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COUNCIL DIRECTIVE

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 of branches

(C 71/304/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 54 (2) and 63 (2) thereof;

Having regard to the General Programme for the abolition of restrictions on freedom of establishment,[1] and in particular Title IV B thereof;

Having regard to the General Programme for the abolition of restrictions on freedom to provide services,[2] and in particular Title V C (e) (1) thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament[3];

Having regard to the Opinion of the Economic and Social Committee[4];

Whereas detailed provisions for the attainment of freedom of establishment and freedom to provide services and detailed provisions concerning transitional measures have already been laid down in respect of activities of self-employed persons which fall within ISIC Major Group 40 by Council Directives Nos 64/427/EEC and 64/429/EEC of 7 July 1964[5]; whereas, in conformity with these Directives, authorities awarding contracts may not practise against the natural or legal persons governed by private law to whom a contract is awarded any discrimination based on the nationality of subcontractors; whereas restrictions are provisionally permitted only in respect of the award of public works contracts where they concern participation in public works contracts by way of provision of services or through agencies or branches; whereas, consequently, the provisions of the afore-mentioned Directives have a general application which renders superfluous their repetition in this Directive;

Whereas works contracts coming within ISIC Major Group 40 may be awarded to or performed by bodies holding concessions granted by the State, by regional or local authorities or by other legal persons governed by public law; whereas this Directive must therefore include such contracts in its scope which represent a considerable number of works; whereas otherwise its scope would be substantially reduced;

Whereas the Treaty establishing the European Atomic Energy Community contains in Article 97 a special provision concerning the construction of nuclear installations of a scientific or industrial nature; whereas, in accordance with Article 232 of the Treaty establishing the European Economic Community, such cases must be excluded from the scope of this Directive;

Whereas, since the adoption of the General Programmes, the European Economic Community has drawn up its own nomenclature of industrial activities, entitled 'Nomenclature of Industries in the European Communities' (NICE); whereas this nomenclature, which contains references to national nomenclatures, is therefore better adapted to the needs of the Member States than the ISIC nomenclature ('International Standard Industrial Classification of all Economic Activities'); whereas the NICE nomenclature should therefore be used, provided that this will not have the effect of altering the timetable laid down in the General Programmes,

[1] OJ No 2, 15.1.1962, p. 36/62.
[2] OJ No 2, 15.1.1962, p. 36/62.
[3] OJ No 62, 12.4.1965, p. 883/65.
[4] OJ No 13, 29.1.1965, p. 158/65.
[5] OJ No 117, 23.7.1964, p. 1863/64 and p. 1880/64.

which refers to the ISIC nomenclature; whereas the use of the NICE nomenclature in this Directive cannot have such effect;

Whereas reference is frequently made to technical specification in public works contracts; whereas the Council, in its statement made at the adoption of the General Programmes, laid down that technical specifications should not contain any discriminatory clause; whereas, consequently, it is necessary to include certain details on this in the Directive;

Whereas provisions applicable to all activities of self-employed persons and relating to movement and residence of persons enjoying freedom of establishment and freedom to provide services are or will be the subject of separate Directives; whereas the system applicable to paid employees accompanying the person providing services or acting on his behalf is governed by provisions laid down pursuant to Articles 48 and 49 of the Treaty;

HAS ADOPTED THIS DIRECTIVE:

Article 1

Member States shall abolish, in respect of the natural persons and companies or firms covered by Title 1 of the General Programmes, and providing services or act through agencies or branches, (hereinafter called 'beneficiaries'), the restriction referred to in Title III of those General Programmes 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.

Article 2

1. The provisions of this Directive shall apply to activities of self-employed persons which are covered by Major Group 40 in Annex I to the General Programme for the abolition of restrictions on freedom of establishment. Such activities correspond to those which fall within Major Group 40 of the 'Nomenclature of Industries in the European Communities' (NICE); they are given in the Annex to this Directive.

2. The Directive shall not apply to:

(a) industrial installations of the mechanical, electrical or energy-producing variety, with the exception of any part of such installations which comes within the province of building or civil engineering;

(b) the construction of nuclear installations of a scientific or industrial nature;

(c) excavation, shaft-sinking, dredging and waste disposal works carried out in connection with the extraction of minerals (mining and quarrying industries).

Article 3

1. Member States shall in particular abolish the following restrictions:

(a) those which prevent beneficiaries from providing services under the same conditions and with the same rights as nationals of that country; the restrictions to be abolished shall include in particular provisions laid down by law, regulation or administrative action and those administrative practices which impose or permit the application of discriminatory treatment, to the prejudice of beneficiaries, by natural or legal persons to whom a contract has been awarded for the execution or management of works or for the management of public services by means of a grant of special or exclusive rights, in respect of contracts which such persons may in their turn award for the execution of such works;

(b) those existing by reason of administrative practices which result in treatment being applied to beneficiaries that is discriminatory by comparison with that applied to nationals;

(c) those existing by reason of provisions or practices which, although applicable irrespective of nationality, nonetheless hinder exclusively or principally the professional or trade activities of nationals of other Member States; discriminatory technical specifications, in particular, are among the restrictions to be abolished; they shall not, however, be considered to be discriminatory when they are justified by the subject of the contract.

2. Member States shall ensure in particular that:

(a) beneficiaries may, under the same conditions as nationals, obtain for the carrying out of works on their territory the various forms of credit, aid and subsidy provided for the purpose by the public authorities;

(b) beneficiaries shall have access without restriction and in any event under the same conditions as