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**PUBLIC PROCUREMENT  
IN THE EUROPEAN UNION**



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# 1 INTRODUCTION

Optimising the functioning of the internal market is of vital importance for the European Union. The Commission's *Single Market Action Plan*<sup>1</sup>, which was endorsed by the Amsterdam European Council and the European Parliament, is intended to ensure that the single market fulfils its potential. As part of the Action Plan, the Commission published, in November 1997, the first edition of the *Scoreboard*<sup>2</sup> containing detailed indicators on the state of implementation and application of single market legislation.

The Scoreboard confirmed that public procurement is one of the key areas of the single market where results do not yet meet expectations. This is particularly significant because of the economic importance of public procurement markets: they represent more than ECU 720 billion or about 11% of the Union's GDP, equivalent to half of the GDP of the Federal Republic of Germany.

Existing policy aims to open up national public procurement markets to competition from other Member States, offering competitive suppliers significant opportunities. Today these opportunities extend to the EEA countries and Europe's major trading partners, the USA, Canada and Japan. As regards the EEA, this extension results from the integration of the Community "acquis" in public procurement in the Agreement on the EEA and, in consequence, in the legislation of the EFTA countries signing it. The agreement guarantees access of these countries' suppliers to the Community market in the same way as Community firms are guaranteed access to the markets of the EFTA countries. Existing policy seeks to encourage transparent and competitive purchasing behaviour in order to deliver the best value for money. Community-wide competition for public contracts will lead to an efficient allocation of resources and thus enhance the quality of public services, improve economic growth, competitiveness and job creation. Efficient procurement is particularly important on the eve of the single currency and in the prevailing climate of stability and budgetary restraint necessary for such fundamental change to occur and develop under satisfactory conditions. A good public procurement policy, by preventing inefficient public spending and by providing a major means of avoiding corruption, can give taxpayers confidence that their money is being spent correctly and thus reinforce public trust in government. While the fight against corruption is not the primary objective of public procurement, improvements in public procurement procedures can make a useful contribution<sup>3</sup>. Accordingly, proposals in this communication aimed at enhancing transparency and clarity, such as publication of tendering information or the designation of independent authorities in each Member State, will help create a system which minimises opportunities for corruption.

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<sup>1</sup> CSE (97) 1 final, 4.6.1997.

<sup>2</sup> Single Market Scoreboard, No 1, November 1997, SEC 97/2196.

<sup>3</sup> See Commission Communication to the Council and the European Parliament on *A Union Policy against Corruption* (COM(97)0192 - C4-0273/97).

The legal framework composed of the principles and rules enshrined in the Treaty and developed in detail by six Directives, was completed nearly four years ago, the first Directives dating back more than twenty years. However, several Member States have failed to implement all the Directives. As the November 1997 Scoreboard shows, public procurement is one of the areas where the deficit in transposition is greatest, with only 55.6%<sup>4</sup> of the Directives correctly implemented in all Member States. Moreover, the Commission's communication on the *Impact and Effectiveness of the Single Market*<sup>5</sup> makes it clear that the economic results so far achieved fall short of expectations. The level of import penetration in the public sector (that is, the sum of direct and indirect imports by public purchasers) may have risen from 6% in 1987 to 10% today. It can be observed, however, that specific sectors remain closed because of the use of standards and certification and qualification systems. Moreover, there is no clear evidence of price convergence between Member States over the same period.

Concerned by Member States' failure to implement the Directives and by the disappointing economic results, the Commission launched its Green Paper on *Public Procurement in the European Union: Exploring the Way forward*<sup>6</sup>, published in November 1996. The high level of response to the Green Paper is gratifying. Nearly 300 contributions have been received from a wide range of key players and the Commission thanks all - institutions, Member States, suppliers and purchasers, representative organisations on the demand and the supply sides and other interested parties - for their valuable contribution. Discussions in the Council, in the European Parliament and in the Advisory Committees for public procurement have been extremely productive and helpful.

The Commission has carefully analysed all of the contributions received. The measures proposed by the Commission in the present communication take them fully into account, recognise that procurement policy needs to be reinvigorated in order to reap the full benefits of the regime and define the direction that public procurement policy in the European Union will take over the next five years.

The conclusions the Commission draws from the debate are twofold. First, the Union must take action to ensure the public procurement regime in place delivers the economic benefits it has promised. Secondly, it must adapt existing instruments to the changing economic environment. Achieving this will require enormous effort from all those involved: the Commission, the Member States and the private sector. While the aims of the internal market policy have remained the same since the adoption of the Treaty of Rome, Europe has gone through immense changes since the adoption of the first public procurement Directives in the 1970s. These are the information revolution, the change of attitude to the State's role in the economy combined with the introduction of budgetary restraint – privatisation, liberalisation of utilities, public-private partnerships – and the increase of cross-border trade in goods and services brought about by the internal market. Together, they have resulted in a highly competitive commercial environment and an increased public awareness of the need to fight corruption and prevent misuse of public finance.

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4 See Annex I.

5 COM (96) 520 final, 30.10.1996.

6 COM (96) 583 final, 27.11.1996.

The main theme emerging from the Green Paper debate is the need to simplify the legal framework and adapt it to the new electronic age while maintaining the stability of its basic structure and avoiding unnecessary changes involving further legislative work at Community and national level.

The Community's response and the measures proposed in this communication contain the following main elements:

- The Commission recognises that a stable legal framework is crucial to the smooth operation of public procurement markets and to maintaining market players' confidence in the efficiency of the system. However, the current legal framework does not exist for its own sake but in order to attain the benefits of the single market in the area of public procurement. Rules, policy and enforcement should follow reality rather than the other way round. In the light of the momentous changes, which have occurred since the publication of the first Directives in the seventies, the Commission recognises the need to re-orient its policy and streamline its rules.
- The Commission acknowledges the complexity of the current legal framework and the rigidity of its procedures. It intends, therefore, to simplify the former and make the latter more flexible. Simplification, in this context implies, on the one hand, the clarification of existing rules and, on the other hand, their amendment. In order to preserve the stability of the framework, priority will be given to clarification of existing rules to resolve the most complex issues. Where clarification is not sufficient or where it is felt that the current framework is not flexible enough to take account of new practices or market reality, the Commission intends to propose amendments through a legislative package.
- The use of information and communication technologies (ICT) in public procurement will determine our ability to adapt in the future and maintain a competitive European industry. Fully-fledged electronic procurement will allow the procurement process to take place much more rapidly and significantly reduce transaction costs over the entire lifecycle of the goods or services purchased.
- Simply laying down and enforcing legal rules cannot on its own guarantee economic benefits. Other measures aimed at improving market access are equally important and necessary:
  - It is of the utmost importance, if one seeks to achieve efficient purchasing, to give the different operators involved in a given public procurement a training, which makes real professionals of them. This training should not focus on the legal provisions as such but on how to use them in an effective way in day-to-day procurement and on how to develop new ways of working in a changing market environment.
  - The relatively low response from suppliers to the enormous volume of contract opportunities needs to be addressed through raising awareness of what is at stake, improving transparency of, and access to, information on contract opportunities, general market monitoring and other useful information.

- Specific action in favour of the participation of SMEs has been sought by the European Parliament. Measures will be taken in connection with the general problems of supplier participation.

In the process of ensuring a single market for procurement, Member States and European industry have a key role to play. Governments, by enforcing the legal framework and by setting a good example themselves, will help to build confidence in the openness of their procurement markets. European industry, for its part, should actively seek out new market opportunities and when it encounters difficulties, should be more courageous in defending its rights. Public procurement is too fundamental for the European economy to be left in the hands of a limited number of specialists: only the establishment of a real partnership between the Community, the Member States and industry will bring about the benefits that are to be expected.

