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on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement

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EXECUTIVE SUMMARY

- Achieving sustainable development in practice requires that economic growth supports social progress and respects the environment, that social policy underpins economic performance, and that environmental policy is cost-effective.

- As stated in the Commission Communication of May 2001 on "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development" to be presented to the meeting of the European Council in Gothenburg in June 2001, Member States should consider how to make better use of public procurement to favor environmentally-friendly products and services. . The present Communication is a contribution to that end.

- The objective of this document is to analyse and to set out the possibilities of the existing Community legal framework with regard to the integration of environmental considerations into public procurement.

- The introduction of further possibilities that go beyond the ones offered by the existing legal framework requires intervention from the Community legislator.

- Existing environmental and other legislation, either Community legislation or national legislation compatible with Community law, is binding upon contracting authorities and may have an influence on the choices to be made and the specifications and criteria to be drawn up by contracting authorities.

- The main possibilities for "green purchasing" are to be found at the start of a public purchase process, namely when making the decision on the subject matter of a contract. These decisions are not covered by the rules of the public procurement directives, but are covered by the Treaty rules and principles on the freedom of goods and services, notably the principles of non-discrimination and proportionality.

- The public procurement directives themselves offer different possibilities to integrate environmental considerations into public purchases, notably when defining the technical specifications, the selection criteria and the award criteria of a contract.

- In addition, contracting authorities may impose specific additional conditions that are compatible with the Treaty rules.

- Public contracts not covered by the public procurement directives are subject to the rules and principles of the Treaty. Here, it depends on national law whether contracting authorities have further possibilities for "green purchasing".

INTRODUCTION

The objective of this document is to analyse and to set out the possibilities of the existing Community legal framework with regard to the integration of environmental considerations in public procurement, offering thus to public purchasers the possibility to contribute to sustainable development.

Public procurement policy is one of the many elements of Single Market policy, which includes its strategic targets (in particular the free movement of goods, persons and services). Public procurement policy aims at contributing to the realisation of the Single Market by the creation of competition necessary for the non-discriminatory award of public contracts and the rational allocation of public money through the choice of the best offer presented. Implementing these principles enables public purchasers to obtain the best value for money, following certain rules on how to define the subject matter of the contract, for the selection of the candidates according to objective requirements and the award of the contract solely on the basis of the price or alternatively on the basis of a set of objective criteria.

The history of the Community Directives on public procurement dates from 1971, when the first directive relating to public work contracts was adopted. Since then, directives on public supply contracts and public service contracts have been adopted, as well as directives for the utilities sector.[1] The basic concept and system of the Directives, though amended several times, was never essentially modified.

The public procurement directives do not contain any explicit reference to environmental protection or considerations or any other aspects beyond the core internal market policy, which is, regarding the time of adoption of these directives, not surprising.

Since the adoption of the public procurement directives, action in the field of **environment** has evolved at the initiative of the Community and the Member States.

The Amsterdam Treaty has reinforced the principle of integration of environmental requirements into other policies, recognising that it is key in order to achieve sustainable development.[2]

Also the Commission proposal for the Sixth Environmental Action Programme, which covers the years 2001 - 2010, has identified public procurement as an area which has considerable

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[1] Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, replaced by Council Directive 93/37/EEC, amended by European Parliament and Council Directive 97/52/EC;
Council Directive 77/62/EEC coordinating procedures for the award of public supply contracts, replaced by Council Directive 93/36/EEC, amended by European Parliament and Council Directive 97/52/EC;
Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, amended by European Parliament and Council Directive 97/52/EC;
Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement of entities operating in the water, energy, transport and telecommunications sectors, amended by European Parliament and Council Directive 98/04/EC.

[2] Article 6 of the consolidated version of the Treaty establishing the European Community states that "environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development".

potential for 'greening' the market through public purchasers using environmental performance as one of their purchase criteria.[3]

Sustainable development offers the European Union a positive long-term vision of a society that is more prosperous and more just, and which promises a cleaner, safer, healthier environment – a society which delivers a better quality of life for us, for our children, and for our grandchildren. Achieving this in practice requires that economic growth supports social progress and respects the environment, that social policy underpins economic performance, and that environmental policy is cost-effective.[4] In relation to public procurement, this means that the legislative framework should facilitate the taking into account of environmental concerns alongside its primary economic purpose.

There is no inherent contradiction between economic growth and the maintenance of an acceptable level of environmental quality. Accordingly, the issue should not be seen as one of economic growth versus the environment, but to achieve synergies between the two. The Commission has recognised in its Communication on the Single Market and the Environment[5] that the increasing openness of markets coupled with growing environmental challenges and greater environmental awareness have revealed synergies, but that there are inevitably also tensions between the functioning of the Single Market and the implementation of environmental policy. It is therefore stated that the Community must seek a coherent approach to the pursuit of the objectives of the Treaty in relation to both the Single Market and the environment whilst also honouring its international obligations.

Also at world level, environmental action has evolved significantly. An example of these evolutions is the adoption of the Kyoto Protocol. The European Union has made a commitment in the Protocol to the Climate Change Convention agreed in Kyoto, which has set an ambitious target for reduction of greenhouse gases by the time frame 2008-2012.

With the growing amount of scientific information available and the increasing public awareness of both the origins as well as the consequences of environmental pollution, there has been, for several decades, in increase in the interest in contributing to the prevention of environmental pollution and contributing to sustainable development. A considerable number of consumers in the European Union, both private and public, tend more and more to purchase environmentally sound products and services.

Public purchasers and other entities covered by the public procurement directives constitute an important group of consumers. By their purchases, which represent more than 1000 billion Euros or about 14% of the Union's GDP, public purchasers could substantially contribute to sustainable development. Conscious of the responsibility regarding the realisation of sustainable development, initiatives for "greening" public procurement at national and local level have already been launched in a number of Member States.

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3 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the sixth environment action programme of the European Community: 'Environment 2010: Our future, Our choice' - adopted by the Commission on 24.01.2001 - COM (2001) 31 final

4 Communication from the Commisison: "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development". Commission's proposal to the Gothenburg European Council; COM(2001)264 final, adopted on 15.05.2001.

