MODULE H

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Public procurement for economic operators

Public procurement
for economic operators

MODULE H

Essential features of the EU procurement rules

PART 1

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. How the EU procurement rules affect your position as tenderers at home and abroad within the EU
2. How public procurement is regulated within the European Union
3. Which specific and general rules apply
4. Why national procurement rules are dependent on EU rules
5. How the European Court of Justice (ECJ) gets involved in the process
6. How national procurement law has developed
7. How various other national laws apply to the procurement process

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The effect of the different sources of the rules
- The basic principles that apply to public procurement
- How national law must be adapted to the European rules [this presupposes accession and must be adapted to the local situation]
- How to apply national and European rules in parallel

This means that it is critical to understand fully:

- The different levels of rules, where they come from and how they interact to provide a comprehensive system of regulation
- The role of the ECJ in interpreting the rules
- The role of the national law in completing the rules

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There is a particularly strong link between this chapter and the following:

- Module A1 on the legislative framework and basic principles of public procurement
- Module A2 on the European institutional framework
- Module A3 on public procurement – historical context

1.4 RELEVANCE

Compliance by contracting entities with the basic principles applying to public procurement in the EU context is a requirement that flows through the whole procurement process, from the design of the technical specifications through the choice of award procedure and selection of tenderers to the award of the contract. The rules are intended to protect tenderers, and the failure of contracting entities to respect these fundamental principles can provide you with a means of challenges the actions of contracting entities in the EU [this last phrase again presupposes accession and must be adapted to the local situation].

This information is important because it provides tenderers with an understanding of the rules and principles that must be followed by all contracting entities in the EU. These represent a basic system of protection so that, whatever form the national legislation takes, these conditions must be respected. You need to know this to understand your rights when you feel that you have been unfairly excluded from a contract award procedure.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In addition to looking at some of the provisions of the Directives and national law, consideration of the basic principles that apply to public procurement in an EU context also implies knowledge of the EC Treaty, as amended. In particular, it will be helpful to be aware of the following articles of the Treaty:

- Article 12 on the prohibition against discrimination on grounds of nationality
- Article 28 on the free movement of goods and the prohibition of quantitative restrictions on imports and exports and measures having equivalent effect
- Article 43 on the freedom of establishment
- Article 49 on the freedom to provide services

In **Directive 2004/18/EC,** you should consider in particular recital 2 and article 2.

In national law, please look at:

To be adapted to national law

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The purpose of this training is to assist tenderers in preparing and submitting tenders for procurement contracts to be awarded both in [localise:XXX] and in other member states of the European Union. In this Module, we will first look at the applicable legal framework within the European Union and [localise:XXX] in order to understand what rules apply.

It is important to understand both of these elements because, although the EU rules are intended to provide tenderers from one member state rights to tender in other member states, they also give tenderers rights in their own countries; these are often rights which they did not have before. It should be noted that the majority of disputes on procurement are raised by tenderers against contracting entities (public purchasers) in their own countries and not against those from other countries. Even where the applicable rules are drafted as national rules, they will often be the result of EU rules which have been transposed (incorporated) into national law.

It is important to bear in mind that the EU directives described in this Module set out the common rules which must be applied in the member states in order to provide minimum guarantees of equal treatment, transparency and non-discrimination. These common rules must be respected in all member states and any national rules applying to procurement must be adapted so that they are compatible with the provisions of the directives. Even if, therefore, the national rules look different or are drafted in a different way, they must always respect the EU rules. As a result, knowledge of the EU rules is a very useful way of understanding what your rights are in any member states of the EU. You may be familiar with the procurement rules that apply in your country but you may not be familiar with the rules that apply in all other member states.

As we will see in H3, member states may also supplement the EU rules with their own national provisions which deal mostly with such practical issues as the methods of submitting tenders so the rules of the different member states will almost always be a little bit different. This is why, as we will see in H4, it is important for you, as tenderers to prepare yourself fully for the tendering procedures of the country in which you submit the tender. However, your basic rights and essential protection flows from the EU rules. It is important that you understand them if you are to benefit from the opportunities opened up by EU tendering procedures.

The main procurement rules are contained in a series of European Directives on procurement. However, these directives are themselves based on some more fundamental principles which guide them. Where these were not explicit in earlier versions of the directives, the ECJ (one of the main institutions which will be discussed later) has made it clear that they apply even if the directives do not say so in detail. These principles are important because they also apply where the directives do not, for example, for lower value contracts. It is also important, therefore, to be familiar with these principles because, if they are breached by a contracting entity, you will probably be able to do something about it even if the national procurement rules or maybe the directives do not mention them.

2.2 EU PUBLIC PROCUREMENT LEGISLATIVE FRAMEWORK

In the case of public procurement, it is necessary to look not only at the procurement directives themselves but also at the context within which they have been adopted. Even with the directives in place, more general provisions contained in the Treaty of Rome will apply as well as more general principles of law which will guide the interpretation of the directives

2.2.1 The Treaty of Rome

The Treaties of the EU (their *'constitution'*) do not include any explicit provisions relating to public procurement. They do, however, establish a number of fundamental principles which underpin the European Union. These principles apply equally to the field of public procurement. Of these fundamental principles, the most relevant in terms of public procurement are:

- the prohibition against discrimination on grounds of nationality (Article 12 of EC Treaty);

  This principle means that a tenderer from one member state must be treated in the same way as a tenderer from the contracting authority's member state. This is not the same as the principle of equal treatment which does not rely on the concept of nationality.

  This Article applies only to Community nationals, individuals and legal persons who are resident in any of the member states of the Community. Nationals from third countries are excluded from the protection because they are 'not within the scope of application' of the Treaties.

- the free movement of goods and the prohibition of quantitative restrictions on imports and exports and measures having equivalent effect (Articles 28 *et seq.*);

  The objective of this principle is to prevent member states, through their contracting authorities, from buying only national products ('buy national' campaigns). It applies both to distinctly applicable measures which are clearly intended to discriminate against foreign goods (such as local content clauses) as well as to indistinctly applicable measures which apply equally to local and foreign goods but which, nevertheless, discriminate indirectly against foreign goods in that their effect is to make market access more difficult for imported products than local ones.

  The provisions relating to the free movement of goods apply both to products originating in member states and to products coming from third countries which are in free circulation in member states. Products coming from third countries are considered to be in free circulation in member states if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that member state.

- the freedom of establishment (Articles 43 *et seq.*);

  In effect, this means that a tenderer from a member state will be permitted to carry out a business in another member state through the establishment of a local entity.

- the freedom to provide services (Articles 49 *et seq.*);

  In effect, this means that a tenderer based in one member state will be entitled to submit a tender in another member state without the need to set up a local entity or representative.

2.2.2 General Principles of Law

In addition to these fundamental principles in the Treaty, some general principles of law have emerged from the case law of the European Court of Justice. As general principles, these will also be applied in the context of public procurement and a number have, in fact, been applied by the ECJ in cases concerned with public procurement disputes. They are important because they will often be used by the ECJ to fill in gaps in the legislation and to provide solutions of principle to situations which are often very complex.

The most important of these general principles of law in the current context are

- equality of treatment,

  This principle requires that identical situations be treated in the same way or that different situations will not be treated in the same way. It does not depend on nationality (as with the principle of non-discrimination) but is based on the idea of fairness to individuals. Thus, treating two tenderers from the same country differently could be unequal treatment but, since they are of the same nationality, there would be no discrimination (on grounds of nationality). The Danish Bridge case provides a good example of the difference.

The European Court of Justice: Danish Bridge case

In this case, there were two alleged breaches of procurement law at issue. First, a clause which required the use of local goods and labour. Second, the way in which the employer had given one of the tenderers the chance of putting forward a variation to the specifications contrary to the instructions set out in the tender documents. The first breach was clearly discriminatory and thus gave rise to unequal treatment between those tenderers who could fulfil the nationality condition and those who could not, even though they could meet the output specifications. The second breach was not discriminatory because it did not distinguish between national and non-national tenderers. It merely treated one tenderer differently from the others. This is unequal treatment but is not necessarily discriminatory it could also (coincidentally) be discriminatory if it were applied to different nationalities.

Case C-234/89 *Commission v Denmark* [1993] ECR I-3353

- transparency,

  This principle imposes an obligation of transparency on the contracting authority which 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.

The ECJ: Coname case

Where the Directives do not apply to the contract in question (either because it is outside the Directives or below the thresholds), the principle of transparency will apply to require some form of advertising of the proposed contract. That will be the case whenever the contract in question may be of interest to an undertaking located in another member state. This is not required, however, where the lack of advertising can be justified by 'objective' or 'special' circumstances such as where there is only a very modest economic interest at stake.

Case C-231/03 *Consorzio Aziende Metano ('Coname') v Padania Acque SpA ('Coname')* [2005] ECR I-7287

Guidance on how the transparency objective might be achieved can be found in the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (24.07.2006)

- mutual recognition, and

  In practice, this means that the Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognised as equivalent to those required by the Member State in which the service is provided.

- proportionality.

  The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought. In the case of contracting entities, for example,it could be said that when selecting candidates and tenderers, contracting entities should not impose technical, professional or financial conditions which are excessive and disproportionate to the subject of the contract.

These general principles of law are enunciated, for the most part, by the European Court of Justice. These principles are unwritten rules, not contained in the Treaty but inspired by those common general principles of law recognised in the national legal systems of the Member States.

Note on general principles: It is important to remember that these general principles apply independently of the directives so that, even if the directives do not apply, the principles may. Thus, contracts below the EU thresholds, for example, are not covered by the directives but are subject to the general principles.

2.2.3 The EU Directives

General principles of law are difficult to apply in specific situations and tend to be negative in substance, *i.e.* they tend to proscribe incompatible behaviour but do not, at the same time, provide positive guidance on how they may be applied in the concrete situations to which they apply. It was necessary therefore to introduce procedural conformity to achieve non-discriminatory access to public procurement markets. The Community therefore adopted a series of Procurement Directives, setting out how these general principles apply in the specific context of public procurement.

2.2.3.1 The Main Directives

There have been a number of directives. Before 2004, in the public sector, there were three main directives covering works, supplies and services and they were amended many times. These did not include contracts awarded by entities operating in the utility sectors of water, energy, transport and telecommunications which, from 1990, were covered by a different series of directives for the utilities sector.

Since 2004, however, there has been a single directive which now applies to the public sector and another which applies to the utilities sector:

- The Public Sector Directive is **Directive 2004/18/EC**.
- The Utilities Sector Directive is **Directive 2004/17/EC**.

These directives cover only the procedural rules. There are two other directives which apply to complaints and review (*i.e.* to the enforcement of the directives). These are known as the Remedies Directives.

- In the Public Sector, remedies are governed by **Directive 89/665/EC**.
- In the Utilities Sector, remedies are governed by **Directive 92/13/EC**.

These have been both been significantly amended by a new Directive: **Directive 2007/66/EC**. The deadline for implementation was 20 December 2009.

In addition there is now a new Directive which applies a more flexible and confidential regime to the procurement of military supplies and related works and services: this is **Directive 2009/81**.

It should be added that these procedural and remedial Directives are supplemented by further legislation which deals with different aspects of the procurement process. These include, in particular:

- Commission **Directive 2001/78/EC** on the use of standard forms in the publication of public contract notices
- Commission **Regulation 1564/2005** establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC

2.2.3.2 The Scope of the Procedural Directives

The Directives are intended to coordinate national contract award procedures by introducing a minimum body of common procedural rules which reflect the basic Treaty principles rather than to achieve the harmonization of all national rules on public procurement. The Directives do not seek to impose a new common regulatory regime on the member states in the field of procurement and member states can continue to apply their national procedures adapted to the Directives.

As a result, the member states remain free to regulate a number of issues, mainly practical matters. Thus, member states may, for example, provide for the application of specific standard form tender and contract documents; they may require adherence to specific tender opening procedures or tender submission procedures; they may require the submission of appropriate tender or performance guarantees and can impose specific contractual obligations to public contracts which result from public procurement.

Good practice note: for economic operators seeking to tender for contracts in other member states, it will be important to have regard not only to the provisions of the Directives themselves but also to the applicable national rules and practices which remain unaffected (other than by reason of compatibility) by the Directives. These national rules and practices will often contain practical requirements which are not mentioned in the Directives.

Localisation: In XXX, for example, the [Procurement Law] applies the following requirements:

- xxx
- xxx

You can find information about local requirements at [insert information available locally such as public procurement office website]

In essence, the common rules of the directives consist of applying the basic principles referred to above, notably non-discrimination, equal treatment and transparency in the:

- publicity of proposed procurement contracts;
- design of technical specifications
- choice of procurement procedure;
- qualification and selection of tenderers;
- award of contracts.

The Directives, however, apply only to proposed procurement contracts above a given threshold financial value. Rather than seek to regulate with precision all public procurement contracts within the EU, the Community legislator chose to regulate in the Directives only those contracts which were most clearly capable of affecting trade between Member States. Those which fall within this broad definition include

(i) contracts which are of a sufficiently high value to attract tenderers from other Member States (*i.e.* where the potential benefits of winning the contract outweigh the extra costs of providing the goods, works or services from a greater distance); and/or

(ii) those contracts whose objects are amenable to cross-border trade.

This may require localisation: This does not mean that such contracts are not subject to competition. They are, in XXX, subject to the [Procurement Law] and, as indicated previously, to the fundamental principles of the Treaty and general principles of law.

2.2.3.3 The 'Legal Effect' of the Directives

Member states are required to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community. The Procurement Directives do not apply automatically: in order to produce their effects within the member states, they need to be implemented or 'transposed' into national law. The member states are, therefore, required to take the measures necessary to give full effect to the provisions of the directives in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

The directives are binding only as the result to be achieved but leave to the national authorities the choice of form and methods. Thus, it is not necessary for the member states to produce an exact copy of the Directives in their national legislation, although some member states have done precisely that, by reference to the Directives themselves. Include localisation where relevant: In XXX, the method chosen is to...

Failure to implement the Directives correctly or on time does not mean, however, that the directives have no effect. Member states are not entitled to deprive the subjects of those Directives (*e.g.* tenderers) of the rights they are intended to enjoy under the Directives. Under the ECJ's doctrine of 'direct effect', the rights conferred by the directives may be enforced by individuals in their national courts where the appropriate conditions are satisfied. This will happen when the member state has failed to implement/transpose the directive into national law by the due date (each directive include a date by which it must be transposed) or when it has transposed the directive but done so incorrectly.

The conditions necessary to give rise to the direct effect of a particular directive are that:

- the obligation imposed on member states is clear and precise,
- unconditional and,
- in the event of implementing measures, the member states or Community institutions are not given any margin of discretion.

Note on direct effect: It is important to remember that tenderers may be able to rely on the provisions of the procurement directives even if they have not been transposed into national law, provided the direct effect conditions are met.

2.3 THE NATIONAL PUBLIC PROCUREMENT LEGISLATIVE FRAMEWORK

This requires extensive localisation and should cover the following:

2.3.1 Primary public procurement law

- History
- Structure
- Scope of regulation

2.3.2 Secondary public procurement legislation

2.3.3 Other relevant legislation

- Administrative law
- Contract law
- Criminal law
- Budget law
- Other special laws

2.4 THE INSTITUTIONS INVOLVED

It is also important to have an idea of the institutions that are involved in procurement. For practical purposes, the institutional framework operates at two levels: the European level and the national level.

Contracting entities, which may also be considered as 'institutions', are bound by the provisions of the Directives and the national provisions which transpose them. They are answerable both to the Commission as emanations of a Member State and to individual economic operators who may rely on the Remedies Directive to challenge infringements by them.

2.4.1 The European Institutional Framework

A number of different organisations are implicated in procurement at the European level. These are:

2.4.1.1 The Community Legislator

Though the Treaty uses different terminology, the Community legislator is, in effect, the Council of the European Communities either alone or acting in co-operation with the European Parliament. All recent Procurement Directives are adopted by these two institutions acting together using the "co-decision" procedure.

Crucially, however, the Council does not have the right of initiative. It can only enact legislation that has been proposed by the Commission. Work on new legislation starts with the Commission and this is who issues new drafts which will be open for public discussion.

2.4.1.2 The Role of the Member States

For the purposes of the EU, the Member States are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Community. They are also required to facilitate the achievement of the Community's tasks and must abstain from any measure which could jeopardise the attainment of the objectives of the Treaties.

In terms of the Directives, the Member States are therefore required to take the measures necessary to give full effect to their provisions in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

As noted above, although the Directives are directly effective (where specific conditions are met) in that they can convey rights even if not implemented, they are not directly applicable, *i.e.* they need to be transposed into national law.

They are binding only as the result to be achieved but leave to the national authorities the choice of form and methods. Thus, it is not necessary for the Member States to produce an exact copy of the Directives in their national legislation.

Provided they achieve the same results, the national authorities can reproduce the provisions of the Directives in identical fashion, by amending existing legislation, or by creating new legislation or codes etc.

Localisation required: In XXX, the relevant provisions of the Directives are, for example, transposed by the [XXX] (where that is the process chosen).

2.4.1.3 The Role of the European Commission

In addition to acting as the proposer of legislation, the Commission has also been given by the Treaty the role of its guardian. It is given the explicit task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant to it are applied.

Thus, in addition to having acted as the primary policy maker in the field of procurement, the Commission is also responsible for the application and general enforcement of the Directives. In the case of procurement, the responsible directorate general is DG Markt.

Implementation measures taken by DG Markt include the adoption of secondary legislation to provide, for example, for the use of standard forms, the CPV, interpretative guidelines and communications and general guidelines.

Whilst enforcement in the national courts/review bodies against contracting entities in breach of their obligations is at the suit of interested economic operators, infringements by those public authorities, as emanations of the Member State will simultaneously amount to a failure of the Member State to fulfil its obligations under the Treaty.

Such a failure may be challenged directly by the Commission before the ECJ through infringement proceedings brought under Article 226 of the Treaty. This process is described in detail in H5.

2.4.1.4 The Role of the European Court of Justice

There are two Community level courts each with its own jurisdiction: the Court of First Instance (CFI) and the European Court of Justice ("ECJ"). In most cases related to procurement, it is the ECJ that is of most interest.

The ECJ ensures the observance of the law in the interpretation and application of the Treaty and its implementing rules. To this end, a number of powers have been expressly conferred on the ECJ. These are mainly intended to enable the ECJ to judge the acts and omissions of the Institutions and the Member States in accordance with Community law and to ensure uniformity in interpretation of Community law in the application of this law by the national courts.

There are three areas of the ECJ's work which are important in the case of procurement:

- **Dispute Resolution**

  Under Article 226 of the Treaty, the ECJ has jurisdiction to hear disputes between the Commission, acting as guardian of the Treaty, and Member States in respect of a Member State's failure to fulfil its obligations under the Treaty. These are often referred to as the Commission's infringement proceedings.

  Thus, the Commission will bring infringement cases against Member States before the ECJ. Such actions may result from a failure to transpose the Directives correctly into national law or from a failure of a contracting entity properly to apply the Directives, the national provisions transposing them or other enforceable Community law such as the Treaty itself.

- **Preliminary Rulings**

  A critical power conferred on the ECJ is the power, granted by Article 234 of the Treaty, to pronounce by way of preliminary ruling on the *interpretation* of the Treaty and on the *validity* and *interpretation* of acts of the institutions of the Community if a question on this subject is raised before a national court or tribunal.

  Thus in disputes between Member States and private persons or between private persons themselves, questions relating to the interpretation, application and validity of Community law which arise in the context of national proceedings may be referred to the ECJ. Where such questions arise in the context of a procurement dispute which has been brought in a national court/review body under the Remedies Directive, for example, the national courts may refer them for interpretation to the ECJ. Under this procedure, the national court/review body will establish the facts of the case and formulate questions of interpretation for the ECJ, the answers to which are necessary for the resolution of the case.

- **General Principles of Law**

  In the exercise of its jurisdiction the ECJ has cause to apply and interpret Community law and, in so doing, has often sought to fill *lacunae* in Community law by reference to general principles of law. These are unwritten rules, not contained in the Treaty but inspired by those common general principles of law recognised in the national legal systems of the Member States.

  Where decisions by the Commission impact on economic operators they may brought before the Court of First Instance.

2.4.2 The National Institutional Framework

Implementation and enforcement of the procurement rules takes place mostly at national level. In the case of XXX, the following institutions have been set up to carry out these tasks.

Localisation required:

2.4.2.1 Public Procurement Office/Agency

2.4.2.2 Procurement Review Body

2.4.2.3 Organisation at level of contracting entities – procurement departments/units; (certified) procurement officers.

2.4.2.4 Centralised Procurement - central purchasing agency

Public procurement
for economic operators

MODULE H

Which purchasers
are covered by the
EU procurement rules?

PART 2

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to identify:

1. The bodies that must apply the public procurement rules in the award of their works, supplies and services contracts
2. Those bodies that are part of the state, at the executive, legislative and judicial levels of government
3. Those bodies that do not fall within the general definition of state but that nonetheless must follow the procurement rules since they are covered by the definition of "utilities"
4. The mechanisms used to bring bodies other than "contracting authorities" within the scope of the Utilities Directive (**Directive 2004/17**)
5. The reasons for bringing such bodies within the scope of the Directive
6. The different utility activities ("relevant activities") that fall within the definition of the "utilities sector"

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- That the procurement rules apply to "public" procurement and that this is defined widely to cover purchases of all public authorities
- That the Court defines the concept of public authorities independently of any national definition, and makes that definition a functional one
- The way that each type of public authority is defined
- The conditions that apply to the different types of public authority before they are covered by the public procurement rules
- The possibility that the ability of a body to meet those conditions may change over time
- That the procurement rules also apply to the procurement of utilities, even where they are private companies
- The extent to which the rules apply in each of the defined utility sectors
- The central role played by the definition of "relevant activities"
- That the logic of including these sectors within the rules also gives way, in appropriate circumstances, to their exemption from the Utilities Directive

This means that it is critical to understand fully:

- The definitions of the Directives in respect of the state and other public authorities
- The definition of the Directives in respect of "bodies governed by public law"
- The interpretation given to these definitions by the Court

- The conditions that apply to a body before it may become a "body governed by public law"
- The definitions of the Utilities Directive in respect of "public undertakings" and "entities operating on the basis of special or exclusive rights"
- The mechanism used to bring these sectors within the system
- The definitions of the covered entities
- The definition of "relevant activities"
- The specific and general exemption mechanisms

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There is a particularly strong link between this chapter and the following:

- Module D1 on contracting authorities (classical sector)
- Module D2 on contracting entities in the utilities sector

1.4 RELEVANCE

This information will be of particular relevance in identifying the purchasers in different member states that will be obliged to follow the EU public procurement rules; those rules thus provide opportunities for tenderers from other member states to compete on an equal footing with national tenderers. Where tenderers are concerned as to whether they have been treated unfairly, they will be able to satisfy themselves that the purchasers at issue are indeed within these definitions and they will then be in a position to identify the potential breaches committed.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In Directive 2004/18, please look at article 1(9).

In national law, please look at:

SECTION 2
NARRATIVE

2.1 INTRODUCTION

As tenderers, you will be seeking to tender both in your own country and in other member states. You may already have identified your main purchasers, *i.e.* procuring entities. You may, however, be looking to identify other potential purchasers. The EU procurement rules define those procuring entities which are subject to the rules. If they fall within the relevant definitions, then they will be obliged to follow the EU procurement and the national rules that implement into the national applies that applies to them. They must, therefore, offer the protection given by the EU rules to tenderers coming from other EU member states. In some cases, they will also be obliged to extend the same protection to tenderers coming from countries with which the EU has entered into bilateral agreements which also concern procurement. [Localisation may be necessary where the country involved is not yet an EU member but benefits from a bilateral or multilateral agreement with the EU on procurement.]

