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Committee on Government Procurement

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NOTIFICATION OF NATIONAL IMPLEMENTING LEGISLATION

Communication from the European Community

The following communication has been received from the Permanent Delegation of the Commission of the European Community in accordance with the Committee Decision of 4 June 1996 relating to the procedures for the Notification of National Implementing Legislation (GPA/1/Add.1).

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I. SUMMARY OF THE EC LEGISLATION ON PUBLIC PROCUREMENT

I.1 EC Level

(i) At **EC level**, general public procurement rules stem from the Rome Treaty. These rules have been completed by several Community Directives, specially with respect to procedural requirements.

The main EC Treaty articles having consequences for public procurement are Articles 6 (non-discrimination on grounds of nationality principle), 30 to 36 (the ban on quantitative restrictions on imports and all measures having equivalent effect), 52 & seq. (the right to establishment in the territory of another member State) and 59 & seq. (freedom to provide services).

Secondary legislation applies these general principles to concrete matters. Thus, there is a group of Council Directives laying down certain common rules with respect to Public Procurement. These directives need implementation at national level and their purpose is to coordinate the procedures to be followed in member States whenever a contract is to be awarded whose value exceeds a certain threshold.

The GPA was transposed into EC law by Council Decision n° 94/800/EC of 22 December 1994 (see section 4 below).

To a large extent, EC rules coincide with the GPA rules on public procurement. Some minor amendments are in the process of being adopted to align the EC directives with the GPA rules where differences would create reverse discrimination against EC suppliers.[1]

For contracts below the thresholds, national rules are not bound by the EC directives, nor by the GPA, though the general rules of the Treaty still apply. This means that, below thresholds, national rules are not uniform, so that each member State has its own public procurement rules which must only respect the general principles laid down in the Treaty, in particular non-discrimination in respect of goods and services.

[1] See Council and Commission Common Position, OJ C111, 09.04.1997.

The directives fall into two groups, those governing the traditional areas of public procurement (Public Authorities directives or traditional sectors directives), and those dealing with water, energy, transport and telecommunications (Utilities directives or "excluded" sectors directives). Each group is completed by a Remedies directive. Although they differ in a number of respects, both groups apply the following principles: a ban on discrimination; open access to all EC suppliers, transparency of award procedures; a precise indication of which of the permissible award procedures has been chosen; compliance with technical requirements and transparency of the procedures for selecting contractors and awarding contracts, through the use of objective criteria which must be known beforehand.

(ii) The public authorities directives

Contracting authorities in the sense of these directives are the State, Regional or Local authorities, and bodies governed by public law. These authorities are covered in Annexes 1 and 2 of Appendix I of the GPA.

- Council Directive n° 93/36 coordinating procedures for the award of public supply contracts (The Public Supplies Directive).

- Council Directive n° 93/37 concerning the coordination of procedures for the award of public works contracts (the Public Works Directive). This directive covers contracts between a contractor and a contracting authority concerning the execution or both the execution and design of works related to building or civil engineering activities, in addition to ancillary supplies and services contracts necessary for their execution.

- Council Directive n° 92/50 relating to the coordination of procedures for the award of public service contracts (the Public Services Directive). This directive covers all contracts between a contracting authority and a service supplier which are not yet covered by other existing public procurement directives. Services are divided into two categories, priority services for which there is a complete set of rules, and other services for which the requirements are much less (see Articles 8-10). Priority services are listed in Annex IA of the directive. All the services listed in Annex 4 to Appendix I of the GPA are included in this category of priority services.

- Council Directive n° 89/665 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 contracts, and public services (the Remedies Directive). This directive obliges member States to ensure adequate procedures, including the authorization of competent review bodies to take the necessary measures to ensure effective remedies for undertakings lessed by infringements of Community law.

(iii) Utilities directives

- Council directive n° 93/38 coordinating the procurement procedures of the entities operating in the water, energy, transport and telecommunications sectors (the Utilities Directive). This directive governs those contracts of authorities and public undertakings operating in the so-called "former excluded sectors" and other contracting entities operating on the basis of special or exclusive rights granted by a competent public authority. Therefore, this directive is relevant for contracts awarded by the contracting entities listed in Annex 3 to Appendix I of the GPA and which operate in the water, electricity, airports, ports and urban transport sectors. Rules applying to those sectors are more flexible than those for the traditional public procurement sectors.

- Council directive 92/13 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 sectors (the Remedies Utilities Directive). This directive also obliges inter alia member States to establish adequate procedures to ensure effective remedies for infringements of Community law in the sectors concerned.

(iv) A **booklet** describing the EC rules governing the procedure in the award of public procurement contracts is attached.

I.2 Member State Level

At **member State level**, national legislation has implemented both GPA and EC rules.

(A) Austria. Procurement regulations above the thresholds for Central Government Entities are specified in the Federal Act "*Bundesvergabegesetz* 1997". Each of Austria's nine states ("Bundesländer") has adopted its own procurement act. The revised *Bundesvergabegesetz* implements the obligatory use of "ONORM A-2050" below the thresholds.

(B) Belgium. Legislation on public procurement of goods, works and services falls within the competences of the federal authorities, which have enacted an Act and implementing regulations (*arrêtés royaux*). This legislation applies to any public contract, regardless of its value, if they have a pecuniary interest.

Those texts are:

- *Law of 24 December 1993 on public procurement and certain works, services and supplies contracts, including Royal Order of 10 January 1996 amending Title IV of Book I of that Law;*

- *Royal Order of 8 January 1996 on public procurement of works, supplies and services and on public works concessions;*

- *Royal Order of 10 January 1996 on public procurement of works, supplies and services in the water, energy, transport and telecommunications sectors.*

(D) Germany. The basis of the German procurement law is article 57a to 57c of the *Haushaltsgrundsätzegesetz* (Budgetary principle law). Article 57a defines the group of contracting authorities. Articles 57b and c are concerned with the review procedures used in cases of violation of procurement provisions. The contract award regulations that German contracting authorities must comply with are the following: *Verdingungsordnung für Leistungen*, VOL/A (Code for Awarding Public Supplies Contracts including services which are supplied commercially, but excluding public works contracts); *Verdingungsordnung für Bauleistungen*, VOB/A (Code for awarding public works contracts). Each code is divided into 4 sections. VOL/A: the first section contains provisions for national awards of supplies and services contracts below the EC thresholds; the second section contains provisions which implement the regulations of the EC public supplies Directive 93/36 and the EC public services Directive (92/50) as regards commercial and industrial services. Contracting authorities must comply with this section if the contract exceeds the EC thresholds; the third section contains provisions applicable to public contracting entities operating in the water, energy, transport and telecom sector according to the EC Utilities Directive 93/38; the fourth section contains the implementation of the EC Utilities Directive for private contracting authorities. The VOB/A is similarly divided: first section, national regulations for the awards of public works contracts below the EC thresholds; second section, regulations which implement the EC public works Directive 93/37 and

therefore are relevant to contracts above the EC threshold; third section, provisions which implement the EC Utilities Directive concerning public contracting authorities; fourth section, implementation of the EC utilities Directive for private contracting authorities. The *Verdingungsordnung für freiberufliche Leistungen* (VOF) contains the contract award regulations of the EC-Directive 92/50 for services which are provided by free-lancers.

(DK) Denmark. All directives have been implemented in Danish legislation. The basis for so doing is the Ministry of Housing and Building's Consolidation Act n° 600 of 30 June 1992, which enables the competent ministries to implement public procurement directives by ministerial orders. The specific implementing measures are the following: Ministerial order n° 201 of 27 March 1995 on the award of public works contracts in the European Communities (Directive 93/37); Ministerial order n° 510 of 16 June 1994 on coordination of procedures for public supplies (Directive 93/36); Ministerial order n° 415 of 22 June 1993 on the coordination of procedures for the award of contracts for public procurement of services within the European Communities (Directive 92/50); Ministerial order n° 558 of 24 June 1994 on tendering of purchases within water and energy supply as well as transport and telecommunications in the European Community (Directive 93/38 as far as works contracts are concerned, also implements the provisions of Directive 92/13 concerning attestation); Ministerial order n° 557 of 24 June 1994 on tendering of purchases within water and energy supply as well as transport and telecommunications in the European Communities (Directive 93/38 as far as supplies and services are concerned, also implements the provisions of Directive 92/13 concerning attestation); Consolidation Act n° 1166 of 20.12.1995 on the Review Board for Tenders (Tendering of works and supplies in the European Communities) combined with ministerial order n° 26 of 23 January 1996 on the Review Board for Tenders implement both Directive 89/665 and Directive 92/13).

The following regulations apply in Denmark also to contracts of a value inferior to the thresholds: Circular of 14 April 1989 issued by the Housing and Building Agency which prescribes that State construction contracts and construction contracts subsidized by the State shall be subject to a public tender; Circular of 1 March 1994 issued by the Ministry of Finance which imposes an obligation on central government institutions to undertake a market testing on a regular basis with a view to a possible contracting out of a given activity.

