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# **PUBLIC PROCUREMENT IN THE EUROPEAN COMMUNITY**

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## FOREWORD

The economic significance of public procurement in the Community is considerable. In 1987 it accounted for some 15% of Community GDP or a total of ECU 550 billion.

European markets in this area are still highly fragmented and access is often restricted to national or even local suppliers.

As long ago as the 70s the Commission had acted to make use of that economic potential. It drew up directives laying down rules on the award of public supplies and work contracts, but owing to the lack of precise drafting, these directives were easy to circumvent and did not achieve the hoped-for success. In the programme for achieving the single internal market after 1992, public procurement now gets pride of place. The liberalization of these markets is bound to yield substantial savings for the Community. The strengthening of competitiveness as a result of that liberalization will also have a dynamic impact all round.

In the context of the cooperation procedure laid down in the Single European Act, the European Parliament, with the help of the Commission, has made a vital contribution to the emergence of a single body of Community legislation on public-sector procurement that will be, in terms of both form and content, complete, accessible and transparent.

The Community directives are designed to facilitate access to the markets and to rule out all forms of discrimination and national favouritism. The rules they lay down coordinate the procedures for awarding public contracts in the various Member States and guarantee all undertakings access to the relevant information. These new arrangements for public procurement should therefore result in a much greater degree of market transparency.

It should also be pointed out that the thresholds for implementing these directives are fixed at levels that allow minor contracts to be awarded without opening them up to Community competition. There will thus always be plenty of opportunities available to regional undertakings.

The directive on harmonization of judicial review procedures, which tightens up the monitoring of contract award procedures within the Member States and the Commission's own checks, is designed to ensure implementation of the other directives and is consequently the keystone of the relevant European legislation.

Lastly, this legislation will create opportunities for the Community to negotiate with third countries on access to each other's markets on a basis of reciprocity.

The new European legislation on public procurement that is now gradually taking shape will be an essential mechanism in fully consolidating an internal market in the Community.

The European Parliament's research department has taken the initiative of drawing up this highly interesting document, which provides a general overview of the main features of public procurement in the European Community. It was

drafted by Mr F. Schuermans, in close cooperation with his trainee assistants, Jean-Baptiste Morlot and Karine Bauer. The document deals also with the problems of incorporating Community legislation into national law. The application of Community legislation by the Member States will, after all, be crucial to the successful operation of the single internal market; indeed it can fairly be regarded as the touchstone of the whole operation.

The European Parliament, and its Committee on Economic and Monetary Affairs and Industrial Policy in particular, have contributed substantially to securing consolidated European legislation on public procurement and hope thereby to ensure that this crucial component of the post-1992 programme is crowned with success.



Bouke BEUMER  
Chairman of the Committee on Economic  
and Monetary Affairs and Industrial  
Policy

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**Part 1: ECONOMIC ANALYSIS OF PUBLIC PROCUREMENT IN THE EUROPEAN COMMUNITY**

## INTRODUCTION

The economic value of public procurement in the Community is considerable and its role in European economic integration is of first importance. Yet 'the continuing fragmentation of national (public) procurement is one of the most evident obstacles to securing a genuine internal market'. We therefore propose considering the reality of the situation in this area within the Member States and at Community level.

Firstly however it will be appropriate to define certain basic concepts:

- public-sector expenditure, which includes wages, salaries and other remunerations, financial charges, transfers, purchases;
- public purchases (from 10 to 20% of administrative expenditure) which relate to payments for goods or services supplied by third parties;
- public procurement contracts which themselves form part of public purchases; these administrative contracts are the subject of invitations to tender and are very highly formalized with a limited period of validity; they should theoretically be open to competition - but current expenditure, rentals, expenditure on heating and electricity, insurance premiums, postal and telephone expenses, etc. are excluded from public procurement contracts.

It should also be noted that public procurement originates both with governments (national, regional and local) and with public-sector undertakings.

### General economic assessment of public contracts

The assessment is set out in Table 1 below<sup>1</sup>

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<sup>1</sup> Commission of the EC, Communication on a Community regime for procurement in the excluded sectors, COM(88) 376 final, in Bull EC, Supplement 6/88, p. 12, Table 1.

**Table 1 - Economic dimensions of public procurement, 1984**

(billion ECU)

	B	D	F	I	UK	Total for the five countries
Total purchasing by general government	6.3	58.5	53.7	43.6	64.7	226.8
Total purchasing by public enterprises	10.6	34.4	34.2	24.8	54.2	158.2
Total public purchasing (as per cent of GDP)	16.9 (17.5)	92.9 (11.8)	87.9 (14.1)	68.4 (13.1)	118.9 (21.8)	385.0 (15.0)
Total public procurement <sup>1</sup>	7.7-11.0	42.5-62.6	39.3-58.2	31.1-43.4	54.2-76.2	174.8-251.4
(as per cent of GDP)	(8-11.4)	(5.4-8.0)	(6.3-9.3)	(6.8-8.3)	(10-14.1)	(6.8-9.8)

Sources: Eurostat; Atkins

<sup>1</sup> Public procurement: that part of public purchasing which is the subject of contracts, estimated by Atkins at between 45 and 65% of total public purchasing.

The most striking feature is perhaps the extent of variation as between governments and public-sector undertakings. For example, public-sector undertakings account for 63% of public-sector purchases in Belgium, for 30 to 40% in France, Germany and Italy.

Moreover, if the figures in Table 1 are extrapolated for the Community of Twelve in 1987, it is found that public purchasing as a whole represents 15% of Community GDP (ECU 592 billion), whereas public procurement would account for 7 and 10% of GDP (from ECU 260 to 380 billion). With such large sums at stake it is not hard to see why the European Community is interested in securing its liberalization.

The assessment will now be considered in detail.

Detailed economic assessment of public procurement

1. Analysis by product or group of products

Table 2, showing public purchasing, will be taken as a basis<sup>2</sup>

Table 2 - Breakdown of public purchasing for goods and services by product<sup>1</sup> in 1984

Extrapolation of figures for five countries (B, D, F, I, UK) to EUR 12

NACE-CLIO Group	Billion ECU	% of total public purchasing
01 Agriculture, forestry and fishery products	2.7	0.6
06 Energy products, of which:	73.2	16.3
031 Coal and coal briquettes	15.6	3.5
073 Refined petroleum products	36.0	8.0
097 Electrical power	9.9	2.2
30 Manufactured goods, of which	147.2	32.7
170 Chemical goods	14.5	3.2
190 Metal goods	9.8	2.2
210 Agricultural and industrial machinery	12.2	2.7
230 Office equipment, etc.	8.6	1.9
250 Electrical goods	19.9	4.4
270 Motor vehicles	8.2	1.8
290 Other transport equipment	37.5	8.3
473 Paper and printing products	10.5	2.3
53 Construction		
530 Building and construction	129.1	28.6
68 Market services, of which	98.3	21.8
570 Wholesale and retail distribution	11.0	2.4
590 Hotels and catering	6.0	1.3
611 Road transport	5.4	1.2
670 Communications	8.0	1.8
690 Banking and insurance	8.4	1.9
710 Business services	20.7	4.6
730 Letting of buildings	6.2	1.4
790 Market services NCS	12.1	2.7

Source: Atkins, using input-output tables

1 Within each sector, only product groups accounting for over 1% of total public purchasing are listed.

2 In 1984 the total of public purchasing at ECU 490.5 billion for EUR 12 was equivalent to 15% of GDP. The figure for 1986, assuming an unchanged proportion of GDP, is ECU 550 billion.

<sup>2</sup> Ibid, p. 13, Table 3

These public contracts are concentrated on a somewhat limited group of industrial sectors<sup>3,4</sup>: one third of industrial sectors studied accounts for 85% of the public contracts. In other words, construction and civil engineering account for nearly 30% of the total in public contracts; military, telecommunications and railway equipment and postal services account for 20 to 35%, and energy products for 16% (heating and energy production).

Moreover, it is important to know the dimensions of public procurement in relation to total public purchasing, in some of these sectors. For example, it accounts for 60% of public purchasing in information technology, 30% in housing construction and civil engineering<sup>5</sup>.

The combination of the two types of data considered above is of crucial importance to the analysis of the impact of opening up public procurement (cf. Part 2).

## 2. Analysis by entity or group of entities

Table 3 gives a fairly clear summary of the major differences that can exist between certain Community countries (5 of them are shown here) as regards the number and types of purchasing entities. It should be noted that in the tables reproduced above, the public-sector undertakings in question are national ones, and consequently are centralized.

Source: Research on the 'Cost of non-Europe' - Vol. 5, Part A: The cost of non-Europe in public-sector procurement - Full report - Par I - 3.6 p 102 Table 3.6.1. - Document, Commission of the European Communities by Atkins Management Consultants.

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<sup>3</sup> Ibid, p. 7.

<sup>4</sup> EC Commission, Communication on the regional and social aspects of public procurement, (COM(89) 400 final, 24.7.1989, pp. 5 and 6.

<sup>5</sup> Ibid, p. 5, paragraph 15.

	Belgium	France	Germany	Italy	UK
Central Government Ministries + Institutions	16	15 + Presidency	16 + 6 highest Institutions	20 + 6 State Institutions + Cassa per il Mezzogiorno	38 departments
Federal States + Ministries	-	-	11 states; 120 departments plus subsidiary offices	-	-
Local + regional authorities	589 communes & regions	36 000 communes + 95 departments +	8500 communities + 261 districts	20 regions + 95 provinces + 8000 communes	524 counties, districts and boroughs regional police authorities; water authorities about 40 public corporations
Central government bodies	82 including public enterprises e.g. SCNB OCF	approx. 1000 établissements publics + 7000 schools UGAP	DBB + DBP + approx. 100 bodies + subordinate offices	5 enti pubblici economici + over 100 enti nazionali	PSA, ICS, HMSO, COI, CCTA
Central purchasing agencies					
Public enterprises	Counted as government bodies	250 + 81 EPICs	468 large COs + many small ad hoc municipal and other companies	8 major Aziende	15 nationalized industries
APPROX. TOTAL NUMBER OF PURCHASING ENTITIES	Under 1000	c. 50 000	c. 20 000	c. 20 000	c. 700
Degree of decentralization of purchasing decisions	Moderately decentralized	Very disperse	Very disperse & highly decentralized, purchasing decisions	Very disperse	Quite centralized

Attention is drawn to the significant connection that can be observed between the degree of decentralization and, on the one hand, the sharing of responsibilities between the entities and, on the other, the number and economic importance of the contracts concluded.

Thus in all Member States, defence, railways, postal and telecommunications services (which account for 20 to 35% of total public procurement) are highly centralized. Except in the Federal Republic of Germany and Italy, much the same can be said of electricity, gas, water, transport infrastructures and public health<sup>6</sup>. It should be noted that a good many of these sectors are in the hands of national public undertakings.

Public procurement that depends on centralized authorities often applies to fundamental economic sectors or those with major development potential. The particularly important role of the centralized contracting authorities is confirmed by the analysis of the number and economic scope of the contracts; there too, central government and public-sector undertakings are clearly dominant. This is clearly indicated by Tables 5 and 6, derived from a sample of just over 4000 contracts chosen from 5 countries (Belgium, France, Italy, FRG, UK) (Table 4)<sup>7</sup>.

**Table 4: Breakdown of the sample of public-sector contracts (million ECU)**

Country	No. of contracts	Total value	Average value
Belgium	1101.00	857.33	0.78
France	744.00	1466.38	1.97
Germany	568.00	1085.68	1.91
Italy	847.00	2129.66	2.51
UK	733.00	2876.38	3.72
<b>Total</b>	<b>4033.00</b>	<b>8415.43</b>	<b>2.09</b>

<sup>6</sup> Commission of the EC, 'The cost of non-Europe in public-sector procurement', DOCUMENT op. cit., executive summary, p. 11, No. 4.1.

<sup>7</sup> Ibid, full report, Part I, pp. 257, 258, 264 and 267, Tables Nos. 6.2.1. and 6.2.4.

**Table 5: Average size of contracts broken down by contracting entity (million ECU)**

Entity type	No. of contracts	Total value	Average value
Central govt. - Min.	1370.00	3682.78	2.69
Central govt- other	531.00	1046.11	1.97
Regional govt.	159.00	85.47	0.54
Local govt.	617.00	399.52	0.65
Public enterprises	1356.00	3201.54	2.36
Total	4033.00	8415.43	2.09

**Table 6: Size of contracts by type of contracting entity**

Entity type	No. of contracts in the range (million ECU)			
	0.1	0.1 to 1.0	1 to 10	10
Central govt. - Min	123	873	309	65
Central govt. - other	153	279	72	27
Regional govt.	26	114	19	0
Local govt.	186	348	79	4
Public enterprises	223	794	271	68
Unspecified	0	0	0	0
Total	711	2408	750	164

**Is there a Europe in public procurement?**

There has so far been no difficulty in establishing the considerable economic significance of public procurement. The data set out above is sufficient to give an idea of the political and economic difficulties that can arise in the course of the process of opening up public procurement.

Firstly, its importance to the economies of the Member States of the Community is such that it can in no circumstances be a neutral component of the latter. On the contrary, it acts as its controlling mechanism. That explains why it has been the subject of extensive discriminatory practices to avoid Community competition considered as disruptive and dangerous. The walling off of public procurement by state is beyond dispute, even if it is now being mitigated as a result of the recent reforms undertaken by the Community authorities.



One indicator of that walling off is the fact that the level of imports into the Community as a whole is significantly higher than the level of imports resulting from public purchasing<sup>8</sup>. Table 7 shows this clearly<sup>9</sup>.

Table 7 - Imports in public purchasing, 1985

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	B	D	F	I	UK
National import penetration <sup>1</sup> (%)	43	22	20	19	22
Imports in public purchasing (%)	2.6	3.8	1.6	0.3	0.4

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<sup>1</sup> Penetration = imports/internal demand

Sources: National Accounts Eurostat, 1985; Atkins, 1987.

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Consequently, there is no 'Europe' in public procurement.

Secondly, and conversely, the economic significance of public procurement in the Community is a key component of completing the internal market. Its volume is precisely what accounts for its enormous significance in the context of economic integration. The absence of liberalization in public procurement therefore represents a cost to the Community as a whole.

Consequently, we shall consider in turn the two aspects of the problem as they have been set out above: it will be important both to establish precisely why opening up public procurement at Community level is so difficult, and to assess the costs and losses resulting from this fragmentation.

The remainder of this study comprises two main parts:

1. The causes of 'non-Europe'
2. The cost of 'non-Europe' in public procurement.

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<sup>8</sup> EC Commission, Communication on a Community regime for procurement in the excluded sectors, op. cit., p. 7, paragraph 3.

<sup>9</sup> Ibid, p. 12, Table 2.

## **THE CAUSES OF 'NON-EUROPE' IN PUBLIC-SECTOR PROCUREMENT**

The causes are evidently threefold: psychological, economic and legal, the last being a result of the other two.

### **I. THE 'PSYCHOLOGICAL' REASONS**

We have taken the liberty of using the term 'psychological' in a more popular sense than is generally understood in a scientific context. We have used it because of the image it tends to evoke; here it in fact covers both individual behaviour and, at a more collective level, established public service practices.

In practice, the contracting authorities act through civil servants or (in the case of public-sector undertakings) employees. The behaviour of these individuals is sometimes crucial. Yet, particularly in decentralized administrations, though also in central government departments, it can happen that administrators do not have the qualifications necessary to cope with all the intricacies of public procurement. Moreover, it is not always easy for them to make a valid assessment of tenders; that is all the more likely if such tenders, which may refer to unusual specifications, are submitted by foreign companies whose precise circumstances can be difficult to assess.

Moreover these officials are often motivated more by a desire to protect the public purse than by the commercial profitability of the projects submitted. In addition, they are constrained to operate in adherence to stringent rules of public-sector accounting; moreover, contract specifications are often descriptive rather than geared to performance. Lastly, government departments have a habit of concluding contracts with undertakings that are well known to them in terms of financial, commercial and technical considerations and at a personal level; the undertakings themselves are correspondingly in a better position to comply with deadlines, technical specifications etc. set by those government bodies as a result of their regular contacts with them.

However a change, discernible to varying degrees according to Member State, is beginning to operate within central government, particularly certain ministries (public works, defence, nationalized industries, etc). The relevant departments include specialist staff more in touch with the business world. That in itself does nothing to open up European public procurement, since the departments concerned continue to deal with national suppliers who are well known to them. At all events, they scarcely feel any need to seek out undertakings beyond their own borders, preferring to pass responsibility to national intermediaries: their supplier or usual operator himself, or importer (agencies, subsidiaries etc). And where they do come across an interesting project submitted by a foreign undertaking they tend nevertheless to approach a firm in their own country in an attempt to obtain an equivalent offer.

Conversely, suppliers or contractors looking for business are often at a disadvantage owing to lack of information about public contracts in other countries. Similarly, the poor guarantees of redress available in certain Member States against the contracting entities have often discouraged them from applying.