In H2, we will be looking at the definition of procuring entities so that you will be able to recognise, in all member states, which procuring entities must allow you to submit tenders and which must treat you in the same way as they treat tenderers from their own countries.

2.2 PUBLIC AND UTILITIES SECTORS

The first big distinction is between purchasers which operate in the public sector and those which operate in the utilities sector. From your perspective, it may not matter who buys your products. However, slightly different rules apply to the purchasers in these two sectors so this will have an effect on the way you can tender and on the procedures that will be applied. To make sure you know how best to tender, you will also need to be aware of the differences between the purchasers.

- Purchasers that operate in the public sector are covered by the Public Sector Directive.
- Purchasers that operate in the utilities sector are covered by the Utilities Directive.

Note: In the case of the public or 'classical' sector, the preferred term is 'contracting authorities' because the bodies involved are public 'authorities' in the sense that they are, formally or informally, part of the State apparatus. In the utilities sector, on the other hand, the preferred term is 'contracting entities' since, whilst some of them may be public authorities, they can also be private sector companies who happen to operate in the utilities sector under privileged conditions.

2.3 CONTRACTING AUTHORITIES IN THE PUBLIC SECTOR

Another major distinction which must be made is between the two main categories of public or contracting authority defined in Directive 2004/18 (the Directive), namely:

- the State, regional or local authorities ('public authorities')
- bodies governed by public law

Contracting authorities may also be made up of associations formed by one or several of such authorities or one or several of such bodies governed by public law.

The importance of understanding these definitions is that they affect the applicability of the procurement rules which form the subject-matter of this training. These rules only apply if a body falls within one of the definitions of the Directive. If the body in question does not fall within those definitions, its procurement will not be subject to the Directive. The Directive either applies or it does not; there is no 'in between'.

Further, once a body falls within the definition of 'contracting authority', all of its purchases of goods, works and services will be subject to the procedural requirements of the Directive even if they are made for the purposes of tasks not, or even mostly not, in the general interest.

Especially in the case of a body governed by public law, the status of a contracting authority can change over time as a result of a change of its functions or a change in its legal status. The financing of the contracting entity may also change over time. These all have an effect on the inclusion of the body within the definition of the directive so that it may not be possible to say, once and for all whether a body is covered or not covered by the Directive. The situation may require review.

2.3.1 Public Authorities

Public authorities are defined as `the State, regional or local authorities'. This definition covers all State entities and not only the executive authority of the State, *i.e.* the administrations of State and regional or local authorities. The term `the State' also encompasses all the bodies which exercise legislative, executive and judicial powers. The same applies to bodies which, in a federal state, exercise those powers at federal level.

The definition of the State is broad and the European Court of Justice (ECJ) has taken a particularly functional approach. It thus looks more at the actual function of the entity concerned than the formal categorisation it is given by internal law.

Case note: *The term `contracting authority' will be defined according to the functions of the body in question. (Case 31/87 Gebroeders Beentjes BV v Netherlands ('Beentjes') [1988] ECR 4635)*

In the famous *Beentjes* case, the awarding authority was a body with no legal personality of its own whose functions and composition were governed by legislation and its members appointed by the provincial executive of the province concerned. It was bound to apply rules laid down by a central committee established by royal decree, whose members were appointed by the Crown. The state ensured observance of the obligations arising out of measures of the committee and financed the public works contract awarded by the local committee in question.

The ECJ held that the term `State' must be interpreted in functional terms. As a result, a body such as the awarding authority whose composition and functions are laid down by 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, was held to fall within the notion of the State, even though it is not part of the state administration in formal terms.

The state, regional or local authorities (the 'public authorities') are, by definition, contracting authorities for the purposes of the Directive. All contracts awarded by a public authority will be covered by the Directive whatever their character.

[Localisation required: In [xxx], the concept of 'public authorities' would include...]

An 'association' of contracting authorities is not different from a contracting authority; it is merely a term used to describe the mechanism where public contracts are awarded by 'entities' which do not have their own legal personality or identity but which are based on cooperation between public law bodies subject to the Directive such as purchasing consortia between territorial public bodies. It means a group of contracting authorities.

2.3.2 Bodies Governed by Public Law

A 'body governed by public law' does not have a simple definition. It depends rather on whether it has certain characteristics. These are expressed as conditions which need to be met in order for the body in question to be considered as one which is governed by public law. It is similar in approach to the functional test adopted by the ECJ in respect of the definition of public authorities.

The main question centres around the three *cumulative* conditions required by the Directive to indicate the existence of a body governed by public law. The ECJ has consistently held that a body must satisfy all three of these conditions to fall within the definition. These conditions are that a body governed by public law is a body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality, and
- financed, for the most part, by the State, or 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.

Annex III of the Directive includes a list of entities in each member state which are considered to fall within the definition of 'body governed by public law', so this is the first place you should look to see if your potential purchaser is covered. The lists are intended to be as comprehensive as possible and will contain the names of those bodies that the member state considers to fall within the definition at the time of adoption of the Directive. They are not, however, exhaustive. Even if it is not listed, a body will nonetheless be covered if it meets the three conditions referred to above.

[Possible localisation: where [XXX] becomes a member, insert: 'For [XXX] the list of such bodies includes OR is contained in [xxx]']

Condition 1: Defining Needs in the General Interest

There are two main issues which are relevant and these include the definition of (i) needs in the general interest, and (ii) general interest needs not having an industrial or commercial character.

- **Needs in the General Interest**

  'Needs in the general interest, not having an industrial or commercial character' are *generally* needs which are satisfied otherwise than by the availability 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. In general, the ECJ has looked towards State requirements with regard to the specific tasks to be achieved; the explicit reservation of certain activities to the public authorities; the obligation on the State to cover the costs associated with the activities in question; the control of prices to be charged for the services, the degree of monitoring or security required; as well as to 'public interest'.

  There have been several examples:

  - One example is of an entity established to produce, on an exclusive basis, official administrative documents, some of which required secrecy or security measures, such as passports, driving licences and identity cards, whilst others were intended for the dissemination of legislative, regulatory and administrative documents of the State. The prices were fixed by the public authorities and a State control service was responsible for monitoring the security measures where necessary. The documents were closely linked to public order and required guaranteed supply and production conditions which ensured that standards of confidentiality and security are observed. The body was established for the specific purpose of meeting those needs in the general interest (C-44/96 *Mannesmann* [1998] ECR I-73).
  - An entity which was a public limited company set up by two municipalities which was specifically entrusted with a series of tasks defined by law in the field of waste collection and the cleaning of the municipal road network carried out a need in the general interest (Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821).

- The activities of funeral undertakers could be regarded as meeting a need in the general interest, especially since the exercise of the activity was subject to the issue of prior authority and that the public authorities could fix the maximum prices for funeral services (Case C-373/00 *Adolf Truley* [2003] ECR I-1931).
- In other examples, it was found that regional development agencies and other more specialised undertakings which are designed to attract investment to a particular location could fall within the definition of general interest since, by bringing together manufacturers and traders in one geographical location, they are not acting solely in the individual interest of those manufacturers and traders, but also providing consumers who attend the events with information that enables them to make choices in optimum conditions. The resulting stimulus to trade was considered to fall within the general interest (Cases C-223/99 and C-260/99 *Agorà* [2001] ECR 3605; case C-18/01 *Korhonen* [2003] ECR I-5321).

As you see, many entities which carry out 'commercial' type activities will be covered by the rules so that you will have the benefit of competing for contracts awarded by them as well.

General Interest needs not having an industrial or commercial character

The additional criterion for the purposes of this definition is that the general interest needs should not have an industrial or commercial character. These are generally activities which are carried out for profit in competitive markets. The ECJ (Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821) has held that

(i) the absence of an industrial or commercial character is a criterion intended to clarify and not limit the meaning of the term `needs in the general interest',

(ii) the term creates, within the category of needs in the general interest, a sub-category of needs which are not of an industrial or commercial character and

(iii) the 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.

A body governed by public law may carry out both activities. In the *Mannesmann* case, for example, the entity involved had the task of providing the public authorities with official documents (a need in the general interest) but was also in the business of acting as a commercial printing company.

However, once an entity falls within the definition of a body governed by public law, its contracts are to be considered to be public contracts within the meaning of the Directive and covered by the Directive. Even the fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued is irrelevant, provided that it continues to attend to the needs which it is specifically required to meet.

On the other hand, if a body governed by public law carries out other activities and these are provided in a competitive market, this may, in fact, indicate the absence of a need in the general interest, not having an industrial or commercial character. If an entity falls into this category, then the Directive will not apply.

This is a conceptually difficult distinction but the problem is solved essentially by looking at the nature of the entity concerned rather than the activity it carries out. The question becomes one of whether the entity is operating in an industrial or commercial manner. Thus, in the Korhonen case, the ECJ held that if the body:

(i) operates in normal market conditions,

(ii) aims to make a profit, and

(iii) bears the losses associated with the exercise of its activity,

it is unlikely that the needs it aims to meet are not of an industrial or commercial nature.

The relevant legal and factual circumstances will have to be taken into account in each case, especially those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, the level of competition on the market, whether its primary aim is or is not the making of profits, the question of whether or not it bears the risks associated with the activity, and any public financing of the activity in question. It is not always easy, therefore, to be sure that a particular purchaser is governed by the rules or not.

Condition 2: Legal Personality

The existence of legal personality is generally the clearest distinction between bodies which form part of the State, regional or local authorities and those which will be considered to be bodies governed by public law. Most government Ministries, departments and divisions do not have separate legal personality. If a separate body is created as a company or enterprise, then it will have legal personality separate from the State and is likely to be seen as a body governed by public law if the other two conditions are also met.

It does not matter whether the body in question is subject to public or private law. The only issue is whether it has legal personality.

Condition 3: Dependency on the State

This third condition is satisfied where the body is question 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.

This condition is used primarily to determine the degree of dependency of the body in question on the State. This dependency may, alternatively, be

- financial
- managerial or
- supervisory

This condition is satisfied where only *one* of these three criteria is met.

(i) Financial Dependency

The term "financed for the most part" means financed by "more than half", but the term "financed" is not as clear as it seems. The question concerns the actual degree of State dependency implied by the level of State financing. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency between that authority and another body. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing.

Example from case law:

In the case of a university, payments in the form of awards or grants for the support of research work that go to the institution as a whole may be regarded as financing by a contracting authority. Similarly, the payment of student grants in respect of tuition fees collected by the universities may also be classified as public financing.

On the other hand, the position is quite different in the case of payments made, in the form of consideration, by one or more contracting authorities for the supply of services comprising research work or for the supply of other services, such as consultancy or the organisation of conferences. These 'sources of financing' are, in fact, sums paid by one or more contracting authorities as consideration for contractual services provided by the university and it does not matter either that those activities of a commercial nature happen to coincide with the teaching and research activities of the university.

Case C-380/98 *The Queen v HM Treasury, ex parte The University of Cambridge* [2000] ECR 8035.

If the degree of dependency varies according to the sources of funding, so a change in the source of funding will affect the degree of dependency. Accordingly, the decision as to whether a body is a contracting authority must be made annually and the budgetary year during which the procurement procedure is commenced is the appropriate period for calculating how that body is financed. So, if at the beginning of the budgetary year in question, more than half of the body's funding will be public financing, procurement for that year will be covered by the Directive.

(ii) Managerial Dependency

This condition relates in effect to the direct participation of public authorities and officials in the management of the entity in question. The condition will be fulfilled, for example, where a body is established by a Government Minister, where its memorandum and articles and any amendments must be approved by him, where the chairman and other directors are appointed and their remuneration determined by him, where the appointment of the company's auditors must be approved by the Minister and where the company is to comply with State policy and any ministerial directives with regard to the remuneration, allowances and conditions of employment of its employees.

(iii) Supervisory Dependency

This condition goes further than mere general supervision of an administrative or financial nature and it must give rise to dependence on the public authorities, enabling the public authorities to influence their decisions in relation to public contracts.

Where the supervision of the activities of the body in question exceeds that of a mere review, the condition may be fulfilled. That could be the case, for example, 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 public authority which holds all the shares in the body in question.

2.3.3 Central and Joint Purchasing

The Directive has now formalised the practice current in a number of states in respect of centralised procurement. Public purchasers have recognised that they can benefit from economies of scale by buying their requirements in bulk. Even where the procurement needs of a single procuring entity are relatively modest in respect of a given product or service, the combined needs of a number of such government purchasers may be significant. Government departments operating in similar sectors or in neighbouring locations have often found it beneficial to group together jointly to purchase specific items. This is most likely to be the case of products used on a day to day basis where the various purchasers do not have any entity-specific or differential technical requirements. In some cases, it could also be used as a means of purchasing more specialised equipment, where technical compatibility is needed. In some cases, the task of making such bulk purchases may be entrusted to a single purchaser, with either one of the group of purchasers acting as agent for the others or to a specially created entity established with that function in mind: a central purchasing body.

From the tenderers' point of view, access to a central or joint purchasing body will have the effect of potentially increasing the volume of sales possible. Succeeding in a tender at this level will open the possibility of selling to a number of contracting authorities.

For the purposes of the Directive, a central purchasing body is a "contracting authority" which "acquires supplies and/or services intended for contracting entities" or "awards public contracts or concludes framework agreements for works, supplies or services intended for contracting entities".

Example: Office of Government Commerce

In the United Kingdom, for example, the Office of Government Commerce operates a centralized procurement system to particular common use goods and services. It does so through its commercial arm, known as 'Buying Solutions'. This service offers a range of products and services, often available on the basis of a framework arrangement, which have been procured in accordance with the procedures of the Directive. Information on how this system operates can be downloaded from: www.buyingsolutions.gov.uk

Localised Example?: XXX

…Information on how this system operates can be downloaded from:

It is also possible that a number of contracting authorities will simply choose to aggregate their requirements and jointly conduct a contract award procedure (including framework agreements). This form of joint purchasing could be done in the name of each of the contracting entities or in the name of a lead entity acting on behalf of the others. To the extent that these entities simply act jointly, without the benefit of a special purpose vehicle or without nominating one of their number as agent for the others, then they will be acting as an association of contracting authorities.

Example: Eastern Shires Purchasing Organisation

Again in the UK, ESPO is a joint Committee of regional Local Authorities. It acts as a purchasing agent for its member authorities and other customers and provides a procurement and supply service (offering goods and services) to its members to a value of around £700 million per annum. Information on how this system operates can be downloaded from: www.espo.org

Localised Example?: XXX

…Information on how this system operates can be downloaded from:

2.4 CONTRACTING ENTITIES IN THE UTILITIES SECTOR

As the name of the EU Directives suggests, the procurement directives were originally intended to cover *public* procurement, that is, contracts awarded by *public* authorities or other *public* bodies. As a result, the current Directive 2004/18 (as well as all of the previous Directives which applied to the public sector – hereafter 'the Public Sector Directive or Directives') specifically excludes from its scope of application all public contracts which, under the Utilities Directive, are awarded by contracting authorities exercising one or more of the defined activities in the utilities sector (in the field of water, energy, transport and postal services) and are awarded for the pursuit of those activities.

This exclusion was not made because the Community authorities did not want to cover public authorities operating in these sectors (they did) but because the bodies awarding such contracts were not always 'public entities'. Indeed, they were and are often wholly private undertakings even though, in many member states, activities in these sectors are entrusted to government agencies or a combination of both private and public entities.

By 1990, however, the Community regulator had come up with a means of applying the procurement rules to the utilities sector. It did so in a separate Utilities Directive where it was made clear that not only are 'public' entities bound to follow Community rules with regard to their procurement of goods, works and services but so are those private undertakings which operate on the basis of special or exclusive rights. The paramount consideration in both public and private sectors is the extent to which the contracting entities are subject to state influence whether this influence is exercised through direct control or indirect influence (*e.g.* the state's power to control the grant and operation of special or exclusive rights to private undertakings).

The rules were adopted in a separate directive because the provisions are more flexible than in the classical sectors. It was recognised that the entities in these sectors were operating in a more commercial market so that, although the main principles of the public procurement rules needed to be respected, it was also necessary to provide some flexibility in order to take account of the reality of the environment in which their activities took place.

The entities in the utilities covered by the Community procurement rules fall within two broad categories.

- The first category consists of entities over which the state may exercise direct control. These are public authorities and bodies governed by public law and the definitions are the same as for those authorities covered by the Public Sector Directive.
- The second category, referred to, for the sake of convenience consists of defined *public* bodies and those *private* entities which operate in their relevant sectors on the basis of special or exclusive rights granted by a member state of the Community.

It is important to remember that, unlike in the case of the Public Sector Directive where contracting authorities once caught by the definition must carry out all their procurement according to that Directive, public authorities, bodies governed by public law and other entities covered by the Utilities Directive are covered only to the extent that they carry out a relevant activity defined in the Utilities Directive. To fall within the scope of application of the Utilities Directive, they must (i) fall within the definition of an entity operating in a utility sector and (ii) carry out a relevant activity (only or as one among many relevant and/or non-relevant activities).

Important note:

Entities operating in the utilities sector as defined in the Utilities Directive are covered by the Directive only to the extent that they carry out a relevant activity defined in the Utilities Directive.

There are types of defined entity: (i) contracting 'authorities', (ii) public undertakings and (iii) entities (usually privately owned) which operate on the basis of special or exclusive rights.

2.4.1 Contracting 'authorities'

The definition of 'contracting *authority*' is the same in both Public Sector and Utilities Directives. There are two main types of contracting authority and the case law on this issue has resulted in a flexible definition. The two types are: 'public authorities' and 'bodies governed by public law'.

These are discussed in section 2.3 above.

2.4.2 Public undertakings

These are defined as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the major part of the undertaking's subscribed capital, or
- control the majority of the votes attaching to shares issued by the undertaking, or
- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

The distinction between public authorities and public undertakings flows from the recognition that the state may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services in the market. In order to make such a distinction, it is necessary, in each case, to consider the activities exercised by the state and to determine the category to which those activities belong. In this respect, the ECJ also takes a functional approach to the definition.

Example from case law:

The concepts of 'bodies governed by public law' and 'public undertakings' are not mutually exclusive. The objective of the Utilities Directive is to extend the procurement rules to utilities not covered by the public sector directives and thus ensure that all the contracting entities operating in the utilities sectors are included within its scope, regardless of their legal form and the rules under which they were formed.

Case 283/00 *Commission v Spain* [2003] ECR I-11697

[Localisation possible: In (XXX), this might/will include entities such as (xxx)…]

2.4.3 Entities operating on the basis of special or exclusive rights

A critical reason for the exclusion of certain sectors from the scope of the earlier Public Sector Directives (on works, supplies and service, respectively) was that the contracting entities involved in that sector could not simply be classified as `public' entities. Indeed, their legal status ranges from purely government-owned undertakings to private companies holding exclusive concessions. The task of the Community regulator was, therefore, to find a way of avoiding the public/private distinction and to adopt a definition which recognises the privileged position which might encourage private utilities to engage in unfair (nationalistic) procurement practices..

For tenderers, the task remains one of identifying those utilities which are covered by the EU rules and those which are not. For this, the Utilities Directive provides a definition which consists in the identification of those situations in the relevant sectors in which, whatever the public or private status of the entities concerned, the objective conditions leading to nationalistic purchasing practices can be identified. It did so by relying on the concept of special or exclusive rights.

Article 2 of the Utilities Directive thus identifies the contracting entities which are covered by the proposals and groups the contracting entities in two categories, namely public authorities and public undertakings (as above) and undertakings which operate on the basis of special or exclusive rights.

Article 2(2)(b) provides that the provisions of the Utilities Directive shall apply to

- contracting entities when they are not contracting authorities or public undertakings,
- have as *one* of their activities any of those referred to in Articles 3 to 7 (discussed below) or any combination thereof
- and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

Note: Covered Utilities

The Directive also provides, in annexes I-X, an illustrative (and non-exhaustive) list of entities in each of the member states which are considered to fulfil the criteria explained here. [Localisation possible: In (XXX), this might/will include entities such as (xxx)]

Article 2(3) of the Utilities Directive states that, for the purpose of the Directive, special or exclusive rights shall mean rights deriving from authorisations granted by a competent authority of the Member State concerned, by way of any legal, regulatory or administrative provision, the effect of which is to limit the exercise of activities defined in Articles 3 to 7 to one or more entities and which substantially affects the ability of other entities to carry out such activity.

No `special or exclusive rights' exist where they have been conferred upon the undertaking as a member of a class of undertakings carrying on an economic activity which is open to anyone. Indeed, exclusive or special rights must generally be taken to be rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, and which substantially affect the ability of other undertakings to provide the same services in the same geographical area under substantially equivalent conditions.

For further explanation, see the Commission's 'Explanatory note – Utilities Directive definition of exclusive or special rights' (Document CC/2004/33 of 18.6.2004).

2.5 THE DEFINITION OF RELEVANT ACTIVITIES

Unless exempted under Article 30 (see section 2.5.6) , the contracting entities which fall within the above definitions are covered by the Utilities Directive only to the extent that they carry out a relevant activity and only in relation to contracts let for the purpose of carrying out that activity. The relevant activities are the following.

Note: New definitions of 'relevant activities' – changes from the earlier directives

Previously, **telecommunications** was a relevant activity but this has now been removed because, following the success of the Community's telecommunications liberalisation initiative in introducing effective competition into the sector, the Commission no longer considers it necessary to regulate purchases by entities operating in this sector.

Now, **postal services** are also included as a relevant activity and so subject to the Utilities regulations. They were previously subject to the public sector directive.

2.5.1 Water

The relevant activity consists in the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of drinking water.

In the case of a contracting 'authority', the supply of drinking water to networks which provide a service to the public is also a relevant activity for the purposes of the Utilities Directive. In the case of the other contracting entities, the supply of drinking water to such networks will be covered where that is one of their principal activities.

It is not a principal activity and the supply of drinking water will not be covered where

- its production takes place because it is necessary for carrying out an activity other than a relevant activity; and
- where such supply depends only on the entity's own consumption of drinking water and has not exceeded 30 per cent of the entity's total production of drinking water, having regard to the average for the preceding three years, including the current year.

In addition, the Utilities Directive will also cover the award of contracts connected with hydraulic engineering, irrigation or land drainage, as well as to the disposal or treatment of sewage. It will apply in the context of hydraulic engineering, irrigation or land drainage provided that the volume of water intended for the supply of drinking water represents more than 20 per cent of the total volume of water made available by these projects or irrigation or drainage installations.

Exclusion:

Contracts for the purchase of water awarded by entities listed in Annex I to the Utilities Directive (production, transport or distribution of drinking water) are not covered since procurement rules such are inappropriate for purchases of water given the need to procure water from sources near the area where it will be used.

2.5.2 Energy

This activity concerns

- the provision of electricity, gas or heat and
- the exploitation of a geographical area for the purpose of exploring for and extracting oil, gas, coal or other solid fuels

2.5.2.1 Electricity, gas or heat

This consists of the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat.

In the case of a public authority, the supply of electricity, gas or heat to networks which provide a service to the public is also a relevant activity for the purposes of the Utilities Directive.