5 Adopted by the Commission on 08.06.1999; COM(1999) 263 final, p. 4.

Even though the Commission has indicated already some of the main possibilities in the Communication of March 1998[6], public purchasers are confronted with the fact that it is often not clear to what extent environmental considerations are compatible with the existing Community legislation on public procurement.

The Commission has committed itself to explain in greater detail the possibilities for taking into account environmental considerations in public purchases that are offered by the existing public procurement legislation.

In addition to this interpretative communication, the Commission intends to produce a handbook on green public procurement with examples on how to draw up green calls for tender in conformity with Community law.[7]

One must keep in mind, as is expressly mentioned in the Communication of 11 March 1998, that the Commission cannot, in an interpretative document such as this one, propose solutions which go beyond the existing public procurement regime. Moreover interpretation of Community law is ultimately of the sole competence of the Court of Justice.

If it is considered that the current public procurement regime does not allow adequate possibilities for the taking into account of environmental considerations, then modification of the public procurement Directives would be necessary. One should note that in the proposals for modification of the public procurement directives, adopted by the Commission on 10.05.2000, environmental characteristics are listed explicitly amongst the criteria which may serve to identify the most economically advantageous tender.[8]

The objective of this document is therefore to examine and clarify the possibilities offered by the existing public procurement regime in order to enable the optimum consideration of environmental protection in public procurement. The document will follow the different phases of a contract award procedure and examine at each stage how environmental concerns may be taken into consideration.

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6 Commission Communication "Public Procurement in the European Communities", adopted by the Commission on 11 March 1998; COM (1998) 143 final.

7 Commission Communication in Integrated Product Policy, adopted by the Commission on 07.02.2001 – COM(2001) 68 final.

8 Article 53 of the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts - (COM (2000) 275 final of 10.05.2000) and Article 54 of the Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors - (COM (2000) 276 final of 10.05.2000).

I DEFINITION OF THE SUBJECT MATTER OF THE CONTRACT

The first occasion for taking into account environmental considerations relative to a public contract, is the phase just before the public procurement directives will be applicable: the actual choice of the subject matter of the contract or, to simplify the question "what do I, public authority, wish to construct or purchase"? At this stage, purchasing authorities have a "wide" opportunity to take into account environmental considerations and choose an environmentally sound product or service. How far this will effectively be done depends to a great extent on the awareness and knowledge of the purchasing entity.

It should be emphasised that existing environmental or other legislation, either Community legislation or national legislation compatible with Community law, may well limit or influence this freedom of choice[9].

The possibilities for the taking into account of environmental considerations differ according to the different types of contracts.

Work contracts cover not only the final product, the work, but also the design and execution of the works. The best opportunities for contracting authorities to take into consideration environmental concerns are to be found in the phase of the design and the conceptual work. Contracting authorities could give clear instructions to the architects and / or engineers to design for example, a low-energy consuming administrative building, not only taking account of insulation and the use of specific construction materials, but also the installation of solar cells for the generation of warmth. They could equally require that the building be designed so that the use of elevators is necessary only to a limited extent and that the orientation of offices and tables limits the use of artificial lamps.[10]

Contracting authorities are responsible not only for the choice of the work or concept/design itself, but also for the overall execution of the works and all that happens on and around the construction site. Purchasing entities are therefore entitled to define the requirements for the execution of the works. This offers a number of possibilities for the taking into account of environmental considerations, through, for instance, requirements relating to energy and water use or waste management on and around the construction site. Here, one could think of the construction of bridges over rivers in natural reserves and in areas where tides of the sea must not be disturbed because of the specific geographical situation where the work has to be carried out[11].

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9 Like, for instance, the obligation, for certain categories of works, to carry out an environmental impact assessment. See footnote 11.

10 Different national administrations have already issued guidelines to their contracting authorities on "sustainable construction".

11 Example of the Oresund bridge construction or the Vasco de Gama bridge in Lisbon.

For a specific category of work contracts, Community law imposes an obligation to make, previous to the decision of having the work executed, an environmental impact assessment.[12] This obligation, which originates from environmental legislation and not from the public procurement Directives, influences the choice of the purchasing entity. The obligation for the competent authorities to take into account the results of the environmental impact assessment in the decision whether or not to give authorisation or consent for development, tends to lead to more environmentally sound requirements for the execution of the works.

As to **service contracts**, the nature of these contracts implies also a possibility to prescribe a mode of performing. Contracting authorities could, for example, prescribe a specific method of building cleaning, using only those products that are least harmful for the environment. They could also define that, for instance, public transport services are to be carried out by electric buses. They could also prescribe the method for the collection of household waste.

Supply contracts relate, generally, to the purchase of final or end products. Therefore, apart from the basic and essential choice of the subject matter of the contract ("what shall I purchase?"), the possibilities to take into account environmental considerations in addition to this choice are not as extensive as for works and service contracts. Environmental awareness will influence this choice.

The public procurement Directives do not prescribe in any way what contracting authorities should buy and are consequently neutral as far as the subject matter of a contract is concerned.

If different possibilities exist for fulfilling their needs, contracting authorities are free to define the subject matter of the contract in the way that they consider to be the most environmentally sound[13] even through the use of variants (see paragraph II.1.4).

This freedom is, however, not entirely unlimited. A contracting authority, as a public body, has to observe the general rules and principles of Community law. More precisely, these are the principles regarding the free movement of goods and services as laid down in Articles 28 to 30 (formerly 30 to 36), and 43 to 55 (formerly 52 to 66) of the EC Treaty. [14]

This implies that the subject matter of a public contract may not be defined with the objective or the result that the access to the contract is limited to domestic companies to the detriment of tenderers from other Member States.

Contracting authorities are free to define the subject matter of the contract, or alternative definitions of the subject matter through the use of variants, in the way that that they consider to be the most environmentally sound, provided this choice does not result in a restricted access to the contract in question to the detriment of tenderers from other Member States.

The question of whether a measure is compatible with Community law depends on a case-by-case assessment. As announced in the Communication from the Commission to the European Parliament and the Council on the Single Market and the Environment, the Commission will produce a handbook on the application of articles 28 – 30 of the Treaty.