## II. THE ECONOMIC REASONS

The reasons for preferring to buy at home are by no means always open to criticism; some of them are in fact perfectly justified, e.g. in relation to routine supplies and works<sup>10</sup>. The reasons can include lower marketing, trading or transport costs, after-sales service, insurance costs, shorter completion deadlines, the particular circumstances of purchasers (schools, hospitals etc), or customs procedures; many of these reasons will cease to apply after completion of the internal market.

On the other hand there are also other reasons that have become difficult to justify in the present economic context<sup>11</sup>. A brief historical recapitulation shows that after having served as mechanisms of structural policy in the 60s (policy of 'national champions'), public procurement contracts were also used by the Member States as a means of economic policy adjustment from the 70s onwards, which saw the beginning of a period of recession. They have essentially become factors in economic, social and regional policy in an exclusively national perspective.

The first directives concerning the coordination of procedures for the award of public works contracts<sup>12</sup> and supply contracts<sup>13</sup> bore that out (see chapter 3 below). As stated for example in the directive on supply contracts (Article 25(4)), *'paragraph 1 shall not apply when a Member State bases the award of contracts on other criteria within the framework of rules existing at the time this Directive is adopted, whose aim is to give preference to certain tenderers, on condition that the rules invoked are compatible with the Treaty'*.

This outlook has become standard practice with the contracting authorities, even though the economic context has changed considerably in the interim. It can be noted that<sup>14</sup>:

- in the case of 'visible' goods, such as vehicles (in particular motor cars), prestige furniture and crockery it is considered good form to buy nationally;
- in the case of so-called 'strategic' goods (electricity production, telecommunications, defence, etc) all countries seek to maintain security of supply by supporting national industries;
- buying from national producers can of course also be a good means of avoiding job losses if these producers belong to sectors in decline (coal, rail rolling stock, heavy construction, shipyards etc);
- the existence of specific standards used in networks set up gradually over the past hundred years or so (water, electricity, railways, etc) is often used as an argument by the contracting authorities;

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<sup>10</sup> Commission document, 'The cost of non-Europe in public-sector procurement', op. cit., Full Report, Part. I, p.9.

<sup>11</sup> Case-studies and documents in the Revue Française de Droit administratif (RFDA), Les Marchés Publics Européens (Droit Communautaire, Droit comparé), 1989, Paris, RFDA-Sirey, p.14

<sup>12</sup> Directive 71/305/EEC, OJ EC NO. L 185, 16.8.1971, p.5

<sup>13</sup> Directive 77/62/EEC, OJ No. L 13, 15.1.1977, p.1

<sup>14</sup> 'The cost of non-Europe in public-sector procurement', op. cit., Full Report, Part I, p. 9, Commission document.

- the national authorities seek to support the local economy in cases where industries not necessarily favourable to the environment are being set up (nuclear industry, coal mining, etc).

The unremittingly national perspective in which these considerations are applied, sometimes understandably, comes clearly to the fore here. The underlying behaviour, based always on the short term, has had serious implications for the effectiveness of the first legislative instrument relating to public contracts implemented by the Community. While it is fair to characterize this directive as somewhat half-hearted, it is highly likely that if it had been any more ambitious its implementation, already a very delicate matter, would have been extremely difficult.

### III. THE LEGAL REASONS

In order to understand the failure of Community enactments, it will be useful to have an overview of the relevant legislation as a whole.

#### A. The first texts adopted in the area of public procurement

##### 1. The Treaty of Rome and the principle of liberalization

The Treaty of Rome is silent on public procurement, at least explicitly. The negotiators at that time were aware of the difficulties that would be posed for ratification of the Treaty by national parliaments if rules requiring the opening up of public procurement had been included in it<sup>15</sup>.

However some provisions of the Treaty do in fact include public-sector procurement in their area of application. Article 7 of the Treaty for example prohibits in general terms discrimination based on nationality. There are also other more specific provisions.

##### (a) Free movement of goods

Articles 30 ff prohibit in particular quantitative restrictions on imports and exports as well as measures having equivalent effect. The Commission considered it appropriate to make the prohibition of all measures having equivalent effect explicit in a liberalization directive adopted on 17 December 1969<sup>16</sup> concerning public supply contracts. That directive came into force at the end of the transition period, measures with equivalent effect being henceforward prohibited by virtue of Articles 30 and 34 of the Treaty which were directly applicable. It consequently has only an interpretative value.

##### (b) Free movement of services

Based on Articles 59 ff of the Treaty, this is based on the principle of national treatment. In the area of public works procurement a liberalization directive was also adopted, this time by the Council, on 26 July 1971, also with an interpretative function<sup>17</sup>. It should however be noted that the first

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<sup>15</sup> FLAMME, M-A., FLAMME, P., 'Vers l'Europe des marchés publics?', in RMC no. 320, Septembre-Octobre 1988, p.456.

<sup>16</sup> Commission Directive 70/32/EEC, OJ L 13, 19.1.1970, p.1

<sup>17</sup> Directive 71/304/EEC, OJ NO. L 185, 16.8.1971, p.1

directive coordinating procedures for the award of public supply contracts, originating with the Council and binding (see paragraph 2), refers to this liberalization directive in order to lay down its scope.

As can be seen, the Treaty of Rome, as interpreted by these directives, only creates negative obligations. While that may lead to the implementation of effective competition between undertakings originating in different Member States, the disparity in national provisions relating to public procurement has made the above texts inoperative. If public procurement is to be opened up it will be necessary to impose certain positive obligations on contracting authorities.

## 2. The first directives coordinating procedures for the award of public procurement contracts

Having rapidly reached the conclusions described above, the Commission submitted two proposals for directives coordinating procedures for the award of public procurement contracts, adopted by the Council on 26 July 1971 as regards public works<sup>18</sup> and on 21 December 1976 for supply contracts<sup>19</sup>.

These two texts form the basis for the reform recently introduced by the Commission and strongly supported by the European Parliament, and which will be explained in detail below.

The legal analysis of the texts governing public procurement in the Community, in particular the above two directives, is not precisely our concern; our purpose rather is to determine the causes of 'non-Europe' in public procurement, and consequently to identify the role of those texts in that failure.

In any case, the Guide to public procurement in the Community<sup>20</sup> drawn up in 1987 by the Commission gives an excellent account of the initial directives on public works and supplies.

The principal features of the first directives are as follows:

Firstly, these are texts having a real binding effect, and as such complying entirely with the conditions laid down in Article 189 of the Treaty, as distinct from the 'liberalization' directives. Though the adoption of two texts, rather than a single text, seemed preferable to take account of specific features peculiar to the two types of public contract concerned, a close parallelism is nonetheless apparent between the two directives.

The supplies directive concerns deliveries of products (Article 1(a)), which has a wider meaning than a transfer of property as it is customarily understood. It thus includes any form of supply, purchasing, hiring, leasing, etc. The public works directive is hardly more precise: it refers to construction and civil engineering as listed in clause 40 of the Nomenclature of the Industries in the European Communities (NICE) (Article 1(c)).

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<sup>18</sup> Council Directive 71/305/EEC, OJ L 185, 16.8.1971, p.5

<sup>19</sup> Council Directive 77/62/EEC, OJ L 13, 15.1.1977, p.1

<sup>20</sup> OJ No. C 358, 31.12.1987, p.1

In both cases the contracting authorities are the state, local authorities, or legal persons under public law (Article 1(b) and Annex I in both cases).

The threshold for application of the supplies directive is normally fixed at ECU 200 000 (Article 5). However Council directive 80/767/EEC of 22 July 1980<sup>21</sup>, acknowledging the consequences of the GATT agreement on public procurement<sup>22</sup>, introduced a number of changes: the threshold was lowered in the case of purchase contracts concluded by the entities listed in Annex I to Directive No. 80/767/EEC. The threshold is changed annually in response to exchange-rate fluctuations (ECU 181 500 excluding VAT in 1987). In the case of the public works directive, the threshold is set at one million ECU (Article 7).

Both texts lay down rules for preventing the splitting-up or underestimation of contracts as a means of evading application of the directives.

The excluded sectors in both cases are transport services, and the production, transportation and distribution of water and energy supplies. The supplies directive also excludes telecommunications and specifically military products from its area of application.

Both directives stipulate that the use of the 'open' award procedures (in which any supplier or undertaking can submit tenders) or 'restricted' procedures (under which only suppliers or undertakings authorized to submit by the contracting authority may submit tenders) shall be the rule, by reason of the effect of these procedures in opening tendering up to competition. The use of the 'direct agreement' procedure is restricted to exceptional cases.

As to the selection of tenderers, the texts require the use of non-arbitrary qualifying criteria in order to maintain competition. Identical cases for exclusion (bankruptcy, grave professional misconduct, default on payment of taxes or social security contributions, etc) are provided for, and tenderers must show proof of their economic, financial and technical capacity.

The criteria for awarding contracts to candidates are either simply the lowest price or the fact that the tender is 'economically the most advantageous'; examples of appropriate criteria are provided to clarify this term.

As already pointed out (see chapter II) regional or sectoral preferences are allowable on the part of Member States.

As regards the technical specifications laid down by the contracting authorities, these must always be stipulated in general documents (notices of invitation to tender, tender specifications) or in the specific contractual documents for each contract. Moreover, the public works directive (Article 10) stipulates that 'technical specifications may be defined by reference to national standards'. The more advanced supplies directive (Article 7) lays down a descending order of preference for reference standards: Community, international, national and any other standards. Here again, nothing is compulsory. Compliance is entirely voluntary.

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<sup>21</sup> OJ L 215, 18.8.1980, p.1

<sup>22</sup> OJ L 71, 17.3.1980, p.44

Finally, as regards the transparency of contracts and of the relevant award procedures, the supplies directive (Article 9) requires publication of invitations to tender in the 'S' supplement to the Official Journal of the European Communities.

This applies to contracts awarded by an open or restricted procedure, but not to contracts covered by GATT. Nothing is stipulated as regards direct-agreement procedures. The public works directive contains very similar rules adapted to the particular features of those sectors. Finally, a large number of procedural deadlines is provided for, including deadlines for accelerated procedures (emergency procurement).

## **B. Analysis of the failure of these texts**

Since we have already had occasion to refer to the causes of the failure of the liberalization directives (see section 1, last part of paragraph 1) we shall concentrate here on the directives on the coordination of public procurement award procedures. These two directives on public works and supplies were in any event the only ones that contained any real innovations.

The legal causes for the failure of these texts are threefold: they are a mixture of complexity and vagueness; they do not go far enough and were not followed up by the development of other Community activities that could interact with public-sector procurement.

### 1. Insufficient transparency

#### (a) A large number of texts

The relevant texts are as follows:

- the two liberalization directives;
- the two directives on public works and supplies referring back to the two previous texts;
- the GATT code adopted on 12 April 1979 which entered into force in the Community under Council Decision No. 80/271/EEC<sup>23</sup>; its field of application overlaps with that of the supplies directive without being coordinated with it; moreover the code is directly applicable in the Community and compulsory in every respect, whereas the directives are only compulsory in terms of the result to be achieved;
- Directive 80/767/EEC amending the supplies directive to bring it into line with the GATT code;
- A protocol amending the GATT code concluded on 2 February 1987 which entered into force in the Community under a Council decision of 16 November 1987<sup>24</sup>.

The Member States were not slow to argue that the complexity of all this legislation caused difficulties in implementing the directives. The problems were heightened by the varying degrees of advancement of specific legislation on public procurement, which was very unequal from one Member State to

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<sup>23</sup> OJ L 71, 17.3.1980, p.44

<sup>24</sup> OJ L 345, 9.12.1987, p.24

another; the means used to incorporate the directives in national law varied widely in themselves (acts, decrees, circulars, etc)<sup>25</sup>.

(b) Lack of precision

The texts lack precision in many areas: this has resulted in the risk, sometimes borne out in practice, of divergent interpretations of the various provisions from one Member State to another. The exact determination of the excluded sectors is one example. This led the Commission to specify a number of interpretations which it considered as being the most appropriate, and to try to get them accepted by the Member States by means of letters, for example. This approach turned out to be wholly inadequate. Moreover, certain provisions of the directives can easily be circumvented. That is certainly true of the implementation thresholds. In the case of public supplies contracts, the volume of public procurement awarded below the threshold has accounted in some cases for 70% of the total public procurement business concluded<sup>26</sup>. Without always being as high as this the high incidence of contracts evading the threshold is a general characteristic of the Member States of the Community among the signatories to the GATT code. The reason is either an under-estimation of the real value of contracts, or the unlawful splitting-up thereof. This irregular practice is facilitated by the lack of stringency of the rules intended to prevent it.

Another feature is the reluctance of the contracting authorities in the Member States to use the award procedures conducive to competition between applicants; there has thus been a discernible tendency to use the direct-agreement procedure because the relevant conditions laid down in the directives are less restrictive.

Moreover, in a large number of areas these texts leave wide discretionary powers to the contracting authorities; they may freely choose the restricted procedure, award contracts according to the criterion of the economically most advantageous tender (verifying that this criterion has been used is difficult where an undertaking brings discrimination proceedings), refuse to justify decisions to reject tenders or, quite simply, where their bad faith risks becoming apparent, discontinue a procedure rather than let the contract go to a foreign firm. Moreover the texts do not do enough to prevent technical standards being used as a means of walling off national procurement; bringing proceedings before the Court of Justice of the European Communities is hardly a practicable step in the case of public procurement procedures.

Finally, the provisions of the directives themselves are scarcely conducive to procedural transparency: all that is published are notices of invitation to tender, and such a restricted form of publication at the initial stage of the procedure is insufficient. Moreover, the deadlines for the procedure are relatively short: 36 days in the case of open procedures, 21 days for the others, not counting 'urgent' cases (12 or 10 days), which are difficult to monitor.

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<sup>25</sup> Communication from the Commission to the Council: public supply contracts - conclusions and perspectives, COM(84) 717 final, 14 December 1984, p.8

<sup>26</sup> Ibid, p.13



## 2. Narrowness of scope

### (a) Exclusion of various sectors

The public works and supplies directives exclude from their field of application transport services (managed by bodies incorporated under public law), water and energy supplies (their production, distribution and transportation), and, in the case of supplies procurement only, the telecommunications and defence sectors (specifically military equipment: armaments, munitions, etc).

These exclusions are bound to be prejudicial to any real opening up of procurement, since, as rightly pointed out by the European Parliament's Committee on Economic and Monetary Affairs and Industrial Policy<sup>27</sup>, these relate, in some cases, to advanced technologies with high capital density. The committee also pointed to the enormous size of the telecommunications market and to the volume of purchasing by public administrations and companies in that sector<sup>28</sup>.

It is therefore highly regrettable that these sectors have been excluded from a particularly high growth potential; the Commission itself states that 'the absence of these sectors may explain to a large extent the poor performance under the directives'.<sup>29</sup>

Mention should also be made of the non-implementation of the public works directive to concession contracts, the economic significance of which is obvious, as well as the exclusion of relations between administrations and the recipients of 'special exclusive rights' from the scope of the supplies directive. The concept of 'special exclusive rights' also lacks precision.

Lastly, it would be desirable to insist on options for SMUs to participate in the public contract procedures to which the directives apply (problem of threshold; in the supplies directive the possibility of subdividing large contracts into lots is offset by the obligation to take into account the value of the lots as a whole for the purposes of implementing the directive (Article 5(3)). The earlier public works directive is unfortunately silent on this subject.

### (b) The absence of guarantees of redress

There are no provisions on this matter, whereas it is crucial to the success or failure of the whole system.

In the interest of the credibility of the directives with undertakings, it would have been essential to ensure that at least their application was monitored, given that Member State legislation in this connection is highly disparate or even non-existent! That being so, the lack of enthusiasm of contractors to submit tenders beyond the frontiers of their own Member State is understandable.

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<sup>27</sup> European Parliament Committee on Economic and Monetary Affairs and Industrial Policy, Draft report on communication COM(84) 717 final, PE 97.711, 2 May 1985, p.11, paragraph 10.

<sup>28</sup> Ibid., p. 11, paragraph 13

<sup>29</sup> Commission, COM(84)717 final, op.cit., p.13.

The right of redress available to the Commission against a Member State for failure to fulfil an obligation under the Treaty (Article 169), however effective in other contexts, is nevertheless inappropriate to public procurement, where the greatest possible speed is desirable.

In any case, the highly complex area of redress in relation to public procurement requires a specific set of legislative provisions. A multiplicity of rules must after all be laid down to cover the question of interested parties and third parties, the payment of compensation, suspensions of procedure, cancellation of certain clauses, guarantees against risks of 'reprisals' by contracting authorities subsequent to proceedings brought by undertakings discriminated against (blacklisting), the form of law concerned (Community and/or national law), etc. The foregoing illustrates the seriousness of these omissions.

