

Public procurement in the excluded sectors

**Commission communication accompanied
by two proposals for Council Directives
relating to water, energy, transport and
telecommunications**

Bulletin
of the European Communities

Supplement 6/88

Pages 80-138

**Proposal for a Council Directive, based on Articles 100a
and 113 of the EEC Treaty, on the procurement proce-
dures of entities providing water, energy and transport
services**

(presented by the Commission to the Council on 11 October 1988)
(Supplement based on COM(88) 377 final)

EUROPEAN COMMUNITIES

Commission

This publication is also available in the following languages:

ES ISBN 92-825-9261-8

DA ISBN 92-825-9258-8

DE ISBN 92-825-9259-6

GR ISBN 92-825-9263-4

FR ISBN 92-825-9262-6

IT ISBN 92-825-9264-2

NL ISBN 92-825-9265-0

PT ISBN 92-825-9266-9

Cataloguing data can be found at the end of this publication

Luxembourg: Office for Official Publications of the European Communities, 1989

ISBN 92-825-9260-X

Catalogue number: CB-NF-88-006-EN-C

Articles and texts appearing in this document may be reproduced freely in whole or in part provided their source is mentioned.

Printed in Belgium

Contents

<i>Introduction</i>	5
<i>Communication on a Community regime for procurement in the excluded sectors: water, energy, transport and telecommunications</i>	6
Introduction	6
Measures on public procurement: the realization of the internal market and industrial policy	6
Industrial, commercial and social implications of opening up public contracts	6
Sectors and subsectors concerned	22
Other policies that should complement Community measures on procurement procedures	53
The external dimension	59
Defence procurement	60
The excluded sectors	60
The problem in general and the need for a new initiative	60
The two sides of the equation: the field of application and the obligations to be imposed	61
The field of application	63
The obligations	67
Sectoral differences	69
The external dimension	70
Application of Community law and remedies	71
Annex and tables	72
<i>Proposal for a Council Directive on the procurement procedures of entities providing water, energy and transport services</i>	79
Explanatory memorandum	79
The problem in general and the need for a new initiative	79
The two sides of the equation: the field of application and the obligations to be imposed	79
The field of application	81
The obligations	88
Relations with third countries	95
Monitoring of progress and evolution of the Directive	97

Proposal for a Directive	98
Title I: General provisions	99
Title II: Technical specifications and standards	103
Title III: Procedures for the award of contracts	104
Title IV: Qualification, selection and award of contracts	107
Title V: Final provisions	110
Annexes	113
<i>Proposal for a Council Directive on the procurement procedures of entities operating in the telecommunications sector</i>	139
Explanatory memorandum	139
Background	139
The field of application	140
The obligations	142
Comments on the Articles of this Directive	143
Relations with third countries	151
Progressiveness of introduction and monitoring of progress	153
Final provisions	153
Proposal for a Directive	154
Title I: General provisions	156
Title II: Technical specifications and standards	156
Title III: Procedures for the award of contracts	156
Title IV: Qualification, selection and award of contracts	157
Title V: Final provisions	157
Annexes	159

Proposal for a Council Directive on the procurement procedures of entities providing water, energy and transport services

Explanatory memorandum

A. The problem in general and the need for a new initiative

1. The Directives in force on the public procurement procedures of supplies and works specifically exclude certain areas of activity from their scope.

2. Thus, the supplies Directive 77/62/EEC¹ does not apply to contracts awarded by bodies which administer transport services; production, distribution and transmission or transport services for water or energy; and telecommunications services. The modification of the supplies Directive adopted in March 1988² reformulates the exclusion so that the Directive's provisions will not apply to contracts awarded by carriers by land, air, sea or inland waterway or in so far as those contracts concern the production, transport and distribution of drinking-water or those awarded by authorities whose principal activity lies in the production and distribution of energy or is to offer telecommunications services. The purpose of these changes in formulation was to clarify the interpretation of the text, in particular, by limiting the transport exclusion to carriers as distinct from public providers of transport infrastructure such as ports and airports.

3. The works Directive 71/305/EEC³ does not apply to bodies which administer transport services nor to contracts awarded by the production, distribution, transmission or transportation services for water and energy. It should also be recalled that bodies responsible for telecommunications services were not specifically excluded from the works Directive with the result that four such bodies which have the status of State authorities are covered, while others are not. The proposed modification of the works Directive seeks to clarify the interpretation of these texts by modifications similar to those recently adopted in the case of the supplies Directive.⁴

4. The reason given for the exclusions was indeed that some bodies with activities in the sectors concerned had public status while others were private. With the exception of works contracts in the telecommunications sector, therefore, it was felt necessary to exclude these sectors from the field of application of the Directive, pending the development of solutions to take account of these special circumstances.

5. This proposal for a Directive is limited to the sectors of water, energy, and transport. The telecommunications sector is subject to a separate proposal which in its operational part is, however, very similar to the present one.

6. The realization of the internal market by 1992 requires that the complementary measures contemplated when the exclusions were first made now be taken. The economic justification for so doing is clear as already explained in recent studies of the benefits to be realized through the realization of the internal market.⁵ In addition, the governments of the Member States meeting in the European Council have repeatedly emphasized the importance of the Community institutions taking as rapidly as possible the decisions necessary for the opening of public contracts.

B. The two sides of the equation: the field of application and the obligations to be imposed

7. As explained above, the main reason given for excluding the relevant sectors in the first place was that a particular activity may be allocated to a 'public' entity in some States, to a 'private' entity in others or in-

¹ OJ L 13, 15.1.1977.

² Directive 88/295/EEC of 22.3.1988: OJ L 127, 20.5.1988.

³ OJ L 185, 25.8.1971.

⁴ COM(88) 354 final 20.6.1988.

⁵ See 'The economics of 1992', European Economy No 35, March 1988.

deed to both. In addition, even the concept of a public entity is highly variable depending on the precise context, national and regulatory. As a result any Community approach to the problem which sought to base itself simply on a distinction between public and private entities would confront enormous difficulties at the outset and probably be doomed to failure. A concept must be developed which addresses the procurement problem in terms which transcend the public/private distinction and permit situations which are in substance the same to be treated equally regardless of differences in legal form.

8. Accordingly, as regards the field of application, the proposal is based on identification of those underlying objective conditions which lead entities in these sectors to pursue procurement policies that are uneconomic in the sense that they do not ensure that the best offer from any supplier or contractor in the Community is systematically preferred but privilege national suppliers.

9. Two types of condition are of particular relevance.

10. First, barriers to entry for potential competitors, whether technical economic or legal, often place an entity, public or private, in a situation in which it is sufficiently insulated from the force of the market that it can pursue other goals than that of always securing the best offer, including the protection of national suppliers and contractors.

11. This position of relative privilege can arise in a number of ways. The entity may have a formal legal monopoly of a territorial character, which is the clearest case, to be found, for example, in the telecommunications field. Even in the absence of a true monopoly, the number of participants may be restricted by technical, legal or economic factors, or some combination of all of these, so that the competitive environment is fundamentally qualified and the comportment of the entities concerned is not market-led.

12. Where goods or services are made available by means of a technical network, for example, the system has a natural tendency to develop into a monopoly or oligopoly.

That natural tendency may well be reinforced by the allocation by the State of special rights or powers relating to the management of the network. Regardless of whether they are public or private, the entities supplying or managing the network are in a position in which competitive forces are so qualified that regulatory or other governmental measures are considered necessary to redress the balance.

13. Indeed, the second type of condition leading to uneconomic procurement, which is often but not always associated with barriers to entry, consists in the means available to a State to influence the present or future operations of an entity. Such means take multiple forms. The public character of an entity often automatically involves such means of influence: control of the entity's management by the state or of its financing, for example. But private entities too can equally be subject to State influence, particularly where a vital activity depends on the State's continued approval, for example, a concession or authorization to carry out that activity. In such cases, it is hardly surprising that, even in the absence of explicit demands, an entity may decide that it is in its long-term interests to accept the State's objectives as its own, despite the short-term cost, and direct procurement to national firms rather than those from other Member States.

14. Where the two conditions, insulation from the market and exposure to State influence, are both present to a significant degree, and perhaps for a period of very many years, the result is that substantial markets are essentially closed to suppliers or contractors from other Member States, however competitive they may be. Indeed, the result in some cases appears to be a firmly closed, vicious circle in which outside firms do not even try, since to do so would be a waste of resources and impossible for a responsible manager to justify.

15. Of course, the two conditions to which reference has been made can be present to a greater or lesser degree. In some cases, it is relatively easy to conclude that, given the known characteristics of a particular area of activity, it should certainly be dealt with as a

matter of priority. At the other extreme, some situations clearly do not require attention at the present time. In the middle are cases in which the correct judgment is more difficult and different views can be advanced. The particular circumstances of each case are considered in paragraphs 35 to 42 below.

16. The obligations to be imposed on entities to be covered by new community instruments must take fully into account their particular character. Public or private, they differ from the essentially administrative organizations typically covered by the existing Directives in having economic or industrial purposes, in addition, to achieve their goals, they frequently rely upon the exploitation of a technical infrastructure which can be complex and highly specialized. They are in a real sense enterprises having much in common with ordinary enterprises that are not subject to the particular conditions outlined above.

17. Accordingly, the obligations to be imposed should not be those long applied to the administrative bureaucracies. More flexibility is required to permit the entities concerned to manage their procurement activities effectively in the light of their particular circumstances. The requirements should not be conceived as a comprehensive regulation of the procurement function, but as the minimum safeguards needed to permit the entities concerned to secure the best offer from all Community firms that are in position to compete.

18. The regime proposed is a framework for sound commercial practice. Much of the detail will be settled by the purchasing entities themselves in accordance with their particular needs and circumstances. Flexibility is provided as to the choice of open, restricted or negotiated procedures and the particular manner in which the procedures are opened to competition. Traditional open tender notices, periodic notices of procurement intentions, invitations to suppliers who have qualified through an accessible qualification system all find their place in the system. The counterpart of this flexibility is that, whatever procedures are used, they will have to be non-discriminatory; to rely on objective

criteria that are compatible with certain framework provisions in the Directive; and, above all, to be transparent and capable of being monitored in order to help create the climate of mutual confidence without which the market opening would not take place in real terms. The main requirements are considered in greater detail in part D below.

C. The field of application

(1) The general approach

19. As explained above, nationalist procurement practices cannot be identified simply with entities having formal public status. Private entities, insulated from market forces and in a close relationship with both the State and their traditional national suppliers, in some cases for very long periods of time, pursue the same kind of policy.

20. The draft proposals seek to identify those situations in the excluded sectors in which, whatever the public or private status of the entities concerned, the objective conditions leading to nationalist purchasing practices can be identified.

(2) The legal mechanism

21. In addition, in order to ensure a high degree of legal certainty, the provisions formulating those conditions, which are of necessity drafted in rather general terms, are complemented by a series of annexes which identify with the maximum degree of precision possible for each Member State the entities concerned. In certain sectors or for certain Member States, the annex consists of a nominative list of entities; in others, it refers to categories of entities defined by reference to national regulations; and in some cases, the annex is a combination of names and categories. The form chosen seeks to give the national legislator as brief and precise an identification as possible of the organizations subject to the Community regime. The annexes will also facilitate the Commission's task of applying the Directives once they are in force. A mechanism for keeping the annexes up to date is also provided.

(3) The sectors concerned

22. The first category of situations covered are those in which a service is provided to the public through a technical network which, by its very existence, limits the scope for competition. Once one network is in place the prospects for competition through an alternative network or new entrants are in practice small. They are non-existent when the natural monopoly or oligopoly receives legal reinforcement through the grant of special or exclusive rights or through mechanisms of public authorization which exclude new entrants.

