II

*(Acts whose publication is not obligatory)*

# COUNCIL

## COUNCIL DIRECTIVE

**of 17 September 1990**

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

(90/531/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

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

In cooperation with the European Parliament [2],

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

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;

Whereas the European Council has drawn conclusions concerning the need to bring about a single internal market;

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

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;

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

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], as last amended by Council Directive 89/440/EEC [5], and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [6], as last amended by Directive 88/295/EEC [7];

---

(1) OJ No C 264, 16. 10. 1989, p. 22.
(2) OJ No C 158, 26. 6. 1989, p. 258 and OJ No C 175, 16. 7. 1990, p. 78.
(3) OJ No C 139, 5. 6. 1989, pp. 23 and 31.
(4) OJ No L 185, 16. 8. 1971, p. 5.
(5) OJ No L 210, 21. 7. 1989, p. 1.
(6) OJ No L 13, 15. 1. 1977, p. 1.
(7) OJ No L 127, 20. 5. 1988, p. 1.

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;

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;

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;

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

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;

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;

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 nevertheless are directly exposed to competitive forces in markets to which entry is unrestricted;

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 the 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;

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;

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;

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;

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 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;

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;

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

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;

---

(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.

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

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;

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;

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

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;

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

Whereas contracting entities must not be able to reject abnormally low tenders before having requested in writing explanations as to the constituent elements of the tender;

Whereas, within certain limits, preference should be given to an offer of Community origin where there are equivalent offers of third country origin;

Whereas this Directive should not prejudice the position of the Community in any current or future international negotiations;

Whereas, based on the results of such international negotiations, this Directive should be extendable to offers of third country origin, pursuant to a Council Decision;

Whereas the rules to be applied by the entities concerned should establish a framework for sound commercial practice and should leave a maximum of flexibility;

Whereas, as a counterpart for such flexibility and in the interest of mutual confidence, a minimum level of transparency must be ensured and appropriate methods adopted for monitoring the application of this Directive;

Whereas it is necessary to adapt Directives 71/305/EEC and 77/62/EEC to establish well-defined fields of application; whereas the scope of Directive 71/305/EEC should not be reduced, except as regards contracts in the water and telecommunications sectors; whereas the scope of Directive 77/62/EEC should not be reduced, except as regards certain contracts in the water sector; whereas the scope of Directives 71/305/EEC and 77/62/EEC should not, however, be extended to contracts awarded by carriers by land, air, sea, inshore or inland waterway which, although carrying out economic activities of an industrial or commercial nature, belong to the State administration; whereas, nevertheless, certain contracts awarded by carriers by land, air, sea, inshore or inland waterway which belong to the State administration and are carried out only for reasons of public service should be covered by those Directives;

Whereas this Directive should be re-examined in the light of experience;

Whereas the opening up of contracts, on 1 January 1993, in the sectors covered by this Directive might have an adverse effect upon the economy of the Kingdom of Spain; whereas the economies of the Hellenic Republic and the Portuguese Republic will have to sustain even greater efforts; whereas it is appropriate that these Member States be granted adequate additional periods to implement this Directive,

HAS ADOPTED THIS DIRECTIVE:

## TITLE I

## General provisions

### *Article 1*

For the purposes of this Directive:

1. 'public authorities' shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

   A body is considered to be governed by public law where it:

— is established for the specific purpose of meeting needs in the general interest, not being of a commercial or industrial nature, and

— has legal personality, and

— is financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or other bodies governed by public law;

2. 'public undertaking' shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

— hold the major of the undertaking's subscribed capital, or

— control the majority of the votes attaching to shares issued by the undertaking, or

— can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body;

3. 'supply and works contracts' shall mean contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2 and a supplier or contractor and which have as their object:

(a) in the case of supply contracts, the purchase, lease, rental or hire-purchase, with or without options to buy, of products or of software services. These contracts may in addition cover siting and installation operations.

Software services shall be covered by this definition where they are procured by a contracting entity exercising and activity defined in Article 2 (2) (d) and are for use in the operation of a public telecommunications network or are intended to be used in a public telecommunications service as such;

(b) in the case of works contracts, either the execution, or both the execution and design or the realization, by whatever means, of building or civil engineering activities referred to in Annex XI. These contracts may, in addition, cover supplies and services necessary for their execution.

Contracts which include the provision of services other than those referred to in (a) and (b) shall be regarded as supply contracts if the total value of supplies, including siting and installation operations necessary for the execution of the contract and of software services within the meaning of subparagraph (a), is greater than the value of the other services covered by the contract;

4. 'framework agreement' shall mean an agreement between one of the contracting entities defined in Article 2 and one or more suppliers or contractors, the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period;

5. 'tenderer' shall mean a supplier or contractor who submits a tender and 'candidate' shall mean a person who has sought an invitation to take part in a restricted or negotiated procedure;

6. 'open, restricted and negotiated procedures' shall mean the award procedures applied by contracting entities whereby:

(a) in the case of open procedures, all interested suppliers or contractors may submit tenders;

(b) in the case of the restricted procedures, only candidates invited by the contracting entity may submit tenders;

(c) in the case of negotiated procedures, the contracting entity consults suppliers or contractors of its choice and negotiates the terms of the contract with one or more of them;

7. 'technical specifications' shall mean the technical requirements contained in particular in the tender documents, defining the characteristics of a set of works, material, product or supply, and enabling a piece of work, a material, a product or a supply to be objectively described in a manner such that it fulfils the use for which it is intended by the contracting entity. These technical prescriptions may include quality, performance, safety or dimensions, as well as requirements applicable to the material, product, or supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. In the case of works contracts, they may also include rules for the design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and

all other technical conditions which the contracting entity is in a position to prescribe under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

8. 'standard' shall mean a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory;

9. 'European standard' shall mean a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (CENELEC) as a 'European Standard (EN)' or 'Harmonization Document (HD)', according to the common rules of those organizations, or by the European Telecommunications Standards Institute (ETSI) according to its own rules as a 'European Telecommunications Standard (ETS)';

10. 'common technical specification' shall mean a technical specification drawn up in accordance with a procedure recognized by the Member States which a view to uniform application in all Member States and published in the *Official Journal of the European Communities;*

11. 'European technical approval' shall mean a favourable technical assessment of the fitness for use of a product for a particular purpose, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use, as provided for in Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (1). European technical approval shall be issued by an approval body designated for this purpose by the Member State;

12. 'European specification' shall mean a common technical specification, a European technical approval or a national standard implementing a European standard;

13. 'public telecommunications network' shall mean the public telecommunications infrastructure which enables to be conveyed between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means.

'Network termination point' shall mean all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to, and efficient communication through, that public network;

14. 'public telecommunications services' shall mean telecommunications services the provision of which the Member States have specifically assigned notably to one or more telecommunications entities.

'Telecommunications services' shall mean services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television.

*Article 2*

1. This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) or, when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. Relevant activities for the purposes of this Directive shall be:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water, or

(ii) electricity, or

(iii) gas or heat,

or the supply of drinking water, electricity, gas or heat to such networks;

(b) the exploitation of a geographical area for the purpose of:

(i) exploring for or extracting oil, gas, coal or other solid fuels, or

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

(1) OJ No L 40, 11. 2. 1989, p. 12.