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Only the French, German and English versions are concerned.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

(presented by the Commission)

{SEC(2006) 557}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- Grounds for and objectives of the proposal

Directives 89/665/EEC and 92/13/EEC coordinate national provisions relating to the application of review procedures in the event of infringement of the Public Procurement Directives.

However, the lack of coordinated rules on the time limits applicable to pre-contractual reviews has resulted in most Member States retaining national arrangements which do not allow the signing of disputed contracts to be prevented in time. But the result of signing the contract in question is almost always to make irreversible the effects of the disputed award decision. This situation is all the more worrying when it involves preventing contracts which have been directly and illegally awarded, i.e. those which have been illegally concluded with no prior publication of a contract notice and no competitive tendering procedure.

The proposal for a Directive amending Directives 89/665/EEC and 92/13/EEC (the “Remedies Directives”) seeks to give greater encouragement to Community enterprises to tender in any Member State of the Union by providing them with the certainty that they can, if need be, effectively seek effective review if their interests seem to have been adversely affected in procedures for awarding contracts. The increasingly effective nature of pre-contractual reviews will prompt awarding authorities to adopt better publication and competitive tendering procedures for the benefit of all involved.

- General context

The Remedies Directives make a distinction between pre-contractual reviews seeking primarily to correct in time infringements of Community law on public procurement and post-contractual reviews which are generally limited to awarding damages.

Given that there are no specific time limits and provisions allowing the suspension in time of the signature of a contract the award of which is disputed, the relative effectiveness of pre-contractual reviews varies considerably from one Member State to another. Furthermore, in the case of an illegal direct award of contract the injured enterprises can in fact only seek review for damages, but such a review does not allow an illegally awarded contract to be opened again for competition. In addition, such reviews for damages have little deterrent effect on awarding authorities, especially because enterprises who feel that their interests have been harmed must prove that they had serious chances of being awarded the contract. Thus, even though the Court of Justice has called illegal direct awards of contracts “the most serious breach of Community law in the field of public procurement” (*Stadt Halle*, Case C-26/03, paragraph 37), the current Remedies Directives do not make it possible to prevent or correct in an effective way the consequences of such illegal action.

In the absence of legislative action at Community level, the very different situations among the Member States with regard to the effectiveness of review procedures available to enterprises would persist or even be aggravated. Situations of legal

uncertainty and serious or repeated infringements of the public procurement Directives would continue.

- Existing provisions in the area of the proposal

This proposal for a Directive seeks to amend the two Remedies Directives in the area of public procurement: i) Directive 89/665/EEC which applies, in principle, to contracts for works, services and supplies awarded by contracting authorities, now coming under Directive 2004/18/EC; ii) Directive 92/13/EEC which applies to contracts awarded by contracting entities operating in the water, energy, transport and postal services sectors now coming under Directive 2004/17/EC (remedies in the so-called “special” sectors).

The proposed amendments introduce coordinated rules intended to clarify and improve the effectiveness of the current provisions on pre-contractual reviews brought in the framework of the formal procedures for awarding contracts or in the case of illegal direct awards of contracts. The other proposed amendments are intended, on the one hand, to refocus the corrective mechanism which may be applied by the Commission to cases of serious infringement and, on the other hand, to repeal two mechanisms (attestation of contracting entities and conciliation) which apply solely to the special sectors and which have not prompted the interest of the contracting entities or the enterprises concerned.

- Consistency with the other policies and objectives of the Union

The objective in amending the “Remedies” Directives is, in particular, to improve the effectiveness of appeals by economic operators in connection with public procurement procedures, which must comply not only with the specific provisions of Directives 2004/17/EEC and 2004/18/EEC but also with the principles of the EC Treaty, such as the principles of the free movement of goods, the freedom to provide services, the freedom of establishment and the principles derived therefrom, such as equality of treatment, mutual recognition, proportionality and transparency. In addition, this objective is fully in line with the objective of Article 47 of the Charter of Fundamental Rights of the European Union, which states the right of everyone whose rights and freedoms guaranteed by the law of the Union are violated to an effective remedy before an impartial tribunal. Lastly, improving the effectiveness of national review procedures, especially those dealing with illegal direct awards of contracts, is also in line with the European Union’s overall policy against corruption (see Commission Communication of 28.5.2003, COM(2003) 317 final).

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- Consultation of interested parties

Consultation methods used, main sectors targeted and general profile of respondents

The Member States were consulted in the Advisory Committee on Public Procurement.

A public consultation, open to economic operators and their representatives (professional associations and lawyers) was organised using on-line questionnaires

(*Interactive Policy Making*), which provided 138 contributions. In addition, five European and national professional associations voluntarily offered written contributions.

Economic operators were also consulted by means of a questionnaire specifically addressed to a representative panel of European enterprises (*European Business Test Panel*), which provided 543 contributions.

Non-governmental experts, including representatives of economic operators as well, were consulted in the Advisory Committee on the Opening-up of Public Procurement.

Awarding authorities were consulted by means of an on-line questionnaire, which resulted in 16 contributions.

Summary of responses and how they have been taken into account

The consultations of the economic operators and their representatives indicate that the operation of national review procedures in connection with the existing Directives does not always make it possible to remedy effectively non-compliance with Community rules on public procurement. There is virtual consensus among the interested parties on the need to improve the effectiveness of pre-contractual reviews by providing for a standstill period between the notification of an award decision and the signing of the contract, as well as supplementary rules intended to ensure effectiveness. Although there is virtual consensus as well on the seriousness of the illegal practices of direct awards of contracts by certain awarding authorities, opinions differ among the Member States and economic operators on the solutions to be introduced. Only a minority of Member States and economic operators support proposals to impose pecuniary penalties or prior administrative checks on awarding authorities or a system of notification by independent bodies which would receive complaints from enterprises whose interests had been harmed. The requirement to observe a standstill period, together with the requirement of transparency prior to signing a contract directly awarded, is a proposal which is generally more acceptable to the interested parties.