23. This kind of situation is to be found in a number of contexts in the excluded sectors, including those networks providing a service to the public in connection with the production, transport or distribution of drinking-water, electricity, gas or heat.

24. The second category of cases is in many ways analogous to the first: networks providing a service to the public in the field of transport. Indeed, when the service is provided by a single technical network such as a railway or a metro, the situation is exactly the same. However, in the transport field, the network concept needs to be somewhat broader to include also those systems in which the 'network' is not a technical system like a railway for trains or trams but, as in the case of a municipal bus service, a system of interconnecting routes along which vehicles pass in accordance with conditions laid down by public authorities. Where the State restricts access to such networks, the operating entities, whether they are public or private, are insulated from market forces and subject to State influence, not least as regards their procurement. Accordingly, the proposals cover entities providing services to the public in the field of transport by railway, tramway or trolleybus as well as bus services provided under operating conditions laid down by a public authority including conditions on the routes to be served.

25. The third category of cases concerns those situations in which an entity exploits a geographical area for a given purpose, subject to some form of State concession or authorization. Once again the entities con-

cerned find themselves in a situation in which the impact of market forces is often significantly reduced and they are exposed to the influence of the State through a variety of means, not least their need to have the concession or authorization renewed or to secure other similar concessions or authorizations in the future.

Even when competitive forces are still present to a degree, though qualified, the exposure to State influence through the need to retain the concession or obtain new ones is frequently sufficient to influence procurement behaviour.

26. The proposals accordingly cover two types of situation of this kind: the exploitation of geographical areas either for the purpose of exploring for or extracting oil, gas, coal or other solid fuels or for the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea, land or inland waterway.

(4) Sectoral differences

27. The consultations leading to the preparation of the draft proposal on water, energy and transport have not brought to light sectoral differences which are so numerous or important that they cannot be accommodated in a single instrument. In particular, the provisions concerning technical standards and specifications, contract award procedures and transparency appear to correspond to the needs of all the sectors in question. The provisions on the field of application naturally have a more sectoral character, but they do not put in issue the case for a single instrument. The provisions of the Directive are also capable of further adaptation, should it appear necessary, to take into account additional sectoral specificities to for example, differences in thresholds. Such modifications would not require the proposal to be split up or its structure radically changed.

28. It has also been possible to conclude from the consultations of the particular groups responsible for telecommunications matters, notably the Senior Officials Group on Telecommunications (SOGT), that the

operational parts of this Directive and those of the separate proposal for a Directive on the telecommunications sector¹ may, to a very large extent, be the same. The particular context of the opening up of public contracts in the telecommunications sector, as laid down in the Commission's Green Paper² suggests, however, that it would be better not to incorporate the telecommunications sector in this Directive.

(5) Exceptions for competitive activities

29. The entities so far identified are insulated from market forces to different degrees. However, the existence of a degree of competition is not sufficient by itself to ensure open procurement.

30. Several of the activities identified above are to a certain extent in competition with each other (substitution competition). This applies to different sources of energy (electricity, gas, oil, coal, other solid fuels, heat). It also applies to different types of transport (road, rail, air, sea, inland waterway). However, procurement will not become market-led, even when the services of one category of entity can be replaced by another, if both categories are equally insulated from the market, as is frequently the case. Moreover, while procurement according to purely commercial criteria is more likely when entities are operating in competition with others which are not protected or exposed to government influence, much will depend on whether other factors in any event permit the entities concerned to pursue uneconomic procurement practices. The availability of public financing, through one route or another, is just such a factor. Accordingly, it is hardly surprising that this kind of competition has not proved sufficient to guarantee open Community-wide procurement. All study findings suggest that in the categories of activity so far discussed procurement has a strongly national bias.

31. Competition may also exist within a given sector or subsector, however, since the barriers to entry may be more or less absolute. As a general rule, though not invariably, as the level of competition increases so the potential for State influence declines.

The general rule will not apply, however, when the State retains very direct means of influence such as the power to grant valuable concessions for which the entities concerned are also in competition. Procurement practices can then easily become part, though not necessarily an explicit part, of the bargaining process by which the allocation of concessions and their terms are settled.

32. Nevertheless, in certain particular contexts, the level of competition may be such that it is safe to conclude that, taking account of all the factors likely to affect procurement, the entities concerned will be led by the market to pursue fair and open procurement policies. If that is so, it would seem sensible to exclude such cases from the scope of the new regime. Regulation would have no useful purpose and the proposals would be open to the criticism that they seek regulation for regulation's sake.

33. For this reason, the draft proposals contain a number of provisions designed to take account of situations in which the market is, in form and in reality, open and other factors likely to lead to nationalist procurement absent.

34. In the transport field, recent developments have shown that a high level of deregulation can be realized for bus services to the public. An authorization from a public authority may be still required but only to guarantee basic requirements of public safety and order. Within those limits, a large number of operators can and do operate on the same routes serving the same destinations under the same legal conditions. It seems no more sensible to include such bus operators in the new procurement regime than taxi firms. Accordingly, the draft proposal excludes from its field of application public bus services where precisely formulated conditions are met which ensure that the operators will be motivated by market considerations to the exclusion of other factors.

35. Moreover, provision should be made generally for purchases for resale or hire in a

¹ COM(88) 378 final.

² COM(87) 290 final of 30 June 1987.

competitive market. Such situations can arise, for example, in the gas and electricity sectors where the entities in question sell or hire equipment to users for use on their premises — for example, kitchen and other domestic appliances. The draft proposal accordingly excludes purchases of equipment for such purposes from its scope.

36. Not least because of developments in the Member States and at Community level relating to the opening to competition of activities in the excluded sectors, further scope may exist for limiting the coverage of the new Community regime. However, it is important that such limitations are well defined. If they are not, they could empty the regime of much of its real content and also produce unjustified imbalances in the impact of the regime in different Member States. Each demand will need to be considered on its merits as the proposal makes its way through the legislative procedure.

(6) The proper limits of the regime: excluded and doubtful cases

37. Certain categories of activity should clearly be covered by the new Community regime. Other kinds of activity can be identified the inclusion of which would be inappropriate. For example, road transport, other than the provision of bus services to the public, falls into this category. Road haulage and private coach services in the Member States are essentially open to all comers, as generally are transport services by sea and inland waterway. The remaining restrictions and means of influence available to Member States do not appear to play a significant role in influencing the procurement practices of these operators as a whole. For these reasons, these categories of activity have not been included. Their exclusion does not imply, however, that no action could or should be taken when, in a particular case, it becomes apparent that a State has intervened to influence procurement decisions. The action to be taken will depend on the means of leverage used by the State and instruments available to the Commission under the Treaty, for example, pursuant to Article 30 or Community rules on State aids.

38. Three categories of activity are more difficult to classify, however. These are the provision of transport services to the public by aircraft; the transformation, transport or distribution of petroleum products; and the provision of transport services to the public by sea.

39. As to airlines, a number of factors are present which argue in favour of their inclusion. Whether public or private, they operate in most cases in a highly regulated environment in which their access to routes is still limited and depends on State authorization.

40. On the other hand, on cross-frontier routes, they are often in direct, if qualified, competition with one another and with lines from third countries. The extent of this competition is increasing in accordance with Community policy, in particular as regards access to the market and the setting of air fares.¹ In addition, on the supply side, for both airframes and engines, the industry is highly concentrated. The main European suppliers are already organized in various kinds of cross-frontier cooperative venture. Avionics are increasingly supplied as an integrated part of the aircraft as a system, reducing the scope for airlines to choose national suppliers for these components even if they should wish to do so. Finally, the need to achieve operating efficiency, whatever the qualifications to competition on particular routes, is a powerful incentive to purchase the right aircraft for the job.

41. It is therefore appropriate to leave airlines out for the time being while studies will continue so that the situation will be kept under review. Further proposals, perhaps by way of amendment to those now under discussion, could be made should it subsequently appear necessary.

42. As for the transformation, transport and distribution of petroleum products, the structure of the industry is much more var-

¹ Council Regulations Nos 3975/87/EEC and 3976/87/EEC, as well as Council Directive 87/601/EEC and Council Decision 87/602/EEC (OJ L 374, 31.12.1987); Council Directive 83/416/EEC (OJ L 237, 26.8.1983) and the proposal to amend it: COM(86) 424 final/2 of 8 September 1986.

ied and decentralized than is the case in the energy and transport subsectors suggested for inclusion in the proposal. The single technical network does not exist as it does for gas, electricity and heat. Pipelines certainly exist, but they form only a relatively small part of the total distribution system, which includes transport and distribution by sea, rail, inland waterway and road. Barriers to entry are much less significant, and a relatively large number of entities, public and private, compete directly with each other in all Member States except in Spain. These competing enterprises do not operate on the basis of concessions or similar exclusive rights as is the case in the exploration and exploitation field.

43. In the light of these characteristics, the need for including these entities is far from being clearly established. In addition, given the fact that there is likely to be little installation of new refining of pipeline capacity in the near future, their inclusion would in any event probably have very limited economic significance. Accordingly, it is, as for the airlines, not appropriate to include the sector for the time being but to keep the matter under review.

44. Sea transport is an area in which most but not all companies are private. Exceptions exist in several Member States in the form of autonomous bodies under government supervision, or departments of the State railways, or State ownership.

45. As regards shipbuilding and repairs, bunkering and other supplies, the great majority of shipping lines appear to place their contracts on a commercial basis. This is influenced by the pressure of competition under which European Community shipping companies find themselves operating on international routes and the intensity of price competition in the shipbuilding sector. The extensive State aids which are available for shipbuilding are regulated at Community level by Directive 87/167/EEC.¹

46. Furthermore, recent developments regarding the regulation² of international sea trade create a greater openness in that market. Barriers to entry do not in general appear to create conditions favourable to State influence to favour national suppliers.

47. At the same time, the provision of State aids to cover losses of some particular ferry lines, as granted in certain Member States, has apparently led to discrimination when contracts are awarded in a number of cases. However, this problem is limited in its economic importance. It hardly seems significant enough to justify bringing the whole sea transport sector within the Directive's scope. To try to include only ferry lines associated with the difficulty would in turn create a number of complex problems including the need to ensure fairness between competing entities many of which are not in receipt of the aids which lie at the root of the problem.

48. Accordingly, it would seem preferable to deal with this particular problem through Community control of aids to the entities concerned rather than the inclusion of all or part of the sea transport sector in the new procurement regime.

(7) Differences in economic development

49. In accordance with Article 8(c) of the EEC Treaty, the Commission has examined the extent of the effort that the economies of the Member States will have to sustain in applying this Directive in the period up to 31 December 1992 (see the communication on a community regime for procurement in the excluded sectors: water, energy, transport and telecommunications, in particular, Parts II A 2, 3, 4). In the light of this analysis, no particular provision in the Directive appears necessary other than Article 23 on regional preferences (see paragraph 104 below). Other possible measures may be necessary depending on the precise consequences of the opening of the markets in question, as also explained in the communication (Part II, 4).

(8) Comments on Title I of the Directive

50. Title I of the proposed Directive determines the field of application by providing,

¹ OJ L 69, 12.3.1987.

² Council Regulations Nos 4055/86, 4056/86, 4057/86, 4058/86, 4059/86; OJ L 378, 31.12.1986.

along with the necessary definitions in Article 1, both general and sector-related rules:

(i) sector-related rules are contained in Article 2, which is indeed the cornerstone of the Directive, and in Article 5;

(ii) general rules are contained in Articles 3, 4, 6, 7 and 8.

The Articles may be explained in more detail, by taking the definitions first, followed by the relevant provisions on each of the sectors grouped together, and then the general rules.