Nor are there any provisions regarding compliance with the provisions of the directives by the European institutions. The Commission acknowledges this fact, giving as justification the need to have observed a transitional stage during implementation of the public works and supplies directives. The Community authorities thus failed to make compliance with the directives by the contracting authorities a condition of Community contributions to the financing of certain projects. The Commission therefore decided to change its attitude: 'it would seem appropriate that the Commission should in its own procurement activities set the example for the Member States by voluntarily applying as far as possible the dispositions of the directives'.<sup>30</sup>

The Committee on Economic and Monetary Affairs and Industrial Policy also expressed surprise at the restriction contained in that formulation<sup>31</sup>. What is the justification? It should be noted that the European Investment Bank (EIB) itself decided to make an effort in this direction by encouraging its clients to adhere to the directives, and also to open up business to foreign undertakings in the excluded areas.

### (c) Excessively formalistic texts

It is fair to say that the two directives are unnecessarily cautious in defining the concept of public procurement. They appear to have been left behind by developments in the law of contract. They say nothing explicitly about leasing-purchase contracts with or without an option to buy, credit-leases, or 'turnkey' sales, for example, or about the cost of preparatory studies, prototypes, insurance, etc.

### 3. An uncompleted market

The opening up of public procurement forms part, as indeed do many other sectors, of a complex network of multiple transactions. It is virtually impossible to liberalize public procurement in the absence of significant progress in many areas.

The public works and supplies directives did not benefit from the climate created by the Commission's White Paper on completing the internal market,

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<sup>30</sup> Commission, COM(84) 717 final, p. 20

<sup>31</sup> EP, draft report on COM(84)717 final, p. 10, paragraph 6

nor from the Single European Act enabling it to become a reality. The directives were not part of an overall programme.

Accordingly, we note the inadequacy of the provisions of the directives with regard to technical standards: the public works directive merely refers back to national standards, while the supplies directive draws up a classification without binding effect, albeit putting Community standards at the top of the list. It was hardly possible to do otherwise before the adoption of a Council resolution on 7 May 1985 that was responsible for a major change: the standardization directives would subsequently lay down the essential requirements, with other details to be decided on the basis of mutual recognition.

Similarly, progress on company law was required: obtaining certain public-procurement contracts sometimes requires appropriately adapted structures. But there were no rules on company mergers and hiving-offs, European Economic Interest Groupings (EEIG), the European limited company or measures to encourage cooperation between undertakings, or action programmes to assist SMUs.

The opening up of public procurement will also depend on progress being achieved with the free movement of capital; yet little had been accomplished in that area before 1986 (long-term capital movement) or 1988 (movements of current capital).

Lastly, there had to be fiscal harmonization of indirect taxation, corporation tax and tax arrangements applicable to groups.

Obviously, any progress in the area of monetary policy (exchange rates) will tend to foster the opening up of public procurement.

All these deficiencies and the associated behaviour added up to a specific cost: a delay in securing European economic integration. Given the economic significance of public procurement, however, a reaction by the Community authorities was inevitable.

The study on the 'cost of non-Europe' in the area of public procurement thus gave a decisive impetus to reform of the initial texts. The constant updating of that study will subsequently enable those texts to be improved further.

## **THE COST OF 'NON-EUROPE' IN PUBLIC SECTOR PROCUREMENT**

The phrase 'cost of non-Europe' is ambiguous; what it really refers to is the lost opportunities, the gains that have not been achieved because of maintaining compartmentalization in national markets. What we shall therefore consider here is the expected consequences of the opening up of public-sector procurement. Actual achievement of these gains is likely to be accelerated by the recent revision of the relevant directives. As pointed out below, the public works and supplies directives have again been amended and the directives on the excluded sectors, services and guarantees of redress have been enacted. The announcement of these texts has already had certain preventive effects; we shall obviously mention them since they allow the results of previous studies to be corrected. However, these initial effects should be viewed with circumspection because they are short-term effects, whereas completion of the internal market must be analysed in the long term. They nevertheless provide some useful indicators.

Before considering the exact consequences of decompartmentalizing public sector procurement we shall review the types of effects that are generally expected to ensue. The figures in what follows must of course be considered with caution; they must always be read in the light of the initial hypothesis.

### **I: GENERAL EFFECTS OF THE OPENING UP OF PUBLIC-SECTOR PROCUREMENT**

In the context of the study carried out into the cost of non-Europe in public-sector procurement<sup>32</sup>, the economic assumptions used by the consultants (volume of public-sector purchasing and of fixed private consumption, unchanged profit levels assuming that price changes correspond to changes in production costs) meant that the level of prices and hence of public expenditure were essential data.

The industrial sectors of relevance here are those of which the contracting authorities are among the principal customers.

Three types of effect are expected in the following chronological order:

#### **1. A direct static effect:**

This should coincide with completion of the internal market in 1992; the resulting savings in the budgets of the contracting authorities arise from the fact that those authorities will buy from undertakings offering the best terms and that are the most competitive.

The main hypothesis presupposes an unchanged market volume and relates to goods traded on monopolistic markets. The result of all this should be increased interpenetration of public procurement markets in the different Member States.

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<sup>32</sup> Commission document, 'The cost of non-Europe in public-sector procurement', p. 42, Full Report, Part II, p. 42.

## 2. A competition effect

This should follow closely from the effect mentioned above: given the interpenetration of national markets and the heightened competition that will result from it, national undertakings will tend to lower their prices to align them with those of foreign undertakings. This effect on prices, since it will result in budgetary savings for the contracting authorities, should be followed by an effect on production costs requiring undertakings to reorganize, rationalize and invest in new technologies. The quicker the competition effect results in falls in profits, the quicker they will do so.

## 3. A restructuring effect

This will be a more long-term effect (from 5 to 10 years). Restructuring of undertakings (see above) should create economies of scale and lead to reductions in costs and in sales prices by all undertakings staying on the market.

An assessment of the economic impact of all these effects is given in table 8:

**Table 8: Breakdown by country of the economic effects of liberalization of public procurement (billion ECU)**

		Prices 1984 <sup>1</sup>			Prices 1989 <sup>2</sup>		
5	EUR 12	B	D	F	I	UK	EUR
		EUR 12					
Static effect				0.4	1.0	0.3	1.01.0
3.7				4.4		5.5	
Competition effect			0.2	0.8	0.3	0.4	0.32.0
2.3				2.8			
Restructuring effect			0.5	1.0	1.4	1.0	2.16.0
7.2				8.9			
<b>Total 1984</b>					1.1	2.8	2.02.4
3.4			11.7		13.9		17.2
(as % of GDP)				1.1	0.4	0.3	0.40.6
0.5				0.5		0.5	
Additional savings in defence sector							3.744.8
Total (including defence)							
15.4	17.9	22					

Source: Atkins; Commission departments.

The extrapolation of the figures to EUR 12 is based on the effects remaining constant as a % of GDP.

<sup>1</sup> COM(88)376 final, op. cit., table no. 7, p. 16

<sup>2</sup> COM(89)400 final, op. cit., p. 5, paragraph 12.

If efficient use was made of the margin resulting from the expected savings to increase economic activity, around 400 000 jobs could be created in the Community.

Alongside the three types of effects described above, there is also the possibility that private purchasers will benefit from the savings resulting from the increased competition affecting suppliers of public authorities. The sectors concerned - office equipment, pharmacies, construction, etc. - are those where sales are shared between the public and private sectors. The economy as a whole would ultimately be affected, since the effect of restructuring through mergers or cooperation between businesses, eliminating duplication, could lead to lower R&D and marketing costs. The increased efficiency would thus have an impact on investment and, more generally, on growth.

The competitiveness of European industry consequently can be considerably enhanced by liberalization of public-sector procurement. The implications therefore go far beyond mere budget savings. However - and this is a criticism that we shall be reiterating - it is dangerous to state the problems of public-sector procurement simply in those terms. As we have already pointed out, public contracts interact with many other factors in the internal market and the common policies. It will sometimes be very difficult to identify the specific impact of the opening up of public procurement in the economic effects observed.

We shall now consider some more specific areas in defence of that assertion.

## II. THE SECTORAL EFFECTS OF OPENING UP PUBLIC-SECTOR PROCUREMENT

These effects will tend to be concentrated on certain industries, in particular those enjoying an oligopolistic situation (limited number of producers) or in which the public authorities (public administrations and undertakings) are the main customers (Table 9)<sup>33</sup>.

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<sup>33</sup> COM(88) 376 final, op. cit. p. 15, Table No. 4

**Table 9: Sectors with important public purchasing**

NACE	Sector	PP output of sector (%)	Proportion in total PP (%)
11	Extraction and briquetting of solid fuels	60	3.7
152	Production and processing of fissionable and fertile materials	20	0.3
221	Iron and steel industry	10	0.1
222	Manufacture of steel tubes	10	0.1
314/315	Manufacture of structural metal products, boilers, reservoirs, tanks and other sheet-metal containers	30	1.2
33	Manufacture of office and data-processing machinery	30	0.9
342	Manufacture of electrical machinery	30	0.9
344	Manufacture of telecommunications equipment, measuring equipment and electro-medical equipment	90 variable	0.7
362	Manufacture of standard and narrowgauge railway and tramway rolling stock	90	0.9
364	Aerospace equipment manufacturing and repairing	50	2

Source: Atkins

The Member States do not hesitate to lend their support to these 'national leaders' for so-called strategic reasons (security of supply) or social ones (protecting the jobs concerned). This form of national favouritism in awarding public contracts comes on top of the aid these undertakings often need, in particular by reason of the research and development (R&D) required or the poor economic health of the relevant sectors<sup>34</sup>.

We shall next review the savings that ought to result from the liberalization of public-sector procurement (quantitative aspect), after which we shall look at the restructuring that will be certain to take place in certain sectors (qualitative aspect).

<sup>34</sup> Ibid, p. 8, paragraphs 9.10.

## **A: The anticipated savings**

The effects can be expected to be rather slow to appear in certain sectors, such as housing construction, where products tend not to be interchangeable, or again in cases where prior development of a prototype is generally required and monitored by the public-sector purchaser (e.g. for military equipment).

### **1: Manufactured goods**

As regards purchases of manufactured goods (one third of public-sector procurement), the study on the cost of non-Europe<sup>35</sup> sought to establish prices actually charged for some forty products selected from those most frequently purchased by public administrations and undertakings. The potential gains expected from more open award procedures (static effect), on the assumption that the awarding authority would choose the most competitive suppliers, were estimated by deducting from the price discrepancies identified between countries the costs relating to intra-Community trade (transport, marketing, insurance, foreign-exchange risks). An extrapolation covering all products was then attempted. We should point out that the number of suppliers competing for a given project is often low; this means that it is reasonable to conclude that the opening up of public-sector procurement and the subsequent boost to competition would result in substantial gains.

Some of the results of the static effect of purchasing economies are set out in Table 10<sup>36</sup>

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35 . Commission document, 'The cost of non-Europe in public-sector procurement', op. cit.,  
Full Report, Part II, pp 55 et seq.

36 COM(88) 376 final, p. 15, Table No. 5.



**Table 10: Reductions in costs and prices associated with liberalization of public procurement,<sup>1</sup> 1984**

(billion ECU)

	Direct static effect <sup>2</sup>	Competition effect <sup>3</sup>	Restructuring effect <sup>3</sup>	Total
<i>Agriculture</i>	-	-	-	-
<i>Energy<sup>4</sup></i>	-	-	-	-
<i>Manufactured goods</i>	2.7	2.0	6.0	10.7
Plant and machinery	1.7	2.0	6.0	9.7
Current consumption goods	0.2	-	-	0.2
Intermediate goods	0.8	-	-	0.8
<i>Building and construction<sup>5</sup></i>	0.8	-	-	0.8
<i>Market services<sup>5</sup></i>	0.2	-	-	0.2
<b>Total</b>	<b>3.7</b>	<b>2.0</b>	<b>6.0</b>	<b>11.7</b>

<sup>1</sup> Calculated for five Member States (B, D, F, I, UK).

<sup>2</sup> Assuming that, in the public sector, the rate of import penetration from other EC countries rises to the level now found in the private sector, for 80% of public purchasing.

<sup>3</sup> Atkins only estimated the effects of competition and restructuring in sectors where public purchasing is so significant as to be liable to influence producers' behaviour. This is only the case in the plant and machinery sector.

<sup>4</sup> Energy is dealt with elsewhere.

<sup>5</sup> In both these sectors, a 10% rise in import penetration and a 10% fall in prices are assumed for 80% of public purchasing.

Source: Atkins

The table thus shows an assessment of the competition effect on the assumption that reductions in prices by alignment with those of the most competitive foreign suppliers would be fully reflected in costs.

The restructuring effect will appear in two stages. Firstly, an increase in the rate of utilization of production capacity should result in a reduction in

the number of producers. The low utilization rates for these capacities in some of the sectors considered should be noted (Table No. 11)<sup>37</sup>.

Table 11. Cases of industrial restructuring linked to the liberalization of public procurement

	Community market (billion ECU) <sup>1</sup>	Current capacity utilization (%)	Intra-EC trade	Number of EC producers	Number of US producers	Economies of scale <sup>1</sup> (%)
Boilermaking	2	20	very little	12	6	20
Turbine generators	2	60	very little	10	2	12
Locomotives	0.1	50-80	very little	16	2	20
Mainframe computers	10	80	30-100 <sup>2</sup>	5	9	5
Telephone exchanges	7	70	15-45 <sup>2</sup>	11	4	20
Telephone handsets	5	90	very little	12	17	-
Lasers	0.5	50	substantial	over 1000	over 1000	n.a.

<sup>1</sup> Scale economies resulting from a doubling of output.

<sup>2</sup> Percentages of total demand.

Source: Atkins.

Subsequently, mergers and amalgamations, rationalization of production (reduced number of sites), reduction of development costs (more limited product ranges), and the effects of R&D will also play their part in reducing costs (see Table No. 10).

## 2. Construction and public works

These account for 29% of total public-sector procurement, amounting to ECU 150 billion for the Community of Twelve in 1986.

This sector is characterized in particular by a large number of SMUs (95% of undertakings) and by a relatively small number of European undertakings on the Community market. Thus, while American construction firms in 1986 signed contracts on the European market for a total of ECU 6 billion, European firms were well behind with only ECU 600 million. Yet real opportunities exist for frontier-zone, specialized and large businesses. To that should be added the

<sup>37</sup> COM(88) 376 final, p. 16, Table No. 6.

Community's enormous infrastructural requirements, which are highly conducive to trans-frontier cooperation between firms.

Public-works imports representing 10% (as a result of trans-frontier contract awards) of internal demand in the different countries of the Community (competition effect), in addition to a potential saving of 10% on these imports (static effect), could enable savings amounting to nearly ECU 1 billion to be made (for five Member States at 1984 prices). However, the restructuring effect would probably be limited.

### 3. Services

This market (21.8% of public-sector procurement) is scarcely reliant on public-sector orders, and the opening up of this sector would benefit private undertakings by at least as much. The restructuring effect would consequently owe little to the public authorities.

An attempt has been made to assess the direct economic impact by adopting hypotheses analogous with those applied to public works procurement (see Table 10).

### 4. Military equipment

According to the report by H. Vredeling, published in 1987 by NATO<sup>38</sup>, this market is characterized by a number of undertakings each working at a strictly national level; this lack of rationalization entails additional costs that are all the heavier when one considers the share accounted for by R&D expenditure (up to 25% or even 40% of total expenditure for sophisticated armaments).

These expenditures are moreover highly dependent on public-sector purchasing (Table 12)<sup>39</sup>.

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<sup>38</sup> CEC '1992: the new European economy', in European Economy, No. 35, March 1988, p. 62.

<sup>39</sup> Ibid, p. 62, Table 3.4.6.

**Table 12: Public-sector procurement for armaments and missile systems in 1985 (billion ECU)**

	B	D	F <sup>1</sup>	I	NL	UK	EUR 6	EUR 12
Defence budget (as % of GDP)	3.4 (3.3)	28.1 (3.4)	28.3 (4.2)	15.0 (2.7)	5.3 (3.2)	31.5 (5.3)	111.6 (4.0)	132.6 (4.0)
Expenditure on arms and missile systems	0.4	3.9	7.6	2.8	1.2	8.5	24.4	29.3
Potential savings to be made <sup>2</sup>								6.2

<sup>1</sup> In the case of France the share of expenditure on arms and missile systems is assumed to be the same as in the United Kingdom.

<sup>2</sup> It is assumed that the potential savings on this type of arms are analogous with those calculated in the Atkins study for means of transport (other than motor cars).

Source: NATO, Commission departments

Here, the expectation is that opening up public-sector procurement will result in quite high levels of savings (Table 12). Two thirds of the amount saved would be due to a major restructuring effect, given the fragmentation in this sector. Even so the figure thus obtained would have to be reduced by the amount relating to certain manufactured goods (means of transport, for example). The final figure is around ECU 4 billion at 1984 prices, or just under ECU 5 billion at 1989 prices (see Table 8).

