establishment in the Austrian State of Carinthia. The Austrian authorities **claim that the contract concerns a service concession and does therefore not fall under the scope of the specific rules on public service contracts set out in Directive 92/50/EEC.** However, the **Commission concludes that the contract is covered by Directive 92/50/EEC** and should have been advertised in accordance with the rules applying to public service contracts. **But even if it did qualify as a service concession**, the selection procedure applied by the City of Villach **would breach the general principles of the EC Treaty**, and in particular the principle of non-discrimination on grounds of nationality. A reasoned opinion has therefore been sent.

GERMANY – waste disposal

In December 1999 the municipality of Hinte in Lower Saxony awarded a service concession to the Oldenburgisch-Ostfriesischer Wasserverband for the provision of waste water disposal services. **No transparent award procedure** was carried out as required under EU law as interpreted by the Court of Justice (C-324/98, Telaustria). Germany argued that the municipality of Hinte had not procured a service **on the market but rather that the service had been transferred between public bodies, which, it maintained, are not covered by the EU rules**

on public procurement. The Commission does not accept this view, since the **ECJ has established that contracts concluded between public bodies are covered by the obligations of EU law. Thus, EU law was broken by the award of the service concession and the Commission has therefore decided to refer the case to the Court of Justice.**

ITALY – renewal of concessions for horse-race betting services

On 13 September 2007, the European Court of Justice ruled in case C-260/04 that, by renewing 329 concessions for horse-race betting operations without inviting any competing bids, Italy failed to fulfil its obligations under Articles 43 and 49 of EC Treaty and, in particular, had infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising.

In 2008, the Italian authorities adopted a Law establishing that the concessions that were illegally renewed will be reattributed through a competitive procedure and that those concessions will cease to have legal effect after their reattribution and by 31 January 2009 at latest. The Commission considers that these measures would be adequate to comply with the judgment. However, the concessions in question have not yet been re-attributed and the said Law has been amended in order to postpone the final deadline for their expiration to 31 March 2009.

Chapter 9 Negotiation

GERMANY – waste and waste water disposal

The Commission is sending three reasoned opinions to the German authorities over **the award without competition** of contracts for the disposal of waste and waste water.

In the first two cases, the Court of Justice has already ruled against Germany on 10 April 2003 (joint cases C-20/01 and C-28/01). The Commission is now asking the national authorities to comply with this judgement, failing which it can ask the Court to impose a daily fine.

The Court ruled that the Federal Republic of Germany had failed to fulfil its obligations under the services procurement Directive (92/50/EEC) in two cases of procurement by local communities in the German State of Lower Saxony. In 1996, the City of Braunschweig **awarded a contract for waste disposal by direct negotiations with contractors without prior publication** of a contract notice. In 1998, the Municipality of Bockhorn did not invite tenders for the award of the contract for the collection of its waste water. The contracts have been concluded for durations of a minimum of 30 years.

The Commission sent a letter of formal notice to Germany in October 2003 asking it to provide information on the measures it had taken to comply with the Court's judgement. However, the German authorities replied by simply repeating previous arguments which the Court had not accepted. Its judgement established **that the breach of procurement law continues throughout the period of the contracts awarded illegally.** As the current contracts will continue to produce effects for decades, the **Commission considers that it is not sufficient to avoid breaches in future procurement procedures.** To comply with the judgement, measures to end the actual infringements are required.

Finally, in December 1999 the municipality of Hinte, also in Lower Saxony, awarded a service concession to the Oldenburgisch Ostfriesischen Wasserverband for the provision of waste water disposal services. **No transparent award procedure was carried out as required under EU law as interpreted by the Court of Justice (C-324/98, Teleaustria).**

Germany argued that the municipality was justifiably assuming that its decision was in compliance with EU law because at the time of that decision it could not have been aware of the developments in the Court of Justice's case law. However, the Commission does not accept this view, **because an interpretation of EU law by the Court does not mean that the provision which it interpreted had a different substance before the Court's decision.** Thus, EU law was broken by the award of the service concession.