## **2 ADAPTING THE REGULATORY FRAMEWORK TO MARKET CHANGES**

### **2.1 The ground rules: simplification and flexible response to market developments**

#### **2.1.1 Objective**

It is evident from the debate launched by the Commission's Green Paper that the existing legal framework<sup>7</sup> and procedures need to be simplified. The Commission endorses the call for simplification, which is in line with one of the strategic targets of its Single Market Action Plan, namely that of strengthening the existing legal framework by simplifying and improving national and Community rules (Strategic Target 1, Action 4).

The Commission is in any event under the obligation to re-examine the application of the Directives within the deadlines laid down therein, as Parliament pointed out in its opinion on the Green Paper. This communication is therefore a response both to Parliament's request and to the obligation laid down in the Directives.

"Simplification" means in this context both the clarification of provisions which are obscure or complex and adjustment of the rules in force where the problems to be addressed cannot be resolved through interpretation of the provisions.

The Commission takes the view that certain important issues cannot be dealt with through mere interpretative documents and that the legislation needs to be amended. Such amendment will not be tantamount to over-regulation but will endeavour on the contrary to make the rules and procedures clearer and more flexible. Amendments will be precisely targeted so as to preserve the structure and foundations of the legal framework.

These amendments are in line with measures announced in the Single Market Action Plan, in which the Commission stressed the need to remedy weaknesses in the existing legal framework for public procurement in order to ensure that the single market functions properly in this area (Strategic Target 1, Action 5).

#### **2.1.2 Presentation of a legislative package**

Although the Commission is convinced of the need to adjust some aspects of the existing legal framework, it would stress that, three years after expiry of the deadline for transposing the last of the Directives adopted in the public procurement field, the

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<sup>7</sup> Directives 93/36/EEC, 93/37/EEC and 92/50/EEC on public supplies, public works and public services (the "traditional" Directives) as amended by directive 97/52/EC; Directive 93/38/EEC on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (the "Utilities Directive"); Directives 89/665/EEC and 92/13/EEC on review procedures (the "Remedies Directives").



requisite national legislation is still not fully in place in all Member States. Many of the contributions prompted by the Green Paper, and in particular Parliament's opinion, deplore this state of affairs and call on the Commission to act as a matter of urgency.

The Commission invites the Member States to demonstrate their political commitment to putting an end to delays in transposition at the earliest possible opportunity. Since the transposition and correct application of the Directives is a precondition for the proper implementation of public procurement policy, the Commission reaffirms its determination to take all the necessary steps to ensure that Member States fulfil their obligations. It is proposing a set of measures to that end (see point 2.2 below).

The Commission intends to table a set of amendments to the existing legal framework concerning the following aspects:

- Submission of proposals to exclude from the field of application of Directive 93/38/EEC, the sectors or services to which it currently applies (water, energy, transport and telecommunications) that operate, in each of the Member States, under conditions of effective competition.
- introduction of more flexible procedures, namely a competitive negotiated procedure and framework contracts, in response to the criticism sometimes levelled at the system that procedures are excessively rigid and formalistic and, where complied with strictly, can lead to malfunctioning in the award of contracts;
- adoption of rules to take account of certain trends, such as concessions and other forms of partnership between the public and private sectors and privatisation, to ensure that their proper functioning is compatible with that of the single market;
- fully electronic procurement (see point 3.2 below).

**These measures will be tabled by the Commission in a legislative package designed to make certain adjustments to the existing legal framework in areas where interpretation of the rules to take account of changing circumstances would not be sufficient to solve the problems.**

#### ***2.1.2.1 Adjustment of the scope of Directive 93/38/EEC in line with changes in the sectors it covers***

Following the liberalisation of some of the sectors covered by Directive 93/38/EEC, it is necessary to examine the degree of openness to competition of the liberalised sectors with a view to deciding whether the constraints the directive impose on contracting entities are still justified. They were introduced because of the lack of competition resulting from the State's decision to grant a monopoly or a privileged position to an operator. In return for this preferential treatment by the State, the operators concerned had to comply with certain advertising and procedural requirements when awarding contracts. If a sector is found to be effectively open to competition, the constraints imposed by the directive should be removed.

The Commission was the prime mover in the process of liberalisation in the sectors covered by Directive 93/38/EEC (see 3. Report on the implementation of the

telecommunication regulation package<sup>8</sup>). It must now take account of the changes that have occurred and the new factors that are emerging on the market, by excluding from the scope of the Directive entities operating under real competitive conditions in the same way as private entities which base their decisions on purely economic criteria.

**The Commission intends, before the end of 1998, to submit proposals to exclude from the field of application of Directive 93/38/EEC sectors or services to which it applies (water, energy, transport and telecommunications) which operate, in each of the Member States under conditions of real competition.**

**In the immediate future, the Commission is resolved, in the light of the jurisprudence of the Court of Justice, to use the possibilities provided by Article 8 of Directive 93/38/EEC to exempt services in the telecommunications sector operating in a fully competitive environment. Accordingly, the Commission invites the contracting entities to notify the services that they consider excluded from the scope of the Directive.**

**In its evaluation of the real operation of competition, the Commission will take particular account of the degree of transposition and implementation of the relevant Community legal framework.**

### **2.1.2.2 Facilitating dialogue**

Many contributions confirmed the Commission's finding that, especially in the case of particularly complex contracts in areas that are constantly changing, such as high technology, purchasers are well aware of their needs but do not know in advance what is the best technical solution for satisfying those needs. Discussion of the contract and dialogue between purchasers and suppliers are therefore necessary in such cases. But the standard procedures laid down by the "traditional" Directives leave very little scope for discussion during the award of contracts and are therefore regarded as lacking in flexibility in situations of this type.

**The Commission will therefore propose amendments to the existing texts of the Directives with a view to making procedures more flexible and allowing dialogue in the course of such procedures and not just in exceptional circumstances. It will propose a new standard procedure, the "competitive dialogue", which would operate alongside open and restricted procedures and would replace the existing negotiated procedure with prior publication of a notice. The conditions and the rules under which contracting authorities would be allowed to use this new procedure and the details of the procedure itself will have to be spelt out and will be based *inter alia* on the principles of transparency and equal treatment. The only remaining exceptional procedure would then be a "direct-agreement procedure", the conditions for the application of which must be construed strictly, in line with the case law of the Court of Justice.**

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<sup>8</sup> COM (98) 80, 19.2.1998

This is an initiative which does not aim to introduce new regulatory constraints: on the contrary, it is clearly designed to achieve the procedural simplification and flexibility called for by all interested parties who took part in the Green Paper debate, whether from the institutional sphere or the private sector. It will give operators more room for manoeuvre, which will not fail to yield beneficial effects in terms of the quality and efficiency of procurement.

### **2.1.2.3 *The role of framework purchasing***

On markets, which are constantly changing, such as the markets for information technology products and services, it is not economically justifiable for public purchasers to be tied to fixed prices and conditions. Public purchasers therefore increasingly feel the need to manage their procurement on a long-term basis. The essential features of contracts of this nature should consequently offer the necessary flexibility. The question of the compatibility of such flexibility with the traditional Directives was raised in many of the contributions.

**With a view to simplifying procedures and clarifying the situation, the Commission will propose amendments to the existing instruments, which would permit more extensive use of flexible contracts allowing product developments and price changes to be taken into account. Long-term contracts may, however, pose a threat to competition in that they could cause positions to become entrenched and certain firms to be shut out. It is essential therefore that precise rules be laid down for the use of these procedures. Without anticipating the direction that will be taken by discussions on this issue, the Commission takes the view that objective and transparent information should be published on framework contracts. Once candidates had come forward, lists of potential contractors could be drawn up. To ensure that these contracts are not walled off, lists should either be valid only for a limited period or be kept permanently open to new firms.**

### **2.1.2.4 *Treatment of concessions and other forms of public-private partnership***

The concept of public-private partnership encompasses the different ways in which private capital can take part in the financing and operation of infrastructures and public services. The role, which the public authorities still play in such partnerships, varies greatly according to the situation concerned. The Commission has no intention of intervening in Member States' decisions as to whether these infrastructures and services are to be financed and operated by the public or the private sector, since such decisions are their responsibility. However, if it is to be fully in tune with reality, the Commission has a duty to devise a legal framework, which allows the development of these forms of partnership, while guaranteeing compliance with the competition rules and the fundamental Treaty principles.