As with water, above, in the case of the other contracting entities, the supply of electricity, gas or heat to such networks will be covered only where that is one of their principal activities. However, this condition applies differently to, on the one hand, electricity and, on the other, gas or heat.

In the case of the other contracting entities who supply electricity, the supply of electricity to such networks will not be covered, as in the case of water supplies (above) where:

- production takes place because it is necessary for carrying out an activity other than a relevant activity; and
- where such supply depends only on the entity's own consumption of electricity and has not exceeded 30 per cent of the entity's total production of energy, having regard to the average for the preceding three years, including the current year.

In the case of the other contracting entities who supply gas or heat, that supply of gas or heat to such networks will not be covered where:

- production is the unavoidable consequence of carrying on an activity other than a relevant activity; and
- supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 per cent of the entity's turnover having regard to the average for the preceding three years, including the current year.

Exclusion:

The Utilities Directive does not apply to contracts awarded for the supply of energy or of fuels for the production of energy. This exemption was included because of the lack of liberalisation in the Community energy market which meant that energy could effectively not be traded across EU borders. The exemption refers to the purchase of fuels for the production of energy: it does not exclude the purchase of fuels for other purposes such as transport.

2.5.2.2 Exploitation of a geographical area

The Utilities Directive applies to contracting entities which exploit a geographical area for the purpose of exploring for and extracting oil, gas, coal or other solid fuels.

In addition, a specific exemption was provided for in the previous Utilities Directive for the activities and exploration and extraction of hydrocarbons. This exemption has not been retained in the latest Directive and no new exemption will be granted under this procedure, although the exemptions already granted under the procedure remain valid. Exemption will now be considered under the new general exemption mechanism of Article 30 (see 2.5.6 below).

Exclusion:

As with the energy sector in general, the Utilities Directive does not apply to contracts which the contracting entities award for the supply of energy or of fuels for the production of energy.

2.5.3 Transport Services

The provisions apply not only to the operation of transport networks but also to the operation of transport terminal facilities.

2.5.3.1 Transport networks

This activity consists in the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

A transport network is taken to exist where the service is provided under operating conditions laid down by a competent authority of a member state, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

Previously, the provision of bus services was not covered, however, where other entities were free to provide those services, either in general or in a particular geographical area, under the same conditions as the contracting entities. In practice, this means that other contracting entities must not only be authorized to operate in the market for the services in question, without any legal barriers to entry to the provision of those services, but must also be in a position actually to provide those services under the same conditions as the contracting entity.

The transport sector is now also subject to the general exemption procedure under Article 30. Bus transport services not already subject to an exemption will be required to seek an explicit exemption under Article 30 (see 2.5.6 below).

2.5.3.2 Terminal facilities

The exploitation of a geographical area for the purpose of providing airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway is also a relevant activity.

However, it is only the operators of the terminal facilities which are covered by the Utilities Directive. Carriers using such facilities will not be covered.

On the other hand, contracts awarded by carriers, which are also contracting authorities for the purposes of the Public Sector Directive will be subject to the provisions of that Directive.

2.5.4 Postal Services

Before the adoption of Directive 2004/17, contracts awarded for postal services to the public fell within the scope of the Public Sector Directives to the extent that the entities in question were contracting "authorities" for the purposes of those directives.

The difference now is that these entities will be subject to the more flexible regime of the Utilities Directive and will also be in a position to benefit from the general exemption procedure of Article 30 which could apply where postal services are provided in a competitive market.

The Directive applies to:

- activities relating to the provision of postal services, and

  these are services consisting of the clearance, sorting, routing and delivery of postal items
- "other services than postal services".

  these are mail service management services (services both preceding and subsequent to despatch, such as "mailroom management services"); added value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail); services concerning postal items not included in the main definition.

This second category of services is covered only to the extent that the entity in question also provides "postal services" *and* the conditions provided for in the general exemption of Article 30 are not satisfied in respect of those "postal services". As a result, the Utilities Directive applies only where the services are not provided on a competitive basis

2.5.5 The scope and necessity of 'relevant activities'

A utility is covered only where it carries out a 'relevant activity' defined above.

Exclusion:

The Directive does not apply to the pursuit of such relevant activities *in a third country*, in conditions not involving the physical use of a network or geographical area within the Community. Such activities must be notified to the Commission for information purposes.

What happens when an entity carries out a number of activities and awards a contract for a non-relevant activity?

Article 9 of the Utilities Directive provides a mechanism for distinguishing between various situations. There are essentially three tests set out in each of the three paragraphs of Article 9:

- a contract which is intended to cover several activities is subject to the rules applicable to the activity for which it is *principally intended*;
- if one of the activities for which the contract is intended is subject to the Utilities Directive and the other to the Public Sector Directive and if it is objectively impossible to determine which activity the contract is principally intended for, the contract shall be awarded in accordance with the latter Directive;

- if one of the activities for which the contract is intended is subject to the Utilities Directive and the other is not subject to either this Directive or the Public Sector Directive, and if it is objectively impossible to determine which activity the contract is principally intended for, the contract shall be awarded in accordance with the Utilities Directive.

Article 9(1) also includes an anti-avoidance provision. It provides that the choice between awarding a single contract and awarding a number of separate contracts may not be carried out with the objective of excluding it from the scope of this Directive or, where applicable, the Public Sector Directive. This is clearly based on the intention of the contracting entity and would prevent a contracting entity from bundling together all contracts under the pretence that they are for the purposes of non-relevant activities when, in fact, only some are for the purposes of non-relevant activities.

For further explanation, see the Commission's 'Explanatory note – Utilities Directive contracts involving more than one activity' (Document CC/2004/34 of 18.6.2004)

2.5.6 The General Exemption of Article 30

As indicated above, the previous Utilities Directive included a series of exemptions in specific sectors where the entities concerned supplied services in competitive markets either because that was the reality of the market in question or because competition had been introduced through the introduction of Community market liberalisation.

Given the degree of liberalisation in various sectors, the new Utilities Directive has now introduced a more general exemption provision which will grant an exemption from the provisions of the Directive to those contracting entities who carry out an activity which, in the Member State in which it is performed, is

- directly exposed to competition
- on markets to which access is not restricted.

The test of whether markets are competitive will necessarily have to take account of both the legal and factual situation in the member state in question and will necessarily have to be addressed on a case by case basis. It will take account of the nature and quality of the supply market so the input of relevant tenderers would be important.

2.5.6.1 The Existence of Competitive Markets

When looking at the question of whether an activity is directly exposed to competition, the assessment will be made on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question. This indicates very clearly that the tests to be applied are the same applied in making the market analyses required by Articles 81 and 82, as well as 86, of the Treaty.

Further Details:

Commission Decision 2005/15 sets out the more detailed requirements for applications under Article 30. Annex I of the Decision sets out all the information that would be necessary for the market analysis to be conducted, not all of which will be relevant to each specific situation.

Consideration is given to both legal and *de facto* barriers to entry. Since the liberalisation directives in the various sectors are designed to remove any remaining legal barriers to entry, the actual removal of those barriers through compliance with the different directives will be sufficient to demonstrate the absence of any legal restrictions on access to the market for the activities in question. Access to a market will, therefore, be deemed not to be restricted if the Member State has implemented and applied the provisions of Community legislation mentioned in Annex XI which contains a list of Community legislation designed to liberalise various utility sectors.

Currently the list refers to legislation in the following sectors: transport or distribution of gas or heat (Directive 98/30); production, transmission or distribution of electricity (Directive 96/92); contracting entities in the field of postal services (Directive 97/67); and exploration for and extraction of oil or gas (Directive 94/22/EC).

No liberalisation legislation is currently listed for the production, transport or distribution of drinking water; contracting entities in the field of rail services; contracting entities in the field of urban railway, tramway, trolleybus or motor bus services; exploration for and extraction of coal or other solid fuels; contracting entities in the field of seaport or inland port or other terminal equipment; contracting entities in the field of airport installations.

2.5.6.2 Exemption Procedure

The exemption is granted by way of a Decision by the Commission which will be prompted by an application by the member state, a contracting entity or the Commission itself, at its own initiative. The procedure of Article 30 is supplemented by Decision 2005/15 ('the Decision') which covers such things as publication requirements, extensions and the procedures for forwarding decisions.

The procedure also allows for the position adopted by an independent national authority that is competent in the activity concerned to be taken into account. Such a body would need to assess the market circumstances and it might be expected to canvass the views of economic operators in the relevant market.

Public procurement
for economic operators

MODULE H

Which contracts are covered?

PART 3

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The different types of contract that are covered by the rules
2. The contracts not covered by the procurement rules
3. The means of distinguishing between the different types of contract
4. Why some contracts are exempted and others not
5. The mechanisms for determining when contracts are exempted
6. The connection between the exemption and type of contract at issue

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The essential characteristics of a procurement contract
- The nature of the contracts covered
- The scope of the contracts covered
- The effect of combining contract types
- The reasons for excluding some contracts
- The scope and extent of the exclusions
- The specific nature of the exclusions

This means that it is critical to understand fully:

- The elements of a contract
- The characteristics of arrangements that do not constitute contracts
- The aim or purpose of a contract
- The primary purposes of the procurement rules underpinning the inclusion and/or exclusion of contracts
- The limits of exclusion
- The effects of particular exclusions

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There are particularly strong links with the following modules:

- Module D3 on contracts covered
- Module D4 on exemptions

1.4 RELEVANCE

This information will be of particular relevance in identifying the contracts that will be subject to tender under the procurement rules.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In addition to the provisions of the Directives, it may also be useful to have to hand:

- [Localise: the (national law relating to concessions)]
- [The section of the applicable local law that applies to services contracts]
- [Localise: the provisions of national law relating to exemptions]
- If applicable, reference to any national law that applies to defence procurement]

SECTION 2
NARRATIVE

2.1 INTRODUCTION

As tenderers, you will be familiar with the products and services you sell to the public sector and the Directives, as you would expect, cover all three main types of contract:

- works,
- supplies and
- services (other than works), including design contests.

There is, however, no separate category of consultancy services. These are dealt with essentially in the same way as other services.

Some contracts will often contain elements of one or more of the above types of contract. A contract to construct a building might, for example, include design services and certain necessary supplies. Similarly, a supply contract may include siting and installation services. The Directives contain specific rules used to classify these 'mixed contracts'. These are important provisions, not least because they may have an effect on the value of the overall contract and since value, as we will see below, determines when the rules apply, this could have a significant effect on the contracts available.

A number of contracts are entirely excluded from the scope of the Directives (but not necessarily of the Treaty provisions – see H1) either because of their nature (*i.e.* where it would be inappropriate to apply the provisions of the Directives) or because they are the subject of different systems of regulation or administration. Some contracts, the new 'reserved contracts', receive special treatment as a result of the identity of those who supply the goods, works or services under them. These are subject to specific eligibility requirements.

Even if not excluded, contracts will only be subject to the provisions of the Directives where their value exceeds the relevant monetary value set out in the Directives. These thresholds reflect the level at which it was assumed by the legislator that cross-border trade was likely (though it is possible that, depending on the circumstances, tenderers may be interested in below threshold contracts in other Member States – it is to be recalled that the general principles apply to the award of these contracts in any event). In order to prevent creative methods of calculating the value of the contracts to be let, the Directives also apply rules and methods of calculation as well as prohibitions on methods designed to circumvent the Directives by splitting, aggregating or packaging contracts in such a way that contracts do not properly fall within the appropriate provisions.

One important distinction made by the Directives is between 'contracts' and 'concessions' and the latter are treated differently from contracts. Special rules apply to the award of works concessions in the Public Sector Directive, while services concessions are excluded from the scope of both Directives.

Finally, it should be mentioned that the latest Public Sector Directive also resolves the previous uncertainty over the position of framework agreements which, although they may still be contracts for works, supplies or services (or treated as such) and therefore no different in nature by reason of their method of award, require separate treatment.

2.2 'PROCUREMENT' CONTRACTS

The Directives apply to contracts for pecuniary interest concluded in writing between an economic operator and contracting entity [Localisation may be required if the definitions in the local law are different]. Thus:

- The contract must be for pecuniary interest, *i.e.* for money or money's worth. There must be financial consideration, however that is paid.
- The contract must be in writing. In the very unlikely event that a contract which falls within the Directives is not in writing, it will be subject to the general application of the rules contained in the Treaty and discussed in H1.
- The contract must be between two parties: the economic operator and the contracting entity. There are situations in the public sector, however, where agreements are not made between two separate and distinct parties so that there is no contract under this definition. Arrangements made between departments of the same organisation, for example, would not ordinarily be covered by the procurement rules. This is because there will normally be no contractual relationship between different departments of a single organisation.

Note: Contracts may, in practive, be between more than two parties where, for example there are two contracting authorities working together who sign the same contract with a single contractor: Localisation required

- Practical note: Contracts may be between more than two parties where, for example there are two contracting authorities working together who sign the same contract with a single contractor: Localisation required

2.2.1 Internal Arrangements within the Contracting Entity

Where there is a purely internal arrangement between departments of the same public sector organisation, there will generally be no contract and private sector tenderers may not be invited to bid.

Public sector organisations can make use of private sector structures such as companies to carry out public services. These structures/companies can also be used to provide services directly to the public organisation which controls them. Where they are part of the same legal structure, these arrangements are not 'contracts' for the purposes of the Public Sector Directive. As soon as they become separate legal entities, however, any arrangement between them becomes a 'contract' between two parties, one a contracting entity, the other an economic operator.

When this happens, the procurement of goods, works and services between the 'parent' contracting entity and the 'owned' economic operator becomes a procurement contract between those parties. This means that the contract must be awarded using the provisions of the Public Sector Directive so that the contracting entity may not make a direct award of a contract to its own company.

This situation has been explicitly recognised in the utilities sector where it is often the case that a contracting entity owns a number of subsidiaries. Under the Utilities Directive, there is an explicit 'affiliated undertakings' exemption. The effect of this exemption is to exclude the intra-group (*i.e.* between the parent and subsidiary or between the different subsidiaries) provision of goods, works and services from the scope of the Utilities Directive, subject to certain conditions. There is no equivalent provision in the Public Sector Directive.

This situation has been confirmed by the European Court of Justice (ECJ). The ECJ also provides an exemption, however. In the important case of *Teckal*, the ECJ held that it was sufficient to bring the arrangements within the Directive "if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority". It then went on to say, however, that the situation would be different if, in effect, the contracting entity controlled the company as if it were one of its departments. This would take the arrangement outside the scope of the Public Sector Directive.

The ECJ confirmed that an arrangement would be outside the scope of the Public Sector Directive 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."

Case C-107/98 *Teckal Srl v Comune di Viano and AGAC di Reggio Emilia* [1999] ECR I-8121

If the private company (economic operator) at issue is only partly owned by a public authority, the exemption will not apply.

The ECJ:

"The participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant *excludes in any event* the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments."

Case C-26/03 *Stadt Halle* [2005] ECR I-1.

2.2.2 When does a contract arise?

When a new contract is awarded, there is normally little difficulty in identifying it. Sometimes, however, this is not obvious. For example, an existing contract might be amended or renewed. A contract may also be amended during its execution. All of these situations give rise to new obligations between the parties and may change the terms of the original contract.

If the result of the changes is so extensive that the contract is fundamentally different from the original contract, then it may be the case that there is a new contract. If there is a new contract and if all the elements of a contract are present then that is a contract that should be subject to the procurement rules, *i.e.* it must be awarded according to the provisions of the Directives. That means that a simple extension, renewal or even amendment might not be permitted if it is made without competition. This is important for tenderers to bear in mind during the execution of existing contracts. If any variations made are too extensive, the whole contract may need to be put out to tender again.

The practical difficulty will be in determining when a change in the contract will give rise to a new contract, thus creating an obligation to apply the Directives, and when it will not. The Directives are silent on the question and there is very little case law.

In some cases, the Directives do provide a solution. Options can be included in contracts and these might include an extension or renewal of the contract following satisfactory performance, for example. If the value of the option or the renewal is taken into account in the calculation of the estimated price of the original contract, it will be covered by the original competition and there would be no need to apply the Directives again. As tenderers, you should check whether this is the case at the outset.

Similarly, some contracts can be renewed automatically until terminated by one or other party or by mutual agreement or may simply be concluded for an indefinite period of time. These are 'indefinite' contracts and the Directives provide a mechanism for calculating the value of such contracts for the purposes of the applicable thresholds.

The case of contract variations (*i.e.* where the contract needs to be varied/amended during its execution) is less clear. Even where variations are anticipated, as is often the case with works contracts, there will still be a question of whether those variations are acceptable as part of the original contract or whether they go beyond the terms of the original contract and become, in effect, a new contract.

The issue came before the ECJ in the case of *Pressetext* (Case C-454/06 Pressetext v Austria [2008] ECR I-4401). The ECJ provided a number of indicators:

- amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract 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;
- such an amendment 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 or would have allowed for the acceptance of a tender other than the one initially accepted;
- an amendment may also be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered;
- an amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

2.2.3 Contracts and Concessions

A concession is a contract of the same type as the contracts defined in the Directives except that the consideration for the works or services to be carried out, for example, consists either solely in the right to exploit the work or service or this right together with payment.

A concessionaire often accepts the operational and financial risk of providing a public service, in the broadest sense, in return for the chance of making a profit through the exploitation of the 'service'. A contractor looks to make his profit through the fixed payment received for the execution of the contract. Public Private Partnerships will sometimes include the award of a concession.

Concessions are used, for example to carry out and finance major infrastructure projects notably in respect of road network as well as for bridges and tunnels where the concessionaire is remunerated by way of tolls charged to users. They are also used, however, simply to provide for the operation and maintenance (rather than construction) of facilities by concessionaires such as where an operator is given the concession to operate an existing railway or underground railway infrastructure. The former are examples of works concessions; the latter of a services concession.

Only public works concessions are dealt with comprehensively in the Public Sector Directive which sets out a specific publication requirement with appropriate time limits. Article 17 of the Public Sector Directive now explicitly excludes coverage of public services concessions. The general principles of the Treaty continue to apply, however.

General Note:

The general Treaty principles, including the principles of non-discrimination and transparency must be applied to the award of public services concessions.

Case C-275/98 *Unitron* [1999] ECR I-8291.

If you are a concessionaire, however, you will also be obliged to follow certain basic provisions of the Directives. A distinction is made between the obligations that apply to concessionaires depending on whether or not they are themselves contracting authorities.

Where contracts are awarded by concessionaires who are themselves contracting authorities, they are bound to comply with the provisions of the Directive in respect of public works contracts.

Where contracts are awarded by concessionaires who are not contracting authorities, a more limited set of provisions apply. Member states must take measures to ensure that, in respect of *works* (but not supplies or services) contracts they intend to award to third parties, they publicise their intentions by way of an appropriate notice. The condition applies when the value of the contract exceeds the threshold value for works contracts. Advertising is not required, however, in the same circumstances as those which justify the use of a negotiated procedure without a call for competition.

In those cases where a number of economic operators have grouped together in order to obtain the concession, then they or undertakings related to them are not to be considered third parties, so that contracts awarded to such affiliated undertakings will not be subject to award under the provisions of the Directive.

2.2.4 Framework Agreements and Contracts

Under Article 1(5), a framework agreement is an agreement between a contracting entity and one or more suppliers, contractors or service providers the purpose of which is to establish the terms, in particular with regard to prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period. Such agreements are used frequently in practice where a purchaser has a continuing or recurring need to purchase the same or similar products or services and wishes to avoid the costs associated with awarding a new contract each and every time it needs further supplies. Like centralised purchasing, the existence of framework agreements may offer larger volumes to tebnderers.

The difficulty raised by the definition of framework agreement is that it may or may not be a 'contract' for the purposes of the Directives. What the Directives do is to effectively enable a non-binding framework agreement to be treated in the same way as a binding framework contract. Thus, if the contracting entity chooses to award the framework agreement under the provisions of the Directives as if it were a binding contract, then the subsequent call-off 'contracts' may be awarded without competition.

Where the non-binding framework agreement has not been awarded pursuant to the provisions of the Directives, however, each contract above the threshold value will be treated as a contract falling within the terms of the Directives and will be subject to their procedures.

The Directives further provide that contracting entities may not misuse framework agreements in order to hinder, limit or distort competition although they do not refer to any particular cases of misuse and the duration of framework agreements is limited to 4 years save in exceptional circumstances justified by the subject of the framework agreement.

2.3 WORKS CONTRACTS

Works contracts are defined as those contracts which:

- have as their object either the execution or both the execution and design of works related to one of the activities referred to in Annex I, or
- a work or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting entity.

The inclusion of the possibility of including design works into a works contract means that 'design and build' contracts may fall within the definition. This could include, for example, contracts covering the planning and financing of a project as well as its execution. Where design and construction are awarded separately, the design services would be a priority service (category 12) or could, alternatively, be awarded by way of a design contest.

2.3.1 Building and Civil Engineering Activities in Annex 1

Annex I of the Public Sector Directive (Annex XII of the Utilities Directive) gives a list of professional activities as set out in the general industrial classification of economic activities within the European Communities (NACE). This list contained in the Annexes covers building and civil engineering. In summary, this includes:

- general building and civil engineering work and demolition work;
- construction of flats, office blocks, hospitals and other buildings, both residential and non-residential (to include such things as roofing, construction of chimneys, waterproofing, restoration and maintenance of outside walls…);

- civil engineering: construction of roads, bridges, railways, etc ... (to include such things as earth-moving, hydraulic engineering, irrigation, sewage disposal ...);
- installation (fittings and fixtures) (to include such things as gas fitting and plumbing, installation of heating and ventilating apparatus, electrical fittings ...);
- building completion works (to include such things as plastering, joinery, painting, tiling).

The CPV is often recommended for use in the contract award notices and the Annexes provide for each NACE code a corresponding reference to the relevant CPV code, even though the CPV is not binding. Article 1(14) of the Public Sector Directive explicitly provides that, in the event of any difference of interpretation between the CPV and the NACE, the NACE nomenclature will apply.

2.3.2 The Realisation of a Work by Whatever Means

A works contract would also fall within the definition of the Directives where the party signing the agreement is not, in fact, the contracting entity itself, but a company acting on its behalf, as agent. This would apply, for example, where in the construction industry an engineering and construction company is taken on as managing contractor provide engineering design, procurement, construction and project management services to the contracting entity. The management contractor will be obliged to follow the procurement rules when awarding contracts for works since it will be providing a work corresponding to the requirements specified by the contracting authority and the contracting entity will obtain such a work 'by whatever means'.

This provision concerning the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority also catches other arrangements common among developers under which a developer or builder constructs buildings on its own land and subsequently transfers or agrees to transfer the land together with the buildings to the contracting entity. This might, at first sight, appear to be a contract for the acquisition of land (a type of contract excluded from the Directives) but the fact that the building is often constructed according to the contracting entity's specifications would bring the arrangement within this definition of works contract.

2.3.4 Subsidised Works or Services Contracts

The Directive makes special provision for two types of contract, first, in respect of those works or services contracts which are subsidised by contracting authorities as to more than 50% and, second, in respect of design and construction contracts concluded in the context of a public housing scheme.

2.3.4.1 Subsidised Contracts and Housing Schemes

Where a private entity does not fall within the definition of body governed by public law, it may still in certain circumstances be treated as if it were such a contracting authority where it awards a contract with a 'public dimension' which is subsidised by public authorities by more than 50%. Those are defined as works and connected services for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.