Comments on Article 1 — Definitions

51. Paragraphs 1 to 3 define the entities in the public sector from a legal point of view which according to Article 2(1) are among those which have to apply this Directive. Such entities include the public sector as defined for the purposes of the existing Directives 77/62/EEC and 71/305/EEC, in paragraph 1 and 2. In addition the public sector also embraces, according to paragraph 3, those public undertakings which are the object of the Directive on financial transparency.¹

52. Paragraph 4 defines the term 'associated or affiliated undertakings' which is needed in connection with the exemption from major parts of this Directive, as granted according to Article 2(7) to holders of concessions in the water sector, for intra-group transactions. The term 'concession' is defined in Article 1(6).

53. Paragraphs 5, 7 and 8 correspond to the definitions used in the existing Directives for the kind of contracts covered, the participants in award procedures, and the types of award procedures.

54. Paragraphs 9 to 13 concern the terminology used in the area of standards and technical specifications. They are in line with the definitions used in the existing Directives, as regards paragraphs 9 to 12, with some simplified language notably in paragraph 9. It should also be noted that reference is explicitly made to 'quality assurance requirements', in order to clarify that technical spe-

cifications may also deal with such matters as the necessary organization and monitoring of production processes, and with the durability of products and their maintenance. Paragraph 13 corresponds to the definition proposed in the draft Directive on construction products.²

Comments on sector-related rules

55. Article 2(1) is the key provision in that it specifies which types of entities have to apply this Directive and that they must have activities of the sort described in paragraph 3.

56. As regards the types of entities, the public sector as defined in Article 1(1 to 3) is covered. In addition other entities of any legal status are also covered if they fulfil the criteria of paragraph 1. The latter do not need to be defined any further because the criteria are sufficient in themselves to identify these entities.

57. The criteria laid down in subparagraphs (a) and (c) do not apply to entities in the public sector, for the following reasons. First, entities in the public sector frequently do not need any special or exclusive rights to exclude competitors. Their public status and powers are sufficient of themselves to produce this result, for example, when a local authority provides a service for the provision of drinking-water. Furthermore, the concept of 'principal activity' does not fit for the public sector. When, for example, local authorities are involved in the supply of water or energy or transport, this is normally only one part of a multitude of functions which they assume. Irrespective of how widespread their activities are, they must be the first ones to apply procurement rules. Article 2(1) does not therefore subject them to the criteria laid down in (a) and (b).

58. Except for the public sector, incidental activity in one of the relevant sectors is, however, not sufficient to bring an entity

¹ Directive 80/723/EEC, 25.6.1980; OJ L 195, 29.7.1980.

² Initial Commission proposal: COM(86) 756 final/3, 17.2.1987.

within the scope of this Directive. According to subparagraph (c), a private contracting entity must have its 'principal activity' in the relevant sector. This serves to exclude from this Directive cases like, for example, those of certain industrial enterprises which operate their own electricity generating unit and sometimes supply electricity to the grid.

59. It must be noted, as regards the types of entities covered by this Directive, that some of them have to apply the disciplines of the GATT Agreement on Government Procurement, for example, certain electricity producers in Luxembourg.¹ In order to make clear that these entities will continue to be subject to their GATT obligations, Article 2(1) is 'without prejudice to the Community's international obligations'.

60. The relevant rules for the water sector are contained in:

(a) Article 2(3)(a)(I), which declares those entities covered which supply or manage a network for drinking-water;

(b) Article 2(6), which for the sake of coherence extends the coverage of this Directive to their other water-related activities;

(c) Article 2(7), which exempts from this Directive, under certain conditions, intra-group transactions which holders of water concessions want to make with associated or affiliated undertakings; Article 17(5) should also be mentioned: it establishes a minimum time for the receipt of candidatures for water concession contracts;

(d) Article 5(a), which exempts from this Directive the purchase of water, thereby reflecting the fact that when water is purchased for a supply network, it is not normally purchased in the same way as equipment or works; it must normally be purchased from a limited number of sites where it is available and from which it can be readily transported to the distribution system.

61. The relevant rules concerning the energy sector are contained in

(a) Article 2(3)(ii) and (iii) as regards electricity, gas and heat;

(b) Article 2(3)(b)(i) as regards exploration for or extraction of oil, gas or solid fuels;

(c) Article 5(b), which exempts from the Directive the purchase by contracting entities in the energy sector of energy and of fuels for the production of energy; within the energy sector, however, the purchase of electricity poses specific problems in that there exist identifiable obstacles to cross-frontier purchases; these obstacles will have to be removed by the end of 1992. The Commission will therefore propose, in the course of 1989, action to achieve this objective.

62. The relevant rules concerning the transport sector are:

(a) Article 2(3)(c), which determines the kind of transport service covered, and which contains the definition of a network with regard to the transport sector, as explained in paragraph 24 above;

(b) Article 2(4), which excludes certain contracting entities operating in competition with other bus transport providers under the same conditions, as explained in paragraph 34 above; according to paragraph 4, such contracting entities, even if operating on the basis of authorizations, are considered as not being under State influence because the authorizations in the sector are related to such factors as road safety rather than being an instrument of controlling access to the market.

63. With regard to those sectors where the supply or management of a network is the relevant activity for the purposes of this Directive, it is a common requirement that the network is used for providing a service to the public. This requirement is needed so as to limit the application of the Directive to entities having a genuine public utility function. Cases like those in the transport sector of a company owning a school-bus system should not be covered. It follows that 'to the public' means to the public at large, with no other limitations concerning the potential users of the transport service than those related to public order in general.

In the energy sector, 'to the public' comprises supplies for both household and industrial purposes, including high-voltage supplies.

¹ Directive 80/767/EEC adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC, Annex I: OJ L 215, 15.8.1980, p. 17.

Comments on general rules in the field of application

64. The general rules contained in Articles 3, 4, 6, 7 and 8 all provide for exclusions from this Directive. Articles 3 and 4 concern procurements for which there is no need for regulation. Article 6 and 7 take account of State security and international agreements. Article 8 excludes small contracts.

65. Article 3 takes account of the fact that contracting entities may not exclusively be active in one of the sectors concerned. Examples of such other activities include electricity producers involved in commercial deep-freezing or fish farming and water suppliers involved in cable television, and the like. These activities are not relevant to the purposes of this Directive. The field of application of this Directive requires, however, that such activities be clearly identified. Moreover, transparency of the procurement market requires that they are made known to the interested suppliers or contractors. Article 3 serves these purposes by providing that such activities must be notified to the Commission and published in the Official Journal, before being exempted from this Directive. Notifications of such activities could be made even before this Directive comes into force so that they can be published, and the relevant activity be excluded from this Directive from the start.

66. Article 4 excludes from this Directive another group of contracts, namely those where the contracting entity intends to sell or hire the equipment purchased in a competitive market. Paragraph 35 above has already given some examples. Contrary to Article 3, the notification requirement is addressed to the Member States, which should be in a position to inform the Commission about the relevant legal provisions, which are those, in particular, that ensure that other potential market participants are free to sell or hire the products concerned under the same conditions as the contracting entity concerned.

67. Article 6 is a safeguard clause for legitimate State security interests. Its scope is limited in that it must be by virtue of specific rules that contracts may be excluded from

this Directive, or by reference to the basic State security interests which are well-defined in all Member States. The Article is based on a corresponding provision added to the supplies Directive in its Article 2 (2c).

68. Article 7 corresponds to Article 3 of the supplies Directive.

69. Article 8 provides for the thresholds which the value of contracts must exceed in order to be covered by this Directive. The figures are those, as regards supplies, of the existing Directive, and as regards works, of the modified Commission proposal for modification of the works Directive. The calculation method laid down in paragraphs 2 to 4 is largely the same as in the supplies Directive, with the relevant provisions on works contracts being added notably in paragraphs 5 and 6. Extensive consultation on whether the thresholds should be raised or lowered produced no conclusive result. For every argument in one direction, a counterargument can be advanced. It accordingly seems sensible to maintain the present levels for the time being. They are themselves the end result of long and intensive debate in the Community institutions and elsewhere. Further consideration of the matter may however be necessary with regard to the appropriateness of the proposed figures for particular sectors given their specific characteristics, including progress being made on relevant standards and common technical specifications. However, the ECU 5 000 000 threshold for works contracts is a maximum which the Commission does not intend to change. On the contrary, it might well prove necessary to lower this figure on the basis of more detailed studies now being undertaken.

D. The obligations

(1) Standards and technical specifications

(a) General considerations

70. The concept underlying Articles 9 to 11 is basically the same as the one adopted on this matter by the Council, concerning the revision of the Directive on supply contracts. ¹

¹ Directive 88/295/EEC, 22.3.1988: OJ L 127, 20.5.1988.

Its main objective is to ensure as much as possible that contract specifications do not have the effect of excluding foreign suppliers. To that effect,

(i) European standards, common technical specifications and European technical approvals are made obligatory, subject to a number of exceptions;

(ii) there is an explicit prohibition on technical specifications which have the effect of favouring or eliminating certain undertakings, except in strictly defined cases;

(iii) performance specifications and standards that indicate functional requirements rather than particular techniques should be used unless there are sound reasons for not doing so; and

(iv) transparency of the contract specifications to be used on a permanent basis is ensured by an obligation to tell interested suppliers in advance what they are or where to find them.

71. It goes without saying that this provision can apply only in so far as the contracting entity has a choice for developing the contract specifications. There is no choice, however, where mandatory requirements, for example, in the form of technical regulations, exist. Such requirements must obviously be respected.

72. In order to make the reference to European standards and common technical specifications meaningful, the Commission has approached the European standardization bodies CEN and Cenelec to identify how far standards and specifications relevant to the excluded sectors exist already and where new, priority standardization activities should be undertaken. Expert groups have started identifying the most urgent needs with regard to developing mandates for CEN and Cenelec.

73. It is important to understand that the contracting entity remains free to use in-house specifications for those technical aspects which are not subject to any of the prescribed standards or specifications, or for dealing with situations which are not addressed by these standards or specifications.

74. In accordance with the principles of Community standardization policy and of Community law, contracting entities cannot under all circumstances insist on compliance with those standards or specifications which they have laid down in the contract documents. The principles of equivalence and mutual recognition of national standards oblige them to accept any offers which are based on satisfactory but different national standards of other Community countries. There is no specific provision on this matter in the Directive, but these principles apply as a direct effect of Article 30 of the Treaty, in accordance with the decisions of the European Court of Justice as recalled in the preamble.

75. Furthermore, the particular situation in the area of construction products is reflected by the provisions of this Directive. Article 23(4) provides for a particular prohibition on the proposed rejection of offers concerning works contracts for reasons related to the technical specifications of the construction products involved, in accordance with the latest state of the discussion on the construction products Directive.

(b) Comments on Title II of the Directive

76. Article 9 — Application of European standards, common technical specifications and European technical approvals

The differences compared to the same provision in the revised supplies Directive are as follows.

There is no particular preference in paragraph 1 to legally binding national technical rules. As explained above, compliance with such rules is self-evident.

The derogation provided for in paragraph 2(b) does not refer to Directive 86/361 concerning telecommunications terminal equipment because the terminals market will be fully liberalized by virtue of Commission Directive 88/301/EEC of 29 April 1988.¹

¹ OJ L 131, 27.5.1988.

Paragraph 3 does not include the record-keeping and information requirements which are part of the equivalent provision of the supplies Directive. However, the recording requirement has not been deleted from this Directive. It is now included in Article 27, which regroups, for the purpose of simplicity, all record-keeping requirements related to the provisions of this Directive.

77. Article 10 — Other standards and specifications

The differences compared to the revised supplies Directive are as follows.