We should however point out that the opening up of public-sector procurement for specifically military materials and equipment remains only a theoretical hypothesis for the time being. Even the most recent Community texts continue to exclude them (see below).

In conclusion, with a total potential saving to the Community (Table 6) of ECU 22 billion, there is a great deal at stake. However, beyond the savings achievable, the dynamic potential, particularly in structural terms, is worthy of close attention. We shall now look at the qualitative aspect.

#### **B: The structural adjustments envisaged**

The studies carried out by the Commission demonstrated in particular the possibility of extensive structural adjustments in three sectors: electrical plant and equipment (energy production, railway and telecommunications equipment). These of course belong to the sectors excluded by the first directives on public works and supplies (see above, Part I).

According to a recent report commissioned by the Commission<sup>40</sup>, the railway equipment sector can expect to experience a major process of concentration. This process had indeed already begun with the announcement of the new reform. Three or four large European groups can then be expected to survive. The process should be fairly rapid.

As for telecommunications, some 2500 to 5200 jobs can be expected to disappear every year for the next six years, which will have a far from negligible social impact. These job losses, if carefully distributed, should not result in the closing of more than a few of the 116 existing production units.

The electrical plant and machinery sector would be least affected. A number of major amalgamations have nevertheless been carried out in the turbine and generator sectors in order not to jeopardize the subsequent development of European industry in those sectors. It is not however intended to call into question the national positions of the relevant companies in the different countries. But will that situation be viable in the long term?

It is essential to bear in mind that the opening up of public-sector procurement is only one component in the strategy of businesses. It will be very difficult to determine to what extent structural adjustments will be the effect of liberalization of public procurement.

Moreover, according to the report, industrialists still seem pessimistic about the opening up process. In fact, people are expecting the most important changes to be brought about by the authorities, by adopting a more flexible approach. Mere changes in the law cannot suffice.

Finally, the sectoral effects of opening up public-sector procurement will generate regional problems.

### III: THE REGIONAL EFFECTS OF THE OPENING UP OF PUBLIC-SECTOR PROCUREMENT

As in the social sphere, this problem is viewed in terms of risks. While the general implications of liberalization of public-sector procurement are expected to be favourable, an analysis of the precise distribution of these effects appears very difficult. Public procurement is in fact far from being the only factor responsible for the changes expected to take place at regional level. Other, interrelated factors are involved: regulations governing standards, certain markets (telecommunications, for example), freedom of establishment, etc. Similarly, while certain sectors or undertakings can be identified as being at risk regionally, the problem of economic analysis is compounded by the investment plans, innovation (R&D), or readjustment measures (the choice of sites to be saved, in particular) of those undertakings.

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<sup>40</sup> Commission DG on Regional Policy, The regional impact of the liberalization of public procurement. Summary record, provisional report, September 1989, pp. 67 to 81.

It is nevertheless possible to form a reasonably clear picture of the anticipated regional impact of the restructuring process in certain sectors<sup>41</sup>.

As regards the electrical and electronics industries, including telecommunications equipment (Map 1), these sectors often account for a major share of employment in declining industrial regions; these, in common with the former, have been affected by recent job losses.

An equivalent analysis can equally well be applied to the metal manufacturing sector (Map 2).

The situation in the electrical engineering sector, as also in the aeronautics and aircraft construction sectors (in a small number of Member States), is primarily of concern to the industrialized regions of the Community (Maps 3, 4 and 5).

Finally, the railway rolling-stock production sector, already hard hit by the crisis, is present generally in areas of industrial decline (Map 6).

It can therefore be seen that regions in industrial decline probably have something to fear from the liberalization of public-sector procurement (although, once again, other factors are involved), whereas less-developed or peripheral regions will, directly at least, be little affected. SMUs, of which there are large numbers in these latter regions, can even expect to benefit from the opening up of public-sector procurement in the sectors excluded by the first Community directives (water, energy, transport, telecommunications). The most dynamic of these businesses will thus enjoy new sub-contracting opportunities.

Conversely, the peripheral regions will be exposed to a certain amount of risk if sub-contractors or subsidiaries of specialist firms establish operations in their locality in the sectors considered above that are ripe for restructuring.

These considerations led the Commission to undertake a 'continuing study'<sup>42</sup>, at a sufficiently refined sectoral level in order to detect the existence of problems as soon as they appear. This would open the way to structural intervention by the Community under its social and regional policies; the procedures for implementing these policies have recently been developed: implementing multiannual programmes would be open to consideration under Objective No. 1 (regions lagging behind) and No. 2 (industrial areas in decline) under the new framework regulation resulting from the Structural Fund reform<sup>43</sup>. The action to be taken to help SMUs would then have to be in harmony with the principles of that reform.

The main effect of public-sector procurement being opened up would be essentially that of a catalyst, not necessarily of first importance, but in combination with many other factors in the arrangements leading to completion of the internal market. This represents a significant nuancing of the

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41 COM(88) 376 final, op. cit., pp. 10-11 and pp. 17-22 for maps.

42 COM(89) 400 final, p. 8, No. 25

43 Council Regulation (EEC) 2052/88 of 24 June 1988, OJ No. L 185, 15.7.1988, p. 9

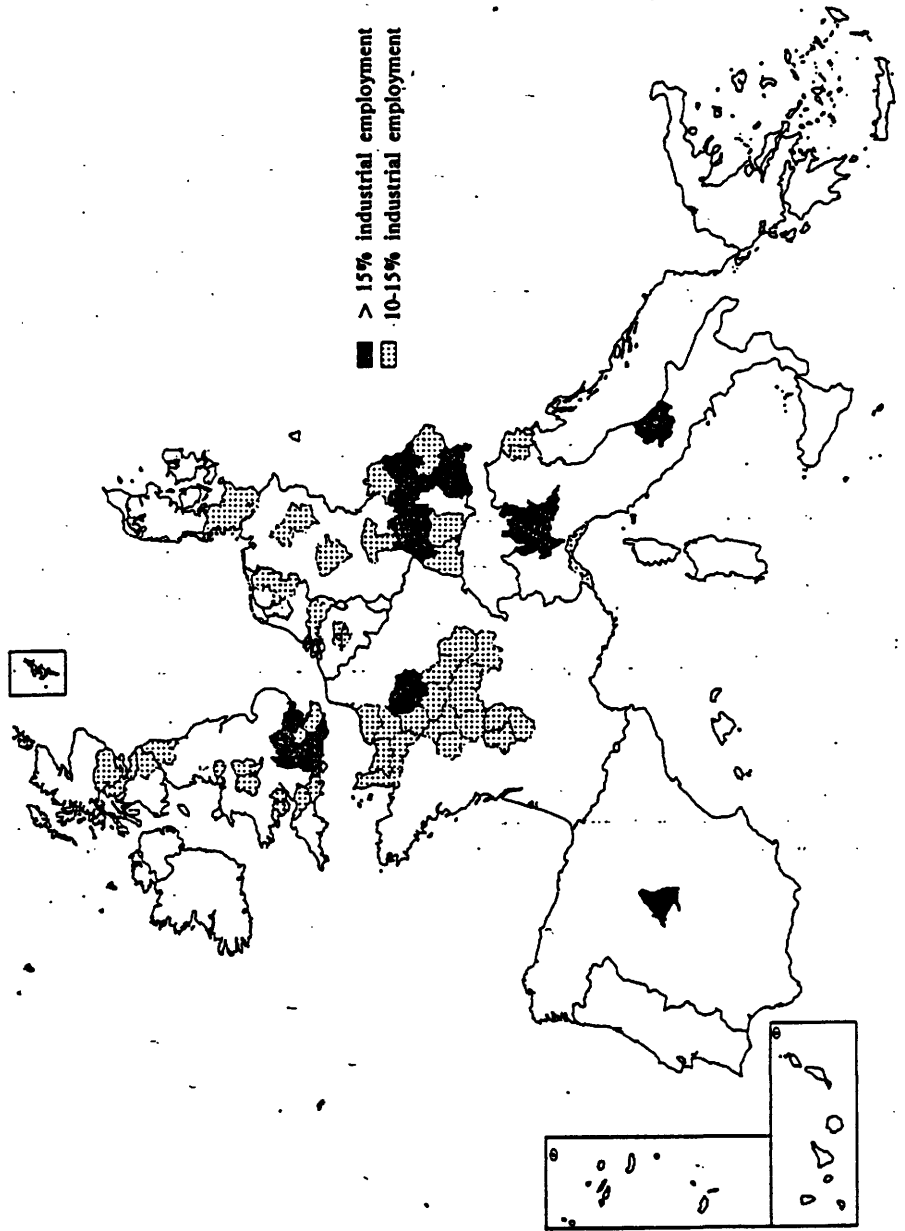
previous conclusions by the most recent studies of the so-called 'cost of non-Europe' in relation to public sector procurement.<sup>44</sup> These studies seem to suggest, however, that liberalization of public procurement would tend to have a favourable effect on economic and social cohesion. We have already seen the favourable impact on growth at Community level, on the rationalization of activities, on the growth of specialist undertakings in sectors hitherto compartmentalized (certain SMUs located in less developed regions in particular).

Yet however favourable this impact may be, might it not well be counterbalanced by the extra-Community consequences of the opening-up of public sector procurement?

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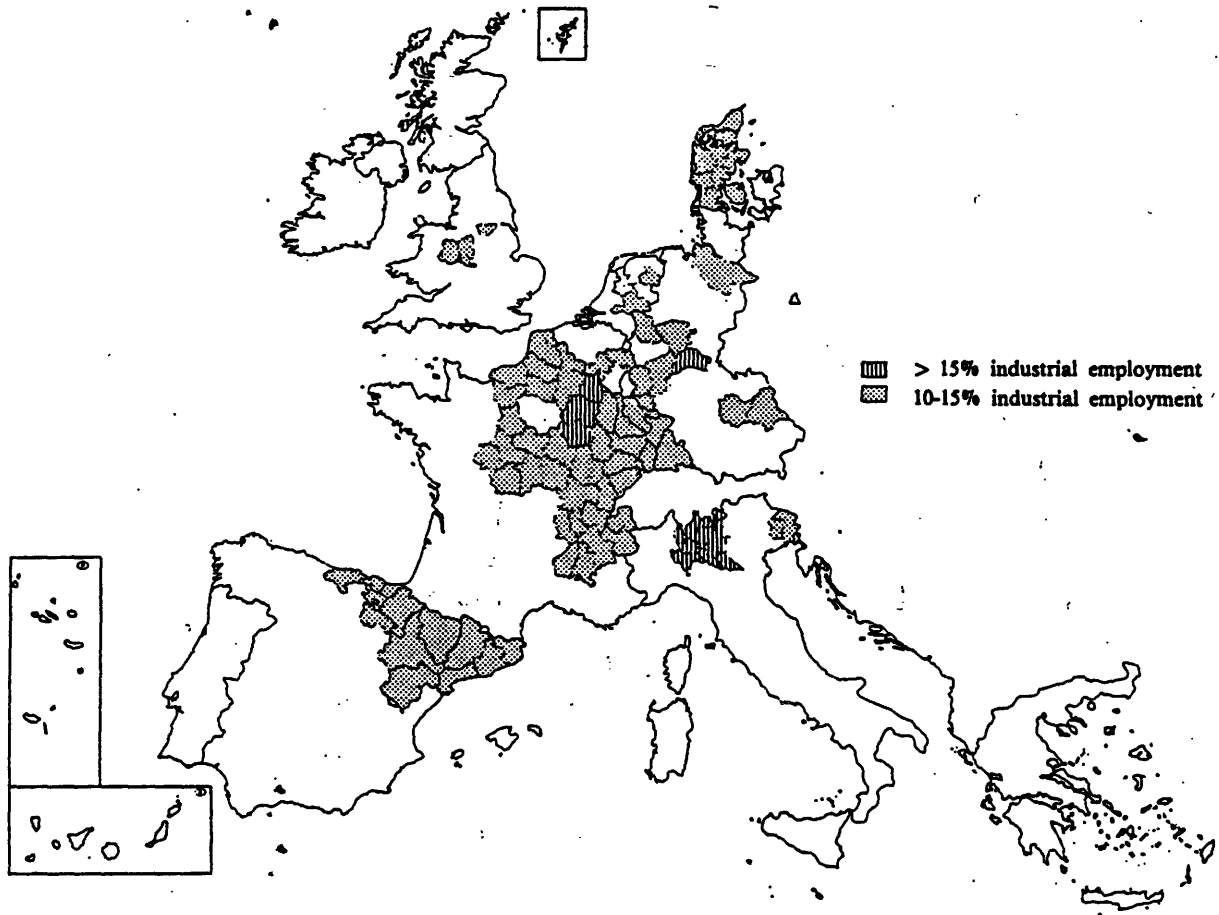
44 Commission, DG for Regional Policy, The regional impact of the liberalization of public procurement - Summary report, op. cit.

Map 1 - The regional concentration of employment in the electrical engineering sector, 1984