(E) Spain. Basic legislation. Law 13/1995 (18 May) of Public Procurement. Its scope covers the State, the Regions, the Local administration, the autonomous bodies and the entities subject to public law which have their own legal personality and are linked to any Public administration which have been created to satisfy the general interest or whose activity is mostly financed by public administrations, or whose direction is controlled by public administrations, or whose direction bodies are composed in their majority by persons appointed by public administrations or other entities of public law. Royal Decree 390/1996 (1 March), implementing the Law 13/1995. Also relevant are: Law 30/1992 (26 November) on the Legal regime of the Public Administrations and on the Common administrative procedure; Law 7/1985 (2 April) on the Local administration. Furthermore, there are some specific regulations enacted by the Regions.

(EL) Greece. As concerns contracts for supplies the value of which is lower than the threshold established by Directive 93/36, Greece applies Law n° 2286/94 and the Regulation of public procurement (Presidential Decree 394/96) implementing the general provisions of the Treaty. In most cases, an open or restricted tendering procedure takes place and in exceptional cases a negotiated procedure. For supplies contracts equal to or exceeding ECU 137_000 in value, for the entities of Annex 1 and ECU 200,000 in value for all the other entities of public sector, Greece applies the treaty and Directive 93/36 as incorporated in the Hellenic Legislation through consecutive presidential Decree 370/95. As concerns contracts for public works the value of which is lower than the threshold established by Directive 93/37, Greece applies Law n° 1418/84 (as modified notably by Law n° 2299/94, Law n° 2308/95, Law n° 2372/96 and by Presidential Decrees) implementing the general

provisions of the Treaty. In most cases, an open or restricted tendering procedure takes place and - in exceptional cases - a negotiated procedure. For those public works contracts equal to or exceeding ECU 5 million in value, Greece applies the Treaty and Directive 93/37 as incorporated in the Hellenic legislation through consecutive presidential Decrees (notably 23/93 and 85/95). For all contracts for design and construction of public works, tendering and monitoring is carried out at three levels: central, peripherical and local level. As regards public services contracts, a legislation of a systematic and general nature is presently absent, pending the incorporation of Directive 92/50 into the Hellenic legislation. For the public services contracts with a value lower than the threshold of ECU 200.000, Greece applies Law n° 2362/95 (Arts. 8 & 23) which provides for public tendering. As an exception, the public procurement of services after a simpler procedure or a negotiated procedure is allowed. There also exists a special legislation for public works design contracts, which, however, has to be modified, pending the incorporation of the 92/50 Directive. The processes for public procurement of services for the entities operating in the utilities sectors, will be provided for in the forthcoming legislation incorporating Directive 93/38.

(F) **France**. Every contract awarded by the State, the territorial subdivisions and the public bodies must follow the rules established by the Code on Public Procurement, which comprises all the texts concerning the award of public contracts. Those rules are similar to those of the EC directives. The Code establishes the general principle of freedom of access for candidates to public contracts, and that of equality of treatment for both candidates and tenders. It sets out that contracts are awarded, in general, after a call for tenders, and limits the cases in which a negotiated procedure can be used.

(I) **Italy**. The Italian regime in force concerning public procurement has been regulated by four Legislative Decrees, that is to say, laws delegated from Parliament to Government. The first, Legislative Decree of 19 December 1991, n° 406 transposed the Works Directive. In addition, a Law of 11 February 1994, n° 109 (so-called Merloni Act) is also relevant to works. The second, Legislative Decree of 24 July 1992, n° 358 transposed the Supplies Directive. The third, Legislative Decree of 17 March 1995, n° 157 transposed into Italian legislation the Services Directive 92/50. The fourth, Legislative Decree of 17 March 1995, n° 158 transposed the Directives 90/531 and 93/38, concerning the so-called excluded sectors.

Furthermore, as regards remedies, there are some provisions applicable in other laws. Law n° 1034 of 6 December 1971, Law n° 142 of 19 February 1992 and the Civil Code.

(IRL) **Ireland**. There is no body of law governing public procurement in Ireland law except for that provided for under European Community, WTO and other international obligations. Ireland has implemented into law all EU public procurement Directives by means of secondary legislation, that is by way of "Statutory Instruments" which transpose the Directives directly into Irish law.

With respect to contracts below EU thresholds, there are no legally binding regulations but there are national government guidelines which public authorities are bound to follow. The national guidelines are published by the Department of Finance and were last issued in 1994. The guidelines sets out the requirements for dealing with sub-threshold and above-threshold EU contracts. The Guidelines apply to "Government Departments, local and regional authorities and other bodies dependent on State funding, in the award of public sector contracts (including the acquisition, letting and disposal of public property)". In addition, it is pointed out that commercial and non-commercial State bodies should comply with the broad principles of Government contracts procedures and that tax clearance procedures are obligatory in all cases. Although these guidelines do not have formal force of law, failure to apply them may obviously attract the censure of the Department of Finance, Parliament, auditors and the Media. In addition, purchasers are aware of the argument that failure to comply with the guidelines may be a breach of a representation or contractual obligation, to the effect that the purchaser will apply the proper published guidelines in consideration of the tenderer submitting his tender.

(L) Luxembourg. The main law is the Act concerning public supply and public works contracts (04.04.1974), based on the non-discrimination principles of the Treaty of Rome. EC directives have been implemented by special Regulations: one for the classical sectors (27.01.1994, as amended 31.05.1996), and one for the utilities (02.02.1996). An Act of 21.12.1989 transposed the remedies directive, which will be amended in what refers to the utilities remedies directive.

(NL) Netherlands. The EC directives have been implemented in The Netherlands through the *Raamwet EEG-voorschriften aansbestedingen* of March 13, 1993 (Staatsblad 1993, 212), entry into force 12 April 1993 (Framework legislation EEC regulation). Under this framework law there are the following two decrees for the relevant sectors:

- *Besluit aanbestedingen nutssector* (Staatsblad 1993, 305), entry into force 21 April 1993 (Decree on procurement in the sector of utilities). This decree applies to procurement in the sector of utilities.
- *Betluit overheidsaanbestedingen* (Staatsblad 1993, 305, as amended in 1994, Staatsblad 1994, 379), entry into force 1 July 1993 (Decree on government procurement). This decree applies to procurement of products, services and construction services.

The implementation is effected by a reference in the national legislation to the provisions of the EC directives which have to be applied.

Additionally, the *Uniform Aanbestedingsreglement EG 1991* (UAR-EG, Staatscourant 228, 1991, as amended in 1995, Staatscourant 1995, 103) (Harmonised regulation on EC procurement) contains standard conditions and procedures for the central government with respect to construction services.

The two EC directives on remedies (89/665 and 92/13) are covered by existing national legislation (Civil Code). Therefore, no specific national legislation implementing these directives was needed.

(**P) Portugal**. Rules governing public procurement in Portugal are the Decreto-Lei n° 55/95 as modified by Decreto-Lei n° 80/96. The Decreto-Lei n° 64/94 governs the procurement of computer-related goods and services. The Decreto-Lei n° 405/93 refers to works.

(S) Sweden. Sweden has incorporated all the relevant EC directives in its Law on public procurement (*Lagen* (1992:1528) *om Offentlig Upphandling, LOU*), which has been revised accordingly (1993:1468) and reprinted in the register of promulgated laws (*Svenk Författningssamling, SFS*). The law has been additionally revised through amendments 1994:614, 1995:704 and 1996:433. Further amendments to the LOU and specific detailed regulations will enter into force on 1 January 1998. The LOU applies to the same procuring entities and covers all types of procurement (supplies, public works and services contracts) that are subject to Community legislation.

(SF) Finland. The Public Procurement Act (1505/92, of 23.12.1992, amend. 1523/94 of 29.12.1994) is a general framework-law that applies to almost all purchase, rental or corresponding transactions in respect of goods and services, or for tenders administered by the State authorities, local authorities or other contracting entities referred to in the Act. The contracting entities covered by the Act shall observe the Act in their procurement with the view to promoting competition and ensuring proper and non-discriminatory treatment of those who participate in a tendering procedure. Within all fields other than the utilities sector (water, energy, transport and telecommunications sector) the Act applies to procurements below the threshold values as well as to procurements in excess thereof.

There are also two implementing orders: order on the procurement of supplies, services and works in excess of threshold value (24.02.1995/243) and Order on the procurement in excess of

threshold value by entities operating in the water, energy, transport and telecommunications sector (28.06.1994/567, amended 24.02.1995/244).

(UK) United Kingdom. The UK has implemented all the EC public directives by secondary legislation as follows: for public authorities, for supplies, Statutory Instrument (SI) 1995/201 implements 93/36/EEC, for works, SI 1991/2680 implements 93/37/EEC, for services, SI 1993/3228 implements 92/50/EEC; for utilities, 1996/2911 implements 93/38/EEC.

It should be noted that each of the above Statutory Instruments also implement the relevant enforcement rules. So the three SIs for the public sector (1995/201, 1991/2680 and 1993/3228) also implement 89/665/EEC the Compliance directive and for the utilities 1996/2911 implements 92/13/EEC, the Remedies directive.