BELGIUM – aerial surveys

The Commission has decided to refer Belgium to the European Court of Justice for failure to apply the rules relating to the public procurement of services as laid down in Directive 92/50/CEE. Under this Directive, tenders for public services worth more than e200,000 must be published in the EU's Official Journal. But in this case, the contracting authority, the Flemish Regional Executive, did not publish a tender for a contract to conduct aerial surveys of the Belgian coast, although it was worth considerably more than the e200,000 threshold. Instead, **the contract in question was directly negotiated with a Flemish company for a period of six years and subsequently extended to nine years.**

The Belgian authorities argue that in this particular case, the Directive is not applicable because the task is highly specific and because national security is at stake, which means that there is only one company to which it can be awarded. They also maintain that the provision of aerial photography services are **excluded from the obligation to publish a tender.** The Commission does not accept these arguments because, as long as a contractor agrees to be bound by professional confidentiality, the military certificate necessary for aerial photographic observation of the coast may be awarded to a non-Belgian company. The Belgian authorities have **failed to convince the Commission that there is only one company capable of doing the job.** Moreover, in the Commission's view, the aerial photographic services required fall under the category of "surface surveillance services and the provision of geographic maps" that, according to the Directive, should be subject to open and competitive tender procedures.

ITALY – purchase by mutual agreement of helicopters for civilian use

The Commission has decided to send Italy a reasoned opinion on the procedures followed by the Government in connection with the purchase of helicopters for civilian use. The Italian Government has for a long time followed a practice of awarding to an Italian manufacturer, **directly and without any kind of competition,** contracts for helicopters to be used by certain public services, and especially by the forestry department ("Corpo Forestale dello Stato"), financial police ("Guardia di Finanza"), fire services ("Vigili del Fuoco"), police and security forces ("Polizia di Stato" and "Carabinieri"), coastguard ("Guardia Costiera") and the civil defence department ("Dipartimento della Protezione Civile").

The Commission feels that this practice is contrary to the Directive on public supply contracts (93/36/EEC), since **none of the strict conditions governing the possibility of using a negotiated procedure without prior publication of a contract notice is met** in this instance.

It also feels that Italy has in no way shown that the practice in question is justified on the basis of Article 2 of Directive 93/36/EEC, which states that the Directive does not apply to "contracts 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 States concerned or when the protection of the basic interests of the Member State's security so requires".

The Commission has already referred Italy to the Court of Justice in connection with a government order authorising one of the services mentioned – "Corpo Forestale dello Stato" to purchase helicopters without any form of competition (see IP/03/1037). The case in question at the moment, on the other hand, concerns the general practice followed by the Italian Government for the purchase of all helicopters for civilian use by the services concerned.

ITALY – gas distribution in Apulia

The Commission has also decided to send a reasoned opinion to the Italian authorities concerning their methods of awarding contracts for the construction and management of gas distribution networks by the eight municipalities constituting the catchment areas known as "Puglia 25" and "Puglia 29" (including San Giovanni Rotondo, San Nicandro Garganico and San Marco in Lamis).

From 1991, these eight municipalities **awarded contracts for the construction and management of the networks to one company via a negotiated procedure,** without putting the contracts out to tender at EU level.

The Directive on public works contracts (93/37/EEC) states that contracting authorities wishing to award a public works contract (if the value of the contract is €5 million or more) must publish a notice in the Official Journal of the European Union. The same rules are provided for in Directive 89/440/EEC.

The Commission considers that, as the above-mentioned **Directives do not lay down exemptions for the award of a public works contract via a negotiated procedure**, the aforementioned contract awards should have been awarded via competitive tender.

GERMANY – waste disposal and waste water collection in Lower Saxony

On 10 April 2003, the European Court of Justice ruled in joint cases C-20/01 and C-28/01 that the Federal Republic of Germany had failed to fulfil its obligations under Directive 92/50/EEC in two cases of service procurement by local authorities in the German State of Lower Saxony. In 1996, the City of Brunswick awarded a contract for waste **disposal by negotiated procedure without prior publication of a contract notice**. In 1998, the Municipality of Bockhorn did not invite tenders for the award of the contract for the collection of its waste water. The contracts have been signed for a minimum of 30 years.

The Commission asked the German Government to provide information on the measures it had taken to comply with the judgment of the Court. However, the German Government simply replied by repeating its previous arguments, namely that it had always acknowledged the violations and had **taken all necessary measures to avoid their repetition in the future**.

