

**EU public sector procurement Directive
2004/18/EC**

**Guideline for auditors
Appendices**

June 2010

Disclaimer

This guideline – which is intended to serve general information purposes only – has been compiled with the greatest care. Under no circumstances will liability be accepted for damages of whatever nature, in any way resulting from the use of this guideline or resulting from or related to the use of information presented in or made available through this guideline.

The user is recommended to check periodically the websites mentioned in Appendix IX and of course to use the text of the most recent version of the Public Sector Directive 2004/18/EC.

EU public sector procurement Directive 2004/18/EC

Guideline for auditors

Appendices

- Appendix I : Glossary of Terms**
- Appendix II : Main thresholds (exclusive of VAT) above which advertising of contracts in the Official Journal of the EU is obligatory, applicable from 1 January 2010 to 31 December 2011**
- Appendix III : Overview of priority and non-priority services**
- Appendix IV: Guidance for auditors on contracts below threshold, and contracts for services listed in annex IIb**
- Appendix V : Public Sector Timescales**
- Appendix VI : Steps in conducting a Competitive Process for contracts above EU Thresholds (Diagram)**
- Appendix VII : Framework Agreements and Framework call off stage (Diagram)**
- Appendix VIII : Competitive Dialogue Procedure (Diagram)**
- Appendix IX : Electronic Auctions (Diagram)**
- Appendix X : Dynamic Purchasing Systems (Diagram)**
- Appendix XI : Information Sources on Public Procurement**
- Appendix XII : Case law of the European Court of Justice concerning public procurement (1982-2009)**
- Appendix XIII : Tender documents. An auditor's view**
- Appendix XIV : Price and quality coefficients in the evaluation of tenders**
- Appendix XV : Directive 2009/81/EC of 13 July 2009 on the award of works contracts, supply contracts and service contracts in the fields of defence and security**

Appendix I: Glossary of Terms

Award Criteria: criteria, set out in tender documentation, on which tenders will be evaluated and the award of the contract will be based, i.e. relating to how a tenderer addresses and proposes to perform or deliver the object of the contract and at what cost.

Buyer Profile: a dedicated online area containing procurement related information. The purpose of a Buyer Profile is to provide details about a contracting authority's procurement practices and intentions, so that potential suppliers will be better informed about the purchaser, and better able to judge whether they want to bid for a particular tender opportunity. A Buyer Profile includes copies of all notices required by the Directive, tender specifications and additional documents, future procurement requirements, the purchaser's procurement process and contact details. The Buyer Profile may also include scheduled purchases, contracts concluded, procedures cancelled and any other useful general information.

Contracting Authority: a Government department or office; local or regional authority; any public body, commercial or non commercial; a subsidiary or body established by a public body; any institution or entity funded largely from public funds.

Public Contract: a contract for the provision of works, supplies or services to a contracting authority. It includes all procurements, not just those which are undertaken on the basis of a full tendering process and formal signing of a contract.

Qualification Criteria: exhaustive criteria (set out in Articles 45 to 48 of Directive 2004/18/EC) to be used in pre-qualifying/pre-selecting candidates who are invited to submit tenders. The criteria relate to a candidate's professional conduct and standing, professional or technical expertise, financial or economic standing, general capacity and competency, i.e. criteria which relate to a candidate's character and capability to perform a particular contract. Proposals in relation to a particular project are not sought and are not a consideration at this stage.

Restricted Procedure: a procedure under EU procurement Directives whereby expressions of interest are invited through a notice in the OJEU (and other appropriate media) and only those who meet certain qualification criteria are issued with the full tender documentation and invited to submit tenders.

RFT (Request for Tenders): all the documentation related to the tendering process. It normally includes a general overview of the tender requirements, a detailed specification of requirements, the format and structure for submission of tenders, how tenders will be examined and the criteria on which they will be evaluated, and some general conditions of tendering. The RFT should normally include a set of conditions for a contract which will be concluded with the successful tenderer.

Segmentation: process by which the global value of a public contract is subdivided to prevent its coming within the scope of the Directive.

Appendix II: Main thresholds (exclusive of VAT) above which advertising of contracts in the Official Journal of the EU is obligatory, applicable from 1 January 2010 to 31 December 2011 ⁽¹⁾

Works		
	€ 4,845,000	Threshold applies to Government departments and offices, local and regional authorities and other public bodies.
Supplies and Services		
	€ 193,000	Threshold applies to local and regional authorities and public bodies outside the utilities sector.
	€ 125,000	Threshold applies to Government departments and offices

(1) Thresholds are revised every two years and published in the OJEU.

Appendix III: Overview of priority and non-priority services

A. Priority Services (*i.e.* Services subject to the full scope of EU procurement Directives)

1. Maintenance and repair services
2. Land transport services, including armoured car services and courier services, except transport of mail and transport by rail
3. Air transport services of passengers and freight, except transport of mail
4. Transport of mail by land (except by rail) and by air
5. Telecommunications services
6. Financial services (a) Insurance services (b) Banking and investment services
7. Computer and related services
8. Certain Research and Development services
9. Accounting, auditing and book-keeping services
10. Market research and public opinion polling services
11. Management consultant services and related services
12. Architectural services: engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services
13. Advertising services
14. Building-cleaning services and property management services
15. Publishing and printing services on a fee or contract basis
16. Sewage and refuse disposal services sanitation and similar services

B. Non-Priority Services (*i.e.* Services not subject to the full scope of the EU procurement Directives: contracts must be awarded using non-restrictive technical specifications and EU Commission informed of award of contract if the value of the awarded service contract has reached the European threshold)

17. Hotel and restaurant services
18. Rail transport services
19. Water transport services
20. Supporting and auxiliary transport services
21. Legal services
22. Personnel placement and supply services (but not employment contracts)
23. Investigation and security services (except armoured car services)
24. Education and vocational education services
25. Health and social services
26. Recreational, cultural and sporting services
27. Other services

The user of this guide should of course be beware that also for these non-priority services the treaty principles such as non-discrimination, transparency, freedom of movement and freedom to provide goods and services must be observed. This implies a requirement to advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders. See section 9 of the guideline.

APPENDIX IV

GUIDANCE FOR AUDITORS ON:

- a. Contracts below threshold for application of the Public Procurement Directives, and**
- b. Contracts for Services listed in Annex IIB to Directive 2004/18/EC**

The following principles are to be observed in such circumstances:

- Non-discrimination on grounds on nationality and equal treatment
- Free movements of goods and prohibition of quantitative restrictions on imports and exports and measures having equivalent effect.
- Right of establishment also including activities as self employed persons
- Freedom to provide services
- Transparency and proportionality.

The auditor should aim to ensure that public procurement rules are complied with and that the principles of the Treaty have been respected. The audit should be carried out as soon as possible after the public procurement process has occurred. When a sample check method of audit is employed the intensity employed may vary according to the risks encountered eg. The value of the tender, type of contract, experience (or lack of it) of the contracting authority.

Checks recommended during the audit process:

Pre-tender stage, issue of documents (see section 14):

- Has there been sufficient advertising?
- Segmentation into smaller tenders is not permitted
- Has the correct tender procedure been used?
- No use of brand names or other references are to be used, as these favour or eliminate potential providers or services.
- Have principles being correctly announced?

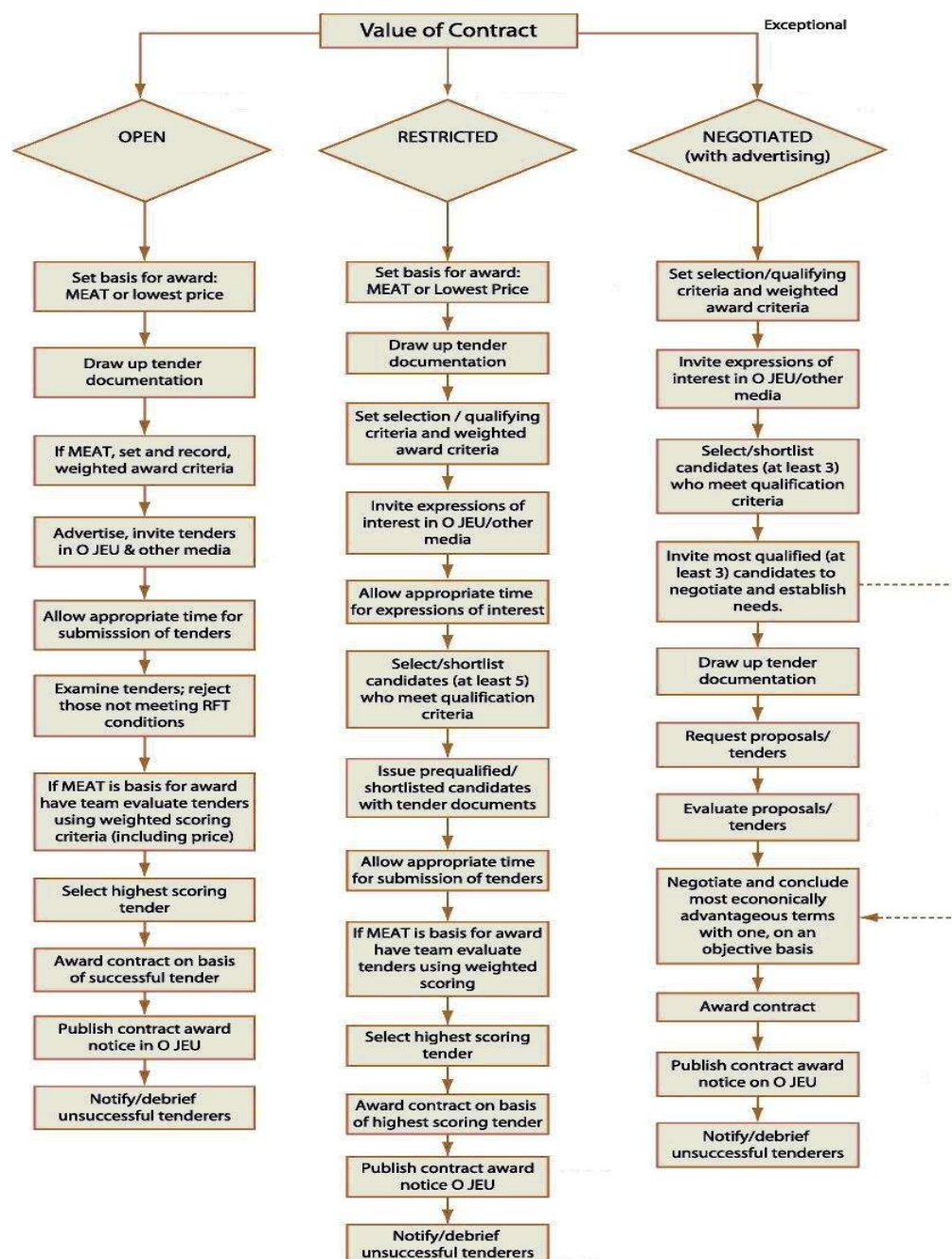
Evaluation stage (see section 17):

- Basis for ejecting applicants (unsuitability, financial soundness, technical capacity)
- Have principles been consistently applied?
- Have decisions been properly verified and documented?
- Has the specified time frame been observed?
- Have there been any complaints submitted by any of the renderers? Investigate.

Appendix V: Public Sector Timescales

Procedure	Article	Text	Days
Open	38(2)	Minimum time for receipt of tenders from date contract notice sent	52
	38(4)	Reduced when PIN published (subject to restrictions) to, generally, –	36
		And no less than -	22
	38(5)	Electronics transmission reduces all the above by 7 days so 52 becomes –	45
		And 36/22 become -	29/22
38(6)	Full electronic access to contract docs reduces 52 by 5 days so it becomes –	47	
	This can also be added to the reduction for 52 days to 45 for electronic transmission so can become –	40	
Restricted	38(3)(a)	Minimum time for receipt of requests to participate from the date contract notice sent	37
	38(5)	Electronic transmission reduces the 37 days by 7 days so becomes -	30
	38(3)(b)	Minimum time for receipt of tenders from the date invitation sent	40
	38(4)	Reduced when PIN published (subject to restrictions) to, generally, -	36
		And no less than -	22
	38(6)	Full electronic access to contract docs reduces 40 by 5 days so it becomes -	35

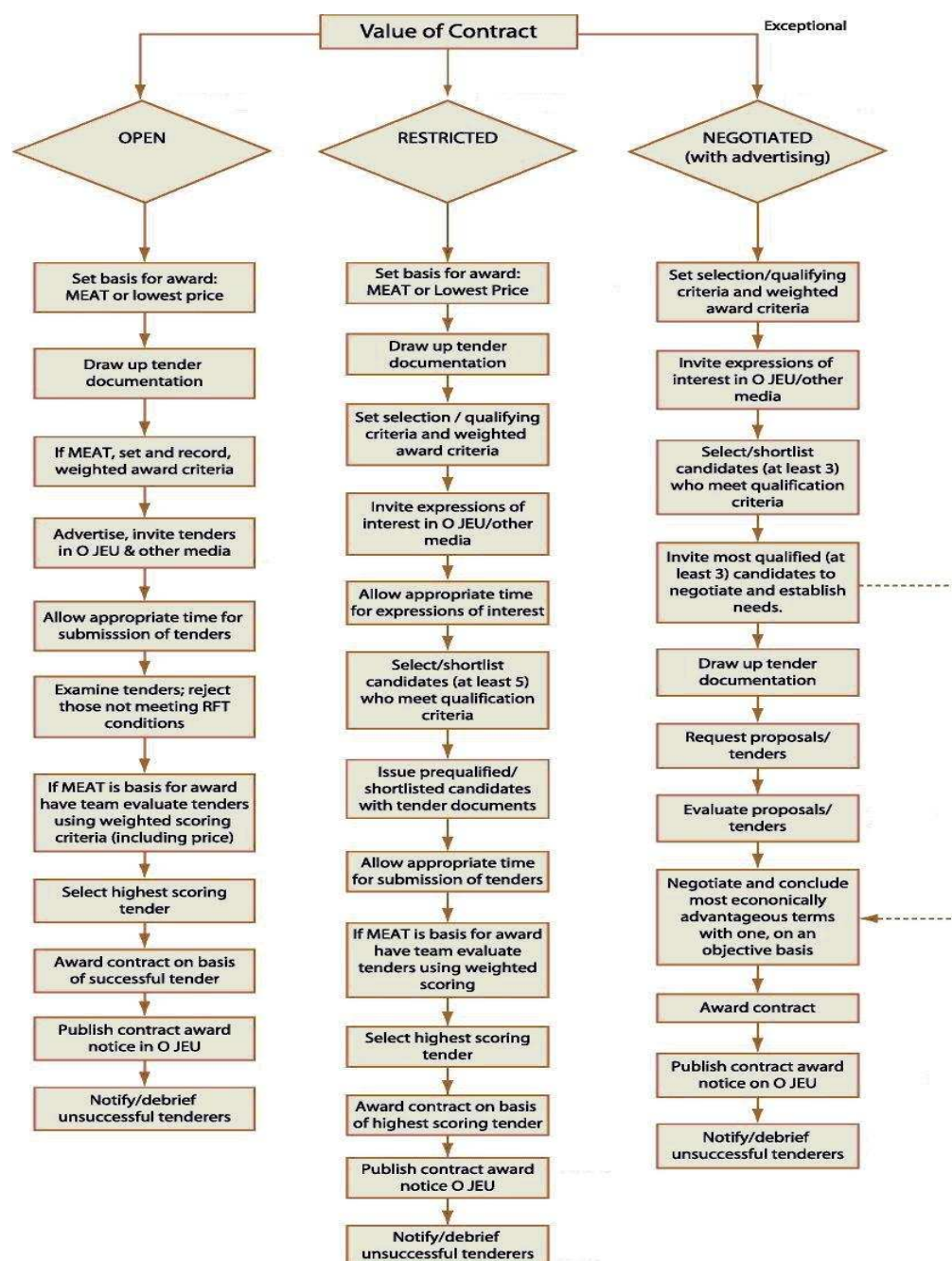
Appendix VI: Steps in conducting a Competitive Process for contracts above EU Thresholds (open, restricted and negotiated procedures) ⁽²⁾



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Source: Irish Department of Finance, *Public Procurement Guidelines – Competitive Process*, 2004

