

Gruppo di lavoro “legislazione e regole comunitarie”

20 settembre 2006

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*Presidenza
del Consiglio dei Ministri*
CONFERENZA UNIFICATA

Parere, ai sensi dell'art.25, comma 2, della legge 18 aprile 2005, n.62, sullo schema di decreto legislativo recante il Codice dei contratti pubblici relativi a lavori, servizi e forniture, in attuazione delle direttive 2004/17 e 2004/18/CE.

Rep. Atti n. 960/06 del 27 luglio 2006

LA CONFERENZA UNIFICATA

Nell'odierna seduta del 27 luglio 2006

VISTE le direttive 2004/17 e 2004/18, che coordinano le procedure di aggiudicazione degli appalti degli enti erogatori di acqua e di energia, degli enti che forniscono servizi di trasporto e servizi postali e le procedure di aggiudicazione degli appalti pubblici di lavori, di forniture e di servizi;

VISTA la legge 18 aprile 2005, n.62, art.25, che al comma 1, delega il Governo a recepire le direttive 2004/17 e 2004/18 prevedendo la raccolta, in un unico testo normativo, sia della disciplina degli appalti e concessioni di rilevanza comunitaria, sia degli appalti e concessioni sotto soglia comunitaria;

VISTO lo schema di decreto legislativo predisposto dal Governo in attuazione della delega prevista dal citato articolo 25 della L. n. 62/2005, esaminato dalla Conferenza Unificata nella Seduta del 9 febbraio 2006, nel corso della quale le Regioni hanno espresso parere negativo con le osservazioni contenute in due documenti coordinati, consegnati nel corso della Seduta;

VISTO il decreto legislativo 12 aprile 2006, n. 163, recante "Codice dei contratti pubblici relativi a lavori, servizi e forniture", emanato in attuazione delle direttive 2004/17 e 2004/18CE;

VISTO l'articolo 25, comma 3, della citata legge n. 62/2005 che prevede la possibilità di emanare disposizioni correttive ed integrative del decreto legislativo 12 aprile 2006, n. 163, entro due anni dalla sua data di entrata in vigore;

VISTO lo schema di decreto legislativo recante "Disposizioni integrative e correttive del d.lgs. 12 aprile 2006, n.163, recante il Codice dei contratti pubblici relativi a lavori, servizi e forniture, a norma dell'art.25, comma 3, della legge 18 aprile 2005, n.62, approvato dal Consiglio dei Ministri nella seduta del 23 giugno 2006,

VISTI gli esiti della riunione tecnica del 10 luglio 2006, nel corso della quale le Regioni hanno espresso parere favorevole sullo schema di decreto in esame condizionato all'apertura di un tavolo tecnico per discutere le ulteriori modifiche da apportare al codice degli appalti;



*Presidenza
del Consiglio dei Ministri*
CONFERENZA UNIFICATA

VISTI gli esiti dell'odierna Seduta, nel corso della quale le Regioni hanno espresso parere favorevole sullo schema di decreto legislativo in esame, con la richiesta di aprire un tavolo tecnico volto alla modifica del decreto legislativo recante il Codice dei contratti pubblici, e a individuare, in attesa di tale provvedimento, misure idonee a regolare e rendere chiaro il regime vigente in rapporto alla legislazione regionale;

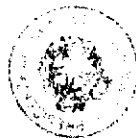
CONSIDERATO che l'ANCI, l'UPI e l'UNCEM hanno espresso parere favorevole sullo schema, secondo quanto contenuto nel documento che, allegato al presente atto, ne costituisce parte integrante (All. sub.A), contenente alcune considerazioni;

CONSIDERATO che il Ministro per le infrastrutture ha ritenuto di poter aderire alla richiesta delle Regioni di apertura di un tavolo tecnico, per la revisione del decreto legislativo recante il Codice dei contratti pubblici e che il citato tavolo avrà sede presso la Conferenza

ESPRIME PARERE FAVOREVOLE

nei termini di cui in premessa, sullo schema di decreto legislativo recante il Codice dei contratti pubblici relativi a lavori, servizi e forniture, in attuazione delle direttive 2004/17 e 2004/18/CE.

Il Segretario
Dott. Riccardo Carpino



Il Presidente
On.le Prof. Linda Lanzillotta



ASSOCIAZIONE
NAZIONALE
COMUNI
ITALIANI



Unione
nazionale
comuni comunità
enti
montani

CONFERENZA UNIFICATA
27 luglio 2006

Elenco A - punto 6) all'ordine del giorno

***SCHEMA DI DECRETO LEGISLATIVO RELATIVO A DISPOSIZIONI
INTEGRATIVE E CORRETTIVE DEL DECRETO LEGISLATIVO 12 APRILE
2006, N. 163, RECANTE IL CODICE DEI CONTRATTI PUBBLICI RELATIVI
A LAVORI, SERVIZI E FORNITURE, A NORMA DELL'ART 25, COMMA 3,
DELLA LEGGE 18 APRILE 2005, N. 62***

PREMESSA

L'introduzione del Codice dei contratti pubblici relativi a lavori, servizi e forniture, risponde anche all'esigenza in sede europea di recepire le direttive comunitarie 2004/17 e 2004/18.

In sede di Conferenza Unificata l'ANCI ha espresso parere non favorevole sul decreto legislativo del 12 aprile 2006, n. 163 c.d. Codice dei contratti pubblici relativi a lavori, servizi e forniture motivando tale decisione nel merito del provvedimento allora in esame e sottolineando la necessità di procedere ad importanti modifiche al testo allora presentato.

Il 12 luglio u.s. è stato convertito il c.d. Decreto Milleproroghe (l. 228/06) dove sono state inserite all'interno alcuni degli emendamenti formulati durante gli incontri tra Governo ed Autonomie locali anche in riferimento alla incertezza della disciplina nel periodo transitorio dopo che l'art. 256 del Codice aveva abrogato le norme di riferimento mentre il decreto correttivo in esame, a sua volta, rinvia al 1 febbraio 2007 l'entrata in vigore delle medesime disposizioni normative.

Il testo del decreto correttivo in oggetto muove delle correzioni per lo più di carattere formale ed in ogni caso si esprime **parere favorevole**.

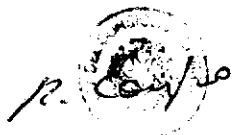
CONSIDERAZIONI A LATERE

Inoltre sarebbe stato il caso, per lo meno per due questioni urgenti procedere ad una modifica del D.Lgs. 163/06 prevedendole all'interno di future previsioni di carattere correttivo, ed in particolare:

Regime di pubblicità: ovvero l'introduzione dell'art. 122, comma 5 del D.Lgs. 163/06 in cui è sancito l'obbligo di pubblicazione in Gazzetta Ufficiale per i contratti di importo pari o superiore a € 500.000,00.

Precedentemente le pubblicazioni in G.U. erano obbligatorie per i contratti pari o superiori a € 1.000.000,00. Questo comporterà delle ripercussioni notevoli, dal punto di vista economico, alle casse comunali.

Responsabilità dei procedimenti interni all'amministrazione: ovvero con l'introduzione del comma 5 dell'art. 10 del D.lgs. n.163/2006 il responsabile del procedimento "deve essere un dipendente di ruolo". Tale precisazione, così tassativamente formulata, rischia di creare non pochi problemi ai Comuni, che si vedono costretti ad affidare necessariamente gli incarichi di responsabile del procedimento al personale a tempo indeterminato in organico; tale previsione crea, dunque, notevoli difficoltà operative soprattutto alla luce dei rigorosi vincoli in materia di assunzioni e di contenimento dei costi del personale intervenuti negli ultimi anni. Il ricorso a formule flessibili di utilizzo del personale per l'affidamento di incarichi di responsabilità, meno rigide rispetto all'assunzione a tempo indeterminato, anche avvalendosi ad esempio di personale comandato o distaccato da altro ente, rappresenta una valida soluzione per reperire personale altamente qualificato riducendo al contempo i costi in un'ottica di complessiva razionalizzazione degli oneri del personale pubblico.

A handwritten signature in black ink is written over a circular stamp. The stamp contains some illegible text and a central emblem, possibly a logo or seal of an official. The signature appears to be a cursive name, possibly starting with 'R.'.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.6.2006
COM(2006) 195 final /2

2006/0066 (COD)

Adaptation after legal revision :

This document annuls and replaces COM(2006) 195 of 4.5.2006 following revision by the Legal Service of the European Commission after adoption.
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.

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

(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.”

19/07/06

COMMUNITY GUIDELINES ON STATE AID TO PROMOTE RISK CAPITAL INVESTMENTS IN SMALL AND MEDIUM-SIZED ENTERPRISES

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NB! This text will be subject to a revision by the Legal Revisers before the publication in the Official Journal.

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1 INTRODUCTION

1.1 Risk capital as a Community objective

Risk capital relates to the equity financing of companies with perceived high-growth potential during their early growth stages. The demand for risk capital typically comes from companies with growth potential that do not have sufficient access to capital markets, while the offer of risk capital comes from investors ready to take high risk in exchange of potentially above-average returns from the equity invested.

In its Communication to the Spring European Council, *Working together for growth and jobs – A new start for the Lisbon strategy*¹, the Commission has recognised the insufficient level of risk capital available for start-up, innovative young businesses. The Commission has taken initiatives, like the Joint European Resources for Micro- to Medium Enterprises (JEREMIE) which is a joint initiative of the Commission and the European Investment Fund to tackle the lack of risk capital for small and medium-sized enterprises in some regions. Building on the experience gained with the MAP financial instruments, the Commission has proposed a High Growth and Innovative SME Facility (GIF) under the Competitiveness and Innovation Programme (CIP), which is currently being adopted and will cover the period 2007-2013. The Facility will increase the supply of equity to innovative SMEs by investing at market terms into venture capital funds focused on SMEs in their early stages and in the expansion phase.

The Commission addressed the issue of risk capital financing in its Communication on “Financing SME Growth- Adding European Value” adopted on 29/06/06 (COM 2006-349). The Commission has also stressed the importance of reducing and redirecting State aids to address market failures in order to increase economic efficiency and to stimulate research, development and innovation. In this context, the Commission has undertaken to reform the State aid rules *inter alia* with the aim of facilitating access to finance and risk capital.

In fulfilment of its commitment, the Commission published the “State Aid Action Plan - Less and better targeted State aid: A roadmap for State aid reform 2005-2009” (“SAAP”) in June 2005². The SAAP has highlighted the importance of improving the business climate and facilitating the rapid start-up of new enterprises. In this context, the SAAP announced the review of the Communication on State aid and risk capital (“SARC”)³ to tackle the market failures affecting the provision of risk capital to start-ups and young, innovative small and medium-sized enterprises (“SMEs”), in particular by increasing the flexibility of the rules contained in the SARC.

¹ COM (2005)24, 2.2.2005.

² COM(2005) 107 final – SEC(2005) 795, 7.6.2005.

³ OJ C 253, 21.8.2001, p. 3.

While it is the primary role of the market to provide sufficient risk capital in the Community, there is an ‘equity gap’ in the risk capital market, a persistent capital market imperfection preventing supply from meeting demand at a price acceptable to both sides, which negatively affects European SMEs. The gap concerns mainly high-tech innovative and mostly young firms with high growth potential. However, a wider range of firms of different ages and in different sectors with smaller growth potential that cannot find financing for their expansion projects without external risk capital may also be affected.

The existence of the equity gap may justify the granting of State aid in certain limited circumstances. If properly targeted, State aid in support of risk capital provision can be an effective means to alleviate the identified market failures in this field and to leverage private capital.

These guidelines replace the SARC by setting out the conditions under which State aid supporting risk capital investments may be considered compatible with the EC Treaty. The guidelines explain the conditions under which State aid is present in accordance with Article 87 (1) of the EC Treaty and the criteria that the Commission will apply in the compatibility assessment of the risk capital measures in accordance with the provisions of Article 87 (3) of the EC Treaty.

1.2 Experience in the field of State aid to risk capital

These guidelines have been prepared in the light of the experience gained in the application of the SARC. Comments from public consultations of Member States and stakeholders on the revision of the SARC, on the State aid Action Plan and on the Communication on State aid to innovation⁴ have also been taken into account.

The experience of the Commission and the comments received in the consultations have shown that the SARC has generally worked well in practice, but also revealed a need to increase the flexibility in the application of the rules and to adjust the rules to reflect the changed situation of the risk capital market. In addition, experience has shown that for some types of risk capital investments in some areas it was not always possible to fulfil the conditions set out in the SARC, and, as a result, risk capital could not be adequately supported with State aid in these cases. Furthermore, experience has also shown a low overall profitability of the aided risk capital funds.

To remedy these problems, these guidelines adopt a more flexible approach in certain circumstances so as to allow Member States to better target their risk capital measures to the relevant market failure. These guidelines also set out a refined economic approach for the assessment of the compatibility of risk capital measures with the Treaty. Under the SARC the authorisation of schemes was already based on a relatively sophisticated economic analysis focussing on the size of the market failure and the targeting of the measure. Hence, the SARC already reflected the key focus of a refined economic approach. However, some fine-tuning was still needed in respect of some of the criteria to ensure that the measure better target the relevant market failure. In particular, the guidelines contain elements to ensure that profit-driven and professional investment decisions are strengthened in order to further encourage private investors to co-invest with the State. Finally, an effort has been made to provide clarity where the experience with the SARC has shown that this was needed.

⁴ COM 2005 (436) final, 21.9.2005.

1.3 The balancing test for State aid supporting risk capital investments

1.3.1 The State Aid Action Plan and the balancing test

In the SAAP the Commission underlined the importance of strengthening the economic approach to State aid analysis. This translates into a balancing of the potential positive effects of the measure in reaching an objective of common interest against its potential negative effects in terms of distortion of competition and trade. The balancing test, as outlined in the SAAP, is composed of three steps, the first two relating to the positive effects and the last one to the negative effects and the resulting balance:

- (1) Is the aid measure aimed at a well-defined objective of common interest, such as growth, employment, cohesion and environment?
- (2) Is the aid well designed to deliver the objective of common interest, that is does the proposed aid address the market failure or other objective?
 - (i) Is State aid an appropriate policy instrument?
 - (ii) Is there an incentive effect, i.e. does the aid change the behaviour of firms and/or investors?
 - (iii) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

The balancing test is equally relevant for the design of State aid rules and for the assessment of cases falling within their scope.

1.3.2 Market failures

On the basis of the experience gained in applying the SARC, the Commission considers that there is no general risk capital market failure in the Community. It does, however, accept that there are market gaps for some types of investments at certain stages of enterprises' development. These gaps result from an imperfect matching of supply and demand of risk capital and can generally be described as an equity gap.

The provision of equity finance, in particular to smaller businesses, presents numerous challenges both to the investor and to the enterprise invested in. On the supply side, the investor needs to make a careful analysis not merely of any collateral being offered (as is the case of a lender) but of the entire business strategy in order to estimate the possibilities of making a profit on the investment and the risks associated with it. The investor also needs to be able to monitor that the business strategy is well implemented by the enterprise's managers. The investor finally needs to plan and execute an exit strategy, in order to generate a risk-adjusted return on investment from selling its equity stake in the company in which the investment is made.

On the demand side, the enterprise must understand the benefits and risks associated with external equity investment to pursue the venture and to prepare sound business plans to secure the necessary resources and mentoring. Owing to a lack of internal capital or the collateral needed to obtain debt funding and/or a solid credit history, the enterprise may face very tight funding constraints. In addition, the enterprise must share control with an outside investor, who usually has an influence over company decisions in addition to a portion of the equity.

As a result, the matching of supply and demand of risk capital may be inefficient so that the level of risk capital provided in the market is too restricted, and enterprises do not obtain funding despite having a valuable business model and growth prospects. The Commission considers that the main source of market failure relevant to risk capital markets, which particularly affects access to capital by SMEs and companies at the early stages of their development and which may justify public intervention, relates to imperfect or asymmetric information.

Imperfect or asymmetric information may result notably in:

- (a) Transaction and agency costs: potential investors face more difficulties in gathering reliable information on the business prospects of an SME or a new company and subsequently in monitoring and supporting the enterprise's development. This is in particular the case for highly innovative projects or risky projects. Furthermore, small deals are less attractive to investment funds due to relatively high costs for investment appraisal and other transaction costs.
- (b) Risk aversion: investors may become more reluctant to provide risk capital to SMEs, the more the provision of risk capital is subject to imperfect or asymmetric information. In other words, imperfect or asymmetric information tends to exacerbate risk aversion.

1.3.3 Appropriateness of the instrument

The Commission considers that State aid to risk capital measures may constitute an appropriate instrument within the limits and conditions set out in these guidelines. However, it must be borne in mind that risk capital provision is essentially a commercial activity involving commercial decisions. In this context, more general structural measures not constituting State aid may also contribute to an increase in the provision of risk capital, such as promoting a culture of entrepreneurship, introducing a more neutral taxation of the different forms of SME financing (for example new equity, retained earnings and debt), fostering market integration, and easing regulatory constraints, including limitations on investments by certain types of financial institutions (for example, pension funds) and administrative procedures for setting up companies.

1.3.4 Incentive effect and necessity

State aid for risk capital must result in a net increase in the availability of risk capital to SMEs, in particular by leveraging investments by private investors. The risk of "dead-weight", or lack of incentive effect, means that some enterprises funded through publicly supported measures would have obtained finance on the same terms even in the absence of State aid (crowding out). There is evidence of this happening, although such evidence is inevitably anecdotal. In those circumstances public resources are ineffective.

The Commission considers that aid in the form of risk capital satisfying the conditions laid down in these guidelines ensures the presence of an incentive effect. The need to provide incentives depends on the size of the market failure related to the different types of measures and beneficiaries. Therefore different criteria are expressed in terms of size of investment tranches per target enterprise, degree of involvement of private investors, and consideration of notably the size of the company and the business stage financed.

1.3.5 Proportionality of aid

The need to provide incentives depends on the size of the market failure related to the different types of measures, beneficiaries and development stage of the SMEs. A risk capital measure is well-designed if the aid is necessary in all its elements to create the incentives to provide equity to SMEs in their seed, start-up and early stages. State aid will be inefficient if it goes beyond what is needed to induce more risk capital provision. In particular, to ensure that aid is limited to the minimum, it is crucial that there is significant private participation and that the investments are profit-driven and are managed on a commercial basis.

1.3.6 Negative effects and overall balance

The Treaty requires the Commission to control State aid within the Community. This is why the Commission has to be vigilant in order to ensure that measures are well targeted and to avoid severe distortions of competition. When deciding whether to authorise the grant of public funds for measures designed to promote risk capital, the Commission will seek to limit as far as possible the following categories of risk:

- (a) the risk of "crowding out". The presence of publicly supported measures may discourage other potential investors from providing capital. This could, over the longer term, further discourage private investment in young SMEs and thus end up widening the equity gap, while at the same time creating the need for additional public funding;
- (b) the risk that advantages to the investors and/or investment funds create an undue distortion of competition in the venture capital market relative to their competitors that do not receive the same advantages;
- (c) the risk that an oversupply of public risk capital for target enterprises not invested according to a commercial logic could help inefficient firms stay afloat and could cause an artificial inflation of their valuations, making it all the less attractive for private investors to supply risk capital to these firms.

1.4 Approach for State aid control in the area of risk capital

Provision of risk capital funding to enterprises cannot be linked to the traditional concept of "eligible costs" used for State aid control, which relies on certain specified costs for which aid is allowed and the setting of maximum aid intensities. The diversity of possible models for risk capital measures devised by Member States also means that the Commission is not in a position to define rigid criteria by which to determine whether to authorise such measures. The assessment of risk capital therefore implies a departure from the traditional way in which State aid control is carried out.

However, since the SARC has proved to work well in practice in the area of risk capital, the Commission has decided to continue and thereby ensure continuity with the SARC approach.

2 SCOPE AND DEFINITIONS

2.1 Scope

These guidelines only apply to risk capital schemes targeting SMEs. They are not intended to constitute the legal basis for authorisation of an ad-hoc measure providing capital to an individual enterprise.