The Court established in its judgment that the violation of procurement law continues throughout the execution period of the contracts awarded in breach of the Directive. As the present contracts will be in effect for decades, the Commission considers that it is not sufficient to avoid future violations. **Measures to end the current infringements are required**. Consequently, the Commission has decided to send a letter of formal notice. If the German authorities still do not comply, the Commission can ask the Court to impose a daily fine.

Secondly, if the purchase of the aircraft, although planned well in advance, **was not completed in time to cope with the fire hazard in the 2002 summer season, this seems to be attributable solely to the choice made by the administration**, which suspended, and then cancelled, the award procedures launched in 2000 for the purchase of 49 helicopters for firefighting, despite the fact that the competent national courts had recognised the procedures' legality.

ITALY – operating tables for Ivrea Hospital

This case concerns a decision to award a contract for the supply of operating tables to the hospital of Ivrea under a **negotiated procedure without first publishing an invitation to tender**. The Commission believes that the negotiated procedure used, whereby the contracting authorities consulted contractors of their choice and negotiated the terms of the contract with one or more of them, was not justified in this case according to the rules on the public procurement of supplies under Directive 93/36/EEC. The Directive establishes strict rules to ensure that public contracts are awarded only after an open and transparent tender process. **The Directive does provide for negotiated procedures without prior publication of a notice, but only in very specific circumstances** and in this case the Commission does not believe that such a procedure was justified.

GERMANY – City of Mainburg

The problem concerns a procurement procedure for engineering design services for the renovation of a sewage plant in the City of Mainburg (Hallertau). Under the public procurement of services Directive (92/50/EEC), a contracting authority may, **exceptionally, award a public service contract by the so-called negotiated procedure with prior publication** when the nature of the service required is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the most economically advantageous tender, as is the case for open or restricted tenders. **The burden of proof to justify the award of a contract under a negotiated procedure lies with the contracting party** and in this case the Commission does not believe the German authorities have proved the existence of exceptional circumstances. The use of negotiated procedures for the award of engineering services in Germany is widespread so that this case has broader implications.

UNITED KINGDOM – provision of community facilities in Ipswich

The Commission has decided to send a reasoned opinion to the United Kingdom concerning a decision to award a contract for the provision of infrastructure, community and other social facilities for a new neighbourhood in the Borough of Ipswich, under a negotiated procedure. The Commission believes that a negotiated procedure, whereby the contracting authorities consult contractors of their choice and **negotiate the terms of the contract with one or more of them, was not justified** in this case according to the rules on the public procurement of construction works (Directive 93/37/EEC). The Directive establishes strict rules to ensure that public contracts are awarded only after an open and transparent tender process. The Directive does provide for negotiated procedures but only in very specific circumstances and in this case the Commission does not believe the procedure was justified.

UNITED KINGDOM – redevelopment of Pimlico School, London

The Commission has decided to send a reasoned opinion to the United Kingdom concerning the award of a contract to re-develop Pimlico School in Westminster, London. As in the case above, the contracting authorities used a negotiated procedure and the Commission, as in the case above, **does not believe that this procedure was justified by the circumstances**. The Commission therefore considers that the UK has infringed the terms of the procurement of construction works Directive.

GERMANY – Braunschweig waste incineration contract

The Commission has 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 considers 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.

LITHUANIA – radio communication

After publishing a contract notice on the launch of an open procedure for the award of the contract above, Lithuanian Railways decided to reject the two offers received, qualifying them as unsuitable, in view of certain incompatibilities with the technical requirements specified in the tender documents. It decided then to resort to the negotiated procedure without a prior call for competition for the award of the contract.

However, the Commission considers that the offers received could not be qualified as unsuitable since those offers were apt to meet the purpose of the contracting authority. Therefore, the contracting entity was not allowed to resort to the negotiated procedure without a prior call for competition. The correct qualification of a deficient offer under the provisions of Directive 2004/17/EC is of utmost importance since the legal consequences bear directly on the competition that takes place for the contract.

The Commission concludes thus that the above procedure breaches Article 40 (2) and (3) (a) of Directive 2004/17/EC which provides that contracting entities may use a procedure without prior call for competition when no tenders or no suitable tenders or no applications have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of contract are not substantially altered.

The contract above was awarded for a total price of €59,578,199.96 and the project linked to it has been selected for co-funding by the EU Cohesion Fund (85% of the total cost).