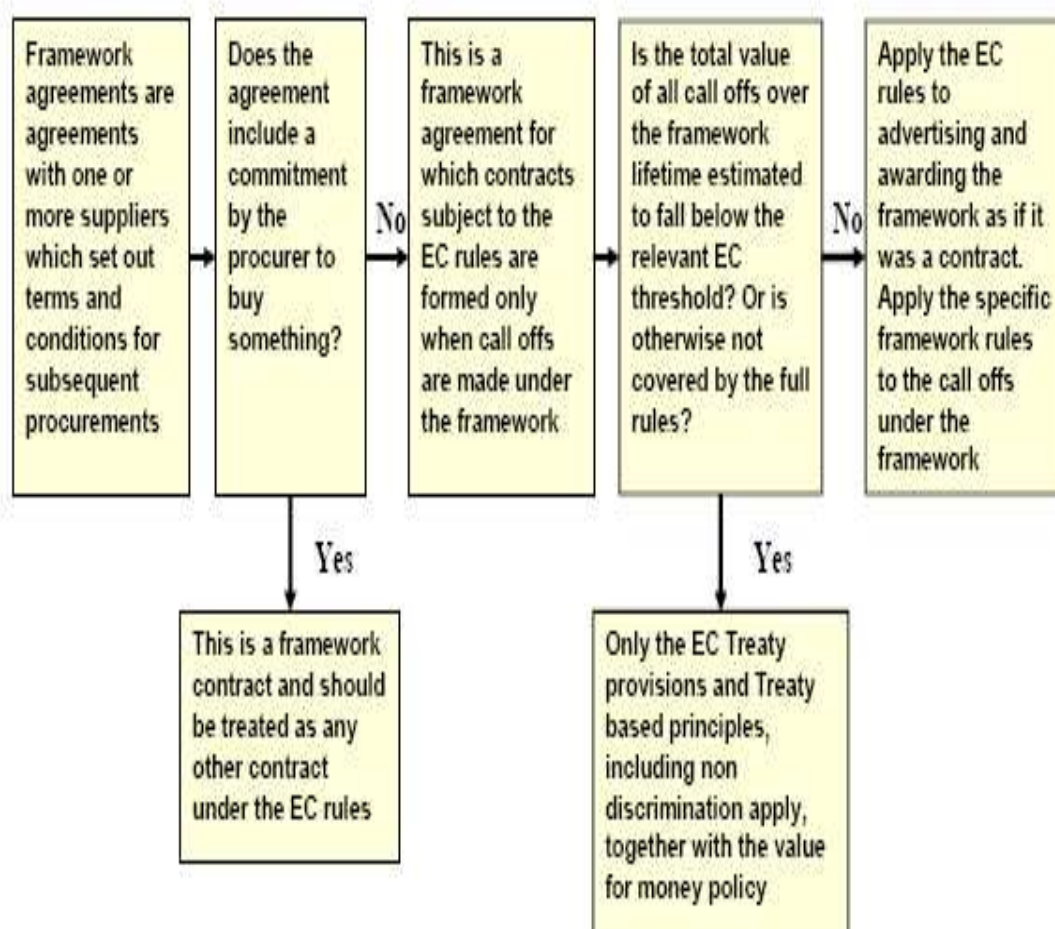
Appendix VII – ‘Framework Agreements’ and ‘Framework call off stage’⁽³⁾



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Source: OGK (U.K.) publication: “[EC Public Procurement Directives](#)”

Framework Agreements



Framework Call Off Stage

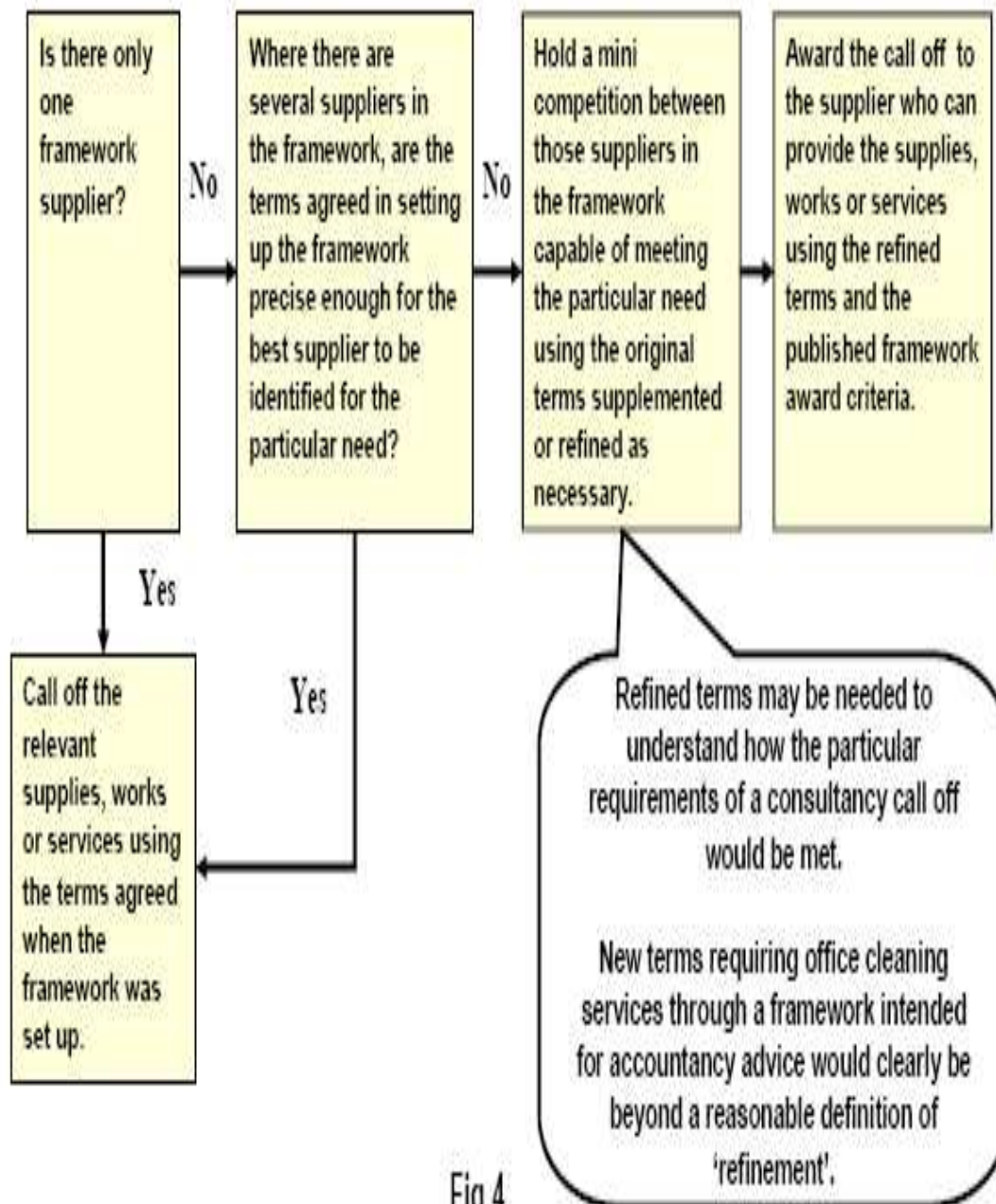
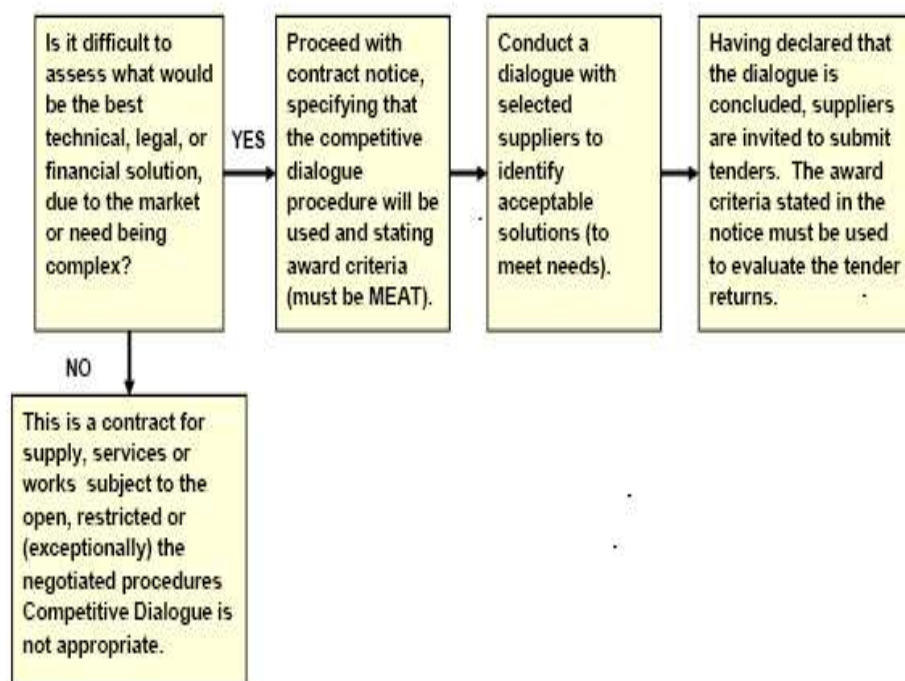


Fig 4

Appendix VIII – ‘Competitive Dialogue Procedure’⁽⁴⁾

Article 29

Competitive Dialogue



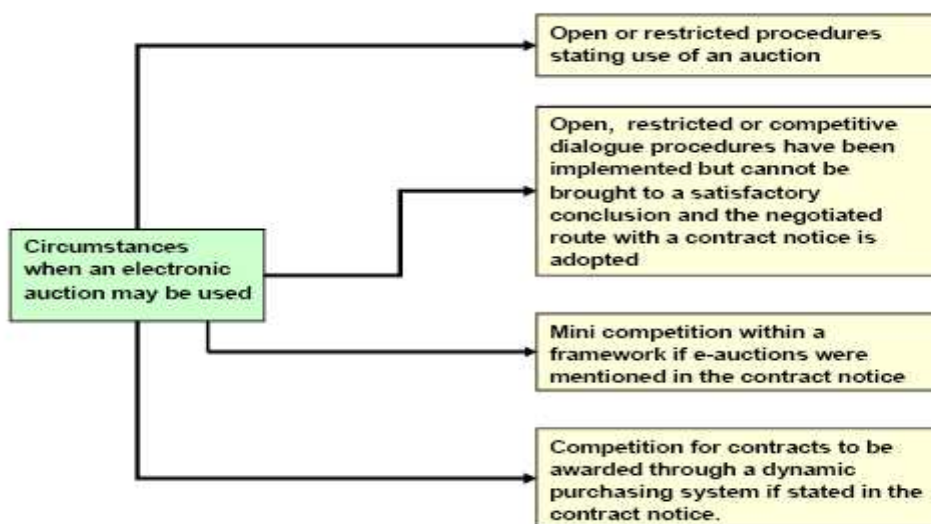
⁴

Source: OGK (U.K.) publication: "[EC Public Procurement Directives](#)"

Appendix IX – ‘Electronic Auctions’ ⁽⁵⁾

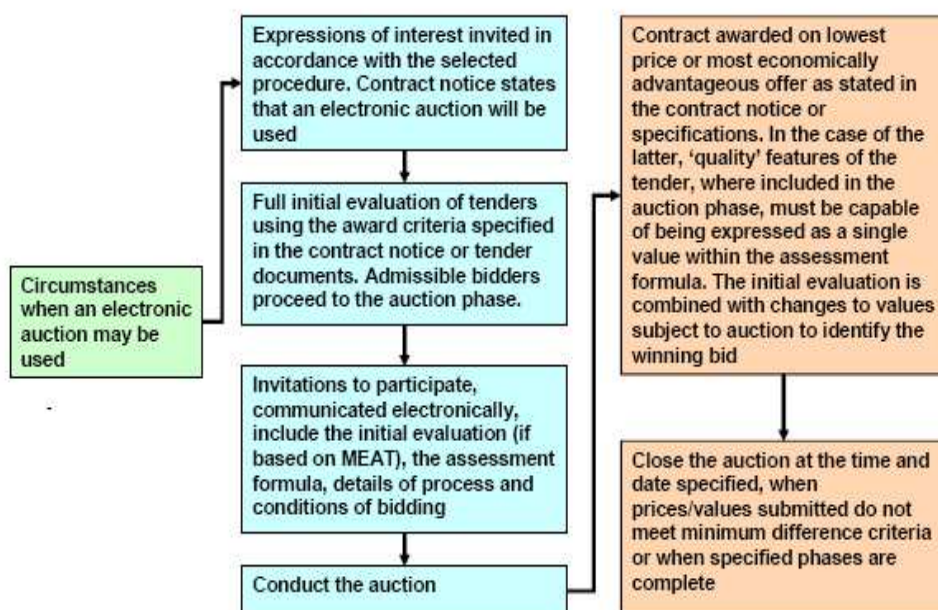
Article 54

Electronic Auctions



Article 54

Electronic Auctions

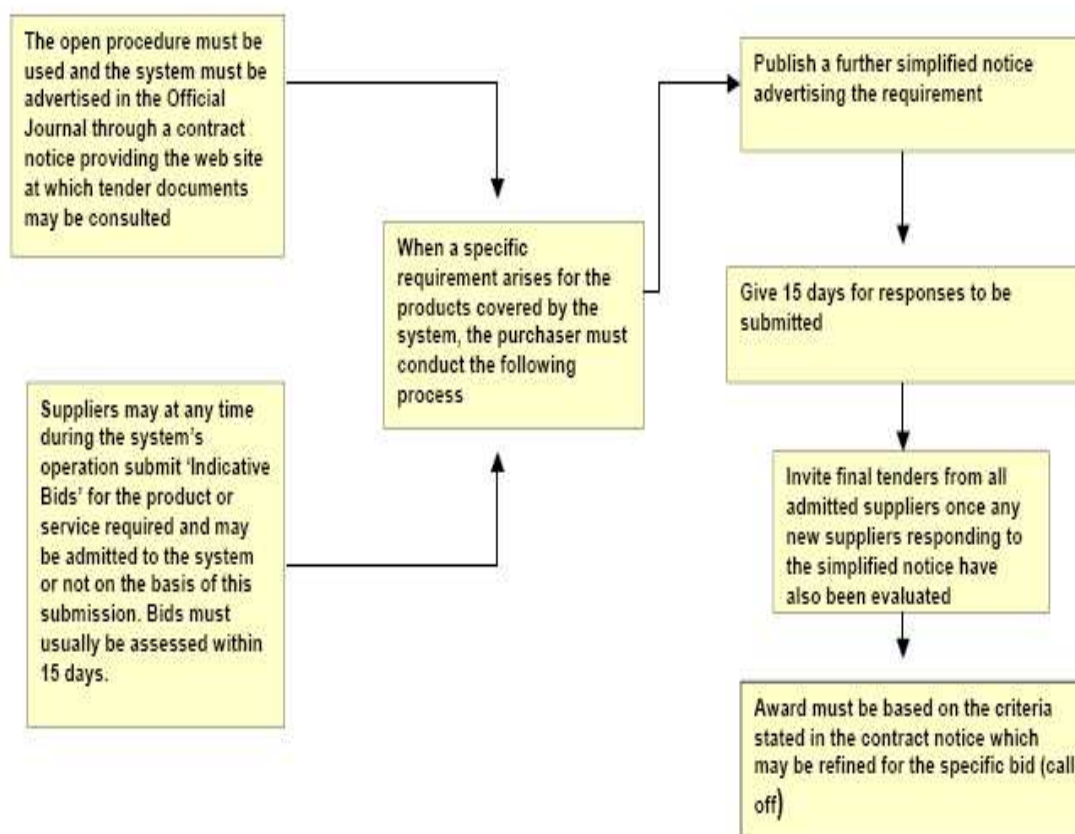


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Source: OGK (U.K.) publication: "[EC Public Procurement Directives](#)"

Appendix X – ‘Dynamic Purchasing Systems’⁽⁶⁾

Article 33



⁶ Source: OGK (U.K.) publication: “[EC Public Procurement Directives](#)”

Appendix XI: Information Sources on Public Procurement

Guidelines and Directives

EU Directive 2004/18/EC covers the procurement of public sector bodies. Directive 2004/17/EC covers the procurement of entities operating in the utilities sector. These Directives were published in OJ No L 134 of 30 April 2004 and are available on <http://eur-lex.europa.eu/en/index.htm>

General information about public procurement can be found at the following website: http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

Official Journal of the EU

Online publication of notices is available on <http://simap.eu.int>

Other relevant websites

- EU Public Procurement website : <http://simap.europa.eu>
- General EU website: <http://europa.eu>
- WTO site on the 1994 Government Procurement Agreement (GPA):http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm
- Court of Justice website: <http://www.curia.europa.eu>

Appendix XII: Case law of the European Court of Justice concerning public procurement (1982-2005)

Introduction

The Court of Justice has an important role in the European Union. According to the Treaty, it “shall ensure that in the interpretation and application of this Treaty the law is observed” (Article 19 TEU). The relevant judgments collected in this Appendix are thus an official interpretation of the EU procurement directive.

The analysis of the case law of the Court of Justice has been established - as far as possible - from the official Summaries of the Judgments published in the European Court Reports. Some relevant paragraphs of Judgments can also be found in the text.. The Summaries and Judgments are available on the website of the Court of Justice (<http://curia.europa.eu/en/content/juris/index.htm>) or on the portal “Eur-Lex” to European Union law (<http://eur-lex.europa.eu/en/index.htm>).

Reference to the factual context of each case has also be mentioned for a more “concrete” and “realistic” understanding of the rules provided by the EU procurement directive and their interpretation by the Court of Justice.

1. Judgment of 10 February 1982, case 76/81, Transporoute

- **Factual context** : see paragraphs 2 to 5 of the judgment.
- **Criteria for qualitative selection** - Proof of tenderer's good standing and qualifications - Requirement of an establishment permit not permissible [Directive 2004/18/EC, article 45 *et seq.*]

The EU procurement directive must be interpreted as precluding a Member State from requiring a tenderer in another Member State to furnish proof by any means, (for example by an establishment permit) other than those prescribed by that directive, that he satisfies the criteria laid down in those provisions and relating to his good standing and qualification.

- **Principle of non-discriminatory treatment** – Common market fundamental freedoms [Directive 2004/18/EC, article 2]

The aforementioned interpretation of the directive is also in conformity with the scheme of the treaty provisions concerning the provision of services, the purpose of those provisions being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

- **Principle of non-discriminatory treatment** [Directive 2004/18/EC, article 2]

The directive's rules regarding participation and advertising are intended to protect tenderers against arbitrariness on the part of the authority awarding contracts.

- **Award of contracts** - Abnormally low tender - Obligations of the authority awarding the contract [Directive 2004/18/EC, article 55]

When in the opinion of the authority awarding a contract a tenderer's offer is obviously abnormally low, the EU procurement directive requires the authority to seek from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal, and to allow him a reasonable time within which to submit further details.