Paragraph 1 does not state that the principles of equivalence and mutual recognition of standards must be respected. As explained above, these principles apply, irrespective of whether or not they have been mentioned, when offers received by the contracting entity refer to other national standards than those of the country where the contract is to be awarded.

Paragraph 2 is new. It reflects the idea that performance-related standards or specifications leave more choice to the supplier and are therefore more appropriate than design standards, for the purpose of market opening. However, provision is made for justified deviations from this principle.

Paragraph 3 is somewhat different from Directive 77/62/EEC (Article 7(2)) in that it focuses on the need not to discriminate against certain undertakings. It does not prohibit, however, favouring or eliminating certain products. It must indeed be possible to require the product to be of a particular material, or performance, and thereby to eliminate others.

78. Article 11 — Availability of technical specifications

This Article goes beyond the new provisions retained for Directive 77/62/EEC in that it requires contracting entities to inform interested suppliers about those technical specifications which will be applied in forthcoming procurements. In order to avoid the dispatch of voluminous texts, references may suffice where suppliers can have access to the full

texts. Contracting entities are free to make the relevant information available against payment of a fee which must not in itself, however, operate as a barrier to trade. This provision corresponds to the request of suppliers for having as much specific information as possible at an early stage in order to have a longer lead-time for preparing participation in award procedures. It also reflects the widespread practice of some entities to lay down and make available the technical specifications which they regularly apply.

(2) Procedures and transparency

(a) General considerations

79. In industrial contexts like those in which many of the entities in the excluded sectors operate, procurement is frequently not a matter of discrete arms-length transactions in a traditional market. As is increasingly the case for all industrial enterprises, the procuring entity is in a more permanent, organic relationship with a group of suppliers and contractors with which it cooperates to achieve important goals like improved product quality, reliability in the short and long term, timeliness of supply ('just in time') and new product development. This close relationship with suppliers and contractors is particularly necessary when procurement relates to technically sophisticated, complex equipment and installations which are central to the performance of the procuring entity's public service mission, be it the provision of a continuous energy or water supply, reliable transportation according to a fixed schedule or some other service upon which the community at large depends to complete its daily business.

80. The regime proposed accordingly provides for the maximum possible degree of flexibility as to the choice of award procedure, and the way in which competition is invited. The counterpart to this necessary flexibility is the transparency of the particular system that each entity applies.

(b) Comments on Title III of the Directive

81. The provisions of this Title deal with the following major aspects:

- (i) the choice of award procedures;
- (ii) the choice of how to make a call for competition under each of the procedures;
- (iii) formal requirements concerning publication in the *Official Journal of the European Communities*;
- (iv) minimum time-limits established for each phase of the award procedures.

82. Contracting entities will according to Article 12(1) have a free choice between procedures which have the characteristics of any one of the procedures described in Article 1. Thereby, they will enjoy substantially more flexibility than under Directives 77/62/EEC and 71/305/EEC, which make the use of the negotiated procedure and, concerning supply contracts, the choice of the restricted procedures subject to certain conditions. The provisions of Article 12 do not attempt to fix which award procedure is appropriate for what kind of contract. It is rather the entities themselves which will decide. It would, however, be no great surprise if the open procedure were mainly used for purchasing standard off-the-shelf items and the negotiated procedures were applied in case of complex and sensitive projects.

83. The objective of introducing competitive bidding requires that there should be a call for competition as part of whatever award procedure has been chosen. The proposed provisions on this matter are designed with particular care in order to allow for a maximum of flexibility and to avoid any undue bureaucracy. The underlying concept is that entities may choose between the different ways of approaching the potential suppliers which are current practice already. There are two exceptions from these principles.

84. In open procedures, the 'normal' tender notice is mandatory according to Article 13(1). It is indeed an essential part of the open award procedure that any interested supplier has the benefit of a tender notice to which he is free to respond if he so wishes.

85. In negotiated procedures, a call for competition would not make sense in certain situations where there is no prospect for any

competition at all or where the existing competitors are known in any case. These situations are listed in Article 12(2) along the lines accepted by the Council with regard to Directive 77/62/EEC and in accordance with the Commission proposals for modifying Directive 71/305/EEC.

86. The particular ways and means for making a call for competition in the other cases are described in Articles 13(2) and (3).

87. The normal tender notice according to Article 13(2)(a) is an option which should be available to entities if they so wish even in the case of restricted or negotiated procedures.

88. The possibility of making a call for competition, according to Article 13(2)(b), by inviting suppliers who have undergone a qualification test reflects the current practice of many entities in the excluded sectors. Inviting qualified suppliers could not by itself be considered as a sufficient call for competition because those other suppliers who have not (yet) qualified would have no chance to compete. A call for competition could be considered as having been made only if those other suppliers had a chance to qualify. It is therefore necessary to establish the condition that the existence of the qualification system is publicly known, that the rules of operation are available, and that a minimum standard of fairness in the operation of the qualification system is guaranteed. These requirements are laid down in Article 20. It may be noted that the notice concerning qualification systems is not mandatory but its publication is a prerequisite for the entity to be able to invite only qualified suppliers to take part in an award procedure.

89. The periodic notice of Article 13(3) is a survey which entities have to publish once a year. The information contained in it will normally be of a rather general nature. However, the periodic notice offers the opportunity to any interested suppliers to approach the entity concerned for more detailed information on specific contracts to which the contracting entity decides to make

reference; therefore it can also serve the purpose of a call for competition provided that those suppliers who have stated their interest get a chance to participate when particular award procedures are initiated. It is evident that suppliers who intend to sell to contract-

ing entities should have a strong interest in monitoring periodic notices.

90. The ways and means for making calls for competition are summarized in the following table:

Call for competition Award procedure	'Normal' notice Art. 13(1) and (2)(a)	Periodic notice Art. 13(3)	Qualification system Art. 13 (2)(b)
Open procedure	obligatory	—	—
Restricted procedure	optional	optional	optional
Negotiated procedure with prior call for competition	optional	optional	optional

91. The provisions of this Title can be explained in more detail as follows.

92. The list of cases in which negotiated procedures may be applied without call for competition, figuring in Article 12(2), is essentially a compilation of the relevant provisions of the revised supplies Directive and of the proposals for revision of the public works Directive.

Differences compared to those provisions are:

(i) In subparagraph (a), the possibility of all tenders being irregular has been added. The requirement that the original terms of the contract must stay the same in the negotiated procedure has been deleted because these terms may subsequently be modified anyway. There is no requirement for a report to the Commission.

(ii) According to subparagraph (d), contracting entities are dispensed from making a call for competition whether or not they are responsible for the situation of extreme urgency.

(iii) In subparagraph (e), a time-limit for not making any call for competition has been introduced following the example of subparagraph (g).

(iv) In subparagraph (f), there is no limit as regards the proportion of the value of additional works compared to the value of the original contract.

(v) In subparagraph (g), the duration during which the negotiated procedure may be applied in the circumstances referred to has been extended to five years.

(vi) A new subparagraph (h) has been added in order to allow purchases on commodity markets to be made according to the rules of these markets which in any case guarantee competition.

(vii) A new subparagraph (i) has been added which allows contracting entities to use the occasion for making bargains by purchasing from suppliers which are in bankruptcy or any other of the situations described in Article 20(1)(a) of the supplies Directive.

93. Article 14, on periodic notices, is in line with the corresponding provision of the revised supplies Directive, as regards subparagraph (a), and with the Commission's modified proposal for revising the public works Directive, as regards subparagraph (b).

It should be borne in mind that this Article does impose the inclusion in the periodic notices of all contracts which are envisaged for the next 12 months at the time when the periodic notice is drawn up. However, only those envisaged must be covered. Where additional projects are developed, or additional funds become available later in the year, there are two possibilities: either the award procedure will be initiated in the same year by other means of calling for competition (except where no call is required), or the

contract will be included in the periodic notice of the following year, unless the project is abandoned.

Equally the Article does not require that contracts included in a periodic notice must be launched during the period covered by that notice. If they are not, they would simply have to be included in the periodic notice of the following year.

94. Article 15, on publication of results of procedures, attempts to strike the right balance between the need to ensure transparency in the public procurement market and respect for confidential information. The compromise consists in making a post-award publication mandatory, but in allowing its contents to be reduced to the bare minimum where confidentiality or other obstacles to disclosure of information are at stake. In this case, the contracting entities may decide what information they would like to give to interested suppliers on a bilateral basis. The time-limit set by paragraph 3 allows sufficient time to pass by before the notice is published for possible subsequent debriefings to individual suppliers to take place in a non-controversial way.

95. Article 16, on general rules on publication of notices, lays down certain formalities for the publication of notices. They largely correspond to the rules of the existing Directives. Cross-references to the existing Directives are not made on this issue, in order that the text should be self-explanatory.

96. The time-limits laid down in Article 17, concerning the different phases of award procedures, are indispensable despite the need to make the rules on the excluded sectors as flexible as possible. Partly contradictory interests have to be reconciled in fixing them. On the one hand, contracting entities may want to proceed very quickly for certain procurement; indeed this may not present problems for those of their suppliers with whom they have long-standing relationships. On the other hand, too short time-limits are the most evident and one of the most efficient means of excluding notably foreign suppliers who have to overcome certain handicaps which do not exist for domestic suppliers, such as language problems. Arti-

cle 17 provides for the time-limits accepted by the Council for modification of Directive 77/62/EEC.

97. In addition, Article 18 also provides for time-limits within which the contracting entities have to respond to requests for information. These are also based on the provisions of the existing Directives. There is no express rule as regards the costs of any documents to be sent. However, charges for such documents should not be higher than their real cost and must not in any case be fixed in a discriminatory way.

(3) Criteria for the selection of bidders and for the award of contracts

(a) General considerations

98. The relevant provisions of the Directive may be subdivided between those dealing with:

(i) qualification and selection of participants (Articles 19 to 21);

(ii) award of contracts (Articles 22 and 23).

99. As regards qualification and selection of participants, the relevant provisions are of a different nature:

(i) Articles 19 and 20 are part of a new concept which establishes the general principles according to which the contracting entities can fix their own rules;

(ii) Article 21 is based on Directive 77/62/EEC and the current state of discussions concerning the revision of Directive 71/305/EEC.

The new concept underlying Articles 19 and 20 reflects the need to avoid any unnecessary formalities and to allow for a maximum of adaptation to the particular circumstances in which each individual contracting entity operates. In order to meet these criteria, common general principles are laid down in Article 19 for any stage before and during award procedures where contracting entities need to select between interested suppliers, i.e.:

(a) when enterprises apply for qualification; Article 20 specifies how the qualification system must be handled;

(b) when they request to participate in restricted or negotiated procedures; Article 21 lays down the basic principles.

The general principles contained in Article 19 are based on the interpretation given by the Court of Justice to Article 30 of the Treaty. Paragraph 3 leaves it to the contracting entities to determine their own rules within these limits.

As a counterpart for the freedom thereby created, it is, however, necessary that the rules fixed by contracting entities are laid down in writing, and that they must be sent to anybody interested. Without this, the conditions of the market would become totally obscure rather than more transparent, since the rules applied by individual contracting entities will be different from one to another.

The provisions of Title IV are also applicable in those cases where contracting entities have entrusted third parties with qualification or selection of participants, or with awarding the contract in so far as those third parties act as agents for and on behalf of the contracting entity.

100. The general approach to rules on the award of contracts follows the provisions of the existing Directives very closely. It provides a considerable degree of flexibility for the contracting entities. Unless they choose to base the award decision on the lowest tender, they can, according to Article 22 (1)(a), take into account any relevant aspect related to the object of the contract.

Article 23 also repeats provisions from the existing Directives. There are certain contracting entities in the excluded sectors which by national law have to apply regional preference rules, mainly among those entities which belong to the public sector. The Directive on the excluded sectors accordingly takes exactly the same approach as the existing Directives.