Chapter 10 Aggregation

ITALY – public health services in Frosinone

The case against Italy concerns the procedures followed for the procurement of public service contracts to set up and manage a computerised accounting system for 'Azienda Sanitaria Locale', an administrative body charged with the management of the public health

service in Frosinone, Italy. Although the total value of the project exceeded the threshold value of the Directive (€200,000), the authority did not publish any call for tender in the Official Journal of the European Communities. **While individual parts of the contract were lower than the threshold value, the Commission considers that it was against the rules of the Directive to split the project in this way.**

ITALY – Olbia road tunnel and road design in Calabria

In Italy, ANAS, the public body responsible for managing the national road network, in 1992 awarded without a tender process the contract to build a tunnel in the port of Olbia in Sardinia, thus contravening the Directive on public works procurement (93/37/EEC). The contract **was given to a company which was already undertaking other work at the port**. The Italian authorities argue that **for technical reasons the contract could not have been awarded** to anyone else. However, under the Directive the onus is on the relevant authorities to prove this and the Commission does not consider that they have done so and has sent Italy a reasoned opinion.

The Commission has sent another reasoned opinion to Italy concerning contracts awarded by ANAS, this time in violation of the Directive on the public procurement of services (92/50/EEC). In 1999 ANAS awarded six contracts for design work for a major road in Calabria (the N106), after launching a call for tender on the same day and without publication in the EU's Official Journal. **None of these contracts taken alone was for a sufficient sum to reach the threshold above which the Directive applies**. However, **taken together they do exceed that threshold** and the Directive states that in certain circumstances – including design work of this sort – when contracting authorities divide work into several different contracts, **it is the total value of those contracts which determines whether the Directive applies**. The Commission considers that ANAS should therefore have awarded the contracts after publication in the Official Journal and after allowing an appropriate time for responses, thus allowing service providers from other Member States to tender on an equitable basis.

NETHERLANDS – renovation of Hoogezand-Sappemeer

The Commission has decided to send the Netherlands a reasoned opinion asking it to rectify breaches of EU law over works contracts for renovating the city centre of Hoogezand-Sappemeer. The local authority signed an agreement **giving a particular company the exclusive right to carry out several types of work and then awarded it several contracts without competition**. The Commission considers that **such direct awards constitute a violation of the Public Works Directive (93/37/EEC), if the threshold for application of this Directive is reached, in terms of the value of the contracts concerned. Even if that threshold is not reached**, the EC Treaty requires, in order to comply with the **principles of equality of treatment and of non-discrimination, an adequate degree of advertising to enable different businesses to compete**.

ITALY – school buildings in Genoa

The municipality of Genoa failed to publish at EU level an invitation to tender for the preliminary, definitive and executive planning of works to be carried out to school buildings. Under the Directive on public procurement of services (92/50/EEC), tenders for public services worth more than €200,000 must be published in the EU's Official Journal.

The Italian authorities argue that in this particular case, the Directive is not applicable because the **tender concerns various tasks which are independent from one another and do not exceed the threshold of €200,000 on an individual basis**.

The **Commission does not accept this argument** because the Directive specifically foresees that services cannot be divided with the intention of avoiding application of the threshold and lays down that, in case of contracts divided into lots, **the values of the lots have to be cumulated when calculating this value**. Consequently, and considering the homogeneity of the services to be provided and the unity of the tendering procedure, the **Commission considers that the invitation to tender should nevertheless have been published at EU level**.

Chapter 11 Selection and Award Criteria

ITALY – procedural errors in the procurement of trams

The Commission has decided to refer Italy to the European Court of Justice over infringement of EU public procurement rules in the tendering procedure followed by the Municipality of L'Aquila for the award of the design, the realisation and the management of a tramway for public transport.

The Commission is of the view that the contract being awarded is to be qualified as a public works contract and not as a public works concession. As a consequence, the award of a public contract through a procedure, such as that of "project financing", aimed at the award of a works concession constitutes a violation of Directive 93/37/EEC.

In addition, the Commission considers that the **modification of the conditions for the award of the public contract in question after the publication of the tender notice**, in particular with respect to the classification of the works to be realised, amounts to a breach of EC Treaty principles. This concerns in particular the principles of transparency and non-discrimination, in that all interested and qualified operators were not allowed to take part in the tendering procedure.