Nothing in these guidelines should be taken to call into question the compatibility of State aid measures which meet the criteria laid down in any other guidelines, frameworks or regulations adopted by the Commission.

The Commission will pay particular attention to the need to prevent the use of these guidelines to circumvent the principles laid down in existing frameworks, guidelines and Regulations.

Risk capital measures must specifically exclude the provision of aid to enterprises:

- (a) in difficulty, within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁵;
- (b) in the shipbuilding⁶, coal⁷ and steel industry⁸.

These Guidelines do not apply to aid to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity, as well as aid contingent upon the use of domestic in preference to imported goods.

2.2 Definitions

For the purposes of these guidelines, the following definitions shall apply:

- (a) **"equity"** means ownership interest in a company, represented by the shares issued to investors;
- (b) **"private equity"** means private (as opposed to public) equity investment in companies not listed on a stock-market, including venture capital, replacement capital and buy-outs;
- (c) **"quasi-equity investment instruments"** means instruments whose return for the holder (investor/lender) is predominantly based on the profits or losses of the underlying target company, are unsecured in the event of default. This definition is based on a substance over form approach;

⁵ OJ C 244, 1.10.2004, p. 2.

⁶ For the purpose of these Guidelines, the definitions laid down in the Framework on State aid to shipbuilding OJ C 317, 30.12.2003, pages 11-14, apply.

⁷ For the purpose of these Guidelines, 'coal' means high-grade, medium-grade and low-grade category A and B coal within the meaning of the international codification system for coal laid down by the United Nations Economic Commission for Europe.

⁸ For the purpose of these Guidelines, the definition laid down in Annex I in the Guidelines on national regional aid for 2007-2013 (OJ C 54, 04.03.2006, p. 13-45) applies.

- (d) **“debt investment instruments”** means loans and other funding instruments which provide the lender/investor with a predominant component of fixed minimum remuneration and are at least partly secured. This definition is based on a substance over form approach;
- (e) **“seed capital”** means financing provided to study, assess and develop an initial concept, preceding the start-up phase;
- (f) **“start-up capital”** means financing provided to companies, which have not sold their product or service commercially and are not yet generating a profit, for product development and initial marketing;
- (g) **“early-stage capital”** means seed and start-up capital;
- (h) **“expansion capital”** means financing provided for the growth and expansion of a company, which may or may not break even or trade profitably, for the purposes of increasing production capacity, market or product development or the provision of additional working capital;
- (i) **“venture capital”** means investment in unquoted companies by investment funds (venture capital funds) that, acting as principals, manage individual, institutional or in-house money and includes early-stage and expansion financing, but not replacement finance and buy-outs;
- (j) **“replacement capital”** means the purchase of existing shares in a company from another private equity investment organisation or from another shareholder or shareholders. Replacement capital is also called secondary purchase;
- (k) **“risk capital”** means equity and quasi-equity financing to companies during their early-growth stages (seed, start-up and expansion phases), including informal investment by business angels, venture capital and alternative stock markets specialised in SMEs including high-growth companies (hereafter referred to as investment vehicles);
- (l) **“risk capital measures”** means schemes to provide or promote aid in the form of risk capital;
- (m) **“Initial Public Offering” (“IPO”)** means the process of launching the sale or distribution of a company’s shares to the public for the first time;
- (n) **“follow-on investment”** means an additional investment in a company subsequent to an initial investment;
- (o) **“buyout”** means the purchase of at least a controlling percentage of a company’s equity from the current shareholders to take over its assets and operations through negotiation or a tender offer;
- (p) **“exit strategy”** means a strategy for the liquidation of holdings by a venture capital or private equity fund according to a plan to achieve maximum return, including trade sale, write-offs, repayment of preference shares/loans, sale to another venture

capitalist, sale to a financial institution and sale by public offering (including Initial Public Offerings);

- (q) **”small and medium-sized enterprises”** (“SMEs”) means small enterprises and medium-sized enterprises” within the meaning of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises Commission Regulation (EC) 364/2004⁹ or any regulation replacing that regulation.
- (r) **”target enterprise or company”** means an enterprise or company in which an investor or investment fund is considering investing;
- (s) **“business angels” means** wealthy private individuals who invest directly in young new and growing unquoted business (seed finance) and provide them with advice, usually in return for an equity stake in the business, but may also provide other long-term finance;
- (t) **“assisted areas” means** regions falling within the scope of the derogations contained in Article 87(3)(a) or (c) of the EC Treaty;

3 APPLICABILITY OF ARTICLE 87(1) IN THE FIELD OF RISK CAPITAL

3.1 General applicable texts

There are already a number of published Commission texts which provide interpretation on whether individual measures fall within the definition of State aid and which may be relevant to risk capital measures. These include the 1984 communication on government capital injections¹⁰, the 1998 notice on the application of the State aid rules to measures relating to direct business taxation¹¹ and the notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees¹². The Commission will continue to apply these texts, when assessing whether risk capital measures constitute State aid.

3.2 Presence of aid at three levels

Risk capital measures often involve complex constructions devised to promote risk capital because the public authorities create incentives for one set of economic operators (investors) in order to provide finance to another set (target SMEs). Depending on the design of the measure, and even if the intention of the public authorities may be only to provide benefits to the latter group, enterprises at either or both levels may benefit from State aid. Moreover, in most cases the measure provides for the creation of a fund or other investment vehicle which has an existence separate from that of the investors and the enterprises in which the investment is made. In such cases it is also necessary to consider whether the fund or vehicle can be considered to be an enterprise benefiting from State aid.

⁹ OJ L 10, 13.1.2001, p. 33; Regulation as amended by Regulation (EC) 364/2004 (OJ L 63, 28.2.2004, p. 22).

¹⁰ Bulletin EC 9-1984, reproduced in "Competition law in the European Communities", Volume IIA, p. 133.

¹¹ OJ C 384, 10.12.1998, p. 3.

¹² OJ C 71, 11.3.2000, p. 14.

In this context, funding with resources, which are not State resources within the meaning of Article 87.1 of the EC Treaty, is considered to be provided by private investors. This is, in particular, the case for funding by the European Investment Bank and the European Investment fund.

The Commission will take into account the following specific factors in determining whether State aid is present at each of the different levels¹³.

Aid to investors. Where a measure allows private investors to effect equity or quasi-equity investments into a company or set of companies on terms more favourable than public investors, or than if they had undertaken such investments in the absence of the measure, then those private investors will be considered to receive an advantage. Such advantage may take different forms, as specified in section 4.2 of these guidelines. This remains the case even if the private investor is persuaded by the measure to confer an advantage on the company or companies concerned. In contrast, the Commission will consider the investment to be effected *pari passu* between public and private investors, and thus not to constitute State aid, where its terms would be acceptable to a normal economic operator in a market economy in the absence of any State intervention. This is assumed to be the case only if public and private investors share exactly the same upside and downside risks and rewards and hold the same level of subordination, and normally where at least 50 percent of the funding of the measure is provided by private investors, which are independent from the companies in which they invest.

Aid to an investment fund, investment vehicle and/or its manager. In general, the Commission considers that an investment fund or an investment vehicle is an intermediary vehicle for the transfer of aid to investors and/or enterprises in which investment is made, rather than being a beneficiary of aid itself. However, measures such as fiscal measures or other measures involving direct transfers in favour of an investment vehicle or an existing fund with numerous and diverse investors with the character of an independent enterprise may constitute aid unless the investment is made on terms which would be acceptable to a normal economic operator in a market economy and therefore provide no advantage to the beneficiary. Likewise, aid to the fund's managers or the management company will be considered to be present if their remuneration does not fully reflect the current market remuneration in comparable situations. On the other hand, there is a presumption of no aid if the managers or management company are chosen through an open and transparent public tender procedure or if they do not receive any other advantages granted by the State.

Aid to the enterprises in which investment is made. In particular, where aid is present at the level of the investors, the investment vehicle or the investment fund, the Commission will normally consider that it is at least partly passed on to the target enterprises and thus that it is also present at their level. This is the case even where investment decisions are being taken by the managers of the fund with a purely commercial logic.

In cases where the investment is made on terms which would be acceptable to a private investor in a market economy in the absence of any State intervention the enterprises in which the investment is made will not be considered as aid recipients. For this purpose, the Commission will consider whether such investment decisions are exclusively profit-driven,

¹³ It should, however, be noted that guarantees granted by the State in favour of investments in risk capital are more likely to include an element of aid to the investor than is the case with traditional loan guarantees, which are normally considered to constitute aid to the borrower rather than to the lender.

linked to a reasonable business plan and projections as well as to a clear and realistic exit strategy. Also important will be the choice and investment mandate of the fund's managers or the management company as well as the percentage and degree of involvement of private investors.

3.3 De minimis amounts

Where all financing in the form of risk capital provided to beneficiaries is *de minimis* within the meaning of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid¹⁴ and Commission Regulation (EC) No 1860/2004 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid in the agriculture and fisheries sectors¹⁵, then it is deemed not to fall under Article 87(1) of the Treaty. In risk capital measures the application of the *de minimis* rule is made more complicated by difficulties in the calculation of the aid and also by the fact that measures may provide aid not only to the target enterprises but also to other investors. Where these difficulties can be overcome, however, the *de minimis* rule remains applicable. Therefore, if a scheme provides public capital only up to the relevant *de minimis* threshold to each enterprise over a three-year period, then it is certain that any aid to these enterprises and/or the investors is within the prescribed limits.

4 ASSESSMENT OF THE COMPATIBILITY OF RISK CAPITAL AID UNDER ARTICLE 87(3) (C) OF THE EC TREATY

4.1 General principles

Article 87(3)(c) of the Treaty provides that aid to facilitate the development of certain economic activities may be considered to be compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. On the basis of the balancing test set out in section 1.3, the Commission will authorise a risk capital measure only if it concludes that the aid measure leads to an increased provision of risk capital without adversely affecting trading conditions to an extent contrary to the common interest. This section sets out a set of conditions under which the Commission will consider that aid in the form of risk capital is compatible with Article 87(3)(c).

Where the Commission is in possession of a complete notification which shows that all the conditions laid down in this section are met, it will try to make a rapid assessment of the aid within the time limits laid down in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty¹⁶. For certain types of measures which do not fulfil all the conditions set out in this section, the Commission will undertake a more detailed assessment of the risk capital measure as set out in detail in section 5.

Where there is also aid at the level of target enterprises and the provision of risk capital is linked to costs which are eligible for aid under another regulation or framework or other guidelines, that text may be applied to consider whether the aid is compatible with the common market.

¹⁴ OJ L 10, 13.1.2001, p. 30

¹⁵ OJ L 325, 28.10.2004, p.4

¹⁶ OJ L 83, 27.3.1999, p.1.

4.2 Form of aid

The choice of form of an aid measure lies in general with the Member State and this applies equally to risk capital measures. However, the Commission's assessment of such measures will include whether they encourage market investors to provide risk capital to the target enterprises and are likely to result in investment decisions being taken on a commercial (that is, a profit-driven) basis, as further explained in section 4.3.

The Commission believes that the types of measure capable of producing this result include the following:

- (a) constitution of investment funds ("venture capital funds") in which the State is a partner, investor or participant, even if on less advantageous terms than other investors;
- (b) guarantees to risk capital investors or to venture capital funds against a proportion of investment losses, or guarantees given in respect of loans to investors/funds for investment in risk capital, provided the public cover for the potential underlying losses does not exceed 50% of the nominal amount of the investment guaranteed;
- (c) other financial instruments in favour of risk capital investors or venture capital funds to provide extra capital for investment;
- (d) fiscal incentives to investment funds and/or their managers, or to investors to undertake risk capital investment.

4.3 Conditions for compatibility

To ensure that the incentive effect and the necessity of aid as set out in section 1.3.4 are present in a risk capital measure a number of indicators are relevant. The rationale is that State aid must target a specific market failure for the existence of which there is sufficient evidence. For this purpose, these guidelines lay down specific safe-harbour thresholds relating to tranches of investment in target SMEs in their early stages of business activity. Furthermore, so that aid is limited to the minimum necessary, it is crucial that aided investments into target SMEs are profit-driven and are managed on a commercial basis. The Commission will consider that the incentive effect, the necessity and proportionality of aid are present in a risk capital measure and that the overall balance is positive where all the following conditions are met.

Measures specifically involving investment vehicles will be assessed under section 5 of these guidelines and not under the conditions in this section.

4.3.1 Maximum level of investment tranches

The risk capital measure must provide for tranches of finance, whether wholly or partly financed through State aid, not exceeding EUR 1.5 million per target SME over each period of twelve months.

4.3.2 Restriction to seed, start-up and expansion financing

The risk capital measure must be restricted to provide financing up to the expansion stage for small enterprises, or for medium-sized enterprises located in assisted areas. It must be

restricted to provide financing up to the start-up stage for medium-sized enterprises located in non-assisted areas.

4.3.3 Prevalence of equity and quasi-equity investment instruments

The risk capital measure must provide at least 70% of its total budget in the form of equity and quasi-equity investment instruments into target SMEs. In assessing the nature of such instruments, the Commission will have regard to the economic substance of the instrument rather than to its name and the qualification attributed to it by the investors. In particular, the Commission will take into account the degree of risk in the target company's venture borne by the investor, the potential losses borne by the investor, the predominance of profit-dependent remuneration versus fixed remuneration, and the level of subordination of the investor in the event of the company's bankruptcy. The Commission may also take into account the treatment applicable to the investment instrument under the prevalent domestic legal, regulatory, financial, and accounting rules, if these are consistent and relevant for the qualification.

4.3.4 Participation by private investors

At least 50% of the funding of the investments made under the risk capital measure must be provided by private investors, or for at least 30% in the case of measures targeting SMEs located in assisted areas.

4.3.5 Profit-driven character of investment decisions

The risk capital measure must ensure that decisions to invest into target companies are profit-driven. This is the case where the motivation to effect the investment is based on the prospects of a significant profit potential and constant assistance to target companies for this purpose. This criterion is considered to be met if all the following conditions are fulfilled:

- (a) by measures with significant involvement of private investors as described in section 4.3.4, providing investments being invested on a commercial basis (that is, only for profit) directly or indirectly in the equity of the target enterprises; and
- (b) by the existence of a business plan for each investment containing details of product, sales and profitability development and establishing the ex ante viability of the project; and
- (c) by the existence of a clear and realistic exit strategy for each investment.

4.3.6 Commercial management

The management of a risk capital measure or fund must be effected on a commercial basis. The management team must behave as managers in the private sector, seeking to optimise the return for their investors. This criterion is considered to be present where all the following conditions are fulfilled:

- (a) there is an agreement between a professional fund manager or a management company and participants in the fund, providing that the manager's remuneration is linked to performance and setting out the objectives of the fund and proposed timing of investments; and
- (b) private market investors are represented in decision-making, such as through an investors' or advisory committee; and

(c) best practices and regulatory supervision apply to the management of funds.

4.3.7 Sectoral focus

To the extent that many private sector funds focus on specific innovative technologies or even sectors (such as health, information technology, biotechnology) the Commission may accept a sectoral focus for risk capital measures, provided the measure falls within the scope of these guidelines as set out in section 2.1.

5 COMPATIBILITY OF RISK CAPITAL AID MEASURES SUBJECT TO A DETAILED ASSESSMENT

This section applies to risk capital measures which do not satisfy all the conditions laid down in section 4. A more detailed compatibility assessment based on the balancing test outlined in section 1.3 is necessary for these measures due to the need to ensure the targeting of the relevant market failure and due to the higher risks of potential crowding-out of private investors and of distortion of competition.

The analysis of compatibility of the measures with the Treaty will be based on a number of positive and negative elements. No single element is determinant, nor can any set of elements be regarded as sufficient on its own to ensure compatibility. In some cases their applicability, and the weight attached to them, may depend on the form of the measure.

Member States will have to provide all the elements and the evidence they consider useful for the assessment of a measure. The level of evidence required and the Commission assessment will depend on the features of each case and will be proportionate to the level of market failure tackled and to the risk of crowding out private investment.

5.1 Aid measures subject to a detailed assessment

The following list of types of risk capital measures not complying with one or more of the conditions set out in section 4 will be subject to a more detailed assessment given the less obvious evidence of a market failure and the higher potential for crowding out of private investment and/or distortion of competition.

(a) Measures providing for investment tranches beyond the safe-harbour threshold of EUR 1.5 million per target SME over each period of twelve months

The Commission is aware of the constant fluctuation of the risk capital market and of the equity gap over time, as well as of the different degree by which enterprises are affected by the market failure depending on their size, on their stage of business development, and on their economic sector. Therefore, the Commission is prepared to consider the authorisation of risk capital measures providing for investment tranches exceeding the threshold of EUR 1.5 million per enterprise per year provided the necessary evidence of the market failure is submitted.

(b) Measures providing finance for the expansion stage for medium-sized enterprises in non-assisted areas

The Commission recognises that certain medium-sized enterprises in non-assisted areas may have insufficient access to risk capital even in their expansion stage despite the

availability of finance to enterprises having a significant turnover and/or total balance. Therefore, the Commission is prepared to consider the authorisation of measures partly covering the expansion stage of medium-sized enterprises in certain cases provided the necessary evidence is submitted.

(c) Measures providing for follow-on investments into target companies that already received aided capital injections to fund subsequent financing rounds even beyond the general safe-harbour thresholds and the companies' early-growth financing

The Commission recognises the importance of follow-on investments into target companies that already received aided capital injections in their early stages to finance financing rounds even beyond the maximum safe-harbour investment tranches and the companies' early-growth financing up to the exit of the initial investment. This may be necessary to avoid dilution of the public participation in these financing rounds while ensuring continuity of financing for the target enterprises so that both public and private investors can fully benefit from the risky investments. In these circumstances and taking into account the specificities of the targeted sector and enterprises, the Commission is prepared to consider the authorisation of follow-on investment provided the amount of this investment is consistent with the initial investment and with the size of the fund.

(d) Measures providing for a minimum participation by private investors below 50% in non-assisted areas or below 30% in assisted areas

In the Community the level of development of the private risk capital market varies to a significant extent in the various Member States. In some cases, it might be difficult for the State to find private investors, and therefore the Commission is prepared to consider the authorisation of measures with a private participation below the thresholds set out in section 4.3.4 if Member States submit the necessary evidence. This problem may be even greater for risk capital measures targeting SMEs in assisted areas. In these cases there may be an additional shortage of capital available for them given their remote location from venture capital centres, the lower population density, and the increased risk-aversion of private investors. These SMEs may also be affected by demand-side issues such as the difficulty in drawing up a viable, investment-ready business proposition, a more limited equity culture, and particular reluctance to lose management control as a result of venture capital intervention.

(e) Measures providing seed capital to small enterprises which may foresee (i) less or no private participation by private investors, and/or (ii) predominance of debt investment instruments as opposed to equity and quasi-equity

The market failures affecting enterprises in their seed stage are more pronounced due to the high degree of risk involved by the potential investment and the need to closely mentor the entrepreneur in this crucial phase. This is also reflected by the reluctance and near absence of private investors to provide seed capital, which implies no or very limited risk of crowding-out. Furthermore, there is reduced potential for distortion of competition due to the significant distance from the market of these small-size enterprises. These reasons may justify a more favourable stance of the Commission towards measures

targeting the seed stage, also in light of their potentially crucial importance to generate growth and jobs in the Community.

(f) Measures specifically involving an investment vehicle

An investment vehicle may facilitate the matching between investors and target SMEs for which it may therefore improve the access to risk capital. In case of market failures related to the enterprises targeted by the vehicle, the vehicle may not function efficiently without financial incentives. For instance, investors may not find the type of investments targeted by the vehicle attractive compared to investments of higher tranches of investments or investments in more established enterprises or more established market places, despite a clear potential for profitability of the target enterprises. Therefore, the Commission is prepared to consider measures specifically involving an investment vehicle provided the necessary evidence for a clearly defined market failure is submitted.