In addition to these laws, the basic UK policy approach, which covers below threshold procurement as well, is set out in 'Public Purchasing Policy: Consolidated Guidelines,' (HM Treasury 1988). These provide that government purchasing should be conducted on the basis of achieving value for money through competition, which would not permit discrimination on grounds of nationality.

II. OTHER LEGISLATION GIVING EFFECT TO THE AGREEMENT ON GOVERNMENT PROCUREMENT

Not applicable.

III. CONTACT POINT

Requests from another Party concerning the EC legislation shall be addressed to:

The European Commission
Directorate General for Internal Market and Financial Services
Unit XV/B/5 - Public Procurement: International Relations and Economic Aspects
200, Rue de la loi
B-1049 Bruxelles
Belgium

Tel: + (32 2) 296.58.26
Fax: + (32 2) 295.01.27
E-mail: Auke.Haagsma@dg15.cec.be

IV. RESPONSES TO THE CHECKLIST OF ISSUES

IV.1 General Elements

1. Has the Agreement been transposed into national law and/or does it apply directly?

The Agreement was transposed into EC law by Council Decision n° 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994). See OJ L336 pages 1 and 273, of 23.12.1994.

It was completed by Decision n° 95/215/EC of 29 May 1995 concerning the conclusion of an Agreement in the form of an exchange of letters between the European Community and the United States of America. See OJ L134 page 25, of 20.6.1995.

A Communication was also made to explain that art. 36 of Directive 93/38 establishing a Community preference has been waived as a consequence of the entry into force of the GPA for those fields covered by the GPA. See OJ C 332/9, of 9.12.1995.

Under EC law no further legal instruments are required to ensure full application of such agreement. In other words, following Council's Decision, the GPA forms an integral part of the EC law. All covered contracting entities have to comply with the requirements of the GPA, as is the case for the requirements of the Directives.

2. In the case that entities below the federal or central state level are covered: are these categories of entities autonomous from federal or central state level government in the implementation of the Agreement?

National laws need to be adapted to the requirements of the Agreement as incorporated by Council Decision 94/800. This is done either at federal/central level or at sub-central level depending on the internal allocation of powers in each member State.

It must be noted that within the EC, federal/central level includes entities from the EU (Council and Commission) as well as entities at central and federal level of the different member States.

3. In the case that Annex 3 entities are covered: are these categories of entities autonomous in the implementation of the Agreement or do they apply the legislation provided by the federal/central or sub-central level?

Annex 3 entities apply the legislation provided by the federal/central or sub-central level.

4. Which main differences (if any) exist between the implementing laws at the federal or central level, the sub-central level and for Annex 3 entities?

The so-called Public Authorities Directives (see subchapter I.1, *supra*) apply both to the central/federal and sub-central levels. Therefore, rules are identical.

As for Annex 3 entities, they follow the rules of the Utilities Directive, which might slightly differ from the traditional Directives in some points. In particular, utilities have a free choice between open, restricted and negotiated procedures provided that a call for competition has been made through publication in the Official Journal. For Annex 1 and 2 entities, the use of the negotiated procedure, even with prior call for competition, is more restricted.

Another important difference is that unlike the traditional directives, the Utilities Directive does not lay down any qualitative selection criteria and thus allows contracting entities some discretion here. However, the criteria adopted must be objective and made available to all interested firms.

5. To what extent is information technology used in the process of government procurement?

Notices above the relevant thresholds set out in the GPA and in the EC Directives must be published in the Official Journal of the European Communities (Supplement "S"). The Official Journal (Supplement "S") is published in paper version and, from January 1997, in CD-Rom. In addition, notices are included in an electronic database: Tenders Electronic Daily, known as TED.

TED is the on-line version of the printed "Supplement S to the Official Journal". Similarly to the Official Journal, TED is updated five times per week. It is produced by the Office for Official Publications of the European Communities, hosted by the European Commission Host Organisation

(ECHO) and offered in many countries via Official Gateways. At present, in addition to the former connection procedures, a user-friendly graphical interface allows users to connect to the ECHO databases using a "Windows" environment ("Windows access to Central Host"). Watch-ECHO can be downloaded from the Internet (http://www2.echo.lu/echo/en/menuecho.html).

Furthermore, the Commission services are currently working on a pilot project named SIMAP (Information system for public procurement) which intends to create an EU-wide electronic public procurement network aiming to make the process more efficient, more reliable, less time-consuming, and ultimately more cost effective, both for procurers and suppliers. The Internet Homepage can be visited at: http://simap.eu.int.

IV.2 Specific Elements

6. Identify the specific provisions in your legislation which reflect the national treatment and non-discrimination commitments of Article III of the Agreement.

There are no discriminatory provisions in the EC law against third country suppliers or products other than those contained in Directive 93/38 (utilities directive). Furthermore, to the extent that the GPA is part of the EC law, pursuant to Decision 94/800, all relations between contracting entities and GPA countries' suppliers are governed by this decision.

Article 36 of the so-called Utilities Directives allows contracting entities to reject a tender if the proportion of non-Community products contained exceeds 50 per cent of the total value of the products constituting the tender. In presence of two equivalent tenders, rejection is compulsory. They are considered to be equivalent if the price difference does not exceed 3 per cent between tenders containing Community or non-Community products as described above.

This article only applies to entities covered by Annex 3 to Appendix I of the Agreement. However, the provisions of this article are automatically disapplied in case that an Agreement ensures comparable and effective access for Community suppliers. This is particularly the case of the GPA. A communication clarifying this issue was published in the Official Journal C332 page 9, of 9.12.1995.

See also Council Decision n° 94/800/EC, of 22.12.1994 referred to in answer to question n° 1.

7. Article IX:2 of the Agreement foresees that the invitation to participate may take the form of a notice of proposed procumbent. If your implementing legislation provides for this opportunity, give details.

EC Directives provide for the publication of notices of proposed procurement. We can distinguish the traditional sectors from the utilities.

For the traditional sectors (entities listed in Annex 1 and 2 of the GPA), Contracting authorities shall make known, by means of a notice, their intention to award a contract. This notice shall be sent to the Office for Official Publications of the European Communities, which shall publish it not later than 12 days after its dispatch (5 days in accelerated procedures). Notices shall be drawn up in accordance with the models given in the Annexes to the relevant directives, and shall specify the information requested in those models. Notices are published in full in the Official Journal of the European Communities (supplement S) and in the TED data base in the original language, which alone is authentic. A summary of the important elements of each notice is published in the other official languages of the Community, the original text alone being authentic. At present, the official languages of the Community are: Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish.

In the utilities sectors (entities covered under Annex 3), a call for competition is published in full in the original language in the O.J. of the E.C. and in the TED data bank. A summary of the important elements of each notice is published in the other official languages of the Community, the original text alone being authentic. Notices are sent to the Office for Official Publications of the European Communities, which publishes them not later than 12 days after dispatch (5 days in accelerated procedures).

Calls for competition may adopt four different forms: a notice stating the intention to award a particular contract; a periodic indicative notice to which undertakings can express their interest (in that case, it must have been published not more than 12 months prior to the date on which the invitation to confirm the interest is sent, there is no further publication of a notice of a call for competition); a notice on the existence of a qualification system; or a notice of a call for competition in the case of design contests.

Moreover, electronic standard forms are currently being used for transmission of notices to the Office of Publications. However, the use of standard forms is not yet mandatory.

8. Article IX:3 of the Agreement foresees that entities at the sub-central level as well as Annex 3 entities may use a notice of planned procurement or a notice regarding a qualification system as an invitation to participate. If your implementing legislation provides for this opportunity, give details.

As regards the traditional sectors (Annexes 1 and 2), in addition to invitation to tender notices, pre-information notices are published. These are however purely for information and cannot be used as a call for competition. In works contracts, contracting authorities publish indicative notices containing the essential characteristics of the works contracts which they intend to award. This notice is published in full in all the official languages of the Community, the original text alone being authentic. In other services and in supplies contracts, contracting authorities shall make known, by means of an indicative notice to be published as soon as possible after the beginning of their budgetary year, the intended total procurement which they envisage awarding during the subsequent 12 months where the total estimated value is not less than ECU 750,000.

As regards utilities, (Annex 3 entities), see the answer to question 7.

9. In the case of selective tendering procedures: to what extent are entities allowed to use permanent lists of suppliers or is there a requirement for lists of suppliers to be selected on a contract-by-contract basis?

In the case of Annex 3 entities, contracting entities which so wish may establish and operate a system of qualification of suppliers, contractors and service providers. An informative notice is published in the Official Journal of the European Communities. The system operates on the basis of objective criteria and rules. Updating of criteria and rules is possible. Refusal of qualification or bringing the qualification to an end must be reasoned and applicants or services providers should be notified.

Where a qualification system exists and a Qualification Notice is used as the sole "call for competition", the selection of candidates for bidlists for specific contracts must derive from those suppliers or contractors qualified under the system.

10. Article XIV of the Agreement allows for negotiation under certain conditions. Are entities allowed to proceed to negotiations? If so, which categories and what are the conditions imposed?