GREECE – protection and restoration of the Seih Sou forest around Thessaloniki

The Commission has formally requested the Greek government to submit its observations on the compatibility with Community law of the procedures for awarding contracts for six sub-projects of the overall project for the "protection and restoration of the forest around Thessaloniki (Seih-Sou)".

The Commission considers that two of the sub-projects **were awarded on the basis of qualitative selection criteria, which is against the provisions of Articles 23, 32 and 36 of Directive 92/50/EEC**. The Commission also considers that the procedures for awarding contracts for the six sub-projects failed to respect the principles of transparency and equal treatment of tenderers, **because they were initiated at a stage when the content of the contracts could not be defined with certainty or precision and was thus ambiguous**.

IRELAND – modify award procedure for agriculture advertising contracts

The European Commission has formally requested the Irish government to modify the procedure followed by the Department of Agriculture and Food for awarding a contract for the provision of advertising services. This request takes the form of a 'reasoned opinion', the second stage of the infringement procedure under Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may refer the matter to the European Court of Justice.

The Commission considers that the procedure for awarding the **contract failed to respect the principle of transparency as well as Article 19(2)(e) of Directive 92/50/EEC, as the award criteria had not been disclosed in a sufficiently precise manner before the contract was awarded**. The Commission also considers that the contract was awarded on the basis of qualitative selection criteria related to the past experience of tenderers, which is against the provisions of Articles 23, 32 and 36 of Directive 92/50/EEC. Furthermore, the Commission takes the view that some of **the award criteria used in this procedure were overly subjective and that thereby the principle of equal treatment of tenderers was infringed**.

SPAIN – Commission refers to Court of Justice over Valencia town planning law

The European Commission has decided to refer Spain to the European Court of Justice over its laws on land-and-town planning that apply to the Valencia Community (known as "LRAU" and "LUV").

The Commission has already sent a letter of formal notice and reasoned opinion (IP/05/1598, 14 December 2005) to Spain regarding law 6/1994 on land-and-town planning ("LRAU") of Valencia. In these, the Commission took the view that the award of integrated action programmes (Programas de Actuación Integrada – "PAI") constitute

public works and/or service contracts that should be awarded in accordance with Directives 93/37/EEC and 92/50/EEC (now consolidated and amended by Directive 2004/18/EC). PAI are contracts awarded by local authorities that include the provision of services and performance of public infrastructure works by property developers ("agentes urbanizadores") selected by the local authority. The LRAU was revoked by law 16/2005 ("LUV"), which entered into force on 1 February 2006.

The Commission considers that, although the LUV streamlines the procedure to select property developers, **it still contravenes the EU procurement Directives in several respects. These include the position of bidders who request contracting authorities to open a procedure to award a PAI, the contents of contract notices and tender documents, some of the criteria for the award of the contract, and the possibility to make various amendments to the contract at the time of the award or during its performance.** The Commission further considers that the Spanish authorities did not comply with their EU obligations, by failing to adopt measures to prevent the award of contracts and in violation of EU legislation. Finally, there is still a difference of opinion as regards the core issue of whether PAIs are public contracts subject to the EU procurement rules. The Spanish authorities maintain that PAIs are not public contracts, and therefore, that neither the LRAU nor the LUV contravene the EU Directives. The Commission holds the opposite view.

GREECE – restoration of forest

The Commission has decided to refer Greece to the European Court of Justice over the compatibility with Community law of the procedures for awarding contracts for six sub-projects of the overall project entitled "protection and restoration of the forest around Thessaloniki (Seih-Sou)".

The **Commission considers that two of the sub-projects were awarded on the basis of qualitative selection criteria, which infringes the provisions of Articles 23, 32 and 36 of Directive 92/50/EEC.** The Commission also considers that the procedures for awarding contracts for the six sub-projects failed to respect the principles of transparency and equal treatment of tenderers, because they were initiated at a stage when the content of the contracts could not be defined with certainty or precision and was thus ambiguous.