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12 Projects covered by Directive 85/337/EEC (Official Journal of the European Communities L 175 of 05.07.1985, p. 40), amended by Directive 97/11/EEC (Official Journal of the European Communities L 073 of 14.03.1997, p. 05).

13 Contracting authorities have the possibility to either prescribe the solution chosen, or avoid prescribing requirements which would lead the tenderers to offer products whose production processes would damage more the environment. They could, for example, require recycled paper which is not bleached

14 COM(1999) 263 final of 08.06.1999, p. 8 and 9.

The rules set out above are applicable to all public contracts, irrespective of the fact whether they fall within or outside the scope of application of the public procurement Directives.[15]

After having made the first choice on the subject matter of the contract, the public procurement Directives oblige contracting authorities to specify the characteristics of the subject in a manner such that it fulfils the use for which it is intended by the contracting authority. To this end, the Directives contain a number of provisions relating to common rules in the technical field, to be specified in the contract documents relating to each contract.

[15] With the exception of those contracting entities which are covered by the Utilities Directive (Directive 93/38/EEC), but which are nevertheless private bodies.

II CONTRACTS COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES

1. TECHNICAL SPECIFICATIONS OF THE SUBJECT MATTER OF CONTRACTS AND THE POSSIBILITY TO DEFINE REQUIREMENTS RELATING TO ENVIRONMENTAL PERFORMANCE

As a preliminary remark, it should be emphasised that environmental or other legislation, either Community legislation or national legislation compatible with Community law is of course binding for contracting authorities. All public procurement directives contain the rule that the way contracting authorities define technical specifications is *"without prejudice to the legally binding national technical rules."*[16] This implies that, on condition that this legislation is compatible with Community law, national legislation may, for instance, prohibit the use of specific substances which the national authorities consider harmful for the environment, or may oblige the observance of a specific minimum level of environmental performance. Contracting authorities are, of course, bound to observe such legislation.

In order to enhance transparency, the Directives oblige contracting authorities to indicate the technical specifications in the general or contractual documents relating to each contract. The objective of these rules is the opening up of public markets, the creation of genuine competition and preventing markets being reserved for national or specific undertakings (i.e. avoiding discrimination). Technical specifications include all characteristics required by the contracting authority in order to ensure that the product or service fulfils the use for which it is intended. These technical specifications give objective and measurable details of the subject matter of the contract and therefore have to be linked to the subject matter of the contract.

The public procurement Directives contain a detailed system of obligatory references to standards and comparable instruments, with a clear hierarchy: preference is given to the European instruments and in the absence of these, reference can be made to international or national standards or comparable instruments.[17]

In addition to this obligation, the Directives prohibit mentioning products of a specific make or source or of a particular production because these generally favour or eliminate certain undertakings. The indication of trade marks, patents, types, or of a specific origin or production is authorised only in cases where the subject of the contract may not be sufficiently precise and intelligible to all parties concerned. Such indication must always be accompanied by the terms *"or equivalent"* where the directives provide such exceptions.

Contracting authorities can depart from these rules and refrain from the reference to standards or comparable instruments. This is notably the case where the contract is of a genuine innovative nature for which the use of such instruments would not be appropriate.

It should be emphasized that the obligation to refer to (European) standards, does not imply that contracting authorities are bound to purchase only products or services in conformity with these. The obligation is only to refer to these instruments as a benchmark, leaving the possibility for suppliers to offer equivalent solutions.

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16 These are technical specifications the observance of which is mandatory by law or regulation in order to place a product on the market or to use it.

17 See the Annexes to this Communication.

At present very few European and national standards exist that deal with environmental performance of products and services.[18] This implies that until environmental performance attributes will be integrated into standards, contracting authorities can define the required level of performance, provided that this does not lead to discrimination.

Contracting authorities are free to define on specific points that they require a higher level of environmental protection than that laid down in legislation or in standards, on condition that the level required does not limit the access to the contract and lead to discrimination to the detriment of potential tenderers.

1.1. The possibility to prescribe which basic or primary materials shall be used

The concept of "technical specification" includes the possibility of prescribing the basic or primary materials to be used, if this contributes to the characteristics of the product or service in such a manner that it fulfils the use for which it is intended by the contracting authority. As long as these prescriptions observe Community law and are, in particular, non-discriminatory, contracting authorities may prescribe for a specific contract the materials which are to be used. This could include for instance that for a specific contract the window frames of an administrative building are made of wood or a requirement for recycled glass or other recycled materials.

1.2. The possibility to require the use of a specific production process

The definition of technical specifications in the Directives does not explicitly refer to production processes[19]. However, provided that this will not reserve the market to certain undertakings[20], the use of a specific production process may be required by contracting authorities if this helps to specify the performance characteristics (visible or invisible) of the product or service. The production process covers all requirements and aspects related to the manufacturing of the product which contributes to the characterising of the products without the latter being necessarily visible in the end-product.

This implies that the product differs from identical products in terms of its manufacture or appearance (whether the differences are visible or not) because an environmentally-sound production process has been used, e.g. organically grown foodstuffs[21], or "green" electricity. Contracting authorities must be careful that the prescription of a specific production process is not discriminatory.[22].

Requirements which do not relate to the production itself, like the way how the firm is run, on the contrary, are no technical specifications and can therefore not be made mandatory.[23]

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18 The Commission supports European standardisation organisations in integrating environmental aspects into the standardisation process.

19 It should be observed that the Government Procurement Agreement explicitly lists production process in the definition of technical specification.

20 See for example article 8 § 6 of Directive 93/36/EEC.

21 Contracting authorities may, for instance, for the description of what they consider organically grown foodstuffs, use the technical specifications laid down in Council Regulation n° 2092/91 of 24 June on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs. Official Journal of the European Communities L 198 of 22/07/1991 p. 1 – 15.

22 They may not prescribe that green electricity is generated by wind-energy only; indeed, water-energy and solar energy can also be used for the production of green electricity and the technical prescription should therefore be that the green electricity is produced by using renewable energy sources.

23 For example, the use of recycled paper in offices, the application of specific waste disposal methods on the contractors premises, the engagement of specific groups of workers (ethnic, handicapped, women).