(b) Comments on Title IV of the Directive

101. Article 19(1)(b) is to be interpreted in the context of the case-law of the European

Court of Justice. It requires contracting entities to recognize existing tests or proofs in so far as they are relevant for its purposes.

102. Article 20(1) allows the opening of qualification systems to interested suppliers from abroad to take place in a progressive way. Contracting entities can respond to objective constraints in dealing with new applications by programming their examination over a given period of time. They must, however, give some precise information on the time schedule to the applicants. The real cost of the examination may be charged to applicants provided this is done in a non-discriminatory manner.

Paragraphs 4 and 5 reflect the two existing ways of operating a qualification system: either on a permanent basis or on an *ad hoc* basis in connection with specific investment projects.

103. As regards Article 22, the catalogue of criteria listed in paragraph 1(a) is not exhaustive. However, the term 'economically most advantageous tender' does not allow reference to macroeconomic or social, regional or other criteria which are not relevant to the objective of the contract.

Paragraphs 3 and 4 deal with tenders which do not fully conform to the contractual requirements.

Paragraph 3 clarifies that contracting entities may themselves decide to what extent they would accept alternative proposals, by fixing the hard core of requirements from which no deviations would be accepted. In the interest of transparency they must, however, specify in the contract documents whether they are ready to consider variants.

Paragraph 4, concerning construction products, reflects the principles of mutual recognition of such products as proposed by the Commission in the proposal for a Directive on construction products.

Paragraph 5 is a particularly important provision because of the differing cost calculation basis which may be underlying tenders from other Member States. The purpose of market opening and competitive purchasing

would not be achieved if tenders which are low but sound were rejected because they could at first sight be considered abnormally low and therefore unreliable. Paragraph 5 identifies accordingly the cases in which an apparently very low tender may not be rejected.

Paragraph 5 also states that contracting entities, when considering that a very low offer is unreliable because it is based on a State aid, may reject such offers. The main purpose of this provision is not to make contracting entities instrumental in the application of the rules on State aids of the Treaty. Their own interest requires that they be allowed in an explicit way to reject such offers. Without such a clause, entities would, according to the second subparagraph of paragraph 5 ('exceptionally favourable conditions'), be obliged to accept tenders which might not afterwards be carried out if the State aid had to be reimbursed.

Article 23, dealing with regional preference rules, corresponds in its paragraph 1 to Article 25(4) of Directive 77/62/EEC and refers to national rules which require the application of other than the normal criteria, or a different weighting of them, in awarding individual contracts. It does not cover rules, however, which aim at giving preference to certain tenderers by such methods as market quotas.

Paragraph 2 establishes, as in the recently modified supplies Directive, the basis for a general solution to the question of preference schemes. The existing national schemes should come to an end not later than end 1992 in the absence of a new Community regime which the Commission has indicated its intention to propose. It does not exempt Member States, in the period up to 1992, from their obligations to respect the rules of the EEC Treaty and of the GATT Agreement on Government Procurement.

E. Relations with third countries

(a) General considerations

104. Third-country firms are watching with growing interest the Community's new impe-

tus to establish a common procurement framework as a key element in the realization of its internal market by 1992. They are focusing especially on the Community's moves towards opening procurement in the excluded sectors because of their obvious economic and technological importance and also because fierce international competition in these sectors is forcing all participants to seek new markets. Opening procurement in the excluded sectors could under certain conditions result in access to large contracts becoming available to firms of third-country origin, either directly or through their subsidiaries established in the Member States. In other words, the Community is running a serious risk of unilaterally making its domestic market more accessible to third-country firms if the Directives on the excluded sectors fail to take proper account of the external dimension.

105. Furthermore, in parallel with the Community's efforts to create the conditions whereby domestic industry can exploit the single European market, discussions have been under way to strengthen and extend the scope of the GATT procurement Code, with the US in particular pushing for the inclusion of entities engaged in telecommunications and power generation. It should be recalled that at present the procurement practices of entities in the excluded sectors fail largely outside the scope of GATT disciplines. The Community clearly has an important interest in ensuring that its enterprises have access to third-country markets in the sectors concerned. The Community has accordingly supported the GATT broadening exercise, though the outcome, including the timing of any future agreement, is at present hard to predict.

106. Discussions are also under way between the Community and EFTA countries concerning possibilities for further mutual opening of public procurement. The implications of these discussions for procurement in the excluded sectors are also uncertain at the present time.

107. In these circumstances, the adoption of Community legislation opening procurement in the excluded sectors needs to be accompanied by measures designed to achieve the

following general objectives. First, provisions are needed to defend the Community's commercial interests and preserve its negotiating position by making no unilateral concession but on the contrary creating a positive incentive for third countries to give guarantees of equal access to similar markets. Second, Community producers should, where necessary, be given the necessary time for the industrial adaptation required to meet the objectives of 1992 and the day when reciprocal access is finally agreed.

108. As to the content of Community legislation in this field, it should explicitly address the problem of offers made by firms established within the Community. Situations in which offers are made by firms established entirely outside the Community are in practice relatively rare and, in any case, the Directives will simply not apply to them. On the other hand, where an offer is made by a firm established in a Member State, the Directives will apply to it even if the firm is a subsidiary or agent of a third-country firm and the goods or services to be rendered under the offer have their origin entirely in that third country.

109. After having examined various possible approaches, the Commission considers that the best means for the Community to realize these important objectives is to provide for a regime whereby, in the absence of relevant international obligations, contracting entities are placed under no obligation to apply the provisions of the Directives to offers having their origin outside the Community. For this purpose, an offer is considered as having its origin outside the Community when more than half its value represents goods or services produced or performed outside the Community. However, in the case of offers from subsidiaries or agents, a substantial part of the value of the offer may represent economic activity within Member States, and can thus be considered to be of Community origin. In addition, where a Community offer is equivalent to one from a third-country firm or to one of third-country origin, the Community offer should be preferred.

110. The equally important counterpart to these provisions, which preserve the position

of the Community in relation to third countries, is a mechanism which will permit the Council, on a Commission proposal, to extend the benefit of the provisions of the Directives to third-country undertakings or undertakings offering goods or services of third-country origin. This mechanism makes it clear that the Community is not simply seeking to protect its own market, but is in a position to implement agreements with third countries on equal market access, whether reached through multilateral or bilateral negotiations. Indeed, the fundamental purpose of the provisions is to provide a firm basis for negotiations with third countries.

Comments on Article 24

111. Article 24(1) provides for contracting entities to be able to exclude offers when less than half the value of the goods or services to be rendered is of Community origin. Paragraph 4 provides definitions of the value of products manufactured and of services performed outside the Community. However, paragraph 2 indicates that the contracting entities must choose a Community offer if offers are equivalent, except when this acceptance would oblige it to acquire material having different technical characteristics, thus creating unreasonable and disproportionate difficulties, from existing material (paragraph 3). At the same time paragraph 5 provides for a mechanism whereby the Council, on a Commission proposal, can extend the benefit of the provisions of the Directive to undertakings or offers of third-country origin.

112. This approach ensures that, for the time being, contracting entities are placed under no obligation to apply the provisions to an offer unless a substantial part of its value represents economic activity within Member States. It thus preserves the status quo, allowing contracting entities to reject offers not meeting the Community origin criterion or to reject firms not having a real connection with the Community.

113. The proposed approach also takes into account the need to give a clear preference to a Community offer where offers are equivalent. For the purpose of comparing prices, a

difference of up to 3% in favour of a non-Community offer shall be disregarded. This provision is designed to facilitate the application of the approach in practice. It should be stressed that this preference still leaves the possibility for the contracting entity to choose a non-Community offer on the basis of a sound technical reason in relation to the operation and maintenance of existing material, even where a non-Community offer is being evaluated on the basis of the lowest price criterion and is within the 3% margin.

114. The provision permitting and requiring contracting entities to exclude non-Community offers will ensure that the Community does not open its market unilaterally. The position of the Community is thus preserved in relation to both multilateral and bilateral negotiations.

115. The extension provision provides a specific mechanism for arrangements for equal market access to be made between the Community and third States, should such negotiations produce positive results.

116. This approach is, however, not applicable in so far as the GATT Agreement on Government Procurement¹ applies. It is therefore necessary to provide that those contracting entities which have to apply the Agreement (examples are given in the footnote to point 59 above) must continue to do so. Article 24 is accordingly without prejudice to the obligations of the Community or its Member States in relation to third States.

F. Monitoring of progress and evolution of the Directive

(1) General considerations

117. Implementation and monitoring of progress of market opening are the objectives in particular of Articles 27 (internal reports), 28 (statistical reports) and 30 (review clause). These provisions may at first sight appear to be heavy-handed and bureaucratic. They are, however, of fundamental importance. The opening up of procurement markets in the excluded sectors is a very complex and sensitive undertaking. It can succeed only if it is clear from the outset that everyone con-

cerned will have to fully comply with the rules. Without everyone being seen as conforming to the rules, the necessary climate of confidence can never be established. The prospect for making a realistic review after four years, and for developing meaningful and necessary modifications would equally be hampered if statistical evidence on the operation of this Directive was missing. The Commission intends furthermore to pursue other ideas for assessing progress in market opening in order to keep the degree of bureaucracy required by this Directive as low as possible.

(2) Comments on Title V of the Directive.

118. The other relevant provisions of this Title deal with:

- (i) technical adaptations of certain provisions;
- (ii) coming into force, adaptation of the existing Directives, and transpositions into national law.

119. Article 25 enables currency adaptations in the context of the European Monetary System to be taken into account on a regular basis, and subject to a confirmation or a revision of the calculation method.

120. Article 26 provides the criteria and the method for adjusting the field of application of this Directive by way of modification of the annexes. It thereby creates the necessary margin of manoeuvre with regard to changes in the market place, such as those which may follow from privatization, deregulation, and market liberalization policies.

The procedure envisaged in Article 26(2) corresponds to the one agreed by way of Council Decision 87/373/EEC¹ for cooperation with advisory committees.

121. Article 29 is necessary for establishing a priority for the Directive on the excluded sectors for those cases where public contracting entities are also in the field of appli-

¹ OJ L 71, 17.3.1980, p. 44.

² OJ L 197, 18.7.1987.

cations of the existing Directives on public supply contracts and public works contracts.

Second, it enlarges the exclusion of the water sector from the existing Directives with regard to contracts related to hydraulic engineering, irrigation, land drainage and sewage. These contracts should be subject to the same rules as those concerned with drinking-water for the reasons already given.

Proposal for a Council Directive

on the procurement procedures of entities providing water, energy and transport services

The Council of the European Communities

Having regard to the Treaty establishing the European Economic Community and in particular Articles 100a and 113 thereof,

Having regard to the proposal from the Commission,

in cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

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

Whereas successive European Councils have drawn conclusions concerning the need to realize a single internal market;

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

Whereas Article 97 of the Euratom Treaty prohibits any restrictions based on nationality as regards companies under the jurisdic-

tion of a Member State where they desire to participate in the construction of nuclear installations of a scientific or industrial nature in the Community;

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

Whereas the White Paper on completing the internal market contains an action programme and a timetable for opening up public procurement markets in sectors which are currently excluded from Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts,¹ as last amended by the Act of Accession of Spain and Portugal, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts,² as last amended by Directive 88/295/EEC;³

Whereas among such excluded sectors are those concerning the provision of water, energy and transport services;

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

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

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

¹ OJ L 185, 16.8.1971.

² OJ L 13, 15.1.1977.

³ OJ L 127, 20.5.1988.