GREECE – technical consultant for the construction of a wastewater treatment plant

A reasoned opinion is also to be sent to Greece with regard to a call for tenders issued by the Ministry of Public Works to recruit a technical consultant in connection with the construction of a wastewater treatment plant on the island of Psittalia. The award criteria related to tenderers' economic, financial and technical capacities and their experience. However, **according to Directive 92/50, these aspects must be part of the selection criteria, and the Directive stipulates that the evaluation of bids must be divided into two distinct phases, first the selection phase and then the award phase.** The function of the selection criteria including the above-mentioned capacities is basically to allow the contracting authority to establish a list of tenderers capable of carrying out the work concerned, whereas the award criteria are used for assessing tenderers' bids and awarding the contract.

ITALY – Piedmont region technical assistance contract for managing European funds

The Piedmont region of Italy in July 2001 awarded a contract for technical assistance in the management of European funds, **according to criteria incompatible with Directive 92/50/EEC** on the public procurement of services.

In line with the Directive, the contracting authority **awarded the contract on the basis of what it considered the economically most advantageous tender.** However, one of the criteria used in making this assessment was an evaluation of the composition of the working group proposed by the tenderer to manage the work concerned. The use of such a criterion at this stage of the tendering process breaches article 36 of the Directive.

Bidders who have failed to demonstrate that they have the necessary abilities and capacities to provide the service should be eliminated from the selection process at an earlier stage. The ability or the capacity of the

service providers and their personnel should then play no role in the evaluation of the quality and pricing of tenders. **The award of the contract to the most economically advantageous tender should be based exclusively on an assessment of the value of the tenders.**

FRANCE – Le Mans sewage plant

Following irregularities in the **preparation of several calls for tender launched by the local authority of Le Mans, the total value of which is close to €2 million,** the Commission will send a reasoned opinion to the French Authorities. These calls for tender concerned the provision of certain services at the Chauvinière sewage treatment plant. During the first call for tender the **contracting authority did not respect the obligation,** under the services procurement Directive (92/50/EEC, Article 27§2), to ensure real competition in the tendering procedure. It accepted only three candidates for consideration, whilst the Directive and relevant Court case law require that the **number of candidates cannot be less than five.** Moreover, a second contract was awarded to the holder of the first above-mentioned contract, without application of a **competitive procedure** or prior publication, thereby violating the rules of the same Directive. Lastly, a contract notice concerning a third call for tenders indicates **confusion on the part of the contracting authority between the selection criteria and criteria for awarding the contract.** This contract was also awarded to the existing tender holder.

ITALY – public procurement of architectural services

The Commission has decided to refer Italy to the Court of Justice for its **incorrect implementation of Directive 92/50/EEC on public procurement** of services. The Commission has raised three objections in relation to a decree of 27 February 1997 (the "Karrer decree") establishing provisions for determining the economically most advantageous tender for the award of architectural and engineering services and other technical services. Firstly, and contrary to the requirement of the Directive, the Commission was not notified about the decree. Secondly, the criteria for awarding a contract indicated in the decree include criteria that should be considered at the previous stage in the procedure, i.e. the selection of service providers. This is contrary to the provisions of the Directive. Thirdly, the decree allows the committee responsible for assessing tenders to define subsidiary award criteria after the specifications have been prepared; **this infringes not only the provisions of the Directive but also the principle of transparency** that must be observed throughout the procedure.

SWEDEN – bus transport services

Kalmar Länstrafik AB, an entity in charge of organising regional bus transport services in the Kalmar regional jurisdiction in Sweden, in December 2000 awarded contracts for bus transport services on the basis of a **misapplication of EU public procurement law.** The total amount of the contracts is estimated at 189.5 million Swedish Kroner (approximately €20.75 million).

As in the Italian case referred to above, some of the **award criteria used breached the provisions of EU public procurement law** (in this case Directive 93/38/EEC for utilities entities) in that they related to the characteristics of the tenderer as such and not to the service provided.

Case-law of the European Court of Justice has consistently **confirmed that selection of those candidates among the bidders who have the abilities and capacity to provide the service required on the one hand and the evaluation of their tenders on the other, are two different operations that may take place simultaneously but are governed by different rules.**

BELGIUM – housing projects in Brussels

The case concerns a series of housing construction projects for the 'Société de développement régional de Bruxelles' (SDRB) on the site of a former military hospital in the Ixelles commune. The Commission considers that the **rules laid down in the EU Directive on public procurement of works were not respected.** For example, the contract notice was misleading as regards the availability of subsidies.