1.3. The possibility to refer to ECO-labels

Eco-labels certify products that are deemed to be more environmentally sound than similar products in the same product group. The labels are awarded on a voluntary basis to products fulfilling specific criteria and they aim at informing consumers about environmentally sound products.

Different types of Eco-labels exist: the European Eco-label[24], national Eco-labels and pluri-national Eco-labels. There are also private Eco-labels.[25]

For the various product groups, the underlying criteria are specified in the relevant instruments.[26]

These criteria are based on the life cycle of the product and relate to different aspects, such as: performance of the products, materials contained in the products, production processes, take back and recycling, user instructions and consumer information. They are technical specifications within the meaning of the public procurement directives.

European, pluri-national and national Eco-label decisions are taken in accordance with procedures laid down in the relevant instruments[27]. These systems guarantee transparency and are open to all producers / suppliers.

Private Eco-labels are issued by private persons or organisations. In order to use a private Eco-label, the authorisation from the owner of the label is necessary. There are no common characteristics or a common system agreed or harmonised at national, pluri-national or Community level. Private Eco-labels do not provide the same guarantees as to their transparency and equal access, as European and national Eco-labels decisions.

In the absence of mandatory references[28], or where they require a higher level of environmental protection than that laid down in standards or legislation, contracting authorities can define the technical specifications related to the environmental performances in line with Eco-label criteria and may indicate that products having these Eco-label certificates are deemed to comply with the technical prescriptions of the contract documents.

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24 The European eco-label system was first laid down in Council Regulation (EEC) n° 880/92 of 23 March 1992 on a Community eco-label award scheme. Official Journal of the European Communities L 099 of 11.04.1992, p.1-7. This regulation has been repealed and replaced by European Parliament and Council Regulation N° 1980/2000 of 17 July 2000 on a revised Community Eco-label Award Scheme; Official Journal of the European Communities L 237 of 21.09.2000, p.1.
The Internet site: http://europa.eu.int/comm/environment/ecolabel/prodgr.htm contains a list of all product groups for which a European eco-label exists or is under development or revision.

25 An important group of private Eco-labels are the labels identifying timber as being the product of sustainable forestry.

26 So, for instance, criteria for the European Eco-label for personal computers are specified in the Commission Decision of 26 February 1999 establishing ecological criteria for the award of the Community Eco-label to personal computers; Official Journal of the European Communities L 70 of 17. 3. 1999; p.46.

27 European Eco-label decisions are taken in accordance with the procedure defined in European Parliament and Council Regulation n° 1980/2000 (EEC) and (pluri-)national Eco-label decisions are taken on the basis of the procedures defined in the national rules. Article 10 of the European Eco-label Regulation states that *"in order to encourage the use of Eco-labelled products the Commission and other institutions of the Community, as well as other public authorities at national level should, without prejudice to Community law, set an example when specifying their requirements for products."*

28 Like for instance a European, international or national standard covering also environmental aspects of a product – see above paragraph II.1.

Contracting authorities have to be careful not to limit the means of proof only to Eco-label certificates[29]. They shall accept also other means of proof, like test reports. This is of particular relevance in the case of national and private Eco-labels, to ensure that the specification and the means to assess the conformity with the specification would not result in the reservation of the contract to national / local companies. [see also Article 8 of Directive 93/36/EEC.]

1.4. The possibility to use variants

Products and services that are less damaging for the environment can be , generally speaking , more expensive than other products and services. When defining the subject matter of a contract, contracting authorities have to find a balance between their financial considerations, on the one hand, and their objectives of greening their purchases, on the other hand.

The use of variants[30] enables contracting authorities to assess which option best meets both of these requirements.

When using this possibility, contracting authorities first define a standard definition for the subject matter of the contract that lays down the minimum requirements. In addition to this standard definition, contracting authorities can define one or more variants, laying down alternative definitions of the subject matter, like for instance a higher environmental performance or the use of a specific production process which was not a requirement in the standard definition.

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29 Eco-labelled products often represent a limited part of a certain product market: European eco-labelled products represent normally less than 20% and in some cases even less than 5% of the product markets.

30 All public procurement directives provide for the possibility that where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting entities. Contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and specific requirements for their presentation. Where variants are not permitted, they shall so indicate in the tender notice. Article 24 of Directive 92/50/EEC; Article 16 of Directive 93/36/EEC; Article 19 of Directive 93/37/EEC and Article 34 (3) of Directive 93/38/EEC.

2. SELECTION OF THE CANDIDATES

This chapter sets out the rules of the public procurement Directives relating to the selection of those candidates whom the contracting authority considers able to execute its contract.

The rules laid down in the public procurement Directives consist of three different types.

The first set of rules concerns the grounds that justify a candidate's exclusion from participating in a public contract. These relate to, e.g. the state of bankruptcy, conviction for offences, grave professional misconduct, non-payment of social security contributions or taxes.

The second set of rules concerns the candidate's financial and economic standing. These rules do not offer possibilities to take into account environmental considerations.

The third set of rules concerns the candidate's technical capacity. These rules enable, to a certain extent, environmental considerations to be taken into account, by defining e.g. a minimum level of equipment or facilities, guaranteeing the correct execution of the contract. The Directives specify[31] that the information required for evidence of the operator's financial and economic standing as well as for technical capacity must be confined to the subject matter of the contract. The possibilities contained in these rules will be set out below.

In the Utilities sectors, the contracting entities dispose of a wider margin of appreciation for the assessment of the capacity of candidates or tenderers in so far as Directive 93/38/EEC only requires that objective rules and criteria are applied which are defined beforehand and are put at the disposal of interested candidates or tenderers.

2.1. Grounds for exclusion from participation in the contract

All public procurement Directives define the grounds on which enterprises may be excluded from participating in tender procedures. These grounds read, as far as relevant, as follows:

> *Any supplier/contractor/service provider may be excluded from participation in the contract who:*
>
> *(c) has been convicted of an offence concerning his professional conduct by a judgement, which has the force of res judicata;*
>
> *(d) h.as been guilty of grave professional misconduct proven by any means, which the contracting authorities can justify;*

[31] See for example art. 23 § 3 of Directive 93/36/EEC.