(g) Costs linked to the first screening of companies in view of the conclusion of the investments, up to the due diligence phase (“scouting costs”)

Risk capital funds or their managers may incur ‘scouting costs’ in identifying SMEs, prior to the due diligence phase. Grants covering part of these scouting costs must encourage the funds or their managers to carry out more ‘scouting’ activities than would otherwise be the case. This may also be beneficial for the SMEs concerned, even if the search does not lead to an investment, since it enables those SMEs to acquire more experience with risk capital financing. These reasons may justify a more favourable stance of the Commission towards grants covering part of the scouting costs of risk capital funds or their managers, subject to the following conditions: The eligible costs must be limited to the scouting costs related to SMEs mainly in their seed or start-up stage, where such costs do not lead to investment, and the costs must exclude legal and administrative costs of the funds. In addition, the grant must not exceed 50% of the eligible costs.

5.2 Positive effects of the aid

5.2.1 Existence and evidence of market failure

For risk capital measures envisaging investment tranches into target enterprises beyond the conditions laid down in section 4, in particular those providing for tranches above EUR 1.5 million per target SME over each period of twelve months, follow-on investments or financing of the expansion stage for medium-sized enterprises in non-assisted areas as well as for measures specifically involving an investment vehicle, the Commission will require additional evidence of the market failure being tackled at each level where aid may be present before declaring the proposed risk capital measure compatible. Such evidence must be based on a study showing the level of the ‘equity gap’ with regard to the enterprises and sectors targeted by the risk capital measure. The relevant information concerns the supply of risk capital and the fundraising capital, as well as the significance of the venture capital industry in the local economy. It should ideally be provided for periods of three to five years preceding the implementation of the measure and also for the future, on the basis of reasonable projections, if available. The evidence submitted could also include the following elements:

- (a) development of the fundraising over the past five years, also in comparison with the correspondent national and/or European averages;

- (b) the current overhang of money;
- (c) the share of government aided investment programs in the total venture capital investment over the preceding three to five years;
- (d) the percentage of new start-ups receiving venture capital;
- (e) the distribution of investments by categories of amount of investment;
- (f) a comparison of the number of business plans presented with the number of investments made by segment (amount of investment, sector, round of financing, etc.).

For measures targeting SMEs located in assisted areas, the relevant information must be supplemented by any other relevant evidence proving the regional specificities which justify the features of the measure envisaged. The following elements may be relevant:

- (a) estimation of the additional size of the equity gap caused by the peripherality and other regional specificities, in particular in terms of total amount of risk capital invested, number of funds or investment vehicles present in the territory or at a short distance, availability of skilled managers, number of deals and average and minimum size of deals if available;
- (b) specific local economic data, social and/or historic reasons for an underprovision of risk capital, in comparison with the relevant average data and/or situation at national and/or Community level as appropriate;
- (c) any other relevant indicator showing an increased degree of market failure.

Member States may resubmit the same evidence several times provided that the underlying market conditions have not changed. The Commission reserves the right to question the validity of the submitted evidence.

5.2.2 Appropriateness of the instrument

An important element in the balancing test is whether and to what extent State aid in the field of risk capital can be considered as an appropriate instrument to encourage private risk capital investment. This assessment is closely related to the assessment of the incentive effect and the necessity of aid, as set out in section 5.2.3.

In its detailed assessment, the Commission will take particular account of any impact assessment of the proposed measure which the Member State has made. Where the Member State has considered other policy options and the advantages of using a selective instrument such as State aid have been established and submitted to the Commission, the measures concerned are considered to constitute an appropriate instrument. The Commission will also assess evidence of other measures taken or to be taken to address the 'equity gap' notably ex post evaluations and both supply and demand side issues affecting the targeted SMEs, to see how they would interact with the proposed risk capital measure.

5.2.3 Incentive effect and necessity of aid

The incentive effect of the risk capital aid measures plays a crucial role in the compatibility assessment. The Commission believes that the incentive effect is present for measures meeting all the conditions in section 4. However, as for the measures covered in this section the presence of the incentive effect becomes less obvious. Therefore, the Commission will also take into account the following additional criteria showing the profit-driven character of investment decisions and the commercial management of the measure, where relevant.

5.2.3.1 Commercial management

In addition to the conditions laid down in 4.3.6 the Commission will consider it positively that the risk capital measure or fund is managed by professionals from the private sector or by independent professionals chosen according to a transparent, non discriminatory procedure, preferably an open tender, with proven experience and a track record in capital market investments ideally in the same sector(s) targeted by the fund, as well as an understanding of the relevant legal and accounting background for the investment.

5.2.3.2 Presence of an investment committee

A further positive element would be the existence of an investment committee, independent of the fund management company and composed of independent experts coming from the private sector with significant experience in the targeted sector, and preferably also of representatives of investors, or independent experts chosen according to a transparent, non discriminatory procedure, preferably an open tender. These experts would provide the managers or management company with analyses of the existing and the expected future market situation and would scrutinise and propose to them potential target enterprises with good investment prospects.

5.2.3.3 Size of the measure/fund

The Commission will consider it positively where a risk capital measure has a budget for investments into target SMEs of a sufficient size to take advantage of economies of scale in administering a fund and the possibility of diversifying risk via a pool of a sufficient number of investments. The size of the fund should safeguard a likelihood of absorption of the high transaction costs and/or to finance the latter, more profitable financing stages of target companies. The size of the risk capital measure will be considered positively also taking into account the sector targeted, and provided the risks of crowding-out private investment and distorting competition are minimised.

5.2.3.4 Presence of business angels

For measures targeting seed capital, in view of the more pronounced level of market failure that can be perceived in this phase, the Commission will consider positively the direct or indirect involvement of business angels in investments in the seed stage. In such circumstances, it is therefore prepared to consider the authorisation of measures which may foresee a predominance of debt instruments, including a higher degree of subordination of the State funds and a right of first profit for business angels or higher remuneration for their provision of capital and active involvement in the management of the measure/fund and/or of the target enterprises.

5.2.4 Proportionality

Compatibility requires that the aid amount is limited to the minimum necessary. The way to achieve this aspect of proportionality will necessarily depend on the form of the measure in question. However in the absence of any mechanism to check that investors are not overcompensated, or a measure where the risk of losses is borne entirely by the public sector and/or where the benefits flow entirely to the other investors, the measure will not be considered proportionate.

The Commission will consider that the following elements positively influence the assessment of proportionality as they represent a best-practice approach:

- (a) **Open tender for managers.** A transparent, non-discriminatory open tender for the choice of the managers or management company ensuring the best combination of quality and value for money will be considered positively, as it will limit the cost (and possibly aid) level at the minimum necessary and will also minimise distortion of competition.
- (b) **Call for tender or public invitation to investors.** A call for tender for the establishment of any “preferential terms” given to investors, or the availability of any such terms to other investors. This availability might take the form of a public invitation to investors at the launch of an investment fund or investment vehicle, or might take the form of a scheme (such as a guarantee scheme) which remained open to new entrants over an extended period.

5.3 Negative effects of the aid

The Commission will balance the potential negative effects in terms of distortion of competition and risk of crowding-out private investment against the positive effects when assessing the compatibility of risk capital measures. These potentially negative effects will have to be analysed at each of the three levels where aid may be present. Aid to investors, to investment vehicles and to investment funds may negatively affect competition in the market for the provision of risk capital. Aid to target enterprises may negatively affect the product markets on which these enterprises compete.

5.3.1 Crowding-out

At the level of the market for the provision of risk capital, State aid may result in crowding out private investment. This might reduce the incentives of private investors to provide funding for target SMEs and encourage them to wait until the State provides aid for such investments. This risk becomes more relevant, the higher the amount of an investment tranche invested into an enterprise, the larger the size of an enterprise, and the later the business stage, as private risk capital becomes progressively available in these circumstances.

Therefore, the Commission will require specific evidence regarding the risk of crowding-out for measures providing for larger investment tranches in target SMEs, for follow-on investments or for financing of the expansion stage in medium-sized enterprises in non-assisted areas or for measures with low participation by private investors or measures involving specifically an investment vehicle.

In addition, Member States will have to provide evidence to show that there is no risk of crowding-out, specifically concerning the targeted segment, sector and/or industry structure.

The following elements may be relevant:

- (a) the number of venture capital firms/funds/investment vehicles present at national level or in the area in case of a regional fund and the segments in which they are active;
- (b) the targeted enterprises in terms of size of companies, growth stage, and business sector;

- (c) the average deal size and possibly the minimum deal size the funds or investors would scrutinise;
- (d) the total amount of venture capital available for the target enterprises, sector and stage targeted by the relevant measure.

5.3.2 Other distortions of competition

As most target SMEs are recently established, at the level of the market where they are present, it is unlikely that these SMEs will have significant market power and thus that there will be a significant distortion of competition in this respect. However, it can not be excluded that risk capital measures might have the effect of keeping inefficient firms or sectors afloat, which would otherwise disappear. Furthermore, an oversupply of risk capital funding to inefficient enterprises may artificially increase their valuation and thus distort the risk capital market at the level of fund providers, which would have to pay higher prices to buy these enterprises. Sector specific aid may also maintain production in non-competitive sectors, whereas region-specific aid may build up an inefficient allocation of production factors between regions.

In its analysis of these risks, the Commission will examine, in particular, the following factors:

- (a) overall profitability of the firms invested in over time and prospects of future profitability
- (b) rate of enterprise failure targeted by the measure;
- (c) maximum size of investment tranche envisaged by the measure as compared to the turnover and costs of the target SMEs;
- (d) overcapacity of the sector benefiting from the aid.

5.4 Balancing and decision

In the light of the above positive and negative elements, the Commission will balance the effects of the risk capital measure and determine whether the resulting distortions adversely affect trading conditions to an extent contrary to the common interest. The analysis in each particular case will be based on an overall assessment of the foreseeable positive and negative impact of the State aid. For that purpose the Commission will not use the criteria set out in these guidelines mechanically but will make an overall assessment of their relative importance.

The Commission may raise no objections to the notified aid measure without entering into the formal investigation procedure or, following the formal investigation procedure laid down in Article 6 of Regulation (EC) No 659/1999, it may close the procedure with a decision pursuant to Article 7 of that Regulation. If it adopts a conditional decision pursuant to Article 7 (4) of Regulation (EC) No 659/1999 closing a formal investigation procedure, it may in particular attach the following conditions to limit the potential distortion of competition and ensure proportionality:

- (a) if higher thresholds of investment tranches per target enterprise are foreseen, it may lower the maximum amount proposed per investment tranche or set an overall maximum amount of finance per target enterprise;
- (b) if investments in the expansion stage in medium-sized enterprises in non-assisted areas are foreseen, it may limit investments predominantly to the seed and start-up

- stage and/or limit the investments to one or two rounds and/or limit the tranches to a maximum threshold per target enterprise;
- (c) if follow-on investment is foreseen, it may set specific limits to the maximum amount to be invested into each target enterprise, to the investment stage eligible for intervention, and/or to the period during which aid may be granted, having also regard to the sector concerned and to the size of the fund;
 - (d) if a lower participation of private investors is foreseen, it may require a progressive increase of the participation of private investors over the life of the fund, having particular regard to the business stage, the sector, the respective levels of profit-sharing and subordination, and possibly the localisation in assisted areas of the target enterprises;
 - (e) for measures providing seed capital only, it may require Member States to ensure that the State receives an adequate return on its investment commensurate with the risks incurred for these investments, in particular where the State finances the investment in the form of quasi-equity or debt instruments, the return on which should, for instance, be linked to potential rights of exploitation (for example, royalties) generated by intellectual property rights created as a result of the investment;
 - (f) require a different balancing between respective profit- and loss-sharing arrangements and level of subordination between the State and private investors;
 - (g) require more stringent commitments as regards cumulation of risk capital aid with aid granted under other State aid regulations or frameworks, by way of derogation from section 6.

6 CUMULATION

Where capital provided to a target enterprise under a risk capital measure covered by these guidelines is used to finance initial investment or other costs eligible for aid under other block exemption regulations, guidelines, frameworks, or other State aid documents, the relevant aid ceilings or maximum eligible amounts will be reduced by 50% in general and by 20% for target enterprises located in assisted areas during the first three years of the first risk capital investment and up to the total amount received. This reduction does not apply to aid intensities provided for in the Community Framework for State aid for Research and Development¹⁷ or any successor framework or block exemption regulation in this field.

7 FINAL PROVISIONS

7.1 Monitoring and reporting

Regulation (EC) No 659/1999 and Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty,¹⁸ require Member States to submit annual reports to the Commission.

In respect of risk capital measures the reports must contain a summary table with a breakdown of the investments effected by the fund or under the risk capital measure including a list of all

¹⁷ OJ C 45, 17.2.1996, p 5.

¹⁸ OJ L 140, 30.4.2004, p. 1.

the enterprise beneficiaries of risk capital measures. The report must also give a brief description of the activity of investments funds with details of potential deals scrutinised and of the transactions actually undertaken as well as the performance of investment vehicles with aggregate information about the amount of capital raised through the vehicle. The Commission may request additional information regarding the aid granted, to check whether the conditions of the Commission's decision approving the aid measure have been respected.

The annual reports will be published on the internet site of the Commission.

In addition, the Commission considers that further measures are necessary to improve the transparency of State aid in the Community. In particular, it appears necessary to ensure that the Member States, economic operators, interested parties and the Commission itself have easy access to the full text of all applicable risk capital aid schemes.

This can easily be achieved through the establishment of linked internet sites. For this reason, when examining risk capital aid schemes, the Commission will systematically require the Member State concerned to publish the full text of all final aid schemes on the internet and to communicate the internet address of the publication to the Commission.

The scheme must not be applied before the information is published on the internet.

Member States must maintain detailed records regarding the granting of aid for all risk capital measures. Such records, which must contain all information necessary to establish that the conditions laid down in the guidelines have been observed, notably as regards the size of the tranche, the size of the company (small or medium-sized), the development stage of the company (seed, start-up or expansion), its sector of activity (preferably at 4 digit level of the NACE classification) as well as information on the management of the funds and on the other criteria mentioned in these guidelines. This information must be maintained for 10 years from the date on which the aid is granted.

The Commission will ask Member States to provide this information in order to carry out an impact assessment of these guidelines three years after their entry into force.

7.2 Entry into force and validity

The Commission will apply these guidelines from the date of their publication in the Official Journal of the European Union. These guidelines will replace the 2001 Communication on State aid and risk capital

These guidelines will cease to be valid on 31 December 2013. After consulting Member States, the Commission may amend it before that date on the basis of important competition policy or risk capital policy considerations or in order to take account of other Community policies or international commitments. Where this would be helpful the Commission may also provide further clarifications of its approach to particular issues. The Commission intends to carry out a review of these guidelines three years after their entry into force.

The Commission will apply these guidelines to all notified risk capital measures in respect of which it must take a decision after the guidelines are published in the *Official Journal*, even where the measures were notified prior to their publication.

In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (“consecutio legis”)¹⁹, the Commission will apply the following in respect of non-notified aid:

- (a) these guidelines, if the aid was granted after their publication in the Official Journal of the European Union;
- (b) the Communication on State aid and risk capital (SARC) in all other cases.

7.3 Appropriate Measures

The Commission hereby proposes to Member States, on the basis of Article 88(1) of the EC Treaty, the following appropriate measures concerning their respective existing risk capital measures.

Member States should amend, where necessary, their existing risk capital measures in order to bring them into line with these guidelines within twelve months after the publication of the guidelines.

The Member States are invited to give their explicit unconditional agreement to these proposed appropriate measures within two months from the date of publication of these guidelines. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

¹⁹ OJ C 119, 22.5.2002, p. 22.



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 24 July 2006
(OR. en)**

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**COMPET 152
SOC 294
JUSTCIV 141
CODEC 569**

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: COMMON POSITION adopted by the Council on 24 July 2006 with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market

DIRECTIVE 2006/.../EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

on services in the internal market

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the first and third sentence of Article 47(2) and Article 55 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty³,

¹ OJ C 221, 8.9.2005, p. 113.

² OJ C 43, 18.2.2005, p. 18.

³ Opinion of the European Parliament of 16 February 2006 (not yet published in the Official Journal). Council Common Position of ... (not yet published in the Official Journal) and Position of the European Parliament of ... (not yet published in the Official Journal).

Whereas:

- (1) The European Community is seeking to forge ever closer links between the States and peoples of Europe and to ensure economic and social progress. In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of services is ensured. In accordance with Article 43 of the Treaty the freedom of establishment is ensured. Article 49 of the Treaty establishes the right to provide services within the Community. The elimination of barriers to the development of service activities between Member States is essential in order to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress. In eliminating such barriers it is essential to ensure that the development of service activities contributes to the fulfilment of the task laid down in Article 2 of the Treaty of promoting throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life and economic and social cohesion and solidarity among Member States.

- (2) A competitive market in services is essential in order to promote economic growth and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises (SMEs), from extending their operations beyond their national borders and from taking full advantage of the internal market. This weakens the worldwide competitiveness of European Union providers. A free market which compels the Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.
- (3) The report from the Commission on "The State of the Internal Market for Services" drew up an inventory of a large number of barriers which are preventing or slowing down the development of services between Member States, in particular those provided by SMEs, which are predominant in the field of services. The report concludes that a decade after the envisaged completion of the internal market, there is still a huge gap between the vision of an integrated European Union economy and the reality as experienced by European citizens and providers. The barriers affect a wide variety of service activities across all stages of the provider's activity and have a number of common features, including the fact that they often arise from administrative burdens, the legal uncertainty associated with cross-border activity and the lack of mutual trust between Member States.

- (4) Since services constitute the engine of economic growth and account for 70% of GDP and employment in most Member States, this fragmentation of the internal market has a negative impact on the entire European economy, in particular on the competitiveness of SMEs and the movement of workers, and prevents consumers from gaining access to a greater variety of competitively priced services. It is important to point out that the services sector is a key employment sector for women in particular, and that they therefore stand to benefit greatly from new opportunities offered by the completion of the internal market for services. The European Parliament and the Council have emphasised that the removal of legal barriers to the establishment of a genuine internal market is a matter of priority for achieving the goal set by the European Council in Lisbon of 23 and 24 March 2000 of improving employment and social cohesion and achieving sustainable economic growth so as to make the European Union the most competitive and dynamic knowledge-based economy in the world by 2010, with more and better jobs. Removing those barriers, while ensuring an advanced European social model, is thus a basic condition for overcoming the difficulties encountered in implementing the Lisbon Strategy and for reviving the European economy, particularly in terms of employment and investment. It is therefore important to achieve an internal market for services, with the right balance between market opening and preserving public services and social and consumer rights.

- (5) It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty. Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the free movement of services. Providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State.
- (6) Those barriers cannot be removed solely by relying on direct application of Articles 43 and 49 of the Treaty, since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation. As the European Parliament and the Council have recognised, a Community legislative instrument makes it possible to achieve a genuine internal market for services.

- (7) This Directive establishes a general legal framework which benefits a wide variety of services while taking into account the distinctive features of each type of activity or profession and its system of regulation. That framework is based on a dynamic and selective approach consisting in the removal, as a matter of priority, of barriers which may be dismantled quickly and, for the others, the launching of a process of evaluation, consultation and complementary harmonisation of specific issues, which will make possible the progressive and coordinated modernisation of national regulatory systems for service activities which is vital in order to achieve a genuine internal market for services by 2010. Provision should be made for a balanced mix of measures involving targeted harmonisation, administrative cooperation, the provision on the freedom to provide services and encouragement of the development of codes of conduct on certain issues. That coordination of national legislative regimes should ensure a high degree of Community legal integration and a high level of protection of general interest objectives, especially protection of consumers, which is vital in order to establish trust between Member States. This Directive also takes into account other general interest objectives, including the protection of the environment, public security and public health as well as the need to comply with labour law.
- (8) It is appropriate that the provisions of this Directive concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States either to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services.