IRELAND – civic centre in Blanchardstown

The problem concerns the award of contracts for the construction of a civic centre in Blanchardstown in breach of the Directive on public procurement of works (93/37/EEC). In particular, the contracting authority

(Fingal County Council) **used a number of selection criteria which are not among the authorised criteria listed in the Directive** (Article 27).

SPAIN – tendering procedures for public works contracts

The Commission has decided to send a reasoned opinion to Spain in relation to the tendering procedures used for public works contracts. **The problem concerns the standard contract documents drawn up by the Spanish authorities for use by procurement bodies which in several key respects do not follow the rules** (e.g. as regards selection criteria) that are laid down in the Directive on works procurement (93/37/EEC).

GREECE – main drainage collectors of the west part of Thriassion field

In the course of the tendering procedure, the contracting entity accepted the offer of the preferred bidder, although it deviated from the term of the call of tenders in relation to the bank guarantees, provided under exclusion penalty. Furthermore, it accepted also the offer of the second lowest bidder, although it presented unacceptable deviations regarding the way of submission of the supporting documents.

The Commission found that the acceptance of such offers constitutes an infringement of article 10 of Directive 2004/17 (coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors), which deals with the principles of transparency and equal treatment of the participants, as interpreted by the relevant jurisprudence of the European Court of Justice.

GREECE – award of contracts for the supply of vehicles for the transport of waste

The Commission considers that these contracts have been concluded in violation of the applicable Directive at the time, Directive 93/36/EEC, as during the tendering procedures leading to their award, the Directive has been infringed in a number of ways. These include the application of criteria relating to the tenderers' ability to perform the contract as award criteria instead of selection criteria, and the fact that the local authorities concerned have failed to proceed with the publication of a contract award notice.

CYPRUS – electricity

The Commission has decided to refer Cyprus to the European Court of Justice over the tendering procedure launched by the Electricity Authority of Cyprus (EAC) for the award of the public contract for the design, supply and construction of the 4th Unit of the Vasilikos Power Station.

More specifically, the Commission found that: 1) the provisions of the invitation to tender were not applied in a uniform way during the procedure in question, by rejecting an offer on the basis of criteria which were not clearly mentioned in the call for tenders and by accepting a candidate who did not respect the requirements on experience; 2) the complainant was not provided in due time with the necessary information

concerning the reasons for his rejection so that the latter could have formed an effective procedural defence. By acting in this way, Cyprus has infringed its obligations under Articles 4(2) and 33(1) of Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as well as Article 1(1) of Directive 92/13/EEC as interpreted by the Court of Justice.

GREECE – electricity

The Commission has decided to send Greece a reasoned opinion under Article 228 of the EC Treaty, following the judgment of 18 December 2007 in which the Court of Justice found that the Greek legislation, which allows a negotiated procedure to be used without a prior call for tenders for the award of public contracts for the supply of certain types of medical equipment is not in conformity with Community public procurement law.

The Commission took the view that the measures communicated by the Greek authorities to comply with the Court's judgment were incomplete. The Greek authorities have failed to reply to the letter of formal notice sent to them in connection with this case.

IRELAND – interpretation services

The Commission considers that by attributing weightings to the award criteria following the closing date for the submission of the bids and by modifying them subsequent to an initial review of the submitted bids, the contracting authority changed the emphasis among the award criteria that were originally advertised and gave them a relative importance that was materially different from what a tenderer could understand from the contract documents.

Therefore, the Commission takes the view that the award procedure in question was not in conformity with Community law on public procurement, and more specifically that Ireland has failed to fulfil its obligations under the principles of equal treatment and transparency as interpreted by the European Court of Justice in its judgments handed down in cases C-92/00 HI Krankenhaustechnik, C-19/00 SIAC Construction Ltd and C-448/01 EVN.

Ireland – animal identification tags

The Commission considers that the arrangement entered into by the Irish authorities qualifies as a public supply contract and that the procedure for awarding the contract failed to respect the obligations under Article 53 of Directive 2004/18/EC as well as the principles of equal treatment and transparency as interpreted by the European Court of Justice. The Commission takes this view because the contracting authority applied criteria relating to tenderers' ability to perform the contract in question as award criteria instead of selection criteria, and also introduced weightings in the evaluation phase which modified the emphasis among the published award criteria.

Therefore, the Commission takes the view that the award procedure in question was not in conformity with EU law on public procurement.



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