A consultation was organised using the Internet from 19 March 2004 to 7 May 2004. The Commission received 543 replies. The results of the consultation are available on:

http://europa.eu.int/comm/internal_market/publicprocurement/remedies

- Collection and use of expertise

Use of external expertise was not necessary.

- Impact assessment

Three major options are available in connection with the revision of the “Remedies” Directives, with two of these options subject to a variant depending on whether the Directives are amended or a communication is adopted:

(1) Retaining the Directives as they are: this option would involve encouraging the Commission to pursue infringement proceedings in order to deal with all the problems of the incompatibility of national legislation or practice in this area with the

“Remedies” Directives. The differences which have been noted in the way in which the Member States draw the operational conclusions from the principles deriving from the case-law of the Court would persist, and the problems of the race to sign contracts would be solved only in part and the pace would vary greatly depending on the Member State, thus depriving economic operators of guarantees with regard to the effectiveness of the pre-contractual reviews applicable in the Member States (“*no level playing field*”). In the case of illegal direct awards, most Member States have no plans at present to introduce specific review mechanisms. In practice, potential tenderers would continue to be able to apply only for damages. Now, the difficulties inherent in this type of procedure, such as the burden of proof and the length and expense of proceedings, give tenderers no encouragement to make use of it, since only rarely is a positive result the outcome. In the absence of a coordinated approach allowing the introduction of effective remedies against this illegal practice, there would be no improvement to the transparency and competitive tendering of public procurement, and this would deprive European enterprises (including the most competitive among them) of the chance to bid for public contracts which are still directly and illegally awarded.

(2) Introduction of a standstill period by means of an amendment to the Directives or a communication indicating the Member States’ obligations in this regard: although the case-law of the Court of Justice has specified the requirement to provide for a reasonable standstill period, so that the tenderers who consider that their interests have been harmed can seek a remedy at a time when the infringements can still be corrected, there are still differences of approach from one Member State to another with regard to the scope and exact content of such a requirement. Drawing the operational conclusions from such a requirement in a Directive makes it possible to deal at the same time with the problem of the race to sign contracts in formal tendering procedures and the problem of illegal direct awards, by improving the legal certainty of the situations in question and providing guarantees for an effective application of the mechanism.

(3) New powers granted to independent bodies by means of an amendment to the Directives or a communication encouraging the introduction of such bodies: the Member States would appoint independent bodies which would have the power to notify awarding authorities of more serious breaches of Community law on public procurement (more particularly, illegal direct awards) so that they would be prompted to correct the shortcomings themselves. This notification mechanism offers advantages for tenderers in terms of cost and anonymity. On the other hand, uncertainty about the administrative costs likely to be generated for these independent bodies to function, together with the negative position expressed by the majority of the Member State delegations in the Advisory Committee on Public Procurement, prompted the Commission to discard this solution in favour of introducing a standstill period.

The Commission conducted an impact assessment under the Commission’s Legislative and Work Programme. The report may be found at:

http://europa.eu.int/comm/internal_market/publicprocurement/remedies

3. LEGAL ELEMENTS OF THE PROPOSAL

- Summary of the proposed measures

When an awarding authority completes a formal procedure for awarding a contract in accordance with the Directives on public procurement, it must in principle suspend the conclusion of the contract until the end of a minimum period of ten calendar days from the date on which the economic operators involved in the award procedure are given a reasoned notification of the award decision.

When an awarding authority considers that it has the right to directly award a contract with a value above the thresholds fixed by the Directives on public procurement it must – except in cases of extreme urgency – suspend the conclusion of the contract for a minimum period of ten calendar days, following sufficient publicity in the form of a simplified award notice.

If a contract is concluded illegally by the awarding authority during the standstill period, such an action is considered invalid. The consequences of such an illegal action on the effects of the contract are drawn by the competent review body, although the matter must be referred to the body by an economic operator before the end of a limitation period of six months with effect from the effective date of conclusion.

The corrective mechanism is focused on serious infringements and the unused attestation and conciliation mechanisms are repealed.

- Legal basis

Article 95 of the EC Treaty.

- Subsidiarity principle

The principle of subsidiarity applies insofar as the proposal does not concern an area in which the Community has exclusive competence.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reasons.

In spite of the developments in case-law since 1999 and the resulting actions by certain Member States, especially following infringement proceedings by the Commission, there are still significant disparities among the Member States in terms of the effectiveness of reviews in the area of public procurement. In addition, the lack of guarantee of effective remedy discourages Community enterprises from tendering outside their country of origin. The experience of recent years shows that this legal uncertainty will not be removed by isolated and separate action by some Member States.

The objectives of the proposal can be better achieved by Community action for the following reasons.

The shortcomings which it was possible to detect during the consultation process occur in the scope of the two Directives adopted in 1989 and 1992. Improvements to and clarifications of the existing provisions of these Directives would be fully effective only by means of an amending Directive.

The Union is best capable of achieving the objective of improving review procedures in the area of public procurement covered by Directives 2004/17/EC and 2004/18/EC. In fact, the preliminary consultations have shown that the degree of mobilisation is still very different from one Member State to another with regard to the need to strengthen provisions which can ensure effective enforcement of the Directives on public procurement. If there is no Community initiative in this area, the disparities among the Member States in the proper application of Community legislation on public procurement will persist.

With regard to the problem of illegal direct awards of contracts, no effective solution to combat this illegal practice has yet been adopted by most Member States, even though the vast majority acknowledge the reality and the seriousness of the problem. As for the problem of the race to sign the contract in the case of formal award procedures, there is an emerging consensus among the representatives of the Member States on the need to include in an amending Directive a standstill period, which will be clearly defined with regard to its scope and arrangements. In addition, legislative action at Community level proves necessary with a view to establishing a clear system of effective, proportionate and deterrent sanctions against the most serious infringements of Community law on public procurement.

The Member States will retain their power to appoint the bodies responsible for the review procedures and to maintain the national procedural rules applicable to such reviews (respect for the Member States' procedural autonomy). The proposal for a Directive focuses on the two most important problems which are common to all the Member States.