In the case where legislation qualifies the non-compliance with environmental legislation as an offence concerning professional conduct,[32] the public procurement directives allow a contracting authority to exclude a candidate from participation on the ground mentioned under (c) where this undertaking is convicted for committing this offence and where the judgement has the force of res judicata.

Moreover, the Commission has proposed a Community Directive defining a minimum set of criminal offences to the detriment of the environment .[33]

The concept of grave professional misconduct is a concept which is, as such, not yet defined in European legislation or case law[34] and it is therefore left to the Member states to define this concept in national legislation.

2.2. Requirements relating to the technical capacity of the candidates

The public procurement Directives define the means by which evidence of a contractor's technical capability may be supplied. The public procurement Directives exhaustively list[35] the references by which technical capacity may be proved according to the nature, quantity and purpose of the contract. Therefore, each individual requirement relating to the candidate's technical capacity, defined by a contracting authority must come within one of the references listed in the Directives.

The objective of the selection phase is to identify those candidates, which are considered by the contracting authority to be capable of executing the contract in the best way. Therefore, the different requirements must have a direct link to the subject matter or the execution of the contract at stake.[36]

Among the references listed exhaustively by the public procurement Directives, the following could in specific cases relate to environmental aspects:

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32 Some countries have framed what are called "ecological offences" in their Criminal Code. For instance, Article 325 of the current Spanish Criminal Code (Organic Law No. 10/1995 of 23 November 1995) provides that *"anyone who, in breach of the laws or other general provisions to protect the environment, causes or whose actions directly or indirectly give rise to emissions, discharges, radiation, extraction or excavation, silting, noise, vibrations, injections or deposits in the atmosphere, soil, subsoil, or inland, marine or ground waters, including any influencing transboundary areas, or who undertakes water abstraction which may seriously upset the balance of natural systems, shall be liable to a term of imprisonment of between six months and four years, penalties payable over periods of between eight and twenty-four months and disqualification from pursuing an occupation or holding office for a period ranging from one to three years. If there is a risk of serious damage to human health, the term of imprisonment shall be in the upper half of the range".*

33 An approximation of a minimum set of offences against the environment, as envisaged in the Commission proposal, would not prevent Member States from providing for additional offences and/or additional sanctions as more stringent protective measures (article 176 EC).

34 Final Report on the Falcone Study on procurement and organised crime (1998) – Volume I: 24.05.1999 - Institute of Advanced Legal Studies – University of London.

35 Case 76/81: Transporoute et travaux v. Ministère des travaux public; judgement of 10 February 1982; *Jur*. 1982; p. 417.

36 The service directive (92/50/EEC) indicates expressly that these requirements must be defined according to the nature, quantity and purpose of the services to be provided.

– a statement of the tools, plant and technical equipment available to the candidate for executing the contract;

– a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities;

– a statement of the technicians or technical bodies which the candidate can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality control.

2.2.1. The possibility to require specific (environmental) experience

If the contract needs specific know-how in the field of the environment, specific experience is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of candidates[37] and may therefore be required (e.g. the construction of a waste treatment plant).

2.2.2. The possibility to require suppliers to operate an environmental management scheme

Environmental management schemes have been set up by an international standard (ISO 14001) and in an EC Regulation (EMAS[38]).

The Regulation establishes a voluntary environmental management scheme, based on harmonised lines and principles throughout the European Union, open to organisations operating in the European Union and the European Economic Area, in all sectors of economic activities.

The aim of the European environmental management scheme is to promote continuous environmental performance improvements of activities, products and services by committing organisations to evaluate and manage their significant environmental impacts.

The implementation of EMAS requires following several steps. The environmental review is the initial step which allows organisations to evaluate their environmental situation and therefore to build up the appropriate management system to lead to better environmental performance through clear environmental objectives. Regular environmental audits provide for the means to check that the environmental management system works and to follow the progress of the organisation towards better environmental performance.

Amongst these steps, registration in the scheme requires that the organisation adopts an environmental policy containing, in particular, the following key commitments:

- Compliance with all relevant environmental legislation;
- Prevention of pollution; and
- achieving continuous improvements in environmental performance.

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37 Case 31/87: Gebroeders Beentjes bv. / State of the Netherlands. Judgement of 20 September 1988; Conclusion, par.35; *Jur*. 1988, p. 4635.

38 The ECO Management and audit scheme was first developed in Council Regulation EEC – n° 1836 / 93 of 29 June 93 - Official Journal of the European Communities L.168. The regulation has been revised and replaced by Regulation 761/2001 of the European Parliament and of the Council allowing voluntary participation by organisations in a Community Eco-management and audit scheme (EMAS).

As part of EMAS all participating countries have created verification mechanisms, by which compliance to EMAS is verified and information validated by independent verifiers who are accredited by accreditation bodies. This validation leads to request for registration which is granted by the Competent Bodies, designated by the Member State.

The lists of registered organisations from the EU Member States plus the EEA countries is regularly communicated to the Commission and a complete list is available from Commission services.[39]

The contents of the environmental programmes and environmental management schemes may differ from company to company and organisation to organisation because they are "tailor-made". This is the reason that it is not possible to give a general answer to the question whether or not EMAS as such can be qualified as one of the possible references relative to the technical capacity of a company or organisation which are listed exhaustively in the public procurement directives. The question of whether or not a specific environmental management and audit scheme can be qualified as one of these references depends on the contents of the specific system.

It is however important to underline that common to all environmental management and audit schemes is that the company or organisation fulfils a number of minimum criteria and that all such systems represent a high level of environmental performance and management.

In order to be relevant as a means of proof of technical capacity, the system should have an impact on the quality of the supply or the capacity of a company (for example the equipment and technicians) to execute a contract with environmental requirements (for example a works contract for which the contractor has to deal with waste on the construction site).

Therefore, whenever elements of a company's or organisation's environmental programme and management scheme could be regarded as one or more of the references that could be required for establishing a company's technical capacity[40] the EMAS registration could serve as a means of proof.