In such cases, member states are required to take the measures necessary to ensure that the contracting authorities awarding such subsidies comply with the Directive where that contract is awarded by one or more entities other than themselves.

In cases of public contracts relating to the design and construction of a subsidised housing scheme, a special award procedure can be adopted for selecting the contractor most suitable for integration into the team but the contracting authorities are required to follow a set of basic procedures and must, in any event, treat economic operators equally, without discrimination and transparently.

No particular procedure is mandated but the contracting authorities are required to advertise the scheme in accordance with the Directive's rules on advertising and transparency

2.4 SUPPLIES CONTRACTS

The definition of supplies is rather more straightforward than that of works or services. 'Public supply contracts' are defined in Article 1(2)(d) as contracts, other than works, involving the purchase, lease, rental or hire purchase, with or without option to buy, of products. In addition, the delivery of such products may include siting and installation operations.

The range of products covered by the Directives can be seen in the various nomenclatures used to describe products for the purposes of advertising. See, for example, the Common Procurement Vocabulary.

2.5 SERVICES CONTRACTS

The term 'service contracts' essentially refers to contracts other than works or supply contracts having as their object the provision of services referred to in Annex II of the Public Sector Directive (Annex XVII of the Utilities Directive). A number of services are specifically excluded, mainly because they are not amenable to purchase through the rules provided by the Directives.

However, further distinction is made in the relevant Annexes between what may be called priority services (Annex IIA) and non-priority services, respectively (Annex IIB).

2.5.1 The Two-Tier Approach

The Directives make a distinction between priority and non-priority services. This distinction is not made on the basis of the nature of the particular activity but rather on the potential which exists for the provision of the services concerned across national borders and which are most clearly capable of affecting trade between member states.

This becomes most readily apparent in the case of services where those listed in Part B as non-priority, whilst capable of attracting localised competition, are less amenable to international competition either because of the nature of the services (*e.g.* legal and administrative services which are based on familiarity with national laws and jurisdiction) or because of the location in which they need to be provided (*e.g.* hotel and restaurant services).

This does not mean that competition for such contracts is not possible, certainly at local or national level, or even that international competition for them is inconceivable, only that the nature of the services or their value is such that this is less likely. [Localisation required if appropriate: "For example, in XXX, competitive procedures are also applied for the purchase of [xxx] and [xxx] which, under the Directives, are non-priority services. Within XXX, competition is both possible and desirable for these services]

The priority services are subject to the detailed award procedures and other provisions of the Directives.

The non-priority services are subject only to a basic transparency regime which requires adherence to the Directives' rules on non-discriminatory technical specifications and the obligation to publish the results of the award.

2.5.2 Priority services

These are listed in Annex IIA of the Public Sector Directive. They are:

1. Maintenance and repair services (CPC: 6112, 6122, 633, 886);
2. Land transport services[1], including armoured car services, and courier services, except transport of mail (CPC: 712 (except 71235) 7512, 87304);
3. Air transport services of passengers and freight, except transport of mail (CPC: 73 (except 7321));
4. Transport of mail by land[2] and by air (CPC: 71235, 7321);
5. Telecommunications services (CPC: 752);
6. Financial services: (a) insurance services and (b)banking and investment services[3] (CPC: ex 81, 812, 814);
7. Computer services and related services (CPC: 84);
8. Research and development services[4] (CPC: 85);
9. Accounting, auditing and bookkeeping services (CPC: 862);
10. Market research and public opinion polling services (CPC: 864);
11. Management consulting services[5] and related services (CPC: 865, 866);
12. Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services (CPC: 867);

[1] Except for rail transport services covered by category 18.
[2] Except for rail transport services covered by category 18.
[3] Except financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services. Also excluded: services involving the acquisition or rental, by whatever financial procedures, of land, existing buildings or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive.
[4] Except research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.
[5] Except arbitration and conciliation services.

13. Advertising services (CPC: 871);
14. Building-cleaning services and property management services (CPC: 874, 82201 to 82206);
15. Publishing and printing services on a fee or contract basis (CPC: 88442);
16. Sewage and refuse disposal services; sanitation and similar services (CPC: 94);

2.5.3 Non priority services

These are listed in Annex I1B of the Directive. They are:

17. Hotel and restaurant services (CPC: 64);
18. Transport services by rail (CPC: 711);
19. Water transport services (CPC: 72);
20. Supporting and auxiliary transport services (CPC: 74);
21. Legal services (CPC: 861);
22. Personnel placement and supply services[6] (CPC: 872);
23. Investigation and security services, except armoured car services (CPC: 873 (except 87304));
24. Education and vocational education services (CPC: 92);
25. Health and social services (CPC: 93);
26. Recreational, cultural and sporting services (CPC: 98);
27. Other services[7].

2.5.4 Mixed Priority and Non-Priority Services Contracts

The Directives apply an explicit value test to services contracts which contain both priority and non-priority services.

Where the value of the priority services contained in the contract is greater than the value of the non-priority services then the contract will be for priority services, and vice versa.

There is no obligation to separate out the priority and non-priority services and to award them as separate contracts. This could lead to the result that a contract for largely non-priority services, even if it contained a large proportion (say 49%) of priority services would be awarded as one for non-priority services. The facts could also turn out in the opposite way so that the value of priority services is greater than the value of non-priority services. The result would be the application of the procedures of the Directives even to the non-priority services.

This cannot be used, however, to avoid the application of the Directives.

6 Except employment contracts.
7 Except contracts for the acquisition, development, pro

ECJ:

A contracting authority may not *"artificially* group in one contract both priority and non-priority services *without there being any link arising from a joint purpose or operation,* with the sole purpose of increasing the proportion of non-priority services and thus avoiding the full application of the Directives."

Case C-411/00 *Felix Swoboda* [2002] ECR-567

So, in assessing whether priority and non-priority services have been correctly packaged together or split up, regard will be had to the artificiality of the exercise as well as to the intention of the contracting entity. If the services naturally combine to achieve a single purpose, then splitting them up would be artificial. In other cases, where the services do not naturally combine to achieve a single purpose, then can be no objection to awarding them separately.

2.6 DESIGN CONTESTS

Design contests are those national procedures which provide the contracting entity with a plan or design which is selected by a jury on the basis of a competition, with or without the award of prizes.

Such contests are held mainly in the fields of area or town planning (with regard particularly to the public sector), architecture and civil engineering or data processing. They are used often in the case of the construction of notable public buildings and are being used more and more frequently for the design of such things as IT infrastructure projects.

These contests may be part of a procedure which leads to the award of a service contract or may be held independently under a separate procedure since there is nothing inevitable about realising the results of a design contest.

The rules only apply where the total amount of contest prizes and payments to participants meets the appropriate threshold.

On the other band, where the contests form part of a procedure for the award of other contracts, the threshold value will consist of both the value of contest prizes and payments *and* the value of the services contract which might be awarded to the winner where the rules of the competition provide that the resulting services must be awarded to one or the other of the winners of the design contest. The resulting services must be a 'direct functional link' between the contest and the contract concerned so that a mere connection in terms of the subject matter of the contract is not enough. Further, this provision applies only where, under the rules of the competition provide that the resulting services must be awarded to one or the other of the winners of the design contest.

2.7 MIXED CONTRACTS

The Directives contain provisions on how to categorise a contract containing elements of works and/or supplies and/or services.

The distinctions are relevant in the case of mixed supplies and services contracts, notably where the services included are non priority services. If the contract can be categorised as non-priority services contract, then it would remain largely unregulated even if it also contains supplies.

It is an issue also in the case of works contracts which contain elements of supplies or services given the much higher thresholds that apply to works contracts. The way in which mixed contracts are categorised depends on the mix.

- **Supplies/Services**

  Essentially, contracts containing elements of both supplies and services will be treated as one or the other type of contract depending on the value represented by each element.

  The contract will be considered to be a services contract where the value of the services performed is greater than the value of the products supplied.

  Where the value is equal, it will be a supplies contract.

  The definition makes no distinction between priority and non priority services with the effect that, where the value of non-priority services in a mixed contract is greater than the value of supplies, the whole contract will be treated as a contract for non-priority services

  Supplies contracts which also cover, as an incidental matter, siting and installation operations, will be defined as supplies contracts.

- **Works/Services**

  In the case of works and services, the Directives do not take a value test, as above, but include a test based on the principal object of the contract as opposed to what is merely incidental to that object.

  A contract having as its object services (either priority or non-priority) and including activities within the definition of 'works' that are only incidental to the principal object of the contract shall be considered to be a service contract.

- **Works/Supplies**

  Under the Directives, supplies contracts which also cover, as an incidental matter, siting and installation operations, will be defined as supplies contracts For example, in the case of the purchase of a crane to be installed on a dockside, the object of the contract is the *supply* of the crane, and not the works required to site it, even if those works are considerable.

  This 'principal object' test which mirrors the way in which works and services contracts are to be distinguished, would appear to apply even if the value of siting or installation services is greater than the value of the supplies itself since it is a test based on the object of the contract and not the value based test applied to distinguish between supplies and services.

2.8 EXEMPTED CONTRACTS

Even where contracts fall within the general definition of a public contract, some of these contracts will be excluded from the scope of the Directives for a number of reasons. Some are excluded because they are not, by their nature, amenable to competition. Some are excluded because Governments wish to exclude them from competition for specific reasons. Some of the exclusions apply only to contracts of a specific type. There is also a category of 'reserved' contracts which, although not excluded, do benefit from preferential treatment.

2.8.1 Exemptions by reason of choice

These exemptions concern the Public Sector Directive.

- **Defence procurement**

  Defence procurement was never excluded because of the identity of the contracting authority, *e.g.* Ministry of Defence. The partial exemption which has existed until recently has applied to *products* which are of a military nature.

  Until 2009, certain military products were explicitly exempted from the provisions of the Public Sector Directive and not subjected to any alternative provisions. Since 2009, however, those exempted products and related services are now covered by Directive 2009/81 which applies a more flexible and confidential regime to the procurement of military supplies and related works and services (although Member States have until August 2011 to transpose this Directive).

Important Note

The procurement of certain military supplies and related works and services is now covered by Directive 2009/81. All other public contracts awarded in the fields of defence and security remain covered by the Public Sector Directive.

The partial exemption continues to apply (and Directive 2009/81 now applies) to contracts awarded by contracting authorities in the field of defence where the products are subject to the provisions of Article 296(1)(b) (formerly Article 223(l)(b)) of the Treaty. This sets up a clear distinction between purely military equipment and equipment which, although used in the context of defence, is not specifically 'military' *i.e.* dual use products (*i.e.* those which may have both civil and defence applications, *e.g.* computers, clothing, blankets, food, medicine).

The provision does not apply to works or services, although probably applies to such things as repair and maintenance services *connected with* the procurement in question, and only to those products which are specifically subject to Article 296(1)(b). A list of such products was included in a Council Decision of 15 April 1958 and, although this was not published, is readily available. Whilst Directive 2009/81 also makes explicit reference to this list, it does not reproduce the list either. Products which, despite appearing in the list, are not intended for specifically military purposes and all other products not covered by the list are subject to the procurement rules.

Directive 2009/81 extends the exemption of both that Directive and the Public Sector Directive to contracts awarded in a third country, with local economic operators, for the deployment of military forces, or to conduct or support a military operation outside the territory of the European Union.

■ **Contracts requiring secrecy measures**

The Directive does not apply to public contracts which are (i) declared secret, or (ii) the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the member state concerned or (iii) when the protection of the essential interests of that state's security so requires.

■ **Contracts governed by other rules**

The Directive does not apply to contracts which are governed by different procedural rules and awarded:

- pursuant to an international agreement concluded in conformity with the EEC Treaty between a member state and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory states;
- to undertakings in a member state or a third country in pursuance of an international agreement relating to the stationing of troops;
- pursuant to the particular procedure of an international organisation.

In the case of defence procurement, the public contracts otherwise subject to Directive 2009/81 now benefit from this exemption by virtue of Article 8 of that Directive.

2.8.2 Exemptions due to the nature of the contract

■ **Contracts for the Acquisition of Land**

The Directives exclude contracts for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon.

The contracts are excluded because they relate to immoveable property which is naturally dependent on geographic location. Such contracts take place essentially in local markets and their objects generally rule out any real prospect for cross-frontier competition. The exclusion concerns only contracts concerning the purchase of land or buildings, however.

Financial services contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, are subject to the Directive. The Directive would also cover other associated services such as contracts for the sale of land or property on a fee basis (estate agency contracts) covered by the priority service category 14.

In the case of defence procurement, the public contracts otherwise subject to Directive 2009/81 now benefit from this exemption by virtue of Article 9(a) of that Directive.

Services Contracts provided on the basis of Exclusive Rights

The Directives do not apply to services contracts awarded to contracting authorities or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

Broadcasting Material and Time

The Public Sector Directive (it is not relevant in the utilities sector) excludes contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time. This covers the production of audio-visual works such as films, videos and sound recording, including advertising and will include the purchase of services for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services such as those relating to scripts or artistic performances necessary for the production of the programmes.

It also covers broadcasting time (transmission by air, satellite or cable and now defined as any transmission and distribution using any form of electronic network). In principle, the contracting out of audio-visual production for such things as information, training or advertising purposes would be covered but are given an exemption *in so far* as they are connected with broadcasting activities of broadcasting organisations which are public authorities.

Arbitration and Conciliation Services

The recitals of the Directives state that it is inappropriate to include the procurement of contracts for arbitration and conciliation services in the Directives because competitive bidding for such services would interfere with the joint selection of arbitrators and conciliators by the parties to a dispute. These would, in any event, want to select arbitrators and conciliators on the basis of their competence and experience within relatively short time frames.

Certain Financial Services

The Directives exclude contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services. This refers to contracts which constitute transactions concerning government bonds, for example, and activities related to public debt management.

It will also include within the derogation contracts awarded to financial intermediaries to arrange such transactions because these are specifically excluded from the scope of investment services (Category 6 of the list of priority services).

- **Employment Contracts**

  The Directives do not cover employment contracts, only contracts for the provisi0on of services .

- **Research and Development Contracts**

  The Directives exclude research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is mostly remunerated by the contracting authority.

  The exclusion would not apply where the benefits accrue to itself. To avoid an interpretation which would lead to abuse of this provision, the Council and Commission adopted, in the context of the former Services Directive, an interpretative declaration stating that *any* fictitious sharing of the results of research and development or *any* symbolic participation in the remuneration of the service provided will not prevent the application of the Directive.

  This provision does not extend to quantity production to establish commercial viability or to recover research and development costs.

2.8.3 Exemptions specific to the utilities sector

The Utilities Directive provides for sector specific exemptions in a number of utility sectors based essentially on the degree of competition in these markets. Such exemptions apply in respect of the purchase of fuel and energy for the production of energy; purchases of water; bus transport services and the exemption in respect of upstream oil and gas exploration and exploitation. The Utilities Directive has also introduced a new general exemption mechanism for activities exposed to competition on markets to which access is not restricted. These exemptions are discussed in H2.

The Utilities Directive also contains a series of other exemptions specific to the utilities sector:

- **Activities outside the Community**

  The Directive does not apply to contracts which the contracting entities award for purposes other than the pursuit of their relevant activities or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Community.

  The contracting entities must notify the Commission at its request of any activities which they regard as excluded under this provision and the Commission may periodically publish for information purposes, lists of the categories of activities which it considers to be covered by this exclusion and will respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

- **Affiliated Undertakings Exemption**

  Where 'undertakings' are made up of a number of mutually owned or mutually dependant companies, the Utilities Directive provides a specific exemption for purchases made between them under certain conditions. They are treated like 'in-house' contracts known as intra-group transactions. Since the amendment to the Utilities Directive in 2004, the exemption now covers works and supplies contracts in addition to services contracts.

  The contracts excluded are those which are awarded to an affiliate whose essential purpose is to act as a central service-provider to the group to which it belongs, rather than sell its services commercially on the open market.

The Utilities Directive excludes two categories of contracts. They are contracts awarded:

- by a contracting entity to an affiliated undertaking, or
- by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out relevant activities, to [one of those contracting entities] or an undertaking which is affiliated with one of these contracting entities.

This provision relates to, for example, the provision of common services such as accounting, recruitment and management; the provision of specialised services embodying the know how of the group; and the provision of a specialised service to a joint venture.

The exclusion from the provisions of the Utilities Directive is subject, however, to two conditions:

(i) *the economic operator must be an undertaking affiliated to the contracting entity:* an affiliated undertaking, for the purposes of Article 23(1) of the Utilities Directive, is one the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the seventh company law Directive. In the case of contracting entities not subject to that Directive, an affiliated undertaking will be any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence in the same way as a public authority may exercise a dominant influence over a public undertaking. This will also be the position where it is the undertaking which may exercise a dominant influence over the contracting authority or where both the undertaking and the contracting entity are subject to the dominant influence of a third undertaking.

(ii) *the economic operator must exist essentially to provide services to the group and not to sell them on the open market:* since a number of such economic operators do, in fact, have their own marginal commercial activities, the Directive lays down criteria by which the acceptability of such commercial activities may be gauged. The exclusion will only apply if at least 80 per cent of the average turnover of the affiliated undertaking arising within the Community for the preceding three years derives from the provision of the works, supplies or services to undertakings with which it is affiliated. The 'average turnover' relates to that turnover which results from the works, supplies or services provided and not from the general or total turnover of the undertaking. Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages are calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

- **Purchases for Re-sale or Hire**

  The Directive excludes from its scope of application contracts awarded for purposes of re-sale or hire to third parties. This is intended to include contracts for goods where the contracting entity intends to sell or hire the equipment purchased in a competitive market.

  These contracts will only be included if the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.

2.9 RESERVED CONTRACTS

The Directives have introduced a new category of 'reserved' contracts which, although not excluded from the scope of the Directive, will impose specific conditions of eligibility on the participants.

Member states may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

2.10 THRESHOLDS

The Directives apply only to contracts above a specific threshold value. Those threshold values have been set at levels which are intended to reflect those contracts which are likely to attract bidders from other member states. It is assumed that contracts falling below these thresholds are likely to attract local competition only so that it is inappropriate to apply the EC level procurement rules, even if such contracts remain subject to the Treaty and are otherwise subject to national rules.

The threshold values for each of the different sectors and for each of the types of contract involved are shown in the following Table. The threshold values are revised in January every two years and the table shows the key current threshold values [Requires updating].

See Module D5 for further detail.

Type of contract	Type of contracting authority		
	Public sector Central government	Public sector Other authorities	Utilities
Works	EUR 4 845 000	EUR 4 845 000	EUR 387 000
Supplies	EUR 125 000 (with some exceptions for defence purchasers)	EUR 193 000 (and defence purchasers for certain supplies)	EUR 387 000
Services (for nearly all priority services)	EUR 125 000	EUR 193 000	EUR 387 000
Services (non priority and specified priority services)	EUR 125 000	EUR 193 000	EUR 387 000

The award procedures apply where the *estimated* value (net of VAT) is not less than the threshold values set out above and both Directives provide for methods of calculation of these values. For example, the value of options or renewals of the contract should be taken into account; the value of any supplies (or services in the case of the utilities sector) necessary for the execution of the works that a contracting entity makes available to the contractor; and the value of any prizes or payments to candidates or tenderers made as part of the procedure.

Specific methods of calculation apply to various situations where it is not always possible to identify a specific value, for example, in the case of contracts for the lease, rental or hire purchase of products. depending on whether the contract is for a fixed or an indefinite term.

In calculating the value of a services contract, the contracting authority must include the estimated total remuneration of the service-provider and not necessarily the value of the service, *e.g.* in the case of an insurance contract, the cost of purchasing the insurance, not the value of the insurance payout.

In the case of services contracts which do not specify a total price, the basis for calculating the estimated contract value is either the total value of the contract for the duration where that is less than 48 months and, where the duration exceeds 48 months, the monthly value multiplied by 48.

None of the contracts subject to the Community procurement regime may be split up with the intention of circumventing the application of the rules set out in the Directives and the specific methods of calculations provided by the Directives and described above are intended to prevent the use of any special or unusual methods of calculation which would serve the intention of circumventing the Directives by, for example, splitting up large contracts or requirements into smaller packages so that the value of each or some of the smaller packages fall below the relevant threshold levels and, therefore, outside the scope of the Directives.

The Directives do foresee, however, a specific procedure for the legitimate splitting up of contracts where a single requirement is split up into a series of lots. This may be done, for example, for technical reasons (given different specializations needed for the component elements) or from a desire to include the participation of small and medium sized enterprises by offering a series of lower value contracts. However, in calculating the value of such a contract, it is the aggregate value of the lots that is relevant.

Public procurement
for economic operators

MODULE H

Achieving fair and equal participation

PART 4

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The mechanisms for guaranteeing the fair and equal participation of all economic operators
2. The qualitative selection criteria that can be applied
3. The rules applicable to technical specifications
4. The award criteria that may be applied

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The ways in which the principles of objectivity and non-discrimination are applied in practice
- The means of demonstrating compliance with the selection criteria
- The various means of setting and meeting technical specifications
- The application of the award criteria

This means that it is critical to understand fully:

- The different types of selection criteria
- The evidence used to establish compliance
- The choices to be made by the contracting entities based on the contracts at issue
- The way in which technical specifications can be prepared
- The means of meeting those requirements
- The detailed content of the permitted award criteria

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There are particularly strong links with the following modules:

- Module E3 on selection
- Module E4 on setting contract award criteria in tender documents
- Module E5 on contract evaluation and contract award
- Module C5 on social and environmental considerations

1.4 RELEVANCE

This information will be of particular relevance in enabling tenderers to prepare for participation in tender procedures and to identify those cases where they may be unfairly excluded from participation.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

Part 1 described the general principles that must be respected and which guarantee your rights. To be effective, these need to be translated into concrete actions which can be implemented by contracting entities and enforced by economic operators. One of the most critical pillars of the EU Directives is the emphasis they place on the fair and equal treatment of economic operators from all member states as a means of guaranteeing their participation in EU procurement procedures without any bias or favour. The key words are "objectivity" and "non-discrimination", ensuring that nothing in the procurement process unfairly favours particular economic operators (nationals or other 'favourites' of the contracting entities) or discriminates against foreign economic operators.

The mechanism adopted by the Directives is to impose the obligation on contracting entities to apply objective and non-discriminatory criteria

- in the selection of economic operators,
- in the setting of technical specifications and
- in the award of contracts.

These must be the same for all economic operators and provide them with equal opportunities for tendering. You need to know these to make sure that you are not unfairly excluded from any contract award procedure.

2.2 THE SELECTION CRITERIA

The EU public procurement system is based on the idea that there should be no discrimination between economic operators of different nationalities and that they should all be given an equal chance to compete for contracts to be awarded throughout the Community. The Directives require that procurement take place on the basis of objective criteria. It is not open, therefore, for contracting entities to eliminate any economic operators from the award procedure on arbitrary grounds, particularly those linked to nationality. The Directive thus lays down detailed criteria of suitability and qualification which may be used in order to exclude economic operators from the procedures in the event that the criteria are not met. The Directives also apply conditions with regard to the evidence which may be required to verify these criteria.

On terminology, it should be noted that the term 'economic operator' is used to designate the three broad categories of economic operator distinguished by reference to the contracts for which they tender: 'contractors' in the case of works contracts; 'suppliers' in the case of supply contracts and 'service providers' in the case of contracts for services. There are few requirements in the directives, other than those regarding their suitability, relating to economic operators.