The proposal thus complies with the principle of subsidiarity.

- Proportionality principle

The proposal complies with the principle of proportionality for the following reasons.

The proposal for a Directive is limited to providing some improvements or clarifications to existing provisions dealing with pre-contractual reviews and with those contracts where the amounts are higher than the thresholds fixed by Directives 2004/18/EC and 2004/17/EC, and does not demand any changes to existing administrative or judicial systems. In addition, the fact that there is provision for subsequent drafting of interpretative documents to deal with other problems in connection with the poor operation of national review procedures as a result of incorrect interpretation of existing provisions by some Member States indicates the proportionate nature of the Commission's initiative.

The burden on public authorities is limited mainly to the marginal costs in connection with deferring the signing of a contract for ten calendar days as a rule, and to an initial increase in the number of reviews by a few percent in relation to the number of public

contracts published at Community level. For society in general, the main benefit of better application of Community law on public procurement as a result of the deterrent effect of effective reviews would be a reduction in public expenditure and an improvement in the quality of public service, with this overall benefit greatly exceeding the additional costs which have been mentioned. Since there is no requirement to create new administrative structures, the financial and administrative burden on the public authorities has also been kept to a minimum.

- Choice of instruments

Proposed instrument(s): Directive.

Other instruments would not have been appropriate for the following reasons.

The alternative to a Directive establishing the scope and the arrangement for applying a standstill period would have been the adoption of a document interpreting the case-law of the Court. However, this alternative was discarded because it could not have guaranteed the application in every Member State of a standstill period which was clearly defined and satisfactory in terms of the various situations covered by the Directives on public procurement. In general terms, the differences of interpretation with and between the Member States on the scope of the case-law on which the requirement to observe a standstill period is based, as well as arrangements for applying effective, proportionate and deterrent sanctions in the event of infringement of this key provision for the effectiveness of pre-contractual reviews, would not be removed by the Commission's adoption of an interpretative document.

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

5. ADDITIONAL INFORMATION

- Simplification

The proposal simplifies the legislative framework.

The proposed simplification consists of repealing the attestation and conciliation mechanisms which are applicable in the special sectors (Directive 92/13/EEC) and which have not been used.

- Review/revision/sunset clause

The proposal includes a review clause.

- Correlation table

The Member States are required to communicate to the Commission the text of national provisions transposing the Directive, as well as a correlation table between those provisions and this Directive.

- European Economic Area

The proposed act concerns an EEA matter and should therefore extend to the European Economic Area.

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amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the Opinion of the European Economic and Social Committee²,

Having regard to the Opinion of the Committee of the Regions³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

- (1) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts⁵ and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors⁶ concern the review procedures with regard to contracts awarded by contracting authorities and contracting entities respectively. Those Directives are intended to ensure the effective application of Directives 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁷ and 2004/17/EC of the European Parliament and of the Council of

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

⁴ OJ C [...], [...], p. [...].

⁵ OJ L 395, 30.12.1989, p. 33. Directive amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).

⁶ OJ L 76, 23.3.1992, p. 14. Directive as last amended by the 2003 Act of Accession.

⁷ OJ L 134, 30.4.2004, p. 114. Directive as last amended by Commission Regulation (EC) No 2083/2005 (OJ L 333 of 20.12.2005, p. 28).

31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors⁸.

- (2) Consultations of the interested parties and the case-law of the Court of Justice of the European Communities have revealed a certain number of weaknesses in the review mechanisms in the Member States. Because of these weaknesses the mechanisms referred to by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community provisions, especially at a time when infringements can still be corrected. Consequently, the economic operators do not yet have the guarantees of transparency and non-discrimination sought by those Directives. In these circumstances, the Community as a whole cannot fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement, which were achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should thus be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.
- (3) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question, which sometimes results in contracting authorities which wish to make irreversible the consequences of the disputed award decision proceeding very quickly to signature of the contract. In order to remedy this weakness which is a serious obstacle to effective judicial protection for the candidates or tenderers involved, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signing the contract or not.
- (4) In view of the need, recognised by all the interested parties, to reconcile speed of award procedures and effectiveness of national review procedures, it is necessary to combine, on the one hand, the requirement to observe a reasonable minimum standstill period adapted to time constraints and to the conditions of varying complexity in which some procedures are launched and, on the other hand, the requirement to transmit by the most rapid available means of communication the information essential for any person wishing to seek effective review. Such information includes in particular, in the form of a summary, the reasons as laid down in Directives 2004/17/EC and 2004/18/EC respectively.
- (5) Since the purpose of Directives 2004/17/EC and 2004/18/EC is to modernise and simplify the procedures for the award of public contracts, the requirement of a minimum standstill period should be restricted to circumstances in which economic operators other than the operator to whom the contract has been awarded can reasonably rely on an infringement of the Community provisions which are applicable in the area of public procurement with regard to transparency and competitive tendering.
- (6) This type of minimum standstill period is not intended to apply either in cases of extreme urgency within the meaning of Directives 2004/17/EC and 2004/18/EC or to contracts explicitly excluded by those Directives.

⁸ OJ L 134, 30.4.2004, p. 1. Directive as last amended by Regulation (EC) No 2083/2005.