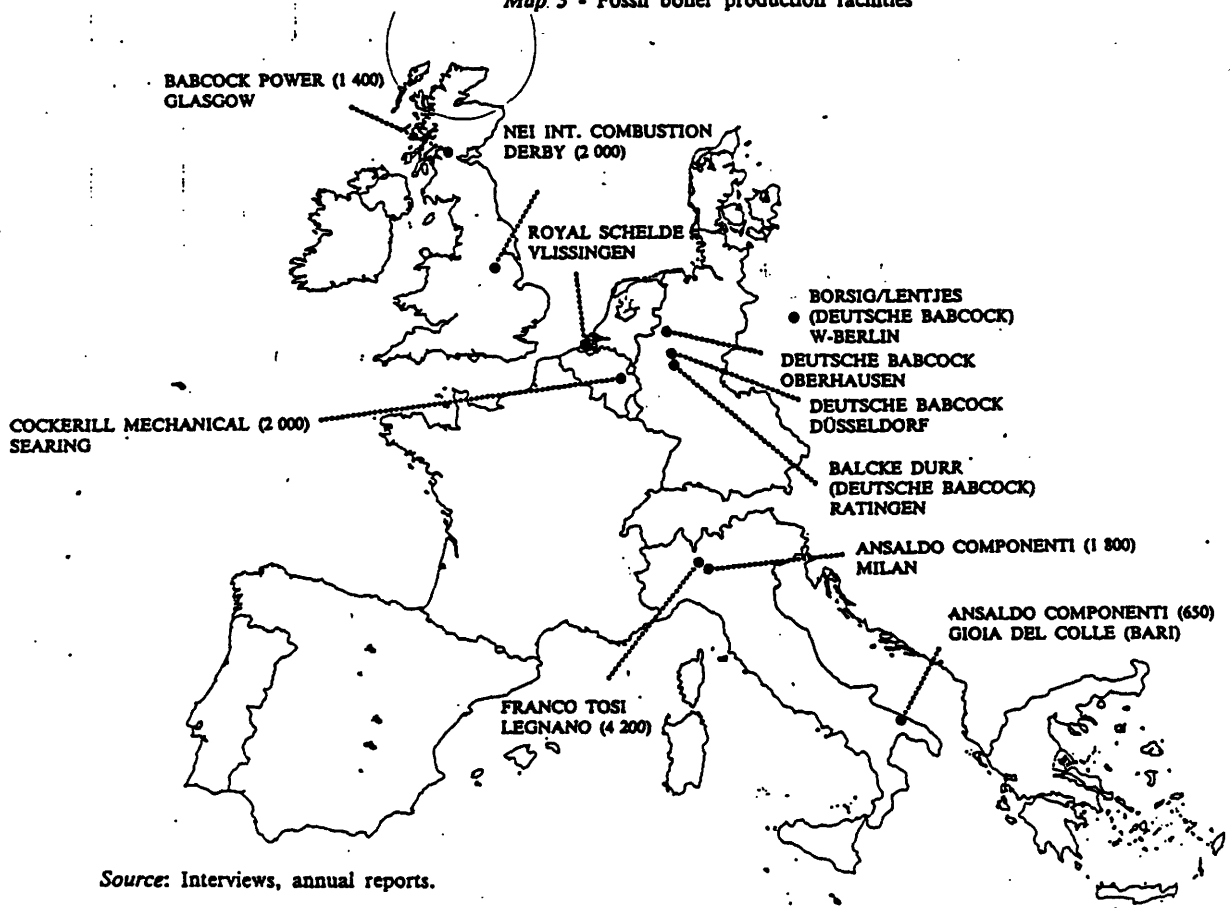




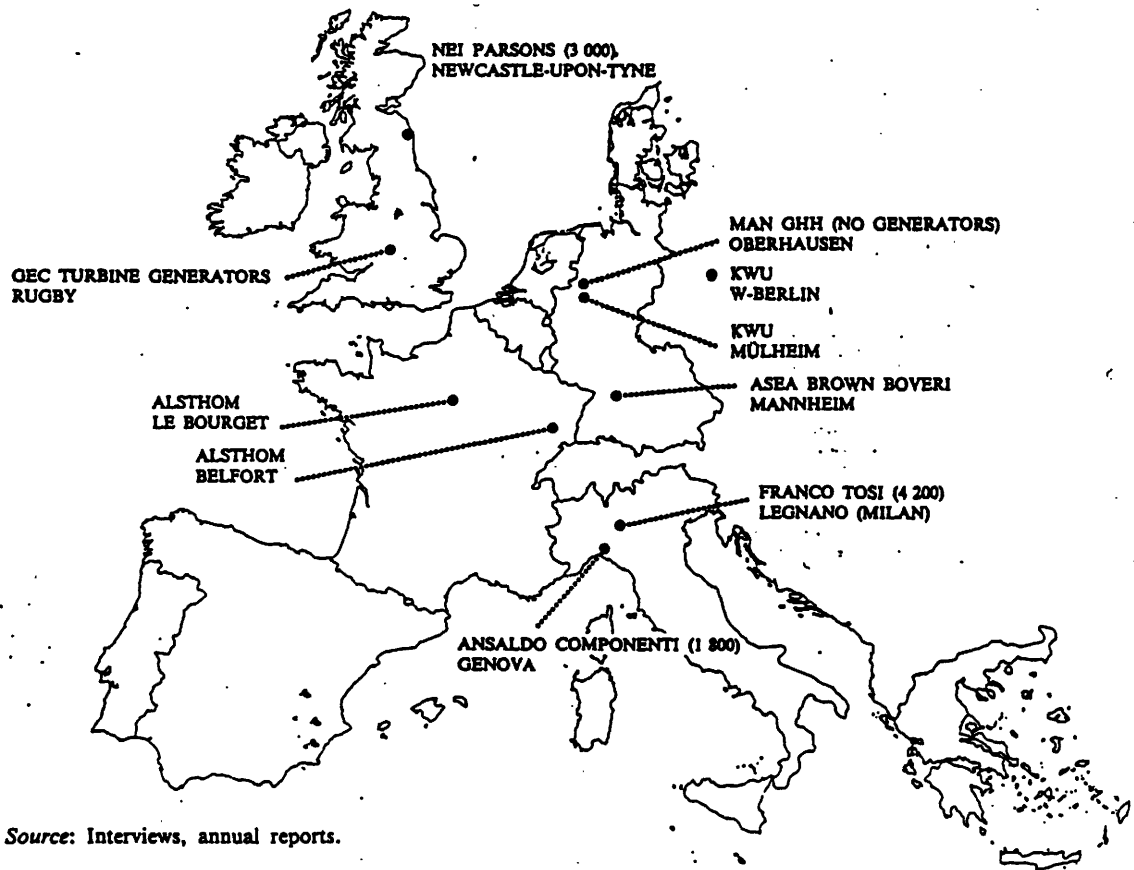
Map 2 - The regional concentration of employment in the metal manufacturing sector, 1984



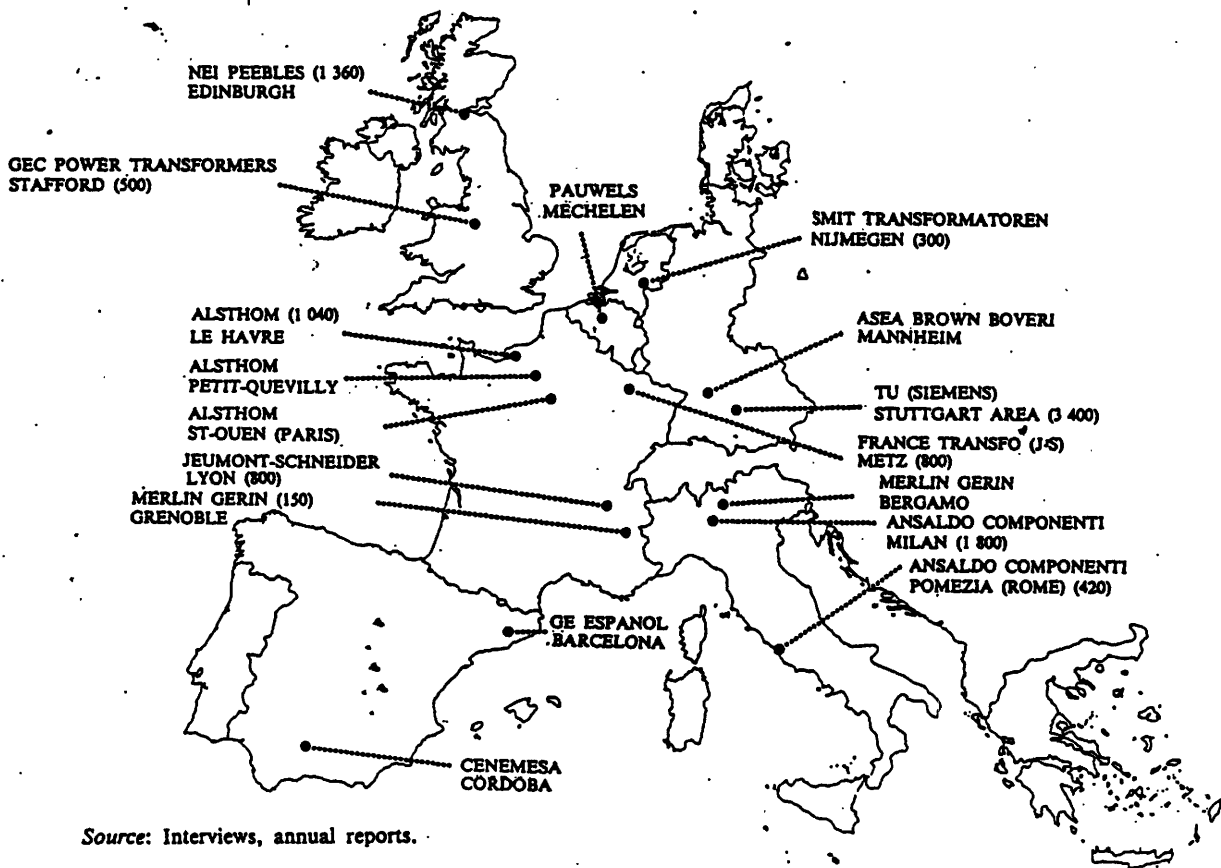
Map 3 - Fossil boiler production facilities



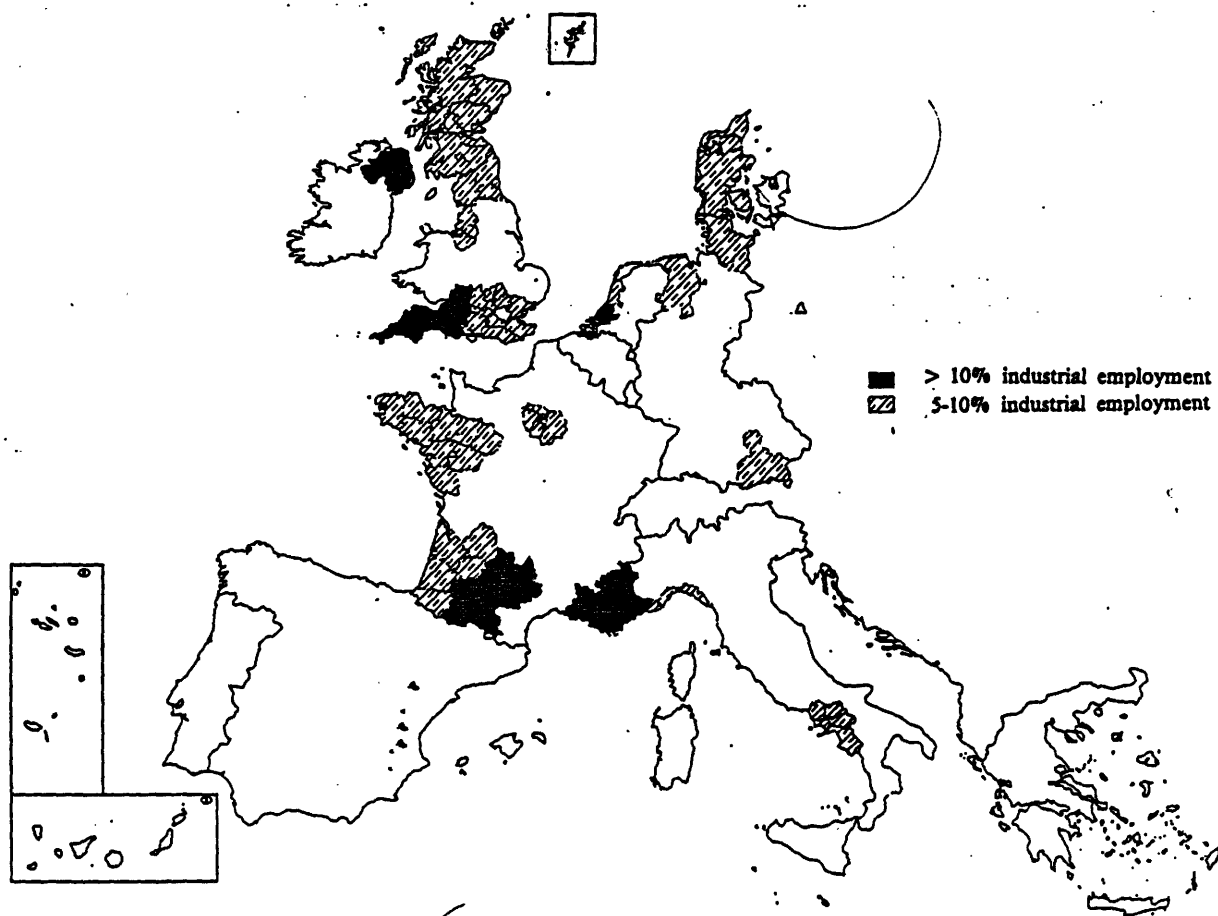
Map 4 - Steam turbine generator production facilities.



Map 5 - Transformers main production facilities



Map 6 - The regional concentration of employment in the other transport (NACE 36) sector, 1984



#### **IV : THE EXTERNAL EFFECTS OF PUBLIC-SECTOR PROCUREMENT LIBERALIZATION**

##### **A: The threat to the internal market**

This threat is conditional upon the political and economic decisions by the European Community in relation to undertakings in third countries<sup>45</sup>.

One solution, albeit an extreme one, would be the construction of 'Fortress Europe', protecting its industries against external trade and so enabling it to restructure while sheltering from competition from non-member countries. This course would be favourable to the Community balance of trade; nevertheless, the absence of external competition would be dangerous to productivity, to innovation and to markets for Community firms, which are often interested in public contracts abroad. Moreover, certain projects also require contracts to be awarded to undertakings in third countries (specific technologies).

The other, equally extreme, solution would be to operate a free-market policy, which would provide extensive markets in the Community to third-country undertakings. After all, the Community is already highly liberal in the area of the right of establishment. This would consequently be of considerable interest to non-Community undertakings that have established subsidiaries in the Community; they would be in a strong position to take full advantage of the Community's internal market where public-sector procurement plays a major role. The liberalization of that procurement in the previously excluded sectors (water, energy, transport, telecommunications) with their impressively high potential, would be of major interest to undertakings seeking new markets. Some markets could well even be monopolized by some of these undertakings. Were that to happen the internal market would in a sense turn against the Community itself.

##### **B: The measures taken by the European Community**

Faced with these dangers, the Community has set itself the following objectives<sup>46</sup>: on the one hand, taking advantage of its continuing strong position in negotiations, conferred on it by the existence of the means of protecting the Community market, it must insist on reciprocity in access to equivalent markets. Without that precaution the result would be an invasion of the internal market, which would correspondingly reduce the Community's weight in the negotiations. On the other hand, access to public-sector procurement for third-country undertakings would have to be introduced gradually, with Community undertakings already having to reorganize in anticipation of 1993. That would enable them at the same time to face up to the consequences of more open trade with third countries. Priority would of course have to be given to Community standards.

These different factors have prompted the Community to be highly active in negotiations within GATT to obtain counterpart arrangements. As we have seen (see Part I, Chapter III above), a 'code' was adopted in 1980 asserting equality of access to public contracts for undertakings in the signatory countries and approved by the contracting authorities stipulated in a list.

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45 COM(88) 376 final, op. cit., pp. 12, 63 and 76

46 COM(88) 376 final, op. cit., p. 77

An amending protocol was adopted in 1987 including new types of contracts and lowering the threshold. A code of this kind is essential to European industry, and the objective of the negotiations within GATT is to secure the best extra-Community market opportunities for Community firms.

Most of the 'excluded' sectors are not covered by the GATT code at present. However, the code requires the parties to negotiate an extension of its scope to those sectors. The stakes here are considerable. The United States has a strong interest in this matter and is pushing hard for the extension and the negotiations have become highly complex precisely on account of the interests that are at stake. Other negotiations are in the course of conclusion between the Community and the EFTA Member States. Pending conclusion of these negotiations, the Commission has provided in its proposal for a directive on the excluded sectors (see above) that the contracting entities will not be bound by the provisions of that text when undertakings from third countries submit tenders to them.

The study of the cost of 'non-Europe' highlights the considerable interdependence of public-sector procurement with numerous other Community activities. This, of course, makes it possible to envisage utilizing public-sector orders as mechanisms of economic intervention, but this time in the interests of economic integration. Public-sector procurement might even contribute to the achievement of economic and social cohesion (Article 130 A-E of the Treaty). It would indeed appear that the Community can scarcely afford to forego the advantages of such a useful economic device.

#### CONCLUSION

To explain the failure of the first Community measures on public-sector procurement one commentator<sup>47</sup> summed it up as follows: 'The fundamental reason for failure, it seems to me, is quite simply that the time was not yet right, whereas today it is'. Is it though? That is the question.

#### A: A new economic context

In economic terms the context has indeed changed considerably. We have experienced a period of growth which, although it has now somewhat run out of steam, should tend more to a perception of the international environment in terms of opportunities (gains) rather than of risks, as was the case in the 1970s. In addition, 1985 saw the adoption of the White Paper on completing the internal market, which envisaged creating a huge economic area. The mechanism, as well as the laws, underpinning this huge market, stimulating intra-Community trade, will in turn tend to favour growth. In a word, it will have a synergic effect. That being so, the opening up of public sector procurement is an opportunity to be grasped; the profits to be made nationally will count for little compared with the gains to be realized at European level. Of course certain risks remain, but a new vision is needed; it will be essential to make the transition from short-term pessimism, which favours the compartmentalization of markets, to long-term optimism. Such optimism must become more widespread both in space and in time; success depends upon it.

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47 Dossiers et documents de la RFDA, Les marchés publics européens, op. cit., p. 9.

Moreover, liberalization of public-sector procurement is not only an opportunity to be grasped; it is a necessity when one considers the Community's position in the international economic context. It is one of the conditions for expanding the markets of European firms by putting them on a scale comparable to that of their international competitors. Thus the world market in telecommunications (one of the 'excluded' sectors) was worth ECU 90 billion in 1987, 18 billion being accounted for by the 12 Member States of the Community. While the American market accounted for 35% and Japan 11%, none of the European national markets, still compartmentalized, exceeded 6% of that total<sup>48</sup>. It will be essential to take advantage of the current economic climate to break out of this impasse, which is bad for all concerned.

**B: A new legal context**

The legal context has also changed radically. Since 1984 the Commission has issued three communications<sup>49</sup> affirming its determination to react to its initial failure. It confirmed this in the White Paper by integrating the opening up of public sector markets into a huge overall programme: that of the internal market. In its second communication (of 19 June 1986) in particular, it submitted an action programme on public-sector procurement (p. 5) setting out the main points of its reform (increased transparency, rules on the direct agreement procedure, harmonization of technical standards, incorporation of the 'excluded' sectors, guaranteed means of redress). This resulted in the adoption of two directives amending the original public works and public supplies directives<sup>50,51</sup>, another on review procedures<sup>52</sup>, a directive on the excluded sectors<sup>53</sup> and a proposal on means of redress in these sectors<sup>54</sup>, a communication from the Commission to the Member States on monitoring compliance with public procurement rules in the case of projects and programmes financed by the Structural Funds and financial instruments<sup>55</sup>, and a proposal for a directive on services.<sup>56</sup>

These texts have been a source of high hopes for the liberalization of public-sector procurement. As we stated at the beginning of Part II, they have already had some of the effects anticipated by certain undertakings, even before all the provisions have been adopted. For example the study of their impact on the creation of a Europe of public-sector procurement has only just begun and has revealed a number of defensive reflex reactions in the short-term. The study will have to be continued over several years, but it is already possible to venture some comments on them, in anticipation of an assessment of their potential effectiveness.