2.2.1 Who may tender?

An economic operator can be any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services. Economic operators who are entitled to provide the relevant work, service or supply under the law of the member state in which they are established, cannot be rejected solely on the ground that, under the law of the member state in which the contract is awarded, they would be required to be either natural or legal persons.

Where the economic operator in question is a legal person, then it may be required to indicate in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question. The contracting authority may also require economic operators to prove that they hold any particular authorisation or membership of a professional organisation, insofar as candidates or economic operators are required to possess that particular authorisation or to be members of a particular organisation in order to be able to perform the service concerned in their country of origin. Membership of a professional organisation is frequently a condition imposed on individuals wishing to carry out a specific profession and, where the economic operator is a legal person, may be required to demonstrate the relevant membership of its staff.

The definition of economic operator contained in the Directive includes 'a group of natural or legal persons and/or bodies'. Contracting authorities may not require these groups to assume a specific legal form in order to submit a tender or a request to participate. However, the successful group may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

Groups of companies may rely on each others qualifications in the selection process. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. Proof of the availability of resources may be furnished by the production of an undertaking by the entities possessing the relevant resources that they will be made available to the economic operator in question.

2.2.2 The Permitted Selection Criteria

The Directives require mandatory exclusion of economic operators where they have been involved in certain specified criminal activities but, otherwise, qualitative selection is based on the economic operator's general suitability, economic and financial standing and technical and/or professional ability.

2.2.2.1 Grounds for Mandatory Exclusion

These grounds were introduced for the first time in 2004 and are a response to the growing concern over the effects of organised crime and terrorism on public procurement both as a means of subverting the normal competitive process and as a mechanism for laundering money. It also includes provisions relating to issue of corruption in procurement.

The Directives effectively impose a policy requirement which considers economic operators who have participated in certain activities as unsuitable for participation in contract award procedures, regardless of their ability to perform the contracts, and requires their exclusion from those procedures. The prohibited activities are:

(a) *participation in a criminal organisation*, as defined in Article 2(1) of Council Joint Action 98/733/JHA;

(b) *corruption*, as defined in Article 3 of the Council Act of 26 May 1997 and Article 3(1) of Council Joint Action 98/742/JHA respectively;

(c) *fraud* within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;

(d) *money laundering*, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

It is for the member states to specify, in accordance with their national law and having regard for Community law, the implementing conditions for these provisions. This preserves the flexibility in the measures that member states may take in respect of such activities and requires them to set out the conditions for application. [Localisation: where national rules have implemented this provision, they should be included here]

2.2.2.2 Optional Grounds for Exclusion

The Public Sector Directive sets out the grounds in which a contracting authority may exclude an economic operator from participation. The Utilities Directive refers to these criteria as illustrative – utilities may take a more flexible approach and include other selection criteria provided these are set out in advance and comply with the general requirements of objectivity and non-discrimination.

- **General Suitability**

  An economic operator *may* be excluded from participation in a contract where that economic operator:

  (a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

  (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

  (c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

  (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Contracting authorities must accept certain documents as sufficient evidence of the above criteria. In the case of the criteria mentioned under rubrics (a), (b) and (c) above, sufficient evidence will be the production of an extract from the 'judicial record' of the economic operator. Where the member state does not have a system of providing such records, it will be sufficient to produce an equivalent document issued by a competent judicial or administrative authority in the country of origin or in the country from which the contractor comes which shows that these requirements have been met. In the case of (e) and (f) above, it will be sufficient to produce a certificate issued by the competent authority designated by the member state concerned. As already explained, no specific forms of evidence are prescribed in cases of misrepresentation foreseen in (g) above.

Where the member state concerned does not issue such documents or certificates, they may be replaced by a declaration on oath (or in member states where there is no provision for declarations on oath, by a solemn declaration) made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country from which the person comes. The member states are under an obligation to designate the authorities and bodies competent to issue these documents, certificates or declarations and, without prejudice to data protection law, to inform the Commission of their identity.

In order to prove their general fitness and commercial standing, economic operators may be requested to prove their enrolment in the relevant professional or trade register in their member state of residence as required under the laws of that State. [Localisation: where these exist in XXX, they should be mentioned by name and sources of information given]

Economic and Financial Standing

Evidence of suitable standing may, as a general rule, be provided by one or more of:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

The entities awarding the contracts must specify in the contract notice or invitation to tender which of these references they have chosen `and what references other than those mentioned under (a), (b) or (c) are to be produced. It is for the contracting entities, however, to determine the substantive level of financial and economic standing required.

- **Technical and/or Professional Ability**

  The Directive sets out the means by which the technical and/or professional abilities of the economic operators are to be assessed and examined. The listed references only set out the evidence to be furnished; it is for the contracting authority to determine the levels of technical and/or professional ability required of the economic operators.

  Evidence of the economic operators' technical abilities *may* be furnished by one or more of the listed means *according* to the nature, quantity or importance, and use of the works, supplies or services. The contracting authority must specify, in the notice or in the invitation to tender, which references it wishes to receive. The references enumerated in the Directive are:

In the case of works only:

- a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority direct.

In the case of works and services:

- the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work.
- for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract.
- a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years.
- a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract.
- an indication of the proportion of the contract which the services provider intends possibly to subcontract.

In the case of supplies and services:

- a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:
  - where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,
  - where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator.
- a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities.
- where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate.

In the case of the products to be supplied:

- samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests.
- certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards.

In the case of all contracts:

- an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work.

In the case of siting and installation services:

- in procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2.2.2.3 Official Lists and Registered Economic Operators

Many countries and contracting authorities maintain official lists or, more commonly, registration systems. The Public Sector Directive provides that member states may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law and that, where they do, they are obliged to inform the Commission and the other member states of the address of the body to which applications should be sent.

Failure to register on a list is not, in itself a stated or legitimate ground for exclusion. Contracting authorities are always required to recognise equivalent certificates from bodies established in other member states and must also accept other equivalent means of proof. The Directive permits registration on official lists in the economic operator's member state of origin to be used to provide a presumption of suitability in the host member state, in respect of those suitability criteria they have in common.

Member states who introduce and maintain official lists of recognised contractors (suppliers or service-providers) are required to adapt them to the provisions of the Directive, that is in respect of certain of the criteria relating to economic and financial standing and to the capability of the economic operator must be the same as those described here. In order to ensure that these lists are not closed or do not create an obstacle to participation in contract award procedures, economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

When bidding for contracts, economic operators appearing on such lists or in possession of an appropriate certificate may submit a certificate of registration issued by the competent authority or certificate issued by the competent certification body to the contracting authority issuing the invitation to tender in satisfaction of the qualification criteria, at least where those criteria have been taken into account in the registration process. That certificate will operate to create a presumption of suitability in respect of economic operators established in the member state holding the official list. This certified registration in an official list of a member state or a certificate issued by the certification body constitutes, for contracting authorities of other member states, a presumption of suitability corresponding to the contractor, supplier or service-provider's registration classification *only* for certain of the criteria described in this chapter.

2.2.2.4 Qualification System (utilities only)

The Utilities Directive explicitly allows contracting entities to establish and operate a system of qualification of economic operators which may also include a classification so that the qualified economic operators may be divided into categories according to the type of contract for which the qualification is valid.

One of the crucial features of the qualification system envisaged by the Directive is that it may itself be used as a call for competition. The purpose and benefit of this is that it enables the contracting entity to dispense with the normal advertising rules and select directly from its list of qualified economic operators, those candidates it wished to invite to tender under a restricted or negotiated procedure.

The qualification system must be operated on the basis of objective criteria and specific rules for qualification to be established by the contracting entity and these criteria and rules for qualification must be made available to economic operators on request. When they are updated, the updated criteria and rules must be communicated to interested economic operators.

2.3 TECHNICAL SPECIFICATIONS

The technical specifications consist in a definition of what it is the purchaser wishes to buy. The contracting entity has the freedom to choose what it wishes to procure, provided that decision is not based on subjective or unjustified grounds which distort competition. The role of the Directives is to ensure that when that decision has been made, the procurement is not made in a way which distorts the market. Technical specifications and contract conditions are particularly susceptible to manipulation. The Directives seek to prevent an initial definition of the purchaser's requirements that have been specifically designed to favour one or more product or economic operator where that is done for reasons which are not objective.

The Directives make it explicit that technical specifications must afford equal access for economic operators and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

The technical specifications to be applied must be set out in the contract documentation, such as contract notices, contract documents or additional documents and the contract notices must also contain the contact details of the service from which contract documents and additional documents can be requested. These may also be maintained and transmitted in electronic format.

2.3.1 Permitted Specifications

To ensure such equal treatment, the Directive sets out a series of options for the use of technical specifications by contracting entities. These options are, however, without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law. [Possible localisation where there are specific national technical rules].

Contracting entities are free to specify their requirements by way of output requirements, namely those which refer to the performance or functional characteristics of the products or services to be provided.

Subject to any EC-compatible mandatory national technical rules, the technical specifications must be formulated in one of two main ways:

- by reference to certain specifications or
- by reference to performance or functional requirements.

The possibility of combining these methods gives rise to four ways of expressing the technical requirements of the contract:

(a) by reference to specified technical specifications in order of preference: to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when these do not exist - to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference must be accompanied by the words 'or equivalent'; or

(b) in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow economic operators to determine the subject-matter of the contract and to allow contracting authorities to award the contract; or

(c) in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements; or

(d) by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

The final sentence of (a) above is important. The Directives provide explicitly that where a contracting authority makes use of the option of referring to the listed specifications, it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the economic operator proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

2.3.2 Prohibited References

Unless justified by the subject-matter of the contract, the Directive prohibits references in the technical specifications to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production. As well as prohibiting the identification of specific products, this will also prevent the requirement to use certain processes, especially where those are not otherwise protected by intellectual property rights.

In all cases, such references will be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract, either by reference to the listed standards and specifications or by means of performance or functional characteristics is not possible. Whenever any specific and justified reference to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production is used, it must be accompanied by the words 'or equivalent'.

2.3.4 Social and Environmental Requirements

For the first time, the new Directive explicitly provide for social and environmental considerations to be taken into account in the procurement process. It does so, *inter alia*, in respect of technical specifications and there are several possibilities for setting requirements with a view to attaining a level of green or socially responsible procurement. Critically, the Directive allows environmental considerations to be taken into account at the production rather than only at the consumption stage. In addition, the Directives make explicit reference to the use of eco-labels.

2.3.4 Technical Dialogue

The setting of technical specifications is often a difficult exercise, especially in the case of a public contracting entities which are largely insulated from the private sector. To make sure that it makes the optimum decision in terms of the technology specified, the contracting entity needs to have access to information on those technologies and will sometimes need to communicate with potential economic operators. Doing so in the context of a competitive bidding procedure may be a breach of the rules because discussions are generally not permitted with the economic operators during the procedure.

The Directive include a provision (in the recitals) which allows the possibility of discussing technical specifications with potential economic operators in advance of any contract award procedure. It is referred to as technical 'dialogue'. With the crucial proviso that any discussions should not have the effect of precluding competition, the recital provides that 'before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications…' The definition of technical dialogue means that such discussions are *prima facie* permitted. They must not, of course, have the effect of precluding competition and so should not provide any potential economic operator with an unfair competitive advantage by, for example, setting the technical specifications by reference to those met by one economic operator, national or otherwise.

2.3.4 Variants

Tenders which do not comply with the technical requirements of the purchaser will be non-compliant and would ordinarily be rejected. Indeed, it is arguable that they must be rejected because to accept a non-compliant bid would infringe the principle of equal treatment: to accept a tender which is non-compliant distorts the level playing field and disadvantages those economic operators who have sought to meet the stated requirements. Nevertheless, there will be circumstances where it is beneficial to accept tenders based on alternative means of meeting the stated requirements. These are called variants but are not always acceptable to the contracting entity.

The Directives require the contracting entities to state in the contract notice *whether* or not variants are permitted. Variants will not be authorised without such an indication. Variants are only authorised where the criterion for award is that of the most economically advantageous tender and, where the contracting entities do authorise variants, they must state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation. Only variants meeting the minimum requirements laid down by these contracting authorities may be taken into consideration.

2.4 THE AWARD CRITERIA

In awarding contracts, contracting entities have a choice between two award criteria:

- the lowest price; or
- the most economically advantageous tender.

If no explicit choice is made, the criterion that will be applied will be the lowest price.

The choice of what is the most economically advantageous tender is to be made on the basis of a series of criteria linked to the subject matter of the contract chosen by the contracting entities. The Directives offer a non-exhaustive list of examples of the type of criteria which may be used. These include

- quality,
- price,
- technical merit,
- aesthetic and functional characteristics,
- environmental characteristics (introduced by the new Directives, thus allowing non-economic criteria to be used),
- running costs,
- cost effectiveness,
- after-sales service and technical assistance,
- delivery or completion date,
- commitments with regard to parts and
- security of supply.

When basing the award on the most economically advantageous tender, the contracting entity must specify in the contract notice or in the contract documents the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread. Where, in the opinion of the contracting entity, weighting is not possible for demonstrable reasons, the contracting entity must indicate the criteria in descending order of importance.

Where a particular tender appears abnormally low, the contracting entity may reject it but only after it has requested, in writing, details of the constituent elements of the tender which it considers relevant. It must verify those elements and take into account the explanations received.

2.4.1 Community 'Preferences' in the Utilities Sector

The Utilities Directive (only) provides that any tender made for the award of a supply contract may be rejected by the contracting entity where the proportion of the products originating in third countries, which do not provide comparable and effective access for Community undertakings, exceeds 50 per cent of the total value of the products constituting the tender.

This is a test relating to the origin of goods, and does not refer to the nationality of the economic operator. The origin of the product is to be determined in accordance with Council Regulation 2913/92 on the common definition of the origin of goods. Where a Community offer is equivalent to an acceptable *offer* which includes more than 50 per cent of non-EC products (equivalent here means that the price difference is no more than 3 per cent) the Community *offer* must be given preference.

In the case of services, there is the possibility of using a safeguard clause which would only be set in motion when the Commission, on the basis of information supplied by member states or otherwise, establishes that a third country, with regard to the award of service contracts:

- does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country ('reciprocity');
- does not *grant* Community undertakings national treatment or the same competitive opportunities as are available to national undertakings;
- grants undertakings from other third countries more favourable treatment than Community undertakings.

Where the Commission has established the existence of any of the above situations, it may, at any time, make a proposal to the Council for the suspension or restriction of the award of services contracts to:

- undertakings governed by the law of the third country in question;
- undertakings affiliated to the undertakings specified above, having their registered office in the Community but having no direct and effective link with the economy of a member state;
- undertakings submitting tenders which have as their object services originating in the third country in question.

Public procurement
for economic operators

MODULE H

Which procedures apply?

PART 5

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The different types of procedures that apply
2. How and under what conditions they may be used
3. The publicity and advertising rules
4. The minimum time limits that contracting entities must respect
5. The information that contracting entities must communicate to unsuccessful economic operators

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The essential guarantees represented by the procedural rules
- The reasons why contracting entities may justifiably deviate from the "standard" procedures
- The decisions they may take that affect economic operators
- The way in which economic operators participate in each of the procedures
- How economic operators can find out about contracts in the EU
- The rights of economic operators to find out why they have not been successful

This means that it is critical to understand fully:

- The nature of each procedure
- The conditions that apply to exceptional procedures
- The conditions of participation of economic operators in each of these procedures
- The compliance obligations imposed on contracting entities in terms of procedure, timing, publicity, and the provision of information

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G

There are particularly strong links with the following modules:

- Module C4 on public procurement procedures and tools
- Module E2 on advertisement of contract notices

1.4 RELEVANCE

This information will be of particular relevance in understanding how to find contracts that will be of interest and to determine what needs to be done in order to compete. This module will help economic operators understand what procedures may be applied and when; what the conditions of participation are likely to be; and what they can do to identify why they may have been unsuccessful.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

It may be useful to have to hand copies of the contract award notices that must be published in the *OJEU*.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

Your rights as tenderers are protected by the Directives which set out procedures which must be followed by all contracting entities subject to the procurement rules. These are designed to ensure that all tenderers from the EU are given fair and equal treatment in procurement throughout the EU and impose certain obligations on the contracting entities.

Part 1 set out the general principles that must be respected and which guarantee your rights. In practice, these are translated into procedures which can be seen as a concrete expression of these rights. The procedures which must be applied by contracting entities detail the methods that they will employ, the publication requirements they must use and the minimum time limits to which they must adhere. The purpose is to provide legal certainty through the application of transparent and consistent procedures which provide all tenderers with the same and equal opportunities for participation.

As with other aspects of the Directives, these procedures represent the minimum guarantees that you, as tenderers, possess. However the national rules are drafted, these procedures must be applied.

2.2 THE GENERAL SCHEME

The rules on advertising and award procedures are similar in both the public and utilities sectors. However, in view of the special characteristics of the utilities sector, the presumption in favour of open or restricted tendering found in the case of the public sector is replaced with a more flexible approach and permits the contracting entities a free choice regarding the procedures they will employ. Further, the new Public Sector Directive introduces a new competitive dialogue procedure which is not available in the utilities sector. Similarly, the Utilities Directive provides for a qualification system which is not explicitly provided for in the public sector.

Both the Public Sector and Utilities Directives have also been brought up to date in terms of the use of technology so that communications may now be made in electronic form with significant consequences in respect of the applicable time limits thanks to the faster and more efficient means of communication employed. The possibilities opened up by modern electronic technology have also led to the creation of two new tools, namely dynamic purchasing systems and electronic auctions.

The three primary procedures which have been inherited from the previous directives are:

- **'open procedures'** whereby all interested contractors, suppliers or service-providers may submit tenders;
- **'restricted procedures'** whereby only those contractors, suppliers or service-providers invited by the contracting entity may submit tenders; and
- **'negotiated procedures'** whereby contracting entities consult contractors, suppliers or service-providers of their choice and negotiate the terms of the contract with one or more of them.

As in the public sector, the new Directives also retains a contract award procedure for

- **'design contests'** whereby contracting entities acquire a plan or design selected by a jury after being put out to competition with or without the award of prizes

With the now explicit reference to framework contracts in the public sector, the Public Sector Directive has imposed a specific procedure for the award of framework contracts:

- **'framework agreement procedure'** whereby one or more contracting authorities and one or more economic operators can enter into an agreement to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged

The new Public Sector Directive has also introduced a new specific procedure (not available in the utilities sector) which provides for a two stage procedure known as:

- **'competitive dialogue'** whereby an economic operator may request to participate in a procedure in which the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

Taking on board developments in the field of information technology, the Directives now also provide for two new tools which take a largely electronic form. These are:

- **'dynamic purchasing systems'** whereby contracting entities can use a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entity, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification;
- **'electronic auctions'** whereby contracting entities can procure through auction by way of a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Economic operators who submit tenders are referred to as `tenderers'. Those who have sought an invitation to take part in a restricted or negotiated procedure or in a competitive dialogue are designated by the term `candidate'.

2.3 THE AVAILABLE PROCEDURES

This section will consider the specific characteristics of each of the procedures in turn before considering the general procedural requirements imposed by the Directives.

The general principle in the utilities sector is that the contracting entities have a free choice between the open, restricted or negotiated procedures, provided that a call for competition has been made by means of the appropriate notice.

Nevertheless, the negotiated procedure may be used without a prior call for competition in a series of cases which mirror those in the public sector and discussed below.

If the contracting entities use an improper or inappropriate procedure (*i.e.* one which does not meet the conditions set out below), then there may well be a breach of the Directives.

2.3.1 Open and Restricted Procedures

Both procedures allow for full competition and are both advertised in the *Official Journal*. The difference lies in the fact that, in practical terms, the restricted procedures takes place in two stages: the first is effectively a selection (pre-qualification) stage during which candidates are invited to present their qualifications. Those candidates who are selected following this stage will then be invited to submit a tender.

In the open procedure, tenderers submit both their qualifications and their technical tenders at the same time, even if the contracting entity will consider these two aspects (qualification and technical tender) sequentially.

In the restricted procedure, the choice of candidates to be invited to participate in the next (tender) stage is to be made on the basis of the objective criteria discussed in Part 4. The new Directive states that a minimum of five must be invited but does not set any upper limit Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities and in so doing the contracting authority may not include other economic operators who did not request to participate, or candidates who do not have the required capabilities.

In the utilities sector, there is no minimum number to be invited Where a contracting entity intends to apply a mechanism for determining the relative ranking of the candidates with a view to identifying those it will invite to tender, it is obliged to state them out in advance in the contract notice or tender documents.

2.3.2 The Negotiated Procedure

In the public sector, the negotiated procedure is an exception, and the Directive provides for those situations in which use of such a negotiated procedure is permitted. The negotiated procedure may be used with or without publication of a tender notice depending on the circumstances.

In the utilities sector, the negotiated procedure may be used without ay justification as one of the three primary procedures (open, restricted or negotiated) provided it is preceded by a call for competition.

2.3.2.1 Public Sector Negotiated Procedure With a Call for Competition

The Public Sector Directive sets out four situations in which the contracting authority may rely on this derogation. Where this procedure is used, the record of the procedure must include the reasons for choosing it so that the decisions of the contracting authority may be verified. The grounds justifying the use of this procedure are as follows.

(i) **In the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with the Directive, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered**

This refers to those situations in which the tenders received are non-compliant or non-responsive.

(ii) **In exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing**

This derogation applies in two circumstances: where (i) the nature of the works, supplies or services or (ii) the risks attaching thereto, do not permit overall pricing. This is particularly true of contracts based on varying degrees of public private partnership ('PPP') which is where this exception has been frequently used.

(iii) **In the case of services, inter alia services within category 6 of Annex II A, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures**

The category 6 services referred to are insurance services, banking and investment services.

(iv) **In respect of public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs**

In the case of supplies, such contracts may be let by way of a negotiated procedure *without* a call for competition.

The negotiated procedure with a call for competition is commenced, in the same way as other competitive procedures, by a contract notice which will include a reference to the to the qualitative selection criteria of the candidates it will invite to the negotiations.

The contracting authority must invite a minimum of three, provided a sufficient number of suitable candidates is available, and the number of candidates invited must, in any event, be sufficient to ensure genuine competition. Any methodology to be used in making that selection must be explained in the notice.

Following the selection (pre-qualification) stage, the invitations to negotiate must be sent *simultaneously* and *in writing* to the selected candidates. The procedure can take place in successive stages in order to reduce the number of tenders to be negotiated.

The numbers will be reduced by applying the award criteria set out in the contract notice or the specifications and the contracting authorities will be able to assess the relative economic advantages offered by the different candidates at each stage of the procedure. In this final stage, the number arrived at must make for genuine competition insofar as there are enough solutions or suitable tenderers.

In reducing the number of candidates through these successive stages, contracting authorities must ensure the equal treatment of all tenderers. In particular, they must not provide information in a discriminatory manner which may give some tenderers an advantage over others.

2.3.2.2 Negotiated Procedure Without a Call for Competition

In both public and utilities sectors, contracting entities may award a contract by way of the negotiated procedure without the prior publication of a contract notice in a series of defined circumstances. This negotiated procedure may be used without a call for competition in the following cases.

- **For All Contracts**

  (i) **When no tenders or no suitable tenders or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests.**

  This ground applies where no tenders were received or where all of those that were received are unsuitable and provided that the initial conditions of contract are not substantially altered.