- (7) However, in view of the acknowledged seriousness of any illegal direct award of a contract, and in order to ensure effective judicial protection to any person concerned, a minimum standstill period should be applied in conjunction with a requirement of transparency for the direct award of any contract with no prior publicity or competitive tendering in accordance with the derogations indicated in Directives 2004/17/EC and 2004/18/EC and, in any event, on each occasion when a contracting authority awards directly a contract, the amount of which exceeds the thresholds fixed by the Directives, without prior publicity or competitive tendering, to a person legally distinct from it. The application of this standstill period, in conjunction with a requirement of transparency as indicated by the judgment of the Court of Justice in Case C-26/03, *Stadt Halle*⁹, must make it possible to combat effectively contracts directly and illegally awarded, which is the most serious breach of Community law in the field of public procurement on the part of a contracting authority.
- (8) Since this Directive must fix the minimum standstill period considered essential for the exercise of effective review, it is necessary to ensure the coherence of the provisions concerned of Directives 89/665/EEC and 92/13/EEC, so that the effectiveness of the overall mechanism intended to allow a review before the conclusion of a contract is not prejudiced.
- (9) In particular, when a Member State requires that a person intending to use a review procedure must inform the contracting authority of that intention, it is necessary that no additional minimum period be imposed between the time when that information is sent to the contracting authority and the time when review is sought. Similarly, when a Member State requires that the person concerned has first of all sought review with the contracting authority, it is necessary that this person has a reasonable minimum period within which to refer to the competent review body before the conclusion of the contract, in the event of his wishing to challenge the reply or lack of reply from the contracting authority.
- (10) Seeking review shortly before the end of the minimum standstill period must not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract. It is thus necessary to provide for an independent minimum standstill period, initiated by the very fact of referral to the body responsible for review procedures and allowing, in any case, the latter a short but reasonable time to act.
- (11) For the same reasons of ensuring the effectiveness of the overall mechanism, it is necessary that the information in question be transmitted and the review concerned be sought by the most rapid means of communication capable of maintaining the effectiveness of the minimum standstill period and of providing evidence of such communications. There should thus be provision in this context for transmission by fax or electronic medium, which are means of communication combining those features and, moreover, involving simplicity of use and lower cost for all the parties concerned.
- (12) Similarly, there should be consistency between, on the one hand, the periods for seeking review of contracting authorities' decisions terminating the participation of a

⁹ [2005] ECR I-1, paragraph 39.

tenderer or candidate in a procedure covered by Directives 2004/17/EC and 2004/18/EC and, on the other hand, the standstill periods.

- (13) In order to secure observance of effective review periods to combat the precipitate signature of illegally awarded contracts and the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority, there should be provision for an effective, proportionate and dissuasive sanction against any contracting authority which has failed to comply with the minimum standstill periods. In those circumstances, as there is provision in Directives 89/665/EEC and 92/13/EEC for the Member States to ensure that illegal decisions by contracting authorities can be set aside by the bodies responsible for review procedures, any conclusion of a contract occurring in breach of those periods should be considered ineffective and the body responsible for review procedures should ensure that all the consequences follow from that for the illegal contract, such as those concerning the repayment of any sums which may have been paid by the contracting authority.
- (14) However, in order to ensure the proportionality of the sanctions applied, the Member States should give the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest of a non-economic nature to be respected. Furthermore, the need to ensure over time the legal certainty of the decisions taken by contracting authorities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the conclusion of a contract is ineffective and to ensure that consequences follow from that.
- (15) Strengthening the effectiveness of national reviews thanks to this Directive should encourage those concerned to make greater use of the possibilities for review by way of interlocutory procedure before the conclusion of a contract. In those circumstances, the corrective mechanism should be refocused on the serious infringements of Community provisions on public procurement and it should be left to the Commission to fix for the Member State concerned a reasonable period within which to reply which takes better account of the circumstances in question.
- (16) The voluntary attestation system provided for by Directive 92/13/EC, whereby contracting entities have the possibility of having the conformity of their award procedures established through periodic examinations has been virtually unused, and it cannot thus achieve its objective of preventing a significant number of infringements of Community law on public procurement. On the other hand, the requirement imposed on Member States by Directive 92/13/EEC to ensure the permanent availability of bodies accredited for this purpose can represent an administrative cost for maintenance which is no longer justified in the light of the lack of real demand by contracting entities. For these reasons, the attestation system should therefore be abolished.
- (17) Similarly, the conciliation mechanism provided for by Directive 92/13/EEC has not elicited real interest from economic operators, both because of the fact that it does not of itself make it possible to obtain binding interim measures likely to prevent in time the illegal conclusion of a contract and also because of its character, which is not readily compatible with observance of the particularly short deadlines for reviews

seeking interim measures and the setting aside of decisions taken unlawfully. In addition, the potential effectiveness of the conciliation mechanism has been weakened further by the difficulties encountered in establishing a complete and sufficiently wide list of independent conciliators in each Member State, available at any time and capable of dealing with conciliation requests at very short notice. For these reasons, this conciliation mechanism should therefore be abolished.

- (18) The requirement should remain for the Member States to provide on a regular basis information on the operation of national review procedures, proportionate to the objective pursued, by involving the Advisory Committee for Public Contracts in determining the extent and nature of such information. Indeed, only by making such information available will it be possible to assess correctly the effects of the changes introduced in connection with this Directive at the end of a significant period of implementation.
- (19) Directives 89/665/EEC and 92/13/EEC should therefore be amended accordingly.
- (20) Since, for the reasons stated above, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives, while respecting the principle of the procedural autonomy of the Member States.
- (21) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Directive 89/665/EEC

Directive 89/665/EEC is amended as follows:

- (1) Article 1 is amended as follows:
 - (a) paragraph 1 is replaced by the following:

“1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directive 2004/18/EC of the European Parliament and of the Council^(*), decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

(*) OJ L 134 of 30.4.2004, p. 114.”

(b) paragraph 3 is replaced by the following:

“3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement.”

(c) the following paragraphs 4 and 5 are added:

“4. The Member States may require that the person wishing to use a review procedure has notified the contracting authority by fax or electronic means of the alleged infringement and of his intention to seek review. In that case, the Member States shall ensure that no minimum period is imposed between the time when the notification is sent to the contracting authority and the time when an application for review is lodged with the body responsible for review procedures.

Similarly, the Member States may require that the person concerned first seek review with the contracting authority. In that case, the Member States shall ensure that the submission of such an application for review by fax or electronic means results in immediate suspension of the possibility of proceeding to the conclusion of the contract.

The automatic suspension referred to in the second subparagraph shall end at the expiry of a period which may not be less than five working days with effect from the day following the date on which the contracting authority has sent its reply by fax or electronic means.

