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►B DIRECTIVE 98/4/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

(OJ L 199, 9.8.1993, p. 84)

Amended by:

		Official Journal No	page	date
►M1	Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998	L 101	1	1.4.1998
►M2	Commission Directive 2001/78/EC of 13 September 2001	L 285	1	29.10.2001

Amended by:

►A1	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995

Corrected by:

►C1 Corrigendum, OJ L 82, 25.3.1994, p. 39 (93/38/EEC)

►C2 Corrigendum, OJ L 214, 9.8.2002, p. 1 (2001/78/EC)

NB: This consolidated version contains references to the European unit of account and/or the ecu, which from 1 January 1999 should be understood as references to the euro — Council Regulation (EEC) No 3308/80 (OJ L 345, 20.12.1980, p. 1) and Council Regulation (EC) No 1103/97 (OJ L 162, 19.6.1997, p. 1).

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COUNCIL DIRECTIVE 93/38/EEC

of 14 June 1993

coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the last sentence of Articles 57 (2), 66, 100a and 113 thereof,

Having regard to the proposal from the Commission [1],

In cooperation with the European Parliament [2],

Having regard of the opinion of the Economic and Social Committee [3],

1. Whereas the measures aimed at progressively establishing the internal market during the period up to 31 December 1992 need to be taken; whereas the internal market consists of an area without internal frontiers in which free movement of goods, persons, services and capital is guaranteed;

2. Whereas restrictions on the free movement of goods and on freeedom to provide services in respect of supply and service contracts awarded in the water, energy, transport and telecommunications sectors are prohibited by the terms of Articles 30 and 59 of the EEC Treaty;

3. Whereas Article 97 of the Euratom Treaty prohibits any restrictions based on nationality as regards companies under the jurisdiction of a Member State where they desire to participate in the construction of nuclear installations of a scientific or industrial nature in the Community or to provide the relevant service in the Community;

4. Whereas these objectives also require the coordination of the procurement procedures applied by the entities operating in these sectors;

5. Whereas the White Paper on the completion of the internal market contains an action programme and a timetable for opening up public procurement markets in sectors which are currently excluded from Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts [4], and Council Directive 77/62/EEC of 21 December 1976 coordinating procedure for the award of public supply contracts [5];

6. Whereas the White Paper on the completion of the internal market also contains an action programme and a timetable for opening up service contracts;

7. Whereas among such excluded sectors are those concerning the provision of water, energy and transport services and, as far as Directive 77/62/EEC is concerned, the telecommunications sector;

8. Whereas the main reason for their exclusion was that entities providing such services are in some cases governed by public law, in others by private law;

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(1) OJ No C 337, 31. 12. 1991, p. 1.
(2) OJ No C 176, 13. 7. 1992, p. 136 and OJ No C 150, 31. 5. 1993.
(3) OJ C 106, 27. 4. 1992, p. 6.
(4) OJ No L 185, 16. 8. 1971, p. 5. Directive as last amended by Directive 89/440/EEC (OJ No L 210, 21. 7. 1989, p. 1).
(5) OJ No L 13, 15. 1. 1977, p. 1. Directive as last amended by Directive 88/295/EEC (OJ No L 127, 20. 5. 1988, p. 1).

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9. Whereas the need to ensure a real opening-up of the market and a fair balance in the application of procurement rules in these sectors requires that the entities to be covered must be identified on a different basis than by reference to their legal status;

10. Whereas, in the four sectors concerned, the procurement problems to be solved are of a similar nature, thus permitting them to be addressed in one instrument;

11. Whereas, among the main reasons why entities operating in these sectors do not purchase on the basis of Community-wide competition is the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the national authorities, concerning the supply to, provision or operation of, networks for providing the service concerned, the exploitation of a given geographical area for a particular purpose, the provision or operation of public telecommunications networks or the provision of public telecommunications services;

12. Whereas the other main reason for the absence of Community-wide competition in these areas results from various ways in which national authorities can influence the behaviour of these entities, including participations in their capital and representation in the entities administrative, managerial or supervisory bodies;

13. Whereas this Directive should not extend to activities of those entities which either fall outside the sectors of water, energy and transport services or outside the telecommunications sector, or which fall within those sectors but are nevertheless directly exposed to competitive forces in markets to which entry is unrestricted;

14. Whereas it is appropriate that these entities apply common procurement procedures in respect of their activities relating to water; whereas certain entities have been covered up to now by Directives 71/305/EEC and 77/62/EEC in respect of their activities in the field of hydraulic engineering projects, irrigation, land drainage or the disposal and treatment of sewage;

15. Whereas, however, procurement rules of the type proposed for supplies of goods are inappropriate for purchases of water, given the need to procure water from sources near the area it will be used;

16. Whereas, when specific conditions are fulfilled, exploitation of a geographical area with the aim of exploring for or extracting oil, gas, coal or other solid fuels may be made subject to alternative arrangements which will enable the same objective of opening up contracts to be achieved; whereas the Commission must ensure that these conditions are complied with by the Member States who implement these alternative arrangements;