At present, only works concessions are subject to specific rules laid down in a Directive; service concessions, public service contracts or other partnerships involving the provision of services are not covered<sup>9</sup>. Treaty rules and principles such as equal treatment and non-discrimination are of course applicable, but cannot always be readily implemented in specific cases. A legal framework therefore needs to be devised for these arrangements in order to clarify and simplify the conditions in which they may operate, thereby ensuring greater legal certainty.

**In the interests of simplification and clarification, the Commission envisages the following action to establish uniform principles for all types of concession.**

**In the first stage, the Commission will draw up an interpretative document explaining and spelling out the rules and principles that it considers, on the basis of the cases it has had to deal with, should apply to concessions. In this context, the Commission will also be examining other forms of public-private partnership in order to determine whether and to what extent the public procurement rules can constitute an appropriate legal framework for ensuring compliance with the Treaty rules without hindering the development of these forms of co-operation. This rethink could lead to clarification or even adjustment of existing instruments. In the same way, the Commission intends to tackle some urgent interpretation problems that have arisen in connection with Trans-European Networks (TENs). It has already announced to the high-level group chaired by Mr Kinnock and to other bodies its intention to publish an explanatory guide providing concrete solutions to certain questions arising in this area in the light of the existing legal framework.**

**In a second stage, the Commission envisages proposing amendments to the Directives in order to cover all forms of concessions, that are not yet subject to regulation. The aim would be to guarantee that partners were chosen after Community-wide competition ensured by prior publication of a notice and minimum procedural rules, which, in the interests of flexibility, allow ample scope for, dialogue between the parties involved while upholding the principle of equal treatment. To respond to the legitimate concerns voiced by certain operators, the amendments would include provisions allowing the chosen consortium to award contracts to its partners, provided that the existence of such contracts is announced during the award procedure.**

One aspect of the public-private partnership issue is the trend towards privatisation in which the public authorities transfer to the private sector responsibility for tasks that they previously carried out themselves. The process can take many different forms, ranging from a simple transfer of assets to more complex arrangements. These could combine transfer of ownership from a public body to the private sector and the establishment of a contractual relationship (purchase of goods or services, concessions, etc.) between that body and the privatised entity in question.

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<sup>9</sup> Except for the public tendering procedures in cases where for reasons which are in the public interest, Member States restrict access to intra-Community air routes or to the ground handling markets at Community airports.

The option of whether or not to carry out such privatisation falls entirely within the competence of Member States. The Commission ought nevertheless to ensure the removal of all the obstacles that could unduly hinder this type of transaction.

It is clear that the rules and principles of the Treaty, particularly Articles 34, 52, 59 and 67 on free movement of goods, the right of establishment, freedom to provide services and free movement of capital have a valid application as regards the transfer of assets to private purchasers.

**The Commission will look into the problems arising in this area from the standpoint of the public procurement Directives and, in the interests of clarity, publish an interpretative document on the topic.**

### 2.1.3 Clarification and consolidation

As stressed in the introduction to this communication, the Commission is convinced of the importance of a stable legal framework in providing a favourable environment for businesses. The framework must, however, also be transparent. The Commission will therefore endeavour, wherever possible, to avoid constantly amending legislation and to solve problems that arise through interpreting the law in a manner that takes account of changing circumstances and in the light of the principles developed by the Court, the only institution which has the power to give an authentic interpretation of Community law.

**The Commission therefore undertakes to shoulder its responsibilities by clearly stating its position on the complex questions which have arisen in relation to the application of Community law and which were mentioned in responses to the Green Paper.<sup>10</sup>**

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<sup>10</sup> The Commission proposes to clarify the following particular topics in an interpretative document:

- definitions of such basic concepts as “body governed by public law”, “work”, “special or exclusive rights”, “contracting authority” and “contracting entity” and the borderline between works contracts and service contracts;
- service contracts covered by the Directive, in particular the situation of financial services and R&D services;
- “in-house” contracts, i.e. contracts awarded within the public administration, for example between a central and local administration or between an administration and a company wholly owned by it;
- the “technical dialogue” whereby a contracting authority enters into technical discussions with potential bidders when determining its needs, before the contract award procedure is initiated, while observing the principle of equal treatment and safeguarding competition;
- the methods to be used for calculating whether or not a contract exceeds the thresholds for application of the Directives;
- an operational distinction between selection criteria and award criteria;
- identification of “abnormally low tenders” within the meaning of the Directives;
- definition of the concept of “irregular”, “unacceptable” and “inappropriate” tenders within the meaning of the Directives;
- the conditions in which “variants” may be used;

The Commission also intends to adopt interpretative communications, particularly in the following areas:

- the Treaty rules applicable to contracts not covered by the directives and the relevant principles clarified by the jurisprudence of the Court of Justice, such as, for example, the principles of equality of treatment, non-discrimination, transparency, mutual recognition and proportionality and the principles applicable to the stage following contract award:

Bringing the Commission's position on these problems to the attention of all parties will enhance legal certainty, and this will in turn help to create a favourable climate that will encourage firms to be more active in bidding for contracts.

The view is also taken in many quarters that the "traditional" Directives (on supplies, works and services) should be consolidated in order to iron out inconsistencies and make them easier to understand.

**The Commission intends ultimately, once the work on interpretation and adjustment of the existing legislation is complete, to combine the three "traditional" Directives into a single instrument. The consolidation exercise would be strictly confined to incorporating the adjustments and clarifications made since the Directives were adopted and eliminating any inconsistencies.**

It should not be forgotten, however, that if consolidation of the Community Directives is genuinely to result in greater clarity of the rules applicable in the field of public procurement, it must be backed up by consolidation and clarification of the relevant national rules.

## **2.2 Improving the implementation of public procurement policy: a joint responsibility for the Member States, the Commission and economic operators**

### **2.2.1 Objective**

If the single market is to function properly, the ground rules must be applied and observed uniformly in all Member States; this is far from being the case at present, a fact which is highlighted by various surveys and many of the contributions.

For this purpose, Member States must shoulder their responsibilities for ensuring compliance with the existing rules, and it is up to economic operators to use the instruments (particularly the means of redress) available to them to make the single market work in the field of public procurement. This allocation of responsibilities is in line with the principle of subsidiarity and in tune with the idea of the partnership between the Community institutions, the Member States and economic operators, which is necessary for the successful liberalisation of public procurement.

The Commission recognises the need to continue streamlining infringement proceedings under Article 169 of the Treaty and its own internal procedures. However, it must also

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- the conditions under which environmental criteria can be taken into account in public procurement (the use of "eco-labels", "eco-audit" systems, taking into account of production and working methods and the correct use of standards at different levels will be dealt with, inter alia).
  - the conditions under which social criteria can be taken into account in public procurement.

establish better co-operation with Member States, for, in view of the large number of cases concerning public procurement, it is necessary that the citizen can quickly obtain satisfaction as regards to the difficulties he encounters.

This is why, in pursuance of the subsidiarity principle, the Commission is encouraging Member States to set up or to designate independent authorities, which would deal with the vast majority of disputes in the public procurement field. The Commission would thus concentrate on cases having a Community-wide impact or raising major questions of interpretation. The objective pursued is to deal with problems at the appropriate level.