In the case of entities covered by Annexes 1 and 2 of the GPA, Contracting Authorities are entirely free to opt between open or restricted procedures. However, the option of negotiated procedures, with or without prior publication of a contract notice, is limited to particular situations:

- with prior publication of a contract notice:
  - in case of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions insofar as the original terms for the contract are not substantially altered (supplies, works, services);
  - when the works involved are carried out for the purpose of research, experiment, or development (works);
  - in exceptional cases, when the nature of the works/services or the risks attaching thereto do not permit prior overall pricing (works, services);
  - when the nature of the services to be procured is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by using open or restricted procedures (services);
- without prior publication of a contract notice:
  - in the absence of tenders or appropriate tenders in response to an open or restricted procedure insofar as the original terms for the contract are not substantially altered (supplies, works, services);
  - when the products involved are manufactured for the purpose of research, experiment, study or development (supplies);
  - when for technical or artistic reasons, or for reasons connected with protection of exclusive rights, there is only one supplier or contractor (supplies, works, services);
  - when the contract follows a design contest and must be awarded to the successful candidate or one of the successful candidates (services);
  - when it is strictly necessary for reasons of extreme urgency brought about by events unforeseeable (supplies, works, services);
  - in case of additional deliveries by the original supplier, justified by the risk of technical incompatibility or disproportionate technical difficulties (supplies);
  - for additional works/services (up to a limit of 50 per cent of the amount of the main contract) becoming necessary for the carrying out of the work/for the performance of the service through unforeseen circumstances, if the non-separation is justified by technical or economic reasons (works, services);
  - for new works/services consisting of the repetition of similar works/services entrusted to the contractor/service provider to which the same contracting authorities awarded an earlier contract, under certain conditions (works, services).

In the case of entities covered by Annex 3, Contracting entities may choose any of the procedures (open, restricted and negotiated) provided that a call for competition has been made (see answer to question 7). This prior call for competition can be avoided under some circumstances:

- in the absence of tenders or suitable tenders in response to procedure with a prior call for competition provided that the original contract conditions have not been substantially changed;

- when the contract is purely for the purpose of research, experiment, study or development, under certain conditions;

- when for technical or artistic reasons, or for reasons connected with protection of exclusive rights, there is only one supplier or contractor;

- when it is strictly necessary for reasons of extreme urgency brought about by events unforeseeable by the contracting entities;

- in case of additional deliveries by the original supplier, justified by the risk of technical incompatibility or disproportionate technical difficulties (supplies);

- for additional works/services becoming necessary for the carrying out of the work/for the performance of the service through unforeseen circumstances, if the non-separation is justified by technical or economic reasons (works, services);

- for new works consisting of the repetition of similar works entrusted to the contractor to which the same contracting authorities awarded an earlier contract, under certain conditions (works);

- for supplies quoted and purchased on a commodity market;

- for contracts to be awarded on the basis of a framework agreement (agreement the purpose of which is to establish the terms governing the contracts to be awarded during a given period);

- for bargain purchases (particularly advantageous opportunity available for a very short space of time at a price considerably lower than normal market prices);

- for purchases of goods under particularly advantageous conditions from either suppliers winding up their business activities or the liquidators for a bankruptcy (or similar);

- when the service contract follows a design contest and must be awarded to the successful candidate or one of the successful candidates (services).

11. Article XI contains the time-limits for tendering and delivery. Time-limits shall normally be "not less than X days". Does the domestic legislation reflect the various minimum time-limits as set out in the Agreement? If not, give information on any longer time-limits which have been established.

As for the entities covered by Annex 1 and 2 of the GPA, (the traditional sectors) time-limits are as follows:

- In open procedures, the deadline established by the authority for receipt of the tenders cannot be less than 52 calendar days from the date of dispatch of the notice for publication. This time-limit may be reduced (only for works and services) to 36 days if a prior information notice has been published.

- In restricted and negotiated procedures, the bid is preceded by a request from the contractor to be invited to participate in the tender. The time-limit for receipt of requests to participate fixed by the contracting authorities shall be no less than 37 days from the date of dispatch of the notice. The time-limit for receipt of tenders may not be less than 40 days from the date of dispatch of the written invitation in the case of restricted procedures. This time-limit can be reduced to 26 days if a prior information notice has been published. In case of justified urgency, those time-limits may be reduced to not less than 15 days for the receipt of request, and not less than 10 days for the receipt of tenders.

As for the entities covered by Annex 3 of the GPA (utilities operating in some sectors) time-limits are as follows:

- In open procedures, the time-limit for the receipt of tenders is the same as for the traditional sectors: 52 days (36 if pre-information).

- In restricted and negotiated procedures, timing is different. The time-limit for receipt of requests to participate shall, as a general rule, be at least 5 weeks from the date of dispatch of the notice or invitation and shall in any case not be less 22 days (or 15 under certain conditions). The time-limit for receipt of tenders may be fixed by mutual agreement between the contracting entity and the selected candidates, provided that all tenderers are given equal time to prepare and submit tenders. If that kind of agreement is not reached, the contracting entity shall fix a time-limit which shall, as a general rule, be at least 3 weeks and shall in any case not be less than 10 days from the date of invitation to tender.

12. To what extent does the implementing legislation allow entities, in pursuance of Article XII:1 to permit tenders to be submitted in several languages (one of which has to be a language of the WTO)? To what extent do entities use this flexibility?

The language to be used in public procurement procedures is a matter to be decided by each member State. It must be highlighted that six member States have a WTO language as an official language (Belgium, France, Ireland, Luxembourg, Spain and the United Kingdom).

IV.3 Challenge Procedures - Article XX

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

The rule is that any potential contractor who considers that he has been injured by an unlawful decision on the part of a contracting authority may seek review. There are two levels of remedies available: national procedures and EC level control.

(i) Regarding **national remedies**, the Community has adopted two directives (the so-called Remedies Directives, see *supra* chapter I.1) aiming to coordinate the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures. According to the general aim of these directives, member States shall take the measures

necessary to ensure that decisions taken by contracting entities may be reviewed effectively on the ground that such decisions have infringed Community law in the field of procurement or national rules implementing that law as regards contract award procedures falling within the scope of the Public Authorities Directives or the Utilities Directive. The objective is to ensure that everyone everywhere has the same rights concerning the review procedures.

These directives provide for the establishment in every member State of courts or other legally authorised bodies with real powers to settle the conflicts which might arise between contracting entities and firms, suppliers of services or individuals. This means that in every member State there is some legally authorised body able to resolve conflicts in the field of public procurement. Nevertheless, the nature of the jurisdiction may differ from one member State to another, as well as the remedies available. Review bodies of first instance might not be necessarily judicial in character, although their decision should always be reasoned. However, in such a case, their decision must be subject to judicial review or review by another body which is a court or tribunal within the meaning of article 177 of the Treaty, and independent of both the contracting entity and the review body. This independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each member State, be legally binding.

Review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

Member States must ensure that the review bodies have a minimum number of powers.

- Review of contracting entities' action

In the case of the conflicts arising under the Public Authorities Directive (i.e. entities covered by Annexes 1 and 2 of the Agreement), member States shall ensure that the review bodies have the power to intervene directly in the contracting entities' procurement procedures. Those powers include, firstly, power to take, at the earliest opportunity and by way of interlocutory procedure, interim measures, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity. Secondly, power to set aside decisions taken unlawfully (see art. 2.1.a) and b) of the Public Remedies Directive).

In the case of conflicts arising under the Utilities Directive (i.e. entities covered by Annex 3 of the Agreement), member States are authorised to choose between the introduction of different powers for the review bodies which have equivalent effect (taking into account differences in the nature of member States' legal orders).

The first option includes the power to intervene directly in the contracting entities' procurement procedures such as by suspending them, or by setting aside decisions or discriminatory clauses in documents or publications (see art.2.1. a) and b) of the Remedies Utilities Directive).

The second option provides for the power to exert effective indirect pressure on the contracting entities in order to make them correct any infringement, and to prevent injury from occurring. In particular those measures can consist in making an order for the payment of a particular sum, like for instance periodic (or even daily) penalty payments (see art. 2.1.c) of the Remedies Utilities Directive).

Hence, in the case of the Utilities, member States can choose between the first solution or the second one. This choice can be made either for all contracting entities or for categories of entities defined on the basis of objective criteria. In any event, the choice must preserve the effectiveness of the measures laid down in order to prevent injury being caused to the interest concerned.

- Compensation of losses: claims for damages

According to article 2.1.c) of the Public Remedies Directive and article 2.2.d) of the Remedies Utilities Directive, the award of damages to persons injured by the infringement must always be possible. Therefore, third parties injured can seek damages as a consequence of the breach of the public procurement rules.

Directives oblige member States to provide for at least negative damages (*damnum emergens*), that is to say, the cost of preparing a bid or of participating in an award procedure. Where a claim is made for damages representing those negative costs, the person making such claim shall be required to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected. This does not mean that the person making the claim must prove that the contract would have been awarded to him in the absence of such infringement.

That is to say, one needs proof of an infringement, evidence of the damages and it has to be proved that a link of causality exists.