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48 Ibid, p. 6

49 Commission communications of 14.12.1984 (COM(84) 717 final) and 19.6.1986 (COM(86) 375 final), and Guide to the Community rules on open government procurement, OJ C 358, 31.12.1987, p. 1

50 Directive 89/440/EEC, OJ No. L 210, 21.7.1989, p. 1

51 Directive 88/295/EEC, OJ L 127, 20.5.1988, p. 1

52 Directive 89/665/EEC, OJ L 395, 23.12.1989

53 Directive 90/531/EEC, OJ L 297, 29.10.1990, p. 1

54 Amended proposal for a directive, COM(91) 158 final - SYN 292, 4 June 1991

55 COM(88) 2510, OJ C 22, 28.1.1989, p. 3

56 Proposal for a directive relating to the coordination of procedures on the award of public service contracts. COM(90) 372 final - SYN 293, 31.1.1991, p. 1



### C: Supplementary provisions

Provisions intended to supplement the above directives are beginning to appear. A number of studies on the interaction between the liberalization of public-sector procurement and other Community policies (regional, industrial, monetary and business policies) are in progress, and specific actions should follow. Supplementary means of publicity have appeared; TED (Tenders Electronic Daily), for example, can be used at reduced rates by interested firms to keep themselves abreast of notices of invitation to tender in the Community and GATT, and subsequently also EFTA.

Lastly, the Commission decided on 4 March 1988 to implement a scheme for monitoring compliance with public procurement rules in the case of projects and programmes financed by the structural funds and financial instruments<sup>57</sup>. The scheme entered into force on 28 March 1989.

We can now nevertheless begin to attempt a juridical analysis of these different texts and submit an assessment of the content of the new provisions in the area of public sector procurement.

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<sup>57</sup> Communication COM(88) 2510, OJ No. C 22, 28.1.1989, p. 3

**PART 2: JURIDICAL ANALYSIS OF COMMUNITY PROCEDURES FOR THE AWARD OF PUBLIC-  
SECTOR PROCUREMENT CONTRACTS**

## INTRODUCTION

The White Paper on completing the internal market published by the Commission on 14 June 1985 (COM(85) 310) places particular emphasis on the opening-up of public procurement. Public-sector procurement accounts for 9% of Community GDP (15% when public-sector undertakings are included) and the contracts theoretically accessible to non-national undertakings should account for between 7 and 10% of GDP. The estimates contained in the study on the cost of non-Europe show that completion of the internal market in this area will in the medium to long-term mean savings of the order of 0.5% of Community GDP<sup>58</sup>. The opening up of public procurement therefore represents a major challenge.

Having realized that the best approach was to impose certain positive obligations on the contracting authorities to limit their discretionary powers, the Commission drew up two directives concerning the coordination of procedures for the award of public contracts, adopted by the Council on 26 June 1971 in the case of public works<sup>59</sup>, and on 21 December 1976 in the case of supplies<sup>60</sup>. These were failures, due to the excessive cautiousness of the provisions, the failure to incorporate them correctly into national legislation or poor enforcement, evasion of the threshold rules for the application of the directives, the multiplicity of technical obstacles, the lack of transparency, and the absence of redress for injured parties.

The Commission set out the main points of reform needed in 1984<sup>61</sup> (increased transparency, rules on direct-agreement contracts, harmonization of technical standards, rules on the water, energy, transport and telecommunications sectors, i.e. the 'excluded' sectors, and guaranteed means of redress) and drew up a programme for achieving the internal market in public procurement. This led successively to: two directives amending the original directives on the coordination of award procedures for public supply and works contracts, a third directive on means of redress, a directive on the sectors excluded under the other coordination directives, a communication from the Commission to the Member States on monitoring compliance with public procurement rules in the case of projects and programmes financed by the Structural Funds and financial instruments.<sup>62</sup> In July 1990 the Commission submitted a proposal laying down remedies in the 'excluded' sectors<sup>63</sup> and in September 1990 the Commission proposed a directive on the coordination of procedures on the award of public service contracts<sup>64</sup>. We shall concentrate here firstly on the directives and proposals for directives coordinating the procedures and secondly on the proposal for a directive on remedies; these texts all relate very closely to each other. The communication for its part deals with a specific problem that really requires a separate study.

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<sup>58</sup> Commission communication 'Public procurement - Regional and social aspects', (COM(89) 400 final, 24.7.1989)

<sup>59</sup> Directive 71/305/EEC, OJ No. L 185, 16.8.1971, p. 5

<sup>60</sup> Directive 77/62/EEC, OJ No. L 13, 15.1.1977, p. 1

<sup>61</sup> Commission communications of 14.12.1984 (COM(84) 717 final) and 19.6.1986 (COM(86) 375 final), and Guide to the Community rules on open government procurement, OJ C 358, 31.12.1987, p. 1

<sup>62</sup> COM(88) 2510, OJ C 22, 28.1.1989, p. 3

<sup>63</sup> Commission proposal COM(90) 297 final, OJ No. C 216, 31.8.1990; amended proposal COM(91) 158 final.

<sup>64</sup> Commission proposal COM(90) 372, OJ No. C 23, 31.1.1991

## I. PUBLIC PROCUREMENT AWARD PROCEDURES

These have all been or still are subject to the procedure for cooperation with the European Parliament, which has contributed substantially to their drafting. The two directives amending the original supplies and public works directives were adopted by the Council on 22 March 1988<sup>65</sup> and 18 July 1989<sup>66</sup> respectively. Two other proposals on the 'excluded' sectors: water, energy, transport, on the one hand, and telecommunications on the other, were merged on the advice of the European Parliament and a single text was adopted on 17 September 1990<sup>67</sup>.

Given that an undeniable parallelism can be detected between these four texts, which form a coherent body of legislation, we should consider the main subjects of this legislation one after the other.

The excluded sectors have been dealt with separately because of their special features, in particular:

- **technical:** for example, the need to obtain water supplies locally;
- **economic:** the national authorities often have major shareholdings in the capital of the contracting companies in these sectors and consequently tend to favour national tenderers when awarding procurement contracts; It being customary in these sectors not to proceed by invitation to tender, the markets tend to be narrow, a feature intensified by the fact that special rights are conceded to certain applicants;
- **legal:** the entities operating these services are governed sometimes by public law, sometimes by private law; consequently a fair balance in the implementing of rules for the award of procurement contracts in these sectors requires the entities concerned to be identified otherwise than by their legal status;
- **political:** some sectors, such as telecommunications, have a bearing on sensitive areas such as state security. The legislation applicable to them should take these characteristics into account.

### A. The field of application of the directives coordinating procurement procedures

#### 1. The types of contract concerned

The new supplies and public works directives have adopted a similar approach: they have laid down the field of application, while including some additional areas compared with the old arrangements.

The supplies directive consequently refers (Article 1(a)) to 'delivery of products' but it is now stipulated that this can involve 'purchase, lease, rental or hire purchase, with or without option to buy'. In addition, the delivery of such products 'may include siting and installation operations'.

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<sup>65</sup> Directive 88/295/EEC, OJ NO. L 127, 20.5.1988, p. 1

<sup>66</sup> Directive 89/440/EEC, OJ No. L 210, 21.7.1989, p. 1

<sup>67</sup> Directive 90/531/EEC, OJ L 297, 29.10.1990, p. 1

As for public works, the old directive was far too vague: the concept of works is now excluded (market in services), whereas the following are included (Article 1(a)): the execution, or both the execution and design, of works, and the execution by whatever means of a work, so as to allow for innovations in the law of contract and concessions (Article 1b).

The directive on the 'excluded sectors' lacks any such conciseness (cf. Article 2(2)); it covers the provision or operation of transport infrastructures, the exploitation of energy resources, the management of networks intended to provide a service to the public involving the production, transport or distribution of drinking water, electricity, gas or heat, or surface transport services. It does not entirely cover the sectors formerly excluded by the public works and supplies directives.

The proposal for a directive on services stipulates that public service contracts are contracts for pecuniary interest concluded in writing between a supplier and a contracting authority (Article 1 letter a) with certain well-defined exceptions. The definition thus covers all procurement not already covered by the existing directives. The proposal concentrates principally on public service concessions, i.e. operations for which the public authorities delegate the provision of a public service to an external organization. One of the features of this directive is the distinction it draws between priority services and other services dealt with under their own separate classification. Only the priority services are subjected to a relatively complete procurement award procedure similar to the other public procurement directives. The group of priority services includes various types of intellectual services, non-restricted telecommunications services, insurance services and certain banking services, research and development services, transport services (except rail, sea and inland waterway transport), publication and printing services, and cleaning, maintenance, repair and similar services.

## 2. Excluded sectors and activities

The three texts already adopted, together with the proposal on public service contracts, have in common the stipulation on exemptions aimed at averting divergencies of interpretation.

Neither the supplies (Article 2(2)) nor the public works (Article 3(4)) directives apply to the 'sensitive' areas (essential interests of a Member State, for example), or to surface, air, sea or inland waterway transport, or to the production, distribution or transportation of drinking water, or to the production or distribution of energy (as principal activity), but only the supplies directive excludes the telecommunications sector (as principal activity).

With the adoption of the 'excluded sectors' directive, these provisions have been replaced with the simple stipulation that the sectors excluded by these two directives are those that are covered by the new excluded sectors directive. That will ensure that the texts complement each other.

Finally, the 'excluded sectors' directive itself eliminates water purchases, the purchase of energy or fuels intended for energy production (Article 9), transport services by bus open to competition (a stipulation insisted on by the European Parliament - Article 4), purchases with a view to offering

telecommunications services in a competitive market (Article 8) and, in a general way, activities by contracting entities open to competition (Articles 6 and 7).

Similarly, the proposal for a directive on public services lays down standard derogations relating to state secrecy and security (Article 4) and to contracts governed by special award procedures (Article 5). It is applicable in the area of defence but subject to the restrictions laid down pursuant to Article 223 of the Treaty (Article 4(1)). Moreover, the proposal introduces a number of specific derogations (Article 1) owing to the very nature of certain contracts, in particular: immovable property (Article 1(a) (ii)); contracts for the acquisition of programme material, and contracts for broadcasting time pursuing public interest objectives (Article 1(a)(iii)); contracts for voice telephony, telex, radiotelephony, paging and satellite services (Article 1(a)(iv)); contracts for arbitration and conciliation services (Article 1(a)(v)); public service concessions relating to broadcasting activities (Article 1(a)(vi)); financial services such as issues of government bonds and other activities in the area of public debt management (Article 1(a)(vii)).

### 3. The contracting authorities

The supplies directive has retained its former provisions (Article 1(b)); the contracting authorities are the state, regional or local authorities and legal persons governed by public law (or equivalent entities), and all associations of such entities with each other.

In the public works directive, in addition to the first two, they also include (European Parliament amendment) 'bodies governed by public law' defined as meeting a number of criteria: having legal personality, subject to supervision by a public body, not having an industrial or commercial character.

The proposed public services directive contains the same provisions in this connection as the public works directive. The excluded sectors directive incorporates in full the European Parliament's amendment (Article 2(1)); the contracting authorities are public authorities or public undertakings, or undertakings operating on the basis of special or exclusive rights - the relevant criteria having been stipulated by the European Parliament (Article 2(3)) - granted by a competent authority of a Member State. The specific features of the sectors concerned played a major part here.

### 4. The thresholds

In the case of public-sector supplies contracts (Article 5(1) of the directive), the threshold remains fixed at ECU 200 000. However, it falls to ECU 130 000 in the case of contracts to which the GATT agreement is applicable. In addition, Article 5(2-5) lays down precise rules to prevent contracts from being subdivided in order to evade application of the directive (principle laid down in paragraph 6).

In the case of public works contracts (Article 4a(1)), a new threshold is fixed at ECU 5 m (in place of ECU 1 m) on an amendment by Parliament. There

again, rules drawn up under the influence of the European Parliament have been included to prevent the subdivision of contracts (paragraph 4).

In the case of the excluded sectors (Article 12) the thresholds are identical to those in the above directives for contracts for supplies and services involving software and public works contracts respectively. Partly on the advice of Parliament, the rules against subdivision are very similar to those contained in the other directives.

Finally, for most of the categories of services considered, the proposal stipulates (Article 8) the application of minimal value thresholds contained in the supplies directive but adapted to the specific circumstances of certain service contracts. By amending the proposal in this respect the European Parliament sought to strengthen the analogy of the directive with the provisions relating to the opening up of public service markets already in force.

#### **B. The hierarchy of public contract award procedures**

A significant new feature of the supplies directive is that it makes the open procedure the rule, and requires recourse to the other procedures to be duly justified. In doing so the directive breaks with national laws in order to give priority to the procedure that 'best assures the establishment of equal conditions for participating in public contracts in all the Member States' (11th recital and Article 6(5)). It will be noted that the idea for the criteria proposed for using the restricted procedure originates with the European Parliament (Article 6(2)). As to the 'direct-agreement procedure' here referred to as 'negotiated procedure', the major innovation is that this can now be subject to prior Community publication (notice of invitation to tender), thereby safeguarding a minimum of competition (Article 6(2)). In other cases, however (e.g. R & D activities defined narrowly on the advice of the European Parliament), publication is not compulsory (Article 6(4)).

The public works directive is not organized on the hierarchical principle. The open and restricted procedures are treated equally (Article 5(4)), while the negotiated procedure is applied more exceptionally. The distinction between negotiated procedure with or without previous opening up to competition is retained with a number of criteria drawn from the supplies directive except that R & D activities are now subject to publication. The European Parliament drew up the relevant criteria.

As regards the excluded sectors (Article 15 of the directive), free choice of procedure is the rule provided that there is no distortion of competition. The distinction between the two types of negotiated procedures is retained. Most of the criteria of the two other directives are amalgamated, often being made more flexible, and extended to service contracts for the supply of software.

The proposal for a directive on services provides for arrangements for the award of contracts for priority services modelled on that of the existing directives. In particular it provides for the same flexibility as the public works directive. Account has also been taken of the characteristics peculiar to certain types of services by providing for arrangements specially adapted to them but without introducing any particular hierarchy.

### **C. Selection of tenderers**

The **supplies** directive (Article 19s) and **public works** directive (Article 20s), in which little has been changed on this point, stipulate that there must be no discrimination between tenderers; cases where they may be excluded are provided for; an entry in a professional register is required, as is proof of financial, economic and technical capability.

The new arrangements under the **public works** directive include, firstly, a stipulation of the range within which the number of undertakings to be invited to tender will fall where contracts are to be awarded by restricted and negotiated procedures (Article 22(2) and (3)), secondly, a requirement that the contracting party state in the contract documents the authority or authorities from which a tenderer may obtain the appropriate information relating to the employment protection provisions applicable to the locality in which the works are to be executed and, lastly, a provision making a declaration to the effect that they have complied with that legislation a condition of the choice of candidates invited to tender (Article 22a, on the basis of a European Parliament amendment).

For practical reasons the **excluded sectors** directive lays down the basic principles on which the contracting authorities will draw up their own rules for selecting candidates for the restricted and negotiated procedures (Article 25(1)). The criteria have to be objective and non-discriminatory; the exclusion criteria proposed by the two previous directives are in conformity with that, as is the fact of fixing a minimum number, as justified by the concern to establish a balance between the complexity of an awards procedure and its cost (Article 25(2) and (3)). The rules used are notified to candidates on request.

The question of entry in a register and quality guarantees is dealt with by the directive on services. That directive contains a number of provisions laying down the same requirements as the **supplies** and **public works** directives, including extracts from the judicial record, proof of enrolment in a trade register, bank references or certificates of inclusion in official lists of approved suppliers.

### **D. Contract award criteria**

#### **1. General criteria**

Here, there is total consistency between all three directives. The relevant provisions of the **supplies** and **public works** directives have not been changed since they were first laid down (Articles 25 and 29 respectively). Article 27 of the **excluded sectors** directive is an exact copy of the others. The same goes for the proposal relating to services.

For the award of a contract, the contracting authorities base their decision either solely on the lowest price or on a set of criteria intended to enable them to select the most economically advantageous offer. Variants can then be taken into consideration. The criteria referred to are no more than examples. The European Parliament helped to supplement them in relation to the **excluded sectors** and services. This considerable freedom is offset by a requirement of transparency: the criteria applied must be stated in the



contract documents or the notice of invitation to tender in decreasing order of importance.

## 2. Procedure in the case of abnormally low tenders

The unchanged Article 25(5) of the supplies directive stipulates that where 'tenders are obviously abnormally low' the contracting authority shall examine the details of the tenders before deciding to whom it will award the contract and request the tenderer to furnish the necessary explanations.

The public works directive, previously similar to the supplies directive, has been tightened up (Article 29(5)). If tenders 'appear to be abnormally low', the contracting authority 'shall request, in writing, details of the constituent elements of the tender which it considers relevant'. Four possible justifications are now proposed: economy of the construction method, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer, or the originality of the work proposed by the tenderer. Under both directives the Commission must be informed of any rejections.