The Commission is also concerned with fighting irregularities affecting public procurements under two aspects i.e.

- Corruption occurring during the procedure for awarding the contract.
- Irregularities occurring during the execution of the contract once awarded.

This is particularly true for the contracts either awarded by the Commission (direct expenditure) or financed by the Commission (indirect expenditure) where the Communities' financial interests are at stake.

### ***2.2.2 Improving checks at the Community level***

Infringement proceedings under Article 169 of the Treaty are the main weapon in the Commission's arsenal for enforcing Community law. But the Article 169 procedure cannot on its own guarantee the rapid and effective settlement of disputes which is necessary in public procurement: by the time the dispute is settled, contracts have more often than not already been awarded, or even performed.

The European Parliament proposes strengthening the Commission's powers to conduct investigations and impose penalties in this area, along the lines of the powers it exercises in the competition field, so that it can enforce the legal framework effectively. The Amsterdam European Council has also requested the Commission to make proposals to it for the setting up of an efficient mechanism for combating serious infringements of Community law in the field of free movement of goods.

The Commission will consider whether it is opportune to provide, if necessary, such a mechanism for dealing with infringements of the public procurement rules. It could also consider having recourse, in appropriate cases, to Article 90, paragraph 3, of the EC Treaty.

**The Commission is determined to speed up its own procedures for dealing with infringement cases.**

However, these efforts also require the co-operation of Member States, which should respond to the Commission's requests within the specified time limits. More generally, the Commission is firmly resolved, in all cases where it proves necessary, to use the procedure available under Article 171 of the EC Treaty, under which the Commission

can request the Court of Justice to impose penalty payments on Member States which fail to comply with a Decision establishing a breach of the public procurement rules.

Another shortcoming pointed up by certain contributions resides in the fact that the Commission does not act systematically against infringements of the public procurement rules but haphazardly, as and when it receives complaints.

**In response to this criticism, the Commission undertakes to follow an approach, which will be less reactive and more proactive. It will therefore first seek to prevent infringements by reinforcing co-operation with Member States e.g. when they prepare for major events or when they plan large infrastructure projects having particular public procurement relevance. In the second place, the Commission will pay special attention to particularly serious infringements brought to its knowledge by whatever means, including the media; in such cases it will take the initiative in launching proceedings under Article 169. Finally, when a specific case brought to its attention raises a general problem of application, it will check the situation in all Member States and initiate proceedings against all similar infringements.**

### **2.2.3 *Independent authorities***

In its Green Paper, the Commission invited the Member States to designate independent authorities specialised in public procurement.

The Commission is not proposing that new institutions are set up from scratch, but rather that already existing bodies, such as audit offices or competition authorities, be used for the purpose. Without trying to evade its responsibilities as the guardian of Community law, the Commission takes the view that it cannot set itself up as a kind of "super enforcement authority" for settling all disputes in the public procurement field. Neither does it have enough human and material resources to solve all the problems arising. The aim of devolving the handling of disputes to national authorities is to relieve the Commission of some of the caseload of disputes currently submitted to it. This would enable it to concentrate on its rule-making tasks and on those cases which have a Community-wide impact or raise major questions of interpretation, while complainants would be able to find solutions to their disputes at national level.

**The Commission therefore encourages Member States to set up or designate independent authorities with the task of identifying problems of interpretation and discussing the treatment of individual cases. These authorities would serve as contact points for the rapid, informal solution of problems encountered in gaining access to contracts, and could co-operate with each other and with the Commission, in the latter case *inter alia* with a view to producing reliable statistics.**



These positive effects will be further enhanced following the pilot project for co-ordination and co-operation between these authorities suggested by Denmark and soon to be implemented.<sup>11</sup> Under this project, a supplier facing a problem with a procurement procedure in another Member State can contact the independent authority in that country. However, he can also address himself to the authority in his own country, which would then contact the authority in the Member State concerned. These contacts should enable a rapid, informal and adequate solution to be found. This could contribute to the creation of a genuinely open European procurement market without obliging suppliers to go to court.

#### **2.2.4 Market monitoring**

An effective public procurement policy is feasible only if all the parties involved (purchasers, suppliers and public authorities) have sufficient information on the real operation of the market and on the - particularly economic - impact of the policies pursued.

Very little information is currently available. What does exist is too patchy to serve as a tool for assessing the effectiveness of current policy and the economic benefits for the main players. Member States and contracting entities currently supply the statistics required by the Directives and the Agreement on Government Procurement (GPA) very late, if at all. The amount and complexity of the information required goes some way towards explaining this situation.

**The Commission will propose that these statistical requirements be scaled down to the minimum strictly necessary for effectively monitoring the market. It will ensure that statistical reporting obligations are complied with.**

In future, an alternative solution for obtaining these statistical data could be based on contract award notices within the SIMAP system. The necessary information could be gathered from these notices if the format was adjusted and notices actually published. The possibility of requiring price information only on a confidential basis, enabling the Commission to aggregate the data, could be considered.

**The Commission insists on compliance with the obligation to publish contract award notices (CANs) and will use all necessary means at its disposal in order to enforce it. If the obligation were complied with, it could consider abolishing the requirement to supply statistical data.**

Within the SIMAP system a market analysis tool will be developed to present market information in a user-friendly manner. Suppliers and purchasers could use this

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<sup>11</sup> The pilot project suggested by the Danish Government is supported by the Commission. It is the first concrete project following up ideas developed in the Action Plan for the Single Market under Strategic Target 1, Action 2 (establish a framework for enforcement and problem solving) and follows the logic of the so-called observatory, launched via the Advisory Committee for Public Procurement in 1994.

information to gain a better understanding of the markets they are working in. Such a system would significantly improve transparency of procurement markets.

**In order to pursue the series of statistical surveys in the Member States, which have so far been carried out, by the national statistical offices in Greece, Portugal and Germany, the Commission invites other Member States to volunteer for such a study.**

Bringing together all the information available, the Commission will define indicators to measure market trends and the impact of public procurement policy over time.

**Alongside these planned actions, the Commission will if necessary carry out additional economic studies.**

### **2.2.5 Attestation: a guarantee of non-discriminatory procurement**

Bearing in mind that prevention is better than cure, the EU set up an attestation system for purchasers. Nevertheless, as can be seen from the contributions to the Green Paper debate, if the system is to be used, it must confer certain benefits on the entity undergoing attestation.

**Among these benefits, the Commission is thinking in particular of exemption from certain constraints currently imposed by the Directives, which could be seen as an excessive burden for an entity that had agreed to undergo attestation.**

**Nevertheless, even if an entity were exempted from certain requirements, the basic principles, such as transparency, non-discrimination and equal treatment of all suppliers, would still apply.**

### **2.2.6 Fighting corruption**

The Commission in its Communication on Corruption<sup>12</sup> highlights the importance of public procurement for an effective Union-wide policy to the fight against corruption.

**The Commission will explore the possibility of obliging public procurement entities to enter into anti-corruption pledges and a corresponding obligation on tenderers to agree that they will not use bribery to obtain a contract.**

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<sup>12</sup> See Commission Communication to the Council and the European Parliament on *A Union Policy against Corruption* (COM(97)0192 – C4-0273/97).

The need for a blacklisting system has been raised within the European Union on at least two fronts. Firstly, the Commission's Communication on Corruption mentioned above commits the Commission to working on a scheme of blacklisting applicable to areas where Community finances are at risk. Similarly, the European Council in June 1997 adopted an *Action Plan for Combating Organised Crime*<sup>13</sup>. This contains a recommendation that Member States and the Commission provide for the possibility of exclusion from public tender procedures of an applicant who has committed or is under investigation or prosecution for having committed an offence connected with organised crime.