In such cases, Article 11 (2) of the EMAS Regulation states that *"In order to encourage the organisation's participation in EMAS the Commission and other institutions of the Community as well as other public authorities at national level should consider, without prejudice to Community law, how registration under EMAS may be taken into account when setting criteria for their procurement policies."* Contracting authorities could explicitly mention in their contract documents or the tender notice that whenever companies have an environmental management and audit system which covers the requirements as to the

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39 A list of registered sites is also published on the Internet: http://europa.eu.int/comm/environment/emas. At the beginning of 2001, over 3000 sites have been registered in the EU.

40 See before in paragraph 2.2: (a) a statement of the tools, plant and technical equipment available to the candidate for executing the contract; (b) a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities; or (c) a statement of the technicians or technical bodies which the candidate can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality control.

technical capacity, this system will be accepted as a sufficient means of proof. At the same time, contracting authorities may not exclude other means by accepting only an EMAS registration as means of proof: any other certificate (e.g. ISO 14001) or any other means of proof should also be accepted.

3. AWARD OF THE CONTRACT

Once the candidates have been selected, the contracting authorities enter the phase of the evaluation of the tenders, resulting in the award of the contract.

The public procurement Directives contain two options for the award of contracts: either the lowest price or the '*most economically advantageous tender*'. The aim of this second option is to help the contracting authorities get the best value for money.

In order to define which tender should be considered the most economically advantageous, the contracting authority has to indicate beforehand which criteria will be decisive and will be applied. These different criteria should be mentioned either in the contract notice or in the contract documents, where possible in descending order of importance.

3.1. The most economically advantageous tender

The Directives give examples of the criteria that may be applied in order to define the most economically advantageous tender[41]. Other criteria are possible.

As a general rule, the public procurement directives impose two conditions with regard to the criteria which will be applied for determining the most economically advantageous tender. First, the principle of non-discrimination has to be observed and second, the criteria applied shall generate an economic advantage for the contracting authority. As confirmed by the European Court of Justice, the aim of the public procurement directives is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations that are not economic.[42] Economic considerations can include aspects of environmental protection, like, for instance the energy consumption of a product.

The common factor shared by all criteria used for the evaluation of tenders is that they must, like those expressly cited, concern the nature of the work to be carried out or the manner in which it is done.[43] The criteria applied should give the contracting authority discretion to compare objectively the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in the directives.[44]

The objective of this assessment is to establish which tender best fulfils the needs of the contracting authority. Therefore the function of the award criteria is to assess the intrinsic quality of the tenders. This implies that the award criteria have to be linked to the subject matter of the contract.[45]

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41 Price, delivery date, delivery period, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics of the goods or services, after-sales service, technical assistance, profitability, technical merit.

42 Case C-380/98: The Queen and H.M. Treasury, ex parte: University of Cambridge; judgement of 3 October 2000; Reference for a preliminary ruling. (Jur. 2001, I-8035) and Case C-237/99: Commission / France (HLM); judgement of 1st of February.2001, (not yet published)

43 Case 31/87: Gebroeders Beentjes - *(infra)* - Conclusion of the Advocate-General.

44 Case 31/87: Gebroeders Beentjes - *(infra)* - par. 27.

45 See for example art 26 § 1 (b) Directive 93/36/EEC "various criteria according to the contract in question".

Environmental considerations are not explicitly mentioned in the current public procurement legislation[46]; nevertheless the article on award criteria has to be interpreted in such a way that environmental considerations can result in the definition of specific award criteria. The "environmental soundness" of a product, without further specification, is, as such, not measurable and does not necessarily have an economic advantage for the contracting authority. However, contracting authorities could take into account the "environmental soundness" of products or services, for example, the consumption of natural resources, by "translating" this environmental objective into specific, product-related and economically measurable criteria by requiring a rate of energy consumption.[47] In most cases, such criteria relate to the quality or performance of the product or the execution of works or services (i.e. quality or technical merit as mentioned amongst the award criteria). Hence, environmental aspects relating to a product or service would be considered on an equal footing as the functional and aesthetic characteristics of goods or services, criteria that are explicitly listed in the public procurement Directives, in terms of assessment of what is economically measurable.

Environmental elements can serve to identify the most economically advantageous tender, in cases where these elements imply an economic advantage for the purchasing entity, attributable to the product or service which is the object of the procurement.

The question rises whether the concept of "economically most advantageous tender" implies that each individual award criterion has to have an economic advantage which directly benefits the contracting authority, or that each individual award criterion has to be measurable in economic terms, without the requirement of directly bringing an economic advantage for the contracting authority in the contract at stake. This question has been put to the European Court of Justice in case C-513/99.[48] The judgement is expected by the end of 2001.

Both in the Green Paper[49] and in the Communication[50] on public procurement the Commission has clearly taken a position in favour of the first interpretation.

The Commission notes in this respect that contracting authorities retain the possibility to define the subject matter of a contract and to integrate at this stage of the tender procedure their environmental preferences linked to eventual indirect economic advantages, including through the use of variants (see paragraph II.1.4).

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46 One should note that in the proposals for modification of the public procurement directives, which are adopted by the Commission on 10.05.2000, environmental characteristics are listed explicitly amongst the criteria which may serve for identifying the most economically advantageous tender (see footnote 8).

47 Eco-label criteria can be used to define the most economically advantageous tender where they satisfy the conditions set out in this section.

48 Case C-513/99: Stagecoach Finland Oy Ab, formerly Oy Swebus Finland Ab, of Espoo (request for a preliminary ruling). Official Journal of the European Communities, C 102 of 8.4.2000, p. 10.

49 Green paper: public procurement in the European Union: exploring the way forward, adopted by the Commission on 27th November 1996; COM (96) 583 final

50 Commission Communication "Public Procurement in the European Communities", adopted by the Commission on 11 March 1998, COM (1998) 143 final.

3.2. The possibility to take into consideration all costs incurred during the whole life cycle of a product

Life cycle costing is the taking into account of all costs incurred during the production, consumption/use and disposal of a product or service (cradle to grave approach)[51].

The price paid by a contracting authority to purchase a product, reflects and takes account of those costs incurred in the phases which are already completed (normally: design, materials, production; sometimes also testing and transport) and should therefore not be taken into consideration a second time in the award process[52]. On the contrary, all costs occurring after the purchase of the product, which will be borne by the contracting authority and thus will affect directly the economic aspects of the product, may be taken into account.