5. In the case of a review relating to the circumstances in which the submissions by fax or electronic means referred to in paragraph 4 did or did not occur, the body responsible for review procedures, independent of the contracting authority, shall in particular consider all reasonable and relevant evidence which is communicated to it by the authors of such submissions and which confirm that the submissions were sent and that they were received by the addressees.”

(2) Article 2 is amended as follows:

(a) paragraph 3 is replaced by the following:

“3. Except where provided for in Article 1(4) and Articles 2a to 2f, review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.”

(b) the following paragraph 3a is inserted:

“3a When a body independent of the contracting authority has to review a contract award decision or a decision subsequent thereto, it shall notify the contracting authority without delay by fax or electronic means of the fact that the contracting authority cannot proceed to the conclusion of the contract for a period determined by the Member State where the body is established. The period cannot be less than five working days with effect from the day following the dispatch of the notification concerned. After considering all the documents supporting the review, and when it reaches the conclusion that the period of suspension referred to above should not be extended, the body may terminate at any time the requirement not to conclude the contract.”

(c) paragraph 4 is replaced by the following:

“4. The Member States may provide that, when considering whether to order interim measures, the body responsible for review procedures 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 when their negative consequences could exceed their benefits.

In making use of the option provided for in the first subparagraph, the Member States may not obstruct the application of Article 2f, when the contract concerned has been concluded in breach of Article 1(4), Article 2(3a) or any one of Articles 2a to 2e or in breach of an additional interim measure taken by the body responsible for review procedures and intended to extend the suspension of conclusion.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.”

(d) paragraph 6 is replaced by the following:

“6. Except where provided for in Article 1(4) and Articles 2a to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(4), Article 2(3) or Articles 2a to 2f,

the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.”

- (e) in the first subparagraph of paragraph 8, the expression “court or tribunal within the meaning of Article 177 of the EEC Treaty” is replaced by the expression “court or tribunal within the meaning of Article 234 of the Treaty”.

- (3) The following Articles 2a to 2f are inserted:

“Article 2a

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the decisions taken by contracting authorities, by adopting the necessary provisions which respect the minimum conditions stated in paragraphs 2, 3 and 4 of this Article and in Articles 2b, 2c and 2d.
2. A contract may not be concluded following the decision to award a public contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least ten calendar days with effect from the day after the date on which the contract award decision is communicated to the tenderers concerned by fax or electronic means. The communication of the award decision to each tenderer concerned shall be accompanied by a summary of the relevant reasons, as referred to in Article 41(2) of Directive 2004/18/EC.
3. By way of derogation from paragraph 2, in the cases of urgency referred to in Article 38(8) of Directive 2004/18/EC, the Member States may make provision that a contract may not be concluded following the decision to award a public contract before the expiry of a period of at least seven calendar days with effect from the day after the date on which the contract award decision is communicated to the tenderers concerned by fax or electronic means. This period shall be automatically extended by three calendar days when a person referred to in Article 1(3) of this Directive notifies, within this period, the contracting authority concerned by fax or electronic means of his intention to seek review. The communication of the award decision to each tenderer concerned shall be accompanied by a summary of the relevant reasons, as referred to in Article 41(2) of Directive 2004/18/EC.

The Member States may apply the first subparagraph in the case of contracts based on a framework agreement within the meaning of Article 1(5) of Directive 2004/18/EEC or contracts awarded as part of dynamic purchasing systems within the meaning of Article 1(6) of that Directive.

4. The periods referred to in paragraphs 2 and 3 shall not apply in cases of extreme urgency within the meaning of Article 31(1)(c) of Directive 2004/18/EC.

Article 2b

The Member States may provide that the periods referred to in Article 2a(2) and (3) do not apply in the following cases:

- (a) in the case of contracts based on a framework agreement concluded with a single economic operator as provided for in Article 32(3) of Directive 2004/18/EC;
- (b) in the case of contracts based on a framework agreement concluded with several economic operators when such contracts have been awarded by application of the terms laid down in the framework agreement, without reopening competition, as provided for in the first indent of the second subparagraph of Article 32(4) of Directive 2004/18/EC;
- (c) in the case of contracts awarded in the context of an open procedure within the meaning of Article 1(11)(a) of Directive 2004/18/EC when the contracting authority has received only the bid of the tenderer who is awarded the contract;
- (d) in the case of contracts awarded in the context of a restricted procedure within the meaning of Article 1(11)(b) of Directive 2004/18/EC when, apart from the economic operator to whom the contract is awarded, all the economic operators invited to submit a bid have already been the subject of a decision by the contracting authority which is amenable to review and which terminates their participation in the procedure for reasons other than the contract award criteria;
- (e) in the case of contracts awarded in the context of a negotiated procedure within the meaning of Article 1(11)(d) of Directive 2004/18/EC when, apart from the economic operator to whom the contract is awarded, all the economic operators who have expressed interest in that procedure have already been the subject of a decision by the contracting authority which is amenable to review and which terminates their participation in the procedure for reasons other than the contract award criteria.

Article 2c

1. When the Member States provide that any application for a review of a contracting authority's decision taken in the context of, or in relation with, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period may not be less than ten calendar days with effect from the day following the date on which the contracting authority's decision is communicated by fax or electronic means to the tenderer or candidate concerned. The communication of the contracting authority's decision to each tenderer or candidate concerned shall be accompanied by a summary of the relevant reasons, as referred to in Article 41(2) of Directive 2004/18/EC.
2. The Member States which make use of the options provided for in Article 2a(3) may provide that the application for review referred to in paragraph 1 of this Article must be made within a period which may not be less

than seven calendar days with effect from the day following the date on which the contracting authority's decision is communicated by fax or electronic means to the tenderer or candidate concerned.

This period shall be automatically extended by three calendar days when a person referred to in Article 1(3) notifies, within this period, the contracting authority concerned by fax or electronic means of his intention to seek review.

The communication of the contracting authority's decision to each tenderer concerned shall be accompanied by a summary of the relevant reasons, as referred to in Article 41(2) of Directive 2004/18/EC.