**The Commission will explore how a blacklisting system could be used as an anti-corruption tool.**

### **2.2.7 Contracts awarded by the Commission**

The Commission has been criticised by other Community institutions (the Council (internal market) and the Economic and Social Committee) and by economic operators with regard not only to its own contract award procedures but also to the contracts it finances (on the latter, see point 4.6.3 below).

Other shortcomings, such as excessive delays in paying contractors and failure to publish indicative and contract award notices, as required by the Directives, have also been mentioned.

The Commission is nevertheless convinced that considerable progress has been achieved in recent years, particularly in the wake of the SEM 200 (Sound and Efficient Management 200) programme, which is aimed at rationalising its procurement and managing it on a more professional basis.

As regards the fight against corruption and financial irregularities concerning contracts to be awarded by the Commission, its communication on "Sound Financial Management and Administration Improving Action against Incompetence, Financial Irregularities, Fraud and Corruption"<sup>14</sup> of November 1997 explicitly deals with public procurement and announces a number of measures to be taken to improve its procedures for awarding contracts. In particular, it has improved its internal administrative procedures concerning public procurement and established an internal early warning system.

**The Commission reaffirms its commitment to observing the same rules as national authorities. The contract award procedures of the Community institutions already provide for the application of the Council public procurement directives on works, supplies and services. The Commission proposes to add a reference to the multilateral agreement on public procurement concluded within the framework of the WTO. It undertakes to be**

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<sup>13</sup> OJC 251 of 15.8.97, page 1.

<sup>14</sup> SEC(97) 8198 18/11/97.

**more careful in complying with the Directives and to tighten its payment discipline. The Commission has undertaken to include in all its contracts involving identifiable deliverables, a clause obliging payment within 60 days of receipt of the claim with interest in case of delay. For contracts falling below the thresholds laid down in the Directives, it will likewise observe the principles of transparency, non-discrimination and equal treatment.**

**The Commission intends to explore the different possible methods of re-enforcing monitoring of observance of the principles and rules applicable to the award of public contracts, including the designation of an independent authority accessible to goods and services providers. This authority could exercise monitoring responsibilities and other functions, especially those of conciliation and assistance.**

**In the interests of transparency, Commission departments will make more extensive use of new IT systems, in particular the Internet. They will thus offer access to much more information than is currently available via the Official Journal and the TED database, thereby making it possible, among other things, to consult tender specifications on the Internet and even print them direct, so that interested suppliers can obtain these documents forthwith.**

## **3 DEVELOPING A FAVOURABLE ENVIRONMENT FOR BUSINESSES, AND IN PARTICULAR SMEs**

### **3.1 Training, information and measures helping SMEs**

#### **3.1.1 Objective**

The opening-up of public procurement markets to competition is a significant supply-side operation. Eliminating red tape is of enormous economic importance, creating business opportunities for competitive European suppliers from nearly all economic sectors.

The weakness of the impact of the Community regime is due in particular to the low response rate of suppliers. This is confirmed by the findings on public procurement published in the "*The Single Market Review*"<sup>15</sup>. Moreover, a recent supplier survey revealed that an average of only 10% of suppliers answer calls for tenders. In this connection, many contributions to the Green Paper, and in particular that of the European Parliament, highlight the disappointing record of SMEs and their specific problems.

An efficient public procurement policy needs to increase supplier participation. The Commission therefore proposes a set of measures addressing the various aspects of the problem: Making markets more transparent through better information; Increasing confidence in contract procedures by training focused on professionalism and best practice; Specific action to help SMEs overcome obstacles to selling to the public sector; Promoting mutual recognition of qualification procedures by contracting entities, thus reducing the costs to suppliers of entry to public procurement.

#### **3.1.2 Information**

The information given on public procurement is a key element in creating a business friendly environment. Indeed, low supplier participation may indicate that information on potential public procurement markets must be extended and made more accessible.

**The Commission will therefore exchange the present system of publication for an Internet based solution. This will allow free and easy access to information essential to potential contractors, including purchaser profiles (see point 3.2) and market monitoring information (see point 2.2.4). Commission and Member States need to work together to make information on the legal framework in the different Member States and on administrative procedures available. The Commission will also draw up interpretative texts (see point 2.1.3).**

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<sup>15</sup> The Single Market Review, Subseries III: Dismantling of Barriers, Volume 2: Public Procurement (OPOCE 1996).

### **3.1.3 Training and commercial practices ("best practice")**

A higher degree of professionalism among both purchasers and suppliers could significantly improve the environment in which public procurement takes place. Adequate training is therefore of the utmost importance in the opening up of markets, and there is wide support for a Community initiative for this purpose. Given the wide field to be covered, the diversity of administrative cultures and training programmes, a training policy will only be effective with the participation of Member States and economic and training actors at national, regional and local levels. The Commission, for its part, will develop a framework for implementing an effective public procurement training policy in the Union. This policy will also take into account measures to integrate environmental, social and consumer protection objectives.

**The Commission, on the basis of contributions from Member States and other interested parties, will complete a stocktaking of existing training needs, best practices, actions and current programmes in this field.**

**The Commission will examine the results of the stocktaking exercise with a view to developing guidelines on a public procurement training policy. This policy will make full use of the possibilities offered by information technology.**

### **3.1.4 Measures in favour of SMEs**

SMEs have the potential to supply that additional competition, flexibility and capacity for innovation essential to the successful opening up of public procurement markets. Every effort to make public procurement more accessible for businesses should start off from the point of view of the SME. While the Community regime has enabled SMEs to enjoy some success in breaking into regional and national procurement markets, however, experience of direct participation in cross-border contracts has remained disappointing.

Replies to the Green Paper suggest many reasons for this failure. SMEs face obstacles at every stage of the procurement procedure. SMEs must surmount many problems, such as lack of information about potential contracts, inability to draw up business plans, mismatch between the size of the enterprise and the large size of many contracts, anxiety about currency fluctuations, and the need to meet standards, certification and qualification requirements. Other problems, such as delays in payment, may arise in the post award stage.

**The Commission will adopt a comprehensive and concerted approach in a communication on SMEs and public procurement. This strategy will, in particular, develop the possibilities of improving access to information, crucial for SME, by consistent application of information and communications technology.**

This approach will be based particularly on an information policy based on electronic communication, high quality services provided by European-scale networks focused on SMEs, on better mutual recognition of qualification systems, on clarification of general provisions generally applicable to below thresholds, on promoting co-operation between SMEs and on the conditions for SMEs participation in large-scale projects.<sup>16</sup>

### **3.1.5 Qualification of suppliers**

Purchasers must be given the confidence to deal with new and previously unknown suppliers. Several Member States have set up nation-wide qualification systems, while in other Member States individual contracting entities have created their own qualification system.

**The Commission sees an important role for qualification systems, provided they do not result in additional barriers for suppliers. The principle of mutual recognition applies in this area: a supplier which has been qualified in one Member State should also be able to use this qualification in others, without having to be qualified again or at least without having to go through the full qualification procedure in other Member States. The Commission will use all the means available to it, in particular the powers conferred on it by Article 169, to ensure that the principle of mutual recognition is respected and that qualification systems are used to open up markets rather than to create new barriers.**

In order to make different national qualification systems in the construction industry more comparable, the Commission has given a mandate to the standardisation bodies CEN and CENELEC to develop a European standard for qualification of construction enterprises for contracts covered by Directive 93/37/EEC. This standard, which the Commission awaits, will ensure a balance between the legitimate requirements of contracting authorities to have certain information at their disposal and the wish of suppliers to see administrative requirements limited to a strict minimum.