17. Whereas the Commission has announced that it will propose measures to remove obstacles to cross-frontier exchanges of electricity by 1992; whereas procurement rules of the type proposed for supplies of goods would not make it possible to overcome existing obstacles to the purchases of energy and fuels in the energy sector; whereas, as a result, it is not appropriate to include such purchases in the scope of this Directive, although it should be borne in mind that this exemption will be re-examined by the Council on the basis of a Commission report and Commission proposals;

18. Whereas Regulations (EEC) No 3975/87 [1] and (EEC) No 3976/87 [2], Directive 87/601/EEC [3] and Decision 87/602/EEC [4] are

[1] OJ No L 374, 31. 12. 1987, p. 1.
[2] OJ No L 374, 31. 12. 1987, p. 9.
[3] OJ No L 374, 31. 12. 1987, p. 12.
[4] OJ No L 374, 31. 12. 1987, p. 19.

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designed to introduce more competition between the entities offering air transport services to the public and it is therefore not appropriate for the time being to include such entities in the scope of this Directive although the situation ought to be reviewed at a later stage in the light of progress made as regards competition;

19. Whereas, in view of the competitive position of Community shipping, it would be inappropriate for the greater part of the contracts in this sector to be subject to detailed procedures; whereas the situation of shippers operating sea-going ferries should be kept under review; whereas certain inshore and river ferry services operated by public authorities should no longer be excluded from the scope of Directives 71/305/EEC and 77/62/EEC;

20. Whereas it is appropriate to facilitate compliance with provisions relating to activities not covered by this Directive;

21. Whereas the rules on the award of service contracts should be as close as possible to the rules on the works and supply contracts referred to in this Directive;

22. Whereas obstacles to the free movement of services need to be avoided; whereas, therefore, service providers may be either natural or legal persons; whereas this Directive shall not, however, prejudice the application, at national level, of rules concerning the conditions for the pursuit of an activity or a profession provided that they are compatible with Community law;

23. Whereas the field of services is best described, for the purpose of application of procedural rules and for monitoring purposes, by subdividing the services into categories corresponding to particular positions of a common classification; whereas Annexes XVI A and XVI B to this Directive refer to the United Nations CPC (Central Product Classification) nomenclature; whereas that nomenclature is likely to be replaced by a Community nomenclature in the future; whereas it is necessary to make provision for the possibility of adapting the reference made to the CPC nomenclature in Annexes XVI A and XVI B accordingly;

24. Whereas the provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as law, regulations or administrative provisions or employment contracts, is not covered;

25. Whereas, in accordance with Article 103f of the EEC Treaty, the encouragement of research and development is a means of strengthening the scientific and technological basis of European industry and the opening-up of public contracts will contribute to this end; whereas contributions to the financing of research programmes should not be subject to this Directive; whereas research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority, are not therefore covered by this Directive;

26. Whereas contracts for the acquisition or rental of land, existing buildings or other immovable property have particular characteristics, which make the application of procurement rules inappropriate;

27. Whereas arbitration and conciliation services are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules;

28. Whereas the service contracts covered by this Directive do not include contracts for the issue, purchase sale or transfer of securities or other financial instruments;

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29. Whereas this Directive should not apply to procurement contracts which are declared secret or may affect basic State security interests or are concluded according to other rules set up by existing international agreements or international organizations;

30. Whereas contracts with a designated single source of supply may, under certain conditions, be fully or partly exempted from this Directive;

31. Whereas the Community's or the Member States' existing international obligations must not be affected by the rules of this Directive;

32. Whereas it is appropriate to exclude certain service contracts awarded to an affiliated undertaking having as its principal activity, with respect to services, the provision of such services to the group of which it is part, rather than the offering of its services on the market;

33. Whereas full application of this Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realized; whereas contracts for other services need to be monitored for a certain period before taking a decision on the full application of the said Directive; whereas the mechanism for such monitoring needs to be set up by this Directive and whereas it should at the same time enable those interested to share the relevant information;

34. Whereas the relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in an award procedure or a design contest;

35. Whereas products, works or services must be described by reference to European specifications; whereas, in order to ensure that a product, work or service fulfils the use for which it is intended by the contracting entity, such reference may be complemented by specifications which do not change the nature of the technical solution or solutions set out in the European specification;

36. Whereas the principles of equivalence and of mutual recognition of national standards, technical specifications and manufacturing methods are applicable in the field of application of this Directive;

37. Whereas Community undertakings should be granted access to the award of service contracts in third countries; whereas the Community should endeavour to remedy any situation whereby such access, in law or in fact, is found to be restricted and whereas it should be possible, under certain conditions, to take measures as regards access to service contracts covered by this Directive for undertakings of the third country concerned or for tenders originating in that country;

38. Whereas, when the contracting entities define by common accord with tenderers the deadlines for receiving tenders, they shall comply with the principles of non-discrimination, and whereas, if there is no such agreement, it is necessary to lay down suitable provisions;

39. Whereas it could prove useful to provide for greater transparency as to the requirements regarding the protection and conditions of employment applicable in the Member State in which the works are to be carried out;

40. Whereas it is appropriate that national provisions for regional development requirements to be taken into consideration in the award of public contracts should be made to conform to the objectives of the Community and be in keeping with the principles of the EEC Treaty;