Article 2d

In the case of a review relating to the circumstances in which the communication by fax or electronic means referred to in Articles 2a and 2c did or did not occur, the review body shall in particular consider all reasonable and relevant evidence which is communicated to it by the contracting authority concerning dispatch by the latter and receipt by the tenderer or candidate concerned.

Article 2e

1. The Member States shall ensure the effectiveness of the interlocutory procedures and the procedures for setting aside decisions referred to in Articles 1 and 2(1)(a) and (b) in the case of illegal direct awards of contracts, in accordance with the conditions stated in paragraphs 2, 3 and 4 of this Article.
2. When a contracting authority considers that it is permitted, in the light of the applicable Community law, not to initiate a formal procedure consisting of prior publicity and competitive tendering in respect of the award of a public contract, the amount of which exceeds the relevant threshold under Directive 2004/18/EC, the contracting authority shall, prior to the conclusion of the contract in question, take the following two measures:
 - (a) adopt an award decision which has no contractual effect and which is amenable to review within the meaning of Articles 1 and 2 of this Directive;
 - (b) publish a notice ensuring a sufficient degree of publicity and containing at least the information mentioned in the Annex to this Directive.

The publication of a notice in accordance with Articles 35(4) and 36 of Directive 2004/18/EC shall fulfil the conditions stated in subparagraph (b) of this paragraph.

3. A contract may be concluded following the contract award decision referred to in paragraph 2 only after the expiry of a period of at least ten calendar days with effect from the day following the date on which the notice mentioned in paragraph 2(b) was given the requisite publicity.

4. Paragraphs 2 and 3 shall not apply either in cases of extreme urgency within the meaning of Article 31(1)(c) of Directive 2004/18/EC or to contracts explicitly excluded in accordance with Articles 12 to 18 thereof.

Article 2f

1. The Member States shall ensure compliance with, on the one hand, the periods provided for in Articles 1(4) and 2a(2) and (3) and, on the other hand, Article 2e, in accordance with the conditions stated in paragraphs 2, 3 and 4 of this Article.
2. The conclusion of a contract in breach of the provisions referred to in paragraph 1 shall be considered ineffective.
3. By way of derogation from paragraph 2, the Member States may provide that a contract which has been concluded in breach of the provisions referred to in paragraph 1 nevertheless has certain effects between the parties concerned or with regard to third parties, on account of the end of a limitation period, which cannot be less than six months with effect from the effective date of conclusion.

The derogation provided for in the first subparagraph may also be applied when, in connection with a review seeking to establish a conclusion in breach of the provisions referred to in paragraph 1 and the consequences thereof, a review body independent of the contracting authority finds that certain overriding reasons relating to a general interest of a non-economic nature require in the case concerned that some effects of the contract should not be challenged.

4. The Member States shall lay down the rules on penalties applicable in the case of conclusion of a contract in breach of the provisions referred to in paragraph 1, when the circumstances referred to in paragraph 3 occur or when extreme urgency within the meaning of Article 31(1)(c) of Directive 2004/18/EC has been invoked by a contracting authority even though all the conditions provided for by that provision were not met.

The penalties provided for must be effective, proportionate and dissuasive.

The Member States shall notify those provisions to the Commission by *[18 months after the date of publication of this Directive in the Official Journal of the European Union]* at the latest, and shall notify it without delay of any subsequent amendment affecting them.”

(4) Article 3 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

“1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when it considers that a serious infringement of Community provisions in the field of public procurement has been committed during

a contract award procedure falling within the scope of Directive 2004/18/EC.

2. The Commission shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction.

It shall allow the Member State concerned a reasonable period within which to reply, regard being had to the circumstances of the case in point.”

- (b) in paragraph 3, the opening sentence is replaced by the following:

“Within the period referred to in paragraph 2, the Member State concerned shall communicate to the Commission:”.

- (5) Article 4 is replaced by the following:

“Article 4

1. The Member States shall communicate to the Commission each year information on the operation of the national review procedures which have occurred during the previous calendar years. The Commission shall determine, in consultation with the Advisory Committee for Public Contracts, the subject matter and nature of such information.
2. Not later than six years with effect from [*18 months after the date of publication of this Directive in the Official Journal of the European Union*], the Commission, in consultation with the Advisory Committee for Public Contracts, shall review the manner in which the provisions of this Directive have been implemented and, if necessary, make proposals for amendments.”

- (6) The text in Annex I to this Directive is added as an Annex.

Article 2
Directive 92/13/EEC

Directive 92/13/EEC is amended as follows:

- (1) Article 1 is amended as follows:

- (a) paragraph 1 is replaced by the following:

“1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directive 2004/17/EC of the European Parliament and of the Council^(*), decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such

decisions have infringed Community law in the field of public procurement or national rules transposing that law.

(*) OJ L 134 of 30.4.2004, p. 1.”

(b) paragraph 3 is replaced by the following:

“3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement.”

(c) the following paragraphs 4 and 5 are added:

“4. The Member States may require that the person wishing to use a review procedure has notified the contracting entity by fax or electronic means of the alleged infringement and of his intention to seek review. In that case, the Member States shall ensure that no minimum period is imposed between the time when the notification is sent to the contracting entity and the time when an application for review is lodged with the body responsible for review procedures.

Similarly, the Member States may require that the person concerned first seek review with the contracting authority. In that case, the Member States shall ensure that the submission of such an application for review by fax or electronic medium results in immediate suspension of the possibility of proceeding to the conclusion of the contract.

The automatic suspension referred to in the second subparagraph shall end at the expiry of a period which may not be less than five working days with effect from the day following the date on which the contracting entity has sent its reply by fax or electronic means.

5. In the case of a review relating to the circumstances in which the submissions by fax or electronic means referred to in paragraph 4 did or did not occur, the body responsible for review procedures, independent of the contracting entity, shall in particular consider all reasonable and relevant evidence which is communicated to it by the authors of such submissions and which confirm that the submissions were sent and that they were received by the addressees.”

(2) Article 2 is amended as follows:

(a) paragraph 3 is replaced by the following:

“3. Except where provided for in Article 1(4) and Articles 2a to 2f, review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.”