**The Commission will also consider in which other areas a similar process of harmonisation of qualification systems can be undertaken.**

## **3.2 Towards efficient electronic procurement**

### ***3.2.1 Preparing the EU to meet the exciting new challenge of electronic commerce***

One of the most exciting and challenging developments for the future of public procurement is the emergence of the new Information and Communication Technologies (ICTs). These technologies allow the current procedures to run more smoothly and could

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<sup>16</sup> See also points 2.1.3, 3.1.2., 3.1.3., 3.1.5., 3.2. of this communication and OJ C 285 of 20.9.1997, p. 17. For the European Economic Interest Grouping (E.E.I.G.).

enable a more efficient purchasing process, reducing the need for detailed regulation. They also offer the best possibility yet to ensure meaningful participation of SMEs in the procurement process. The Commission and the Member States are co-ordinating their efforts in this regard within the SIMAP project, which has been funded through the Commission's IDA project<sup>17</sup>.

On 12<sup>th</sup> December 1997, the Commission proposed a second phase of the IDA programme to the EP and the Council. In this second phase, the Commission proposes to enhance and extend the SIMAP-project to comprise the entire procurement process.

**The Commission will ensure that the tools and systems developed through its SIMAP Information System will be compatible with and not duplicate tools already developed by the private sector. The Commission will furthermore ensure that all the requirements of the Member States are taken into account in the SIMAP framework.**

The SIMAP system for electronic creation and submission of procurement notices has been tested through pilot projects with a limited number of purchasers and suppliers throughout the Community and the EEA and will now be made available to all contracting entities.

**The Commission will provide the possibility to all contracting entities to electronically prepare and submit their notices for publication through procurement transparency system operated by the EU institutions. Several options, including electronic mail and the Internet, will be provided.**

The software developed through Simap has been found to result in substantial savings for the EU taxpayer and deliver better information to suppliers through more consistently accurate notices. However, costs to the taxpayer will remain unacceptably high so long as contracting entities continue to submit poor-quality notices, which do not comply with the legal obligations imposed by the Directives. Finally several comments stress the high costs of TED and the difficulties of using the paper OJ "S" series on account of the increasing number of notices published.

**The Commission will consider incentives to encourage contracting entities to use these electronic means of submission. Currently a notice must be published within twelve days of being sent. Where electronic mail and the Internet are used to provide instant publication the Commission intends to propose to reduce the overall length of the procedure, for example from 52 to 40-45 days (in an open procedure).**

**The Commission will continue to publish notices without cost to the procuring entity only when it submits a notice which complies with the**

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<sup>17</sup> Interchange of Data between Administrations



**formal requirements of the Directives, includes a reference to the CPV and follows standard forms or model notices. In other cases the costs of ensuring notices meet those requirements will be recovered from the contracting entity concerned.**

**The Commission has decided to discontinue the publication of the paper version of the Supplement to the Official Journal from July 1998. It will be replaced by the CD-ROM version already being available. Moreover, the TED database will be made available to all users for free over the Internet.**

For ease of use suppliers should be able to find all notices in one single location. In order to prepare a bid, however, suppliers need more information than that provided in the notice. They need in particular the tender documents themselves. The new ICTs, and in particular the emergence of the Internet, offer important new opportunities in this regard. Another basic characteristic of this development will be to make it easier than at present to publish tender notices in all the Community languages.

**The Commission will encourage the publication of all tender documents, in particular in open procedures, on the Internet. It invites contracting entities who already have a site ("homepage") on the Internet, to make tender documents available on a "purchaser profile" on their homepage. In order to promote the establishment of such purchaser profiles the Commission will make model software available over its SIMAP homepage.**

### ***3.2.2 The way ahead: pan-European electronic procurement***

Although the Commission has a clear role in the collection and dissemination of public procurement notices, the development of fully-fledged electronic procurement systems is not its direct responsibility.

**The Commission calls for the active participation of interested purchasers and suppliers, companies active in the ICT sector and others, including Euro Info Centers, in order to stimulate the development of a pan-European electronic procurement environment in which a substantial number, for example 25%, of all procurement transactions takes place electronically by the year 2003.**

Member States also have a very important role to play in promoting electronic procurement. The highest potential for savings will probably exist for relatively small purchases of readily available, "off-the-shelf" products. Such purchases often remain below the threshold values laid down in the Directives.

**The Commission will seek a commitment from the Member States to ensure mutual compatibility and interoperability of electronic procurement systems which they set up for below threshold purchases. To facilitate such compatibility it will publish any necessary specifications on the SIMAP homepage.**

Pilot projects will be identified which use electronic mail, electronic data interchange and Internet technology to conduct procurement activities. These projects will, of course, need to respect the principles of non-discrimination and transparency. Specific attention will be given to the use of electronic catalogues, virtual procurement networks and the promotion of best practice through procurement clubs.

**The Commission will come forward with recommendations for further measures to be taken in modifying the legal regime, developing standards or specifications or establishing a regulatory framework. The Commission will ensure that the requirements of electronic procurement are taken into account in any proposals for standards or legislation on digital signatures.**

The Commission recognises that electronic procurement needs to be seen in the context of globalisation. It will increasingly play an important role in opening-up markets outside the EU (see also point 4.4). Bilateral contacts have already started with some of our major trading partners.

**The Commission will seek agreement with its international partners in the WTO in order to simplify and harmonise the exchange of information on both public procurement opportunities and statistics in the electronic procurement context.**

### **3.2.3 Measures proposed**

The majority of comments received highlighted the need to allow the widespread use of Information and Communication Technologies (ICT). Recent amendments to the Directives already allow the use of electronic mail in some procurement procedures. Further changes are needed, however, to allow its use e-mail for all exchanges of information specified in the Directives (see also point 2.1.2).

**The Commission will propose amendments to the Directives to put electronic means of exchanging information on an equal footing with other means.**

The hardly predictable development of electronic procurement makes it difficult to modify the Directives to reflect the latest state of the art. The Commission intends to encourage electronic procurement through pilot projects, before proposing major changes

to the regime. These pilots may need waivers from certain provisions in the Directives for the duration of a pilot. Where pilots demonstrate their value, formal changes of the Directives can be contemplated to allow for their general and more permanent application. Obviously the underlying principles (non-discrimination/equal treatment, transparency etc.) should not be jeopardised by such waivers and should at all times be guaranteed.

**The Commission will allow as soon as possible the running of pilot projects in order to test specific electronic procurement procedures. To this effect it will also take the necessary legislative initiatives to allow such projects to take place as soon as possible while respecting the principles of the public procurement regime. The details of these initiatives will be determined after discussions with all interested parties, including in particular the Member States who should allow similar projects to take place for below-threshold purchases. The Commission will continue to take an active part in related discussions which are currently taking place in the WTO committees on modifying the Government Procurement Agreement (see point 4.6.2).**

## 4 COMPLEMENTING AND ACHIEVING SYNERGY WITH OTHER COMMUNITY POLICIES

### 4.1 Objective

The Communities' public procurement policy integrates Member States' procurement markets into the single market putting in place a market economy with free competition. The decision in favour of "best value for money" principle is more and more heard in the area of defence procurement. Budgetary pressure and the need for a serious restructuring of the supply side in this sector have fostered a debate on how to extend the principles of competitive procurement to defence procurement.

The best value for money objective in public procurement does not exclude taking environmental, social and consumer protection considerations into account. Nor does it require changing the present rules. It is, however, necessary to lay down clear guidelines to purchasers on how they how environmental and social criteria can be taken into account in their contract award procedures, while complying with Community law, particularly as regards transparency and non-discrimination and the public procurement rules. Such guidelines are necessary if European suppliers are to be placed on an equal footing.

Public procurement contracts in third countries are of significant interest for European firms, especially when it comes to infrastructure projects. Opening these market opportunities for our European suppliers is therefore an integral part of the Communities' public procurement policy. In order to allow European firms to win procurement contracts outside the Union and the European Economic Area, the same objectives as followed for inside the Union need to be pursued vis à vis our trading partners.