- (9) This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.
- (10) This Directive does not concern requirements governing access to public funds for certain providers. Such requirements include notably those laying down conditions under which providers are entitled to receive public funding, including specific contractual conditions, and in particular quality standards which need to be observed as a condition for receiving public funds, for example for social services.
- (11) This Directive does not interfere with measures taken by Member States, in accordance with Community law, in relation to the protection or promotion of cultural and linguistic diversity and media pluralism, including the funding thereof. This Directive does not prevent Member States from applying their fundamental rules and principles relating to the freedom of press and freedom of expression. This Directive does not affect Member State laws prohibiting discrimination on grounds of nationality or on grounds such as those set out in Article 13 of the Treaty.

- (12) This Directive aims at creating a legal framework to ensure the freedom of establishment and the free movement of services between the Member States and does not harmonise or prejudice criminal law. However, Member States should not be able to restrict the freedom to provide services by applying criminal law provisions which specifically affect the access to or the exercise of a service activity in circumvention of the rules laid down in this Directive.
- (13) It is equally important that this Directive fully respect Community initiatives based on Article 137 of the Treaty with a view to achieving the objectives of Article 136 thereof concerning the promotion of employment and improved living and working conditions.
- (14) This Directive does not affect terms and conditions of employment, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work, which Member States apply in compliance with Community law, nor does it affect relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law, nor does it apply to services provided by temporary work agencies. This Directive does not affect Member States' social security legislation.

- (15) This Directive respects the exercise of fundamental rights applicable in the Member States and as recognised in the Charter of fundamental Rights of the European Union and the accompanying explanations, reconciling them with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty. Those fundamental rights include the right to take industrial action in accordance with national law and practices which respect Community law.
- (16) This Directive concerns only providers established in a Member State and does not cover external aspects. It does not concern negotiations within international organisations on trade in services, in particular in the framework of the General Agreement on Trade in Services (GATS).
- (17) This Directive covers only services which are performed for an economic consideration. Services of general interest are not covered by the definition in Article 50 of the Treaty and therefore do not fall within the scope of this Directive. Services of general economic interest are services that are performed for an economic consideration and therefore do fall within the scope of this Directive. However, certain services of general economic interest, such as those that may exist in the field of transport, are excluded from the scope of this Directive and certain other services of general economic interest, for example, those that may exist in the area of postal services, are the subject of a derogation from the provision on the freedom to provide services set out in this Directive. This Directive does not deal with the funding of services of general economic interest and does not apply to systems of aids granted by Member States, in particular in the social field, in accordance with Community rules on competition. This Directive does not deal with the follow-up to the Commission White Paper on Services of General Interest.

- (18) Financial services should be excluded from the scope of this Directive since these activities are the subject of specific Community legislation aimed, as is this Directive, at achieving a genuine internal market for services. Consequently, this exclusion should cover all financial services such as banking, credit, insurance, including reinsurance, occupational or personal pensions, securities, investment funds, payments and investment advice, including the services listed in Annex I to Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions^{*1}.
- (19) In view of the adoption in 2002 of a package of legislative instruments relating to electronic communications networks and services, as well as to associated resources and services, which has established a regulatory framework facilitating access to those activities within the internal market, notably through the elimination of most individual authorisation schemes, it is necessary to exclude issues dealt with by those instruments from the scope of this Directive.

* Note for the OJ: Please insert the OJ reference of Directive 2006/48/EC.

¹ OJ L ...

(20) The exclusion from the scope of this Directive as regards matters of electronic communications services as covered by Directives 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)¹, 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)², 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)³, 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)⁴ and 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)⁵ should apply not only to questions specifically dealt with in these Directives but also to matters for which the Directives explicitly leave to Member States the possibility of adopting certain measures at national level.

¹ OJ L 108, 24.4.2002, p. 7.

² OJ L 108, 24.4.2002, p. 21.

³ OJ L 108, 24.4.2002, p. 33.

⁴ OJ L 108, 24.4.2002, p. 51.

⁵ OJ L 201, 31.7.2002, p. 37. Directive as amended by Directive 2006/24/EC (OJ L 105, 13.4.2006, p. 54).

- (21) Transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive.
- (22) The exclusion of healthcare from the scope of this Directive should cover healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided.
- (23) This Directive does not affect the reimbursement of healthcare provided in a Member State other than that in which the recipient of the care is resident. This issue has been addressed by the Court of Justice on numerous occasions, and the Court has recognised patients' rights. It is important to address this issue in another Community legal instrument in order to achieve greater legal certainty and clarity to the extent that this issue is not already addressed in Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community¹.
- (24) Audiovisual services, whatever their mode of transmission, including within cinemas, should also be excluded from the scope of this Directive. Furthermore, this Directive should not apply to aids granted by Member States in the audiovisual sector which are covered by Community rules on competition.
- (25) Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection.
- (26) This Directive is without prejudice to the application of Article 45 of the Treaty.

¹ OJ L 149, 5.7.1971, p. 2. Regulation as last amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council (OJ L 114, 27.4.2006, p. 1).

- (27) This Directive should not cover those social services in the areas of housing, childcare and support to families and persons in need which are provided by the State at national, regional or local level by providers mandated by the State or by charities recognised as such by the State with the objective of ensuring support for those who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalised. These services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by this Directive.
- (28) This Directive does not deal with the funding of, or the system of aids linked to, social services. Nor does it affect the criteria or conditions set by Member States to ensure that social services effectively carry out a function to the benefit of the public interest and social cohesion. In addition, this Directive should not affect the principle of universal service in Member States' social services.
- (29) Given that the Treaty provides specific legal bases for taxation matters and given the Community instruments already adopted in that field, it is necessary to exclude the field of taxation from the scope of this Directive.

- (30) There is already a considerable body of Community law on service activities. This Directive builds on, and thus complements, the Community acquis. Conflicts between this Directive and other Community instruments have been identified and are addressed by this Directive, including by means of derogations. However, it is necessary to provide a rule for any residual and exceptional cases where there is a conflict between a provision of this Directive and a provision of another Community instrument. The existence of such a conflict should be determined in compliance with the rules of the Treaty on the right of establishment and the free movement of services.
- (31) This Directive is consistent with and does not affect Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications¹. It deals with questions other than those relating to professional qualifications, for example professional liability insurance, commercial communications, multidisciplinary activities and administrative simplification. With regard to temporary cross-border service provision, a derogation from the provision on the freedom to provide services in this Directive ensures that Title II on the free provision of services of Directive 2005/36/EC is not affected. Therefore, none of the measures applicable under that Directive in the Member State where the service is provided is affected by the provision on the freedom to provide services.

¹ OJ L 255, 30.9.2005, p. 22.

- (32) This Directive is consistent with Community legislation on consumer protection, such as Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the Unfair Commercial Practices Directive)¹ and Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)².
- (33) The services covered by this Directive concern a wide variety of ever-changing activities, including business services such as management consultancy, certification and testing; facilities management, including office maintenance; advertising; recruitment services; and the services of commercial agents. The services covered are also services provided both to businesses and to consumers, such as legal or fiscal advice; real estate services such as estate agencies; construction, including the services of architects; distributive trades; the organisation of trade fairs; car rental; and travel agencies. Consumer services are also covered, such as those in the field of tourism, including tour guides; leisure services, sports centres and amusement parks; and, to the extent that they are not excluded from the scope of application of the Directive, household support services, such as help for the elderly. Those activities may involve services requiring the proximity of provider and recipient, services requiring travel by the recipient or the provider and services which may be provided at a distance, including via the Internet.

¹ OJ L 149, 11.6.2005, p. 22.

² OJ L 364, 9.12.2004, p. 1. Regulation as amended by Directive 2005/29/EC.

- (34) According to the case-law of the Court of Justice, the assessment of whether certain activities, in particular activities which are publicly funded or provided by public entities, constitute a "service" has to be carried out on a case by case basis in the light of all their characteristics, in particular the way they are provided, organised and financed in the Member State concerned. The Court of Justice has held that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the services in question and has recognised that the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State or on behalf of the State in the context of its duties in the social, cultural, educational and judicial fields, such as courses provided under the national education system, or the management of social security schemes which do not engage in economic activity. The payment of a fee by recipients, for example, a tuition or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system, does not in itself constitute remuneration because the service is still essentially financed by public funds. These activities are, therefore, not covered by the definition of service in Article 50 of the Treaty and do not therefore fall within the scope of this Directive.
- (35) Non-profit making amateur sporting activities are of considerable social importance. They often pursue wholly social or recreational objectives. Thus, they might not constitute economic activities within the meaning of Community law and should fall outside the scope of this Directive.

(36) The concept of "provider" should cover any natural person who is a national of a Member State or any legal person engaged in a service activity in a Member State, in exercise either of the freedom of establishment or of the free movement of services. The concept of provider should thus not be limited solely to cross-border service provision within the framework of the free movement of services but should also cover cases in which an operator establishes itself in a Member State in order to develop its service activities there. On the other hand, the concept of a provider should not cover the case of branches in a Member State of companies from third countries because, under Article 48 of the Treaty, the freedom of establishment and free movement of services may benefit only companies constituted in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community. The concept of "recipient" should also cover third country nationals who already benefit from rights conferred upon them by Community acts such as Regulation (EEC) No 1408/71, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents¹, Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality² and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States³. Furthermore, Member States may extend the concept of recipient to other third country nationals that are present within their territory.

¹ OJ L 16, 23.1.2004, p. 44.

² OJ L 124, 20.5.2003, p. 1.

³ OJ L 158, 30.4.2004, p. 77.

- (37) The place at which a provider is established should be determined in accordance with the case law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. This requirement may also be fulfilled where a company is constituted for a given period or where it rents the building or installation through which it pursues its activity. It may also be fulfilled where a Member State grants authorisations for a limited duration only in relation to particular services. An establishment does not need to take the form of a subsidiary, branch or agency, but may consist of an office managed by a provider's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency. According to this definition, which requires the actual pursuit of an economic activity at the place of establishment of the provider, a mere letter box does not constitute an establishment. Where a provider has several places of establishment, it is important to determine the place of establishment from which the actual service concerned is provided. Where it is difficult to determine from which of several places of establishment a given service is provided, the location of the provider's centre of activities relating to this particular service should be that place of establishment.
- (38) The concept of "legal persons", according to the Treaty provisions on establishment, leaves operators free to choose the legal form which they deem suitable for carrying out their activity. Accordingly, "legal persons", within the meaning of the Treaty, means all entities constituted under, or governed by, the law of a Member State, irrespective of their legal form.

- (39) The concept of "authorisation scheme" should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.
- (40) The concept of "overriding reasons relating to the public interest" to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.

- (41) The concept of "public policy", as interpreted by the Court of Justice, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. Similarly, the concept of public security includes issues of public safety.
- (42) The rules relating to administrative procedures should not aim at harmonising administrative procedures but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings therefrom.

(43) One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, inter alia through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the "red tape" involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States.

- (44) Member States should introduce, where appropriate, forms harmonised at Community level, as established by the Commission, which will serve as an equivalent to certificates, attestations or any other document in relation to establishment.
- (45) In order to examine the need for simplifying procedures and formalities, Member States should be able, in particular, to take into account their necessity, number, possible duplication, cost, clarity and accessibility, as well as the delay and practical difficulties to which they could give rise for the provider concerned.
- (46) In order to facilitate access to service activities and the exercise thereof in the internal market, it is necessary to establish an objective, common to all Member States, of administrative simplification and to lay down provisions concerning, inter alia, the right to information, procedures by electronic means and the establishment of a framework for authorisation schemes. Other measures adopted at national level to meet that objective could involve reduction of the number of procedures and formalities applicable to service activities and the restriction of such procedures and formalities to those which are essential in order to achieve a general interest objective and which do not duplicate each other in terms of content or purpose.

- (47) With the aim of administrative simplification, general formal requirements, such as presentation of original documents, certified copies or a certified translation, should not be imposed, except where objectively justified by an overriding reason relating to the public interest, such as the protection of workers, public health, the protection of the environment or the protection of consumers. It is also necessary to ensure that an authorisation as a general rule permits access to, or exercise of, a service activity throughout the national territory, unless a new authorisation for each establishment, for example for each new hypermarket, or an authorisation that is restricted to a specific part of the national territory is objectively justified by an overriding reason relating to the public interest.
- (48) In order to further simplify administrative procedures, it is appropriate to ensure that each provider has a single point through which he can complete all procedures and formalities (hereinafter referred to as "points of single contact"). The number of points of single contact per Member State may vary according to regional or local competencies or according to the activities concerned. The creation of points of single contact should not interfere with the allocation of functions among competent authorities within each national system. Where several authorities at regional or local level are competent, one of them may assume the role of point of single contact and coordinator. Points of single contact may be set up not only by administrative authorities but also by chambers of commerce or crafts, or by the professional organisations or private bodies to which a Member State decides to entrust that function. Points of single contact have an important role to play in providing assistance to providers either as the authority directly competent to issue the documents necessary to access a service activity or as an intermediary between the provider and the authorities which are directly competent.

- (49) The fee which may be charged by points of single contact should be proportionate to the cost of the procedures and formalities with which they deal. This should not prevent Member States from entrusting the points of single contact with the collection of other administrative fees, such as the fee of supervisory bodies.
- (50) It is necessary for providers and recipients of services to have easy access to certain types of information. It should be for each Member State to determine, within the framework of this Directive, the way in which providers and recipients are provided with information. In particular, the obligation on Member States to ensure that relevant information is easily accessible to providers and recipients and that it can be accessed by the public without obstacle could be fulfilled by making this information accessible through a website. Any information given should be provided in a clear and unambiguous manner.
- (51) The information provided to providers and recipients of services should include, in particular, information on procedures and formalities, contact details of the competent authorities, conditions for access to public registers and data bases and information concerning available remedies and the contact details of associations and organisations from which providers or recipients can obtain practical assistance. The obligation on competent authorities to assist providers and recipients should not include the provision of legal advice in individual cases. Nevertheless, general information on the way in which requirements are usually interpreted or applied should be given. Issues such as liability for providing incorrect or misleading information should be determined by Member States.

- (52) The setting up, in the reasonably near future, of electronic means of completing procedures and formalities will be vital for administrative simplification in the field of service activities, for the benefit of providers, recipients and competent authorities. In order to meet that obligation as to results, national laws and other rules applicable to services may need to be adapted. This obligation should not prevent Member States from providing other means of completing such procedures and formalities, in addition to electronic means. The fact that it must be possible to complete those procedures and formalities at a distance means, in particular, that Member States must ensure that they may be completed across borders. The obligation as to results does not cover procedures or formalities which by their very nature are impossible to complete at a distance. Furthermore, this does not interfere with Member States' legislation on the use of languages.
- (53) The granting of licences for certain service activities may require an interview with the applicant by the competent authority in order to assess the applicant's personal integrity and suitability for carrying out the service in question. In such cases, the completion of formalities by electronic means may not be appropriate.

- (54) The possibility of gaining access to a service activity should be made subject to authorisation by the competent authorities only if that decision satisfies the criteria of non-discrimination, necessity and proportionality. That means, in particular, that authorisation schemes should be permissible only where an a posteriori inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned a posteriori, due account being taken of the risks and dangers which could arise in the absence of a prior inspection. However, the provision to that effect made by this Directive cannot be relied upon in order to justify authorisation schemes which are prohibited by other Community instruments such as Directive 1999/93/EC of the European Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures¹, or Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce)². The results of the process of mutual evaluation will make it possible to determine, at Community level, the types of activity for which authorisation schemes should be eliminated.
- (55) This Directive should be without prejudice to the possibility for Member States to withdraw authorisations after they have been issued, if the conditions for the granting of the authorisation are no longer fulfilled.

¹ OJ L 13, 19.1.2000, p. 12.

² OJ L 178, 17.7.2000, p. 1.

- (56) According to the case law of the Court of Justice, public health, consumer protection, animal health and the protection of the urban environment constitute overriding reasons relating to the public interest. Such overriding reasons may justify the application of authorisation schemes and other restrictions. However, no such authorisation scheme or restriction should discriminate on grounds of nationality. Further, the principles of necessity and proportionality should always be respected.
- (57) The provisions of this Directive relating to authorisation schemes should concern cases where the access to or exercise of a service activity by operators requires a decision by a competent authority. This concerns neither decisions by competent authorities to set up a public or private entity for the provision of a particular service nor the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurement, since this Directive does not deal with rules on public procurement.
- (58) In order to facilitate access to and exercise of service activities, it is important to evaluate and report on authorisation schemes and their justification. This reporting obligation concerns only the existence of authorisation schemes and not the criteria and conditions for the granting of an authorisation.
- (59) The authorisation should as a general rule enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, unless a territorial limit is justified by an overriding reason relating to the public interest. For example, environmental protection may justify the requirement to obtain an individual authorisation for each installation on the national territory. This provision should not affect regional or local competences for the granting of authorisations within the Member States.

- (60) This Directive, and in particular the provisions concerning authorisation schemes and the territorial scope of an authorisation, should not interfere with the division of regional or local competences within the Member States, including regional and local self-government and the use of official languages.
- (61) The provision relating to the non-duplication of conditions for the granting of an authorisation should not prevent Member States from applying their own conditions as specified in the authorisation scheme. It should only require that competent authorities, when considering whether these conditions are met by the applicant, take into account the equivalent conditions which have already been satisfied by the applicant in another Member State. This provision should not require the application of the conditions for the granting of an authorisation provided for in the authorisation scheme of another Member State.
- (62) Where the number of authorisations available for an activity is limited because of scarcity of natural resources or technical capacity, a procedure for selection from among several potential candidates should be adopted with the aim of developing through open competition the quality and conditions for supply of services available to users. Such a procedure should provide guarantees of transparency and impartiality and the authorisation thus granted should not have an excessive duration, be subject to automatic renewal or confer any advantage on the provider whose authorisation has just expired. In particular, the duration of the authorisation granted should be fixed in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to make a fair return on the capital invested. This provision should not prevent Member States from limiting the number of authorisations for reasons other than scarcity of natural resources or technical capacity. These authorisations should remain in any case subject to the other provisions of this Directive relating to authorisation schemes.

- (63) In the absence of different arrangements, failing a response within a time period, an authorisation should be deemed to have been granted. However, different arrangements may be put in place in respect of certain activities, where objectively justified by overriding reasons relating to the public interest, including a legitimate interest of third parties. Such different arrangements could include national rules according to which, in the absence of a response of the competent authority, the application is deemed to have been rejected, this rejection being open to challenge before the courts.
- (64) In order to establish a genuine internal market for services, it is necessary to abolish any restrictions on the freedom of establishment and the free movement of services which are still enshrined in the laws of certain Member States and which are incompatible with Articles 43 and 49 of the Treaty respectively. The restrictions to be prohibited particularly affect the internal market for services and should be systematically dismantled as soon as possible.

- (65) Freedom of establishment is predicated, in particular, upon the principle of equal treatment, which entails the prohibition not only of any discrimination on grounds of nationality but also of any indirect discrimination based on other grounds but capable of producing the same result. Thus, access to a service activity or the exercise thereof in a Member State, either as a principal or secondary activity, should not be made subject to criteria such as place of establishment, residence, domicile or principal provision of the service activity. However, these criteria should not include requirements according to which a provider or one of his employees or a representative must be present during the exercise of the activity when this is justified by an overriding reason relating to the public interest. Furthermore, a Member State should not restrict the legal capacity or the right of companies, incorporated in accordance with the law of another Member State on whose territory they have their primary establishment, to bring legal proceedings. Moreover, a Member State should not be able to confer any advantages on providers having a particular national or local socio-economic link; nor should it be able to restrict, on grounds of place of establishment, the provider's freedom to acquire, exploit or dispose of rights and goods or to access different forms of credit or accommodation in so far as those choices are useful for access to his activity or for the effective exercise thereof.
- (66) Access to or the exercise of a service activity in the territory of a Member State should not be subject to an economic test. The prohibition of economic tests as a prerequisite for the grant of authorisation should cover economic tests as such, but not requirements which are objectively justified by overriding reasons relating to the public interest, such as the protection of the urban environment, social policy or public health. The prohibition should not affect the exercise of the powers of the authorities responsible for applying competition law.