Damages can be claimed directly before the competent courts. However, where damages are claimed on the grounds that a decision has been taken unlawfully, member States may provide that the contested decision must be first set aside or declared illegal, if their system of internal law so requires.

As regards positive damages, i.e. *lucrum cessans*, the directives do not oblige member States to provide for the compensation of lost profits to the injured persons. However, nothing in the directives prevents member States from including such a possibility in their national rules. In that case, compensation for lost profits will be awarded according to the requirements set up in the national legislation.

As regards punitive damages being awarded to third parties and which would therefore have a deterrent effect, they are unknown in the European legal system. The directive does not contain any provision requiring member States to oblige contracting entities to grant punitive damages to injured persons.

The Utilities Remedies Directive provides for a special procedure known as attestation. Contracting entities are given the possibility of having recourse to an attestation system in which contract award procedures are periodically examined by independent bodies with a view of obtaining an attestation that, at that time, those procedures and practices are in conformity with Community law concerning the award of contracts and the national rules implementing the law.

If the Remedies directives have not been duly implemented, parties may bring a case against the member State in question before a national court of that State, invoking the ECJ case law which states that the member State could be liable for failure to implement directives, provided that some requirements are met (see ECJ judgments in cases Francovitch and Brasserie du Pecheur).

There is also a mixed procedure. Any national court can raise a preliminary question before the European Court of Justice in Luxembourg in order to obtain a judgment interpreting the E.C. law provision which might be applicable to the case. During the procedure before the ECJ, the Commission is allowed to intervene and express its views. After the ruling of the European Court of Justice, the national court "a quo" must rule in the case in question according to the interpretation given. See article 177 of the E.C. Treaty.

(ii) In what concerns **EC review procedures**, parties can lodge complaints with the EC Commission, possibly at the same time as a domestic legal action, with the latter not being a necessary preliminary to the lodging of such a complaint. A complaint can be treated in confidence and does not involve any expense.

The Commission examines those complaints, and when it considers that an infringement of Community provisions in the field of procurement has been committed, it can open the procedure established in articles 169 and 170 of the Treaty, which, after prior consultations between the Commission and the member State, can lead to the adoption of a decision by the European Court of Justice. There is a special procedure under article 3 of the Remedies Directive and article 8 of the Remedies Utilities directive in the case that the Commission considers that an infringement has been committed prior to a contract being concluded.

The Commission can also, under articles 186 of the E.C. Treaty and 83 of the Procedure Regulation of the Court, seek, in an interlocutory procedure before the Court of Justice, to obtain the suspension of the award procedure.

(iii) These directives are implemented at **member State level**. See infra for detailed information.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"? In the latter:

- *How are its members selected?*
- *Are its decisions subject to judicial review?*
- *If not, how are the requirements of paragraph 6 of Article XX taken into account?*

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities?

- *Do these measures include the possibility to suspend the procurement process? On what conditions?*

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

See answers by member State, *infra*.

IV.3.A Challenge procedures - Article XX: Austria

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

The challenge procedure is exercised by:

(1) the "Bundesvergabekontrollkommission" (hereinafter "Control Commission"); and

(2) the "Bundesvergabeamt" (hereinafter "Federal Procurement Agency") in first and final instance.

The actual challenge procedure before the Federal Procurement Agency is initiated by an undertaking, which claims to have an interest in obtaining a particular public contract, subject to the Federal Procurement Act, and which seeks review of an unlawful decision of a contracting authority in the procurement procedure, provided that it has been or risks being harmed by the alleged infringement.

The Federal Procurement Agency is responsible for the execution of the challenge procedure which aims at setting aside unlawful decisions. Before the award of the contract, the Federal Procurement Agency has the competence:

(1) to issue interim measures (see also point 14. (iv) below); and

(2) to annul unlawful decisions of the contracting authority.

Following the award of the contract or the award procedure, the Federal Procurement Agency is responsible for stating if the contract has not been awarded to the economically most advantageous bidder in an unlawful manner.

The complaint to the Federal Procurement Agency is normally subject to the precondition that the claimant first attempted to reach an amicable settlement before the Control Commission, where the case has not already been settled amicably, and also that the claimant appeals within two weeks after the Control Commission has made a recommendation on the case.

Following the conclusion of the contract or the completion of the award procedure, the time-limit is six weeks commencing from the day the claimant learns of the award.

As regards a claim for damages on behalf of the neglected bidder, please refer to point 14(v) below.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

As regards the time-limit for a complaint before the Federal Procurement Agency, please refer to question 13 above. The following paragraphs provide information on the procedure before the Control Commission.

Before the award is made, the Control Commission is responsible for the settlement of disputes between candidates or tenderers and the contracting entity in relation to the award procedure

upon request. After the dispute has become known, the request has to be filed expeditiously. There is no official time-limit.

The conciliation body of the Control Commission shall hear both parties of the dispute and shall investigate the facts of the case. Within a time-limit of two weeks, it must try to reach an amicable settlement. If this is not possible, the conciliation body has to make a recommendation on the application of the provision which gave cause to the dispute.

During the procedure before the Control Commission the contracting authority must not award the contract.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"? In the latter:

- *How are its members selected?*
- *Are its decisions subject to judicial review?*
- *If not, how are the requirements of paragraph 6 of Article XX taken into account?*

The Federal Procurement Agency is a public body granted with sovereign rights. It has the competence to deliver enforceable acts. Its members are free in their decisions and not bound by any directives or orders. Appeals are not allowed from the Federal Procurement Agency to any other administrative agency or the Administrative Court. The only recourse against a decision of the Federal Procurement Agency is a complaint to the Constitutional Court.

The Federal Procurement Agency consists of a chairman, a sufficient number of deputy chairmen and other members. The chairman and the deputy chairmen must hold positions as judges. The President of the Republic appoints them all upon the recommendation of the Federal Government for a period of five years.

The Federal Procurement Agency therefore fulfils the criteria of a tribunal within the meaning of Article six of the Human Rights Convention as well as the criteria of a court within the meaning of Article 177 Treaty of Rome.

The Control Commission, in contrast, is a mere arbitration body which has no competence to deliver enforceable acts. It is restricted to mediation and negotiation only. As regards its composition and the legal position of its members, the same rules apply for the Federal Procurement Agency.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

The Federal Procurement Act of 1997 and the regulations enacted upon it are applicable to the challenge procedures on federal level. Claims for damages have to be brought before civil courts and are governed by Civil Law.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities?

- *Do these measures include the possibility to suspend the procurement process? On what conditions?*

After the initiation of the challenge procedure before the Federal Procurement Agency, this body may, upon request, grant necessary and appropriate interim measures by way of an interlocutory procedure, to prevent the complainant against further injury of its interests. The body has to take into account the probable consequences for all interests likely to be affected, especially the public interest in continuing such a procedure.

The interim measures may include:

(1) the interim suspension of the whole award procedure; or
(2) the interim suspension of decisions of the contracting authority as long the Agency has not decided on the merits.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

If the contracting authority has breached the provisions of the Federal Procurement Act culpably, a neglected tenderer or candidate may claim damages, provided that it could have a real chance of winning the contract, had the contracting authority complied with the law. A neglected tenderer may demand lost profit, bid preparation costs as well as all other costs caused by the participation in the award procedure. The claim for damages has to be filed at the ordinary civil courts.

Austrian Procurement Law does not provide any means for rescinding a concluded contract. However, the annulment of a concluded contract is possible in certain restricted circumstances under Austrian Civil Law.

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

The Federal Procurement Agency has to decide on an application for an interim measure within five days, at the latest. On an application for the annulment of decisions of the contracting authority, the time-limit is two months, provided that the contract has not been awarded. Furthermore, the Austrian Code on Administrative Procedure is applicable to the administrative procedure before the Federal Procurement Agency.

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

The complainant may be required to pay the expenses of the procedure before the Federal Procurement Agency according to the Austrian Code on Administrative Procedure. There is no fee for the complainant before the Control Commission.

IV.3.B Challenge procedures - Article XX: Belgium

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

The Council of State (*Conseil d'Etat*) is the judicial body responsible for ruling, by means of orders, with respect to annulment proceedings against acts of the various administrative authorities.

As regards government contracts in particular, the Council of State may annul any unilateral and detachable acts associated with their conclusion and execution.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less than ten days". What are the limits in domestic legislation?

To lodge an appeal for annulment of an administrative act with the Council of State, the applicant must provide evidence of damage or legitimate interest. The application to intervene must be submitted within a maximum time-limit of 60 days following the date on which the applicant learned of the administrative act in question.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

The Council of State is an administrative tribunal.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

The coordinated laws of 12 January 1973 on the Council of State.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

Requests for the suspension of an administrative act may be referred to the Council of State, which may order suspension of execution to safeguard the interests of the parties (summary administrative jurisdiction procedure).

Suspension of execution may only be ordered if serious grounds are put forward to justify the annulment of the challenged act and provided the immediate execution of the act could cause an applicant serious damage which is difficult to repair.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

When a complaint has been lodged of violation of the Agreement in the course of public procurement procedures coming within the scope of application of the Agreement, the Council of State annuls the challenged decision.