### 4.2 Defence

In its recent communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions entitled *Implementing European Union Strategy on Defence-related Industries*<sup>18</sup>, the Commission announced measures in defence procurement, following the appropriate procedures in accordance with Article M of the Treaty on European Union, to lay down binding principles, rules and mechanisms for transparency and non-discrimination in procurement, taking the current Community public procurement rules as a model.

The rules that will apply to procurement of defence equipment will contribute substantially to the creation of a competitive defence technological and industrial base.

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<sup>18</sup> COM(97) 583 final, 4.12.1997.

The framework should make provision for competitive tendering whenever feasible.

Furthermore, it must favour the maintenance and development of the fundamental industrial capabilities and key technologies at European level. In addition, the rules must guarantee security of supply, while enabling a progressive elimination of over-capacity.

**To this end, taking into account the need to build broad support in this matter, it is necessary to establish an appropriate set of principles, rules and mechanisms on procurement by the defence sector. In order to take into account the specificity of the defence sector, and in particular the need for confidentiality and security of supplies, an appropriate level of flexibility should be envisaged where necessary.**

For this purpose, materials for the defence sector could be divided into three categories:

- Products intended for the armed forces but not for military use, and therefore covered neither by Article 223 EC nor by Article 2 of Directive 93/36/EEC (markets declared secret, protection of vital interests, national security, etc.). As these products are already subject to the Community public procurement rules, the Commission will specify, where appropriate and in the most suitable form, the conditions for the application of these rules;
- Products intended for the armed forces and for military use, but not constituting “highly sensitive defence equipment”. The Commission could work out a fairly flexible set of rules, while respecting the principles of transparency and non-discrimination, inspired by the existing Community public procurement rules;
- Highly sensitive equipment covered by the scope of Article 223 EC. These products could be exempted from the rules referred to above, when safety or the protection of vital national interests of the country in question so requires. A notification mechanism for this purpose should be provided in order to ensure a degree of control and transparency.

### **4.3 Protection of the environment**

The environment is becoming an increasingly important component of any modern economic policy. The Amsterdam Treaty fully recognises this by raising environmental objectives to one of the Union’s priorities. As confirmed by the contributions received, more and more public purchasers wish to buy products and services, which are environmentally friendly. Several Member States are already pursuing an active policy. OECD has adopted a recommendation on “Greening Public Procurement”<sup>19</sup>. For its part, the Commission is implementing a plan for environmental protection in its administration, and, in particular, its purchasing.

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<sup>19</sup> Recommendation of the Council on Improving the Environmental Performance of Governments, adopted 20.2.1996.

The Commission re-emphasises that Community law, and the public procurement directives in particular, offer many possibilities of taking environmental protection into account in public purchasing. The Commission recalls the existing possibilities below.

- In general, any administration which so wishes can, in defining the goods or services which it intends to purchase, choose the products and services which correspond with its pre-occupations for the protection of the environment. The measures taken must, of course, comply with the rules and principles of the Treaty, particularly that of non-discrimination.
- The rules of the public procurement directives allow, in certain instances, the exclusion of candidates who are in breach of national environmental legislation.
- Purchasing organisations can draw up technical specifications concerning the characteristics of works, supplies and services, which are the object of public procurement, which take account of environmental values. They can from now on encourage the development of a positive approach by companies to the environment, in accepting tenders offering products, which meet the requirements, defined in the specifications.
- The directives allow the inclusion of the objective of protection of the environment in the criteria of selection of candidates in so far as these criteria are aimed at testing their economic, financial and technical capacity.
- As regards the award of contracts, environmental elements can serve to identify “the most economically advantageous offer”, in cases where these elements imply an economic advantage for the purchasing entity, attributable to the product or service which is the object of the procurement. In evaluating tenders, a purchasing organisation can, for example, take account of costs of maintenance, treatment of waste or re-cycling.
- A contracting authority can require the supplier, whose tender has been accepted, that the deliverable, which is the object of the contract, be provided with due regard to certain constraints aimed at safeguarding the environment. These conditions of execution must be known in advance by all the tenderers.

In general, the Commission reiterates that the object of public procurement remains essentially economic and that it is of the utmost importance to determine, for each procurement, the environmental factors linked to the goods and services required, which can, in consequence, be taken into consideration in a contract award procedure.

**The possibilities offered by the existing regime, which have just been spelled out above, will be developed and clarified in a specific interpretative document in order to enable the optimum consideration of environmental protection in public procurement (see point 2.1.3). In this exercise, the Commission will, in particular examine how far it is possible to refer in technical specifications to the European eco-label or even to national eco-labels. In the same way, it will analyse the question of whether purchasing entities can require suppliers to have an eco-audit system, such as EMAS or ISO standard 14001.**

The Commission cannot, however, propose solutions in an interpretative document, which go beyond the existing public procurement regime. These would require amendments to the legislation.

**In order to promote those practices which give the best results and respect the principles stated above concerning the integration of environmental aspects in public procurement, the Commission undertakes, with interested Member States and the private sector to develop initiatives which would make it easier to define environmental concerns in the tender documents in a balanced manner.**

#### **4.4 Public procurement and social aspects**

Social policy is of the greatest importance for the European Union. It aims, among other things, at promoting a high level of employment and social protection. Furthermore, the Amsterdam Treaty lays down as a priority the elimination of inequality and the promotion of equality between men and women in all the policies and activities of the European Union and requires it to combat every type of discrimination.

The Commission has already indicated in its Green Paper the conditions under which social criteria can play a role in contract award procedures, particularly the possibility of including the obligation to comply with existing social legislation, especially Community social legislation and, where appropriate, that emerging from the International Labour Organisation (ILO).

There is a range of possibilities for public administration to take the pursuit of social objectives into consideration in their purchasing:

- The rules of the public procurement directives allow the exclusion of candidates who breach national social legislation, including those relevant to the promotion of equality of opportunities.
- A second possibility is to lay down as a condition of execution of public contracts, compliance with obligations of a social character, aimed for example at promoting the employment of women or encouraging the protection of certain disadvantaged groups. Of course, only those conditions of execution are authorised which do not discriminate, directly or indirectly, against tenderers from other Member States. Moreover, indicating these conditions in the tender notice or the specification must ensure sufficient transparency.

Contracting authorities and entities can therefore be called upon to implement the various aspects of social policy in awarding contracts, public purchases in practice constituting a significant means of influencing the behaviour of economic operators. One can cite, as an example of this situation, legal obligations to protect employment and working conditions, which must be enforced on the site where a public works contract is being carried out. Yet again, there are the so-called “positive actions”, that is the use of a public contract as a means of achieving the objective sought, for example, establishing a captive

market for a sheltered workshop, which could not reasonably be expected to stand up to competition from classic commercial companies with a normal level of productivity.

**As in the case of the environment, the Commission intends to clarify the principles, which can be applied to allow social factors to be taken into account.**

**It re-iterates that public contracts can be a means of influencing the actions of economic operators, providing the limits laid down by Community law are respected. In this context the Commission encourages the Member States to use their procurement powers to pursue the social objectives mentioned above. The Commission will act similarly in its own procurement activity.**

## **4.5 Consumer protection**

The improvement of market access and transparency through the implementation of an effective procurement policy will bring significant benefit to consumers, including better quality and more economically efficient services and infrastructures. It is therefore necessary to take greater account of consumer policy in the Union's procurement policy, especially with regard to the promotion of transparency and dialogue with consumer organisations.

## **4.6 International aspects**

### **4.6.1 *Opening up third-country public procurement markets for European companies***

The Government Procurement Agreement (GPA), which was last amended in 1994, lays down disciplines between a limited number of countries including the world's major trading blocks. These disciplines cover the traditional national treatment and most favoured nation principles but also contain precise requirements with regard to procurement procedures, akin to those in the Directives. Thus the GPA affects the regulatory regimes of the adhering countries, including the EU, in a far-reaching manner.