2. Judgment of 28 March 1985, case 274/83, Commission/Italy

- **Factual context** : see paragraphs 2 to 9 of the judgment.
- **Contract award criteria** - The most economically advantageous tender [Directive 2004/18/EC, article 54]

The award of a contract on the basis of the criterion of the most economically advantageous tender presupposes that the authority making the decision is able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and is not restricted solely to the quantitative criterion of the average price stated in the tenders.

3. Judgment of 10 March 1987, case 199/85, Commission/Italy

- **Factual context** : see paragraphs 1 to 9 of the judgment.
- **Contract award procedures** - Award by private contract - Derogations from the common rules - Strict interpretation - Existence of exceptional circumstances - Burden of proof [Directive 2004/18/EC, article 31]

The derogations from the common rules must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation and in particular the award by private contract, lies on the person seeking to rely on those circumstances.

4. Judgment of 09 July 1987, joined cases 27-29/86, CEI and Bellini

- **Factual context** : see paragraphs 2 to 6 of the judgment.

- **Criteria for qualitative selection** - Economic and financial standing of tenderer - References required - Member States' discretion - Fixing of maximum value of the works which may be carried out at one time – Permissible [Directive 2004/18/EC, article 47]

The references enabling a contractor's financial and economic standing to be determined are not exhaustively enumerated by the EU procurement legislation. A statement of the total value of the works awarded to a contractor may be required from tenderers as a reference and no provision precludes a Member State from fixing the value of the works which may be carried out at one time.

- **Criteria for qualitative selection** - Economic and financial standing of tenderer - Level required - Recognition in a Member State - Probative value in regard to an awarding authority in another Member State – Limits [Directive 2004/18/EC, article 47]

The EU procurement directive must be interpreted as not precluding an awarding authority from requiring a contractor recognized in another Member State to furnish proof that his undertaking has the financial and economic standing and technical capacity required by national law even when the contractor is recognized in the Member State in which he is established in a class equivalent to that required by the national law by virtue of the value of the contract to be awarded unless the classification of undertakings in both member states concerned is based on equivalent criteria in regard to the capacities required.

5. Judgment of 20 September 1988, case 31/87, Beentjes

- **Factual context** : see paragraphs 2 to 5 of the judgment.
- **Contracting authorities** - Contracts awarded by a body which falls within the notion of the State although it is not formally part of the State administration – Included [Directive 2004/18/EC, article 1(9)]

For the purposes of the EU procurement directive, the term "the State" must be interpreted in functional terms. A body whose composition and functions are laid down by national legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award must be regarded as falling within the notion of the State. The directive thus applies to public procurement contracts awarded by that body.

- **Criteria for qualitative selection** [Directive 2004/18/EC, article 44 *et seq.*]

The authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability.

- **Criteria for qualitative selection** - Technical ability and knowledge of tenderers - Criteria for checking - Publicity requirements [Directive 2004/18/EC, article 48]

The criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors.

Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents.

- **Contract award criteria** - Most economically advantageous tender - Publicity requirements [Directive 2004/18/EC, article 54]

The criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice.

Where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents. A general reference to a provision of national legislation cannot satisfy the publicity requirement.

- **Conditions for performance of contracts** - Condition concerning employment of long-term unemployed persons - Principle of non-discriminatory treatment - Publicity requirements. [Directive 2004/18/EC, article 26]

The condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

6. Judgment of 22 September 1988, case 45/87, Commission/Ireland

- **Factual context** : see paragraphs 1 to 4 of the judgment.
- **Technical specifications** - Free movement of goods – Invitation to tender - Technical specification requiring the materials used to comply with a national standard - Not permissible [Directive 2004/18/EC, article 23]

Member States may not allow a public body for whose acts it is responsible to include in the contract specification for tender for a public works contract a clause stipulating that

the materials used must be certified as complying with a national technical standard. This may cause economic operators utilizing materials equivalent to those certified as complying with the relevant national standards to refrain from tendering.

7. Judgment of 22 June 1989, case 103/88, Fratelli Costanzo

- **Factual context** : see paragraphs 2 to 13 of the judgment.
- **Award of contracts** - Abnormally low tenders - Automatic disqualification - Not permissible - Obligation to conduct an examination procedure - Tenders subject to examination. [Directive 2004/18/EC, article 55]

The EU procurement directive prohibits the Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations. Member States may require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

8. Judgment of 5 December 1989, case 3/88, Commission/Italy

- **Factual context** : see paragraphs 1 to 4 of the judgment.
- **Principle of non-discriminatory treatment** - Equal treatment - Discrimination by reason of nationality - Prohibition - Covert discrimination – Included [Directive 2004/18/EC, article 2]

The principle of equal treatment, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

- **Activities connected with the exercise of official authority** - Contracts declared to be secret when their performance must be accompanied by special security measures - Derogations to the common market fundamental freedoms - Technical activities in the field of data processing carried out for the public authorities – Excluded [Directive 2004/18/EC, article 14]

The exception to freedom of establishment and freedom to provide services must be restricted to those of the activities which in themselves involve a direct and specific connection with the exercise of official authority.

That is not the case in respect of activities concerning the design, programming and operation of data-processing systems for the public authorities, since they are of a technical nature and thus unrelated to the exercise of official authority. It must be borne in

mind that the confidential nature of the data processed by the systems could be protected by a duty of secrecy, without there being any need to restrict freedom of establishment or freedom to provide services.

- **Contract award procedures** - Application of negotiated procedure without justification - National legislation giving companies controlled by the national public sector exclusive rights to supply goods in the field of data processing - Not permissible [Directive 2004/18/EC, article 31]

A Member State which provides that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities thereby fails to fulfil its obligations

9. Judgment of 20 March 1990, case C-21/88, Du Pont de Nemours

- **Factual context** : see paragraphs 2 to 5 of the judgment.
- **Principle of non-discriminatory treatment** - Principle of freedom of movement of goods - Reservation of 30 % of public supply contracts to undertakings located in a particular region of the national territory - Not permissible - Measure benefiting only part of domestic production - No effect [Directive 2004/18/EC, article 2]

The principle of freedom of movement of goods precludes national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts.

Although the restrictive effects of a preferential system of that kind are borne in the same measure both by products manufactured by undertakings from the Member State in question which are not situated in the relevant region and by products manufactured by undertakings established in the other Member States, the fact remains that all the products benefiting by the preferential system are domestic products. Moreover, the fact that the restrictive effect exercised by a State measure on imports does not benefit all domestic products but only some, cannot exempt the measure in question from the prohibition set out by the principle of freedom of movement of goods.

10. Judgment of 18 March 1992, case C-24/91, Commission/Spain

- **Factual context** : see paragraphs 1 to 8 of the judgment.
- **Contract award procedures** - Mandatory publication – Infringement - Application of negotiated procedure without justification - reasons of extreme urgency [Directive 2004/18/EC, article 31 and 35]

The EU procurement directive permits, in exceptional circumstances, derogations from the common rules, in particular those on advertising. That provision does not, however, apply if sufficient time is available to the authorities awarding contracts to organize an

accelerated award procedure such as that provided for in the directive.

11. Judgment of 3 June 1992, case C-360/89, Commission/Italy

- **Factual context** : see paragraphs 1 to 3 of the judgment.
- **Principle of non-discriminatory treatment** - Principle of equal treatment - Covert discrimination - Freedom to provide services - Award of public works contracts [Directive 2004/18/EC, article 2]

A Member State which reserves any public works to companies which have their registered offices in the region where the works are to be carried out and establishes a preference for temporary associations which include undertakings carrying on their main activity in that region is in breach of its obligations under the EC Treaty and the EU procurement directive.

- **Criteria for qualitative selection** - National rules favouring local undertakings – Prohibited [Directive 2004/18/EC, article 44 *et seq.*]

When a preference is to be accorded by a national legislation to temporary associations or consortia which include undertakings carrying on their main activity in the region where the works are to be carried out, such preference constitutes a criterion of selection which is not mentioned in the directive and, in particular, does not relate to any of the economic and technical standards provided for. Consequently, this national provision infringes the EU procurement Directive.

12. Judgment of 22 June 1993, case C-243/89, Commission/Denmark

- **Factual context** : see paragraphs 1 to 7 of the judgment.
- **Principle of non-discriminatory treatment** - Common market fundamental freedoms - Condition requiring the use to the greatest possible extent of national products and labour [Directive 2004/18/EC, article 2]

By letting tenders be invited, in a procedure for the award of public works contracts, on the basis of a condition requiring the use to the greatest possible extent of national materials, consumer goods, labour and equipment, a Member State fails to fulfil its obligations under the Treaty and the EU procurement directive.

- **Principle of equal treatment** [Directive 2004/18/EC, article 2]

The principle of equal treatment of tenderers lies at the very heart of the EU procurement directive whose purpose is to ensure in particular the development of effective competition in the field of public contracts

- **Contract award procedures** - Principle of equal treatment - Negotiations with a tenderer on the basis of a tender not complying with the tender conditions - Not permissible [Directive 2004/18/EC, article 2]

Observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.

By letting negotiations be conducted with the selected tenderer on the basis of a tender not complying with the tender conditions, a Member State fails to fulfil its obligations under the Treaty and the EU procurement directive.

13. Judgment of 2 August 1993, case C-107/92, Commission/Italy

- **Factual context** : see paragraphs 1 to 10 of the judgment.
- **Contract award procedures** - Mandatory publication – Infringement - Application of negotiated procedure without justification - (no) reasons of extreme urgency [Directive 2004/18/EC, article 31, article 35]

The EU procurement directive allows, in exceptional circumstances, derogations from the general rules, in particular those concerning advertising. However, such derogations are not available if the authorities awarding contracts have sufficient time to arrange for an accelerated tendering procedure which is provided in the directive.

- **Contract award procedures** - Mandatory publication – Exemption – Conditions [Directive 2004/18/EC, articles 31 and 35]

The exemption from the obligation to publish a notice of a call for tenders, is available only if three conditions are fulfilled concurrently. It requires the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible and, finally, a causal link between the unforeseeable event and the extreme urgency resulting therefrom.

14. Judgment of 14 April 1994, case C-389/92, Ballast Nedam Groep I

- **Factual context** : see paragraphs 2 to 5 of the judgment.
- **Criteria for qualitative selection** - Registration of contractors - Suitability to pursue the professional activity - Relevant entity - Application by a holding company not itself carrying out the works but availing itself, for the purpose of proving its standing and competence, of references relating to its subsidiaries - Whether permissible – Conditions [Directive 2004/18/EC, article 44 *et seq.*]

The EU procurement directive must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an appli-

cation for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works.

15. Judgment of 19 April 1994, case C-331/92, *Gestión Hotelera Internacional*

- **Factual context** : see paragraphs 2 to 10 of the judgment.
- **Scope of the EU procurement directive** - Mixed contract relating both to the performance of works and to the assignment of property - Performance of the works incidental to the assignment of property - Exclusion [Directive 2004/18/EC, article 1 (2) by analogy]

A mixed contract relating both to the performance of works and to the assignment of property should not be considered as works if the performance of the works is merely incidental to the assignment of property.

16. Judgment of 26 April 1994, case C-272/91, *Commission/Italy*

- **Factual context** : see paragraphs 1 and 2 of the judgment.
- **Contract award procedures** - Common market fundamental freedoms - Invitation to tender restricting the right to tender for the concession of the lottery computerization system to bodies controlled by the public sector - Contract not relating to activities connected with the exercise of official authority [Directive 2004/18/EC, article 2]

The provisions of the Treaty on the common market fundamental freedoms and the EU procurement directive are infringed where a Member State restricts participation in a contract for the concession of the lottery computerization system to bodies the majority of whose capital is held by the public sector.

The contract, which relates to the premises, supplies, installations, maintenance, operation and transmission of data and everything else that is necessary for the conduct of the lottery, does not involve any transfer of responsibility to the concessionaire for the various activities inherent in the lottery. The derogation to the fundamental freedoms regarding activities connected with the exercise of official authority does therefore not apply.

17. Judgment of 3 May 1994, case C-328/92, *Commission/Spain*

- **Factual context** : see paragraphs 1 to 7 of the judgment.
- **Contract award procedures** - Pharmaceutical products and specialities - Application of negotiated procedure without justification - (no) reasons of extreme urgency -

Derogations from common rules - Strict interpretation - Existence of exceptional circumstances - Burden of proof [Directive 2004/18/EC, article 31]

The derogations from the common rules must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances. They cannot in any way justify general and indiscriminate recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to social security institutions.

If a derogation is to apply, it is not sufficient for the pharmaceutical products and specialities to be protected by exclusive rights; they must also be capable of being manufactured or delivered only by a particular supplier, a requirement which is satisfied only with respect to those products and specialities for which there is no competition in the market.

With regard to the derogation on the grounds of urgency although, having regard to the freedom of doctors to prescribe pharmaceutical products, an urgent need for a particular pharmaceutical speciality may well arise in a hospital pharmacy, that cannot justify systematic recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to hospitals. In any event, even if the requirement of urgency were considered to have been satisfied in a particular case, the derogation provided for by that provision may be relied on only if all the conditions it lays down are satisfied cumulatively.

18. Judgment of 24 January 1995, case C-359/93, Commission /Netherlands

- **Factual context** : see paragraphs 1 to 9 of the judgment.
- **Contract award procedures** – Tender notices - Information which must be given in tender notices - Information concerning the opening of tenders - Technical specifications - Use of technical specifications defined by reference to a trade mark – Condition [Directive 2004/18/EC, article 23]

A Member State fails to fulfil its obligations under the EU procurement directive where it:

1. fails to indicate in a tender notice the persons authorized to be present at the opening of tenders or the date, time and place of opening, when that information is compulsorily and unconditionally required by the directive in order to enable potential suppliers to discover the identity of their competitors and to check whether they meet the criteria laid down for qualitative selection;
2. and fails in such notice to add the words "or equivalent" after a technical specification defined by reference to a particular trade mark, when the directive requires them to be added and when failure to do so may impede the flow of imports in intra-Community trade, contrary to the Treaty.

19. Judgment of 28 March 1996, case C-318/94, Commission/Germany

- **Factual context** : see paragraphs 1 to 9 of the judgment.
- **Contract award procedures** - Application of negotiated procedure without justification - (no) reasons of extreme urgency - Refusal by a body within a Member State, during the procedure provided for under national legislation, to give its approval for a public works project - Refusal not an unforeseeable event within the meaning of the directive [Directive 2004/18/EC, article 31]

The fact that a body in a Member State which must, in the procedure for approval of public works projects provided for under national legislation, approve a project may, before expiry of the period laid down for that purpose, raise objections for reasons which it is entitled to put forward cannot constitute an unforeseeable event.

A Member State whose competent authorities, after deciding not to award a public works contract by open procedure by reason of the delay resulting from the refusal by a body to approve the work plans originally envisaged, award a contract for partial work by negotiated procedure without prior publication of a tender notice, will therefore be in breach of its obligations under the directive

20. Judgment of 25 April 1996, case C-87/94, Commission/Belgium

- **Factual context** : see paragraphs 1 and 9 to 28 of the judgment.
- **Contract award criteria – Variants - Principle of equal treatment - Principle of transparency** - Taking into account, after the opening of tenders of amendments made to one of them - Contract awarded on the basis of figures not corresponding to the prescriptive requirements of the contract documents - Taking into account variants of the award criteria not mentioned either in the contract documents or in of the tender notice - Breach [Directive 2004/18/EC, article 2 and 54]

It follows from the EU procurement directive that the contracting entity's procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency.

A Member State which, in the procedure for the award of a public contract,

- 1) takes into account tender amendments submitted by a tenderer after the opening of tenders,
- 2) awards the contract to the same tenderer on the basis of figures which do not correspond to the prescriptive requirements of the contract documents,
- 3) takes into account, when comparing tenders for certain lots, the cost-saving features suggested by the same tenderer, without having referred to them in the contract documents or in the tender notice,

fails to fulfil that obligation.

21. Judgment of 18 December 1997, case C-5/97, Ballast Nedam Groep II

- **Factual context** : see paragraphs 2 to 5 of the judgment.
- **Criteria for qualitative selection** - Suitability to pursue the professional activity - Economic and financial standing - Technical and/or professional ability - Registration of contractors - Relevant entity – Obligation to take into accounts the resources of companies belonging to a holding in assessing suitability of dominant legal person of this group [Directive 2004/18/EC, article 45 *et seq.*]

The EU procurement directive is to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take into account the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in the directive.

22. Judgment of 15 January 1998, case C-44/96, Mannesmann

- **Factual context** : see paragraphs 6 to 16 of the judgment.
- **Contracting authorities - Body governed by public law** – Definition - Needs in the general interest, not having an industrial or commercial character - Body such as the Austrian State printing office - Included - Public works contracts - Definition - Works contracts awarded by the body in question - Included irrespective of the nature of the contract [Directive 2004/18/EC, article 1 (9)]

The EU procurement directive provides that bodies governed by public law mean any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, having legal personality and closely dependent on the State, regional or local authorities or other bodies governed by public law. The three conditions set out in the directive are cumulative

An entity such as the Austrian State Printing Office, must be regarded as a body governed by public law and thus as a contracting authority, in so far as:

- a) the documents which this office must produce are closely linked to public order and the institutional operation of the State and require guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed. In that respect the condition that the body must have been established for the 'specific' purpose of meeting needs in the general interest, not having an industrial or commercial character, does not mean that it should be entrusted only, or even primarily, with meeting such needs;
- b) this office has legal personality;

- c) the Director-General of this office is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries, this office is subject to scrutiny by the Court of Auditors, the majority of its shares are still held by the Austrian State and a State control service is responsible for monitoring the printed matter which is subject to security measures.