- (67) With respect to financial guarantees or insurance, the prohibition of requirements should concern only the obligation that the requested financial guarantees or insurance must be obtained from a financial institution established in the Member State concerned.
- (68) With respect to pre-registration, the prohibition of requirements should concern only the obligation that the provider, prior to the establishment, be pre-registered for a given period in a register held in the Member State concerned.
- (69) In order to coordinate the modernisation of national rules and regulations in a manner consistent with the requirements of the internal market, it is necessary to evaluate certain non-discriminatory national requirements which, by their very nature, could severely restrict or even prevent access to an activity or the exercise thereof under the freedom of establishment. This evaluation process should be limited to the compatibility of these requirements with the criteria already established by the Court of Justice on the freedom of establishment. It should not concern the application of Community competition law. Where such requirements are discriminatory or not objectively justified by an overriding reason relating to the public interest, or where they are disproportionate, they must be abolished or amended. The outcome of this assessment will be different according to the nature of the activity and the public interest concerned. In particular, such requirements could be fully justified when they pursue social policy objectives.

- (70) For the purposes of this Directive, and without prejudice to Article 16 of the Treaty, services may be considered to be services of general economic interest only if they are provided in application of a special task in the public interest entrusted to the provider by the Member State concerned. This assignment should be made by way of one or more acts, the form of which is determined by the Member State concerned, and should specify the precise nature of the special task.
- (71) The mutual evaluation process provided for in this Directive should not affect the freedom of Member States to set in their legislation a high level of protection of the public interest, in particular in relation to social policy objectives. Furthermore, it is necessary that the mutual evaluation process take fully into account the specificity of services of general economic interest and of the particular tasks assigned to them. This may justify certain restrictions on the freedom of establishment, in particular where such restrictions pursue the protection of public health and social policy objectives and where they satisfy the conditions set out in Article 15(3)(a), (b) and (c). For example, with regard to the obligation to take a specific legal form in order to exercise certain services in the social field, the Court of Justice has already recognised that it may be justified to subject the provider to a requirement to be non-profit making.
- (72) Services of a general economic interest are entrusted with important tasks relating to social and territorial cohesion. The performance of these tasks should not be obstructed as a result of the evaluation process provided for in this Directive. Requirements which are necessary for the fulfilment of such tasks should not be affected by this process while, at the same time, unjustified restrictions on the freedom of establishment should be addressed.

- (73) The requirements to be examined include national rules which, on grounds other than those relating to professional qualifications, reserve access to certain activities to particular providers. These requirements also include obligations on a provider to take a specific legal form, in particular to be a legal person, to be a company with individual ownership, to be a non-profit making organisation or a company owned exclusively by natural persons, and requirements which relate to the shareholding of a company, in particular obligations to hold a minimum amount of capital for certain service activities or to have a specific qualification in order to hold share capital in or to manage certain companies. The evaluation of the compatibility of fixed minimum and/or maximum tariffs with the freedom of establishment concerns only tariffs imposed by competent authorities specifically for the provision of certain services and not, for example, general rules on price determination, such as for the renting of houses.
- (74) The mutual evaluation process means that during the transposition period Member States will first have to conduct a screening of their legislation in order to ascertain whether any of the above mentioned requirements exists in their legal systems. At the latest by the end of the transposition period, Member States should draw up a report on the results of this screening. Each report will be submitted to all other Member States and interested parties. Member States will then have six months in which to submit their observations on these reports. At the latest by one year after the date of transposition of this Directive, the Commission should draw up a summary report, accompanied where appropriate by proposals for further initiatives. If necessary the Commission, in cooperation with the Member States, could assist them to design a common method.
- (75) The fact that this Directive specifies a number of requirements to be abolished or evaluated by the Member States during the transposition period is without prejudice to any infringement proceedings against a Member State for failure to fulfil its obligations under Articles 43 or 49 of the Treaty.

- (76) This Directive does not concern the application of Articles 28 to 30 of the Treaty relating to the free movement of goods. The restrictions prohibited pursuant to the provision on the freedom to provide services cover the requirements applicable to access to service activities or to the exercise thereof and not those applicable to goods as such.
- (77) Where an operator travels to another Member State to exercise a service activity there, a distinction should be made between situations covered by the freedom of establishment and those covered, due to the temporary nature of the activities concerned, by the free movement of services. As regards the distinction between the freedom of establishment and the free movement of services, according to the case law of the Court of Justice the key element is whether or not the operator is established in the Member State where it provides the service concerned. If the operator is established in the Member State where it provides its services, it should come under the scope of application of the freedom of establishment. If, by contrast, the operator is not established in the Member State where the service is provided, its activities should be covered by the free movement of services. The Court of Justice has consistently held that the temporary nature of the activities in question should be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodical nature or continuity. The fact that the activity is temporary should not mean that the provider may not equip itself with some forms of infrastructure in the Member State where the service is provided, such as an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of providing the service in question.

- (78) In order to secure effective implementation of the free movement of services and to ensure that recipients and providers can benefit from and supply services throughout the Community regardless of borders, it is necessary to clarify the extent to which requirements of the Member State where the service is provided can be imposed. It is indispensable to provide that the provision on the freedom to provide services does not prevent the Member State where the service is provided from imposing, in compliance with the principles set out in Article 16(1)(a) to (c), its specific requirements for reasons of public policy or public security or for the protection of public health or the environment.
- (79) The Court of Justice has consistently held that Member States retain the right to take measures in order to prevent providers from abusively taking advantage of the internal market principles. Abuse by a provider should be established on a case by case basis.
- (80) It is necessary to ensure that providers are able to take equipment which is integral to the provision of their service with them when they travel to provide services in another Member State. In particular, it is important to avoid cases in which the service could not be provided without the equipment or situations in which providers incur additional costs, for example, by hiring or purchasing different equipment to that which they habitually use or by needing to deviate significantly from the way they habitually carry out their activity.

- (81) The concept of equipment does not refer to physical objects which are either supplied by the provider to the client or become part of a physical object as a result of the service activity, such as building materials or spare parts, or which are consumed or left in situ in the course of the service provision, such as combustible fuels, explosives, fireworks, pesticides, poisons or medicines.
- (82) The provisions of this Directive should not preclude the application by a Member State of rules on employment conditions. Rules laid down by law, regulation or administrative provisions should, in accordance with the Treaty, be justified for reasons relating to the protection of workers and be non-discriminatory, necessary, and proportionate, as interpreted by the Court of Justice, and comply with other relevant Community law.
- (83) It is necessary to ensure that the provision on the freedom to provide services may be departed from only in the areas covered by derogations. Those derogations are necessary in order to take into account the level of integration of the internal market or certain Community instruments relating to services pursuant to which a provider is subject to the application of a law other than that of the Member State of establishment. Moreover, by way of exception, measures against a given provider should also be adopted in certain individual cases and under certain strict procedural and substantive conditions. In addition, any restriction of the free movement of services should be permitted, by way of exception, only if it is consistent with fundamental rights which form an integral part of the general principles of law enshrined in the Community legal order.
- (84) The derogation from the provision on the freedom to provide services concerning postal services should cover both activities reserved to the universal service provider and other postal services.

- (85) The derogation from the provision on the freedom to provide services relating to the judicial recovery of debts and the reference to a possible future harmonisation instrument should concern only the access to and the exercise of activities which consist, notably, in bringing actions before a court relating to the recovery of debts.
- (86) This Directive should not affect terms and conditions of employment which, pursuant to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services¹, apply to workers posted to provide a service in the territory of another Member State. In such cases, Directive 96/71/EC stipulates that providers have to comply with terms and conditions of employment in a listed number of areas applicable in the Member State where the service is provided. These are: maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, including overtime rates, the conditions of hiring out of workers, in particular the protection of workers hired out by temporary employment undertakings, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth and of children and young people and equality of treatment between men and women and other provisions on non-discrimination. This not only concerns terms and conditions of employment which are laid down by law but also those laid down in collective agreements or arbitration awards that are officially declared or de facto universally applicable within the meaning of Directive 96/71/EC. Moreover, this Directive should not prevent Member States from applying terms and conditions of employment on matters other than those listed in Article 3(1) of Directive 96/71/EC on the grounds of public policy.

¹ OJ L 18, 21.1.1997, p. 1.

- (87) Neither should this Directive affect terms and conditions of employment in cases where the worker employed for the provision of a cross-border service is recruited in the Member State where the service is provided. Furthermore, this Directive should not affect the right for the Member State where the service is provided to determine the existence of an employment relationship and the distinction between self-employed persons and employed persons, including "false self-employed persons". In that respect the essential characteristic of an employment relationship within the meaning of Article 39 of the Treaty should be the fact that for a certain period of time a person provides services for and under the direction of another person in return for which he receives remuneration. Any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of Articles 43 and 49 of the Treaty.
- (88) The provision on the freedom to provide services should not apply in cases where, in conformity with Community law, an activity is reserved in a Member State to a particular profession, for example requirements which reserve the provision of legal advice to lawyers.
- (89) The derogation from the provision on the freedom to provide services concerning matters relating to the registration of vehicles leased in a Member State other than that in which they are used follows from the case law of the Court of Justice, which has recognised that a Member State may impose such an obligation, in accordance with proportionate conditions, in the case of vehicles used on its territory. That exclusion does not cover occasional or temporary rental.

- (90) Contractual relations between the provider and the client as well as between an employer and employee should not be subject to this Directive. The applicable law regarding the contractual or non contractual obligations of the provider should be determined by the rules of private international law.
- (91) It is necessary to afford Member States the possibility, exceptionally and on a case-by-case basis, of taking measures which derogate from the provision on the freedom to provide services in respect of a provider established in another Member State on grounds of the safety of services. However, it should be possible to take such measures only in the absence of harmonisation at Community level.
- (92) Restrictions on the free movement of services, contrary to this Directive, may arise not only from measures applied to providers, but also from the many barriers to the use of services by recipients, especially consumers. This Directive mentions, by way of illustration, certain types of restriction applied to a recipient wishing to use a service performed by a provider established in another Member State. This also includes cases where recipients of a service are under an obligation to obtain authorisation from or to make a declaration to their competent authorities in order to receive a service from a provider established in another Member State. This does not concern general authorisation schemes which also apply to the use of a service supplied by a provider established in the same Member State.

- (93) The concept of financial assistance provided for the use of a particular service should not apply to systems of aids granted by Member States, in particular in the social field or in the cultural sector, which are covered by Community rules on competition, nor to general financial assistance not linked to the use of a particular service, for example grants or loans to students.
- (94) In accordance with the Treaty rules on the free movement of services, discrimination on grounds of the nationality of the recipient or national or local residence is prohibited. Such discrimination could take the form of an obligation, imposed only on nationals of another Member State, to supply original documents, certified copies, a certificate of nationality or official translations of documents in order to benefit from a service or from more advantageous terms or prices. However, the prohibition of discriminatory requirements should not preclude the reservation of advantages, especially as regards tariffs, to certain recipients, if such reservation is based on legitimate and objective criteria.

(95) The principle of non-discrimination within the internal market means that access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient's nationality or place of residence. It does not follow that it will be unlawful discrimination if provision were made in such general conditions for different tariffs and conditions to apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment. Neither does it follow that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory would constitute unlawful discrimination.

- (96) It is appropriate to provide that, as one of the means by which the provider may make the information which he is obliged to supply easily accessible to the recipient, he supply his electronic address, including that of his website. Furthermore, the obligation to make available certain information in the provider's information documents which present his services in detail should not cover commercial communications of a general nature, such as advertising, but rather documents giving a detailed description of the services proposed, including documents on a website.
- (97) It is necessary to provide in this Directive for certain rules on high quality of services, ensuring in particular information and transparency requirements. These rules should apply both in cases of cross border provision of services between Member States and in cases of services provided in a Member State by a provider established there, without imposing unnecessary burdens on SMEs. They should not in any way prevent Member States from applying, in conformity with this Directive and other Community law, additional or different quality requirements.
- (98) Any operator providing services involving a direct and particular health, safety or financial risk for the recipient or a third person should, in principle, be covered by appropriate professional liability insurance, or by another form of guarantee which is equivalent or comparable, which means, in particular, that such an operator should as a general rule have adequate insurance cover for services provided in one or more Member States other than the Member State of establishment.

- (99) The insurance or guarantee should be appropriate to the nature and extent of the risk. Therefore it should be necessary for the provider to have cross-border cover only if that provider actually provides services in other Member States. Member States should not lay down more detailed rules concerning the insurance cover and fix for example minimum thresholds for the insured sum or limits on exclusions from the insurance cover. Providers and insurance companies should maintain the necessary flexibility to negotiate insurance policies precisely targeted to the nature and extent of the risk. Furthermore, it is not necessary for an obligation of appropriate insurance to be laid down by law. It should be sufficient if an insurance obligation is part of the ethical rules laid down by professional bodies. Finally, there should be no obligation for insurance companies to provide insurance cover.
- (100) It is necessary to put an end to total prohibitions on commercial communications by the regulated professions, not by removing bans on the content of a commercial communication but rather by removing those bans which, in a general way and for a given profession, forbid one or more forms of commercial communication, such as a ban on all advertising in one or more given media. As regards the content and methods of commercial communication, it is necessary to encourage professionals to draw up, in accordance with Community law, codes of conduct at Community level.

- (101) It is necessary and in the interest of recipients, in particular consumers, to ensure that it is possible for providers to offer multidisciplinary services and that restrictions in this regard be limited to what is necessary to ensure the impartiality, independence and integrity of the regulated professions. This does not affect restrictions or prohibitions on carrying out particular activities which aim at ensuring independence in cases in which a Member State entrusts a provider with a particular task, notably in the area of urban development, nor should it affect the application of competition rules.
- (102) In order to increase transparency and promote assessments based on comparable criteria with regard to the quality of the services offered and supplied to recipients, it is important that information on the meaning of quality labels and other distinctive marks relating to these services be easily accessible. That obligation of transparency is particularly important in areas such as tourism, especially the hotel business, in which the use of a system of classification is widespread. Moreover, it is appropriate to examine the extent to which European standardisation could facilitate compatibility and quality of services. European standards are drawn up by the European standards-setting bodies, the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI). Where appropriate, the Commission may, in accordance with the procedures laid down in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services¹, issue a mandate for the drawing up of specific European standards.

¹ OJ L 204, 21.7.1998, p. 37. Directive as last amended by the 2003 Act of Accession.

- (103) In order to solve potential problems with compliance with judicial decisions, it is appropriate to provide that Member States recognise equivalent guarantees lodged with institutions or bodies such as banks, insurance providers or other financial services providers established in another Member State.
- (104) The development of a network of Member States' consumer protection authorities, which is the subject of Regulation (EC) No 2006/2004, complements the cooperation provided for in this Directive. The application of consumer protection legislation in cross-border cases, in particular with regard to new marketing and selling practices, as well as the need to remove certain specific obstacles to cooperation in this field, necessitates a greater degree of cooperation between Member States. In particular, it is necessary in this area to ensure that Member States require the cessation of illegal practices by operators in their territory who target consumers in another Member State.
- (105) Administrative cooperation is essential to make the internal market in services function properly. Lack of cooperation between Member States results in proliferation of rules applicable to providers or duplication of controls for cross-border activities, and can also be used by rogue traders to avoid supervision or to circumvent applicable national rules on services. It is, therefore, essential to provide for clear, legally binding obligations for Member States to cooperate effectively.

- (106) For the purposes of the Chapter on administrative cooperation, "supervision" should cover activities such as monitoring and fact finding, problem solving, enforcement and imposition of sanctions and subsequent follow-up activities.
- (107) In normal circumstances mutual assistance should take place directly between competent authorities. The liaison points designated by Member States should be required to facilitate this process only in the event of difficulties being encountered, for instance if assistance is required to identify the relevant competent authority.
- (108) Certain obligations of mutual assistance should apply to all matters covered by this Directive, including those relating to cases where a provider establishes in another Member State. Other obligations of mutual assistance should apply only in cases of cross-border provision of services, where the provision on the freedom to provide services applies. A further set of obligations should apply in all cases of cross-border provision of services, including areas not covered by the provision on the freedom to provide services. Cross-border provision of services should include cases where services are provided at a distance and where the recipient travels to the Member State of establishment of the provider in order to receive services.
- (109) In cases where a provider moves temporarily to a Member State other than the Member State of establishment, it is necessary to provide for mutual assistance between those two Member States so that the former can carry out checks, inspections and enquiries at the request of the Member State of establishment or carry out such checks on its own initiative if these are merely factual checks.

- (110) It should not be possible for Member States to circumvent the rules laid down in this Directive, including the provision on the freedom to provide services, by conducting checks, inspections or investigations which are discriminatory or disproportionate.
- (111) The provisions of this Directive concerning exchange of information regarding the good repute of providers should not pre-empt initiatives in the area of police and judicial cooperation in criminal matters, in particular on the exchange of information between law enforcement authorities of the Member States and on criminal records.
- (112) Cooperation between Member States requires a well-functioning electronic information system in order to allow competent authorities easily to identify their relevant interlocutors in other Member States and to communicate in an efficient way.
- (113) It is necessary to provide that the Member States, in cooperation with the Commission, are to encourage interested parties to draw up codes of conduct at Community level, aimed, in particular, at promoting the quality of services and taking into account the specific nature of each profession. Those codes of conduct should comply with Community law, especially competition law. They should be compatible with legally binding rules governing professional ethics and conduct in the Member States.

- (114) Member States should encourage the setting up of codes of conduct, in particular, by professional bodies, organisations and associations at Community level. These codes of conduct should include, as appropriate to the specific nature of each profession, rules for commercial communications relating to the regulated professions and rules of professional ethics and conduct of the regulated professions which aim, in particular, at ensuring independence, impartiality and professional secrecy. In addition, the conditions to which the activities of estate agents are subject should be included in such codes of conduct. Member States should take accompanying measures to encourage professional bodies, organisations and associations to implement at national level the codes of conduct adopted at Community level.
- (115) Codes of conduct at Community level are intended to set minimum standards of conduct and are complementary to Member States' legal requirements. They do not preclude Member States, in accordance with Community law, from taking more stringent measures in law or national professional bodies from providing for greater protection in their national codes of conduct.
- (116) Since the objectives of this Directive, namely the elimination of barriers to the freedom of establishment for providers in the Member States and to the free provision of services between Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, 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.

- (117) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹.
- (118) In accordance with paragraph 34 of the Interinstitutional Agreement on better law-making², Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

General provisions

Article 1

Subject matter

1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.
2. This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.

¹ OJ L 184, 17.7.1999, p. 23.

² OJ C 321, 31.12.2003, p. 1.

3. This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by Community rules on competition.

This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

4. This Directive does not affect measures taken at Community level or at national level, in conformity with Community law, to protect or promote cultural or linguistic diversity or media pluralism.
5. This Directive does not affect Member States' rules of criminal law. However, Member States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive.
6. This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.

7. This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.

Article 2

Scope

1. This Directive shall apply to services supplied by providers established in a Member State.
2. This Directive shall not apply to the following activities:
 - (a) non-economic services of general interest;
 - (b) financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC;
 - (c) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC;
 - (d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty;
 - (e) services of temporary work agencies;

- (f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;
- (g) audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting;
- (h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions;
- (i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;
- (j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;
- (k) private security services;
- (l) services provided by notaries and bailiffs, who are appointed by an official act of government.

3. This Directive shall not apply to the field of taxation.

Article 3

Relationship with other provisions of Community law

1. If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. These include:
 - (a) Directive 96/71/EC;
 - (b) Regulation (EEC) No 1408/71;
 - (c) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities¹;
 - (d) Directive 2005/36/EC.