  (ii) **When, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator**

  This ground encompasses a series of grounds. First, it refers to ***technical*** reasons where a particular contractor is the only one capable of completing a particular project, due to the particular technical expertise or capacity of the contractor concerned whether or not that is subject to any proprietary interest.

The second ground subsumed by this condition refers to ***exclusive rights*** such as intellectual or industrial property rights. Holders of these rights will have a proprietary interest in these rights which may mean that only they may exploit them.

To be relied upon successfully, it will be necessary to demonstrate that there are, in fact, no alternatives.

(iii) **Insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting entity**

All the conditions set out in the derogation must be met, for they are cumulative. It is thus necessary to prove that use of the derogation is (i) strictly necessary when, for (ii) reasons of extreme urgency. (iii) brought about by events unforeseeable by the contracting entities in question, (iv) the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be complied with and that (v) the circumstances invoked to justify extreme urgency must not in any event be attributable to the
contracting entity.

- **For Supplies Contracts**

(iv) **When the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs**

(v) **For additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance**

(vi) **For supplies quoted and purchased on a commodity market**

(vii) **For the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations**

This allows the contracting entities to take advantage of stock clearances based on the financial difficulties of the suppliers.

(viii) In the utilities sector only, **for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices**

This derogation is inherited from the GPA where it is intended to cover both the situation of bankruptcy (above) and other situations, notably unusual disposals by firms that are not normally suppliers. It is not intended to cover routine purchases from regular suppliers.

- **For Services Contracts**

(ix) **When the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotiations**

- **For Works contracts and Service Contracts**

(x) **For additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services**

In addition to the conditions set out above, the derogation will only be available in two situations:

- when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting entities, or
- when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

The unforeseeability requirement, to be strictly interpreted, would ensure that the derogation is not used as a means of awarding new works or services contracts under the guise of additions.

(xi) **For new works or services (only new works in the case of the utilities) consisting in the repetition of similar works entrusted to the economic operator to whom the same contracting entities awarded an original contract, provided that such works are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure**

Unlike the previous derogation, these additional works are those which are foreseen in the original contract which must have been awarded pursuant to the open or restricted procedures. The derogation applies on condition that:

- the possible use of this procedure is disclosed as soon as the first project is put up for tender, *and*
- the total estimated cost of subsequent works shall be taken into consideration by the contracting entities when they calculate the threshold values of the original contract

2.3.3 Design Contests

Specific procedures apply to the award of design contests. These procedures are also commenced by way of a notice and the award is also subject to the prior publication of a contract notice. There are a number of specific conditions.

Firstly, the admission of participants to design contests may not be limited by reference to the territory or part of the territory of a member state. Secondly, where such design contents are restricted to a limited number of participants, the contracting entities must lay down clear and non-discriminatory selection criteria. Where such a selection takes place, the number of candidates invited to participate must be sufficient to ensure adequate or genuine competition.

The third condition relates to the jury which should be:

- independent of the participants in the contest;
- familiar with the professional qualifications required of the participants; (at least a third of the members of the jury should have the same qualification as that required of the participants or its equivalent)
- autonomous in its decisions.

The decision of the jury will be taken only on the basis of projects which have been submitted anonymously and the jury may only take into account the criteria indicated on the appropriate notice.

2.3.4 Public Sector Competitive Dialogue

The new Public Sector Directive introduces an entirely new procedure called the 'competitive dialogue'. The procedure may be used in the case of particularly complex contracts where the use of the open or restricted procedure will not allow the award of the contract. It is nevertheless commenced in the same way as a normal procedure by way of a notice but the contract will be awarded (only) on the basis of the most economically advantageous tender.

As with the restricted and negotiated procedures, the contracting authorities may then select (according to the Directive's selective qualification criteria) a number of candidates with whom to conduct the dialogue. This should be ay least three where three suitable candidates can be found.

Contracting authorities enter a dialogue with the selected candidates with the aim of identifying and defining the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue but they must ensure equality of treatment among all tenderers. In particular, they may not provide information in a discriminatory manner which may give some tenderers an advantage over others. Crucially, contracting authorities may not either reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

Provided it is announced in advance, contracting authorities may provide for the procedure to take place in successive stages to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contracting authority will continue the dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs. The contracting authorities will finally ask the tenderers to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

2.3.5 Dynamic Purchasing System

In the new Directives, the Commission created a hybrid electronic procedural tool known as the electronic dynamic purchasing system for commonly used purchases. This purchasing technique allows the contracting entity, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to take part, to have a particularly broad range of tenders as a result of the electronic facilities available, and hence to ensure optimum use of public funds through broad competition. It thus shares some of the benefits of framework agreements, qualification systems (or lists of official providers) and electronic catalogues although it is none of these things and stands alone as a new procedure.

The basic procedure (based on an open procedure) is that:

- the contracting entity advertises the existence of the system using the open procedure;
- interested operators then submit 'indicative tenders' setting out then terms on which they will supply the requirements;
- all qualifying operators will be admitted to the system (and new operators may be admitted at any time, normally within 15 days);
- when it wishes to place an order, the contracting entity invites a tender from all of those admitted to the system and requests a tender within a time period of at least 15 days;
- the contracting entity must also advertise each intended order in the *Official Journal* to notify any remaining unregistered operators and must provide at least 15 days for the submission of tenders.

The system must be entirely electronic so that all stages from the setting up of the system and the award of contracts under that system will all be carried out by electronic means. The originating notice must also contain all the necessary information concerning the electronic equipment used and the technical connection arrangements and specifications as well as the internet address at which the contracting entity offers unrestricted, direct and full electronic access to the specification and to any additional documents.

A dynamic purchasing system may not last for more than four years, except in exceptional cases and contracting entities may not resort to this system to prevent, restrict or distort competition. No charges may be billed to the interested economic operators or to parties to the system.

2.3.6 Framework Agreements in the Public Sector

Essentially, the contracting authorities will follow the open, restricted or competitive dialogue procedure for all phases up to the award of contracts based on that framework agreement. It is only in the final stage that the procedure differs. The Directive offers a choice between awarding a framework agreement to one economic operator or to several.

Where a framework agreement is concluded with one economic operator, contracts based on that agreement must be awarded within the limits of the terms laid down in the framework agreement. Where a framework agreement is concluded with several economic operators, there must be at least three operators (to the extent that three are available who meet the conditions). Contracts based on framework agreements concluded with several economic operators may be awarded either:

- by application of the terms laid down in the framework agreement without reopening competition, or
- on further or more precisely formulated terms

In the latter case contracting authorities must carry out a 'mini-tender' with the chosen economic operators and consult in writing the economic operators capable of performing the contract; must fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted; accept tenders from the operators in writing; and award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement and the term of a framework agreement may not exceed four years, save in exceptional cases.

Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

2.3.7 Electronic Auctions

This is not a new procedure, only a tool for use with an open, restricted or negotiated procedure with a call for competition. The rules relating to the operation of those procedures will continue to apply adapted to the provisions relating to auctions.

An electronic auction may also be held on the opening for competition of contracts to be awarded under the dynamic purchasing system and, in the public sector, on the reopening of competition among the parties to a framework agreement.

Electronic auctions apply to contracts for works, supplies or services for which the specifications can be determined with precision, for example in the case of recurring supplies, works and service contracts.

The basic mechanism of reverse auctions enables contracting entities to ask tenderers to submit new prices, revised downwards and, when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices.

In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting entity, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. Consequently, certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, should not be the object of electronic auctions.

The procedure is commenced by way of a standard form contract notice which must contain some additional information, however:

(a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

Before proceeding with an electronic auction, the contracting entities must make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them. Then, all tenderers who have submitted admissible tenders will be invited simultaneously by electronic means to submit new prices and/or new values.

The invitation will also contain all relevant information concerning individual connection to the electronic equipment being used and state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases but may not start sooner than two working days after the date on which invitations are sent out.

An electronic auction will be based either solely on prices when the contract is awarded to the lowest price or on prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender. When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation to participate must be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting applied to the various award criteria. The invitation must also state the mathematical formula (including the weightings) to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices and/or new values submitted. Once closed (se below), the contract will be awarded on the basis of the stated award criteria.

Throughout each phase of an electronic auction the contracting entities must instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

Electronic auctions can be closed (concluded) in a number of ways:

- on the date and time fixed in advance;
- when the contracting entity receives no more new prices or new values which meet the requirements concerning minimum differences (in that event, the contracting entity will state in the invitation the time it will allow to elapse after receiving the last submission before closing the electronic auction);
- when the number of phases in the auction, fixed in the invitation, has been completed.

2.4 PROCEDURAL REQUIREMENTS

The directives contain a series of provisions which apply to advertising and publicity with a view to guaranteeing the transparency of the system. These are the main transparency provisions and provide the most visible opportunity for tenderers to identify contracts throughout the EU in which they might be interested.

2.4.1 Notices for Publication

The Directives provide for a series of notices to be published in the *Official Journal of the European Union (OJEU)* depending on the award procedure chosen. The Directives also give the contracting entities the option of having published in the *Official Journal* notices announcing works, supplies and services contracts whose value is below the necessary threshold value. Standard form notices indicating the information required are contained in the annexes to the Directives.

Publication of all notices means publication in the OJEU or, alternatively, in the case of prior or periodic indicative notices, on the contracting entity's buyer profile. As well as publication in hard copy, the Office for Official Publications also operates a computer database system known as the Tenders Electronic Daily ('TED'). Contract notices are to be published in full in their original language. A summary of the important elements of each notice shall be published in the other official languages of the Communities, the original text alone being authentic. The translation of the notices is undertaken by the Office for Official Publications so contracting entities need only submit the appropriate notice in their original language.

The contracting entities must be able to provide proof of the date of dispatch.

No notice which must be published at European level (in the *Official Journal*) may be published in any national journal or in the press of the country of the contracting entity before the date of dispatch of the same notice to the Office for Official Publications and the date of dispatch should be mentioned in any national publication. Any publication of the tender notice should not contain information other than that published in the *Official Journal*.

The function of the public sector *prior information notices* is to advise potential tenderers of forthcoming contracts or framework agreements which will be advertised by means of a notice.

The function of the utilities sector *periodic indicative notices* is twofold. First of all, a call for competition may itself be made by means of a periodic indicative notice. Where such a periodic indicative notice is used to make a call for competition, it is subject to the following conditions:

- the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;
- the notice must indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested economic operators to express their interest in writing;
- all candidates must subsequently be invited to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations; and
- be published not more than 12 months before this invitation is sent.

Second, periodic indicative notices may also be used simply as an advance warning mechanism. They are intended to inform potential suppliers that there is likely to be procurement, possibly involving contracts below the threshold value, in classes of goods they are able to supply.

These notices are not compulsory but the advantage for the contracting entity is that the time limit for the receipt of tenders is reduced where such a prior or periodic indicative notice has been published. They may be published in the *Official Journal* or on a 'buyer profile'. A 'buyer profile' is a new concept which refers to an internet site on which contracting entities can publish information relating to the contracts. It may be used as an alternative to the *Official Journal* but is not compulsory. Where it is used, a notice to that effect must also be sent to the *Official Journal*.

In the case of works contracts, the notice is used to forewarn contractors of works contracts which the contracting entities intend to award with a volume not less than the normal threshold value of Euro 4 845 000 (value at *1 January 2010*). In the case of supplies and services, the contracting entities must make known, as soon as possible after the beginning of their budgetary year, the intended total procurement by product area which they envisage awarding during the subsequent 12 months where the total estimated value is not less than €750,000 (value at *1 January 2010*).

2.4.2 Minimum Time Limits

The award procedures of the Directives are subject to specific minimum time limits which are imposed in order to ensure that tenderers in all member states are given adequate time to prepare and submit their tenders.

They are fixed according to the complexity of the contract and the time required for drawing up tenders but must not be less than the minimum periods set out in the Directive.

In the case of open procedures, the minimum time limit for the receipt of tenders is 52 days from the date on which the contract notice was sent.

The time limit runs from the date on which the contract notice was sent. If a contracting entity has published a prior information or periodic indicative notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days. Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders may be shortened by 7 days. In addition to this 7 days, the time limits for the receipt of tenders may be reduced by a further 5 days where the contracting entity offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents. The cumulative effect of these reductions may not, however, reduce the time period to less than 15 days.

2.4.2.1 In the Public Sector:

In the case of restricted procedures, the minimum time limit

- for receipt of requests to participate is 37 days from the date on which the contract notice is sent;
- for the receipt of tenders is 40 days from the date on which the invitation is sent.

The time limit runs from the date on which the invitation to tender was sent. If a contracting authority has published a prior information notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days. Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders may be shortened by 7 days. In addition to this 7 days, the time limits for the receipt of tenders may be reduced by a further 5 days where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents

In the case of negotiated procedures with publication of a contract notice and the competitive dialogue, the minimum time limit for receipt of requests to participate is 37 days from the date on which the contract notice is sent. Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders may be shortened by 7 days.

An accelerated procedure may be used in the case of restricted procedures or negotiated procedures with publication of a contract notice where urgency renders impracticable the above time limits. In these cases, contracting authorities may fix:

- a time limit for the receipt of requests to participate which may not be less than 15 days from the date on which the contract notice was sent, or less than 10 days if the notice was sent by electronic means; and, in the case of restricted procedures,
- a time limit for the receipt of tenders which must be not less than 10 days from the date of the invitation to tender.

2.4.2.2 **In the Utilities Sector:**

In the case of restricted procedures and negotiated procedures with a call for competition, the minimum time limit

- for receipt of requests to participate is, as a general rule, 37 days from the date on which the contract notice is sent and cannot be less than 22 days (where the invitation is not sent by electronic means) or less than 15 days (where the invitation is sent by electronic means);
- for the receipt of tenders may be set by mutual agreement but, failing that, should not, as a general rule, be less than 24 days and in no case less than 10 days from the date of the invitation to tender.

The time limit runs from the date on which the invitation to tender was sent. Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders may be shortened by 7 days. In addition to this 7 days and except where fixed by mutual agreement, the time limits for the receipt of tenders may be reduced by a further 5 days where the contracting entity offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents.

The cumulative effect of these reductions may not, however, reduce the time period (1) for requests to participate to less than 15 days from the date the invitation is sent (2) for receipt of tenders, except where fixed by mutual agreement, to less than 10 days from the date of the invitation to tender.

2.4.3 Communications

With the acceptance of electronic forms of communication, the Directives now permit all communication and information exchange to be made by post, by fax, by electronic means, by telephone in some circumstances, or by a combination of those means, according to the choice of the contracting entity. However, the means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.

2.4.4 Information Requirements

Contracting entities must as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system.

The information must be given in writing based on a request to the contracting entities.

At the request of a tenderer, the contracting entity must as quickly as possible and, in no case, more than 15 days from receipt of the written request, inform:

- any unsuccessful candidate of the reasons for the rejection of his application,
- any unsuccessful tenderer of the reasons for the rejection of his tender,
- any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

Contracting entities may decide to withhold certain information where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

In the utilities sector, contracting entities which establish and operate a system of qualification must inform applicants of their decision as to qualification within a period of six months. If the decision is going to take longer than four months, the entity must inform the applicant, within two months of the application of the reasons justifying the longer period and of the date of the decision. Applicants whose qualification is refused must be informed of this decision and the reasons for refusal as soon as possible and under no circumstances more than 15 days later than the date of the decision. Any intention to bring the qualification of an economic operator to an end must be notified in writing to that operator beforehand, at least 15 days before the date on which qualification is due to end, together with the reason or reasons justifying the proposed action.

Public procurement
for economic operators

MODULE H

Making the most of the tendering process

PART 6

SECTION 1
INTRODUCTION

1.1. OBJECTIVES

The objectives of this chapter are to provide general and practical guidance on:

1. Planning and preparation of tenders
2. Identifying market profile and conducting market research
3. Identifying potential tenders and contracts
4. Preparing tenders

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The provisions of the Directives that facilitate identification of tenders and contracts
- The expectations of the contracting entities
- The elements that go towards making a potentially successful tender

This means that it is critical to understand fully:

- The nature of your market and your position in it
- The needs of the contracting entity
- The tendering process
- The role and content of tender documentation

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There is a particularly strong link with the following:

- Module E2 on advertisement of contract notices

1.4 RELEVANCE

This information will be of particular relevance in preparing and submitting successful tenders.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

It may be useful to have to hand copies of the contract notices that must be published in the *OJEU*.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The successful preparation and submission of tenders is not a mechanical process consisting of providing standard documents and reproducing existing templates or models using the 'cut' and 'paste' functions of computer software. It is true that tenders will need to be accompanied by certain documents required by the contracting entity, usually those relating to the status and qualifications of the economic operator, but the drafting of a tender provides the economic operator with the opportunity to shine.

It will enable the economic operator not only to demonstrate that it complies with the formal requirements of the contracting entity (client) but also that it is familiar with the client's needs and business in a general sense, that it is committed to the client's goals, that it understands the specific requirements of the client (even where the client has not articulated or has been unable to articulate those requirements clearly) and that it has the right mix of skills, resources and experience to fulfil those requirements.

The successful economic operator will not only respond to advertisements as they arise but will actively seek to position itself to seize the opportunities as they arise. Doing so involves taking the initiative right through from planning its intervention in the market to completing the contract on time and within cost. At each stage of the process, the economic operator will be able to do things which will improve its chances of success. H6 considers the various stages of the tendering process and seeks to identify the possibilities it offers for economic operators to improve their chances of success.

A core mechanism used to ensure maximum participation on fair and equal terms is transparency which operates by guaranteeing that the actions of the public purchaser are both known and available to economic operators and verifiable by the authorities. These objectives inevitably lead to a certain formalism in then procedures which is often compared unfavourably to the more streamlined, but opaque, procedures of the private sector. However, it is this formality which provides economic operators from the EC with the opportunity to identify and to bid for procurement contracts throughout the Community and it is thus important to recognise the practical impact of the provisions of the directives for the economic operators and the benefits that they offer in terms of improved opportunities.

2.2 PLANNING AND PREPARATION

Tendering is just another way of selling products and services. However, it is not a passive activity and requires positive action to be taken to make the sale.

The procurement rules came into existence partly because of the recognition that governments tended to buy products and services from the same suppliers over and over again, very often from their own nationals. Without making any searches in the market (especially the wider European market) to elicit comparison prices, those governments also tended to pay the higher prices asked by the incumbent suppliers who were then able to benefit from their 'monopoly' positions.

The situation was even more acute in the vase of 'national champions', *i.e.*, those companies that operated in what the governments considered to be strategic sectors and who were effectively protected from competition, subsidised or given preferred supplier status. The results of such practices were large price variations for basic goods, works and services throughout the Community as well as artificially inflated prices.

One of the major consequences of the introduction of the procurement Directives is to force contracting entities to apply competitive procedures and thus obtain a range of comparison prices. Armed with such a comparison, contracting entities are able to identify the overpriced goods and services offered and, subject to the permitted quality considerations of the directives (see H4) opt for goods and services offered by economic operators at the lowest prices for the level of quality required – this price/quality combination is often referred to as 'value for money'. One of the effects of this process has also been to see lower prices offered by those economic operators who had previously been able to charge inflated prices thanks to their privileged positions.

European economic operators can no longer rely on their national governments to buy from them at inflated prices. Those governments will now have to base their purchasing decisions on competitive pricing and it is up to the economic operators to demonstrate that they can offer the best prices for the specified requirements.

This does not mean that contracts will go to foreign economic operators. The primary effect of the Directives has been on national procurement markets where competition has been encouraged between national economic operators and where prices offered by those economic operators have decreased to match the prevailing market price.

For large value contracts which attract international competition, there is competition from economic operators from other member states but they are given no preference. Public purchasers are required to base their decisions on an objective mix of quality and price and it is the economic operator that offers the best mix that will win the contract. It makes no difference, from the point of view of the Directives, whether the successful economic operator is a national of the purchaser's country or not.

The crucial factor in successful bidding under the public procurement regime is, therefore, to persuade the contracting entity that the economic operator can meet the stated requirements of the purchaser and has the necessary skills, resources and experience to deliver on time and at the stated price.

The key phrase is 'persuade' – it is for the economic operator to convince the contracting entity that he is the best choice. The economic operator needs to be proactive in this respect and cannot simply rely on vague and unsubstantiated promises to deliver. The tendering procedure which is mandated by the Directives provides the economic operator with a vehicle through which to persuade the contracting entity that he should win the tender. Whilst some of the formality is a necessary evil, the tendering process is the pre-eminent means for the economic operator to make the sale. It is, therefore, a task to be taken very seriously.

2.2.1 Market Profile and Research

Even if the primary procurement procedure for the purposes of the directives is the open bidding procedure commenced by way of advertisement, not every procurement opportunity comes through an advertisement. Even if the economic operator does mostly react to advertisements, it can still seek to position itself in the market to make itself more attractive to potential clients.

Even if there is an advertisement at European level, we saw in H5 that contracting entities are permitted, in addition, to advertise in the national press, provided they do not so before the European level advertisement is placed and provided the national advertisement does not contain any other information. The rationale is to ensure that all bidders (in each member state) are given an equal opportunity of bidding and this means that they are all given the same amount of time to prepare and submit their tenders. Under the same conditions (*i.e.* not before the European advertisement and without additional information), purchasers would also be able to send copies of the notice directly to potential economic operators who they think may be interested. Thus, where purchasers are familiar with a economic operator, maybe as a result of previous work or of general market profile, it may work to the economic operator's advantage. This is particularly true where the purchaser is aware of a economic operator's interest in a particular sector or field of activity.

As indicated in H5, there are also circumstances which justify recourse to less competitive procedures and which allow purchasers to select a number of candidates whom they will invite to submit tenders. There is no doubt that such procedures could be used to prefer a particular economic operator but they may also be used legitimately to the benefit of economic operators. Those who have a high profile in a given market, those who have a good reputation in government circles and those successfully worked with the public sector or the contracting entity before will be in a good position to receive such an invitation based on their quality and reputation.

Economic operators who are specialised in particular fields will participate in trade fairs, will be active in trade associations and may contribute to the relevant technical press. All of these are consulted by and encourage the participation of both the public and private sectors.

The government's technical officers also need to keep abreast of technical developments and will need to gather information on the most recent developments and innovations which affect their field of technical expertise. Such officers will be well aware of high profile and reputable economic operators who are active in the sector. When such technical officers are consulted, as they will be, on reliable operators in the field, economic operators who have positioned themselves in the market will stand a better chance of attracting the interest of the public purchaser. The success of such a public relations exercise depends on the amount and quality of the information the potential client has about the economic operator. Whilst, as we will see below, it is not a good idea to attach general brochures to tenders, there is no reason that such brochures should not be provided as part of a more general marketing campaign. However, any information must be up to date and accurate and must be relevant to the market. Potential economic operators need to be able to showcase their strengths.

At a more direct level, it is important for economic operators to cultivate and maintain a good (and professional) relationship with existing and potential clients. This is not to suggest that decisions will be made on the basis of personal relationships nor that economic operators should overstep the mark and seek to enter into improper relationships with potential clients. But a good working relationship will establish a economic operator's reputation for professionalism, efficiency and reliability which are all factors which will be important to the purchaser. Maintaining contacts may be done through informal and chance meetings at trade fairs or industry gatherings, for example. They may take place at the occasion of applications to register or to maintain registration on lists qualified suppliers.