Contracts entered into by that entity are to be considered to be public contracts whatever their nature and irrespective of the relative proportion, whether large or small, which they represent of the activities of the State Printing Office pursued for the purpose of meeting needs not having an industrial or commercial character.

- **Contracting authorities - Body governed by public law** – Definition - Undertaking carrying on commercial activities and owned by a contracting authority – Excluded - Contract relating to a works project which, from the outset, falls within the objects of an undertaking which is not a contracting authority – Excluded [Directive 2004/18/EC, article 1(9)]

An undertaking which carries on commercial activities and in which a contracting authority, has a majority shareholding is not to be regarded as a body governed by public law within the meaning of the provisions of the EU procurement directive.

Furthermore, a public contract is not subject to the provisions of the directive when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when the contracts relating to that project were entered into by a contracting authority on behalf of that undertaking.

23. Judgment of 17 September 1998, case C-323/96, Commission/Belgium

- **Factual context** : see paragraphs 1 to 5 of the judgment.
- **Contracting authorities - State** - Definition - Bodies exercising legislative, executive and judicial powers - Bodies of the federal authorities of a federal State – Included [Directive 2004/18/EC, article 1(9)]

The term “the State” referred to in the definition of “contracting authority” in the EU procurement directive necessarily encompasses all the bodies which exercise legislative, executive and judicial powers. The same is true of the bodies which, in a federal State, exercise those powers at federal level.

24. Judgment of 10 November 1998, case C-360/96, Arnhem and Rheden/BFI

- **Factual context** : see paragraphs 5 to 23 of the judgment.
- **Contracting authorities – Body governed by public law** - Needs in the general interest, not having an industrial or commercial character - Meaning - Existence of

private undertakings capable of satisfying such needs - Not relevant [Directive 2004/18/EC, article 1(9)]

The provision stipulating that “Body governed by public law means any body ... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”, must be interpreted as meaning that the Community legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

The term “needs in the general interest not having an industrial or commercial character” does not exclude needs which are or can be satisfied by private undertakings as well. The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations.

The removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

- **Contracting authorities** - Body governed by public law - Status not dependent on the relative importance of activities designed to satisfy needs in the general interest and of the way they are carried out [Directive 2004/18/EC, article 1(9)]

The status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern.

- **Contracting authorities** - Needs in the general interest, not having an industrial or commercial character - Legal form of provisions defining such needs - Not relevant [Directive 2004/18/EC, article 1 (9)]

The term “contracting authority” must be interpreted in functional terms. Therefore, the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal forms of the provisions in which those needs are mentioned being immaterial in that respect.

25. Judgment of 17 December 1998, case C-353/96, Commission/Ireland

- **Factual context** : see paragraphs 8 to 19 of the judgment.

- **Contracting authorities – Body governed by public law** - Bodies corresponding to legal persons governed by public law - Public authorities whose public supply contracts are subject to control by the State [Directive 2004/18/EC, article 1 (9)]

A body such as the Irish Forestry Board, although established in the form of a private company, is a contracting authority within the meaning of the EU procurement directive. Such a body, which has legal personality and does not award public contracts on behalf of the State or a regional or local authority, cannot be regarded as being the State or a regional or local authority, but constitutes a body governed by public law within the meaning of the EU procurement directive, where the State may exercise control, at least indirectly, over the award of public supply contracts.

26. Judgment of 16 September 1999, case C-27/98, *Fracasso and Leitschutz*

- **Factual context** : see paragraphs 8 to 17 of the judgment.
- **Award of contracts** – Whether it is compulsory to award the contract to the sole tenderer considered suitable - No such obligation [Directive 2004/18/EC, article 41 (1)]

The EU procurement directive must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable. In the first place, the directive contains no provision expressly requiring a contracting authority which has put out an invitation to tender, to award the contract to the sole tenderer; secondly, the contracting authority is not required to complete a procedure for the award of a public works contract.

27. Judgment of 18 November 1999, case C-107/98, *Teckal*

- **Factual context** : see paragraphs 8 to 25 of the judgment.
- **Scope of the directive - Contracting authorities** - “In-house”-service or public procurement contract? - Contracts awarded by a contracting authority to a distinct and independent body - Covered - Where the successful tenderer is itself a contracting authority – Irrelevant [Directive 2004/18/EC, article 1 (9)]

The EU procurement directive is applicable in cases where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

However this does not include the position where the local authority exercises over a legally distinct person a form of control similar to that exercised over its own departments and, at the same time, the person carries out the essential part of its activities together with the controlling local authority or authorities.

28. Judgment of 18 November 1999, case C-275/98, Unitron Scandinavia

- **Factual context** : see paragraphs 6 to 14 of the judgment.
- **Contract award procedures - Contracting authorities** - Where the contracting authority grants to a body other than such an authority the right to engage in a public service - Obligatory to require compliance with the principle of non-discrimination - No obligation to require compliance with tendering procedures [Directive 2004/18/EC, article 3]

Article 3 of the EU procurement directive is to be interpreted as follows:

1. it requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality;
2. it does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by the Directive.

29. Judgment of 2 December 1999, case C-176/98, Holst Italia

- **Factual context** : see paragraphs 8 to 16 of the judgment.
- **Criteria for qualitative selection** - Suitability to pursue the professional activity - Economic and financial standing - Technical and/or professional ability - Service provider relying on the standing of another company as proof of its own standing – Conditions [Directive 2004/18/EC, articles 45 to 52]

The EU procurement directive is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract.

30. Judgment of 26 September 2000, case C-225/98, Commission/France

- **Factual context** : see paragraphs 14 to 26 of the judgment.
- **Contract award procedures - Common rules on advertising** - Publication of a prior information notice by the contracting authorities - Scope - Limits [Directive 2004/18/EC, article 35]

The purpose of the rules on advertising laid down in the EU procurement directive,

including publication of the prior information notice, is to inform all potential tenderers at the Community level in good time about the main points of a contract in order that they may submit their tender within the time-limits. It follows from the provisions of the directive that the publication of a prior information notice is compulsory only where the contracting authorities exercise their option to reduce the time-limits for the receipt of tenders.

- **Contract award criteria** - Condition linked to the campaign against unemployment - Permissible - Conditions - Rules on advertising. [Directive 2004/18/EC, article 53 (1) (a)].

The criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit. In the latter case, the contracting authorities are required to state these criteria in the contract notice or the contract documents.

None the less, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination.

Furthermore, even if such a criterion is not in itself incompatible with the EU procurement directive, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising. It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence.

- **Contract award procedures** - Number of candidates invited to tender in the context of a restricted procedure - Limitation to a maximum number of five tenderers - Not permissible [Directive 2004/18/EC, article 44]

A Member State which, in contract notices, limits to five the number of candidates invited to tender in the context of a restricted procedure fails to fulfil its obligations under the EU procurement directive.

Although it is true that the directive does not provide for a minimum number of candidates which the contracting authorities are required to invite where they do not opt in favour of fixing a range, the Community legislature none the less considered that, in the context of a restricted procedure and where the contracting authorities prescribe a range, a number of candidates below five is not sufficient to ensure genuine competition. The same must be true a fortiori in cases where the contracting authorities opt for inviting a maximum number of candidates.

It follows that the number of undertakings which a contracting authority intends to invite to tender in the context of a restricted procedure cannot ever be less than five.

- **Criteria for qualitative selection** - Discriminating technical specifications - Designation of the lots by reference to classifications of national professional organisations - Proof of the tenderer's professional qualification - Requirement of proof of registration with the national Ordre des Architectes - Not permissible [Directive 2004/18/EC, article 2, articles 45 to 52]

A Member State which, in contract notices, uses as the mode of designating the lots references to classifications of national professional organisations and also requires from the designer, as minimum standards for participation, proof of registration with the Ordre des Architectes fails to fulfil its obligations under the Treaty and under the EU procurement directive.

To the extent that the designation of the lots by reference to classifications of French professional organisations is likely to have a dissuasive effect on tenderers who are not French, it thereby constitutes indirect discrimination and, therefore, a restriction on the freedom to provide services. Moreover, first, the requirement of proof that the designer is registered with the Ordre des Architectes can only give advantage to the provision of services by French architects, which constitutes discrimination against Community architects and, accordingly, a restriction on their freedom to provide services. Second, the EU procurement directive precludes a Member State from requiring a tenderer established in another Member State to furnish proof by any means other than those prescribed in that directive, that he satisfies the criteria laid down in those provisions and relating to his qualifications.

31. Judgment of 3 October 2000, case C-380/98, University of Cambridge

- **Factual context** : see paragraphs 2 to 13 of the judgment.
- **Contracting authorities** – Bodies governed by public law – Expression “financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law” – Definition - Research awards and grants, student grants – Included – Payments made for the provision of services – Excluded – Percentage of public financing – Assessment [Directive 2004/18/EC, article 1 (9)]

In the definition of “Bodies governed by public law” provided by the EU procurement directive, the expression “financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law”, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.

On a proper construction, the term “for the most part”, cited above, means more than

half. In order to determine correctly the percentage of public financing of a particular body, account must be taken of all of its income, including that which results from a commercial activity.

- **Contracting authorities** – Bodies governed by public law – Financed by the State – Definition – Percentage of public financing – Reference period – Determination [Directive 2004/18/EC, article 1 (9)]

The decision as to whether a body such as a university is a contracting authority within the meaning of the EU procurement directive must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a contracting authority for the purposes of the directive when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of the directive until such time as the relevant procedure has been completed.

32. Judgment of 5 October 2000, case C-16/98, Commission/France

- **Factual context** : see paragraphs 12 to 22 of the judgment.
- **Public works contract** - Definition - Criterion - Economic and technical function of the result of the works - Artificial splitting of a single work – Assessment [Directive 2004/18/EC, article 1 (2)(b) , article 9 (3)]

The existence of a work must be assessed in the light of the economic and technical function of the result of the works concerned in order to determine whether several lots of a single work have been artificially split. An electricity supply network and a street lighting network have a different economic and technical function and works on the electricity supply and street lighting networks cannot be considered to constitute lots of a single work artificially split.

- **Public works contract** - Definition - Existence of a single contracting entity and possibility of a single undertaking's carrying out the whole of the works - Not decisive criteria [Directive 2004/18/EC, article 1 (2)(b)]

While the existence of a single contracting entity and the possibility of a Community undertaking's carrying out the whole of the works described in the contracts concerned may, according to circumstances, constitute corroborative evidence of the existence of a work within the meaning of the EU procurement directive, they cannot constitute decisive criteria on that point. The definition of the term “work” in the Directive does not make the existence of a work dependent on matters such as the number of contracting entities or whether the whole of the works can be carried out by a single undertaking.

- **Principle of non-discrimination between tenderers** - Scope [Directive 2004/18/EC, article 2]

The principle of non-discrimination between tenderers applies to all the stages of the tendering procedure and not only from the time when a contractor submits a tender.

That interpretation is consistent with the purpose of the directive which is to open up the contracts to which it applies to Community competition. That purpose would be undermined if a contracting entity could organise a tendering procedure in such a way that contractors from Member States other than that in which the contracts are awarded were discouraged from tendering.

It follows that the directive, in prohibiting any discrimination between tenderers, also protects those who are discouraged from tendering because they have been placed at a disadvantage by the procedure followed by a contracting entity.

33. Judgment of 7 December 2000, case C-94/99, ARGE Gewässerschutz

- **Factual context** : see paragraphs 12 to 16 of the judgment.
- **Principle of equal treatment** - Participation of tenderers receiving subsidies from contracting authorities enabling them to submit tenders at prices lower than those of their competitors - No covert discrimination [Directive 2004/18/EC, article 2]

The mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in the EU procurement directive. The mere fact that a contracting authority allows such bodies to take part in a procedure for the award of a public service contract does not constitute either covert discrimination or a restriction contrary to the Treaty.

34. Judgment of 7 December 2000, case C-324/98, Telaustria Verlag

- **Factual context** : see paragraphs 13 to 27 of the judgment.
- **Scope of the EU procurement directive** - Public service concession – Excluded – Obligation of transparency of the contracting authority [Directive 2004/18/EC, article 2 and 17]

Notwithstanding the fact that, as Community law stands at present, public service concessions are excluded from the scope of the EU procurement directive, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality.

The obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

35. Judgment of 1st February 2001, case C-237/99, Commission/France

- **Factual context** : see paragraphs 4 to 20 of the judgment.
- **Contracting authorities - Bodies governed by public law** - Definition - Low-rent housing corporations – Included – Conditions [Directive 2004/18/EC, article 1(9)]

A body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law.

With regard to that third condition characterising a body governed by public law : since management supervision constitutes one of the three criteria referred to in the directive, it must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of the managerial organs of the body.

Consequently, low-rent housing corporations which meet needs in the general interest, not having an industrial or commercial character, which have legal personality and whose management is subject to supervision by the public authorities which allows the latter to influence their decisions in relation to public contracts, fulfil the three cumulative conditions which characterise a body governed by public law within the meaning of the EU procurement directive and are contracting authorities.

36. Judgment of 10 May 2001, joined cases C-223 and 260/99, Agora and excelsor.

- **Factual context** : see paragraphs 4 to 16 of the judgment.
- **Contracting authorities - Body governed by public law** - Meaning - Needs in the general interest, not having an industrial or commercial character –Body which carries on activities relating to the organization of fairs and exhibitions, which operates according to performance criteria and in a competitive environment - Exclusion [Directive 2004/18/EC, article 1 (9)]

A body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, with legal personality and closely dependent on the State, regional or local authorities or

other bodies governed by public law. The first condition is not met by a body whose object is to carry on activities relating to the organization of fairs, exhibitions and other similar initiatives, which is non-profit-making but is administered according to the criteria of performance, efficiency and cost-effectiveness, and which operates in a competitive environment.

37. Judgment of 12 July 2001, case C-399/98, Ordine degli Architetti

- **Factual context** : see paragraphs 16 to 37 of the judgment.
- **Contract award procedures** - Purpose – Effectiveness [Provisions of the EC Treaty concerning the common market fundamental freedoms]

The EU procurement directive aims to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public contracts in order to open up such contracts to genuine competition. The development of such competition entails the publication at Community level of contract notices. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism.

- **Scope of the EU procurement directive** - National rule providing for the direct execution of infrastructure works of a value equal to or exceeding the ceiling fixed by the directive by a holder of a building permit or approved development plan by way of set-off against a contribution - Not permissible [Directive 2004/18/EC, articles 1(2)(b) and 1(9)]

The EU procurement directive precludes national urban development legislation under which, without the procedures laid down in the directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

38. Judgment of 18 October 2001, case C-19/00, SIAC Construction

- **Factual context** : see paragraphs 4 to 27 of the judgment.
- **Award of contracts** - Principle of equal treatment - Scope [Directive 2004/18/EC, article 2]

Compliance with the principle that tenderers must be treated equally, which lies at the very heart of the EU procurement directive, requires that tenderers be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority

- **Contract award criteria** - Most economically advantageous tender – Choice of criteria by the awarding authority – Limits [Directive 2004/18/EC, article 54]

The EU procurement directive does not list exhaustively the criteria which may be accepted as criteria for the award of a public works contract. The choice of criteria made by the appointing authority may, however, relate only to criteria designed to identify the offer which is economically the most advantageous and must not confer on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract to a tenderer.

- **Contract award criteria** - Award criterion relating to a factual element that could be known precisely only after the contract had been awarded - Whether permissible - Conditions - Compliance with the principle of equal treatment [Directive 2004/18/EC, article 2 and 54]

In the case of the award of a public contract coming within the scope of the EU procurement directive, the use of a criterion for awarding the contract which relates to a factual element that will be known precisely only after the contract has been awarded will be compatible with the requirements of equal treatment of tenderers only on condition that the transparency and objectivity of the procedure are respected.

This presupposes that the criterion is mentioned in the contract documents or contract notice, that it is there formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret it in the same way, and that the adjudicating authority must keep to that interpretation throughout the procedure and apply the criterion in question objectively and uniformly to all tenderers.

Objectivity may be guaranteed by recourse to the professional opinion of an expert, on condition that his report is based, in all essential respects, on objective factors regarded in good professional practice as being relevant and appropriate to the assessment made

39. Judgment of 27 November 2001, joined cases C-285 and 286/99, Lombardini and Mantovani

- **Factual context** : see paragraphs 6 to 26 of the judgment.
- **Award of contracts** - Abnormally low tenders - Automatic exclusion - Not permissible - Duty to use an examination procedure allowing the parties to be heard - Application of a mathematical criterion for identifying abnormally low tenders not revealing the exclusion threshold to the undertakings concerned before submission of their tenders - Whether permissible - Conditions - Exclusion of certain justifications - Not permissible [Directive 2004/18/EC, article 55]

The EU procurement directive must be interpreted as precluding legislation and administrative practice of a Member State which,

3. allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions, and,
4. require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data.

However, provided all the requirements it imposes are otherwise complied with and the aims pursued by the EU procurement directive are not defeated, that directive does not in principle preclude legislation and administrative practice of a Member State which, in the matter of identifying and examining abnormally low tenders,

1. require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and,
2. apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file, the result produced by applying that calculation method having, however, to be capable of being reconsidered by the contracting authority.