In the excluded sectors directive, which follows the public works directive closely on this point, the novelty is the specific reference to state subsidies as a possible justification provided these comply with the rules stipulated by Article 93(3) of the Treaty. Here too, the Commission must be informed of the rejection of any such tenders. The same arrangements are laid down in the proposed public services directive.

## 3. Preferences

### (a) Regional preferences

Article 26 of the supplies directive and Article 29a of the public works directive are innovations resulting from amendments by the European Parliament, which always gives a high priority to regional issues. These articles allow existing national provisions on the award of public works contracts to continue to be applied if they have as their objective the reduction of regional disparities and the promotion of job creation in regions whose development is lagging behind and in declining industrial regions. The national provisions must however be compatible with the Treaty and the Community's international obligations.

The Commission itself inserted this provision in Article 28(2) of the directive on public procurement in the excluded sectors, making it applicable until 31 December 1992. The same time limit was also stipulated in the proposal for a directive on services. However, since the time limit is likely to be exceeded by the decision-making procedure and with the Court of Justice having in its Du Pont de Nemours judgment declared the Italian regional preferential scheme incompatible with Article 30 of the Treaty, the European Parliament preferred to delete it.

### (b) Community preferences

This provision (Article 29), which is unique to the excluded sectors directive, is designed to ensure that the Community cannot open its markets

unilaterally to third countries as a consequence of liberalization of public procurement. It therefore stipulates that any offer may be rejected when more than half the value of the products is not of Community origin (paragraph 2). In addition, the contracting authorities must give preference to a Community tender where two or more tenders are equivalent, i.e. where the price difference does not exceed 3% (Article 29(3)). These provisions will evolve in accordance with the outcome of negotiations with third countries seeking equivalent treatment, as in the case of the GATT negotiations.

Article 40(4) of the public service proposal for a directive lays down a procedure that may be used to restrict access to Community contracts for tenders from undertakings in third countries that do not grant Community undertakings equitable access to their contracts in accordance with the conditions laid down in Article 40(3).

#### E. The problem of technical standards

The imprint of the European Parliament is unmistakable in this area.

The supplies directive (Article 7(2)) places an obligation on the contracting authorities to define technical specifications 'by reference to national standards implementing European standards' or 'legally binding national technical rules insofar as these are compatible with Community law' (amendments by Parliament). There are four possibilities, laid down by the European Parliament (paragraph 3), for departing from this principle. In the absence of the standards laid down in Article 7(2), the replacement standards are, by order of preference: the national standards of the country of the contracting authority transposing international standards; other national standards of that same country; any other standard (paragraph 5) (stipulated on an amendment by the European Parliament). Lastly (paragraph 6) standards that could have the effect of introducing compartmentalization of the Community market (the indication of trade marks, patents, types or specific origin or production, etc.) are prohibited unless justified by the subject of the contract.

Article 10 of the public works directive, which, as a result of the European Parliament's amendments, is very close to the equivalent provisions in the supplies directive, differs from the latter on two points in particular: the reference to 'European technical approvals' (European Parliament amendment) is added to paragraph 2, together with certain new replacement standards, including national standards recognized in accordance with the availability requirements listed in the directives relating to technical harmonization.

Article 13 of the excluded sectors directive is an amalgamation of the provisions of the other two directives, the technical specifications being defined by reference to European specifications (paragraph 2) and, where these do not exist, by reference to other standards having currency within the Community (paragraph 3). The article stipulates a clear preference for specifications that indicate performance requirements (paragraph 4). The relevant provisions of the existing directives concerning the use of harmonized standards are also applicable to public service procurement (Article 16). However, products used in public sector procurement are often of only marginal interest to the contracting authority. Article 16(2) is consequently only appropriate when the contracting authorities consider it necessary to specify the technical characteristics of products.

## F. Transparency

The different sectors are clearly differentiated from each other in this respect.

### 1. 'Ex-ante' information

#### (a) Periodic indicative notice

The supplies directive (Article 9(1)) stipulates that the contracting authorities 'shall make known ... as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area of which the estimated value, ... is equal to or greater than ECU 750 000 and which they envisage awarding during the coming twelve months'. This information is to be rapidly published in the Official Journal (deadlines stipulated).

The public works directive contains some differences (Article 12(1)). The value of the works is the same as the threshold for the application of the directive, and the 'essential characteristics' of the markets are specified in the indicative notice. The European Parliament, which is partly responsible for this provision, rejected any exceptions to the publication of such a notice.

Article 17 of the excluded sectors directive combines these provisions but does not stipulate any time limit.

The services directive includes the corresponding provisions from the supplies directive with the identical threshold: ECU 750 000 by category of service (Article 17(1)).

#### (b) Non-periodical prior information

The supplies and works directives (Article 9(2) and Article 12(2) respectively) require publication (with the same deadline as for the periodic notice) of a notice in which the contracting authorities make known their intention to award a public supply contract. The sole exemption is for the negotiated procedure without recourse to competition. These notices are required to contain extensive and essential information about the contracts concerned (selection, standards, etc.).

The excluded sectors directive (Article 16) provides for three types of indicative notice: a compulsory invitation to tender in the case of open procedures (paragraph 1), an optional invitation to tender in the case of restricted and negotiated procedures with prior opening up to competition (paragraph 2(a)) and invitation to qualified tenderers by virtue of a qualification system laid down in Article 23 and itself having been the subject of a specific notice (cf. Article 24, (5) and (6)). Every effort is made to maintain competition while adhering to standard practices in these sectors. No time limit for publication is stipulated, and the notice itself is less informative, preference being given to notification on request.

The proposed services directive requires publication of a notice in which the contracting authorities make known their intention to award a contract by

means of an open, restricted or, in some conditions, negotiated procedure (Article 17(2)). The same applies to the award of a public service concession and the organizing of a contest (Article 17(3) and (4)).

## 2. 'Ex post' information

### (a) Justification by written report

The **supplies** and **works** directives (Article 6(6) and Article 5a(5) respectively) require written reports to be drawn up. These reports, to be forwarded to the Commission at its request, are required to justify the use of the negotiated procedure, with or without prior opening up to competition, including that of the restricted procedure for public supply contracts. The obligation to provide justifications in these documents offsets the flexibility of certain criteria for the use of these procedures. The same applies in the proposed **services** directive (Article 14(3)).

### (b) Notice of the results of procedures

The **supplies** (Article 9(3)), **works** (Article 12(5)), **excluded sectors** (Article 18) directives and the proposal on **services** (Article 18) contain equivalent provisions concerning publication in the Official Journal of a notice announcing the outcome of every contract award to be sent not later than 48 days after the award of the contract. A derogation is provided in respect of 'sensitive' information.

### (c) Notification on request

The **works** directive (Article 5a(1) and (2)) requires, in what represents significant progress compared with the new **supplies** directive, which does not, that the contracting authority indicate, at the request of any candidate or tenderer, either the reasons for the rejection of an application or tender and the name of the successful tenderer, or the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure. The Office of Official Publications of the Community must also be informed. The European Parliament helped in formulating these stipulations.

Equivalent provisions are contained in the **excluded sectors** for a directive concerning the system of qualifications for tenderers (Article 24) and in Article 14 of the **services** proposal.

## 3. Time limits for procedures

These time limits, particularly those concerning receipt of tenders, have been extended considerably in the **supplies** (Article 10) and **works** (Article 13) directives.

In the case of the **excluded sectors** the directive simply stipulates a minimum compulsory time limit (10 days) and an average indicative deadline (3 weeks), while leaving it open to the contracting parties to fix time limits by joint agreement, with any form of discrimination between tenderers, of course, being prohibited (Article 20).

The proposal for a directive on services stipulates that the provisions of the works directive (71/305/EEC) shall be applicable in this connection (Article 19).

To conclude, it should be noted that the works directive represents significant progress on a number of points over the supplies directive; are there therefore lessons to be learnt for the latter? As to the excluded sectors, the arrangements adopted are often the consequence of their specific economic characteristics, although the idea of progress is also present here. The services proposal for a directive, which is directly based on the existing public procurement directives, has made some changes in this area to allow for the specific nature of services by comparison with works and supplies. But the effectiveness of these instruments will depend on there being guaranteed remedies for tenderers harmed by an infringement.

## II. REVIEW PROCEDURES AND REMEDIES

Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts was the subject of the cooperation procedure with the European Parliaments and was adopted by the Council on 21 December 1989<sup>68</sup>.

The Member States are required to implement the measures necessary to comply with the new 'remedies' directive before 21 December 1991 (Article 5). By 21 December 1995, the Commission, in consultation with the appropriate advisory committee, will reconsider the text adopted and propose, where appropriate, any amendments considered necessary (Article 4).

In July 1990 the Commission submitted a proposal<sup>69</sup> laying down review procedures for the excluded sectors. An amended proposal<sup>70</sup> was submitted on 4 June 1991 - under the cooperation procedure - taking a number of amendments by Parliament into account. These amendments distinguished in particular between redress for violation of the directive on the excluded sectors and a mechanism providing general proof of compliance with the directive (the attestation scheme). By 1 January 1993 the Member States will have to have adopted the measures necessary for implementing the new directive (with derogations for Spain, Portugal and Greece - Article 14). By analogy with remedies Directive 89/665/EEC, the proposal stipulates a procedure for a review of the implementation of the directive not later than four years after the application of that directive (Article 13). On 8 June 1991 the Council of Ministers reached an agreement in principle on the adoption of a common position on the amended proposal.

### **A. The reasons for these directives**

Different reasons lie behind the drawing up of these directives:

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<sup>68</sup> OJ No. L 395, 30.12.1989, pp. 33-35.

<sup>69</sup> COM(90) 297 final, 30.7.1990, OJ C 216, 31.8.1990

<sup>70</sup> COM(91) 158 final, 4.6.1991

- The procedure for determining failure to fulfil an obligation (Article 169 of the Treaty) is ponderous and slow and applies only to the Member States.
- The procedures for the award of procurement contracts (cf. point I) contain no provisions for guaranteeing their effective implementation;
- The ways and means of securing redress are very different according to Member State and there are sometimes major lacunae resulting in differences in treatment of tenderers and participants in award procedures.
- Looking ahead to the opening up of public procurement to Community competition it is essential for effective and rapid means of redress to be in place in the event of violations of Community law or national rules incorporating that law.

## B. Content of the directives

### 1. Scope of implementation (Article 1)

The award procedures concerned (Article 1(1)) fall within the scope of amended Directives 71/305/EEC and 77/62/EEC as described above. The proposal for a directive on public service procurement stipulates (Article 41) that the latter are covered by the existing review procedures directive.

The amended proposal of 4 June 1991 applies to all 'excluded' sectors (water, energy, transport and telecommunications - Article 1(1)) and includes in those same articles the provisions already implemented under the remedies Directive 89/665/EEC. The remedy must be effective and rapid and relate to decisions in violation of Community law on public procurement or national rules implementing that law (paragraph 1). Paragraph 2 requires the Member States to ensure that there is no discrimination as a result of the distinction made between national and Community rules.

Paragraph 3 stipulates that the review procedures must be available, under detailed rules which the Member States may establish, 'at least' to any person having or having had an interest in obtaining a particular public supply or public works contract and risks being harmed by an alleged infringement. This wording allows subcontractors for example the option of adding their own complaint to that of the principal undertaking. The Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

### 2. Creation, strengthening and coordination of review procedures (Article 2)

The powers and bodies responsible for the reviews are empowered to:

- (1) take interim measures with the aim of correcting the alleged infringement including measures to suspend the award procedure (paragraph 1a). The effect of such measures need not necessarily be automatic.
- (2) to set aside decisions taken unlawfully (including the removal of discriminatory, technical, economic or financial specifications) (paragraph 1b).
- (3) to award damages (paragraph 1c).

Parliament's contribution to the amended proposal on the excluded sectors includes authorizing the body responsible for the review procedures to choose between measures (1) and (2) above and other measures having an equivalent effect, including the payment of a given sum of money (paragraph 1(c)). The choice is open either to the contracting authorities as a whole or to only some of them. Article 2(5) stipulates that the sum of money payable must be fixed at a deterrent level. Whatever option is chosen, the measures taken under the review procedures must provide for the option of awarding damages to persons harmed by an infringement (paragraph 1(d)).

The bodies responsible for review procedures may, but need not be, judicial in character. However in the latter case, Article 2(8) of Directive 89/665/EEC and Article 2(10) of the amended proposal on the excluded sectors stipulate that guarantees of equivalent procedures must be given. Consequently, the decisions of non-judicial bodies must be accompanied by written reasons, the option of a judicial review must always be open and conditions are also laid down for the appointment of members of these bodies and their qualifications. These guarantees are the result of amendments by the European Parliament which strongly influenced the drafting of the texts as a whole.

The effects of the exercise of powers by the bodies responsible are determined by national law (Article 2(6) of Directive 89/665/EEC and Article 2(7) of the amended proposal on the excluded sectors). It is for the Member States to ensure that decisions taken by bodies responsible for review procedures can be effectively enforced (Article 2(7) of Directive 89/665/EEC and Article 2(9) of the amended proposal on the excluded sectors).

The decision to take interim measures must take into account the probable consequences of the measures for all interests likely to be harmed as well as the public interest. Where it appears that the negative consequences of such measures could exceed the benefits, the decision may be taken not to grant such measures (paragraph 4). However, any such decision shall not prejudice any other claim (where a decision must be set aside prior to the award of damages). Where damages are claimed on the grounds that a decision was taken unlawfully, the Member States may stipulate that that decision shall be set aside prior to an award by a body authorized to make that decision. In such cases it may be stipulated that the powers of the body responsible for the review procedures shall be limited to awarding damages (Article 2(6), second subparagraph, Directive 89/665/EEC and Article 2(7) of the amended proposal on the excluded sectors).

Moreover, the amended proposal on the review procedures in the excluded sectors (paragraph 8) stipulates that a person making a claim for damages shall not be required to prove that he would have been awarded the contract but only that there has been an infringement of Community law and that the infringement adversely affected his chances of being awarded the contract. The basis of the claim consists primarily not in having been denied the award of the contract but of having been prevented from competing on equal terms for its award. This fully reflects one of the principal objectives of the directives intended to open up public procurement, namely equitable organization of the award procedures.

Moreover, given the public-service industry nature of the sectors considered, it can be more difficult for private persons to secure an effective interim measure, hence the importance of relaxing the burden of proof.

There are thus evident similarities between the review procedures laid down in Directive 89/665/EEC and those featuring in the amended proposal on review procedures in the excluded sectors.

### **3. Cooperation between the Commission and the Member States**

The relevant provisions are identical in Directive 89/665/EEC and in the amended proposal on the excluded sectors. They feature in Article 3 and Article 9 respectively. It should be pointed out that in the amended proposal of June 1991 these provisions are contained in Chapter 3 entitled 'corrective mechanism'. Parliament tabled an amendment aimed at strengthening this corrective mechanism. The Commission refused to adopt the amendment in its amended proposal on the ground that it would entail excessive costs.

If the Commission considers, before conclusion of the contract, that a clear and evident infringement of Community provisions relating to the award of public sector procurement contracts has been committed, it may invoke the procedure stipulated in the directives. In that case it shall notify the Member State and the contracting authority of its reasons for considering that a clear infringement exists and ask for it to be corrected.

Within 21 days of receipt of the notification, the Member State concerned shall communicate to the Commission:

- (a) its confirmation that the infringement has been corrected; or
- (b) a reasoned submission as to why no correction has been made. This may rely on the fact that the alleged infringement is already the subject of judicial review proceedings. In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.
- (c) a notice to the effect that the contract award procedure has been suspended if a review is already in progress. The Member State must also inform the Commission of the result of the suspension.

It is also open to the Commission to initiate infringement proceedings under the Treaty (Article 169) by bringing the matter before the Court of Justice and applying for the procedure to be suspended (cf. La Spezia Case, European Court of Justice).

### **4. Specific provisions for review procedures in the excluded sectors**

In addition to the system of remedies at national level and the corrective mechanism, the amended proposal on the excluded sectors also provides for an attestation system and a conciliation procedure. The special features of the sectors considered and of the national legal systems under which the



review procedures must be conducted clearly require a certain flexibility in the proposal.

**(a) The attestation system**

Introduced for the first time in the Community's public-sector procurement arrangements, this is a form of control intended to supplement existing internal controls. Its purpose is to ensure mutual confidence between the interested parties by providing independent confirmation that the systems for awarding contracts are equitable and non-discriminatory and that they take account of the obligations imposed by Community law.

The proposal covers only the essential features of the attestation system (Articles 3 to 8) and does not go into detail. It stipulates (Article 4) that attestation must be carried out at least once a year by an authorized attestor, thereby providing an ongoing and effective assessment of contract award procedures and practices. The attestors must submit a written report (Article 5) and their appointment or dismissal must be subject to guarantees of independence and professional competence (Articles 6 and 7).

