



A Guide to...

EC Public Procurement Related Infringement Cases



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CHAPTER I

COMPETITION ISSUES

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 EVE 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 DM29 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 DM14.6 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.

CHAPTER 2

FRAMEWORK LAW

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

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.

THE 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.

CHAPTER 4

REVIEW PROCEDURES (ALCATEL)

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 is 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.

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 XVIA 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

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 awardee 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.

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

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, Teleaustria). 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.**

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 €200,000 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 €200,000 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 – RE-DEVELOPMENT 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.

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 NI 06**), 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

GREECE – TECHNICAL CONSULTANT FOR THE CONSTRUCTION OF A WASTE-WATER 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 waste-water treatment plant on the island of Psitallia. 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).



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