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

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

Whereas the purchase of water as such and of energy, as well as the purchase of fuels for the production of energy, takes place at present under conditions for which procurement rules of the type proposed for supplies of goods are inappropriate, while the problems posed by purchases of energy and fuels in the energy sector will be addressed in the context of the initiatives to be taken to realize the Community's internal market in energy;

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

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

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

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

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

Whereas in the area of standards and technical specifications it is necessary to adopt common rules taking fully into account Community policy in the field;

Whereas contracting entities must be able to reject offers which, because they are based on State aids, are unreliable;

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

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

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

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

Whereas it is desirable for national provisions in favour of regional development to be included in the Communities' objectives;

Whereas the Commission should review the functioning of this Directive and the effects which it has had, after four years, in order to make any necessary further proposals,

Has adopted this Directive:

Title 1 — General provisions

Article 1

For the purposes of this Directive:

1. '*Public contracting entities*' means public authorities and public undertakings.

2. '*Public authorities*' means the State, regional or local authorities, bodies governed by public law or associations formed by one

or several of such authorities or bodies governed by public law. A body is considered to be governed by public law where it:

- is established for the specific purpose of meeting needs in the general interest, and
- has legal personality, and
- has an administrative, managerial, or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law, and
- is financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law.

3. '*Public undertakings*' means:

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

- hold the major part of the undertaking's subscribed capital; or
- control the majority of the votes attaching to shares issued by the undertakings; or
- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

4. An '*associated or affiliated undertaking*' means any undertaking over which the contracting entity may exercise directly or indirectly a dominant influence or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it. A dominant influence on the part of an undertaking shall be presumed under the circumstances set out in point 3 above.

5. '*Supply and works contracts*' are contracts for pecuniary interest concluded in writing between one of the contracting enti-

ties referred to in Article 2 and a tenderer, and which have as their object:

(a) in the case of *supply contracts*, the purchase, lease, rental or hire-purchase of products with or without options to buy. The contract may in addition cover siting and installation operations provided that their value is lower than that of the products;

(b) in the case of *works contracts*, either the execution or both the execution and design of works related to one of the activities referred to in Annex X or the realization by whatever means of building or civil engineering works taken as a whole that are sufficient of themselves to fulfil an economic or technical function for the user.

6. A '*concession*' is a contract concluded in writing between a contracting entity which is a public authority within the meaning of point 2 and a contracting entity which is not a public contracting entity within the meaning of point 1 whereby the latter accepts the responsibility for constructing, supplying or managing a network falling within the scope of Article 2(3)(a)(i) at its own expense and risk, in return for a remuneration.

7. A supplier or contractor who submits a tender shall be designated by the term '*tenderer*' and one who has sought an invitation to take part in a restricted or negotiated procedure by the term '*candidate*'.

8. '*Open, restricted and negotiated procedures*' are the purchasing procedures applied by contracting entities whereby:

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

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

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

9. '*Technical specifications*' means any of the technical prescriptions contained in particular in the tender documents, which de-

fine the characteristics of a work, material, product or supply, in such a manner that it fulfils the use for which it is intended. These technical prescriptions may include quality, performance, safety or dimensions, as well as requirements concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling. In relation to works contracts, they may also include the test, inspection and acceptances for works and methods or techniques of construction and any other technical conditions, in relation to the finished works and to the materials or parts which they involve.

10. A *'standard'* is a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory.

11. A *'European standard'* is a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as a *'European Standard (EN)'* or *'Harmonization Document (HD)'* according to the Common Rules of those organizations.

12. A *'common technical specification'* is a technical specification drawn up with a view to uniform application in all Member States of the Community.

13. A *'European technical approval'* is a favourable technical assessment of the fitness for use of a product for a particular purpose, based on fulfilment of the essential requirements for building works for which the product is used.

Article 2

1. Subject to paragraphs 4 and 7, and without prejudice to the Community's international obligations, the provisions of this Directive shall apply to the award of supply and works contracts by contracting entities which:

(a) are public or operate on the basis of special or exclusive rights or an authorization granted by a competent authority of a Member State; and

(b) in the case of public contracting entities, have as one of their activities any of those defined as being relevant for the purposes of this Directive by paragraph 3;

(c) in the case of contracting entities which are not public, have as their principal activity any of those defined as being relevant for the purposes of this Directive by paragraph 3 or any combination thereof.

2. The contracting entities identified in Annexes I to IX fulfil the criteria set out above.

3. Relevant activities for the purposes of this Directive are:

(a) the supply or management of networks providing a service to the public in connection with the production, transport or distribution of:

(i) drinking-water; or

(ii) electricity; or

(iii) gas or heat;

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

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

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

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

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

4. Contracting entities providing bus transport services to the public within the meaning of paragraph 3(c) shall be excluded from the provisions of this Directive provided that:

(a) they enjoy no special or exclusive right to provide those services either in general or in a particular geographical area; and

(b) other entities are free to provide those services under the same conditions as the contracting entities.

5. For the purposes of applying paragraph 1(a), a contracting entity shall be considered to operate on the basis of special or exclusive rights when:

(a) for the purpose of constructing the networks or facilities to which paragraph 3 refers, it may take advantage of a procedure for the expropriation or use of property or place network equipment on, under or over the public highway;

(b) in the case of paragraph 3(a) it supplies a network which is itself managed by an entity on the basis of special or exclusive rights or an authorization granted by a competent authority of a Member State.

6. This Directive shall also apply to contracts awarded by contracting entities whose activities are described in paragraph 3(a)(i), in so far as the contracts are in connection with hydraulic engineering projects, irrigation, land drainage or the disposal or treatment of sewerage.

7. A contracting entity benefiting from a concession within the meaning of Article 1(6) in relation to an activity described in paragraph (3)(a)(i) may award supply or works contracts without respecting the provisions of Titles II, III and IV when it intends to award such contracts to undertakings with which it is associated or affiliated, provided that:

(a) for those cases where the concession contract of which it is a beneficiary has been concluded after the coming into force of this Directive, a call for competition has been made through the publication of a tender notice in the *Official Journal of the European Communities* drawn up in accordance with Annex XI; and

(b) the entity enclosed a comprehensive list of these undertakings with its candidature for the concession, and has updated that list following any subsequent changes in relationships between the undertakings.

Article 3

This Directive shall not apply to contracts which the contracting entities award exclusively for purposes other than the pursuit of their activities as described in Article 2(3), provided that, except in the case of public authorities:

(a) the activities have been notified to the Commission, and

(b) the Commission has published notification of their exclusion, after verification, in the *Official Journal of the European Communities*.

Article 4

1. The provisions of this Directive shall not apply to contracts for the supply of products purchased for resale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire such products, and other entities are free to sell or hire them under the same conditions as the contracting entity.

2. Member States shall notify the Commission of the products falling within the scope of paragraph 1 and of any relevant legal provisions.

Article 5

This Directive shall not apply to contracts:

(a) in the case of the contracting entities specified in Annex I for the purchase of water;

(b) in the case of contracting entities specified in Annexes II, III, IV and V, for the purchase of energy or for the supply of fuels for the production of energy.

Article 6

This Directive shall not apply to contracts when their execution must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.

Article 7

1. This Directive shall not apply to contracts governed by different procedural rules and awarded:

(a) pursuant to an international agreement concluded between a Member State and one or more non-member countries and covering supplies or works intended for the joint implementation or exploitation of a project by the signatory States; every agreement shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts set up by Council Decision 71/306/EEC;¹

(b) to undertakings in a Member State or a non-member country in pursuance of an international agreement relating to the stationing of troops;

(c) pursuant to the particular procedure of an international organization.

Article 8

1. This Directive shall apply to contracts whose value, net of VAT, is not less than:

— ECU 200 000 in the case of supply contracts;

— ECU 5 000 000 in the case of works contracts.

2. In the case of supply contracts the basis for calculating the contract value shall be:

— in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for its duration, or, where their term exceeds 12 months, its total value including the estimated residual value;

— in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the monthly instalment multiplied by 48.

3. In the case of regular supply contracts or of contracts which are to be renewed within a given time, the contract value may be established on the basis of:

— either the aggregate cost of similar contracts concluded over the previous fiscal year or 12 months, adjusted, where possible for

anticipated changes in quantity or value over the subsequent 12 months;

— or the estimated aggregate cost during the 12 months following first delivery or during the term of the contract, where this is greater than 12 months.

The selection of the evaluation method shall not be used with the intention of avoiding the application of this Directive.

4. In cases where a proposed procurement specifies option clauses, the basis for calculating the contract value shall be the highest possible total purchase, lease, rental, or hire-purchase permissible, inclusive of the option clauses.

5. Contracts may not be split up with the intention of avoiding the application of this Directive. For the purpose of establishing the contract value for the application of paragraph 1:

— the value of products of the same type must be added up when contracts for these products are awarded at the same time but in different parts;

— the value of all contracts must be added up where a work is the subject of several lots involving separate contracts.

6. The value of works contracts shall include the value of any products or services which are made available to the contractor by the contracting entity and which are necessary for the execution of the contract.

Title II — Technical specifications and standards

Article 9

1. The technical specifications concerning materials, products, supplies, or works shall be defined by reference to national standards implementing European standards or by reference to common technical specifications or European technical approvals.

2. Contracting entities may derogate from paragraph 1 if:

¹ OJ L 185, 16.8.1971.

(a) the standards do not include provision for establishing conformity, or technical means do not exist to establish satisfactorily conformity with these standards;

(b) the application of paragraph 1 would prejudice the application of Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications;¹

(c) use of these standards would oblige the contracting entity to acquire supplies incompatible with equipment already in use or would entail disproportionate cost or disproportionate technical difficulties, but only as part of a clearly defined and recorded strategy with a view to a changeover, within a determined period, to European standards or common technical specifications;

(d) the project concerned is of a genuinely innovative nature for which use of existing standards would not be appropriate.

3. In so far as contracting entities are obliged to publish a tender notice according to Article 13(1) or do so voluntarily according to Article 13(2)(a), they shall record in that notice, unless it is impossible, the reasons for invoking paragraph 2.

Article 10

1. In the absence of European standards, common technical specifications or European technical approvals, the technical specifications may be defined by reference to other standards.

In this case, it is appropriate to make reference in order of preference to:

(a) national standards implementing international standards accepted in the country of the contracting entity;

(b) other national standards of the country of the contracting entity;

(c) any other standard.

2. Standards and specifications that indicate performance requirements rather than design or description characteristics shall be preferred unless the contracting entity has objective reasons for considering that such

standards are inadequate for the purposes of the contract.

3. Technical specifications which mention goods of a specific make or source or of a particular process and which have the effect of favouring or eliminating certain undertakings shall not be used unless such specifications are indispensable for the subject of the contract. In particular, the indication of trade marks, patents, types or specific origin of production shall be prohibited; however, such an indication accompanied by the words 'or equivalent' shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.

Article 11

1. Contracting entities shall make available to interested suppliers or contractors on demand the technical specifications, concerning materials, products, supplies, or works which they procure regularly or which they intend to apply to procurement covered by periodic information notices within the meaning of Article 14. Where such technical specifications are based on documents available to interested suppliers or contractors, a reference to those documents shall be sufficient.

2. Contracting entities shall include the technical specifications in the general documents or the contractual documents relating to each contract.

Title III — Procedures for the award of contracts

Article 12

1. Contracting entities may choose any of the procedures described in Article 1(8) provided, subject to paragraph 2, a call for competition has been made in accordance with Article 13.

2. Contracting entities may use the negotiated procedure without prior call for competition in the following cases:

¹ OJ L 36, 7.2.1987.