Requests for compensation of loss come under civil law and fall within the jurisdiction of the civil courts.

(vi) Give any available information on the time-periods for the stages of the challenge process, including to obtain interim measures and a final decision.

The decision to suspend execution as described in point (iv) above is an emergency decision and taken as rapidly as possible. The final decision is taken within the time-limit required to examine each case with due respect for the rights of the Parties.

(vii) What are the usual costs to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

The costs of initiating a challenge procedure with the Council of State are minimal, amounting to 7,000 Belgian francs in 1997. Lawyers' fees are charged to the complainant.

IV.3.D Challenge procedures - Article XX: Germany

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

In the Federal Republic of Germany there are two separate bodies which are responsible for challenge procedures:

(a) The challenge procedure before the initial review bodies - "die Vergabeprüfstellen" - (Procurement Inspection Agencies) may be initiated ex officio or ex parte by a bidder. There is no time-limit to launch a complaint. There is no restriction of access to the challenge procedure for the participants. The proceedings can take place in public. Participants can be heard by the review body before a decision is reached. Participants can be represented by a lawyer. Opinions or decisions are given in writing with a statement describing the basis for the opinion or decision. A presentation of witnesses is possible. Documents have to be disclosed to the review body if requested.

The "Vergabeprüfstelle" may force the awarding authority to set aside unlawful actions or decisions or to set lawful actions or decisions. In particular, the "Vergabeprüfstelle" is authorised to suspend awarding procedures. In its consideration the body has to take into account the probable consequences for all interests likely to be affected, especially the public interest in continuing such a procedure. There is no fee for the complainant before this body.

(b) The secondary review bodies responsible for challenge procedures are the "Vergabeüberwachungsausschüsse" (Procurement Monitoring Commissions) which are courts in accordance with EC law. On a federal level they are attached to the "Bundeskartellamt" (Federal Antitrust Authority), on the state level as a rule to the "Landeskartellämter" (Regional Antitrust Authorities).

The function of the "Vergabeüberwachungsausschüsse" is to review the decisions of the "Vergabeprüfstellen". This review procedure can be initiated by the complainant of the procedure before the "Vergabeprüfstelle" within four weeks after a decision has been taken. All participants of the first procedure must be heard by the review body. The body can either legitimate the decision of the "Vergabeprüfstelle" or declare it unlawful. In the latter case, the "Vergabeprüfstelle is instructed by the "Vergabeüberwachungsausschuß" to re-examine the case and decide upon it according to its own interpretation of law.

The complainant may be required to pay the expenses of the procedure.

The president of the "Bundeskartellamt" is responsible for the appointment of the members of the "Vergabeüberwachungsausschuß" on the federal level who are independent and only subject to the law. The chairman and one of the assessors must be officials, the chairman and one of the assessors must hold position as judges.

If the "Vergabeüberwachungsausschuß" considers that a decision on the interpretation of Community law is necessary to enable it to give judgement, it must bring the matter before the European Court of Justice.

The legal basis for the establishment of the "Vergabeprüfstellen" and the "Vergabeüberwachungsausschüsse" is Art. 57 b and Art. 57 c of the "Haushaltsgrundsätzegesetz" (Budgetary Principles Law) and the "Nachprüfungsverordnung" (review directive).

Independently of the review decision, bidders may claim damages before ordinary courts; this is not subject to a time-limit.

In order to improve the rights of aggrieved bidders, the Federal Government of Germany has decided to give them access to ordinary courts. The legal framework is currently being amended.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

Please refer to answer to question 13.

IV.3.DK Challenge procedures - Article XX: Denmark

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

For answer, refer to the enclosed article on the challenge procedures in Denmark, published in the EU Public Contract Law n° 1/1996.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

There are not time-limits.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

The Danish Appeal Board for Public Procurement is, at the least, 'an impartial and independent review body'. It is not clear, however whether the review body possesses all the characteristics required to be considered as a 'court' in the sense of Article 177 of the Treaty.

The Composition of the appeal Board is the following: A High Court judge acts as chairman, assisted by two deputy chairmen also holding position as judges. A number of experts serve as 'specialist members' of the Board in addition to the judges. Chairman, deputy chairmen and experts are all appointed by the Minister for Industry and Trade and serve for 4 years. They may be re-appointed upon expiration of their 4-year term.

The decisions of the Appeal Board are subject to judicial review. Within a period of 8 weeks from the date on which the decision of the Board has been communicated to the parties of a dispute, this decision can be brought before the ordinary courts.

To bring a complaint before the board is, according to Danish law, an option. Alternatively, a complaint can be brought before an ordinary court in the first instance. Also in such cases, a decision can be brought before a higher court.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

'Applicable law' is EC law on public procurement or Danish regulations implementing EC law in that field (which amounts to the same) plus relevant EC Treaty provisions (in cases where a public contract, e.g. because of minor value, is not subject to the provisions of the EC procurement directives).

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

The review body has the powers to suspend contract award procedures or require the contracting authority/entity to comply with applicable law (in other words to legalise its actions).

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

The review body can annul unlawful decisions on which the award of a contract is based or impose the latter of the two sanctions mentioned under (iv) above.

Compensation falls outside the competence of the Board and has to be claimed separately from a bid challenge before an ordinary court (except, probably, in cases where decisions taken by a contracting authority/entity are challenged directly before an ordinary court_-_and not the review body)..

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

There are no legally fixed time periods for the stages of the challenge process. These are fixed by the chairman of the review body, taking into account the need for a rapid settlement of disputes in accordance with the objectives of the 'remedies' directive and the GPA and, of course, the need for a particularly rapid reaction from the Appeal Board in cases where imposition of interim measures is requested.

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

It is formally required that a fee of DKK 4000 is paid together with the submission of a complaint before the Appeal Board. This fee will be paid back to the complainant in cases where the Board, in whole or in part, rules in his favour. There is no requirement as to representation before the Board through an expert, e.g. a solicitor. However, in cases where the Board rules in favour of a complainant, the is entitled to claim the expenses (in addition to the fee) he might have had to cover legal or other expert assistance in connection with the complaint.

IV.3.E Challenge procedures - Article XX: Spain

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

The notification of the agreements must contain a precise reference to the challenge procedures including: the type of remedy available, the body responsible and the deadline for filing complaints, with the warning that the deadline runs from the day on which the notification is received.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less than ten days". What are the limits in domestic legislation?

Thirty days or two months according to the type of remedy.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

According to the type of remedy, the administrative body hierarchically above the body responsible for the challenged act, or a jurisdictional court.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

Law 30/1992 of 16 November on the legal regime of the public administrations and on the common administrative procedure, and the Law on Administrative Jurisdiction of 27 December 1956.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

The body responsible for settling the complaint is authorized to act ex officio or at the request of a party to suspend the challenged act.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

The ruling must cover all of the questions raised during the challenge procedure, declaring them either admissible or inadmissible, and if admissible, accepting or rejecting them.

Compensation for loss or damages suffered may be decided during the same proceedings or in separate proceedings where there are good grounds.

(vi) Give any available information on the time-periods for the stages of the challenge process, including to obtain interim measures and a final decision.

In the case of administrative challenges (Law on the legal regime of the public administrations and on the common administrative procedures) a ruling must be pronounced within a period of three months. If an explicit decision is not made during that time-period, the challenge is to be understood to have been rejected, without prejudice to the administration's obligation to reach a settlement.

The time-limits for judicial proceedings are governed by the Law on Administrative Challenge, and the settlement of challenges depends on the issues under consideration.

(vii) What is the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

Administrative challenges are free of charge. Judicial challenges are also free of charge except in cases where the challenge is considered to have been made in bad faith.

IV.3.EL Challenge procedures - Article XX: Greece

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

Greek law provides for challenge proceedings in public procurement cases. The proceedings are indeed in writing and are open to all aggrieved parties. Very recently Greece has also adopted legislation to implement the Remedies Directive, i.e., directive 89/665/EEC. No implementing measures for Directive 92/13/EEC (the Remedies Utilities Directive) have been adopted. Greece have to implement the latter by 1.1.1998.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

A complaint is subject to the jurisdiction of the administrative or civil courts, depending on the nature of the awarding authority. If the complainant seeks the annulment of an administrative act, such as an award decision, the action should be filed to the Supreme administrative court of Greece within a time-limit of sixty days from the date on which the contested act is published or notified.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

The bodies responsible for challenge proceedings are courts.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

Greek law and Community law.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities?

A complainant may apply to court for an interim order, which may result in the suspension of the procurement process, the conservation of documents etc. If successful, the complainant will have to introduce a full court action within thirty days from the order.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

The awarding decision might be annulled. Damages may also be awarded.

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

Under the new law, which I understand will enter into force in November this year, the complainant has to introduce an objection with the awarding authority within 5 days from taking notice of the contested act. The decision on the objection must be rendered within 10 days. Interim proceedings to a court will have to be introduced within 10 days from the decision of the awarding authority. If successful, the complainant will have to introduce a full court action within thirty days from the order.