They will also result from working relationships on existing contracts. It is important for the economic operator to demonstrate at all times the strengths that make him a successful economic operator. These occasions should be taken to inform the potential clients of improvements and developments in the economic operator's resources and experience, indicating the experience of new assignments and pointing out any additional skills or staff acquired.

Even if the economic operator does not know the client personally, there is no reason that it should not make the effort to do some background research. Successful economic operators will research potential clients so that they come to know what to expect. There is little difficulty in researching the structure of the organisation itself and its field of activity. Previous projects will also often provide an insight into the type of projects it prefers to conduct and what sort of goals and objectives it might have. Clients do not always buy or want to buy standard off-the-shelf equipment or to accept standard designs and quality. They will have their own programmes and objectives their own vision of what they want to achieve. Economic operators who are able to tap in to this vision and show the clients that they understand their objectives, support them and share them will be in a far better position than economic operators who merely respond mechanically to solicitation documents.

Researching past projects may also reveal future plans either as planned extensions of previous projects or as an inevitable consequence of them. The Directives require purchasers to publish contract award notices and monitoring such notices could enable the clever economic operator to gain a picture of the purchaser's spend profile. Being able to foresee what a potential client may want and what he is likely to buy will give a economic operator an edge over his competitors and, possibly, a head start.

But foreseeing what public purchasers may but in future is not only a question of guesswork, In addition to the publication of contract award notices, the Directives themselves provide a mechanism for contracting entities to disclose their annual procurement plans. This is done by way of prior information notices (in the public sector) and periodic indicative notices (in the utilities sector.

The function of the public sector *prior information notices* (PINs) is to forewarn potential economic operators of forthcoming contracts or framework agreements which will be advertised by means of a notice.

- In the case of works contracts, the notice is used to forewarn contractors of works contracts which will exceed the normal threshold value. This notice is to be sent to the Office of Official Publications or published on the buyer profile as soon as possible after the decision approving the planning of the works.
- In the case of supplies, however, the PIN does not apply to individual contracts. The contracting entities must make known, as soon as possible after the beginning of their budgetary year, the intended total procurement by *product area* which they envisage awarding during the subsequent 12 months where the total estimated value is not less than €750,000. The product area is to be established by the contracting entities by means of reference to the nomenclature CPV.
- As with supplies, intended total procurement in each of the service categories listed in annex XVIIA which the contracting entities envisage awarding in the 12 months following the beginning of their budgetary year, are to be the subject of an indicative notice where the total estimated value is not less than €750,000.

Apart from references to the CPV, the term product area is not defined. Some contracting entities use this, however, to define their requirements according to what can be supplied by the same supplier. For example, computing equipment, desks, chairs, paper and staplers may have quite different CPV references but they are all items which could be supplied by one type of supplier: an office equipment supplier. If this approach is taken, then the PIN can also be used to disclose the existence of large volume contracts for particular types of supplier.

In the utilities sector, the functions of the utilities sector *periodic indicative notices* may be different. First, they may be used simply as an advance warning mechanism as they are in the public sector. They are intended to inform potential suppliers that there is likely to be procurement, possibly involving contracts below the threshold value, in classes of goods they are able to supply. Secondly, however, a call for competition may itself be made by means of a periodic indicative notice. Where such a periodic indicative notice is used to make a call for competition, the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded and must indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested economic operators to express their interest in writing. All candidates must subsequently be invited to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of economic operators or participants in negotiations; and the notice must be published not more than 12 months before this invitation is sent.

These notices are not compulsory but the advantage for the contracting entity is that the time limit for the receipt of tenders is reduced where such a prior or periodic indicative notice has been published. They may be published in the *OJEU* or on a 'buyer profile'. For economic operators, they offer an opportunity to foresee what contracts will become available during the course of a year and would enable them to plan accordingly.

Note:

A 'buyer profile' is a new concept which refers to an internet site on which contracting entities can publish information relating to the contracts. It may be used as an alternative to the *OJEU* but is not compulsory. Where it is used, a notice to that effect must also be sent to the *OJEU*.

As the introduction of the new public sector dialogue procedure shows, there are also cases where the contracting entities cannot always specify in advance what it is they need, either because, for example, the project is innovative and requires new technology or because the requirements may give rise to different technologies. In such cases, economic operators may be invited to discuss technical solutions with the contracting entity. Such a procedure is based on an advertisement and, although, a firm's reputation may lead to a direct invitation following the publication of the notice, the whole process takes place within the context of a finite procedure. However, economic operators with particular technical expertise can also assist at an earlier stage and, thereby, begin to develop a good working relationship with contracting entities.

As already discussed in H4, economic operators are permitted to discuss technical issues with contracting entities before any procurement procedure is launched To get the information he needs, the purchaser will need to communicate with potential economic operators but doing so in the context of a competitive bidding procedure may be a breach of the rules because discussions are generally not permitted with the economic operators during the procedure.

The Directives allow (in their recitals) the possibility of discussing technical specifications with potential economic operators in advance of any contract award procedure. It is referred to as technical 'dialogue'. With the crucial proviso that any discussions should not have the effect of precluding competition, the recitals of the directives provide that 'before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications…' The definition of technical dialogue means that such discussions are *prima facie* permitted. They must not, of course, have the effect of precluding competition and so should not provide any potential economic operator with an unfair competitive advantage by, for example, setting the technical specifications by reference to those met by one economic operator, national or otherwise.

2.2.1 Identifying Potential Tenders

In the same way that offering up 'cut and paste; tenders is not particularly efficient and often counter-productive, it is not efficient either for an economic operator to submit tenders for every contract that is advertised. Indeed, this attempt to respond to each advertisement nay be the cause of the poorly drafted tender in the first place so that the economic operator is itself responsible for its lack of success.

The preparation of tenders requires a great deal of effort which translates into the expense of time and money. If the chances of winning a tender are remote, then it is open to question whether the economic operator's resources would be better used elsewhere.

The problem of the cost of tendering is also recognised in the procurement procedures that are made available. Though not stated explicitly in the current directives, the rationale behind the use of the restricted procedure was set out in an earlier directive. One of the reasons why a restricted procedure may be preferred is that it can be used to reduce the tendering costs by splitting up the process into two stages: pre-qualification and tendering. Preparing for qualification is much less onerous than preparing a full technical tender and, by separating out the two stages, a purchaser is first able to concentrate only on the issue of qualification. The benefit for the procuring entity is that it can then invite only those candidates who have a serious chance of winning to submit a full technical bid, thus avoiding the need to evaluate a large number of technical tenders which have no realistic chance of being chosen because the economic operators who have submitted them arte simply not qualified. The benefit for the economic operators is that, if they are not qualified, they are spared the expense of preparing a full technical bid.

Smart economic operators will, however, conduct their own similar exercise for each contract weighing up the chances of success with the costs of submitting a tender. Preparing and submitting a quality tender where the chances are success are limited may be a waste of resources. Economic operators will need to be selective so that their resources are used efficiently and effectively. This involves a cost benefit analysis which takes into account any number of factors.

Some of these factors may be the result of the process itself; others will be the result of the economic operator's own position or the general competitive environment. For example, formal tendering procedures impose certain costs. In those member states which maintain high transaction costs for lower value contracts (by applying the full open or restricted procedures for low value contracts, for example), economic operators may be discouraged from tendering at all. If there are alternative private markets, economic operators may look to these as outlets for their goods and services. Different contracting entities may apply different standards and economic operators will be attracted by procedures which are less costly. Neighbouring member states may also do without unnecessary formality and the intelligent economic operator will start looking further afield for potential contracts. The huge benefit of the directives for economic operators is that they can look for and take the opportunities offered by different contracting entities in the different member states.

Making such assessments also depends on the overall competitive environment. This will include such things as the market conditions and the existence and quality of the potential competitors. It is also here that the results of market research will become useful since that research should also disclose the competitive situation. Knowing when to tender is also a question of knowing when not to tender. Where competition is fierce and where the economic operator cannot offer any discernible advantage over the competition, then the cost/benefit analysis becomes critical.

The factors to be taken into account in this cost benefit analysis will depend on the particular circumstances. Some will be irrelevant, others will become important in respect of one contract or one contracting entity in particular. Some will require no thought on the part of the economic operator; others can only be considered properly after further investigation. Some of the factors that may need to be taken into account include:

- *the competitive environment:* what chances does the economic operator have of winning the tender; does the contracting entity have long standing relationships with other economic operators; is the contract an extension of a previous contract; has the economic operator won any work from this contracting entity before; how well was that contract performed and what is the relationship with the contracting entity; who are the competitors and how do they compare; how many of them are there (this will be known in restricted procedures for example); do the competitors benefit from any state support or subsidies; will you get any support, especially if the contract is abroad;
- *how competitive is the process:* how clear is the tender specification (seek clarifications if it unclear); does it look as if the specifications are drafted to favour certain competitors (this may be unlawful but difficult to prove)[do you have the documents needed to submit the tender; can you get them; how will the tenders be evaluated; does that work in your favour.
- *preparation costs:* what costs are involved in terms of tender preparation drafting, printing, sending; do you have the staff and are they available to prepare the tender; how do these costs compare to the likely profit; have you already spent time in pre-qualifying for the contract and marketing to client; would these costs be lost if you fail to tender; are you required to submit a tender security and/or performance security; what is the cost of this (does it impose an unacceptable burden, *e.g.* where collateral is required); if tendering in another country, will your security be acceptable; will you need to obtain one from a foreign bank; are there any translation costs involved; does that require services to be bought in or can you rely on an existing foreign associate or partners;
- *project costs:* can you accurately ascertain project costs and eventualities; is there a price escalation or variation clause; will these costs outweigh the anticipated profit; will the project have a knock-on effect on other contracts you may have or are planning in terms of the effect on capital and resources which may be diverted; does the project require extensive back office support, does it necessitate additional management time, for example, for the creation and operation of joint ventures or other partners or sub-contractors; where is the contract to be performed; is that acceptable; does it require any additional measures (staff allowances, security measures)

- *price:* how competitive is your price likely to be. Can you undercut the competition; are you in the position of using otherwise under utilised staff and unused resources, can you take advantage of particular bargains (allowed by the directives); are your competitors able to undercut you for similar reasons; do any competitors benefit from State aids (lawful or otherwise); in what currency will you receive payment; does this have any currency exchange rate issues; will you requires additional (foreign) financial services; will you need to take out foreign loans; are there any inflationary pressures; what are the insurance costs;
- *client experience:* how has been your previous experience with the client in terms of working relationship, management and logistical issues. Can you foresee any implementation issues; what are the client's terms of payment; if it does not pay on time, are there interest payments foreseen; is it an important client that you simply cannot refuse; is it a prestige project/client;
- *capacity:* are you capable of completing the contract on time and at cost; do you have the required skills and resources; do you need to provide additional training or buy in more resources and skills.

2.3 IDENTIFYING POTENTIAL CONTRACTS

The Directives of course provide for a series of notices to be published in the *Official Journal of the European Union (OJEU)*. These are the primary means of announcing competitive bidding procedures in the Community. As well as providing model notices for those cases where publication is required, the Directive also give the contracting entities the option of having published in the *OJEU* notices announcing works, supplies and services contracts which are not subject to the publication requirements of the Directives, that is, where the contracts are below the necessary threshold value.

Model notices indicating the information required are contained in the annexes to the directives. These annexes contain references to the information which must be published in the notice sufficient to provide potential economic operators with what they need to decide whether or not to submit a tender and where and when they should do so.

Publication of all notices means publication in the *Official Journal of the European Union* published by the Office for Official Publications in Luxembourg. The *OJEU* is published in a number of volumes: volume 'L' which contains legislative texts; volume 'C' which contains information notices regarding proposed legislation and non-legislative notices and volume 'S' which contains the procurement notices. All of these volumes are available on a subscription service either together or separately. Details are available from:

[insert contact details for OJEU]

The 'S' series is published almost daily in all the official languages of the Community and each edition publishes all of the notices referred to in the directives.

These include:

[TOC of 'S' to be inserted]

The contract notices are published in full in their original language and a summary of the important elements of each notice shall be published in the other official languages of the Communities, the original text alone being authentic. The translation of the notices is undertaken by the Office for Official Publications so contracting entities need only submit the appropriate notice in their original language.

As well as publication in hard copy, the Office for Official Publications also operates a computer database system known as the Tenders Electronic Daily ('TED'). This effectively provides an on-line version of volume 'S' of the *OJEU* which may be accessed electronically. It has the advantage of being searchable through the use of certain keywords and variables (*e.g.* CPV references) and offers a notification service. Such services are also offered by private companies operating in the European market.

The website address of the TED database is:

[insert address]

Taking advantage of new electronic means of communication, the Directives also provide that the prior information and periodic indicative notices may also be published on a 'buyer profile'.

In addition to advertising notices in the OJEU, contracting entities are, as we have seen, also entitled to publish them in any national journal or in the press of the country of the contracting entity provided that this is not done before the date of dispatch of the same notice to the Office for Official Publications. In addition, the date of dispatch should be mentioned in any national publication.

[Possible localisation: if there is a national web portal or national Official Gazette where such notices are published, they should be included here]

Another important condition is that publication of the tender notice in the national press should not contain information other than that published in the OJEU. The conditions are intended to ensure the integrity of the procurement rules by preventing national being given advance oir improved warning of the contracts which will be advertised.

In many cases, the notices will also be published at the national level and in the specialised trade press. Publication in the OJEU is the guarantee of equal opportunity and non-discrimination but a large number of opportunities will be picked up by economic operators through the more traditional channels of the local or international trade press. Nevertheless, more and more contracting entities are making use of the OJEU as their sole source of advertising. Economic operators wishing to make the most of the opportunities available both at home and abroad would, therefore, be well advised to ensure that they adopt a way of accessing and checking the notices published in the OJEU either on- or off-line.

2.4 SUBMITTING TENDERS

Tender preparation is a complicated and sophisticated task. As already stated in the introduction, it is not (or should not be) a mechanical process consisting of providing standard documents and reproducing existing templates or models using the copy/ paste functions of the computer. Success requires more effort.

At a purely logistical level, it is important to manage the process of putting together the tender. This means putting a single person or identifiable team in charge of tender preparation. Among other things, they will need to coordinate:

- the drafting of the tender itself, *i.e.* the narrative parts;
- information gathering which will include the collection of the information and documents required to comply with the requirements regarding the technical specifications and the selection and award criteria;
- compiling of the tender which implies putting g together the various components such as narrative, required documents and certificates; identified means of proof; samples or brochures, as appropriate;
- the proof reading of the document, not only in terms of the narrative but also in respect of any calculations, ensuring that there are no arithmetical errors;
- producing the tender which might include specialised printing and/or binding; and
- sending/delivering the tender in the form stipulated in the tender documents and to arrive at the time and place specified.

This is not a task that should be underestimated. Even the simplest tenders will benefit from good preparation and presentation. Whilst coordination can be carried out by a single person, it is inadvisable that the whole tender should be prepared by a single person. A good tender will generally require the input of many. This can best be achieved through a sensible division of labour with central coordination.

In preparing the tender, there are a number of issues that should be taken into account. They may sound obvious but mistakes are easily made so it is critical to exercise due care and attention. Some points to bear in mind include:

- read the invitation to tender carefully together with attachments; these will contain all the information that is required to complete a tender to the satisfaction of the contracting entity; the attachments will also often contain essential information and should be neglected;
- check all the tender documents thoroughly for missing pages or errors; it is not inconceivable that the contracting entity has made a mistake in compiling and sending the tender documents and it is better to find out about these at the beginning of the tender preparation stage rather at a time that the ender is being finalised since it may well be too late to correct any errors (such as missing certificates or other information);

- if anything is unclear or cannot be properly understood from the tender documents, seek written explanations and clarifications as provided for in the tender documents; do so early enough to allow for clarifications and any consequential amendments you need to make; if those amendments are likely to require more time for the completion of tenders, inform the contracting entity immediately so that it may, where appropriate, extend the time for tender preparation and submission;
- remember that, even in the absence of mistakes or missing pages, invitations to tender are not always complete, quite often because the contracting entity has not been able to articulate its needs fully; in those situations, you should
  - use your own research to complete the picture and respond appropriately;
  - decide whether you need to propose different solutions or alternatives.

In finalising and submitting the tender, there are some cardinal principles to follow to ensure that you present the best possible tender you can. Remember to

- Communicate efficiently without making unnecessary comment;
- Convey the required information and only the required information;
- Present the tender professionally,
- good writing skills
- ensuring that it is easy to read, straightforward and concise
- Use the mandated forms and submit the required certificates
- Follow the formal instructions of the tender documents (with respect to number of copies, submission format such as submission in sealed envelopes, etc.);
- Ensure responsiveness of the tender in technical and substantive terms
- Answer all questions properly, completely and accurately
- Submit your tender within the specified time limits – preferably well in advance of the tender submission deadline.

Public procurement
for economic operators

MODULE H

Challenging breaches of the procurement rules

PART 7

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The possibilities available to tenderers to challenge perceived breaches of the rules
2. The measures that can be taken in the national courts
3. The way in which the European Commission can assist directly
4. The specific remedies provided by the Remedies Directives

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The basic and common safeguards provided by EU law and the Directives
- The role of the tenderers
- The role of the European Commission and the Court
- The tools at the disposal of tenderers

This means that it is critical to understand fully:

- The scope of action of the national courts, the European Commission and the European Court
- The precise remedies made available under the Remedies Directives (as amended)
- The procedures that apply to each process
- The time limits that may apply

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There is a particularly strong link with the following:

- Module F1 on remedies

1.4 RELEVANCE

This information will be critical to tenderers who feel that they have been unfairly treated and can point to what looks like a breach of the EU procurement rules. This section takes tenderers through the possibilities for challenge and the procedures that apply, so that they are in a position to defend the rights they have been given under the Directives.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The procurement rules of the EU Directives will be of little value if they are not applied properly by the contracting entities. Improper application can result from mistakes, oversight, or misunderstanding or it could be the result of deliberate action on the part of a procurement officer. Whatever the reason, it is the economic operator who is usually in the best position to identify a possible breach and the Directives provide the tools.

In H7 we will consider the different possibilities offered by Community legislation. These are based on two main Directives

(1) the Remedies Directive for the Public Sector: Directive 89/665, and

(2) the Remedies (Utilities) Directive: Directive 92/13

These Directives have now been amended by a new Directive: Directive 2007/66.

Where economic operators do notice problems or believe that breaches have taken place, the first course of action should always be to contact the representatives of the contracting entity to indicate that a breach may have occurred. If the breach is the result of a mistake, then this will give the contracting entity the opportunity of correcting that mistake and this is what happens in the vast majority of cases. However, if the contracting entity does not remedy the mistake, then a economic operator can then take further action. The Directives themselves provide for a series of possible remedies which may be used either in the national courts or, where they exist, before special review bodies ([Localisation: like XXXX in XXXX]).

The 2006 amendment also allows member states to turn this notification into a request for first review by the contracting entity. If that is the case, then making the request (by fax or electronic means) will trigger a 5 day suspension of the procedure. Where this initial review stage is provided for, therefore, it will offer economic operators a valuable first strike which will be taken seriously given the suspension. This suspension does not interfere with the award of interim measures. [Possible localisation: if this option has been taken up in XXX, it will need to be described].

This is not the only possibility, however. It is also be possible to make a complaint to the European Commission which, if it considers that a breach has taken place, can itself take action against the member state.

As with the main procedural directives, the aim of the Remedies Directive is not to harmonise the laws of the member states in this respect, but to lay down minimum criteria and safeguards to ensure protection of the rights flowing from the procedural Directives. This has been necessary in the light of the very different procedures available in the national jurisdictions which offer flagrant disparities in the means of protection offered to the subjects of Community law. This chapter will consider only those minimum criteria set out in the Remedies Directives.

2.2 ENFORCEMENT IN GENERAL

The enforcement of Community law, including the enforcement of the procurement directives is not governed solely by the Remedies Directives. National courts have a role in ensuring the application of Community law in general and the European Commission has a specific role to play as the guardian of Community law. These roles also need to be considered.

2.2.1 Using the National Courts

The Directives must be transposed into national law, thereby providing national rules which implement Community rules. The rights and obligations of citizens (economic operators) created by Community law must be protected by the national courts or any other recognised tribunal. A number of cases have been brought by individuals before national jurisdictions which dealt with infringements of the procedural Directives. Such infringements were dealt with under the existing procedures and provisions of national law. It was, however, precisely the disparities between the national jurisdictions both in terms of remedies available and the effectiveness of these remedies which led to the adoption of the Remedies Directive which is designed to put economic operators in all member states on a similar, if not always entirely identical, footing.

Apart from the specific enforcement measures provided for in the remedies Directives, the Treaty, bolstered by the European Court of Justice (ECJ), has always provided means of redress for infringements of both primary and secondary legislation of the Community. This flows from the very nature of Community law itself through the creation of rights which may be relied upon by individuals in their national courts (see H1).

It is well established that Community law is capable of creating rights which may be relied upon by individuals (including companies before their national courts which are bound to protect them. This happens where the provisions of the Treaty have direct effect, *i.e.* they have the effect of creating rights without further implementation. This is not automatic and is subject to certain conditions. Direct effect is assured if the obligation imposed on member states is

- clear and precise,
- unconditional and,
- in the event of implementing measures, the member states or Community institutions are not given any margin of discretion.

The case of Directives is more problematic than the Treat provisions since they are generally binding only as to the result to be achieved and only upon each member state to which they are addressed, but leave to the national authorities the choice of form and methods. Nevertheless, the ECJ has also confirmed that directives can also be directly effective where they also fulfil the same three conditions.

However, the direct effect of directives is limited in two ways.

- First, directives are binding only as to the result to be achieved.

  Directives contain a date by which that result is to be achieved and they may *not* be relied upon until the member states have had time to employ the chosen forms and methods of implementation.

Once that time limit is passed and the member state has failed to adopt the implementing measures required by the directive, it may not rely, as against individuals who act in conformity with that directive, on its own failure to perform the obligations of the Directive. Economic operators could also rely on direct effect where, following the date for implementation, the member state has implemented the directive but has done so incorrectly. In those circumstances, the direct effect of the directive will ensure that the provision of the directive will override the deficient national implementation. This means that if a member state has not implemented the directives properly and a contracting entity follows the incorrect implementation, a economic operator can challenge any resulting breach of the Directives where it is harmed by the breach.

- The second limitation is that a directive is addressed to member states.

  The obligation to implement it is on them and nobody else. The term 'member state' includes emanations of the state and will generally include all of those contracting authorities identified in the directive so that economic operators could rely on the direct effect of the directives against the contracting authorities defined in the procedural directive.

  It may not, on the other hand, cover some of the private contracting entities identified in the utilities sector since they are not necessarily 'emanations of the state'. In the utilities sector, therefore, a economic operator would need to be sure that the utility could be considered as beiong a part of the state before seeking to challenge it in the national court under the doctrine of direct effect.

When looking at the direct effect of directives, the ECJ was asked to look at individual provisions of the various procedural directives. Provisions must be looked at in turn and separate articles must be analysed individually. The ECJ held, for example, that the substantive rules relating to advertising, conducting a competitive procedure and the evidence and criteria for selection and award all generally have direct effect.

To ensure consistency throughout the Community, the national courts are entitled and sometimes required to refer questions relating to the validity and interpretation of Community acts which arise in the context of proceedings before them to the ECJ. This is done under a procedure set out in Article 234 of the Treaty. Essentially, Article 234 gives the ECJ of Justice jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and the interpretation and validity of the acts of the Community institutions.

