COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.11.2006
COM(2006) 748 final

2006/0249 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

repealing Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches

(presented by the Commission)

EXPLANATORY MEMORANDUM

1) CONTEXT OF THE PROPOSAL

• Grounds for and objectives of the proposal

This proposal seeks to contribute to the task of simplifying the Community acquis by repealing a Directive that has become obsolete.

• General context

Following the adoption of its communication on the updating and simplification of the Community acquis,[1] the Commission has intensified its scrutiny of the acquis in order to identify instances where legislative acts had become obsolete and could therefore be repealed in the interests of simplification. One of the acts examined in this context is Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches.[2]

Directive 71/304/EEC, which applies exclusively to the public works sector,[3] first of all imposes an obligation on the Member States to remove restrictions "affecting the right to enter into, award, perform or participate in the performance of public works contracts on behalf of the state, or regional or local authorities or legal persons governed by public law". The removal of these restrictions is intended to benefit economic operators acting, either directly or through agencies or branches, as service providers. Among the restrictions to be removed, the Directive cites a number of examples such as clauses whereby entities that have been awarded a public works contract or a service or public works concession contract are obliged to engage in discriminatory practices when choosing their subcontractors[4] or, again, the example of technical specifications that have a discriminatory effect. Under the Directive, Member States also have to ensure that non-national enterprises have the same access to credits, grants and subsidies as nationals and that the non-national enterprises "have access without restriction and in any event under the same conditions as nationals, to the supply facilities which the state is in a position to control and which they need for the performance of their contract".[5]

This Directive is therefore in two parts: one part concerning the procurement procedure as currently addressed by Directives 2004/18/EC and 2004/17/EC,[6] and another part relating to non-discriminatory access to public works in general which seeks to ensure the direct implementation of Articles 43 and 49 of the EC Treaty and is upstream or

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1 COM (2003) 71 final,11.2.2003.

2 OJ L 185, 16.8.1971.

3 Apart from a number of exceptions listed in Article 2(2) thereof.

4 Article 3(1)(a).

5 Article 3(2)(b).

6 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 1 and p. 114 respectively).

downstream of the ongoing tendering procedure.

The first part has been superseded by the public procurement legislation that followed on from the 1971 Directive, i.e. most recently Directives 2004/17/EC and 2004/18/EC.

As far as the second part is concerned, it needs to be pointed out that, since the entry into force of Directive 71/304/EEC, the case law of the Court in matters relating to freedom to provide services has changed substantially.[7] Consequently, it is clear that Article 49 of the EC Treaty prohibits measures that apply indiscriminately and that are likely to impede the freedom to provide services.[8] Henceforth, the scope of Article 49 of the EC Treaty is broader than that of Article 3 of Directive 71/304/EEC.

It may therefore be concluded that there is no longer any need for Directive 71/304/CEE and that, consequently, steps can be taken to repeal the said Directive without in any way limiting the rights of economic operators.

- **Existing provisions in the area of the proposal**

Apart from the fact that it is governed by the Treaty (in particular, Articles 43 and 49 thereof), this area is currently governed by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors[9] and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.[10]

- **Consistency with other policies and objectives of the Union**

Not applicable.

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Unnecessary given that the rights of the economic operators and the obligations of the contracting authorities and contracting entities remain unchanged.

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7 Thus, in its judgment of 25 July 1991 in Case C-76/90 *Säger*, ECR I-4221, the Court states in paragraph 12 of the grounds for the judgment: "It must be observed, first, that Article 59 [formerly Article 49] of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services."

8 See also judgment of the Court of 25 July 1997 in Case C-288/89 *Gouda*, ECR I-4007, paragraphs 12 and 13.

9 OJ L 134, 30.4.2004, p. 1.

10 OJ L 134, 30.4.2004, p. 114.

- **Collection and use of expertise**

Use of external expertise was not necessary.

- **Impact assessment**

Unnecessary given that:

the rights of the economic operators and the obligations of the contracting authorities and contracting entities remain unchanged.

3) LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The proposed directive repeals Directive 71/304/EEC, which has become obsolete as a result of case law and legislative developments in respect of public works contracts.

- **Legal basis**

Article 47(2) and Articles 55 and 95 of the Treaty.

- **Subsidiarity principle**

The proposal concerns an area that falls under exclusive Community competence. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons:

the formal repeal of a directive that is not time-limited per se can only take place through the adoption of a legislative act;

repeal will have no financial impact.

- **Choice of instruments**

Proposed instrument(s): Directive.

Other means would not have been appropriate for the following reasons:

By analogy, the proposal for a directive is based on the same Treaty provisions as the Directive that is due to be repealed. In the light of these legal bases, the directive option is unavoidable.

4) BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

5) ADDITIONAL INFORMATION

- **Simplification**

The proposal simplifies the legislative framework.

As a result, the Community acquis will no longer contain an act that has become redundant.

- **European Economic Area**

As the proposed act concerns a matter covered by the EEA Agreement, it should therefore be extended to the European Economic Area.

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) and Articles 55 and 95 thereof,

Having regard to the proposal from the Commission,[11]

Having regard to the opinion of the European Economic and Social Committee,[12]

Having regard to the opinion of the Committee of the Regions,[13]

Acting in accordance with the procedure laid down in Article 251 of the Treaty,[14]

Whereas:

(1) In its communication on the updating and simplification of the Community acquis,[15] the Commission announced, inter alia, its intention to scrutinise the acquis so as to establish whether it could be simplified, for instance through the repeal of acts that had become obsolete.

(2) As a result of the adoption of various acts of a legislative nature in the public procurement sector, most recently Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors,[16] and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts,[17] and also in the light of developments involving the case-law of the European Court of Justice, notably in its judgment of 25

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11 OJ C […], […], p. […].
12 OJ C […], […], p. […].
13 OJ C […], […], p. […].
14 OJ C […], […], p. […].
15 COM (2003) 71 final, 11.2.2003.
16 OJ L 134, 30.4.2004, p. 1.
17 OJ L 134, 30.4.2004, p. 114.

July 1991 in Case C-76/90 *Säger*,[18] it has been possible to achieve a level of protection equal to or greater than that offered under Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches.[19] Consequently, Directive 71/304/EEC should be repealed in order to simplify the Community acquis, while at the same time not prejudicing the rights of economic operators.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 71/304/EEC is hereby repealed.

Article 2

Transposition

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by […] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

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

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels, […]

For the European Parliament
The President
[…]

For the Council
The President
[…]

[18] ECR I-4221.
[19] OJ L 185, 16.8.1971, p. 1.