(b) the following paragraph 3a is inserted:

“3a When a body independent of the contracting entity has to review a contract award decision or a decision subsequent thereto, it shall notify the contracting entity without delay by fax or electronic means of the fact that the contracting entity cannot proceed to the conclusion of the contract for a period determined by the Member State where the body is established. The period cannot be less than five working days with effect from the day following the dispatch of the notification concerned. After considering all the documents supporting the review, and when it reaches the conclusion that the period of suspension referred to above should not be extended, the body may terminate at any time the requirement not to conclude the contract.”

(c) paragraph 4 is replaced by the following:

“4. The Member States may provide that, when considering whether to order interim measures, the body responsible for review procedures may take into account the probable consequences of such measures for all the interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

In making use of the option provided for in the first subparagraph, the Member States may not obstruct the application of Article 2f, when the contract concerned has been concluded in breach of Article 1(4), Article 2(3a) or any one of Articles 2a to Article 2e or in breach of an additional interim measure taken by the body responsible for review procedures and intended to extend the suspension of conclusion.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.”

(d) paragraph 6 is replaced by the following:

“6. Except where provided for in Article 1(4) and Articles 2a to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(4), Article 2(3), or Articles 2a to Article 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.”

(e) in the first subparagraph of paragraph 9, the expression “court or tribunal within the meaning of Article 177 of the Treaty” is replaced by the expression “court or tribunal within the meaning of Article 234 of the Treaty”.

- (3) The following Articles 2a to 2f are inserted:

“Article 2a

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the decisions taken by contracting entities, by adopting the necessary provisions which respect the minimum conditions stated in paragraphs 2, 3 and 4 of this Article and Articles 2b, 2c and 2d.
2. A contract may not be concluded following the decision to award a public contract falling within the scope of Directive 2004/17/EC before the expiry of a period of at least ten calendar days with effect from the day after the date on which the contract award decision was communicated to the tenderers concerned by fax or electronic means. The communication of the award decision to each tenderer concerned shall be accompanied by a summary of the relevant reasons, as referred to in Article 49(2) of Directive 2004/17/EC.
3. By way of derogation from paragraph 2, in the cases where the shortest reduced time limits referred to in Article 45(8) of Directive 2004/17/EC are applied, the Member States may make provision that a contract may not be concluded following the decision to award a public contract before the expiry of a period of at least seven calendar days with effect from the day after the date on which the contract award decision was communicated to the tenderers concerned by fax or electronic means. This period shall be automatically extended by three calendar days when a person referred to in Article 1(3) of this Directive notifies, within this period, the contracting entity concerned by fax or electronic means of his intention to seek review. The communication of the award decision to each tenderer concerned shall be accompanied by a summary of the relevant reasons, as referred to in Article 49(2) of Directive 2004/17/EC.

The Member States may apply the first subparagraph in the case of contracts based on a framework agreement within the meaning of Article 1(4) and Article 14(2) and (3) of Directive 2004/17/EC or contracts awarded as part of dynamic purchasing systems within the meaning of Article 1(5) and Article 15 thereof.

4. The periods referred to in paragraphs 2 and 3 shall not apply in cases of extreme urgency within the meaning of Article 40(3)(d) of Directive 2004/17/EC.

Article 2b

1. The Member States may provide that the periods referred to in Article 2a(2) and (3) do not apply in the following cases:
 - (a) in the case of contracts based on a framework agreement concluded with a single economic operator in accordance with Articles 14(2) and 40(3)(i) of Directive 2004/17/EC;

- (b) in the case of contracts awarded in the context of an open procedure within the meaning of Article 1(9)(a) of Directive 2004/17/EC when the contracting entity has received only the bid of the tenderer who is awarded the contract;
- (c) in the case of contracts awarded in the context of a restricted procedure within the meaning of Article 1(9)(b) of Directive 2004/17/EC when, apart from the economic operator to whom the contract is awarded, all the economic operators invited to submit a bid have already been the subject of a decision by the contracting entity which is amenable to review and which terminates their participation in the procedure for reasons other than the contract award criteria;
- (d) in the case of contracts awarded in the context of a negotiated procedure within the meaning of Article 1(9)(c) of Directive 2004/17/EC when, apart from the economic operator to whom the contract is awarded, all the economic operators who have expressed interest in that procedure have already been the subject of a decision by the contracting entity which is amenable to review and which terminates their participation in the procedure for reasons other than the contract award criteria.

Article 2c

1. When the Member States provide that any application for a review of a contracting entity's decision taken in the context of, or in relation with, a contract award procedure falling within the scope of Directive 2004/17/EC must be made before the expiry of a specified period, this period may not be less than ten calendar days with effect from the day following the date on which the contracting entity's decision is communicated by fax or electronic means to the tenderer or candidate concerned. The communication of the contracting entity's decision to each tenderer or candidate concerned shall be accompanied by a summary of the relevant reasons, as referred to in Article 49(2) of Directive 2004/17/EC.
2. The Member States which make use of the options provided for in Article 2a(3) may provide that the application for review referred to in paragraph 1 of this Article must be made within a period which may not be less than seven calendar days with effect from the day following the date on which the contracting entity's decision is communicated by fax or electronic means to the tenderer or candidate concerned.

This period shall be automatically extended by three calendar days when a person referred to in Article 1(3) notifies, within this period, the contracting entity concerned by fax or electronic means of his intention to seek review.

The communication of the contracting entity's decision to each tenderer concerned shall be accompanied by a summary of the relevant reasons referred to in Article 49(2) of Directive 2004/17/EC.

Article 2d

In the case of a review relating to the circumstances in which the communication by fax or electronic means referred to in Articles 2a and 2c did or did not occur, the review body shall in particular consider all reasonable and relevant evidence which is communicated to it by the contracting entity concerning dispatch by the latter and its receipt by the tenderer or candidate concerned.