(a) in the absence of tenders or where all tenders are irregular in response to an open or restricted procedure;

(b) in the case of supply contracts, when the contract will be executed purely for the purpose of research, experiment, study or development. However, this provision shall not extend to quantity production to establish commercial viability or to recover research and development costs;

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier or contractor;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time-limits laid down for open and restricted procedures cannot be adhered to;

(e) in the case of supply contracts, for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. This procedure may only be applied, as a general rule, during the five years following the award of the original contract;

(f) in the case of works contracts, for additional works not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying out of the work described therein, on condition that the award is made to the contractor carrying out such work:

— when such works cannot be technically or economically separated from the main contract without great inconvenience to the contracting entities; or

— when such works, although separable from the execution of the original contract, are strictly necessary to its later stages;

(g) in the case of works contracts, for new works consisting of the repetition of similar works entrusted to the contractor to which the same contracting entities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded after a call for competition. As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting entities when they apply the provisions of Article 8. This procedure may only be applied, as a general rule, during the five years following the conclusion of the original contract;

(h) for goods quoted and purchased on a commodity market,

(i) for purchases from suppliers who are bankrupt or being wound up, whose affairs are being administered by the court, who have entered into an arrangement with creditors, whose business activities have been suspended or who are in any analogous situation arising from a similar procedure under national laws and regulations.

Article 13

1. Contracting entities which intend to award a contract by open procedure shall make known their intention by means of a tender notice in accordance with Annex XII A.

2. Contracting entities which intend to award a contract by restricted or negotiated procedure with a prior call for competition may choose to make the call:

(a) by means of a notice drawn up in accordance with Annex XII B or Annex XII C; or

(b) by inviting candidates who have qualified in accordance with a qualification system meeting the conditions of Article 20 which has been the subject of a notice drawn up in accordance with Annex XIII.

3. A call for competition shall also be considered to have been made by means of a periodic indicative notice within the meaning of Article 14 on condition that:

(a) the contract relates to supplies or works covered by the notice;
and

(b) the notice indicated that the contract would be awarded by restricted or negotiated procedure; and

(c) the contracting entities provide all candidates who have indicated in writing their interest to take part in the procedure with an opportunity to confirm their interest in receiving an invitation on the basis of more detailed information relating to the particular contract.

4. All notices referred to in this Article shall be published in the *Official Journal of the European Communities*.

Article 14

1. Contracting entities shall make known, at least once a year, by means of a periodic indicative notice drawn up in accordance with Annexes XIV A and B and published in the *Official Journal of the European Communities*:

(a) in the case of supply contracts, the total procurement envisaged for the coming 12 months for each product area of which the estimated value, taking into account the provisions of Article 8, is equal to or greater than ECU 750 000;

(b) in the case of works contracts, the essential characteristics of the works contracts envisaged of which the estimated value is equal to or greater than ECU 5 000 000.

2. A periodic notice need not include information on contracts which would prejudice the legitimate commercial interests of the contracting entity.

Article 15

1. Contracting entities which have awarded a contract shall make known the results of the procedure by means of a notice published in the *Official Journal of the European Communities*. The notice shall be drawn up in accordance with Annex XV.

2. Where publication of the information envisaged in the model notice would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular undertakings, public or private, or might prejudice fair competition between suppliers or contractors, the entities may limit the contents of the notice to the fact that the contract has been awarded.

3. The notices referred to in the preceding paragraphs shall be dispatched at the latest 48 days after the award of the contract in question.

Article 16

1. The length of the notices referred to in the preceding Articles shall not exceed one page of the *Official Journal of the European Communities*, that is to say approximately 650 words.

2. The contracting entities must be able to supply proof of the date of dispatch.

3. The notices shall be published in full in their original language in the *Official Journal of the European Communities* and in the data bank TED. A summary of the important elements of each notice shall be published in the other official languages of the Community, the original text alone being authentic.

4. The Office for Official Publications of the European Communities shall publish the notices not later than 12 days after their dispatch. In the case of the accelerated procedure, referred to in Article 17(4), this period shall be reduced to five days.

Each edition of the *Official Journal of the European Communities* which contains one or more notices shall reproduce the model notice or notices on which the published notice or notices are based.

5. The cost of publication of the notices in the *Official Journal of the European Communities* shall be borne by the Communities.

6. Contracts in respect of which a notice is published in the *Official Journal of the European Communities* pursuant to Article 13(1) or (2)(a) shall not be published in any other way before that notice has been dispatched to the Publications Office of the *European Communities*. Such publications shall not contain information other than that published in the *Official Journal of the European Communities*.

Article 17

1. In open procedures the time-limit for the receipt of tenders shall be fixed by contracting entities at not less than 52 days from the date of dispatch of the notice.

2. In restricted procedures and negotiated procedures with prior call for competition, the time for receipt of requests to participate fixed by the contracting entities shall be not less than 37 days from the date of dispatch of the notice or the letter of invitation.

3. In restricted procedures, the time-limit for receipt of tenders fixed by contracting entities may not be less than 40 days from the date of dispatch of the written invitation.

4. In cases where urgency renders impracticable the time-limits laid down in paragraphs 2 and 3, contracting entities may fix the following time-limits:

(a) a time-limit for receipt of requests to participate which shall be not less than 15 days from the date of dispatch of the notice or the letter of invitation;

(b) a time-limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender.

5. Contracting entities which wish to award a concession in the water sector, pursuant to Article 2(7)(a), shall fix a time-limit for receipt of candidatures which shall be not less than 52 days from the date of dispatch of the notice.

Article 18

1. The contract documents must be sent to the suppliers or contractors by the contracting entities as a general rule within four working days of receiving their application.

2. Provided it has been requested in good time, additional information relating to the contract documents shall be supplied by the contracting entities not later than six days before the final date fixed for receipt of tenders. In the case of Article 17(4), the time-limit may be reduced to four days.

3. Where tenders require the examination of voluminous documentation such as lengthy technical specifications, a visit to the site or an on-the-spot inspection of the documents supporting the contract documents, this shall be taken into account in fixing the appropriate time-limits.

4. Contracting entities shall invite selected candidates simultaneously and in writing. The letter of invitation shall be accompanied by the contract documents and supporting documents. It shall include at least the following information:

(a) the address from which any additional documents can be requested and the final date for making such a request; also the amount and terms of payment of any sum to be paid for such documents;

(b) the final date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;

(c) a reference to the tender notice published;

(d) an indication of any document to be annexed;

(e) the criteria for the award of the contract if these are not given in the notice.

5. Requests to participate in contracts and invitations to tender may be made by letter, or by any appropriate means of telecommunication. If by the latter, they must be confirmed by letter.

Title IV — Qualification, selection and award of contracts

Article 19

1. The qualification of suppliers or contractors and their selection to participate in res-

stricted or negotiated procedures shall be based on criteria that are objective and non-discriminatory. Contracting entities shall not, in particular:

(a) impose obligations of an administrative, technical or financial nature on some suppliers or contractors that are not imposed on others;

(b) require tests or proofs that duplicate objective evidence is already available.

2. The criteria for exclusion specified in Article 23 of Directive 71/305/EEC and in Article 20 of Directive 77/62/EEC shall be considered objective and non-discriminatory.

3. Contracting entities shall lay down the criteria and rules according to which they will qualify or select candidates. These criteria and rules shall be made available on demand to any interested supplier or contractor.

4. Contracting entities shall respect the confidential nature of information made available by suppliers or contractors for the purposes of qualification, selection or participation in a contract procedure.

Article 20

1. Contracting entities which operate a system or qualification of suppliers or contractors shall take a decision as to qualification within a period of six months from the presentation of an application unless for objective reasons notified to the applicant within two months of the application a longer period is necessary. In such cases, the contracting entity shall inform the applicant of the reasons justifying the longer period and of the date by which its application will be accepted or refused.

2. Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal. The reasons must be based on the criteria for qualification referred to in Article 19(1).

3. A written record of qualified suppliers or contractors shall be kept, which may be div-

ided into categories according to the type of contract for which the qualification is valid.

4. Contracting entities may bring the qualification of a supplier or contractor to an end only for reasons justified by the criteria referred to in Article 19(1). The intention to bring a qualification to an end must be notified in writing in advance to the supplier or contractor, together with the reason or reasons justifying the proposed action.

5. Where the qualification system is of indefinite duration, it shall be the subject of a notice drawn up in accordance with Annex XIII and published annually in the *Official Journal of the European Communities*, indicating the purpose of the qualification system and the availability of the rules concerning its operation.

6. Where the qualification system is not of indefinite duration, it shall be the subject of a notice in the *Official Journal of the European Communities* indicating, in addition to the information required by paragraph 5, the duration of the system, which shall not be longer than a period of three years.

Article 21

1. Suppliers or contractors which have requested to participate in a contract procedure may not be excluded from the procedure for reasons other than those laid down by the contracting entity and available from it on demand. Such reasons may include the objective need of the entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the contract procedure and the resources required to complete it.

2. Groupings of suppliers or contractors may not be refused as regards the submission of tenders or participation in a contract procedure. Groupings shall not be required to assume a specific legal form in order to submit a tender or to negotiate. However, should a grouping be awarded the contract it may be required to do so, provided that a specific legal form is necessary for the satisfactory performance of the contract.

Article 22

1. The criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria such as: delivery date, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, price; or

(b) the lowest price only.

2. In the case referred to in paragraph 1(a), the contracting entities shall state in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance.

3. Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which meet the minimal specifications required by the contracting entities. Contracting entities shall indicate in the contract documents whether variants will be considered together with the minimal specifications to be respected and any special requirements for the presentation.

4. Contracting entities shall not reject offers concerning works contracts for reasons related to the technical specifications laid down in the contract documents if the products described in the offer are fit for their intended use, that is, have such characteristics that the works in which they are to be incorporated, assembled, applied or installed can, if properly designed and built, satisfy the essential requirements within the meaning of Council Directive,¹ when and where this is required by the regulations concerning given works.

5. If, for a given contract, tenders appear abnormally low in relation to the transaction, the contracting entity shall request, in writing, explanations on the constituent elements of the tender concerned. It shall in particular enquire whether the tenderer is in

receipt of any form of State aid and whether the aid has been notified to and received the approval of the Commission pursuant to Article 93(3) of the Treaty.

Tenders which appear abnormally low may not be rejected if they are justified on objective grounds including the economy of the construction or production method, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the contract, or the originality of the product or the work proposed by the tenderer.

Tenders which are abnormally low due to the receipt of a State aid may be rejected if the aid in question has not been notified to the Commission pursuant to Article 93(3) of the Treaty or has not received the Commission's approval. Contracting entities which reject a tender under these circumstances shall inform the Commission.

Article 23

1. Article 22(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 those rules are compatible with the Treaty.

2. Without prejudice to paragraph 1, this Directive shall not prevent, until 31 December 1992, the application of existing national provisions on the award of public supply or works contracts which 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, on condition that the provisions concerned are compatible with the Treaty and with the Community's international obligations.

¹ Proposal for a Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to construction products; COM(86) 756 final/3 of 17 February 1987.

Article 24

1. Without prejudice to the obligations of the Community or its Member States in relation to third countries, any offer may be rejected when more than half of the price offered represents the value of products manufactured or services performed outside the Community or a combination thereof.

2. Subject to paragraph 3, an offer which is equivalent to one falling within the scope of paragraph 1 but which itself falls outside the scope of that paragraph shall be preferred. The price of such offer shall be considered equivalent provided it does not exceed the price of the offer falling within the scope of paragraph 1 by more than 3%.

3. However, an offer shall not be preferred to another pursuant to paragraph 2 where its acceptance would oblige the contracting entity to acquire material having different technical characteristics from existing material which would result in incompatibility or disproportionate technical difficulties in operation and maintenance.