Costs incurred during the life cycle of a product and will be born by the contracting authority may be taken into account for the assessment of the most economically advantageous tender.

The Directives explicitly mention as possible award criteria running costs and cost effectiveness. Such costs might include direct running costs (energy, water and other resources used during the lifetime of the product); spending to save (for example, investing in higher levels of insulation to save energy and thus money in the future); as well as the costs of maintenance or recycling of the product. In evaluating tenders, a purchasing organisation can also take account of costs of treatment of waste or re-cycling.

3.3. The possibilities to take into account externalities

Externalities are damages or benefits, which are not paid for by the polluter or beneficiary under normal market conditions. They are defined as: "The costs and benefits which arise when the social or economic activities of one group of people have an impact on another, and when the first group fail to fully account for their impact."[53]

External costs and benefits are opposed to "traditional" costs and benefits such as operating costs or income from sales. The characteristic of the latter costs is that they are paid for with a price determined by the market.

As a general rule, externalities are not borne by the purchaser of a product or service, but by society as a whole and therefore do not qualify as award criteria as defined above (see 3.1). The Commission notes in this respect that contracting authorities retain the possibility to define the subject matter of a contract or impose conditions relating to the execution of the contract and to integrate at these stages of the tender procedure their environmental preferences linked to eventual occurrence of external costs.

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51 In general, these phases are, not necessarily in the following order: design of the product; purchase of the materials; production; transport; testing; use; disposal; recycling.

52 Transport costs or costs for testing the product, if borne by the supplier and reflected in the price, may not be taken into consideration a second time by the contracting authority by adding them to the price to be paid to the supplier.

53 European Commission, DG Environment: A Study on the Economic Valuation of Environmental Externalities from Landfill Disposal and Incineration of Waste. Final Main Report; October 2000. Page 9.

Only in specific cases, for instance where external costs are due to the execution of the contract and at the same time are borne directly by the purchaser of the product or service in question, these costs could be taken into account.

In such cases, contracting authorities should be careful not to introduce systems that lead to preferences or disguised discrimination. Up till now, there does not exist a harmonised system for the qualification and economic evaluation of externalities. However, there is work being undertaken in the EU which aims at the co-ordination of the methodologies of economic evaluation of external costs in the field of transport, which could, in time remove risks of discrimination involved in adopting this approach.

3.4. Additional criteria

This concept has been developed by the case law of the European Court of Justice.[54]

The concept was first set out in case 31/87, where the Court held that such criteria (the employment of long term unemployed persons) have neither a relationship to the checking of a candidate's economic and financial suitability and the candidate's technical knowledge and ability nor a connection with the award criteria as listed in article 9 of the directive. The Court held further that these criteria are nevertheless compatible with the Directives on public procurement if they comply with all relevant principles of Community law.

In case C-225/98 the ECJ held that[55] the awarding authorities could apply a condition relating to the campaign against unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two or more economically equivalent bids. Such a condition could be applied as an accessory criterion once the bids had been compared from a purely economic point of view. As regards the criterion relating to the campaign against unemployment the Court made it clear that it must not have any direct or indirect impact on those submitting bids from other Member States of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to ascertain that such a condition existed.

This could be equally applicable to conditions relating to environmental protection or performance.

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54 Case 31/87: Gebroeders Beentjes - *(infra)* and Case C-225/98: Commission of the European Communities v. French Republic, judgement of 26 September 2000 Construction and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Département du Nord. (Jur. 2000, I-7445.)

55 See the General Report on the activities of the European Union in 2000, point 1119, page 407.

4. EXECUTION OF THE CONTRACT

Contracting authorities have the possibility to define the (detailed) contract clauses, relating to the mode of execution of the contract. Contract clauses may not be (disguised) technical specifications, selection criteria or award criteria. They relate merely to the execution of the contract itself. This means that all applicants, should they eventually be awarded the contract, must be in a position to execute these clauses. As a matter of transparency, they should be announced in advance to all applicants.

The public procurement directives do not cover contract clauses. As such, contract clauses must observe the general Treaty rules and principles, notably the principle of non-discrimination.

Contracting authorities have a broad range of possibilities for defining contract clauses having as their object the protection of the environment.

The following are examples of specific additional conditions, which have a bearing on the performance or execution of the contract and which ultimately meet general environmental objectives, which are sufficiently specific, observe Community law principles and are in conformity with the Directives:[56]

- Delivery / packaging of goods in bulk rather than by single unit
- Recuperation or re-use of packaging material and the used products by the supplier
- Delivery of goods in re-usable containers
- Collection, take-back recycling or re-use of waste produced during or after use or consumption of a product by the supplier
- Transport and delivery of chemicals (like cleaning products) in concentrate and dilution at the place of use.

As to the question whether it may be required that a certain mode of environmentally sound transport is used for the delivery of goods, one should note that such a requirement should be defined in such a way that it has a bearing on the performance or execution of the contract and it should comply with Community law principles. A contracting authority may therefore require that the transport of products to be delivered be effected by a certain type of transport, as long as, in the specific circumstances of the contract, this requirement does not lead to discrimination.

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[56] OECD document ENV/EPOC/PPC(98)17REV1.

III CONTRACTS NOT COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES

For contracts not covered by the public procurement Directives, the detailed rules stemming from the public procurement Directives and set out in the previous chapters do not apply.

Indeed Community law leaves it to the Member States to decide whether or not public procurement not covered by the Community Directives should be subject to national procurement rules.

Within the limits set by the treaty and Community law, Member states are free to adopt their national legislation. It will therefore depend on the national legislation whether public procurement may, or even shall be used to fulfil other objectives than the "best value for money" objective of the public procurement directives.

When defining the subject matter of such a contract, a broad range of requirements and conditions may be imposed, even if these conditions and requirements may probably not have a direct link to the subject matter of the contract. Of course these requirements and conditions must observe the rules of the Treaty and principles flowing from the Treaty. Thus, the Court of Justice has held that inclusion of clauses referring to national standards or a specific origin in an invitation to tender may cause economic operators who produce products equivalent to products certified as complying with the national standard to refrain from tendering.[57] If measures impose on the national of one Member State more rigorous rules, or put him in law or in fact in an unfavourable position compared with the national of the Member State imposing the measure, these measures could infringe the Treaty rules on free movement of goods and services.