2. This Directive does not concern rules of private international law, in particular rules governing the law applicable to contractual and non contractual obligations, including those which guarantee that consumers benefit from the protection granted to them by the consumer protection rules laid down in the consumer legislation in force in their Member State.

¹ OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

3. Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.

Article 4

Definitions

For the purposes of this Directive, the following definitions shall apply:

- 1) "service" means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty;
- 2) "provider" means any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service;
- 3) "recipient" means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service;
- 4) "Member State of establishment" means the Member State in whose territory the provider of the service concerned is established;
- 5) "establishment" means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out;

- 6) "authorisation scheme" means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;
- 7) "requirement" means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;
- 8) "overriding reasons relating to the public interest" means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

- 9) "competent authority" means any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof;
- 10) "Member State where the service is provided" means the Member State where the service is supplied by a provider established in another Member State;
- 11) "regulated profession" means a professional activity or a group of professional activities as referred to in Article 3(1)(a) of Directive 2005/36/EC;
- 12) "commercial communication" means any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not in themselves constitute commercial communications:
- (a) information enabling direct access to the activity of the undertaking, organisation or person, including in particular a domain name or an electronic-mailing address;
 - (b) communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration.

Chapter II

Administrative simplification

Article 5

Simplification of procedures

1. Member States shall examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined under this paragraph are not sufficiently simple, Member States shall simplify them.
2. The Commission may introduce harmonised forms at Community level, in accordance with the procedure referred to in Article 40(2). These forms shall be equivalent to certificates, attestations and any other documents required of a provider.
3. Where Member States require a provider or recipient to supply a certificate, attestation or any other document proving that a requirement has been satisfied, they shall accept any document from another Member State which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied. They may not require a document from another Member State to be produced in its original form, or as a certified copy or as a certified translation, save in the cases provided for in other Community instruments or where such a requirement is justified by an overriding reason relating to the public interest, including public order and security.

The first subparagraph shall not affect the right of Member States to require non-certified translations of documents in one of their official languages.

4. Paragraph 3 shall not apply to the documents referred to in Article 7(2) and 50 of Directive 2005/36/EC, in Articles 45(3), 46, 49 and 50 of Directive 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 contracts¹, in Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained², in the First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community³ and in the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State⁴.

¹ OJ L 134, 30.4.2004, p. 114. Directive as last amended by Commission Regulation (EC) No 2083/2005 (OJ L 333, 20.12.2005, p. 28).

² OJ L 77, 14.3.1998, p. 36. Directive as amended by the 2003 Act of Accession.

³ OJ L 65, 14.3.1968, p. 8. Directive as last amended by Directive 2003/58/EC of the European Parliament and of the Council (OJ L 221, 4.9.2003, p. 13).

⁴ OJ L 395, 30.12.1989, p. 36.

Article 6

Points of single contact

1. Member States shall ensure that it is possible for providers to complete the following procedures and formalities through points of single contact :
 - (a) all procedures and formalities needed for access to his service activities, in particular, all declarations, notifications or applications necessary for authorisation from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association;
 - (b) any applications for authorisation needed to exercise his service activities.
2. The establishment of points of single contact shall be without prejudice to the allocation of functions and powers among the authorities within national systems.

Article 7
Right to information

1. Member States shall ensure that the following information is easily accessible to providers and recipients through the points of single contact:
 - (a) requirements applicable to providers established in their territory, in particular those requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities;
 - (b) the contact details of the competent authorities enabling the latter to be contacted directly, including the details of those authorities responsible for matters concerning the exercise of service activities;
 - (c) the means of, and conditions for, accessing public registers and databases on providers and services;
 - (d) the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers;
 - (e) the contact details of the associations or organisations, other than the competent authorities, from which providers or recipients may obtain practical assistance.

2. Member States shall ensure that it is possible for providers and recipients to receive, at their request, assistance from the competent authorities, consisting in information on the way in which the requirements referred to in point (a) of paragraph 1 are generally interpreted and applied. Where appropriate, such advice shall include a simple step-by-step guide. The information shall be provided in plain and intelligible language.
3. Member States shall ensure that the information and assistance referred to in paragraphs 1 and 2 are provided in a clear and unambiguous manner, that they are easily accessible at a distance and by electronic means and that they are kept up to date.
4. Member States shall ensure that the points of single contact and the competent authorities respond as quickly as possible to any request for information or assistance as referred to in paragraphs 1 and 2 and, in cases where the request is faulty or unfounded, inform the applicant accordingly without delay.
5. Member States and the Commission shall take accompanying measures in order to encourage points of single contact to make the information provided for in this Article available in other Community languages. This does not interfere with Member States' legislation on the use of languages.
6. The obligation for competent authorities to assist providers and recipients does not require those authorities to provide legal advice in individual cases but concerns only general information on the way in which requirements are usually interpreted or applied.

Article 8

Procedures by electronic means

1. Member States shall ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities.
2. Paragraph 1 shall not apply to the inspection of premises on which the service is provided or of equipment used by the provider or to physical examination of the capability or of the personal integrity of the provider or of his responsible staff.
3. The Commission shall, in accordance with the procedure referred to in Article 40(2), adopt detailed rules for the implementation of paragraph 1 of this Article with a view to facilitating the interoperability of information systems and use of procedures by electronic means between Member States, taking into account common standards developed at Community level.

Chapter III

Freedom of establishment for providers

SECTION 1

AUTHORISATIONS

Article 9

Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:
 - (a) the authorisation scheme does not discriminate against the provider in question;
 - (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;
 - (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

2. In the report referred to in Article 39(1), Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1 of this Article.

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.

Article 10

Conditions for the granting of authorisation

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.
2. The criteria referred to in paragraph 1 shall be:
 - (a) non-discriminatory;
 - (b) justified by an overriding reason relating to the public interest;
 - (c) proportionate to that public interest objective;
 - (d) clear and unambiguous;
 - (e) objective;
 - (f) made public in advance;
 - (g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.
4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.
5. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.
6. Except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.
7. This Article shall not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations.

Article 11
Duration of authorisation

1. An authorisation granted to a provider shall not be for a limited period, except where:
 - (a) the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements;
 - (b) the number of available authorisations is limited by an overriding reason relating to the public interest; or
 - (c) a limited authorisation period can be justified by an overriding reason relating to the public interest.
2. Paragraph 1 shall not concern the maximum period before the end of which the provider must actually commence his activity after receiving authorisation.
3. Member States shall require a provider to inform the relevant point of single contact provided for in Article 6 of the following changes:
 - (a) the creation of subsidiaries whose activities fall within the scope of the authorisation scheme,
 - (b) changes in his situation which result in the conditions for authorisation no longer being met.

4. This Article shall be without prejudice to the Member States' ability to revoke authorisations, when the conditions for authorisation are no longer met.

Article 12

Selection from among several candidates

1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.
2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.
3. Subject to paragraph 1 and to Articles 9 and 10, Member States may take into account, in establishing the rules for the selection procedure, considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law.

Article 13
Authorisation procedures

1. Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.
2. Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.
3. Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.
4. Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

5. All applications for authorisation shall be acknowledged as quickly as possible. The acknowledgement must specify the following:
 - (a) the period referred to in paragraph 3;
 - (b) the available means of redress;
 - (c) where applicable, a statement that in the absence of a response within the period specified, the authorisation shall be deemed to have been granted.
6. In the case of an incomplete application, the applicant shall be informed as quickly as possible of the need to supply any additional documentation, as well as of any possible effects on the period referred to in paragraph 3.
7. When a request is rejected because it fails to comply with the required procedures or formalities, the applicant shall be informed of the rejection as quickly as possible.

SECTION 2
REQUIREMENTS PROHIBITED OR SUBJECT TO EVALUATION

Article 14
Prohibited requirements

Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:

- 1) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office, including in particular:
 - (a) nationality requirements for the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies;
 - (b) a requirement that the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies be resident within the territory;
- 2) a prohibition on having an establishment in more than one Member State or on being entered in the registers or enrolled with professional bodies or associations of more than one Member State;

- 3) restrictions on the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have its principal establishment in their territory, or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;
- 4) conditions of reciprocity with the Member State in which the provider already has an establishment, save in the case of conditions of reciprocity provided for in Community instruments concerning energy;
- 5) the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest;
- 6) the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority; this prohibition shall not concern the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large;

- 7) an obligation to provide or participate in a financial guarantee or to take out insurance from a provider or body established in their territory. This shall not affect the possibility for Member States to require insurance or financial guarantees as such, nor shall it affect requirements relating to the participation in a collective compensation fund, for instance for members of professional bodies or organisations;
- 8) an obligation to have been pre-registered, for a given period, in the registers held in their territory or to have previously exercised the activity for a given period in their territory.

Article 15

Requirements to be evaluated

1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.
2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:
 - (a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;

- (b) an obligation on a provider to take a specific legal form;
- (c) requirements which relate to the shareholding of a company;
- (d) requirements, other than those concerning matters covered by Directive 2005/36/EC or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;
- (e) a ban on having more than one establishment in the territory of the same State;
- (f) requirements fixing a minimum number of employees;
- (g) fixed minimum and/or maximum tariffs with which the provider must comply;
- (h) an obligation on the provider to supply other specific services jointly with his service.

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

- (a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

- (b) necessity: requirements must be justified by an overriding reason relating to the public interest;
 - (c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.
4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.
5. In the mutual evaluation report provided for in Article 39(1), Member States shall specify the following:
- (a) the requirements that they intend to maintain and the reasons why they consider that those requirements comply with the conditions set out in paragraph 3;
 - (b) the requirements which have been abolished or made less stringent.
6. From ...* , Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3.

* Date of entry into force of this Directive.

7. Member States shall notify the Commission of any new laws, regulations or administrative provisions which set requirements as referred to in paragraph 6, together with the reasons for those requirements. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall not prevent Member States from adopting the provisions in question.

Within a period of 3 months from the date of receipt of the notification, the Commission shall examine the compatibility of any new requirements with Community law and, where appropriate, shall adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them.

The notification of a draft national law in accordance with Directive 98/34/EC shall fulfil the obligation of notification provided for in this Directive.

Chapter IV

Free movement of services

SECTION 1

FREEDOM TO PROVIDE SERVICES AND RELATED DEROGATIONS

Article 16

Freedom to provide services

1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

- (a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;
- (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

- (c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.
2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:
- (a) an obligation on the provider to have an establishment in their territory;
 - (b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;
 - (c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;
 - (d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
 - (e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
 - (f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;
 - (g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.
4. By ...* the Commission shall, after consultation of the Member States and the social partners at Community level, submit to the European Parliament and the Council a report on the application of this Article, in which it shall consider the need to propose harmonisation measures regarding service activities covered by this Directive.

Article 17

Additional derogations from the freedom to provide services

Article 16 shall not apply to:

- 1) Services of general economic interest which are provided in another Member State, inter alia:
 - (a) in the postal sector, services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service¹;
 - (b) in the electricity sector, services covered by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity²;

* Five years after the entry into force of this Directive.

¹ OJ L 15, 21.1.1998, p. 14. Directive as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

² OJ L 176, 15.7.2003, p. 37. Directive as amended by Council Directive 2004/85/EC (OJ L 236, 7.7.2004, p. 10).

- (c) in the gas sector, services covered by Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas¹;
 - (d) water distribution and supply services and waste water services;
 - (e) treatment of waste;
- 2) matters covered by Directive 96/71/EC;
 - 3) matters covered by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data²;
 - 4) matters covered by Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services³;
 - 5) the activity of judicial recovery of debts;
 - 6) matters covered by Title II of Directive 2005/36/EC, as well as requirements in the Member State where the service is provided which reserve an activity to a particular profession;

¹ OJ L 176, 15.7.2003, p. 57.

² OJ L 281, 23.11.1995, p. 31. Directive as last amended by Regulation (EC) No 1882/2003.

³ OJ L 78, 26.3.1977, p. 17. Directive as last amended by the 2003 Act of Accession.

- 7) matters covered by Regulation (EEC) No 1408/71;
- 8) as regards administrative formalities concerning the free movement of persons and their residence, matters covered by the provisions of Directive 2004/38/EC that lay down administrative formalities of the competent authorities of the Member State where the service is provided with which beneficiaries must comply;
- 9) as regards third country nationals who move to another Member State in the context of the provision of a service, the possibility for Member States to require visa or residence permits for third country nationals who are not covered by the mutual recognition regime provided for in Article 21 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders¹ or the possibility to oblige third country nationals to report to the competent authorities of the Member State in which the service is provided on or after their entry;
- 10) as regards the shipment of waste, matters covered by Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community²;
- 11) copyright, neighbouring rights and rights covered by Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products³ and by Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases⁴, as well as industrial property rights;
- 12) acts requiring by law the involvement of a notary;
- 13) matters covered by Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audit of annual accounts and consolidated accounts⁵;

¹ OJ L 239, 22.9.2000, p. 19. Convention as last amended by Regulation (EC) No 1160/2005 of the European Parliament and of the Council (OJ L 191, 22.7.2005, p. 18).

² OJ L 30, 6.2.1993, p. 1. Regulation as last amended by Commission Regulation (EC) No 2557/2001 (OJ L 349, 31.12.2001, p. 1).

³ OJ L 24, 27.1.1987, p. 36.

⁴ OJ L 77, 27.3.1996, p. 20.

⁵ OJ L 157, 9.6.2006, p. 87.

- 14) the registration of vehicles leased in another Member State;
- 15) provisions regarding contractual and non-contractual obligations, including the form of contracts, determined pursuant to the rules of private international law.

Article 18

Case-by-case derogations

1. By way of derogation from Article 16, and in exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures relating to the safety of services.
2. The measures provided for in paragraph 1 may be taken only if the mutual assistance procedure laid down in Article 35 is complied with and the following conditions are fulfilled:
 - (a) the national provisions in accordance with which the measure is taken have not been subject to Community harmonisation in the field of the safety of services;
 - (b) the measures provide for a higher level of protection of the recipient than would be the case in a measure taken by the Member State of establishment in accordance with its national provisions;

- (c) the Member State of establishment has not taken any measures or has taken measures which are insufficient as compared with those referred to in Article 35(2);
 - (d) the measures are proportionate.
3. Paragraphs 1 and 2 shall be without prejudice to provisions, laid down in Community instruments, which guarantee the freedom to provide services or which allow derogations therefrom.

SECTION 2
RIGHTS OF RECIPIENTS OF SERVICES

Article 19
Prohibited restrictions

Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements:

- (a) an obligation to obtain authorisation from or to make a declaration to their competent authorities;
- (b) discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.

Article 20
Non-discrimination

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.

2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

Article 21

Assistance for recipients

1. Member States shall ensure that recipients can obtain, in their Member State of residence, the following information:
 - (a) general information on the requirements applicable in other Member States relating to access to, and exercise of, service activities, in particular those relating to consumer protection;
 - (b) general information on the means of redress available in the case of a dispute between a provider and a recipient;
 - (c) the contact details of associations or organisations, including the centres of the European Consumer Centres Network, from which providers or recipients may obtain practical assistance.

Where appropriate, advice from the competent authorities shall include a simple step-by-step guide. Information and assistance shall be provided in a clear and unambiguous manner, shall be easily accessible at a distance, including by electronic means, and shall be kept up to date.

2. Member States may confer responsibility for the task referred to in paragraph 1 on points of single contact or on any other body, such as the centres of the European Consumer Centres Network, consumer associations or Euro Info Centres.

Member States shall communicate to the Commission the names and contact details of the designated bodies. The Commission shall transmit them to all Member States.

3. In fulfilment of the requirements set out in paragraphs 1 and 2, the body approached by the recipient shall, if necessary, contact the relevant body for the Member State concerned. The latter shall send the information requested as soon as possible to the requesting body which shall forward the information to the recipient. Member States shall ensure that those bodies give each other mutual assistance and shall put in place all possible measures for effective cooperation. Together with the Commission, Member States shall put in place practical arrangements necessary for the implementation of paragraph 1.
4. The Commission shall, in accordance with the procedure referred to in Article 40(2), adopt measures for the implementation of paragraphs 1, 2 and 3 of this Article, specifying the technical mechanisms for the exchange of information between the bodies of the various Member States and, in particular, the interoperability of information systems, taking into account common standards.

Chapter V

Quality of services

Article 22

Information on providers and their services

1. Member States shall ensure that providers make the following information available to the recipient:
 - (a) the name of the provider, his legal status and form, the geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;
 - (b) where the provider is registered in a trade or other similar public register, the name of that register and the provider's registration number, or equivalent means of identification in that register;
 - (c) where the activity is subject to an authorisation scheme, the particulars of the relevant competent authority or the single point of contact;

- (d) where the provider exercises an activity which is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment¹;
- (e) in the case of the regulated professions, any professional body or similar institution with which the provider is registered, the professional title and the Member State in which that title has been granted;
- (f) the general conditions and clauses, if any, used by the provider;
- (g) the existence of contractual clauses, if any, used by the provider concerning the law applicable to the contract and/or the competent courts;
- (h) the existence of an after-sales guarantee, if any, not imposed by law;
- (i) the price of the service, where a price is pre-determined by the provider for a given type of service;
- (j) the main features of the service, if not already apparent from the context;
- (k) the insurance or guarantees referred to in Article 23(1), and in particular the contact details of the insurer or guarantor and the territorial coverage.

¹ OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2006/18/EC (OJ L 51, 22.2.2006, p. 12).

2. Member States shall ensure that the information referred to in paragraph 1, according to the provider's preference:
 - (a) is supplied by the provider on his own initiative;
 - (b) is easily accessible to the recipient at the place where the service is provided or the contract concluded;
 - (c) can be easily accessed by the recipient electronically by means of an address supplied by the provider;
 - (d) appears in any information documents supplied to the recipient by the provider which set out a detailed description of the service he provides.

3. Member States shall ensure that, at the recipient's request, providers supply the following additional information:
 - (a) where the price is not pre-determined by the provider for a given type of service, the price of the service or, if an exact price cannot be given, the method for calculating the price so that it can be checked by the recipient, or a sufficiently detailed estimate;
 - (b) as regards the regulated professions, a reference to the professional rules applicable in the Member State of establishment and how to access them;

- (c) information on their multidisciplinary activities and partnerships which are directly linked to the service in question and on the measures taken to avoid conflicts of interest. That information shall be included in any information document in which providers give a detailed description of their services;
 - (d) any codes of conduct to which the provider is subject and the address at which these codes may be consulted by electronic means, specifying the language version available;
 - (e) where a provider is subject to a code of conduct, or member of a trade association or professional body which provides for recourse to a non-judicial means of dispute settlement, information in this respect. The provider shall specify how to access detailed information on the characteristics of, and conditions for, the use of non-judicial means of dispute settlement.
4. Member States shall ensure that the information which a provider must supply in accordance with this Chapter is made available or communicated in a clear and unambiguous manner, and in good time before conclusion of the contract or, where there is no written contract, before the service is provided.
5. The information requirements laid down in this Chapter are in addition to requirements already provided for in Community law and do not prevent Member States from imposing additional information requirements applicable to providers established in their territory.

6. The Commission may, in accordance with the procedure referred to in Article 40(2), specify the content of the information provided for in paragraphs 1 and 3 of this Article according to the specific nature of certain activities and may specify the practical means of implementing paragraph 2 of this Article.

Article 23

Professional liability insurance and guarantees

1. Member States may ensure that providers whose services present a direct and particular risk to the health or safety of the recipient or a third person, or to the financial security of the recipient, subscribe to professional liability insurance appropriate to the nature and extent of the risk, or provide a guarantee or similar arrangement which is equivalent or essentially comparable as regards its purpose.
2. When a provider establishes himself in their territory, Member States may not require professional liability insurance or a guarantee from the provider where he is already covered by a guarantee which is equivalent, or essentially comparable as regards its purpose and the cover it provides in terms of the insured risk, the insured sum or a ceiling for the guarantee and possible exclusions from the cover, in another Member State in which the provider is already established. Where equivalence is only partial, Member States may require a supplementary guarantee to cover those aspects not already covered.