The Commission will continue to take all steps necessary to ensure that the legal instruments creating opportunities for EU companies are effectively complied with.

On the multilateral front, it will seek to further open up third country public procurement world wide, with a view to eliminating those barriers to trade, which are harmful to European interests. The EU's final objective is to obtain multilateral adherence to a code on procurement through its inclusion in the WTO single undertaking. The work undertaken in the WTO, such as the review of the GPA, the negotiations on public procurement of services within the GATS and the working group on transparency rules in government procurement, should help to achieve this objective. In addition, there are ongoing processes in other fora, such as the OECD or Uncitral.



On the bilateral front, the Commission will continue its efforts to open-up third country markets by concluding bilateral agreements as an alternative or as a complement to its multilateral policy.

Electronic procurement is becoming increasingly widespread and will be one of the main aspects of our external policy in procurement. It is already one of the key aspects, which are being discussed at multilateral level, in particular in the WTO's GPA and Transparency Groups. The use of ICTs can indeed play a major role in achieving real and meaningful transparency of procurement world-wide. But the Commission sees its task at the multilateral level first and foremost as ensuring that the EU's international commitments are consistent with its internal policy on electronic procurement so that the development of the latter is not hindered. In addition, it will, as indicated in point 3.2 above, pursue these matters bilaterally with its major trading partners.

**The Commission intends to actively participate in these fora in order to create the right conditions to allow European industry to enhance competitiveness and maximise commercial opportunities.**

**It is also the Commission's intention to ensure that rules and practices at international level with respect to the use of information technology in the field of public procurement are consistent with its own internal policy on the matter.**

#### ***4.6.2 Integrating neighbouring economies into the Union's public procurement policy***

In some situations our relations in the field of public procurement with third countries go beyond the trade and even the regulatory aspects. This relates in particular to the Central and Eastern European Countries (involved in the pre-accession process) and the Mediterranean Countries. Market opening is not the main objective in this context, but rather a tool to improve the economic situation of these countries. With regard to the CEECs, the adoption of the *acquis communautaire* is also part of the AEU's current policy. Asymmetric liberalisation and the development of comprehensive technical assistance programmes should remain the basis of the AEU's future policy in this area, in particular with respect to the Mediterranean countries.

**The Commission is preparing "Road Maps" adapted to the specific situation of each of the candidates for accession which will set out priorities and actions in order to help them in their efforts to take over the *acquis*. The Commission will address this issue in a communication on the single market and the Mediterranean area further to the Barcelona Declaration, which aims at establishing a Free Trade Area.**

#### ***4.6.3 Ensuring efficiency in the award of contracts financed by the EU within the context of external aid***

The Commission is concerned about achieving economy and efficiency in the management of the Community's financial resources. In this respect, the responsibility of

the Commission includes not only contracts awarded by the Commission itself (see point 2.2.6 above), but also contracts financed by EU funds in the context of external aid.

On the one hand, it is justified in insisting on ensuring a certain European visibility when awarding contracts financed by the EU funds in the context of the external aid. On the other hand, the Commission believes that countries receiving EU funds need to achieve economy and efficiency in their public sector operations, and should also respect the principles of transparency and accountability in public administration.

To achieve these objectives, it is necessary to apply best practice and best management principles based on competitive procurement in the award procedures. Economic benefits for the recipient countries arise from the use of sound procurement policies and practices (such as value for money, improved competitiveness of local industry, increased efficiency in public administration, more foreign investment etc.).

Joining the WTO Agreement on Government Procurement, which forms a legal basis for open and competitive public procurement on an international basis, would be a desirable objective in this respect. The Commission is nevertheless aware that it will be difficult for most of the countries receiving EU funds to join this agreement or even adopt national procurement rules based on competitive tendering at this stage, since these countries may be economies in transition, developing countries or even least developed countries.

**As a result, the Commission will continue to see to it that contracts financed from Community resources in the framework of external aid are awarded in a competitive manner by the recipient countries by respecting the relevant EU rules governing this matter, as well as those established within the framework of bilateral or regional agreements concluded by the European Union. In this regard, the Commission has already presented proposals in order to harmonise the different rules and procedures presently used for awarding certain contracts financed by the EU resources.**

In order to improve the protection of the financial interests of the Community, the Commission has improved the legal framework regarding Structural Funds by adopting Regulation no. 2064/97<sup>20</sup>, which will also enable better control of public procurement contracts awarded by national authorities but co-financed on the Communities' budget, which will help in fighting corruption and avoiding irregularities.

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<sup>20</sup> JO-L No.290 of 23.10.1997.

# ANNEX

## STATUS OF IMPLEMENTATION OF THE PUBLIC PROCUREMENT DIRECTIVES

DIRECTIVES	BE	DK	DE	GR	ES	FR	IRL	IT	LU	NL	PT	UK	AUT	FI	SE
<b>89/440/EEC</b> Works (18.7.1989) In force since 19.7.1990 GR, E, P: 1.3.1992 AT, FI, SE: 1.1.1994 replaced by 93/37/EEC															
<b>88/295/EEC</b> Supplies (2.3.1988) In force since 1.1.1989 GR, E, P: 1.3.1992 AT, FI, SE: 1.1.1994															
<b>89/665/EEC</b> Remedies (21.12.1989) In force since 21.12.1991 AT, FI, SE: 1.1.1994															
<b>90/531/EEC</b> Utilities (17.9.1990) In force since 1.1.1993 E: 1.1.1996 GR, P: 1.1.1998 AT, FI, SE: 1.1.1994															
<b>92/13/EEC</b> Remedies for Utilities (25.2.1992) In force since 1.1.1993 AT, FI, SE: 1.7.1994 E: 30.6.1995 GR, P: 30.6.1997															
<b>92/50/EEC</b> Services (18.6.1992) In force since 1.7.1993 AT, FI, SE: 1.7.1994															
<b>93/36/EEC</b> Supplies (14.6.1993) In force since 14.6.1994 AT, FI, SE: 1.7.1994															
<b>93/38/EEC</b> Utilities (14.6.1993) In force since 1.7.1994 AT, FI, SE: 1.7.1994 E: 1.1.1997 GR, P: 1.1.1998															

**Key:**

	National implementing measures not communicated or only partly communicated
	National implementing measures communicated and checked; infringement proceedings for non-compliance under way
	National implementing measures communicated

**ANNEX 2**  
**TIME TABLE**

<b>PRINCIPAL MEASURES TO BE ADOPTED</b>	<b>ADOPTION BY THE COMMISSION</b>
Legislative package making some adjustments to the legal framework as regards Directive 93/38/EEC, competitive dialogue procedure, framework contracts, concessions. (See point 2.1.2.)	1998
Implementation of Article 8 of Directive 93/38/EEC	Immediately
Communications and interpretative documents (2.1.3.)	2. semester 1998 to 2. semester 1999
Communication on concessions and problems associated with trans-european networks (TENs) (2.1.2.4.)  Reflection and discussion on questions connected with various forms of public-private partnership (2.1.2.4.)	2. quarter 1998
Consolidation of the classic directives (2.1.3.)	2001
Improvement of procedures of supervision at Community level (2.2.2.)	Immediately
Launching of measures to encourage the setting up or designation of independent authorities (2.2.3.)	Immediately
Improvement of the Commission's contracting procedures (not requiring legal changes) (2.2.7.)	Immediately
Developing a policy for public procurement training (3.1.3.)	2. semester 1998
Communication on SMEs and public procurement (3.1.4.)	2. semester 1998
Support for pilot operations on electronic tendering (3.2.2.)	2. semester 1998
Establishment of an appropriate set of principles, rules and mechanisms on procurement by the defence sector (4.2)	1998



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