40. Judgment of 17 September 2002, case C-513/99, Concordia Bus Finland

- **Factual context** : see paragraphs 8 to 35 of the judgment.
- **Contract award criteria** - Most economically advantageous tender - Protection of the environment - Whether permissible - Conditions - Criterion which can be satisfied only by a few undertakings, one of which belongs to the contracting entity - No effect - Principle of equal treatment - Principle of non-discriminatory treatment [Directive 2004/18/EC, articles 2, 26, 23 (6), 48 (2)(f), 50, 53]

The EU procurement directive must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice,

and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

Moreover, the principle of equal treatment does not preclude the taking into consideration of such criteria solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

41. Judgment of 14 November 2002, case C-411/00, Felix Swoboda

- **Factual context** : see paragraphs 17 to 23 of the judgment.
- **Contract award procedures**- Public service contracts - Qualification of services (A or B) – Services falling partly within Annex II A and partly within Annex II B - Determination of the applicable regime – Criteria – Main purpose of the contract – Excluded – Comparison of the value of the services [Directive 2004/18/EC, article 22]

The determination of the regime applicable to public service contracts composed partly of services falling within Annex II A and partly of services falling within Annex II B to the EU procurement directive does not depend on the main purpose of those contracts and is to be made in accordance with the unequivocal test laid down by that directive, based on the comparison of the value of the services covered by Annex II A with that of the services covered by Annex II B.

- **Contract award procedures**- Public service contracts – Contract with a single purpose but composed of several services – Classification in Annexes II A and II B – Whether permissible – Obligation to award separate contracts when the value of services in Annex II B exceeds that of the services falling within Annex II A – No such obligation [Directive 2004/18/EC, article 22]

In the context of the award of a contract with a single object but composed of several services, the classification of those services in Annexes II A and II B to the EU procurement directive, far from depriving it of its effectiveness, is in accordance with the system laid down by the directive. When, following the classification thus made by reference to the CPC nomenclature, the value of the services falling within Annex II B exceeds the value of the services falling within Annex II A, there is no obligation on the part of the contracting authority to separate from the contract in question the services referred to in Annex II B and to award separate contracts in respect of them.

The position would only be different if the contracting authority artificially grouped in one contract services of different types without there being any link arising from a joint purpose or operation, with the sole purpose of increasing the proportion of the services referred to in Annex II B in the contract and thus of avoiding, by way of the second sentence of Article 10, the application of its provisions in full.

42. Judgment of 12 December 2002, case C-470/99, Universale-Bau

- **Factual context** : see paragraphs 14 to 39 of the judgment.

- **Contracting authorities - Body governed by public law** – Definition – Body which was not established to satisfy specific needs in the general interest, not having an industrial or commercial character, but in the meantime satisfying such needs – Covered [Directive 2004/18/EC, article 1 (9)]

The EU procurement directive provides that a ‘body governed by public law’ means, among others conditions, a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. For the purposes of deciding whether a body satisfies that condition, it is necessary to consider the activities which it actually carries on.

It follows that a body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since actually satisfied, fulfils that condition provides that the assumption of responsibility for the satisfaction of those needs can be established objectively.

- **Criteria for qualitative selection** – Restricted procedure – Rules laid down in advance for weighting the criteria for selecting the candidates invited to tender – Publication required [Directive 2004/18/EC, articles 44 to 52]

The EU procurement directive is to be interpreted as meaning that where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules for weighting the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or tender documents.

Such an interpretation is the only one which is apt to guarantee an appropriate level of transparency and, therefore, compliance with the principle of equal treatment in the procedures awarding contracts to which that directive applies.

43. Judgment of 23 January 2003, case C-57/01, Makedoniko Metro and Michaniki

- **Factual context** : see paragraphs 14 to 31 of the judgment.
- **Contract award procedures** - Group of tenderers – National rules prohibiting a change in the composition of the group after submission of tenders – Whether permissible [Directive 2004/18/EC, article 4]

The EU procurement directive does not preclude national rules which prohibit a change in the composition of a group of contractors taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders.

Rules about the composition of such consortia are a matter for the Member States,

since the only provision of the directive dealing with groups of contractors is confined, first, to stating that tenders may be submitted by such groups and, second, to preventing them from being required to assume a specific legal form before the contract has been awarded to the group selected, and contains no provision about the composition of such groups.

44. Judgment of 27 February 2003, case C-373/00, Adolf Truley

- **Factual context** : see paragraphs 4 to 18 of the judgment.
- **Contracting authorities - Body governed by public law** – Needs in the general interest - Definition - Needs in the general interest, not having an industrial or commercial character [Directive 2004/18/EC, article 1 (9)]

In order for a body to be designated as a “body governed by public law” and, therefore, a “contracting authority” within the meaning of the EU procurement directive, that body must meet needs in the general interest which are not industrial or commercial in character, have legal personality and depend heavily, for its financing, management or supervision, on the State, regional or local authorities or other bodies governed by public law.

The term “needs in the general interest” is an autonomous concept of Community law which must be interpreted in the light of the context and the aims of the directive.

The activities of funeral undertakers may indeed be regarded as meeting a need in the general interest. First, such activities are linked to public policy in so far as the State has a clear interest in exercising close control over the issue of certificates such as birth and death certificates and, second, the State may be justified in retaining influence over those activities on manifest grounds of hygiene and public health. The fact that a regional or local authority is legally obliged to arrange funerals - and, where necessary, to bear the costs of those funerals - where they have not been arranged within a certain period after a death certificate has been issued constitutes evidence that there is such a need in the general interest.

With respect to the question whether the activities of funeral undertakers meets a need in the general interest, not having an industrial or commercial character within the meaning of the directive, the existence of significant competition, although not entirely irrelevant, does not, of itself, allow the conclusion to be drawn that there is no need in the general interest not having an industrial or commercial character.

The national court must assess whether or not there is such a need, taking account of all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity.

- **Contracting authorities - Body governed by public law** – Criterion of management supervision by public authorities – Mere review insufficient [Directive 2004/18/EC, article 1 (9)]

A mere review does not satisfy the criterion of management supervision by the State, regional or local authorities or other bodies governed by public law in the EU procurement directive since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts.

That criterion is, however, satisfied where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds, through another company, all the shares in the body in question.

45. Judgment of 10 April 2003, joined cases C-20 and 28/01, Commission/Germany

- **Factual context** : see paragraphs 6 to 18 of the judgment.
- **Contract award procedures** – Negotiated procedure without prior publication of a contract notice – Conditions governing permissibility – Technical or artistic reasons, or reasons connected with the protection of exclusive rights – Meaning – Environmental protection – Whether included [Directive 2004/18/EC, articles 2, 31 (1)(b), 50]

A contracting authority may take into account criteria relating to environmental protection at the various stages of a procedure for the award of public contracts.

Therefore, environmental protection is capable of constituting a technical reason for the purposes of the provisions in the EU procurement directive stipulating that contracting authorities may award public contracts by negotiated procedure without prior publication of a contract notice when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the works, supply and services may be provided only by a particular economic operator.

However, the procedure used where there is a technical reason of that kind must comply with the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on common market fundamental freedoms.

46. Judgment of 15 May 2003, case C-214/00, Commission/Spain

- **Factual context** : see paragraphs 11 to 29 of the judgment.

- **Contracting authorities – Body governed by public law** – Definition – National legislation excluding commercial companies under public control – Not permissible [Directive 2004/18/EC, article 1 (9)]

National legislation that automatically excludes commercial companies under public control from the scope *ratione personae* of the EU procurement directive is not a correct transposition of the term “contracting authority” appearing in that directive.

An entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority within the meaning of the EU procurement directive, since the application of that directive to an entity which fulfils the three cumulative conditions set out therein, according to which it must be a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law, cannot be excluded solely on the basis of the fact that, under the national law to which it is subject, its legal form and rules which govern it fall within the scope of private law.

47. Judgment of 22 May 2003, case C-18/01, Korhonen and others

- **Factual context** : see paragraphs 4 to 14 of the judgment.
- **Contracting authorities - Body governed by public law** – Definition - Company set up by a regional or local authority to promote the development of industrial or commercial activities on the territory of that authority - Needs in the general interest, not having an industrial or commercial character – Assessment by the national courts - Criteria [Directive 2004/18/EC, article 1 (9)]

A limited company established, owned and managed by a regional or local authority meets a need in the general interest, within the meaning of the of the EU procurement directive, where it acquires services with a view to promoting the development of industrial or commercial activities on the territory of that regional or local authority by constructing premises to be leased to undertakings. Such activities are likely to give a stimulus to trade and the economic and social development of the local authority concerned, since the location of undertakings on the territory of a municipality often has favourable repercussions for that municipality in terms of creation of jobs, increase of tax revenue and improvement of the supply and demand of goods and services.

To determine whether that need has no industrial or commercial character, the national court must assess the circumstances which prevailed when that company was set up and the conditions in which it carries on its activity, taking account in particular of the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question. The fact that the premises to be constructed are leased only to a single undertaking is not capable of calling into question the lessor's status of a body governed by public law, where it is shown that the lessor meets a need in the general interest not having an in-

dustrial or commercial character

48. Judgment of 19 June 2003, case C-315/01, GAT

- **Factual context** : see paragraphs 16 to 22 of the judgment.
- **Contract award criteria** - Taking account of a list of the previous principal deliveries
- Not permissible [Directive 2004/18/EC, article 53]

The EU procurement directive precludes the contracting authority, in a procedure to award a public contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

The submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included among the references or evidence which may be required to establish the suppliers' technical capacity. Furthermore, a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the suppliers' previous customers without other details relating to the deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of the Directive, and therefore cannot in any event constitute an award criterion within the meaning of that provision.

- **Contract award criteria** - Requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within some fixed radius – Not permissible [Directive 2004/18/EC, article 53]

The EU procurement directive precludes, in a procedure to award a public contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

Firstly, it is apparent from the Directive that for public contracts the contracting authorities may require the submission of samples, descriptions and/or photographs of the products to be supplied as references or evidence of the suppliers' technical capacity to carry out the contract concerned. Secondly, such a criterion cannot serve to identify the most economically advantageous offer within the meaning of the Directive and therefore cannot, in any event, constitute an award criterion within the meaning of that provision.

49. Judgment of 16 October 2003, case C-421/01, Traunfellner

- **Factual context** : see paragraphs 7 to 20 of the judgment.
- **Award of contracts** – Variants - Conditions for consideration and assessment for the purpose of awarding a contract [Directive 2004/18/EC, article 24]

The EU procurement directive is to be interpreted as meaning that the obligation to set out the minimum specifications required by a contracting authority in order to take variants into consideration is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited.

Tenderers may be deemed to be informed in the same way of the minimum specifications with which their variants must comply in order to be considered by the contracting authority only where those specifications are set out in the contract documents. This involves an obligation of transparency designed to ensure compliance with the principle of equal treatment of tenderers, which must be complied with in any procurement procedure governed by the Directive.

The provision of the Directive which lists the permissible criteria for the award of contracts, can apply only to variants which have been properly taken into consideration by the contracting authority in accordance with the Directive

50. Judgment of 16 October 2003, case C-283/00, Commission/Spain

- **Factual context** : see paragraphs 13 to 22 of the judgment.
- **Contracting authorities - Body governed by public law** – Definition - Needs in the general interest, not having an industrial or commercial character – State commercial company governed by private law - Company's object consisting of the implementation of a plan for repaying the costs of and establishing prisons – Included [Directive 2004/18/EC, article 1(9)]

The concept of “Needs in the general interest, not having an industrial or commercial character” is one of Community law and must accordingly be given an autonomous and uniform interpretation throughout the Community, the search for which must take account of the background to the provision in which it appears and of the purpose of the rules in question. Those needs are generally needs which are satisfied otherwise than by the supply of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence.

Whether or not there exists a need in the general interest not having an industrial or commercial character account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, inter alia, lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question. As a matter of fact, if the body operates in normal market conditions, aims at making a profit and bears the losses associated with the exercise of its activity, it is

unlikely that the needs it aims at meeting are not of an industrial or commercial nature.

It follows that a State commercial company established for the specific purpose of putting into effect, alone, the programmes and actions provided for in the plan for paying off the costs of and establishing prisons for the purpose of implementing the Member State's prison policy must be treated as a body governed by public law for the purposes of the EU procurement Directive and, therefore, as a contracting authority. The needs in the general interest which such a company is responsible for meeting being, therefore, a necessary condition of the exercise of the State's penal powers they are intrinsically linked to public order.

51. Judgment of 16 October 2003, case C-252/01, Commission/Belgium

- **Factual context** : see paragraphs 10 to 16 of the judgment.
- **Scope of the EU procurement directive** – Execution of services accompanied by special security measures - Contract for surveillance of a Member State coast by aerial photography [Directive 2004/18/EC, article 14]

When the execution of the services concerning the surveillance of a Member State coast by aerial photography must be accompanied by special security measures within the meaning of the EU procurement directive, the directive does not apply to such services.

52. Judgment of 4 December 2003, case C-448/01, EVN and Wienstrom

- **Factual context** : see paragraphs 15 to 26 of the judgment.
- **Contract award criteria** - Concept of the most economically advantageous tender – “Green” award criterion giving preference to electricity produced from renewable energy sources – Permissible – Conditions [Directive 2004/18/EC, article 53]

The EU procurement directive does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation does preclude such a criterion where

- it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,
- it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts

53. Judgment of 14 September 2004, case C-385/02, Commission/Italy

- **Factual context** : see paragraphs 4 to 11 of the judgment.
- **Contract award procedure-** Derogations from the common rules - Strict interpretation - Existence of exceptional circumstances - Burden of proof [Directive 2004/18/EC, article 31]

The provisions the EU procurement Directive, which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the TFEU in relation to public works contracts, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

Since the directive authorises the use of the negotiated procedure without prior publication of a contract notice for works which, for technical reasons, may only be carried out by a particular contractor, the Member State authorities must prove that technical reasons made it necessary to award the relevant contracts to the contractor who was entrusted with the original contract.

It is true that the aim of ensuring the continuity of works under complex projects which relate to the flood safety of an area is a technical reason which must be recognised as being important. However, merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor, particularly where the works are subdivided into lots which will be carried out over many years.

- **Contract award procedures-** Derogations from the common rules - Application of negotiated procedure without justification - Repetition of similar works entrusted to the undertaking to which an earlier contract was awarded – Duration [Directive 2004/18/EC, article 31]

The EU procurement Directive authorises the use of the negotiated procedure without prior publication of a contract notice for new works consisting in the repetition of similar works entrusted to the undertaking to which an earlier contract was awarded. That procedure may only be adopted “during the three years following the conclusion of the original contract”.

In the light of a comparison of the language versions of that provision, the expression “conclusion of the original contract” must be understood as meaning the time when the original contract was entered into and not as referring to the completion of the works to

which the contract relates.

That interpretation is confirmed by the objective of the provision in question and its place in the scheme of the Directive.

First, as it is a derogating provision which falls to be strictly interpreted, the interpretation which restricts the period during which the derogation applies must be preferred rather than that which extends it. That objective is met by the interpretation which takes the starting point as being the date on which the original contract is entered into rather than the, necessarily later, date on which the works which are its subject-matter are completed.

Secondly, legal certainty, which is desirable where procedures for the award of public procurement contracts are involved, requires that the date on which the period in question begins can be defined in a certain and objective manner. While the date on which a contract is entered into is certain, numerous dates may be treated as representing the completion of the works and thus give rise to a corresponding level of uncertainty. Moreover, while the date on which the contract is entered into is clearly established at the outset, the date of completion of the works, whatever definition is adopted, may be altered by accidental or voluntary factors for so long as the contract is being carried out.

54. Judgment of 7 October 2004, case C-247/02, Sintesi

- **Factual context** : see paragraphs 7 to 17 of the judgment.
- **Award of contracts** - Right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender [Directive 2004/18/EC, article 53]

The EU procurement Directive is to be interpreted as meaning that it precludes national rules which, for the purpose of the award of public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

Indeed, such a national rule deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.

55 Judgment of 14 October 2004, case C-340/02, Commission/France

- **Factual context** : see paragraphs 7 to 17 of the judgment.
- **Principle of equal treatment - Principle of transparency** [Directive 2004/18/EC, article 2]

The principle of equal treatment of providers and the principle of transparency laid down in the EU procurement directive require the subject-matter of each contract and the criteria governing its award to be clearly defined.

That obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed.

- **Contract award procedures-** Application of negotiated procedure without justification – Contract in several phases - Mandatory publication – Infringement [Directive 2004/18/EC, article 31]

The EU procurement Directive authorises contracting authorities using a negotiated procedure to derogate from the obligation of prior publication in certain cases which are exhaustively listed, derogation is permissible “where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidate”. That provision, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances

In particular, the expression “follows a design contest” as used in the Directive implies that there must be a direct functional link between the contest and the contract concerned. Since the contest in question related to the first phase and was organized for the purpose of awarding the contract envisaged in that phase, the contract in the second phase cannot be regarded as following that contest.

56. Judgment of 18 November 2004, case C-126/03, Commission/Germany

- **Factual context** : see paragraphs 6 to 8 of the judgment.
- **Scope of the EU procurement directive** - Contract concluded by a contracting authority in relation to an economic activity subject to competition - Contract concluded by a contracting authority in order to be able to submit an offer in a tender procedure – Included [Directive 2004/18/EC, article 1(9)]

The EU procurement directive provides that, where contracts for pecuniary interest concluded in writing between a service provider and a regional or local authority have as their object the services listed in Annex I A to the directive, they must be the subject of an open, restricted or negotiated procedure within the meaning of that directive.

In that regard the directive makes no distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task. It is likewise irrelevant that the contracting authority intends to operate as a provider of services itself and that the contract in question aims, in that context, to subcontract a part of the activities to a third

party.

57. Judgment of 11 January 2005, case C-26/03, Stadt Halle and RPL Lochau

- **Factual context** : see paragraphs 14 to 20 of the judgment.
- **Scope of the directive - Contracting authorities** - “In-house”-services - Contracting authority having a holding in the capital of a company legally distinct from it [Directive 2004/18/EC, article 1(9)]

Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of the EU procurement Directive with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, even as a majority, the public award procedures laid down by that directive must always be applied.