When a Member State requires a provider established in its territory to subscribe to professional liability insurance or to provide another guarantee, that Member State shall accept as sufficient evidence attestations of such insurance cover issued by credit institutions and insurers established in other Member States.

3. Paragraphs 1 and 2 shall not affect professional insurance or guarantee arrangements provided for in other Community instruments.
4. For the implementation of paragraph 1, the Commission may, in accordance with the procedure referred to in Article 40(2), establish a list of services which exhibit the characteristics referred to in paragraph 1 of this Article and establish common criteria for defining, for the purposes of the insurance or guarantees referred to in that paragraph, what is appropriate to the nature and extent of the risk.
5. For the purpose of this Article
 - "direct and particular risk" means a risk arising directly from the provision of the service,
 - "health and safety" means, in relation to a recipient or a third person, the prevention of death or serious personal injury,
 - "financial security" means, in relation to a recipient, the prevention of substantial losses of money or of value of property,
 - "professional liability insurance" means insurance taken out by a provider in respect of potential liabilities to recipients and, where applicable, third parties arising out of the provision of the service.

Article 24

Commercial communications by the regulated professions

1. Member States shall remove all total prohibitions on commercial communications by the regulated professions.
2. Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of each profession. Professional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.

Article 25

Multidisciplinary activities

1. Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities.

However, the following providers may be made subject to such requirements:

- (a) the regulated professions, in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality;
- (b) providers of certification, accreditation, technical monitoring, test or trial services, in so far as is justified in order to ensure their independence and impartiality.

2. Where multidisciplinary activities between providers referred to in points (a) and (b) of paragraph 1 are authorised, Member States shall ensure the following:

- (a) that conflicts of interest and incompatibilities between certain activities are prevented;
- (b) that the independence and impartiality required for certain activities is secured;
- (c) that the rules governing professional ethics and conduct for different activities are compatible with one another, especially as regards matters of professional secrecy.

3. In the report referred to in Article 39(1), Member States shall indicate which providers are subject to the requirements laid down in paragraph 1 of this Article, the content of those requirements and the reasons for which they consider them to be justified.

Article 26

Policy on quality of services

1. Member States shall, in cooperation with the Commission, take accompanying measures to encourage providers to take action on a voluntary basis in order to ensure the quality of service provision, in particular through use of one of the following methods:
 - (a) certification or assessment of their activities by independent or accredited bodies;
 - (b) drawing up their own quality charter or participation in quality charters or labels drawn up by professional bodies at Community level.
2. Member States shall ensure that information on the significance of certain labels and the criteria for applying labels and other quality marks relating to services can be easily accessed by providers and recipients.
3. Member States shall, in cooperation with the Commission, take accompanying measures to encourage professional bodies, as well as chambers of commerce and craft associations and consumer associations, in their territory to cooperate at Community level in order to promote the quality of service provision, especially by making it easier to assess the competence of a provider.

4. Member States shall, in cooperation with the Commission, take accompanying measures to encourage the development of independent assessments, notably by consumer associations, in relation to the quality and defects of service provision, and, in particular, the development at Community level of comparative trials or testing and the communication of the results.
5. Member States, in cooperation with the Commission, shall encourage the development of voluntary European standards with the aim of facilitating compatibility between services supplied by providers in different Member States, information to the recipient and the quality of service provision.

Article 27

Settlement of disputes

1. Member States shall take the general measures necessary to ensure that providers supply contact details, in particular a postal address, fax number or e-mail address and telephone number to which all recipients, including those resident in another Member State, can send a complaint or a request for information about the service provided. Providers shall supply their legal address if this is not their usual address for correspondence.

Member States shall take the general measures necessary to ensure that providers respond to the complaints referred to in the first subparagraph in the shortest possible time and make their best efforts to find a satisfactory solution.

2. Member States shall take the general measures necessary to ensure that providers are obliged to demonstrate compliance with the obligations laid down in this Directive as to the provision of information and to demonstrate that the information is accurate.
3. Where a financial guarantee is required for compliance with a judicial decision, Member States shall recognise equivalent guarantees lodged with a credit institution or insurer established in another Member State. Such credit institutions must be authorised in a Member State in accordance with Directive 2006/48/EC and such insurers in accordance, as appropriate, with First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance¹ and Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance².
4. Member States shall take the general measures necessary to ensure that providers who are subject to a code of conduct, or are members of a trade association or professional body, which provides for recourse to a non-judicial means of dispute settlement inform the recipient thereof and mention that fact in any document which presents their services in detail, specifying how to access detailed information on the characteristics of, and conditions for, the use of such a mechanism.

¹ OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

² OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2005/68/EC.

Chapter VI

Administrative cooperation

Article 28

Mutual assistance – general obligations

1. Member States shall give each other mutual assistance, and shall put in place measures for effective cooperation with one another, in order to ensure the supervision of providers and the services they provide.
2. For the purposes of this Chapter, Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States and the Commission. The Commission shall publish and regularly update the list of liaison points.
3. Information requests and requests to carry out any checks, inspections and investigations under this Chapter shall be duly motivated, in particular by specifying the reason for the request. Information exchanged shall be used only in respect of the matter for which it was requested.
4. In the event of receiving a request for assistance from competent authorities in another Member State, Member States shall ensure that providers established in their territory supply their competent authorities with all the information necessary for supervising their activities in compliance with their national laws.

5. In the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the Member State in question shall rapidly inform the requesting Member State with a view to finding a solution.
6. Member States shall supply the information requested by other Member States or the Commission by electronic means and within the shortest possible period of time.
7. Member States shall ensure that registers in which providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States.
8. Member States shall communicate to the Commission information on cases where other Member States do not fulfil their obligation of mutual assistance. Where necessary, the Commission shall take appropriate steps, including proceedings provided for in Article 226 of the Treaty, in order to ensure that the Member States concerned comply with their obligation of mutual assistance. The Commission shall periodically inform Member States about the functioning of the mutual assistance provisions.

Article 29

Mutual assistance – general obligations for the Member State of establishment

1. With respect to providers providing services in another Member State, the Member State of establishment shall supply information on providers established in its territory when requested to do so by another Member State and, in particular, confirmation that a provider is established in its territory and, to its knowledge, is not exercising his activities in an unlawful manner.
2. The Member State of establishment shall undertake the checks, inspections and investigations requested by another Member State and shall inform the latter of the results and, as the case may be, of the measures taken. In so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State. The competent authorities can decide on the most appropriate measures to be taken in each individual case in order to meet the request by another Member State.
3. Upon gaining actual knowledge of any conduct or specific acts by a provider established in its territory which provides services in other Member States, that, to its knowledge, could cause serious damage to the health or safety of persons or to the environment, the Member State of establishment shall inform all other Member States and the Commission within the shortest possible period of time.

Article 30
Supervision by the Member State of establishment
in the event of the temporary movement of a provider
to another Member State

1. With respect to cases not covered by Article 31(1), the Member State of establishment shall ensure that compliance with its requirements is supervised in conformity with the powers of supervision provided for in its national law, in particular through supervisory measures at the place of establishment of the provider.
2. The Member State of establishment shall not refrain from taking supervisory or enforcement measures in its territory on the grounds that the service has been provided or caused damage in another Member State.
3. The obligation laid down in paragraph 1 shall not entail a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the Member State where the service is provided. Such checks and controls shall be carried out by the authorities of the Member State where the provider is temporarily operating at the request of the authorities of the Member State of establishment, in accordance with Article 31.

Article 31
Supervision by the Member State
where the service is provided
in the event of the temporary movement of the provider

1. With respect to national requirements which may be imposed pursuant to Articles 16 or 17, the Member State where the service is provided is responsible for the supervision of the activity of the provider in its territory. In conformity with Community law, the Member State where the service is provided:
 - (a) shall take all measures necessary to ensure the provider complies with those requirements as regards the access to and the exercise of the activity;
 - (b) shall carry out the checks, inspections and investigations necessary to supervise the service provided.

2. With respect to requirements other than those referred to in paragraph 1, where a provider moves temporarily to another Member State in order to provide a service without being established there, the competent authorities of that Member State shall participate in the supervision of the provider in accordance with paragraphs 3 and 4.

3. At the request of the Member State of establishment, the competent authorities of the Member State where the service is provided shall carry out any checks, inspections and investigations necessary for ensuring the effective supervision by the Member State of establishment. In so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State. The competent authorities may decide on the most appropriate measures to be taken in each individual case in order to meet the request by the Member State of establishment.
4. On their own initiative, the competent authorities of the Member State where the service is provided may conduct checks, inspections and investigations on the spot, provided that those checks, inspections or investigations are not discriminatory, are not motivated by the fact that the provider is established in another Member State and are proportionate.

Article 32

Alert mechanism

1. Where a Member State becomes aware of serious specific acts or circumstances relating to a service activity that could cause serious damage to the health or safety of persons or to the environment in its territory or in the territory of other Member States, that Member State shall inform the Member State of establishment, the other Member States concerned and the Commission within the shortest possible period of time.
2. The Commission shall promote and take part in the operation of a European network of Member States' authorities in order to implement paragraph 1.

3. The Commission shall adopt and regularly update, in accordance with the procedure referred to in Article 40(2), detailed rules concerning the management of the network referred to in paragraph 2 of this Article.

Article 33

Information on the good repute of providers

1. Member States shall, at the request of a competent authority in another Member State, supply information, in conformity with their national law, on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud taken by their competent authorities in respect of the provider which are directly relevant to the provider's competence or professional reliability. The Member State which supplies the information shall inform the provider thereof.

A request made pursuant to the first subparagraph must be duly substantiated, in particular as regards the reasons for the request for information.

2. Sanctions and actions referred to in paragraph 1 shall only be communicated if a final decision has been taken. With regard to other enforceable decisions referred to in paragraph 1, the Member State which supplies the information shall specify whether a particular decision is final or whether an appeal has been lodged in respect of it, in which case the Member State in question should provide an indication of the date when the decision on appeal is expected.

Moreover, that Member State shall specify the provisions of national law pursuant to which the provider was found guilty or penalised.

3. Implementation of paragraphs 1 and 2 must comply with rules on the provision of personal data and with rights guaranteed to persons found guilty or penalised in the Member States concerned, including by professional bodies. Any information in question which is public shall be accessible to consumers.

Article 34

Accompanying measures

1. The Commission, in cooperation with Member States, shall establish an electronic system for the exchange of information between Member States, taking into account existing information systems.
2. Member States shall, with the assistance of the Commission, take accompanying measures to facilitate the exchange of officials in charge of the implementation of mutual assistance and training of such officials, including language and computer training.
3. The Commission shall assess the need to establish a multi-annual programme in order to organise relevant exchanges of officials and training.

Article 35

Mutual assistance in the event of case-by-case derogations

1. Where a Member State intends to take a measure pursuant to Article 18, the procedure laid down in paragraphs 2 to 6 of this Article shall apply without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation.

2. The Member State referred to in paragraph 1 shall ask the Member State of establishment to take measures with regard to the provider, supplying all relevant information on the service in question and the circumstances of the case.

The Member State of establishment shall check, within the shortest possible period of time, whether the provider is operating lawfully and verify the facts underlying the request. It shall inform the requesting Member State within the shortest possible period of time of the measures taken or envisaged or, as the case may be, the reasons why it has not taken any measures.

3. Following communication by the Member State of establishment as provided for in the second subparagraph of paragraph 2, the requesting Member State shall notify the Commission and the Member State of establishment of its intention to take measures, stating the following:
 - (a) the reasons why it believes the measures taken or envisaged by the Member State of establishment are inadequate;
 - (b) the reasons why it believes the measures it intends to take fulfil the conditions laid down in Article 18.
4. The measures may not be taken until fifteen working days after the date of notification provided for in paragraph 3.

5. Without prejudice to the possibility for the requesting Member State to take the measures in question upon expiry of the period specified in paragraph 4, the Commission shall, within the shortest possible period of time, examine the compatibility with Community law of the measures notified.

Where the Commission concludes that the measure is incompatible with Community law, it shall adopt a decision asking the Member State concerned to refrain from taking the proposed measures or to put an end to the measures in question as a matter of urgency.

6. In the case of urgency, a Member State which intends to take a measure may derogate from paragraphs 2, 3 and 4. In such cases, the measures shall be notified within the shortest possible period of time to the Commission and the Member State of establishment, stating the reasons for which the Member State considers that there is urgency.

Article 36

Implementing measures

In accordance with the procedure referred to in Article 40(2), the Commission shall adopt the implementing measures necessary for the implementation of this Chapter, specifying the time-limits provided for in Articles 28 and 35 and the practical arrangements for the exchange of information by electronic means between Member States, and in particular the interoperability provisions for information systems.

Chapter VII

Convergence programme

Article 37

Codes of conduct at Community level

1. Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up at Community level, particularly by professional bodies, organisations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another Member State, in conformity with Community law.
2. Member States shall ensure that the codes of conduct referred to in paragraph 1 are accessible at a distance, by electronic means.

Article 38

Additional harmonisation

The Commission shall assess, by ...*, the possibility of presenting proposals for harmonisation instruments on the following subjects:

- (a) access to the activity of judicial recovery of debts;
- (b) private security services and transport of cash and valuables.

* Four years after the entry into force of this Directive.

Article 39

Mutual evaluation

1. By ...* at the latest, Member States shall present a report to the Commission, containing the information specified in the following provisions:
 - (a) Article 9(2), on authorisation schemes;
 - (b) Article 15(5), on requirements to be evaluated;
 - (c) Article 25(3), on multidisciplinary activities.
2. The Commission shall forward the reports provided for in paragraph 1 to the Member States, which shall submit their observations on each of the reports within six months of receipt. Within the same period, the Commission shall consult interested parties on those reports.
3. The Commission shall present the reports and the Member States' observations to the Committee referred to in Article 40(1), which may make observations.
4. In the light of the observations provided for in paragraphs 2 and 3, the Commission shall, by ...** at the latest, present a summary report to the European Parliament and to the Council, accompanied where appropriate by proposals for additional initiatives.

* Three years after the entry into force of this Directive.

** Four years after the entry into force of this Directive.

5. By ...* at the latest, Member States shall present a report to the Commission on the national requirements whose application could fall under the third subparagraph of Article 16(1) and the first sentence of Article 16(3), providing reasons why they consider that the application of those requirements fulfil the criteria referred to in the third subparagraph of Article 16(1) and the first sentence of Article 16(3).

Thereafter, Member States shall transmit to the Commission any changes in their requirements, including new requirements, as referred to above, together with the reasons for them.

The Commission shall communicate the transmitted requirements to other Member States. Such transmission shall not prevent the adoption by Member States of the provisions in question. The Commission shall on an annual basis thereafter provide analyses and orientations on the application of these provisions in the context of this Directive.

Article 40

Committee procedure

1. The Commission shall be assisted by a Committee.
2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall adopt its rules of procedure.

* Three years after the entry into force of this Directive.

Article 41
Review clause

The Commission, by ...[†], and every three years thereafter, shall present to the European Parliament and to the Council a comprehensive report on the application of this Directive. This report shall, in accordance with Article 16(4), address in particular the application of Article 16. It shall also consider the need for additional measures for matters excluded from the scope of application of this Directive. It shall be accompanied, where appropriate, by proposals for amendment of this Directive with a view to completing the Internal Market for services.

Article 42
Amendment of Directive 1998/27/EC

In the Annex to Directive 1998/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests¹, the following point shall be added:

"13. Directive .././EC of the European Parliament and of the Council of ... on services in the internal market (OJ L [...], [...], p. [...])^{*}".

[†] Five years after the date of entry into force of this Directive.

¹ OJ L 166, 11.6.1998, p. 51. Directive as last amended by Directive 2005/29/EC.

^{*} Note for the OJ: Please insert the number and date and the OJ reference of this Directive.

Article 43

Protection of personal data

The implementation and application of this Directive and, in particular, the provisions on supervision shall respect the rules on the protection of personal data as provided for in Directives 95/46/EC and 2002/58/EC.

Chapter VIII

Final provisions

Article 44

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before ...*.

They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

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 45

Entry into force

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

* Three years after the entry into force of this Directive.

Article 46
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President



COMMISSIONE DELLE COMUNITÀ EUROPEE

Bruxelles, 25.07.2006
COM(2006) 424 definitivo

2004/0001 (COD)

**COMUNICAZIONE DELLA COMMISSIONE
AL PARLAMENTO EUROPEO**

ai sensi dell'articolo 251, paragrafo 2, secondo comma, del trattato CE

concernente

**la posizione comune definita dal Consiglio in vista dell'adozione della direttiva del
Parlamento europeo e del Consiglio relativa ai servizi nel mercato interno**

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Parlamento europeo e del Consiglio relativa ai servizi nel mercato interno**

1. ANTEFATTI

Proposta trasmessa al Parlamento europeo e al Consiglio (documento COM (2004) 2 def. – 2004/0001 (COD):	06.02.2004
Parere del Comitato economico e sociale europeo:	09.02.2005
Parere del Comitato delle regioni:	29.09.2004
Parere del Parlamento europeo (in prima lettura):	16.02.2006
Proposta modificata:	06.04.2006
Posizione comune adottata a maggioranza qualificata:	24.07.2006

2. OBIETTIVO DELLA PROPOSTA DELLA COMMISSIONE

La proposta della Commissione intende:

- favorire la crescita economica e l'occupazione nell'Unione europea;
- instaurare un autentico mercato interno dei servizi eliminando gli ostacoli giuridici ed amministrativi allo sviluppo delle attività di servizi;
- rafforzare i diritti dei consumatori come utenti di servizi;
- stabilire obblighi giuridicamente vincolanti per garantire un'effettiva cooperazione amministrativa tra gli Stati membri.

3. OSSERVAZIONI SULLA POSIZIONE COMUNE

3.1 Osservazioni di carattere generale

La posizione comune adottata dal Consiglio mantiene il contenuto sostanziale della proposta modificata della Commissione, che integrava gran parte degli emendamenti adottati in prima lettura dal Parlamento europeo. Inoltre, per quanto riguarda gli elementi fondamentali della proposta (in particolare le esclusioni dal campo di applicazione e le disposizioni relative alla libera prestazione dei servizi), la posizione comune del Consiglio rispetta l'accordo politico raggiunto dal Parlamento europeo, che si riflette ora nella posizione comune, e come appariva già nella proposta modificata della Commissione.

Nel complesso, la posizione comune riprende, pienamente o nello spirito, tutti gli emendamenti del Parlamento europeo accolti in seduta plenaria dalla Commissione. Su alcuni altri punti, tiene conto delle preoccupazioni espresse negli emendamenti del Parlamento

europeo e propone delle soluzioni, anche se sono a volte formulate diversamente. Infine, la posizione comune contiene altresì alcune nuove disposizioni supplementari che rafforzeranno la trasparenza e la cooperazione tra gli Stati membri e la Commissione, contribuendo in tal modo a garantire la corretta attuazione della direttiva.

Gli aspetti principali della posizione comune sono illustrati dettagliatamente di seguito. In primo luogo sono trattati i punti che corrispondono agli emendamenti del Parlamento europeo. Tale sezione è molto più ampia poiché la proposta modificata della Commissione e la posizione comune del Consiglio hanno entrambe accolto la maggior parte degli emendamenti del Parlamento europeo. Successivamente sono trattati altri punti aggiunti dal Consiglio nella posizione comune.

3.2. Aspetti della posizione comune che riprendono gli emendamenti proposti dal Parlamento europeo

3.2.1 Campo di applicazione e altre disposizioni generali (articoli da 1 a 4)

Specifici settori del diritto (articolo 1). Quanto alla materia oggetto della direttiva e delle sue relazioni con specifici settori del diritto (diritti fondamentali, legislazione del lavoro, diritto penale, protezione o promozione della diversità culturale e linguistica e del pluralismo dei media), la posizione comune riprende in sostanza gli emendamenti del Parlamento europeo (7, 8, 290, 291, 297, 298, 299, parte pertinente del 72) e della proposta modificata, con alcuni adattamenti di ordine redazionale accolti dalla Commissione giacché mirano a migliorare l'atto normativo senza cambiare la sostanza del testo votato al Parlamento europeo o della proposta modificata della Commissione.