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

The costs will depend on the procedure and the value of the project. In both administrative and civil proceedings, the judge will usually order the losing party to pay the legal costs of the successful party. However the amount covered is very low and does not cover the actual costs of a procedure.

IV.3.F Challenge procedures - Article XX: France

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

Directive 89/665 has been transposed into French law through Articles L22 and R241-24 of the Code of Administrative Tribunals and Administrative Appeal Courts (copy attached) as regards procurement contracts considered public both under Community law and under the French Code on Public Procurement.

The above-mentioned Directive was transposed through Article 11-1 of Law n° 91-3 as amended on 3 January 1991 and Articles 1441-1 to 1441-3 of the new Code of Civil Procedure as regards procurement contracts considered public under Community law but private under French law (copy attached).

Directive 92/13 was transposed:

- Through Articles L22 and R241-24 of the Code of Administrative Tribunals and Administrative Appeal Courts with respect to contracts concluded by the operators of networks covered by the Code on Public Procurement (State, territorial communities, local public institutions);

- through Article L23 of the said Code of Administrative Tribunals as regards contracts concluded by operators of networks not covered by the Code on Public Procurement and qualifying as administrative contracts (copy attached);

- through Articles 7-1 and 7-2 of the Law of 11 December 1992 as amended with respect to contracts concluded by operators of networks that are not covered by the Code on Public Procurement and qualifying as private law contracts (copy attached).

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

See attached documents.

IV.3.I Challenge procedures - Article XX: Italy

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

The Italian system of complaints foresees the challenge procedures in writing, available to all offers, in front of administrative judges in any case of breaches of legitimate interests before the stipulation of contract. After this phase bidders may go to the ordinary judge competent for subjective rights and compensation for loss and damages.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

In domestic legislation, the time-limit to launch a complaint is 60 days.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

The body responsible for the challenge procedures is a court whose name is "Tribunale Administrativo Regionale" (Administrative Regional Court), subject to judicial review by the "Consiglio di Stato" (Council of State) in the case of appeal from bidders and from contracting entities.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

Law 6 December 1971, n. 1034 (Articles 19 to 37)

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

Precited law foresees rapid interim measures to correct breaches and to preserve commercial opportunities like the suspension of the procurement procedures (article 21) if there is a prima facie case (fumus boni iuris) and the damages may become serious and irreparable (periculum in mora).

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

Precited law foresees the annulment of the procurement procedures for breach of the law. In addition, the ordinary judge may give the compensation for loss or damages suffered following the principle of "loss of profit and accruing damage".

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

In general, a challenge procedure could last about 2 years (including the time period to obtain interim measures and a final decision).

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

The usual costs are, on the average, about LIT 2 millions, without possibility to do free of charge.

IV.3.IRL Challenge procedures - Article XX: Ireland

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

Challenge procedures are available (by intent) through the Irish Courts as set out in the transposing Instruments for the EU Directives on public procurement.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

It is the Court, specifically the High Court of Ireland, which is responsible for hearing such cases.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

The Agreement and EU law and national law, as applicable.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

The rapid interim measure would be suspension of a procurement process. The conditions would be determined by the Court in accordance with the terms of the Agreement.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

First part: a deceleration that an award procedure was in breach of the Agreement or otherwise illegal. The Court has wide discretion to award costs and compensation to aggrieved parties.

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

Interim measures, at least on a temporary basis, can be granted upon application and after initial hearing by the Court. There is no time-limit for the final determination of the matter by the Court.

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

IV.3.L Challenge procedures - Article XX: Luxembourg

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

Challenge procedures (voluntary or contentious) are open to any candidate or bidder irrespective of nationality.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to lodge a complaint contained in the Agreement is "not less than ten days". What are the limits in domestic legislation?

The time-limit for lodging a complaint is three months following the notification of the decision of refusal.

(ii) What body is responsible for the challenge procedures? Is this "court" or an "impartial and independent review body"?

The Administrative Tribunal has the authority to examine disputes concerning the award of public contracts. Appeals may be made through the Administrative Court. The Administrative Tribunal is, of course, impartial and independent:

- Its members are appointed by the Grand Duke;
- it is a judicial body; and
- there is a possibility of appeal.

All of the provisions of Article XX, paragraph 6 are guaranteed under the Law of 7 November 1996 on the organization of the administrative courts.

(iii) What is the applicable law by reference to which the challenged body will examine complaints?

Law of 7 November 1996 mentioned above.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

Possibility of emergency interim suspension. It is up to the judge to decide on any possible suspension in the light of the seriousness of the alleged violation.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenged body order?

When a complaint has been lodged of violation of the Agreement in the course of procurement procedures coming within the scope of application of the Agreement, the Administrative Tribunal annuls the challenged decision.

Requests for compensation of loss of profits come under civil law and fall within the jurisdiction of the civil courts.

(vi) Give any available information on the time-periods for the stages of the challenge process including to obtain interim measures and a final decision.

The decision to suspend procedures as described in point (iv) above is an emergency decision taken as rapidly as possible. The final decision is taken within the time-limit required to examine each case with due respect for the rights of the Parties.

(vii) What is the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

There are no charges for bringing a case. Lawyers' fees are charged to the complainant.

IV.3.NL Challenge procedures - Article XX: Netherlands

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

Legal foundation:

Contractors/suppliers may file claims on the grounds of an unlawful act with the civil courts, pursuant to Article 162, Book 6 of the Civil Code. Failure to act in compliance with national legislation on government orders (which incorporates the relevant international agreements) can be regarded as an act in contravention of a statutory duty and is unlawful in respect of the contractors/suppliers who are passed over.

In as far as there is an agreement between the contracting service and a contractor/supplier, a claim may be filed pursuant to Article 74, Book 6 of the Civil Code.

In the event of any failure to comply with an agreement, a claim may be filed by the contracting service or the party to whom the contract was awarded.

Procedure:

According to rules of the Code of Civil Procedure (Rv); ordinary civil proceedings (on the merits of the case) or, in urgent cases, interim injunction proceedings (Article 289 et seq. of the Rv).

With regard to accessibility, Acts are published in the Statute Book and regulations based on them in the State Gazette. These are accessible and available to the general public.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

The Netherlands does not have a time-limit of less than 10 days for instituting appeal proceedings. The general period of limitation for claims is 20 years, and the period for claims regarding compliance with commitments or compensation for damages is five years (Article 306 et seq., Book 3 of the Civil Code).

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

Appeal proceedings before a civil court.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

Applicable law: relevant provisions regarding government orders; general civil law and law on civil procedure.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities?

Possibility for urgent provision; interim injunction proceedings (Article 289 et seq. of the Rv)
With respect to the question on suspension:

In the event of an unlawful act:

- Possibility of prohibiting unlawful conduct (improper actions in tendering procedures) (Article 296, Book 3 of the Civil Code), with a penalty if necessary (Article 611a of the Rv).

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

See item (iv) and, with regard to unlawful acts, the possibility of compensation for damages.

In the event of default (Article 74 et seq., Book 6 of the Civil Code):

- Compliance order, possibly with compensation for damages.

- Compensation for damages in place of compliance.

- Right to dissolution of the agreement, possibly with compensation for damages. The nature of the compensation for damages is regulated in Article 95 et seq., Book 6 of the Civil Code.

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

- Interim injunction proceedings: no fixed term for hearing of the case/ruling by the court; proceedings can vary from a few days to several weeks.

- Appeals must be filed within 14 days of the ruling being handed down by the court in interim injunction proceedings (Article 295 of the Rv); there is no fixed term for the hearing.

- Appeals to the Supreme Court against the rulings handed down by a Court of Appeal must be filed within six weeks (Article 295 of the Rv).

- Civil proceedings on the merits of the case: no fixed term for hearing of the case/ruling by the court.

- Appeals: as a general rule, appeals must be filed within three months of the ruling being handed down by the court (Article 339 of the Rv); there is no fixed term for the hearing/ruling.

- Appeals to the Supreme Court: in general, within three months of the ruling (Article 402 of the Rv).

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

Costs of proceedings: these vary. In civil proceedings, fixed court fees are regulated in the Civil Court Fees Act. Fees depend on the claim and can range from about NLG 300 to NLG 8,300. Other costs include the costs of legal aid, the costs of providing evidence, such as indemnification of witnesses (Article 208 of the Rv) and remuneration of experts (Articles 223 and 225 of the Rv). The Legal Aid for Indigent Persons Act provides for the possibility of cost-free legal action.

IV.3.P Challenge procedures - Article XX: Portugal

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

Public procurement challenges are governed by the Law on the Procedure of Administrative Tribunals (*Lei de Processo dos Tribunais Administrativos*) approved by Decree Law (*Decreto-Lei)* n° 267/85 of 16 July 1985 with the amendments introduced by Law n° 12/86 of 21 May 1986.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to lodge a complaint contained in the Agreement is "not less than ten days". What are the limits in domestic legislation?

The first paragraph of Article 64 of Decree Law n° 55/95 of 29 March provides for a special time-limit of five days for the submission of a hierarchical remedy with respect to the discussion of a claim. Apart from this special time-limit, the usual time-limit for a hierarchical remedy challenging the legality of administrative acts is 30 days.