58. Judgment of 13 January 2005, case C-84/03, Commission/Spain

- **Factual context** : see paragraphs 1 and 12 to 15 of the judgment.
- **Contracting authorities - Body governed by public law** – Definition – National legislation excluding the bodies of private law satisfying the conditions laid down in the EU procurement directive – Not permissible [Directive 2004/18/EC, article 1(9)]

In order to determine whether a private law body is to be classified as a body governed by public law it is only necessary to establish whether the body in question satisfies the three cumulative conditions laid down in the EU procurement directive since an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority for the purposes of those directives.

Thus a national legislation constitutes an incorrect transposition of the definition of “contracting authority” in so far as it excludes the bodies of private law from its scope, even though they may satisfy the conditions laid down in the directive.

- **Public contract** – Definition – National legislation excluding the cooperation agreements concluded between bodies governed by public law - Not permissible [Directive 2004/18/EC, article 1(2)(a)]

In order to have a public contract within the meaning of the EU procurement directive, it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it.

The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

Consequently, in so far as it excludes, a priori, from its scope relations between public authorities, their public bodies and, in a general manner, non-commercial bodies governed by public law, whatever the nature of those relations, national legislation constitutes an incorrect transposition of the EU procurement directive.

- **Contract award procedures** – Derogations from the common rules – Strict interpretation - Use of the negotiated procedure in cases not provided for by the directive [Directive 2004/18/EC, article 31]

The derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public contracts must be interpreted strictly. To prevent the EU procurement directive being deprived of their effectiveness, the Member States cannot therefore, provide for the use of the negotiated procedure in cases not provided for in the Directives or add new conditions to the cases expressly provided for by that directives which make that procedure easier to use. It is for the Member States to show that their legislation constitutes a faithful transposition of the cases expressly provided for by the directive.

59. Judgment of 3 March 2005, joined cases C-21 and 34/03, Fabricom

- **Factual context** : see paragraphs 12 to 24 of the judgment.
- **Principle of non-discrimination between tenderers** - Prohibition on participation in a procedure of submission of a tender by a person who has contributed to the development of the works, supplies or services concerned – Not permissible [Directive 2004/18/EC, article 2]

The EU procurement Directive precludes a national regulation, whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.

Taking account of the favourable situation in which a person who has carried out certain preparatory work may find himself, therefore, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer. Nevertheless, a rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers when it does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case, that situation would not be capable of distorting competition between tenderers.

60. Judgment of 21 July 2005, case C-231/03, Coname

- **Factual context** : see paragraphs 4 to 11 of the judgment.

- **Common market fundamental freedoms** – Direct award of a concession for the management of a public gas-distribution service – Not permissible without appropriate transparency [Provisions of the TFEU concerning the common market fundamental freedoms] [Directive 2004/18/EC, article 17]

The provisions of the Treaty on the common market fundamental freedoms preclude the direct award by a municipality of a concession for the management of the public gas-distribution service to a company in which there is a majority public holding and in which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements.

Without necessarily implying an obligation to hold an invitation to tender, those requirements are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

61. Judgment of 13 October 2005, case C-458/03, Parking Brixen

- **Factual context** : see paragraphs 12 to 29 of the judgment.
- **Scope of the EU procurement directive** - Public service concession - Management of public pay car parks – Excluded [Directive 2004/18/EC, article 17]

The award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which the EU procurement Directive does not apply.

- **Principle of equal treatment and non-discrimination** – Common market fundamental freedoms – Scope - Public service concession contracts – Included - Limits [Provisions of the EC Treaty concerning the common market fundamental freedoms] [Directive 2004/18/EC, article 2]

The public authorities concluding public service concession contracts are, bound to comply with the fundamental rules of the TFEU, in general, and the principle of non-discrimination on the ground of nationality, in particular, which are specific expressions of the general principle of equal treatment. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.

Nevertheless, in the field of public service concessions, the application of the fundamental rules of the TFEU as well as the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority.

The aforementioned rules and principles are to be interpreted as precluding a public authority from awarding, without putting it out to tender, a public service concession to a company limited by shares which resulted from the conversion of a special undertaking of that public authority, whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

62. Judgment of 20 October 2005, case C-264/03, Commission/France

- **Factual context** : see paragraphs 11 to 21 of the judgment.
- **Common market fundamental freedoms** – Public contracts excluded from the scope of the EU procurement directive – Obligation to respect the fundamental rules of the Treaty [Directive 2004/18/EC, article 2]

The provisions of the TFEU relating to freedom of movement are intended to apply to public contracts which are outside the scope of the EU procurement Directive. Although certain contracts are excluded from the scope of Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on grounds of nationality in particular.

That is particularly the case in relation to public contracts the value of which does not reach the thresholds fixed by that Directive. The mere fact that the Community legislature considered that the strict special procedures laid down in the directives on public procurement are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law.

- **Contract award procedures** – Service providers - National legislation allowing the contracting authority to delegate some responsibilities – Mission of the agent reserved to certain exhaustively listed categories of legal persons under national law – Not permissible [Directive 2004/18/EC, article 2]

By reserving the task of delegated project contracting to an exhaustive list of legal persons under national law, a Member State fails to fulfil its obligations under the EU procurement Directive and under the TFEU for public service contracts outside the

scope of Directive.

63. Judgment of 10 November 2005, case C-29/04, Commission/Austria

- **Factual context** : see paragraphs 6 to 15 of the judgment.
- **Scope of the directive - Contracting authorities** - “In-house”-services - Contracting authority having a holding in the capital of a company legally distinct from it. [Directive 2004/18/EC, articles 1(2)(a) and 1(9)]

By permitting the award by a municipality of a public service contract to a company which is legally distinct from that municipality and 49% owned by a private undertaking without the public tendering procedure provided for in the EU procurement Directive being implemented, a Member State fails to fulfil its obligations under that directive.

Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of the Directive with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, even as a majority, the public award procedures laid down by that directive must always be applied.

64. Judgment of 24 November 2005, case C-331/04, ATI EAC and others

- **Factual context** : see paragraphs 5 to 13 of the judgment.
- **Contract award criteria** - The economically most advantageous tender - Observance of award criteria set out in the contract documents or the contract notice - Establishment of subheadings for one of the award criteria in the contract documents or the contract notice - Decision to apply weighting - Principles of equal treatment of tenderers and transparency. [Directive 2004/18/EC, articles 2 and 53]

The EU procurement directive must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:

- does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;
- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;
- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

65. Judgment of 9 February 2006, joined cases C-226/04 and C-228/04, La Cascina and Zilch

- **Factual context** : see paragraphs 9 to 17 of the judgment

- **Public service contracts – Procedures for the award of public service contracts – Qualitative selection – Exclusion of candidate – Obligations of service providers – Payment of social security contributions and taxes** [Directive 2004/18/EC, articles 2 and 45]

The EU procurement Directive enables Member States to exclude any candidate who 'has not fulfilled obligations' relating to the payment of social security contributions and taxes in accordance with national legal provisions.

That provision does not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position

- pursuant to a tax amnesty or leniency measures adopted by the State, or
- pursuant to an administrative arrangement of payment in instalments or debt relief, or
- by bringing administrative or legal proceedings,

provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

66. Judgment of 6 April 2006, Case C-410/04, Associazione Nazionale Autotrasporto Viaggiatori (ANAV)

- **Factual context** : see paragraphs 8 to 14 of the judgment.

- **Freedom to provide services – Local public transport service – Award with no call for tenders** – Award by a public authority to an undertaking of which it owns the share capital – In house? [Directive 2004/18/EC, articles 1(2), 1(9), 2 and 17]

Articles 49 and 56 TFEU, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency do not preclude national legislation which allows a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital, provided that the public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority.

67. Judgment of 11 May 2006, Case C-340/04, Carbotermo and Consorzio Alisei

- **Factual context** : see paragraphs 8 to 30 of the judgment.

- **Public supply contracts – Award of contract without a call for tenders** – Award of the contract to an undertaking in which the contracting authority has a shareholding – In house? – Contracting authority must exercise over the successful tenderer for the public procurement contract at issue a control similar to that which it exercises over its own departments – Undertaking must carry out the essential part of its activities with the controlling authority. [Directive 2004/18/EC, article 1(2) and 1(9)]

The EU procurement Directive precludes the direct award of a public supply and service contract, the main value of which lies in supply, to a joint stock company whose Board of Directors has ample managerial powers which it may exercise independently and whose share capital is, at present, held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority.

In such circumstances, the condition relating to the inapplicability of the EU procurement Directive, namely that the contracting authority exercises over the successful tenderer for the public procurement contract at issue a control similar to that which it exercises over its own departments, is not fulfilled.

In order to determine whether that condition is fulfilled, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the successful tenderer is subject to a control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions.

That is not the case where the control exercised by the contracting authority can be described as consisting essentially of the latitude conferred by company law on the majority of the shareholders, which places considerable limits on its power to influence the decisions of those companies. Moreover, where any influence which the contracting authority might have is through a holding company, the intervention of such an intermediary may weaken any control possibly exercised by the contracting authority over a joint stock company merely because it holds shares in that company.

In order to determine whether an undertaking carries out the essential part of its activities with the controlling authority, for the purpose of deciding on the applicability of the EU procurement Directive, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided; the territory where the activities are carried out is irrelevant.

68. Judgment of 18 January 2007, Case C-220/05, Jean Auroux and Others

- **Factual context** : see paragraphs 12 to 20 of the judgment.

- **Public procurement – Definition of "public works contract" and "work" – Method of calculation of the value of the contract** - Award without call for tenders – Contract for the implementation of a development project concluded between two contracting authorities [Directive 2004/18/EC, article 1(2), 1(9) and 9]

An agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the meaning of the EU procurement directive, whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work.

In order to determine the value of a contract to determine if the European thresholds have been reached, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties.

A contracting authority is not exempt from using the procedures for the award of public works contracts laid down in the EU procurement directive on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.

69. Judgment of 19 April 2007, Case C-295/05, Asociación Nacional de Empresas Forestales (Asemfo)

- **Factual context** : see paragraphs 16 to 24 of the judgment.
- **National legislation enabling a public undertaking to perform operations on the direct instructions of the public authorities without being subject to the general rules for the award of public procurement contracts** – In house – Internal management structure – Conditions – The public authority must exercise over a distinct entity a control similar to that which it exercises over its own departments – The distinct entity must carry out the essential part of its activities with the public authority or authorities which control it. [Directive 2004/18/EC, articles 1(2) and 1(9)]

The EU Procurement Directive does not preclude a body of rules which enables a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

70. Judgment of 14 June 2007, Case C-6/05, Medipac-Kazantzidis

- **Factual context** : see paragraphs 21 to 27 of the judgment.

- **Free movement of goods - Principle of equal treatment and obligation of transparency** – Hospital purchase of medical devices bearing the CE marking – Protective measures – Public supply contract – Contract falling below the threshold of application of the EU procurement [Directive 2004/18/EC, article 2]

Regarding the applicability of the EU Procurement Directive, it is common ground that it applies only to contracts the value of which is equal to or greater than the threshold laid down in that directive. The file shows that the value of the contract at issue in the main proceedings is lower than the threshold of application laid down in the EU Procurement Directive.

According to settled case-law, even if the value of a contract which is the subject-matter of an invitation to tender does not attain the threshold of application of the directives by which the Community legislature has regulated the field of public procurement, and the contract in question therefore does not fall within the scope of application of those directives, contracting authorities awarding contracts are nevertheless bound to abide by the general principles of Community law, such as the principle of equal treatment and the resulting obligation of transparency .

71. Judgment of 18 July 2007, Case C-382/05, European Commission/Italy

- **Factual context** : see paragraphs 10 to 17 of the judgment.
- **Public service contracts subject to the EU procurement Directive and not service concessions outside the scope of that directive.** [Directive 2004/18/EC, article 1(2) and 17]

Where an awarding authority of a Member State initiates the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of a region of that Member State remaining after the collection of selected material, and concludes those agreements without following the procedures laid down by the EU procurement Directive, and, in particular, without publishing the appropriate contract notice in the Official Journal of the European Union, that Member State fails to fulfil its obligations under that directive.

The abovementioned agreements, which provide, in particular, for the payment by the awarding authority to the operator of a royalty the amount of which is fixed in euros per tonne of waste transferred by the municipalities concerned to that operator do not establish a method of remuneration consisting in the right to exploit the services in question for payment and involving the assumption by the operator of the risk connected with operating them. Such agreements must therefore be considered to be public service contracts subject to the EU procurement Directive and not service concessions outside the scope of that directive, their conclusion being possible only in accordance with the provisions of that directive.

72. Judgment of 13 September 2007, Case C-260/04, European Commission/Italy

- **Factual context** : see paragraphs 8 to 11 of the judgment.
- **Freedom of establishment and freedom to provide services – Public service concessions** – Renewal of 329 horse-race betting licences without inviting competing bids – Requirements of publication and transparency – Discrimination on grounds of nationality. [Directive 2004/18/EC, articles 2 and 17]

Public authorities concluding public service concession contracts are bound to comply with the fundamental rules of the Treaty, especially Articles 49 and 56 TFEU, and the prohibition of discrimination on grounds of nationality in particular, as being a specific expression of the general principle of equal treatment. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.

It follows that a Member State which renews licences for horse-race betting operations without inviting any competing bids fails to fulfil its obligations under Articles 49 and 56 TFEU and, in particular, infringes the general principle of transparency and the obligation to ensure a sufficient degree of advertising.

The renewal of such licences without putting them out to tender cannot be justified by the need to discourage the development of clandestine activities for collecting and allocating bets, since it is not an appropriate means of attaining that objective and goes beyond what is necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities.

In addition, grounds of an economic nature, such as the need to ensure continuity, financial stability and a proper return on past investments for licence holders, cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.

73. Judgment of 13 November 2007, Case C-507/03, European Commission/Ireland

- **Factual context** : see paragraphs 9 to 13 of the judgment.
- **Award of public contracts – Common market fundamental freedoms.** [Directive 2004/18/EC, articles 2 and 21]

For the services coming within the ambit of Annex II B to EU Procurement Directive, and subject to a subsequent evaluation as referred to in Article 43 of that directive, the Community legislature based itself on the assumption that contracts for such services

are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender. For that reason, Directive 92/50 merely imposes a requirement of publicity after the fact for that category of services.

The award of public contracts beneath the thresholds of the EU procurement Directive remains subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services. It follows that the advertising arrangement introduced by the EU procurement Directive for contracts relating to services coming within the ambit of Annex II B cannot be interpreted as precluding application of the principles resulting from Articles 49 and 56 TFEU, in the event that such contracts nevertheless are of certain cross-border interest.

74. Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk

- **Factual context** : see paragraphs 23 to 29 of the judgment.
- **Public service contracts – Contracting authorities** – Bodies governed by public law – Condition that the activity of the institution be ‘financed, for the most part, by the State’. [Directive 2004/18/EC, article 1(9)]

The first condition of the third indent of the second subparagraph of Article 1(9) of the EU procurement Directive must be interpreted as meaning that there is financing, for the most part, by the State when the activities of public broadcasting bodies such as those in the main proceedings are financed for the most part by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to rules such as those in the main proceedings.

The first condition of the third indent of the second subparagraph of Article 1(9) of the EU procurement Directive must be interpreted as meaning that, that, if the activities of public broadcasting bodies such as those in the main proceedings are financed according to the procedures set out when examining the first question, the condition of ‘financing ... by the State’ does not require that there be direct interference by the State or by other public authorities in the awarding, by such bodies, of a contract such as that at issue in the main proceedings.

75. Judgment of 18 December 2007, Case C-532/03, European Commission/Ireland

- **Factual context** : see paragraphs 7 to 13 of the judgment.
- **Public procurement – Common market fundamental freedoms** – Emergency ambulance services [Articles 49 and 56 TFEU]

Without prejudice to the obligation of the Member States to facilitate the achievement of the Commission's tasks, which consist in particular in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied, in an action for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption.

Thus, in an action for a declaration that for one public body, without prior advertising, to provide another with emergency ambulance services is contrary to freedom of establishment and the freedom to provide services, it is for the Commission to place before the Court the information needed to enable the Court to establish that a public contract has been awarded, given that the possibility that the public body concerned provides the services in question in the exercise of its own powers cannot be excluded. In that regard, the mere fact that, as between two public bodies, funding arrangements exist in respect of emergency ambulance services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty.

76. Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi

- **Factual context** : see paragraphs 11 to 15 of the judgment.
- **Economic operators** – National provisions which exclude candidates or tenderers from submitting a tender solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons. [Directive 2004/18/EC, article 4]

The EU procurement Directive precludes national provisions, such as those at issue in the main proceedings, which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of the EU procurement Directive, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital. It is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.

77. Judgment of 24 January 2008, Case C-532/06, Lianakis

- **Factual context** : see paragraphs 9 to 20 of the judgment.

- **Criteria which may be accepted as ‘criteria for qualitative selection’ or ‘award criteria’ - Principle of equal treatment of economic operators and obligation of transparency** – Economically most advantageous tender – Compliance with the award criteria set out in the contract documents or contract notice – Subsequent determination of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice [Directive 2004/18/EC, articles 2, 44 and 53]

In a tendering procedure, a contracting authority is precluded from taking into account as ‘award criteria’ rather than as ‘qualitative selection criteria’ the tenderers’ experience, manpower and equipment and their ability to perform the contract by the anticipated deadline. While the EU procurement directive does not in theory preclude the examination of the tenderers’ suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules. The suitability of tenderers is to be checked in accordance with the criteria of economic and financial standing and of technical capability referred to in the EU procurement directive, whereas the award of contracts is to be based on the criteria set out in EU procurement directive, namely, the lowest price or the economically most advantageous tender.