As regards the qualification of candidates, purchasing authorities are free to impose requirements and define conditions that go beyond what is possible under the public procurement directives. The criteria need not to be limited to the financial and economic situation of a candidate, or to his technical capacity. Of course, the requirements for qualification have to be compatible with Community law and Community law principles, notably the rules and principles relating to the free provision of services, such as non-discrimination and mutual recognition.

As regards the evaluation of tenders, award criteria may be defined freely by a purchasing authority, as long as the Treaty rules and Community law principles are observed, and the criteria remain objective, transparent and non-discriminatory.

The question of whether the Treaty rules or the principles of Community law are observed, depends on a case-by-case assessment.

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[57] Case 45/87: Commission / Ireland (Dundalk); Judgement of 22 September 1988; *Jur*. 1988; p. 4929 and Case C-243/89: Commission/Denmark (Bridge over the Storebaelt); judgement of 22.06.1993 – Jur. 1993; p. I/3353.

ANNEX 1: COMMON RULES IN THE TECHNICAL FIELD

The common rules in the technical field are laid down in article 14 of Directive 92/50/EEC (services), article 8 of Directive 93/36/EEC (supplies) and Article 10 of Directive 93/37/EEC (works). Even though the wording of these articles is not entirely identical the content of the rules articles is the same. Therefore, and by way of example, the text of article 14 of Directive 92/50//EEC is reproduced below.

DIRECTIVE 92/50/EEC

TITLE IV

Common rules in the technical field

Article 14

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

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

3. A contracting authority may depart from paragraph 2 if:

   a) the standards, European technical approvals or common technical specifications do not include any provisions for establishing conformity, or technical means do not exist for establishing satisfactorily the conformity of a product with these standards, European technical approvals or common technical specifications;

   b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment. Amended by Directive 91/263/EEC, or Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications or other Community instruments in specific service or product areas;

   c) these standards, European technical approvals or common technical specifications would oblige the contracting authority to use products or materials incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to the transition, with a given period, to European standards, European technical approvals or common technical specifications;

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

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

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

   a) shall be defined by reference to the national technical specifications recognized as complying with the basic requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives, and in particular in accordance with the procedures laid down in Directive 89/106/EEC;

b) may be defined by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials;

c) may be defined by reference to other documents.

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

i. national standards implementing international standards accepted by the country of the contracting authority;

ii. other national standards and national technical approvals of the country of the contracting authority;

iii. any other standard.

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

For the utilities sector, the common rules in the technical field are laid down in Article 18 of this Directive. These rules differ from the ones in Directives 92/50/EEC, 93/36/EEC and Directive 93/37/EEC in that they are less detailed and exhaustive. Article 18 of Directive 93/38/EEC is reproduced below.

DIRECTIVE 93/38/EEC

TITLE III

Technical specifications and standards

Article 18

1. Contracting entities shall include the technical specifications in the general documents or the contract documents relating to each contract.

2. The technical specifications shall be defined by reference to European specifications, where these exist.

3. In the absence of European specifications, the technical specifications should as far as possible be defined by reference to other standards having currency within the Community.

4. Contracting entities shall define such further requirements as are necessary to complete European specifications or other standards. In so doing, they shall prefer specifications which indicate performance requirements rather than design or description characteristics, unless the contracting entity has objective reasons for considering that such specifications are inadequate for the purposes of the contract.

5. Technical specifications which mention goods of a specific make or source or of a particular process, and which have the effect of favouring or eliminating certain undertakings, shall not be used unless such specifications are indispensable for the subject of the contract. In particular, the indication of trade marks, patents, types, of specific origin or production shall be prohibited; however, such an indication accompanied by the works ‘or equivalent‘ shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.

6. Contracting entities may derogate from paragraph 2 if:

a) it is technically impossible to establish satisfactorily that a product conforms to the European specifications;

b) the application of paragraph 2 would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, or of Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications;

c) in the context of adapting existing practice to take account of European specifications, use of those specifications would oblige the contracting entity to acquire supplies incompatible with equipment already in use *or would entail disproportionate cost or disproportionate technical difficulty. Contracting entities which have recourse to this derogation shall do so only as part of clearly-defined and recorded strategy with a view to a changeover to European specifications;*

d) he relevant European specification is inappropriate for the particular application or does not take account of technical developments which have come about since its adoption. Contracting entities which have recourse to this derogation shall inform the appropriate standardizing organization, or any other body empowered to review the European specification, of the reasons why they consider the European specification to be inappropriate and shall request its revision;

e) the project is of a genuinely innovative nature for which use of European specifications would not be appropriate.

7. Notices published pursuant to Article 21 (1) (a) or Article 21 (2) (a) shall indicate any recourse to the derogations referred to in paragraph 6.

8. This Article shall be without prejudice to compulsory technical rules in so far as these are compatible with Community law.

ANNEX 2: DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

The contents of the definition of certain technical specifications of Annex II of Directive 92/50/EEC (services), Annex III of Directive 93/36/EEC (supplies), Annex II of Directive 93/37/EEC (works), and Article 1, paragraphs 8 – 13 of Directive 93/38/EEC (utilities) are the same, even though the wording of these definitions is not entirely identical. Therefore, and by way of example, the text of Annex II of Directive 92/50//EEC is reproduced below.

ANNEX II

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

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

1) Technical specifications: the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

2) Standard: a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory.

3) European standard: a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as <European Standards (EN); or <Harmonization documents (HD); according to the common rules of these organizations or by the European Telecommunications Standards Institute (ETSI) as a <European Telecommunication Standard; (ETS).

4) European technical approval: a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of applications and use. European approval shall be issued by an approval body designated for this purpose by the Member State;

5) Common technical specification: a technical specification laid down in accordance with a procedure recognized by the Member States to ensure uniform application in all Member States which has been published in the Official Journal of the European Communities.

6) Essential requirements: requirements regarding safety, health and certain other aspects in the general interest, that the construction works can meet.