As regards contentious remedies in respect of administrative acts, the complainant has two months (four months for Macau residents or residents abroad) and the Government Procurator one year to initiate the procedure (Article 28 of Decree Law 267/85 of 16 July), and administrative law establishes the rule concerning the possibility of challenging at all times acts that are void or non-existent.

(ii) What body is responsible for the challenge procedures? Is this "court" or an "impartial and independent review body"?

While the body responsible for challenge procedures is above all the body heirachically above the one responsible for the act, contentious remedies are examined by the Administrative Tribunals.

(iii) What is the applicable law by reference to which the challenged body will examine complaints?

The applicable law is the Law on the Procedure of the Administrative Tribunals (*Ley de Processo dos Tribunais Administrativos).*

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

There are no special rapid interim measures beyond those set forth in Article 84 of the Code of Administrative Procedure regarding the competence of the body responsible for the final decision. The interested parties may request suspension of execution of the administrative act during the contentious stage (Articles 76 and 55 of the Law on the Procedure of Administrative Tribunals and Decree Law n° 267/85 of 16 July). If the cumulative conditions of Article 76, paragraphs 1(a) and 1(c) are met, the result is a suspension of the procurement proceedings pending a decision by the tribunal.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenged body order?

In general, breeches of the Agreement can be corrected by cancelling the administrative act awarding the contract and repeating the proceedings, or by granting compensation for the damage sustained in accordance with Decree N° 48051 of 21 November 1967 governing the tortious liability of the State with respect to public management acts.

vi) Give any available information on the time-periods for the stages of the challenge process including to obtain interim measures and a final decision.

It is impossible to give any precise reply concerning the overall time-period for the contentious stage. However, challenge procedures are often efficient.

vii) What is the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

Common operational costs of the tribunals, which vary according to the value of the remedy.

IV.3.S Challenge procedures - Article XX: Sweden

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

The remedies provided for in Chapter 7 of the Swedish Law on Public Procurement (LOU) in its current form are provisional measures and annulment proceedings as well as actions for damages. A supplier in the broad sense of the term claiming to have suffered injury or to be threatened with injury due to a violation of the provisions of the LOU may file a complaint with the Administrative Tribunal (*Länsrätt*), which determines whether the challenged public procurement procedure has been conducted in accordance with the said Law. The Administrative Tribunal may either take provisional measures or annul the procedure at any time until the public procurement contract has been concluded.

Once the contract has been concluded, the supplier may still submit a claim for damages to an ordinary court (*allmän domstol*). Indeed, the LOU stipulates that a contracting authority that has violated the rules established by the LOU must provide the supplier in question with compensation for the damage sustained.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less than ten days". What are the limits in domestic legislation?

As regards provisional measures and annulment proceedings, the supplier may file a complaint with the Administrative Tribunal until the contract has been awarded.

A claim for damages may be filed with an ordinary court within a period of one year following the date on which the contract was concluded.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

The Administrative Tribunal has jurisdiction over provisional measures and annulment proceedings. The common courts have jurisdiction for awarding damages to parties injured through a violation of the law.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

Law on Public Procurement (1992:1528), amended and republished as Law (1993:1468) which entered into force on 1 January 1994, and further amended by Law (1994:614) which entered into force on 1 July 1994, Law (1995:704) of 8 June 1995 which entered into force on 1 July 1995, and by Law (1996:433). A further amendment is expected to enter into force on 1 January 1998.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

The administrative tribunal may order the immediate suspension of the public procurement procedure pending a definitive decision on the substance of the case. It may, however, refrain from taking such a decision if the damage or inconvenience deriving from such decision can be considered to exceed the damage suffered by the supplier.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

(v)-(vii) The Swedish Public Procurement Office refers to the document attached hereto which deals, *inter alia*, with the question of remedies in Sweden.

IV.3.SF Challenge procedures - Article XX: Finland

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

Award of damages. A claim for damages in case of an award procedure contrary to the Agreement or the implementing legislation shall be made in the court of law according the normal

procedural rules of civil process law. One who has occasioned harm to a contractor by a procedure contrary to the Agreement or the implementing legislation shall be obliged to pay damages for the harm caused. Where a claim is made for damages representing the costs of participating in an award procedure, the candidate or tenderer shall, in order to be awarded damages, be required only to prove an incorrect procedure and that he would have had a real chance of winning the contract if the procedure had been correct.

Other remedies. The Competition Council may, at the request of the person to whom the proceedings apply:

- wholly or partly set aside a decision of a contracting party
- forbid the contracting entity to apply a point in a document relating to the procurement or otherwise to pursue an incorrect procedure, or
- require the contracting entity to correct its incorrect procedure.

The request shall be made in writing. A request concerning which proceedings have been instituted after the contract has been concluded shall not be accepted for consideration. The claimant shall, before submitting a claim to the Competition Council, inform the contracting entity in writing of his intention to bring the matter before the Competition Council. The Competition Council may, in order to emphasize the importance of complying with the prohibition mentioned above at point 2) or with the obligation referred to above at point 3, impose a fine on the contracting entity.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

There is no time-limit to launch a complaint in the Competition Council. It must be noted, however, that the Competition Council does not accept a complaint for consideration after the conclusion of the contract in question. In cases where the contract has already been concluded, the only remedy available is a claim for the award of damages before a court of law.

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

The body responsible for the challenge procedures is the Competition Council, which is an impartial and independent review body. It has a chairman, a vice-chairman and seven members. The matter concerning the composition of the Council is prepared for discussion by the cabinet and referred for decision to the President of the Republic of Finland. The chairman and the vice-chairman of the Council shall have a degree in law and they shall have a good knowledge of the responsibilities of a judge. The members shall be persons who have a good knowledge of different aspects of economic life.

The decisions of the Competition Council are subject to judicial review before the Supreme Administrative Court.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

The Competition Council will examine the complaints by reference to the Public Procurement Act (1502/92, amend. 1523/94), Order on the Procurement of Supplies, Services and Works in excess

of the Threshold Value (243/95) or Order on the Procurement of Supplies, Services and Works by Entities Operating in the Water, Energy, Transport and Telecommunications Sectors (567/94, amend. 244/95). The Council may also apply directly the applicable provisions of the EC Treaty, applicable EC directives or the Agreement.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

After a claim has been brought before it, the Competition Council may, as an interim measure, forbid or suspend the implementation of a decision or otherwise order the procurement procedure to be suspended for the period during which the matter is being dealt with in the Competition Council. The prohibition to apply a point in a document relating to the procurement or otherwise to pursue an incorrect procedure (mentioned above in question 13) and the obligation to correct incorrect procedure (referred to above in question 13) may also be imposed as an interim measure.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

The remedies for correction of the Agreement provided by the Competition Council are referred to under question 13.

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

In urgent cases, the order for interim measures can be obtained from the Competition Council already on the same day when the proceedings have been instituted.

The time periods needed for adoption of the final decision depend on the various aspects of an individual case. In general, the Competition Council has given its final decisions within approximately 2-6 months from the initiation of the proceedings.

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

There is no information available on the usual costs of a challenge procedure. The Competition Council does not charge any fee of the challenge procedure, but there may be some other costs such as the fee charged by the lawyers the parties to a dispute may want to use etc. There is, however, no legal obligation to use a member of bar or any other type of a legal counsellor in the proceedings.

It is also possible that the Competition Council orders the losing side of the dispute to pay the process costs of the winning side. This may naturally lead to situations where the total costs of the proceeding may be considerably high.

IV.3.UK Challenge procedures - Article XX: United Kingdom

13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and make them generally available. Please provide this information.

See EC answer.

14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.

(i) The time-limit to launch a complaint contained in the Agreement is "not less that 10 days". What are the limits in domestic legislation?

Complaints are required to be brought to the attention of the contracting authority/entity. Proceedings have to be initiated as rapidly as possible and, unless the courts grant leave, within three months of the grounds arising;

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"?

The UK review bodies are the High Courts in England, Wales and Northern Ireland and the Court of Session in Scotland.

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

The applicable law by reference to which the Courts will examine complaints is likely to be the UK Regulations which implement the EC_rules and the proposed Regulations for clarifying the rights of GPA_providers where the GPA applies. In the meantime the courts can be expected to rely on their inherent jurisdiction to provide remedies for breach of the GPA, by reference to the GPA itself and the existing remedies for EC providers.

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities? Do these measures include the possibility to suspend the procurement process? On what conditions?

The UK courts have the necessary powers to award interim measures to correct breaches of the GPA, including suspension of an incomplete contract award procedure.

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

The UK courts have powers to correct breaches by ordering the setting aside of a decision or action, or amendment of a document, by awarding damages or by both of these except that under the UK_non-implementation of the EC Compliance and Remedies Directives damages are to be the only remedy once a contract has been entered into.

(vi) Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.

It is unlikely that there would be any significant delay in an application for interim measures but a final decision may take somewhat longer to obtain, depending on the facts of the case**.**

(vii) What are the usual cost to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

The costs are those of legal representation.

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