Read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, the EU procurement directive precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice. The EU procurement directive requires that potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers’ attention.

78. Judgment of 21 February 2008, case C-412/04, European Commission/Italy

- **Factual context** : see paragraphs 10 to 31 of the judgment.
- **Public works, supply and service contracts – Transparency – Equal treatment** – Contracts excluded from the scope of those directives on account of their value – Determination according to the main purpose of the contract – Mixed works, supply and service contracts – Supply or service contracts including ancillary works. [Directive 2004/18/EC, articles 1(2), 2 and 9(5)]

A Member State which makes mixed works, supply and service contracts and supply or service contracts which include ancillary works if the works represent more than 50% of the total value of the relevant contract subject to the national rules on public works contracts fails to fulfill its obligations under the EU Procurement Directive.

Where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is the main purpose of the contract that determines which articles of the EU Procurement Directive Community are to be applied in principle.

The Community legislature expressly made a policy choice to exclude contracts under a certain threshold from the advertising regime which it introduced and therefore did not impose any specific obligation with respect to them. Where it is established that such a contract is of certain cross-border interest, the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in the contract but which are located in other Member States. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 and 56 TFEU.

79. Judgment of 3 April 2008, case C-346/06, Dirk Ruffert

- **Factual context** : see paragraphs 10 to 16 of the judgment.
- **Freedom to provide services** – Restrictions – Posting of workers in the context of the provision of services – Procedures for the award of public works contracts – Social protection of workers. [Article 56 TFEU]

A Member State is not entitled to impose on undertakings established in other Member States, a rate of pay provided for by a collective agreement in force at the place where the services concerned are performed and not declared to be of general application, by requiring, by a measure of a legislative nature, the contracting authority to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement.

80. Judgment of 8 April 2008, case C-337/05, European Commission/Italy

- **Factual context** : see paragraphs 10 to 14 of the judgment.
- **Public supply contracts – Award of public contracts without prior publication of a notice** – Absence of competitive tendering – Agusta and Agusta Bell helicopters. [Directive 2004/18/EC, articles 10, 14 and 31]

The negotiated procedure is exceptional in nature and may be applied only in cases which are set out in an exhaustive list. To that end, the EU Procurement Directive exhaustively and expressly lists the only exceptions for which recourse to the negotiated procedure is allowed. Derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public contracts

must be interpreted strictly. To prevent the EU Procurement Directive being deprived of its effectiveness, the Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for by that directive, or add new conditions to the cases expressly provided for by the directive in question which make that procedure easier to use. In addition, the burden of proving the existence of exceptional circumstances justifying the derogation from those rules lies on the person seeking to rely on those circumstances.

As regards the legitimate requirements of national interest foreseen in Article 346 TFEU and Article 14 of the EU Procurement Directive, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes. Therefore, the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.

81. Judgment of 10 April 2008, case C-393/06, Ing. Aigner

- **Factual context** : see paragraphs 15 to 22 of the judgment.
- **Body governed by public law – Contracting authority** - Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC. [Directive 2004/18/EC, articles 1(2), 1(9) and 2]

A 'body governed by public law' is any body which, first, was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality and, thirdly, is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law. Those three conditions are cumulative.

An entity established specifically for the purpose of supplying district heating to homes, public institutions, offices, undertakings in a local authority area by means of the use of energy produced by the destruction of waste, which has legal personality and of which the local authority wholly owns the share capital and monitors its economic and financial management, meets the two latter conditions laid down by those directives.

With regard to the first condition, it cannot be disputed that such an entity was established specifically to meet needs in the general interest. To provide heating for an

urban area by means of an environmentally-friendly process constitutes an aim which is undeniably in the general interest..

In order to ascertain whether the needs met by the entity in question have a character other than industrial or commercial, account must be taken of all the relevant law and facts such as the circumstances prevailing at the time when the entity concerned was established and the conditions under which it exercises its activity. In that regard, it is common ground that the pursuit of profit did not underlie its establishment. With regard, subsequently, to the relevant market which must be considered in order to ascertain whether the entity in question is exercising its activities in competitive conditions, account must be taken, having regard to the functional interpretation of the concept of a 'body governed by public law', of the sector for which that entity was created, that is to say, the supply of district heating by means of the use of energy produced by the burning of waste.

All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross financing between those sectors.

82. Judgment of 15 May 2008, joined cases C-147/06 and C-148/06, SECAP and Santorso

- **Factual context** : see paragraphs 9 to 17 of the judgment.
- **Community law – Principles – Equal treatment – Discrimination on grounds of nationality** – Contracts with a value below the threshold set by the EU Procurement Directive, which are of certain cross-border interest. [Directive 2004/18/EC, articles 2 and 55]

The fundamental rules of the Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination preclude national legislation which, with regard to contracts with a value below the threshold set by the EU Procurement Directive, which are of certain cross-border interest, imposes an absolute duty on the contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers

concerned to provide details of those elements. That would not be the case if national or local legislation or even the contracting authorities concerned were to set a reasonable threshold above which abnormally low tenders were automatically excluded on account of there being an unduly large number of tenders, which might oblige the contracting authorities to examine on an inter partes basis such a high number of bids that it would exceed their administrative capacity or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

83. Judgment of 19 June 2008, C-454/06, presstext Nachrichtenagentur

- **Factual context** : see paragraphs 8 to 27 of the judgment.
- **Procedures for the award of public service contracts – Award of a contract – Meaning – Amendments to the provisions of a public contract during the currency of the contract.** [Directive 2004/18/EC, article 28]

The terms ‘awarding’ and ‘awarded’, used in the EU procurement Directive must be interpreted as not covering a situation where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.

Amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of the EU procurement Directive when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted.

84. Judgment of 17 July 2008, C-347/06, ASM Brescia

- **Factual context** : see paragraphs 16 to 20 of the judgment.
- **Common market fundamental freedoms – Concession for a public gas-distribution service – Early cessation at the end of a transitional period – Public service concession granted without a competitive tendering procedure – Principles of the protection of legitimate expectations and legal certainty.** [Directive 2004/18/EC, article 2]

Articles 49 and 56 TFEU do not preclude legislation of a Member State to implement the common rules for the internal market in natural gas by means of the early cessation, at the end of a transitional period, of concessions for the distribution of natural gas

granted without a competitive tendering procedure, from providing for the extension, on certain conditions, of the length of that transitional period, provided that such an extension can be regarded as being necessary to enable the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.

Notwithstanding the fact that such a public service concession is outside the scope of the directives on the different categories of public contracts, public authorities are nonetheless bound, when they envisage granting such a concession, to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the grounds of nationality, in particular. More particularly, since such a concession is of a certain cross-border interest, its award, in the absence of any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession but which are located in other Member States. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 and 56 TFEU.

Such a difference in treatment can however be justified by the necessity of complying with the principle of legal certainty, which forms part of the Community legal order and is binding on every national authority responsible for implementing Community law. Since Directive 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30 requires existing concessions for the distribution of gas to be called in question only in cases of long-standing concessions not expiring for decades which were granted at a time when the Court had not yet held that contracts with a cross-border interest might be subject to duties of transparency arising from primary law, the principle of legal certainty, which requires, particularly, that rules of law be clear, precise and predictable in their effects, not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.

85. Judgment of 2 October 2008, case C-157/06, European Commission/Italy

- **Factual context** : see paragraphs 9 to 12 of the judgment.
- **Procedures for the award of public supply contracts** – Light helicopters for the police and the national fire service – Award of public contracts without prior publication of a notice – Derogations from common rules – Restrictive interpretation – Protection of the essential interests of a Member State's security. [Directive 2004/18/EC, articles 10, 14 and 31]

A Member State has failed to fulfil its obligations under the EU procurement Directive, where it has adopted national legislation authorising a derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied.

As regards the legitimate requirements of national interest foreseen by Article 346 TFEU, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. Since it is not disputed that the national legislation applies to helicopters which are clearly for civilian use whereas their military use is only potential, Article 346 TFEU, to which Article 10 of the EU procurement Directive refers, cannot properly be invoked by the Member State concerned to justify national legislation authorising recourse to the negotiated procedure for the purchase of those helicopters.

Furthermore, resort to Article 10 of the EU procurement Directive in respect of the purchase of the helicopters in question appears disproportionate as regards the objective of preventing the disclosure of sensitive information relating to their production in so far as the Member State concerned has not shown that such an objective was unattainable within a competitive tendering procedure such as that specified by that directive. It follows that the mere fact of stating that the supplies at issue are declared secret, that they are accompanied by special security measures or that it is necessary to exclude them from the Community rules in order to protect the essential interests of State security cannot suffice to prove that the exceptional circumstances justifying the derogations provided for in Article 10 of the EU procurement Directive actually exist.

86. Judgment of 13 November 2008, case C-324/07, Coditel Brabant

- **Factual context** : see paragraphs 8 to 22 of the judgment.
- **Public procurement – Tendering procedures – Public service concessions** – Concession for the operation of a municipal cable television network – Awarded by a municipality to an inter-municipal cooperative society – Obligation of transparency – Conditions – Whether the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments. [Directive 2004/18/EC, articles 2 and 17]

Articles 49 and 56 TFEU, the principles of equal treatment and of non-discrimination on grounds of nationality and the concomitant obligation of transparency do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities.

Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.

Where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.

87. Judgment of 16 December 2008, case C-213/07, Michaniki

- **Factual context** : see paragraphs 12 to 26 of the judgment.
- **Public works contracts** – Grounds for excluding participation in a contract – National measures establishing an incompatibility between the public works sector and that of the media. [Directive 2004/18/EC, articles 2 and 45 to 52]

The EU procurement Directive must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main

shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.

88. Judgment of 19 May 2009, case C-538/07, Assitur

- **Factual context** : see paragraphs 9 to 18 of the judgment.
- **Public service contracts** – National legislation not allowing companies linked by a relationship of control or significant influence to participate, as competing tenderers, in the same procedure for the award of a public contract [Directive 2004/18/EC, articles 2 and 45]

The public procurement directive must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

89. Judgment of 9 June 2009, case C-480/06, European Commission/Germany

- **Factual context** : see paragraphs 4 to 11 of the judgment.
- **Contracting authorities** - No formal European tendering procedure for the award of waste treatment services – Cooperation between local authorities [Directive 2004/18/EC, article 1(9)]

It must be observed, first, that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in the public procurement directive, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

90. Judgment of 11 June 2009, case C-300/07, Hans & Christophorus Oymanns
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- **Factual context** : see paragraphs 26 to 39 of the judgment.
- **Public supply contracts and public service contracts –Bodies governed by public law – Contracting authorities** – Invitation to tender – Statutory sickness insurance funds – Manufacture and supply of orthopaedic footwear individually tailored to patients' needs – Detailed advice provided to patients [Directive 2004/18/EC, article 1(2) and 1(9)]

The public procurement directive must be interpreted as meaning that there is financing, for the most part, by the State when the activities of statutory sickness insurance funds are chiefly financed by contributions payable by members, which are imposed, calculated and collected according to rules of public law such as those in the main proceedings. Such sickness insurance funds are to be regarded as bodies governed by public law and therefore as contracting authorities for the purposes of the application the rules in that directive.

When a mixed public contract concerns both products and services, the criterion to be applied in order to determine whether the contract in question is a supply contract or a service contract is the respective value of the products and services covered by the contract. Where the products supplied are individually manufactured and tailored to the needs of each customer and where each customer must receive individual advice on the use of the products, the manufacture of those products must be classified in the 'supply' part of the said contract for the purposes of calculating the value of each part thereof.

91. Judgment of 10 September 2009, case C-573/07, Sea
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- **Factual context** : see paragraphs 20 to 30 of the judgment.
- **Public procurement – Award procedures** – Contract relating to a service for the collection, transport and disposal of urban waste – Awarded without any call for tenders – Awarded to a company limited by shares whose capital is wholly owned by public bodies but under whose statutes a private capital holding is possible

It is not contrary to Articles **49 and 56 TFEU**, the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it.

Without prejudice to the determination by the court making the reference of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exer-

cise over their own departments in circumstances such as those of the case in the main proceedings, when:

- that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit, and
- through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions.

92. Judgment of 10 September 2009, case C-206/08, Eurawasser

- **Factual context** : see paragraphs 11 to 26 of the judgment.
- **Procurement procedures of entities operating in the water, energy, transport and postal services sectors – Service concession** – Definition – Public service for the distribution of drinking water and the treatment of sewage – Transfer to the supplier of the risk connected with operating the service in question [Directive 2004/18/EC, article 17]

In relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for the contract in question to be categorised as a 'service concession' within the meaning of the public procurement directive, where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service.

93. Judgment of 15 October 2009, case C-196/08, Acoset

- **Factual context** : see paragraphs 16 to 28 of the judgment.
- **Award of public contracts – Award of water service to a semi-private company – Competitive procedure** – Appointment of the private partner responsible for operating the service – Award made without regard to the rules governing the award of public contracts [Articles 49 and 56 TFEU]

Articles 49 and 56 TFEU do not preclude the direct award of a public service which entails the prior execution of certain works, such as that at issue in the main proceedings, to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles

of free competition, transparency and equal treatment laid down by the EC Treaty with regard to concessions.

94. Judgment of 15 October 2009, case C-138/08, Hochtief and Linde

- **Factual context** : see paragraphs 13 to 18 of the judgment.
- **Procedures for the award of public works contracts – Negotiated procedures with publication of a contract notice** – Obligation to admit a minimum number of suitable candidates – Obligation to ensure genuine competition

The public procurement directive must be interpreted as meaning that where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of that contract.

The public procurement directive must be interpreted as meaning that the obligation to ensure that there is genuine competition is satisfied where the contracting authority has recourse to the negotiated procedure under the conditions referred to in that directive.

95. Judgment of 12 November 2009, case C-199/07, Commission/Greece

- **Factual context** : see paragraphs 11 to 17 of the judgment.
- **Contract notice – Qualitative selection and award criteria** – Consultancy project – Criteria for automatic exclusion

Greece has failed to fulfil its obligations under the public procurement directive by reason, firstly, of the exclusion, by virtue of a contract notice, of foreign consultancy firms or consultants who had submitted an expression of interest in the tendering procedures in the six months preceding the date of their expression of interest in the current competition and who had declared qualifications corresponding to certificate categories different from those now required and, secondly, of the failure to distinguish in that notice between qualitative selection criteria and award criteria for the contract in question.

96. Judgment of 10 December 2009, case C-299/08, Commission/France

- **Factual context** : see paragraphs 10 to 12 of the judgment.
- **Procedures for the award of public contracts** – National legislation providing for a single procedure for the award of the contract defining needs and of the ensuing marché d'exécution – Compatibility with that directive? No

By adopting and keeping in force national provisions, inasmuch as those provisions lay down a procedure for the award of marchés de définition (public contracts for designing

the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a marché d'exécution (a public works, supply or service contract) to one of the holders of the initial marchés de définition by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under the public procurement directive.

97. Judgment of 23 December 2009, case C-305/08, CoNISMa

- **Factual context** : see paragraphs 14 to 24 of the judgment.
- **Public service contracts – Concepts of ‘contractor’, ‘supplier’ and ‘service provider’ – Concept of ‘economic operator’** – Universities and research institutes – Group (‘consorzio’) of universities and public authorities – Where the primary object under the statutes is non-profit-making – Admission to a procedure for the award of a public contract. [Directive 2004/18/EC, articles 1(8) and 4]

The provisions of the public procurement directive, which refer to the concept of ‘economic operator’, must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – to take part in a public tendering procedure for the award of a service contract.

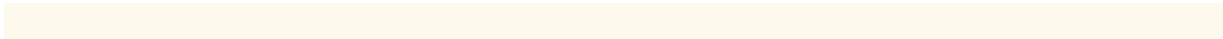
The public procurement directive must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.

98. Judgment of 23 December 2009, case C-376/08, Serrantoni and Consorzio stabile edili

- **Factual context** : see paragraphs 13 to 19 of the judgment.
- **Public works contracts – Principle of equal treatment – Groups of undertakings** – Prohibition on competing participation in the same tendering procedure by a ‘consorzio stabile’ (‘permanent consortium’) and one of its member companies). [Directive 2004/18/EC, articles 2 and 4]

Community law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in the public procurement directive, but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with

the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.



Appendix XIII: Tender documents. An auditor's view⁽⁷⁾

An audit of the tender documents should confirm that:

- there are proper procedures/methods of procurement.
- the procurement process has been subject to competition and if not, whether the reasons for not using competitive tendering are justified.
- the scale and complexity of the procurement project is achievable.
- the procurement team was involved from an early enough stage.
- the suitability of the procurement procedures and type of contract used
- the period of execution of the contract is logical and sensible
- the Contracting Authority's interests are adequately protected (perhaps through liquidated damages)
- the supply of the required goods/services/works are through clear and explicit full descriptions of workmanship, materials and quality.
- the specification was clearly presented to the supplier/provider/contractor
- early warning indicators are in place to identify underperformance from supplier/provider/contractor
- specification is not too specific by pinpointing or mentioning patents or trademarks but gives fair opportunity to all.
- the criteria for evaluation/award are explicit and logical.
- clear procedures are in place for reporting and decision making and whether these are adhered to
- explicit and clear procedures are in place for taking over and approval of supplies/services/works.
- appropriate controls are in place to ensure propriety and regularity.

⁷ See the National Audit Office publication "[Getting Value for Money from Procurement. How auditors can help](#)".

Appendix XIV : Price and quality coefficients in the evaluation of tenders

The two envelope method

The two envelope method describes a procedure where tenderers are requested to submit proposals in two parts, one containing the technical and capacity details and the other containing the tender sum.