Campo di applicazione (articolo 2) - Per quanto riguarda il campo di applicazione della direttiva, la posizione comune tiene ampiamente conto degli emendamenti adottati dal Parlamento europeo in prima lettura. Riguardo ai **servizi di interesse generale**, la posizione comune rispecchia pienamente la sostanza delle modifiche del Parlamento europeo (cfr. in particolare gli emendamenti 13, 44, 73 e le parti pertinenti degli emendamenti 72 e 289) e, rispetto alla proposta modificata, la posizione comune afferma espressamente, all'articolo 2, che la direttiva non si applica ai servizi non economici d'interesse generale. Per quanto riguarda i **servizi di trasporto e i servizi portuali**, la posizione comune conferma l'esclusione di tutti i servizi nel settore dei trasporti, ivi compresi i servizi portuali, come già previsto negli emendamenti 20 e 306 del Parlamento europeo. Rispetto alla proposta modificata, la disposizione relativa all'esclusione dei servizi di trasporto è stata formulata in modo leggermente diverso ai fini della conformità con l'articolo 51 del trattato e integrata dall'esclusione dei servizi portuali. Tale adeguamento non cambia la sostanza della disposizione ed è pertanto accettato dalla Commissione. Per quanto riguarda i **servizi audiovisivi**, gli emendamenti 19 e 79 del Parlamento europeo sono ripresi nella sostanza dalla posizione comune. La posizione comune riformula leggermente il testo pertinente all'articolo 2 della proposta modificata per precisare che l'esclusione dei servizi audiovisivi include anche i servizi cinematografici; modifica accolta dalla Commissione. Anche con riferimento all'esclusione **dei servizi sociali**, gli emendamenti del Parlamento europeo (cfr. emendamenti 252, 294, 295 e 296) sono stati ritenuti nella posizione comune. Rispetto alla proposta modificata della Commissione, la posizione comune afferma più chiaramente che anche i servizi prestati da associazioni caritative sono esclusi; la Commissione accoglie tale modifica perché ritiene che la definizione figurante nella posizione comune rafforzerà la certezza del diritto circa l'esclusione dei servizi sociali. Rispetto alla proposta modificata della Commissione, la posizione comune aumenta il numero delle esclusioni aggiungendo i settori

dei **servizi forniti da notai e ufficiali giudiziari nominati con atto ufficiale della pubblica amministrazione**. Questa esclusione è sostanzialmente conforme agli emendamenti 18 e 81 del Parlamento europeo ed è accolta dalla Commissione. Infine, la posizione comune conferma che **i servizi delle agenzie di lavoro interinale, i servizi sanitari, le attività di azzardo, i servizi privati di sicurezza e il settore fiscale** sono esclusi dal campo di applicazione della direttiva, come previsto dagli emendamenti del Parlamento europeo (cfr. in particolare gli emendamenti 17, 19, 78, 80, 82, 300, 302/332, 304) e dalla proposta modificata della Commissione.

Relazione con le altre disposizioni del diritto comunitario (articolo 3). - La posizione comune adotta lo stesso approccio degli emendamenti del Parlamento europeo (21, 83, 219, 307) e dalla proposta modificata; afferma pertanto chiaramente che la direttiva non pregiudica gli altri strumenti comunitari e che, in caso di conflitto con un altro atto comunitario che disciplina aspetti specifici dell'accesso ad un'attività di servizi o al suo esercizio, prevalgono le disposizioni di quest'ultimo atto comunitario su questi aspetti specifici. Inoltre, la posizione comune conferma anche che la direttiva non concerne le norme di diritto internazionale privato, in particolare le norme che garantiscono che i consumatori beneficeranno della tutela riconosciuta loro dalla normativa sulla protezione dei consumatori in vigore nel rispettivo Stato membro.

Definizioni (articolo 4). La posizione comune rispecchia le modifiche richieste dal Parlamento europeo (1-3, 5-6, 11, 25-26, 93-94, e 97-98) e il testo della proposta modificata per quanto riguarda la definizione dei termini utilizzati nella direttiva.

3.2.2 Semplificazione amministrativa (articoli da 5 a 8)

Semplificazione delle procedure (articolo 5). La posizione comune riprende gli emendamenti del Parlamento europeo (cfr. gli emendamenti 27, 29-30, 99, la parte pertinente dell'emendamento 100) così come accolti nella proposta modificata, con leggere modifiche redazionali. Ad esempio, una frase di nuova introduzione al paragrafo 1 fa esplicitamente obbligo agli Stati membri di semplificare le procedure e formalità nazionali quando l'esame cui sono sottoposte dimostri che non sono "sufficientemente semplici". La Commissione può accogliere questa modifica.

Sportello unico (articolo 6). La posizione comune riprende principalmente il testo della proposta modificata, fondato sulle modifiche corrispondenti (104 e 309) del Parlamento europeo. Sostituendo la preposizione "presso" con "mediante" al paragrafo 1, precisa che il ruolo dello sportello unico può limitarsi ad intervenire come intermediario tra il prestatore di servizi e le autorità competenti. Questa chiarificazione può essere accettata dalla Commissione.

Diritto all'informazione (articolo 7). La posizione comune riprende gli emendamenti del Parlamento europeo (31, 33, 105-106 e 108-110) accolti nella proposta modificata, con una piccola modifica redazionale volta a precisare che la direttiva non interferisce nella legislazione degli Stati membri in materia di uso delle lingue.

Procedure per via elettronica (articolo 8). La posizione comune incorpora il testo della proposta modificata, che si ispirava agli emendamenti del Parlamento europeo (parti pertinenti degli emendamenti 32 e 111). La posizione comune chiarisce, al considerando 52, che l'obbligo di prevedere procedure per via elettronica non impedisce agli Stati membri di offrire, oltre a mezzi elettronici, altre modalità per espletare dette procedure e formalità. Inoltre, la posizione comune amplia la possibilità di applicare procedure non elettroniche nei casi in cui è necessario controllare l'integrità personale del prestatore di servizi o del suo personale responsabile. Infine, la posizione comune dispone, al paragrafo 3, che le modalità

destinate a facilitare l'interoperabilità dei sistemi devono tenere conto di standard comuni definiti a livello comunitario. Queste modifiche possono essere accolte dalla Commissione poiché migliorano il testo.

3.2.3. Libertà di stabilimento dei prestatori (articoli da 9 a 15)

Regimi di autorizzazione (articolo 9). La posizione comune riprende il testo della proposta modificata (che aveva incorporato gli emendamenti 35 e 112-113 e, parzialmente, gli emendamenti 37, 115 e 117), con correzioni redazionali minori al paragrafo 3. La Commissione può accettare questa modifica, che migliora la chiarezza del testo senza alterare in sostanza l'emendamento del Parlamento europeo.

Condizioni di rilascio dell'autorizzazione (articolo 10). La posizione comune riprende il testo della proposta modificata, parzialmente basato sugli emendamenti del Parlamento europeo (emendamenti 34, 118, 119, 120, 121, 122), con piccole correzioni redazionali. A differenza della proposta modificata (che riprendeva l'emendamento 120 del Parlamento europeo), la posizione comune non dispone, al paragrafo 3, che gli Stati membri, all'atto della valutazione se le condizioni sono equivalenti o sostanzialmente comparabili, devono tenere conto del loro impatto e dell'efficacia della loro attuazione. La Commissione può concordare con la nuova formulazione giacché la frase precedente induceva a sollevare dubbi circa la sua praticabilità. Infine, la posizione comune precisa al paragrafo 6 che non è necessario che le decisioni di rilascio di un'autorizzazione siano motivate né oggetto di ricorso in tribunale; ciò riflette l'emendamento 122 del Parlamento europeo, che non era stato ripreso nella proposta modificata. La Commissione può accettare tale aggiunta.

Durata di validità dell'autorizzazione (articolo 11). Selezione tra diversi candidati (articolo 12). La posizione comune riprende il testo della proposta modificata, parzialmente basato sugli emendamenti del Parlamento europeo (emendamenti 36, 38, 124-127, 128, 129, parti degli emendamenti 30 e 130).

Requisiti vietati (articolo 14). La posizione comune riprende il testo della proposta modificata, fondato soprattutto sugli emendamenti del Parlamento europeo (41, 138, 140 e 141, 40, 142 e 143), con aggiunte al paragrafo 6 (il divieto di consultare operatori concorrenti non si applica alla consultazione del grande pubblico) e al paragrafo 7 (la copertura assicurativa è comparata alle garanzie finanziarie: gli Stati membri possono ancora imporre l'una o l'altra, sempre che non debbano essere obbligatoriamente sottoscritte presso un prestatore stabilito sul loro territorio). La Commissione può accettare queste aggiunte poiché migliorano la chiarezza del testo.

Requisiti da valutare (articolo 15). La posizione comune adotta l'approccio seguito nella proposta modificata e negli emendamenti del Parlamento europeo che ha ripreso (42, 144-145, 147-149 e 242, 146 e 150), pur portando alcune modifiche alla disposizione (cfr. sezione 3.3).

3.2.4. Libera prestazione di servizi e deroghe relative (articoli da 16 a 18, corrispondenti agli articoli da 16 a 19 nella proposta modificata della Commissione)

Per quanto riguarda la disposizione sulla **libera prestazione di servizi (articolo 16)** la posizione comune riflette pienamente gli emendamenti del Parlamento europeo (cfr. gli emendamenti 45 a 47, 152 e 293/rev4), già incorporati nella proposta modificata della Commissione, e aggiunge un nuovo considerando (82) che precisa l'applicazione della regolamentazione degli Stati membri in materia di condizioni di occupazione. Anche con riferimento **alle ulteriori deroghe (articolo 17)** in questo settore la posizione comune rispecchia gli emendamenti del Parlamento europeo (53, 48, 50, 51, 54, 161, 162, 163, 165,

169, 170, 171, 172, 173, 174 e 175, 400, 404) e riprende il testo della proposta modificata con una leggera modifica redazionale al paragrafo 12 per quanto riguarda la spedizione dei rifiuti. La disposizione **sulle deroghe transitorie (articolo 18 della proposta iniziale della Commissione)** è stata soppressa conformemente al voto del Parlamento europeo in prima lettura e alla proposta modificata dalla Commissione. Infine, la posizione comune conferma il testo della proposta modificata per quanto riguarda **le deroghe per casi individuali (articolo 18, corrispondente all'articolo 19 della proposta modificata della Commissione)**.

3.2.5. Diritti dei destinatari di servizi (articoli da 19 a 21, corrispondenti agli articoli da 20 a 23 nella proposta modificata della Commissione)

Riguardo ai **diritti dei destinatari di servizi (articoli 19-21)**, la posizione comune rispecchia ampiamente l'emendamento adottato dal Parlamento europeo e la proposta modificata della Commissione. Per quanto riguarda in particolare le disposizioni **sulle restrizioni vietate e la non discriminazione (articoli 19-20)**, la posizione comune conferma il testo della proposta modificata, tranne la soppressione della lettera c) che è accettata dalla Commissione. Per quanto riguarda **l'assistenza ai destinatari (articolo 21)** la posizione comune riflette, con piccole modifiche, l'emendamento 178 del Parlamento europeo e la proposta modificata. Infine, la posizione comune segue pienamente l'approccio del Parlamento europeo e della proposta modificata e conferma la soppressione delle disposizioni relative **al rimborso degli oneri finanziari delle cure ospedaliere fornite in un altro Stato membro** che figuravano nell'articolo 23 della proposta iniziale.

3.2.6. Distacco dei lavoratori e di cittadini di paesi terzi (articoli 24 e 25 della proposta iniziale)

La posizione comune adotta l'approccio del Parlamento europeo (emendamenti 181, 182/248, 63-64, 183/249 e 65-66) e della proposta modificata e conferma pertanto la soppressione degli articoli 24 e 25.

3.2.7. Qualità dei servizi (articoli 22-27, che corrispondono agli articoli 26-32 della proposta modificata della Commissione)

Riguardo alla disposizione relativa **alle informazioni sui prestatori e sui loro servizi (articolo 22, ex articolo 26 della proposta modificata della Commissione)**, la posizione comune rispecchia il voto del Parlamento europeo e la proposta modificata per quanto riguarda l'obbligo per il prestatore di fornire informazioni sul proprio status e la propria forma giuridica. Inoltre, tutti i requisiti in materia di informazione già previsti da altre disposizioni della direttiva (per quanto riguarda ad esempio l'assicurazione o le garanzie, le garanzie post vendita, le attività multidisciplinari e i codici di condotta) sono riuniti in quest'articolo, che è accettato dalla Commissione. Per l'assicurazione di responsabilità professionale **(articolo 23, ex articolo 27 della proposta modificata della Commissione)**, la posizione comune segue l'approccio del Parlamento europeo (cfr. in particolare gli emendamenti 64, 187, 188 e 190) e della proposta modificata e conferma che l'assicurazione professionale non è obbligatoria. La posizione comune inserisce alcune modifiche minori alla proposta modificata, quali il trasferimento verso l'articolo 26 del paragrafo 2 sui requisiti in materia di informazione e la soppressione della procedura in caso di incapacità del mercato assicurativo, che era in realtà superflua vista la natura non obbligatoria dell'assicurazione professionale. Infine, per quanto riguarda le disposizioni **sulle attività multidisciplinari (articolo 25, ex articolo 30 della proposta modificata della Commissione)**, **la politica in materia di qualità dei servizi (articolo 26, ex articolo 31)** e **la risoluzione delle controversie (articolo 27, ex articolo 32)**,

la posizione comune conferma pienamente i testi dell'emendamento del Parlamento europeo e della proposta modificata, apportando semplicemente alcune piccole modifiche redazionali.

3.2.8. Cooperazione amministrativa (articoli da 28 a 36, corrispondenti agli articoli da 33 a 38 della proposta modificata della Commissione)

Mutua assistenza, controllo e disposizioni connesse (articoli 28-36.) La posizione comune riprende, con leggerissime modifiche, il testo della proposta modificata che aveva già incorporato gli emendamenti del Parlamento europeo (cfr. in particolare gli emendamenti 68-69, 197-198, 200-203) pur utilizzando una struttura diversa risultante da precedenti discussioni in Consiglio.

3.2.9. Programma di convergenza e disposizioni finali (articoli da 37 a 46, corrispondenti agli articoli da 39 a 48 della proposta modificata della Commissione)

Per quanto riguarda *i codici di condotta (articolo 37, ex articolo 39 della proposta modificata della Commissione), l'armonizzazione complementare (articolo 38, ex articolo 40) e la clausola di revisione (articolo 41, ex articolo 43)*, la posizione comune conferma gli emendamenti del Parlamento europeo e la proposta modificata, con modifiche leggere che non influiscono sulla sostanza delle disposizioni. Infine, per quanto riguarda il termine di attuazione (*articolo 44, paragrafo 1, ex articolo 45, paragrafo 1*), la posizione comune incorpora l'emendamento del Parlamento europeo e prolunga il periodo di attuazione a 3 anni, invece dei 2 anni previsti nella proposta modificata. La Commissione può accogliere siffatta modifica.

3.3. Altri elementi introdotti dal Consiglio nella posizione comune

Procedure di autorizzazione (articolo 13.) Rispetto alla proposta modificata, la posizione comune apporta alcune modifiche ai paragrafi 3 e 4 dell'articolo 13 e al considerando 63, relativi al principio secondo il quale in mancanza di risposta delle autorità competenti le autorizzazioni si ritengono rilasciate. Secondo la posizione comune, gli Stati membri sono autorizzati a prolungare il termine di risposta quando il dossier sia particolarmente complesso, e a condizione di informarne debitamente il richiedente notificandogli la durata e le ragioni della proroga. Inoltre, il considerando 63 spiega che gli Stati membri hanno facoltà di attuare regimi diversi per le procedure di autorizzazione, quando ciò sia oggettivamente giustificato da motivi imperativi di interesse generale, e che possono includere norme per il tacito rifiuto della domanda alla scadenza del periodo in causa. Dette modifiche dovrebbero inoltre venire incontro alle preoccupazioni espresse dal Parlamento europeo il quale aveva votato la soppressione del principio delle autorizzazioni tacite, che considerava non sufficientemente flessibile. Nel contempo, non risulta pregiudicato l'obiettivo di accelerare le procedure di autorizzazione e migliorare la loro prevedibilità per gli operatori economici. La Commissione accoglie pertanto le modifiche apportate all'articolo 13 della posizione comune.

Valutazione relativa alla libertà di stabilimento (articolo 15). La posizione comune apporta alcune modifiche al paragrafo 4 concernenti l'implicazione del processo di valutazione per i servizi di interesse economico generale (SIEG). Queste modifiche mirano a precisare che la valutazione non deve ostare all'assolvimento dei compiti assegnati ai servizi di interesse economico generale. Ciò dovrebbe risolvere le preoccupazioni del Parlamento europeo circa l'effetto potenziale della valutazione sulle SIEG. Per la Commissione, è chiaro che la valutazione non dovrebbe compromettere l'esecuzione dei compiti delle SIEG. La posizione comune introduce inoltre modifiche relative ai requisiti in materia di notifica per gli Stati membri. Queste modifiche dovrebbero rispondere alle preoccupazioni del Parlamento

europeo, che giudicava l'obbligo di notificazione troppo restrittivo per gli Stati membri. Al paragrafo 6 in particolare, la posizione comune elimina la frase "e che sono resi necessari da circostanze nuove". Questa soppressione può essere accolta. Al paragrafo 7, la posizione comune aggiunge una nuova frase per spiegare che la notificazione ai sensi della direttiva 98/34/CE soddisfa allo stesso tempo all'obbligo di notificazione previsto dalla presente direttiva. La Commissione può accogliere questa aggiunta, che rafforza la certezza del diritto per le amministrazioni nazionali e per le istituzioni comunitarie. La Commissione sottolinea che soltanto i servizi della società dell'informazione sono attualmente contemplati dalla direttiva 98/34/CE, come modificata dalla direttiva 98/48/CE.

Valutazione reciproca (articolo 39, corrispondente all'articolo 41 della proposta modificata della Commissione). La posizione comune prevede, all'articolo 39, paragrafo 5, una nuova procedura secondo la quale gli Stati membri devono presentare una relazione alla Commissione riguardante i requisiti nazionali la cui applicazione potrebbe rientrare nell'ambito dell'articolo 16, paragrafo 1, terzo comma, e dell'articolo 16, paragrafo 3, e la Commissione devono comunicare tali informazioni agli altri Stati membri e fornire analisi e orientamenti circa la loro applicazione nel contesto della direttiva. La Commissione può accettare queste disposizioni poiché migliorano la trasparenza e la certezza del diritto per gli operatori economici.

Procedura di comitato (articolo 40, corrispondente all'articolo 42 della proposta modificata della Commissione). La posizione comune prevede un comitato di regolamentazione. La Commissione può accettare questa disposizione.

Protezione dei dati personali (articolo 43). La posizione comune inserisce un articolo sulla protezione dei dati personali intesa a precisare che l'applicazione della direttiva e, in particolare, lo scambio di informazioni tra gli Stati membri, devono rispettare le norme in materia di protezione dei dati personali. La Commissione può accettare questa disposizione.

4. CONCLUSIONI

La Commissione ritiene che la posizione comune mantenga gli elementi fondamentali della sua proposta modificata e quelli degli emendamenti del Parlamento europeo. La Commissione constata che la posizione comune consegue un buono equilibrio e costituisce un valido compromesso che contribuirà alla realizzazione di un autentico mercato interno dei servizi e alla realizzazione degli obiettivi della strategia di Lisbona pur rispettando uno standard qualitativo elevato dei servizi, compresi i servizi pubblici, i diritti sociali e i diritti dei consumatori. Per questi motivi, la Commissione approva la posizione comune adottata dal Consiglio.