A national court or tribunal is entitled, and if it is a court of last instance, obliged, to ask the ECJ for a preliminary ruling if a question of interpretation or validity is raised before it either by the parties or by the court itself of its own motion. In order to make the reference, the national court must consider that a decision on such a question is necessary to enable it to give judgment. The question or questions are sent by the court making the reference but, in practice, it is the parties to the case and their lawyers that actually draw up the question. Often the ECJ will reword the question in order to give the most appropriate answer but it is important for the parties to the dispute to seek to frame the questions that will provide the answers that they need.

The importance of the procedure lies in the way it ensures the uniform application of Community law. In maintaining the law and acting as ultimate arbiter of Community law it ensures that the rights of individuals flowing from the Treaty and directly effective measures adopted under it are protected equally and uniformly throughout the Community.

2.2.2 How the European Commission can help

The enforcement measures provided for by the Remedies Directive are perhaps only the latest tools available to ensure compliance with the procedural Directives. In the absence of specific remedies to correct infringements of the procurement procedures, the Commission has in the past exercised (and continues to exercise) its traditional role of guardian of the EEC Treaty.

For this purpose it has been granted powers of supervision and enforcement by the Treaty which it has used successfully in the area of public procurement. Many of the early cases dealing with infringements of the procurement Directives which came before the ECJ were the result of Commission action either at its own initiative or on the basis of a complaint from an individual economic operator. As well as those few cases which reach the ECJ, the Commission deals with an increasing number of irregularities which are resolved informally. On the other hand, the limitations of the Commission's resources are such that it can carry out no more than a highly selective review of the application of the procurement procedures in the member states.

Article 226 of the Treaty gives to the Commission a crucial role in supervising the compliance of member states with their obligations under the Treaty including, among other things, compliance with specific directives such as the procurement directives.

If the Commission considers that a member state has failed to fulfil an obligation under the Treaty, it may, after following certain procedural steps, bring the matter before the ECJ. In the case of directives, this usually means the non-implementation or the incorrect implementation of directives into national law.

The procedure is often used, although most cases are settled at the administrative stage before proceedings are begun in the ECJ. In the event that the matter is brought before the ECJ and the latter decides that a member state has not fulfilled its obligations, the state is obliged to take the necessary measures to comply with the judgment. For the competent authorities of a member state (including the national courts) this means a prohibition against applying a national rule recognised as incompatible with the Treaty and, if the circumstances so require, an obligation on them to take all appropriate measures to enable Community law to be fully applied. Member states may also be obliged to pay a fine.

The procedure may be started by the Commission either of its own motion or as the result of a complaint by an individual.

Even if the complaint is against a specific procuring entity, the Commission's actions will be against the member state. Whether based on its own initiative or on the complaint of an individual, the procedure is essentially the same. The basic procedure is as follows:

(a) **The complaints procedure**

The Commission finds out about member states' failures in many ways. It monitors national implementing measures and, in the field of public procurement, must normally be informed of national measures implementing the procurement Directives (this is provided for in the Procedural Directives). There are many instances of infringement, however, about which the Commission simply does not hear and it is here that individuals and companies which have been wronged have a role to play.

Where an individual or company feels that a member state is in breach of its obligations under the Treaty, he can make a complaint to the Commission. This complaint may be informal or formal. A company which feels injured may wish to remain anonymous and may prefer that the Commission does not disclose his identity to the member state or government agency concerned. This might be to maintain business confidentiality or perhaps because there is a fear of commercial retaliation. In such circumstances, the individual could approach the Commission informally to put the services concerned on notice of potential breaches of Community law. This may be possible where the breaches complained of are generalised and not `traceable', but is more difficult where it is the result of an isolated incident.

However begun, the complaint procedure leads to legal action by the Commission and does not directly involve the individual complainant. Informal complaints serve only to remove even further the possibility of identification. In practice, however, the absence of a known individual complainant may deprive the Commission of a specific incident to which it may need to refer. Informal complainants may neglect to supply the Commission with sufficient information and evidence on which to proceed. Although the legal procedure following a complaint is a Commission, the complainant will generally be informed of the progress and will, therefore, have the opportunity to make further observations should that be necessary.

(b) **Making the complaint**

Cases involving public procurement are not subject to strict procedural requirements. Nevertheless, experience has shown that there are certain elements which should be included in any complaint. The complaint should contain basic information about the complainant as well as the facts of the case.

The most important aspect of the complaint is to describe, in as much detail as possible, the full facts of the case. Strictly speaking, it would be for the Commission to determine and prosecute any breaches uncovered by the facts and, even if the complainant does refer to possible breaches, the Commission may not always take them all into account. It is, at the end of the day, for the Commission to decide on the breaches it will pursue. However, for the same reasons as it is necessary to produce a detailed factual statement, it is preferable to help the Commission as much as possible. Where a full list of potential breaches of the Treaty is put before the Commission, the Commission services will be in a better position to investigate the allegations. The complainant will have more time (and more interest) in finding and substantiating the breaches of the member state and will have, at its disposal, more time, information and resources.

The Commission itself will not be able to award damages as compensation for any loss complained of (although a national court might) but the existence of such damage will help establish the seriousness of the complaint. In certain very serious cases, the Commission may go to the ECJ for interim relief where urgent action is necessary to avoid such damage.

An indication of the procedural steps taken at national level to remedy the situation will also be helpful. It is not a hard-and-fast rule that the Commission will only act after other national remedies have failed but it is certainly a significant factor. Quite often, it will become clear that the national administrative or political procedures are inadequate to protect the rights of individuals in the face of a breach of Community law or even non-existent. In such cases, proof of these failures in the national system may incite the Commission to further action.

Any such complaint should be sent in writing to the attention of DG Markt/ Procurement.

(c) The procedure under Article 226

Once the complaint has been delivered, the case is out of the complainant's hands. The Commission services may request further information from the complainant but the conduct of the case from this stage on is entirely the responsibility of the Commission. The complainant may not force the Commission to proceed and with-drawing the complaint will not necessarily stop the procedure. This is, of course, a tactical weapon in the hands of potential complainants.

If the Commission decides that there are breaches of Community law, it will take formal steps to correct the situation. It will normally use the procedure provided for in Article 226 of the Treaty. The essential steps are as follows:

- *Contacting the member state authorities*

  The Commission will contact the member state authorities concerned, raising the alleged infringements and requesting the member state to submit its observations. It will do this by way of formal notice. There is no time limit for this part of the procedure and much will depend on the importance given to the infringement by the Commission services.

- *Reply by member state*

  The member state will usually reply to the Commission's objections. The complainant may be informed of the different positions (but there is no 'right' to this information) and he may wish to make further comments. There is guarantee that the complainant will be in a position to provide more. If the Commission is not satisfied with the member state's response, it will proceed further.

- *Reasoned opinion from the Commission*

  The Commission issues a 'reasoned opinion'. This will include a full statement of the facts and a formal statement of the infringements of Community law alleged to have taken place. The reasoned opinion will require the infringements to be brought to an end but will not normally suggest the measures to be taken. There is no set time-limit between the previous stage and the issue of reasoned opinion but there will be a time limit within which the member state is required to comply. This would usually be set at two months.

- *ECJ*

  If the member state does not comply within the time limit set, the matter will be brought before the ECJ in Luxembourg. If the final result is a judgment against the member state, the latter will be obliged to bring the infringement(s) to an end. The complainant does not have any standing in the ECJ procedure, may not be represented and may make no comments even as an observer.

(d) **Interim measures**

Article 243 the Treaty gives the ECJ the power to prescribe any necessary interim measures in *any* cases before it. Given that cases brought before the ECJ may often take up to two years before final judgment, this power will be of particular value in cases in which there is a degree of urgency. The application for interim measures must be made by a party to a case before the ECJ and must relate to that case. Thus, in the current context, it is only the Commission (and not the complainant) that would have the right to seek interim relief in a case which has already been brought before the ECJ.

The application for interim relief which may be made at the same time as, but in separate documents to, the commencement of proceedings will be heard either by the President or the ECJ (the applications, in all the public procurement cases so far, have been heard by the President). The application will normally be served on the opposite party who will be given a short period within which to submit written or oral observations. However, the President may, exceptionally, grant the order ex parte, before the observations of the opposite party have been submitted.

The principles governing the grant of interim relief have been developed in the case law of the ECJ. In practice, the ECJ will expect the party seeking interim relief to show a *prima facie* case and the necessity for immediate action to avoid serious and irreparable harm (urgency). An order will be granted unless the opposing party can show that he, too, would suffer serious and irreparable harm (the balance of interests test).

2.3 THE COMMON REMEDIES OF THE REMEDIES DIRECTIVES

The basic provisions of the directives are the same but there are some material differences which will be explained below.

Article 1 of both Directive sets out the aims. These are to ensure that decisions taken by contracting entities taken in the context of contract award procedures falling within the scope of the relevant procedural Directives may be *effectively and rapidly reviewed* with regard to their compatibility with Community law in the field of public procurement.

In the utilities sector, the Remedies Directive provides for the possibility of using the same three specific remedies to be made available in the national courts and before national review bodies as in the case of the public sector. These are interim measures, set aside of decisions and the award of damages. However, whereas damages will always be available, member states are free to choose between two alternative but concomitant systems of remedies. The first system is the same as the system foreseen in the public sector and concerns the powers to award interim relief and set-aside. As in the public sector, the Commission is also given specific powers to intervene in addition to those it possesses under Article 226 of the Treaty. The second system refers to the power to award dissuasive payments instead of interim measures and set aside.

The 2006 amendment also introduced a mandatory 'standstill' period. This is an important innovation and one which may benefit economic operators seeking to challenge alleged breaches.

2.3.1 Application

The Remedies Directives apply in the case of those contracts which fall within the scope of the procedural Directives. It would not apply, for example, to those contracts which do not meet the value thresholds of those Directives.

The remedies are available against decisions taken by a contracting entity, although the term 'decision' is not defined. It is clearly intended to cover the use of discriminatory technical, economic or financial specifications; decisions to include or exclude particular economic operators or to award or not award contracts to particular economic operators are also 'decisions' for the purposes of the Remedies Directives. These 'decisions' may only be made on the basis of the selection and award criteria permitted by the procedural Directives.

In those cases where the contracting entity has not commenced a contract award procedure at all or advertised a contract notice where it should have complied with the Directives in the award of that contract, any resulting contract will be deemed to be a "direct illegal award" and will be 'ineffective'. This concept of ineffectiveness has now been introduced through the 2006 amendment and follows a series of cases in which the ECJ found that there had been such direct illegal awards and permitted a challenge even though there may not have been an actual 'decision' open to challenge.

The remedies must be available on substantive and procedural conditions which are no less favourable than those applicable for remedies for purely national situations. Measures adopted pursuant to the Remedies Directives must offer the same protection as is offered by the national provisions which have evolved in the meantime suggesting also that the otherwise national procedures may not offer less.

Under the EC annexes to the WTO's Government Procurement Agreement, the benefits of the Remedies Directives have also been extended to economic operators from GPA signatory states so that contracting authorities which are simultaneously contracting authorities for the purposes of the GPA will have to grant the same remedies to such economic operators in the event of a breach of the applicable procurement rules.

2.3.2 Interim Measures

The first remedy which must be made available is the possibility for the tribunal to take, at the earliest opportunity, interim measures by way of interlocutory procedures. The aim of these interim measures may be twofold:

- to correct an alleged infringement of the procedural Directive;
- to prevent further damage to the interests concerned.

The measures must include at least two remedial possibilities which reflect the twofold aims of this remedy. These are measures to suspend or to ensure the suspension of

- the procedure for the award of the public contract, or
- the implementation of any decision taken by the contracting authority.

This latter remedy may be used in conjunction with the set-aside remedy available in cases where a decision has been taken allegedly in contravention of the procedural Directive. The availability of interim measures in these circumstances ensures that action may be taken swiftly even where a decision has been made.

This is a particularly important right in view of the fact that infringements of the procurement rules may only come to light at the end of the contract award procedure where a decision has been taken. However, the Remedies Directives give to the member states the option to provide that, once the contract has been concluded (as opposed to awarded), the only remedy available is the award of damages to a person harmed by an infringement. Of course, where the contract was awarded without following the provisions of the Directives at all (*i.e.* in the case of an illegal direct award), then the contract itself may be declared ineffective and, in certain circumstances, the contracting authority fined.

However, the ECJ has also held that the principle of effectiveness means that the remedies of both set aside and interim measures must be available against any reviewable decision. This would not be the case where the award and conclusion of the contract are simultaneous because there would be no opportunity to challenge the award of the contract before it is concluded. The right given to member states under Article 2(6) cannot, therefore, be used to exclude review. This issue came to the fore in the famous Alcatel case which led to the introduction, in the 2006 amendment, of a mandatory standstill provision following award in which to allow aggrieved economic operators to bring complaints. This is discussed in more detail in section 2.3.5.

The power to award suspensive measures is also of relevance with regard to the other measures provided for. Review procedures do not need to have an automatic suspensive effect on the award procedures to which they relate. Whether they are, in fact, suspensive is a matter for the national authorities to decide except that, where an application has been made for interim measures or for review to an independent review body, no contract may be concluded before the end of the standstill period. It would still be possible to continue with the procedure up to that point, although this would clearly be a dangerous tactic once the application for review is in place.

It may not always be appropriate or necessary to suspend the award procedure where the infringement can be corrected without disturbing the course of the procedure. The counterbalance offered by the availability of interim measures will ensure that, in cases where it is necessary, the procedures may never the less be suspended.

In providing the remedy of interim relief, the member states are free to provide that the body awarding such relief may have regard to the balance of convenience. They may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits.

A decision not to grant interim measures will not prejudice any other claim (that is, of set-aside or damages) of the plaintiff.

2.3.3 Set Aside

The setting aside of unlawful decisions gives economic operators two means of action.

- In the first place, there must be powers to set-aside or to ensure the setting aside of decisions taken unlawfully.
- This includes, secondly, the power to ensure the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.

The member states may provide that contested decisions must be set aside (or declared unlawful, in the utilities sector) before a claim for damages is made on the grounds that an unlawful decision was taken. Once a contract has been concluded unlawfully, therefore, the cumulative remedies of set-aside and damages would be available. In other cases, where this option has not been exercised by the member states, they may provide only for damages following the conclusion of a contract.

The other aspect of this remedy is designed to enable the correction of contract documents containing unlawful technical specifications or other criteria relating to the economic or financial capability of the economic operators. It refers to all documents related to the contract award procedure including any periodic indicative notices (in the utilities sector) and notices of the existence of a qualification system.

This will be important in practice, since the illegality of such specifications and criteria will be the most visible and immediate indications of infringement of the procedural Directive. It is also a means, together with interim relief, of ensuring compliance with the Directive at an early enough stage to be of real value to economic operators who see their chances being reduced unfairly. The power to amend would also avoid the impracticality of setting aside the whole procedure in the event of an unlawful specification.

2.3.4 Damages

The third remedy which must be made available is the award of damages to the person harmed by an infringement. This may, as was seen above, be the only remedy which is made available by a member state once the contract has been concluded.

The Remedies Directives do no more than require that damages be available and do not indicate either the quantum of damages or the grounds for calculating such damages. This will be left to the national courts. In most cases, this will allow economic operators who have been rejected as the result of a breach of the directives to recover at least their wasted tender costs as well as their lost profits or a proportion of their lost profits.

To recover the full amount of their lost profits, economic operators would theoretically need to prove that, had there been no breach, they would have won the contract. In most cases, they will have been only one among a number of economic operators and, other than in the case of an award criterion based on the lowest price only, it may be very difficult to demonstrate with any certainty that a particular economic operator would have won the contract.

This depends very much on national law. [Localisation required: In XXX, for example, a successful complainant would be able to recover damages representing…]

2.3.5 Ineffectiveness

As stated above, the amending Directive has introduced the concept of contract ineffectiveness. This applies to cases where contracts have been awarded without any regard for the procedural directives at all. To provide an adequate remedy in these cases, the Directives render illegal direct awards as ineffective. This concept also applies where the contract is awarded during the standstill procedure or during the time when a suspension of the conclusion of a contract is in place.

If the contracting entity publishes a notice to the effect that it has awarded a contract with following the provisions of the procedural directives, there is a minimum time limit of 30 days from that date to bring proceedings. In other cases, there will be a minimum of 6 months from the date of the conclusion of a contract. Member states may provide for longer time limits. [Localisation: In XXX, the time limit is: xxx]

Depending on local law, the overturning of a signed contract may be retroactive (*i.e.* all contractual obligations, including those already performed, are to be cancelled, and the tenderer and contracting authority must settle their relationship under local rules) or prospective (*i.e.* only future and unperformed contractual obligations may be annulled). In the case of prospective cancellation, there must also be other penalties, such as fines imposed on the contracting authority. Such fines must be adequately high in order to punish the unlawfulness. Their amount should take into account both the seriousness of the breach as well as the contracting authority's conduct. The harmed tenderer is entitled to ask for compensation in any event.

2.3.6 The 'Standstill' Period

Following the *Alcatel* case where, in effect, the award and conclusion of a contract took place at the same time, measures have been taken in the amending Directive to ensure that economic operators can still challenge the award decision before a contract is concluded. The way this has been done is to require contracting entities to provide a standstill period of at least 10 days during which time no award of the contract can be made, enabling economic operators to bring complaints where they believe there has been an infringement of the Directives. The 10 day period applies if communications are sent by fax or by e-mail. if other forms of communication are used, the period will be 15 days. This provides economic operators with a significant opportunity and time to identify, investigate and complain about potential breaches before it is too late. The contracting entity will no longer be able to rush into signing a contract with a successful economic operator so as to avoid challenge.

The standstill provision operates at a number of levels:

- for contracts awarded in accordance with the Directives, the introduction of a 10 calendar day standstill period between the date on which economic operators are given a reasoned notification of the award decision and the conclusion of the contract;

  It is important to note that time starts running from the date of a reasoned notification, *i.e.* a notification from the contracting entity which provides the reasons for the award and for the rejection of certain tenders – remember that economic operators may seek information on the reasons for disqualification and/or tender rejection and this must be provided within 15 days at most.
- for contracts which are awarded directly without following the procedures of the Directives (*i.e.* where the contracting entity believes that the Directives do not apply), the introduction of a 10 calendar day standstill period, except in cases of extreme urgency, between the date on which the contracting entities provide 'sufficient' publicity of the award decision by way of a simplified award notice and the conclusion of the contract;
- for contracts which are concluded during this standstill period, the introduction of a concept of the ineffectiveness of the conclusion of the contract.

It is for the member states to decide what this means in their legal systems but for economic operators it means that they will be able to challenge unlawful contracts even after they have been signed.

2.4 THE COMMISSION'S CORRECTIVE MECHANISM

Article 3 of the Remedies Directives makes provision for the specific application of the Commission's general power of supervision exercised under Article 226 of the Treaty and discussed above. This gives the Commission explicit power to intervene at any time (before or after the conclusion of the contract - before the 2006 amendment, it could only act before the conclusion of a contract). It will do this where it considers that there has been a 'serious infringement' infringement of Community provisions in the field of procurement during a contract award procedure falling within the scope of the procedural Directive (before the 2006 amendment, it could act only where it saw a 'clear and manifest' infringement). It will notify the member state and contracting entity concerned of the reasons which have led it to conclude that such an infringement has been committed and request its correction.

The member state and not the contracting entity will then be given 'reasonable' time (previously, this was 21 days) from the date of receipt of that notification to communicate to the Commission one of three things:

- its confirmation that the infringement has been corrected;
- a reasoned submission as to why no correction has been made;
- a notice to the effect that contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of interim relief granted pursuant to the powers conferred by the Remedies Directives.

In the event that a member state relies on the second alternative explaining why no correction has been made, it may rely on the fact that the alleged infringement is already the subject of judicial review proceedings or that the decision of the review body is being reviewed by the independent body set up for that purpose. Where the member state relies on this provision, it must inform the Commission of the result of these proceedings as soon as it becomes known.

Where the member state has notified the Commission that the award procedure has been suspended, any lifting of the suspension or the commencement of any new contracting award procedure relating in whole or in part to the same subject matter must be notified to the Commission. This notification must also include confirmation that the alleged infringement has been corrected or, if not, a reasoned submission must be made as to why not.

Where these procedures are not followed correctly by the member state concerned, for example, by omitting to notify the required information or by failing to make the required submission or where the Commission is not satisfied by the replies received, it will be open to the latter to commence proceedings under Article 226 of the EEC Treaty. Thus, the Commission's role remains intact and it may be called upon simultaneously to protect the rights of the economic operators where those rights are threatened either by non-compliance with the procedural Directive or the inability of the national courts to protect those rights. The vigilance of the subjects of Community law will also, therefore, remain an important factor in the protection of their own rights.

2.5 THE ALTERNATIVE SYSTEM OF THE REMEDIES (UTILITIES) DIRECTIVE

This refers to an alternative system to interim measures and set aside called dissuasive payments. Previously (before the 2006 amendment) there were also two additional mechanisms provided for in the utilities sector, namely attestation and conciliation. These have now, however, been removed.

The member states make this choice between the systems either for all contracting entities or for categories of entities. If member states exercise this choice in relation to categories of entities, these must be defined on the basis of objective criteria. The term `objective criteria' is not defined in the Remedies Directive but would include such things as the nature of the contracting entities in terms of the sector covered, their size or legal status Denmark, for example, opted early on for this second system in the case of entities who carry out exploration and extraction activities

This second system consists in the power to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures (other than damages and set-aside) with the aim of correcting any identified infringement and preventing injury to the interests concerned. In particular, this will include the power to make an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented. The sum to be paid must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement. Further, the payment of that sum may be made to depend on a final decision that the infringement has in fact taken place. Since the Directive does not specify the level of this sum other than in general terms, it is up to the discretion of the member states and/or the review bodies to set the level of the dissuasive sums either generally or in each individual case.

[Localisation required: if this system is used in XXX, this should be explained and described in sufficient detail]

2.5 THE REVIEW BODIES

The powers to be made available by the member states may be conferred on separate bodies responsible for different aspects of the review procedure. This will enable the existing practices and procedures of the different national systems to remain in place where appropriate. These bodies may be judicial in character or independent and non judicial. This gives the member states the opportunity to create bodies with perhaps more technical expertise, for example, than is the case with national courts.

Where the body is not judicial, it must give written reasons for its decisions. A guarantee must also be made whereby *any* allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty. The reason for this is that only courts and tribunals have the power and, in the case of courts or tribunals of last instance, the obligation to refer questions of interpretation to the ECJ for a preliminary ruling. Thus, where the review body does not have the power to make such a reference, its decisions must be open to a review by a body which does. Such a body must be independent both of the contracting entity and the review body.

The independent body which must be given the power to review decisions of a non judicial review body whose decisions are not subject to judicial review, is subject to certain requirements. The members of this body must be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office and their removal. At least the president of this independent body must have the same legal and professional qualifications as members of the judiciary. The independent body will take its decisions following a procedure in which both sides are heard and these decisions will, by means determined by each member state, be legally binding.

[Localisation required:

In XXX, the review body is (describe in detail and explain how it complies with the above conditions.

If possible, information should be given about how to commence proceedings, the costs involved and the likely length of the proceedings.

If there is a website for the review body which contains the relevant details, a link to the website should be included in the text.]