**(b) Conciliation procedure**

The proposal on review procedures in the excluded sectors provides for a conciliation procedure at Community level (Chapter 4, Articles 10, 11 and 12). This leaves it open to the parties concerned to settle their differences by mutual agreement. The procedure laid down is flexible, rapid and effective. Nor does it entail prejudice to the rights of those who are parties to proceedings under the review procedure.

**C. Conclusion**

The arrangements for review procedures for the award of public contracts for supplies and public works on the one hand and for services on the other are consequently very similar. They are intended to ensure practical compliance with Community rules on contract award procedures and the attainment of Community objectives in this area. The amended proposal on the excluded sectors, however, also contains features not included in Directive 89/665 and which take into account the special nature of the bodies operating in these sectors from the economic, technical and legal points of view.

**PART 3: ANALYSIS OF THE EXISTING SITUATION IN PUBLIC SECTOR**

**PROCUREMENT IN THE MEMBER STATES**

## INTRODUCTION

It is first necessary to point out that this analysis neither seeks nor claims to be exhaustive.

One of the difficulties in seeking to draw up an exact and detailed study has been the paucity of relevant documents. This is probably due to the 'sensitive' nature of the subject considered, but also to the novelty of Community directives on this subject.

Moreover, the documentation provided by the different Member States, highly uneven in terms of distribution and content, was not sufficient to allow the situation prevailing in the various member countries to be described objectively and equitably.

We have nevertheless sought to provide as wide-ranging and clear an account as possible of the existing situation on the basis of the resources currently available.

### I. TRANSPOSITION OF COMMUNITY DIRECTIVES

#### A. National legislation enacting Community legislation

##### 1. Deadlines for transposition

We shall confine ourselves to the enactment in national law of the supplies (88/2 and public works (89/444) Directives, fixed in those texts at 1.1.1989 and 19.7.1989 respectively. Spain, Greece and Portugal have derogations until 1 March 1992 in respect of these two amended directives, but are required to implement the original directives (77/62 and 71/305). Implementation of the other, more recent directives is stipulated for later dates, viz.:

- 1 January 1992 for the proposal for a directive on public service contract award procedures,
- 1 July 1992 for the amended proposal for a directive on review procedures in the excluded sectors;
- 21 December 1992 for the directive on review procedures for public works and supply contracts;
- 1 January 1993 for the directive on contract award procedures in the excluded sectors.

##### 2. References

The table below sets out, where available, the references for legislation enacted in the different Member States implementing the two amended supplies and public works directives.

SUPPLIES DIRECTIVE 88/295

PUBLIC WORKS DIRECTIVE 89/440

Belgium	Royal Decree of 8 December 1988 Moniteur belge, 17 December 1988, p. 17360	Royal Decree of 1 August 1990
Denmark	Statens indkøbs - cirkulære af 13.11.89 Bekendtgørelse af 7.12.90	Bekendtgørelse N. 565 af 14.9.90 Cirkulære af 14.4.89 (Licitationsloven) Lovtidende 14.8.90
France	Decree No. 236, 17 April 1988, OJ 19.4.89, p. 501	Act 91-3, 3.1.91, OJ 5 January 91, p. 236
Germany	Administrative decree of 22 December 1988 subsequently incorporated into Provision VOZ/A	Law
Greece	Bundesanzeiger No. 45a, 6.3.90	Bundesanzeiger No. 132a, 19.7.90
Ireland	Derogation until 1 March 1991	Derogation until 1 March 1992
Italy	Circular of 23.11.88 of the Department of Finance Act No. 428 of 29 December 1990, Article 13	Act No. 428 of 29 December 1990, Article 12
Luxembourg	Gazzetta Ufficiale No. 10, 12 January 1991 Draft Grand-Ducal regulation implementing EC directives on public supply contracts	Gazzetta Ufficiale No. 10 of 12 January 1992 Draft Grand-Ducal regulation enacting Luxembourg legislation implementing EC directives on public works contracts
Netherlands	Proposal for amending the 1979 Act which implements Directives 77/62 and 80/767	Public works decision 1973 which implements Directive 71/305 'as it may subsequently be amended'
Portugal	Derogation until 1 March 1992	Partial implementation
Spain	Derogation until 1 March 1992	Derogation until 1 March 1992
UK	Treasury guidance notes 12/88 DOE circular 6/89 28.2.89 Welsh circular II/89 Northern Ireland office minute Scottish Development Department circular	Welsh office circular 38/90 Welsh office circular 50/90 Welsh office circular 15/90

## B. Monitoring of transposition

The above table clearly shows the diversity of the legislative means used by the member countries to enact the Community supplies and public works directives under national law.

### 1. The problems raised

The enactment of these directives as national law undoubtedly introduces a number of problems. Firstly, in its VIIIth report to the European Parliament on the application of Community law, the Commission refers to the delays in enacting national legislation affecting implementation of the new directives. Moreover, the national enactment measures introduced in certain Member States are irregular. The United Kingdom, Ireland and Denmark for example resorted to implementation by administrative circular, and this method was not approved by the Commission. Lastly, some member countries have still not notified the Commission of the national transposition provisions they have chosen.

The VIIIth report gives details of the proceedings that the Commission has instituted against certain member countries in monitoring transposition of the directives.

### 2. The infringements discovered

Although Spain, Greece and Portugal are not required to implement the two amended directives until 1 March 1992, they were supposed to have introduced national measures enacting the two original directives. In fact, however, the Commission has brought proceedings in accordance with Article 169 of the Treaty against Spain for the non-comformity of national measures implementing Directives 71/305/EEC and 77/62/EEC. In addition, Portugal is now the subject of a reasoned opinion for failing to notify the Commission of its national measures transposing Directive 77/62/EEC. Other Member States not entitled to the derogation have also been the subject of proceedings. In the case of transposition of the new supplies directive (88/295/EEC), the Commission has initiated proceedings against Italy and the Netherlands for failing to notify it of the relevant measures.

In addition, the Commission has written to the Member States asking them to inform it of their national transposition measures. In general there has been a satisfactory response to this communication, except from Luxembourg, the Netherlands and Italy.

Thus, transposition of the two amended directives on supplies and public works, which strictly speaking should have been effected by 1 January 1989 and 1 July 1989 respectively, is still incomplete. The Member States have tended to delay the enactment of national legislation, and when it has finally appeared it has not always been in the most appropriate form.

It is evident that no real change can be expected in the situation until the complete set of directives relating to public procurement has been correctly incorporated in the national legislations of the different member countries in such a way as to ensure that every facility necessary for a genuine opening up of public procurement within the Community is available to those countries.

## II. IMPLEMENTATION OF COMMUNITY DIRECTIVES

### A. Obstacles to implementation

#### 1. The diversity of methods of organization

The implementation of Community directives on public procurement has been hampered by the fact that procurement is a sensitive and complex area dominated by the prevailing national traditions<sup>71</sup>.

In particular the methods of organizing public procurement differ significantly from one country to another, ranging from intense centralization to complete decentralization of the public purchasing departments<sup>72</sup>.

As is pointed out below, the indicative list of administrative bodies responsible for public-sector purchasing in eight Member States is of greater or lesser length depending on the country, and the public bodies themselves are not necessarily identical.

#### Belgium:

- the state;
- the regions of Flanders, Wallonia and Brussels;
- the Flemish-speaking community, the French-speaking community and the German-speaking community;
- the provinces;
- local authorities and associations of local authorities;
- state universities and other public law institutions or undertakings (SNCB, etc.);
- subsidized private colleges and universities, legal persons in whom the authorities hold a 'preponderant interest' and certain legal persons subsidized by the public authorities.

#### Denmark:

- State, local authorities, hospitals and certain schools.

There are no specific rules on public procurement as such in Denmark. The rules applicable are confined to those laid down at Community level.

#### Britain:

The greater part of public-sector procurement is contracted by certain large departments: the Ministries of Defence, Health, the Environment, Transport and Agriculture.

#### Greece:

The Ministry of Trade and Ministry of Industry, together with various state bodies, including the PPC, OTE, EAS, IKA, etc. The Ministry of Commerce draws

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<sup>71</sup> See G. Guisolphe and Th. Vinois - 'L'ouverture des marchés publics à l'horizon 1993'. Commission of the European Communities.

<sup>72</sup> S. Belujon and P. Posquet, *Moniteur du Commerce International*, Paris, 20 January 1986, p. 28. See also Annex I to Directives 88/295 and 89/440.

up an annual uniform programme of purchases by the state and by various bodies.

In the case of public works: the Ministry of Public Works.

#### Ireland:

- Government ministries, and in particular the Defence and Environment Ministries, whose purchasing sections also act on behalf of other departments;
- state-sponsored bodies, the most important of which in terms of public-sector procurement are:
  - \* Electricity Supply Board
  - \* Bord Gais Eireann (supply and distribution of natural gas)
  - \* Gaelic (Telecommunications)
  - \* Coras Iompair Eireann (road and rail transport)
  - \* Aer Rianta (airport management)
  - \* Aer Lingus (national airline)
  - \* Radio Telefis Eireann (national radio and TV network)
  - \* An Post (post office)
  - \* Local authorities (county councils, county borough corporations)
  - \* Regional health boards
  - \* Harbour authorities
  - \* the universities.

#### Italy:

Central government, and regional, provincial and local authorities, as well as public and quasi-public bodies associated with those authorities are concerned.

Purchases by the Ministry of Defence account for more than 60% of Italian public procurement.

The Provveditorato Generale dello Stato, which answers to the Treasury Ministry, is responsible for providing the equipment and services necessary for the operation of civilian administrative departments of state.

#### Netherlands:

The 'Rijksinkoopbureau (RIB)' is the central body responsible for purchasing equipment and services for government departments. In 1984 it processed centralized orders to a value of nearly ECU 1.159,5m. More than half the purchases whose procurement needs were processed by the RIB were in the education sector. Even so, a number of administrative bodies (universities, hospitals, local authority departments) also make direct purchases. These account for about 80% of total public procurement.

The 'Rijksgebouwendienst' is responsible for equipping the different government departments throughout the country: construction, renovation and maintenance, initial fitting out and furnishing of premises.

The Ministry of Defence buys all military equipment and all other materials required by the armed forces.

There are also two departments that answer to the postal authorities:

- the Royal Automobile Centre (RAC) which buys all vehicles for the government, except for the Ministries of Defence, Justice, Agriculture and the Department responsible for Polders;
- the Office Machine Agency (KMC), which is responsible for purchasing all forms of data-processing equipment.

Germany:

In all cases:

- all Federal Government and Land Government Ministries, government departments directly answerable to them, and all local public authorities (district and local authorities);
- the posts and telecommunications authority (Bundespost), Federal Railways (Bundesbahn), the armed forces (Bundeswehr) and the frontier security forces (Bundesgrenzschutz);
- a good number of public-law establishments, the universities, higher educational establishments, and research institutes financed by public funds.

For complex operations:

- operations carried out by port authorities
- on a case-by-case basis:
- bodies responsible for local distribution of energy supplies and local-authority services.

2. Disparities in review procedures

These coincide with the disparities that can be observed within national review procedures. We have already pointed out that the remedies directive (89/665/EEC), which is supposed to come into force in December 1992 is one of the pillars of the public procurement liberalisation policy since it will ensure implementation and monitoring of the supplies and public works directives. Yet to this day the national review procedures applicable to the award of public procurement contracts still vary widely from one country to another<sup>73</sup>.

All the Member States have administrative review procedures for the award of public procurement contracts, but the terms of reference of the administrative bodies responsible can vary widely from one country to another.

In all Member States the authorities may, on application by an undertaking whose rights have been infringed, take corrective measures in notices of invitation to tender if these contain unlawful or incorrect specifications (Article 2b of Directive 89/665/EEC). The option of suspending the decision awarding the contract is available to the administrative authorities only in a

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<sup>73</sup> See Flamme, Cleary, Gottlieb, Steen and Hamilton. Extracts from the analysis of controls on compliance with the rules concerning public procurement in the Member States. Commission of the European Communities. Consultative Committee on the liberalization of public-sector procurement, information document on ways and means of securing the review of awards of public procurement contracts in the Member States of the Community (EC/90/68).



few Member States (Greece, Denmark, Spain). In other countries (Belgium and the Netherlands) it appears that this option is available, but there are as yet no precedents.

Similarly the setting aside of the decision awarding the contract is not guaranteed in all the Member States (in Greece). The possibility of direct compensation to undertakings whose rights have been infringed by government departments is available only in Denmark and Spain and is hardly ever implemented. Legal traditions and case law have devolved quite different terms of reference from one Member State to another upon judicial authorities that are themselves fundamentally different in each Member State, resulting in major differences in the procedures necessary to secure redress.

In the Danish system, for example, there are no administrative courts, so applications for review must be lodged with the civil courts, whereas in France such applications are nearly always in the province of the administrative courts.

In Belgium a plaintiff can act simultaneously in seeking conciliation before the administrative court and in lodging a claim for damages before a civil court.

In the Netherlands and Germany an application for a decision to be set aside can be lodged with an administrative court, it having been established in case law that the award of a public procurement contract by a government department is an act of private law.

The United Kingdom and Ireland have very specific arrangements. There are no administrative courts but in certain situations firms whose rights have been infringed can bring on action before the court on the basis of either public law or private law.

This means that a third party whose rights have been infringed can apply to the courts to have a decision by a contracting authority set aside in nearly all the Member States except the Netherlands and Germany.

Moreover the option of claiming damages is subject in some Member States (Denmark, Germany, United Kingdom) to restrictions and uncertainties that tend to make it largely theoretical.

The options for third parties to initiate review proceedings are also highly variable, and in some Member States (Germany, Spain) do not exist at all.

The existence of such obstacles, which one might call 'regulatory', i.e. bound up with the actual organization of public procurement and rooted in the historical context and traditions peculiar to each country, has certainly not facilitated implementation of the directives. Our study of the actual situation as regards procedures for awarding public procurement contracts only confirms that the opening up of public sector markets in the European Community is far from being a practical reality.

## B. The award of public procurement contracts in practice

### 1. Firms' reluctance to sue

The public procurement sector is relatively vulnerable to the influence of the local economic and political environment in each Member State. Consequently, undertakings that have been discriminated against often hesitate to go to court for fear of spoiling their chances of obtaining contracts in the future.

In that connection, the Commission's information document shows that only Italy, France, Belgium and Luxembourg have recorded a relatively high or rising number of cases brought by undertakings. In the other Member States such cases are either extremely rare or non-existent. The reasons for this state of affairs may have something to do with the administrative and legal review structures described above.

In addition, undertakings show a distinct lack of enthusiasm in submitting tenders for public procurement contracts open to competition in Member States other than their own<sup>74</sup>, which hardly helps to ensure an effective implementation of the directives.

### 2. The difficulties of effective monitoring

Apart from the reluctance of firms to go to court, the difficulties posed by effective monitoring of public contract award procedures tend not to facilitate practical implementation of the relevant directives. It often happens with the decisions resulting from contract award procedures that irregularities are committed by public-sector buyers, sometimes in genuine ignorance of Community rules but sometimes in bad faith too. The following examples can be cited<sup>75</sup>:

- deliberate sub-division of contracts;
- wrongful use of the negotiation procedure in circumstances not stipulated in the directives;
- incomplete or misleading information to undertakings;
- inclusion of discriminatory clauses in tender specifications.

In addition, the number of public-sector purchasers - and the contracts they conclude - being extremely high, it is very difficult to monitor all the public contract awards in the Community as a whole. In its VIIIth report to the European Parliament the Commission pointed out that it had been possible to carry out checks only on a highly specific and ad hoc basis and that independent specialists with whom a contract had been concluded in 1988 had analysed a number of technical specifications that were liable to contain infringements.

In that same report the Commission lists the different infringements relating to public procurement considered in 1990. Failure to comply with the directives was broken down into three main areas:

- interpretation of the scope of directives and the excluded sectors. Portugal (ANA) and Germany (Duisburg-Ruhrorter Häfen; Munich airport) were served reasoned opinions in this connection;

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<sup>74</sup> G. Grisolphe, Th. Vinois, op. cit.

<sup>75</sup> Ibid.

- failure to publish in the Official Journal of the European Communities for compelling reasons outside the meaning of the term as defined in the directives; this applied in the case of Spain (University of Madrid) and Italy (Istituto Nazionale della Previdenza Sociale).
- criteria for the award of contracts; a reasoned opinion was served on Italy (Consorzio di Bonifica de l'Agro Tortole).

#### CONCLUSION

Consequently, as things now stand in the Member States of the Community, a sufficient level of protection to ensure genuine liberalization in the area of public-sector procurement cannot be said to exist. Problems arise not only as regards the transposition of the directives into national legislation, but even more in their specific implementation in the various member countries. However, certain developments, such as the increase in the number of applications for review by undertakings in certain Member States seem to indicate that the situation is progressing. Clearly, major changes will have to take place when all the directives relating to public procurement have been adopted and incorporated in national legislation. Measures to tighten up the monitoring machinery in this area will then be an essential priority.

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NB: CCC = Commission for the European Communities;  
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