Article 2e

1. The Member States shall ensure the effectiveness of the interlocutory procedures and the procedures for setting aside decisions referred to in Articles 1 and 2(1)(a), (b) and (c) in the case of illegal direct awards of contracts, in accordance with the conditions stated in paragraphs 2, 3 and 4 of this Article.
2. When a contracting entity considers that it is permitted, in the light of the applicable Community law, not to initiate a formal procedure consisting of prior publicity and competitive tendering in respect of the award of a public contract, the amount of which exceeds the relevant threshold under Directive 2004/17/EC, the contracting entity shall, prior to the conclusion of the contract in question, take the following two measures:
 - (a) adopt an award decision which has no contractual effect and which is amenable to review within the meaning of Articles 1 and 2 of this Directive;
 - (b) publish a notice ensuring a sufficient degree of publicity and containing at least the information mentioned in the Annex to this Directive.

The publication of a notice in accordance with Articles 43 and 44 of Directive 2004/17/EC shall fulfil the conditions stated in subparagraph (b) of this paragraph.

3. A contract may be concluded following the contract award decision referred to in paragraph 2 only after the expiry of a period of at least ten calendar days with effect from the day following the date on which the notice mentioned in paragraph 2(b) was given the requisite publicity.
4. Paragraphs 2 and 3 shall not apply either in cases of extreme urgency within the meaning of Article 40(3)(d) of Directive 2004/17/EC or to contracts explicitly excluded in accordance with Articles 19 to 26 thereof.

Article 2f

1. The Member States shall ensure compliance with, on the one hand, the periods provided for in Articles 1(4) and 2a(2) and (3) and, on the other hand, Article 2e, in accordance with the conditions stated in paragraphs 2, 3 and 4 of this Article.

2. The conclusion of a contract in breach of the provisions referred to in paragraph 1 shall be considered ineffective.
3. By way of derogation from paragraph 2, the Member States may provide that a contract which has been concluded in breach of the provisions referred to in paragraph 1 nevertheless has certain effects between the parties concerned or with regard to third parties, on account of the end of a limitation period, which cannot be less than six months with effect from the effective date of conclusion.

The derogation provided for in the first subparagraph may also be applied when, in connection with a review seeking to establish a conclusion in breach of the provisions referred to in paragraph 1 and the consequences thereof, a review body independent of the contracting entity finds that certain overriding reasons relating to a general interest of a non-economic nature require in the case concerned that some effects of the contract should not be challenged.

4. The Member States shall lay down the rules on penalties applicable in the case of conclusion of a contract in breach of the provisions referred to in paragraph 1, when the circumstances referred to in paragraph 3 occur or when extreme urgency within the meaning of Article 40(3)(d) of Directive 2004/17/EC has been invoked by a contracting authority even though all the conditions provided for by that provision were not met.

The penalties provided for must be effective, proportionate and dissuasive.

The Member States shall notify those provisions to the Commission by *[18 months after the date of publication of this Directive in the Official Journal of the European Union]* at the latest, and shall notify it without delay of any subsequent amendment affecting them.”

(4) Articles 3 to 7 are deleted.

(5) Article 8 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

“1. The Commission may invoke the procedures provided for in paragraphs 2 to 5 when it considers that a serious infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC or in relation to Article 27(a) of that Directive in the case of contracting entities to which that provision applies.

2. The Commission shall notify the Member State and the contracting entity concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

It shall allow the Member State concerned a reasonable period within which to reply, regard being had to the circumstances of the case in point.”

(b) in paragraph 3, the opening sentence is replaced by the following:

“3. Within the period referred to in paragraph 2, the Member State concerned shall communicate to the Commission:”.

(6) Articles 9 to 11 are deleted.

(7) Article 12 is replaced by the following:

“Article 12

1. The Member States shall communicate to the Commission each year information on the operation of the national review procedures which have occurred during the previous calendar years. The Commission shall determine, in consultation with the Advisory Committee for Public Contracts, the subject matter and nature of such information.
2. Not later than six years with effect from [*18 months after the date of publication of this Directive in the Official Journal of the European Union*], the Commission, in consultation with the Advisory Committee for Public Contracts, shall review the manner in which the provisions of this Directive have been implemented and, if necessary, make proposals for amendments.”

(8) The text in Annex II to this Directive is added as an Annex.

*Article 3
Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*18 months after the date of publication of this Directive in the Official Journal of the European Union*] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the European Parliament
The President
[...]

For the Council
The President
[...]

ANNEX I

“ANNEX

Minimum information to appear in the notice mentioned in Article 2e(2)(b)

- name, address and contact point(s) of the contracting authority;
- title attributed to the contract by the contracting authority;
- type of contract (works/supplies/services) and location of works or place of delivery or performance;
- short description of the contract;
- CPV (common procurement vocabulary) classification;
- total final value of awarded contract;
- date of contract award decision;
- justification of the decision not to initiate formal procedure consisting of prior publicity and competitive tendering in respect of the award of a public contract, the amount of which exceeds the relevant threshold under Directive 2004/18/EC, with reference to the case(s) referred to in Article 31 of Directive 2004/18/EC or any other justification in compliance with applicable Community law;
- name and address of the economic operator to whom the contract is awarded;
- precise indication of the body responsible for review procedures and the deadlines for seeking review;
- service from which information may be obtained concerning appeal procedures.”

ANNEX II

“ANNEX

Minimum information to appear in the notice mentioned in Article 2e(2)(b)

- name, address and contact point(s) of the contracting body;
- title attributed to the contract by the contracting body;
- type of contract (works/supplies/services) and location of works or place of delivery or performance;
- short description of the contract;
- CPV (common procurement vocabulary) classification;
- total final value of awarded contract;
- date of contract award decision;
- justification of the decision not to initiate formal procedure consisting of prior publicity and competitive tendering in respect of the award of a public contract, the amount of which exceeds the relevant threshold under Directive 2004/17/EC, with reference to the case(s) referred to in Article 40(3) of Directive 2004/17/EC or any other justification in compliance with applicable Community law;
- name and address of the economic operator to whom the contract is awarded;
- precise indication of the body responsible for review procedures and the deadlines for seeking review;
- service from which information may be obtained concerning appeal procedures.”