Usually the tender documents provide that only the financial proposals of those tenderers who attained a minimum technical score, in all criteria, are opened.

Procurement processes carried out with the two envelope method (technical [T] and financial [F] proposals) aim at finding the Most Economically Advantageous Tender, when the Contracting Authority (CA) wishes to award a tender with the “best value for money”.

This method is usually followed for the procurement of services, equipment or design and build (turn key) projects.

When an award is to be made on the basis of the Most Economically Advantageous Tender, the CA is obliged to state in the tender documents, all the technical criteria which will be taken into consideration in the evaluation of the tenders.

To avoid the subjective and arbitrary use of technical criteria, it is widely accepted that a mathematical formula, such as or very similar to, the one given below is established, specified in the tender documents and used to calculate the combined markings of the financial and technical proposals for each tender (Weighted Average Score):

$$\text{Weighted Average Score} = A. \frac{T}{T_{\max}} + B. \frac{F_{\min}}{F}$$

where:

T = Score of Technical Proposal

T_{max} = Score of Best Technical Proposal

F = Tender Sum

F_{min} = Lowest Tender Sum

A = Quality coefficient (technical weighting factor)

B = Price coefficient (financial weighting factor)

$$A + B = 100$$

Selection of an unjustifiably expensive tender can be avoided if the Contracting Authority includes suitable tender provisions such as:

(a) The inclusion of a clause which forbids the submission of tenders beyond a maximum fixed sum, which is usually between 100 – 120%, of the genuine pre-estimated contract cost (ceiling). This method is usually adopted in Services Contracts.

(b) By defining the proportions of the quality to price coefficients in such a way, so as to exclude the selection of an excessively expensive tender as compared to another which is to acceptable quality but of a much lower price. This method should be adopted in the case of Supply Contracts or Turn – Key Contracts.

The technical and financial weighting factors (A and B) prescribed in the above formula, reflect **how much more** the contracting Authority is willing to pay in order to obtain better quality and consequently select a more expensive tender. So, the exact amount which the Contracting Authority will pay for each percentage point of a technically better tender is controlled by the proportion of the technical to financial weighting factors.

As a general rule however, the tender documents usually provide that a technical proposal is acceptable (and will therefore proceed with the opening of the envelope containing the financial part of the tender) only if the tenderer attains a minimum mark (usually set at 70%).

The examples shown in Fig. 1 to 6 and Table 1 (see further on), were calculated with a lowest technical score of 70%. Had a different lowest score been used, the corresponding percentage price differences would have been slightly different for the lower ratios (20:80, 30:70) and markedly different for the higher ratios (70:30, 80:20).

It is stressed that there is still a price advantage for even the lower ratios such as 20:80 or 30:70. This is clearly shown in Table 1 where for example, for a ratio of 30:70 and difference of 20% in the Technical Score, there is 10,5% price advantage for the higher marked tender.

Worth noting (see fig. 6) is the much steeper increase in the % Price Difference as the ratio of A:B increases from $\Delta=5\%$ to $\Delta=25\%$.

Example 1:

Applying the formula for two tenders – both with a technical mark above 70% - having a difference of say 20 marks in the technical score (e.g. 95% and 75%), then the following

prevail:

For a ratio 20:80 the C.A. may pay up to 6% more

For a ratio 30:70 the C.A. may pay up to 10% more

For a ratio 40:60 the C.A. may pay up to 16% more

For a ratio 50:50 the C.A. may pay up to 27% more

For a ratio 60:40 the C.A. may pay up to 46% more

For a ratio 70:30 the C.A. may pay up to 96% more

For a ratio 80:20 the C.A. may pay up to 533% more

Consequently if the Contracting Authority is willing to pay up to 30% extra for the qualitative difference between two acceptable tenders then it must exclude the ratios 60:40, 70:30 and 80:20.

Example 2:

Tenderer A:

$T_A = 70$

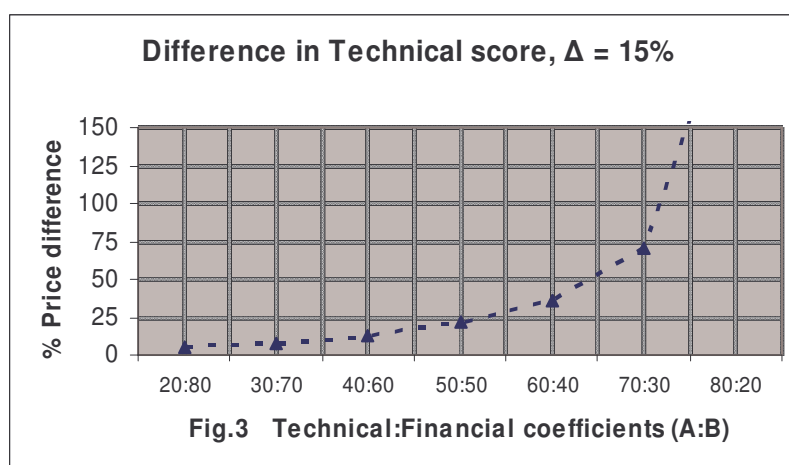
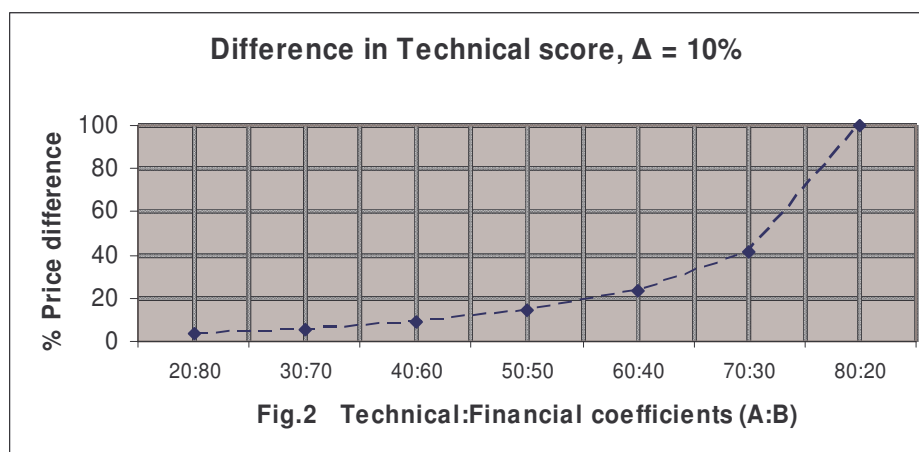
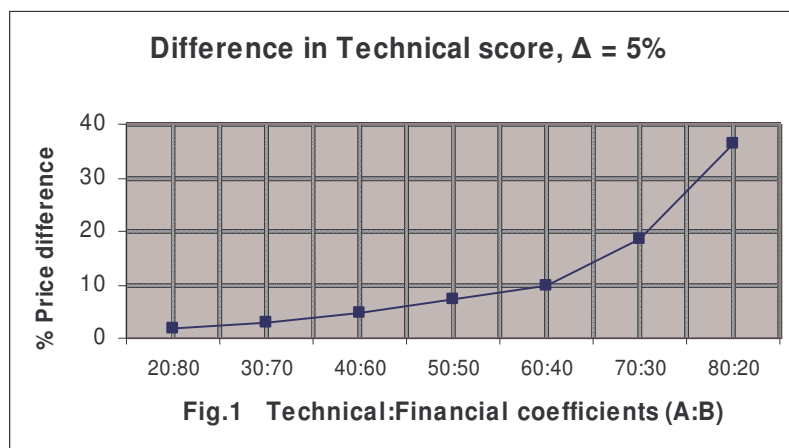
$F_A = 100.000\text{€}$

Tenderer B:

$T_B = 85$

$F_B = ?$

If the technical to financial coefficients (A:B) prescribed in the tender documents, is 60:40 and since the difference in the Technical Scores is 15, then the corresponding percentage price difference (see Table 1 and Fig. 3) is 36%. This means that tenderer B would be the successful bidder, if his tender is lower than €136.000.



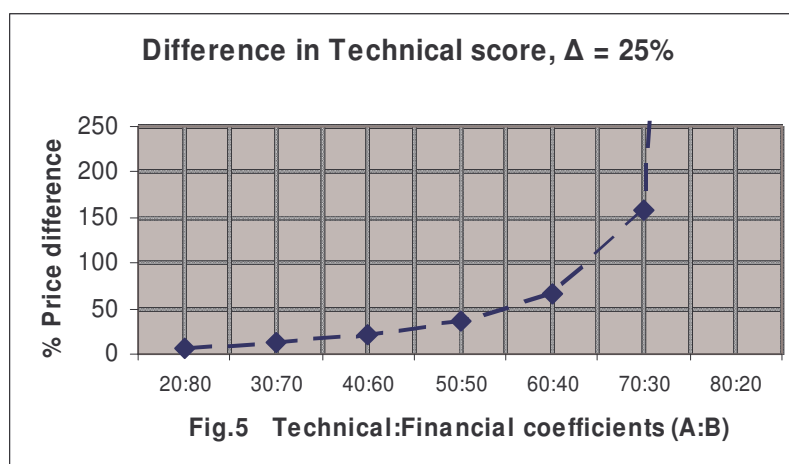
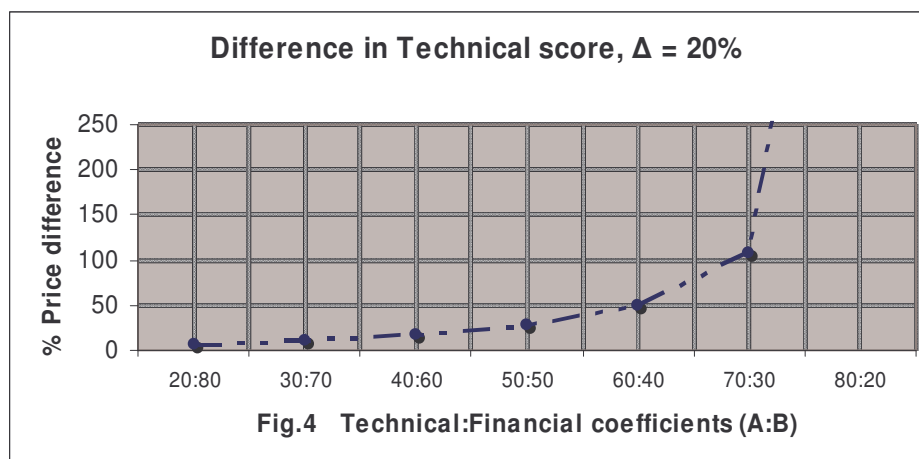
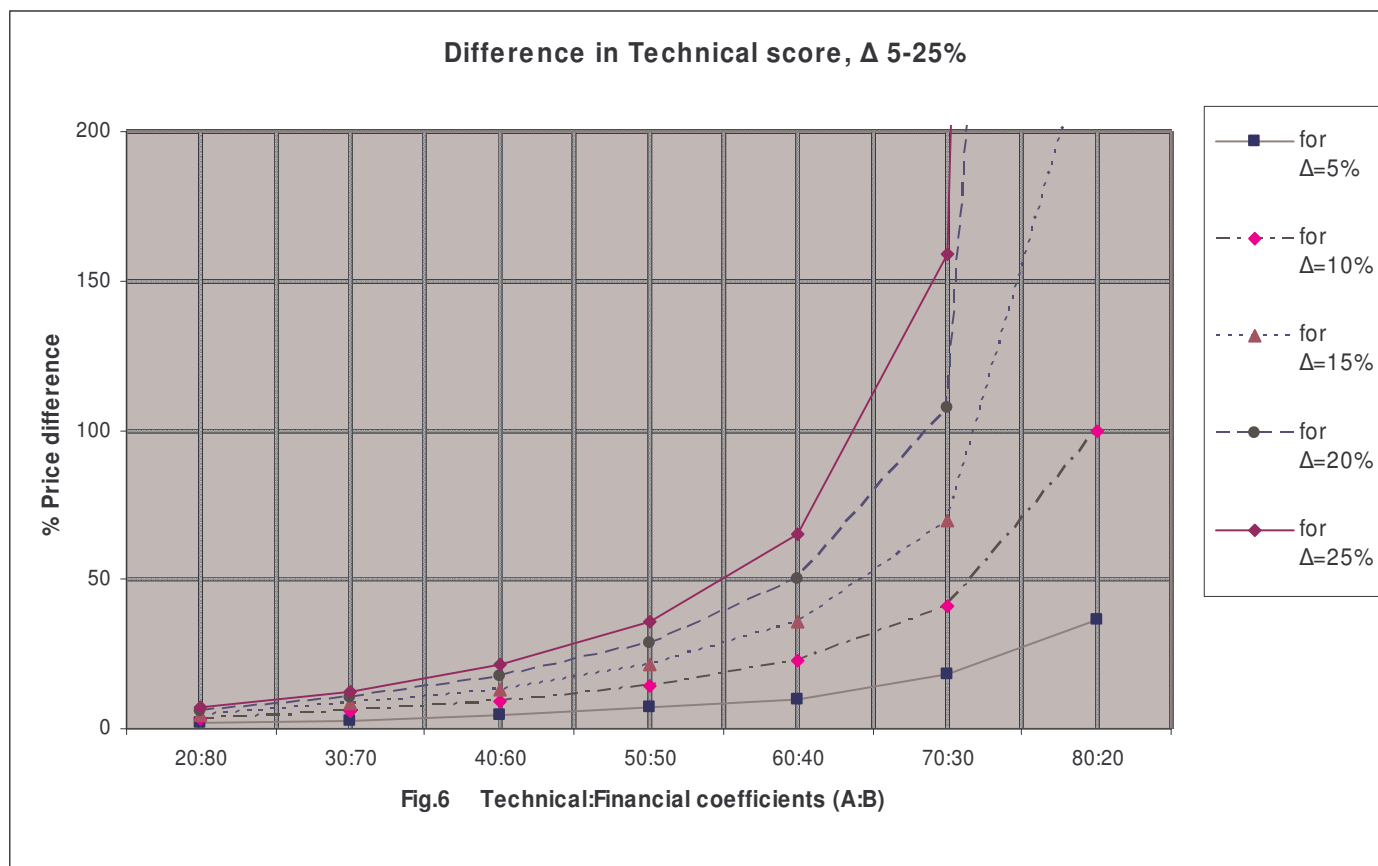


TABLE 1 (values corresponding to Fig. 1 to 6)					
Technical:Financial coefficients (A:B)	% Price difference				
	for $\Delta=5\%$	for $\Delta=10\%$	for $\Delta=15\%$	for $\Delta=20\%$	for $\Delta=25\%$
20:80	1,7	3,2	4,6	5,9	7
30:70	2,9	5,7	8,2	10,5	12,7
40:60	4,7	9,1	13,3	17,4	21,3
50:50	7,1	14,3	21,4	28,6	35,7
60:40	9,7	23,1	36	50	65,2
70:30	18,4	41,2	70	107,8	159,1
80:20	36,4	100	240,1	800	2000

NB: 1. Δ = Difference in Technical score
2. All above examples assume a tender with a lowest Technical score of 70%



Appendix XV: Directive 2009/81/EC of 13 July 2009 on the award of works contracts, supply contracts and service contracts in the fields of defence and security

The new Directive 2009/81/EC on defence and security procurement entered into force on 21 August 2009. The Directive is to become the cornerstone of a truly European Defence Market supporting the development of the European defence-related supplier base. Up until now, the vast majority of defence and sensitive security procurement contracts have been exempted from the Internal Market rules. One of the reasons for this is that the existing EU procurement rules are considered to be ill-suited for most defence- and security-related purchases. The new Directive should greatly improve this situation by providing tailor-made procurement rules for defence and security contracts. Member States now have at their disposal Community rules they can apply to complex and sensitive transactions without putting at risk their legitimate security interests.

More transparency and competition for Europe's defence and security markets

Before Directive 2009/81/EC, most defence and sensitive security equipment had to be procured on the basis of uncoordinated national rules, which differ greatly in terms of publication, tendering procedures, selection and award criteria, etc. This regulatory patchwork was a major obstacle on the way towards a common European defence equipment market and opened the door to non-compliance with the Internal Market principles.

Directive 2009/81/EC will open up the Internal Market for defence and security products by introducing transparent and competitive procurement rules specifically adapted to the needs of these highly sensitive sectors.

A tailor-made procurement regime for sensitive contracts

The new rules apply to the procurement of arms, munitions and war material and also to sensitive non-military contracts in areas such as protection against terrorism which often have similar features to defence contracts.

The Directive contains a number of innovations tailored to the specific needs of procurement in defence and security markets:

- Awarding authorities may use the negotiated procedure with prior publication as a standard procedure, which gives them flexibility to fine-tune all details of the contract.

- Candidates may be required to submit specific guarantees ensuring security of information (safeguarding of classified information) and security of supply (timely and reliable contract execution, especially in crisis situations).
- Specific rules on research and development contracts strike a balance between the need to support innovation and the necessary openness of production markets.
- Awarding authorities may oblige contractors to award subcontracts in a competitive manner, opening-up supply chains and creating business opportunities for SME's in the defence and security sector.
- A set of national review procedures will provide effective remedies protecting the rights of businesses taking part in the award procedure.

Limiting exemptions from the Internal Market rules to the strict minimum

Member States still have the possibility to use Article 296 EC Treaty to exempt defence and security procurement contracts which are so sensitive that even the new rules cannot satisfy their security needs. In most cases, however, Member States should be able to use the new Directive without any risk for their security.

Transposition

Member States have time until 21 August 2011 to transpose Directive 2009/81/EC into their national legislation.

For more information, see:

http://ec.europa.eu/internal_market/publicprocurement/dpp_en.htm