4. For the purposes of this Article:

(a) the value of products manufactured outside the Community shall include the value of all finished or semi-finished products imported, directly or indirectly, from third countries;

(b) the value of services performed outside the Community shall include the value of all activities performed on the territory of third countries that contribute to the rendering of the services covered by the contract.

5. This Article shall not apply to offers of third-country origin to which the benefit of the provisions of this Directive has been extended by a decision of the Council, acting by qualified majority on a proposal from the Commission, pursuant to an agreement between the Community and a third country, within the GATT framework or otherwise.

Article 25

1. The value in national currencies of the thresholds specified in Article 8 shall in principle be revised every two years with effect from 1 January 1990. The calculation of such value shall be based on the average daily values of these currencies in terms of the ecu over the 24 months terminating on the last day of October immediately preceding the 1 January revision. The values shall be published in the *Official Journal of the European Communities* at the beginning of November.

2. The method of calculation laid down in paragraph 1 shall be examined, on the Commission's initiative, by the Advisory Committee for Public Contracts, in principle two years after its initial application.

Article 26

1. Annexes I to IX may be amended by the Commission:

(a) to delete entities to which the Annexes refer because they no longer fulfil the criteria for their inclusion set out in Article 2(1);

(b) to include entities which meet those criteria;

(c) to take account of amendments to the legal instruments to which the Annexes refer which do not involve the deletion or inclusion of entities in accordance with (a) and (b).

2. Amendments shall be made by the Commission after consulting the Advisory Committee for Public Contracts, set up by Decision 71/306/EEC.

The chairman of the Committee shall submit to the Committee any necessary draft revisions. The Committee shall deliver its opinion on the draft, if necessary by taking a vote, within a time-limit to be laid down by the chairman.

The opinion shall be recorded in the minutes. In addition, each Member State shall have the right to ask to have its position recorded in the minutes.

3. Amended versions of the Annexes shall be published for information in the *Official Journal of the European Communities*.

Article 27

1. Contracting entities shall keep internal records on each contract award procedure which are sufficient to permit the contracting entity at a later date to give:

(a) the reasons underlying the use of standards other than European standards, common technical specifications or European technical approvals, pursuant to Article 9(2), or the reasons for not applying performance standards and specifications pursuant to Article 10(2);

(b) information on decisions concerning the qualification, non-qualification or termination of a qualification of undertakings, pursuant to Article 20. These records shall be sufficiently detailed to permit an evaluation to be made of the criteria used and the manner of their application;

(c) the information on contracts awarded provided to interested companies or withheld, pursuant to Article 15(2);

(d) information on cases of reliance on restricted or negotiated procedures. These records shall include at least the subject of the contract; where applicable, the suppliers which have requested to participate; the candidates invited to present an offer; and, should the occasion arise, the candidates rejected and the reasons for their rejection;

(e) the criteria used and the manner of their application with regard to the selection of candidates pursuant to Article 19 and Article 21;

(f) the criteria used and the manner of their application with regard to the award of the contract pursuant to Article 22.

2. These records or the information contained therein shall be made available to the Commission on demand.

Article 28

Member States shall communicate to the Commission, each year at the latest on 31

October for the preceding calendar year, a statistical report including at least:

(a) for each of Annexes I to IX, the number and total value of contracts above and below the thresholds established by this Directive;

(b) for each of the Annexes, by number and total value of contracts,

— the breakdown between supply contracts and works contracts,

— the breakdown between the means of call for competition provided for in Article 13,

— the breakdown between contracts awarded to suppliers inside and outside the Community and from each of the Member States,

— the proportion of contracts awarded by negotiated procedures without prior call for competition.

Article 29

1. Article 2(2) of Directive 77/62/EEC is hereby replaced by the following:

‘2. This Directive shall not apply to:

(a) the award of public supply contracts by contracting authorities in the field covered by the provisions of Council Directive .../.../EEC;

(b) supplies which are declared secret or when their delivery must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State’s security so require.

2. The text of Article 3(4) and (5) of Directive 71/305/EEC, as amended by Directive .../.../EEC, is hereby replaced by the following:

‘This directive shall not apply to the award of public works contracts by contracting authorities in the field covered by the provisions of Council Directive .../.../EEC.

Article 30

Not later than four years after the coming into force of this Directive, the Commission, acting in close cooperation with the Advi-

sory Committee for Public Contracts, shall review the manner in which this Directive has operated and its field of application and, if necessary, make further proposals to adapt it, in the light of developments concerning in particular progress in market opening and the level of competition within and between the sectors concerned.

Article 31

Member States shall adopt the measures necessary to comply with this Directive by 1 March 1990. They shall inform the Commission thereof.

Article 32

Member States shall ensure that the texts of the basic provisions of domestic law, whether laws, regulations or administrative provisions, which they adopt in the field covered by this Directive are communicated to the Commission.

Article 33

This Directive is addressed to the Member States.

Annex I

Production, transport or distribution of drinking-water

Belgium

Entity set up pursuant to the *Décret du 2 juillet 1987 de la Région Wallonne érigeant en entreprise régionale de production et d'adduction d'eau le service du ministère de la région chargé de la production et du grand transport d'eau*.

Entity set up pursuant to the *Arrêté du 23 avril 1986 portant constitution d'une société wallonne de distribution d'eau*.

Entity set up pursuant to the *Arrêté du 17 juillet 1985 de l'Exécutif flamand portant fixation des statuts de la société flamande de distribution d'eau*.

Entities producing or distributing water and set up pursuant to the *Loi relative aux intercommunales du 22 décembre 1986*.

Entities producing or distributing water set up pursuant to the *Code Communal, art. 147 bis, ter et quater sur les régies communales*.

Denmark

Entities producing or distributing water referred to in Article 3, paragraph 3 of *Lov om vandforsyning m.v. af 4. juli 1985*.

Germany

Entities producing or distributing water pursuant to the *Eigenbetriebsverordnungen* or *Eigenbetriebsgesetze* of the *Länder*.

Entities producing or distributing water pursuant to the *Gesetze über die Kommunale Gemeinschaftsarbeit oder Zusammenarbeit* of the *Länder*.

Entities producing water pursuant to the *Gesetz über Wasser- und Bodenverbände vom*

10. Februar 1937 and the *erste Verordnung über Wasser- und Bodenverbände vom 3. September 1937*.

(*Regiebetriebe*) producing or distributing water pursuant to the *Gemeindeordnungen der Länder*.

Entities set up pursuant to the *Aktiengesetz vom 6. September 1965 geändert 19. Dezember 1985* or *GmbH-Gesetz vom 20. Mai 1898 geändert 15. Mai 1986* or having the legal status of a *Kommanditgesellschaft*, producing or distributing water on the basis of a *Konzessionsvertrag* granted by regional or local authorities.

Greece

The Water Company of Athens / *Εταιρία Υδρεύσεως- Αποχετεύσεως Πρωτευούσης* set up pursuant to Law 1068/80 of 23 August 1980.

The Water Company of Thessaloniki / *Οργανισμός Υδρεύσεως Θεσσαλονίκης* operating pursuant to Presidential Decree 61/1988.

The Water Company of Volos / *Εταιρία Υδρεύσεως Βόλου* operating pursuant to Law 890/1979.

Municipal Companies / *Δημοτικές Επιχειρήσεις ύδρευσης-αποχέτευσης* producing or distributing water and set up pursuant to Law 1069/80 of 23 August 1980.

Associations of local authorities (*Σύνδεσμοι 'Υδρευσης*) operating pursuant to the Code of local authorities (*Κζδικας Δήμχν και Κοινοτήτζν*) implemented by Presidential Decree 76/1985.

Spain

Entities producing or distributing water pursuant to the *Ley N° 7/1985 de 2 Abril de 1985 Reguladora de las Bases del Régimen local* and to the *Decreto Real N° 781/1986 Texto Refundido Régimen local*.

France

Entities producing or distributing water pursuant to the:

Dispositions Générales sur les régies Code des Communes L 323-1 à L 328-8, R 323-1 à R 323-6 (Dispositions générales sur les régies).

Code des Communes L 323-8 R 323-4 (Régies directs (ou de fait); or

Décret-loi du 28 décembre 1926, Règlement d'Administration publique du 17 février 1930, Code des Communes L 323-10 à L 323-13 R 323-75 à 323-132 (Régies à simple autonomie financière); or

Code des Communes L 323-9, R 323-7 à R 323-74, Décret du 19 octobre 1959 (Régies à personnalité morale et à autonomie financière); or

Code des Communes L 324-1 à L 324-6, R 324-1 à R 324-13 (Gestion déléguée, concession et affermage); or

Jurisprudence administrative, circulaire intérieure du 13 décembre 1975 (gérance); or

Code des Communes R 324-6, Circulaire intérieure du 13 décembre 1975 (Régie intéressée); or

Circulaire Intérieur du 13 décembre 1975 (Exploitation aux risques et périls); or

Décret du 20 mai 1955, loi du 7 juillet 1983 sur les sociétés d'économie mixte (participation à une société d'économie mixte); or

Code des Communes L 322-1 à L 322-6, R 322-1 à R 322-4 (dispositions communes, aux régies, concessions et affermagés)

Ireland

Dublin Corporation (local authority).

Entities producing or distributing water pursuant to *The Public Health (Ireland) Act 1878, the Water Supplies Act 1942, the Sanitary Services Act 1964.*

Italy

Entities producing or distributing water pursuant to the *Testo Unico delle leggi sull'assunzione diretta dei pubblici servizi da parte dei comuni e delle province approvato con Regio Decreto 15 ottobre 1925, n 2578* and to the *Decreto del P.R. n° 902 del 4 ottobre 1986.*

Ente Autonomo Acquedotto Pugliese set up pursuant to *RDL 19 ottobre 1919, n° 2060. Ente Acquedotti Siciliani* set up pursuant to *leggi regionali 4 settembre 1979, n° 2/2e 9 agosto 1980, n° 81.*

Ente Sardo Acquedotti e Fognature set up pursuant to *legge 5 luglio 1963 n° 9.*

Luxembourg

Local authorities distributing water.

Associations of local authorities producing or distributing water set up pursuant to the *Loi du 14 février 1900 concernant la création des syndicats de communes telle qu'elle a été modifiée et complétée par la Loi du 23 décembre 1958 et par la Loi du 29 juillet 1981* and pursuant to the *Loi du 31 juillet 1962 ayant pour objet le renforcement de l'alimentation en eau potable du Grand Duché de Luxembourg à partir du réservoir d'Esch-sur-Sûre.*

The Netherlands

Entities producing or distributing water pursuant to the *Waterleidingwet van 6 april 1957* amended by the *Wetten van 30 juni 1967, 10 september 1975, 23 juni 1976, 30 september 1981, 25 januari 1984, 29 januari 1986.*

Portugal

Empresa Pública das Águas Livres producing or distributing water pursuant to the *Decreto-Lei 190/81, 4.7.1981.*

Local authorities producing or distributing water.

United Kingdom

Water authorities and companies producing or distributing water pursuant to the Water Acts 1945, 1973 and 1983.

The Central Scotland Water Development Board producing water and the water auth-

orities producing or distributing water pursuant to the Water (Scotland) Act 1980.

The Department of the Environment for Northern Ireland responsible for producing and distributing water pursuant to the Water and Sewerage (Northern Ireland) Order 1973.

Annex II

Production, transport or distribution of electricity

Belgium

Entities producing, transporting or distributing electricity pursuant to *Article 5: Des régies communales et Intercommunales* of the *Loi du 10 mars 1925 sur les Distributions d'Energie Electrique*.

Entities transporting or distributing electricity pursuant to the *Loi relative aux intercommunales du 22 décembre 1986*.

EBES, Intercom, UNERG and other entities producing, transporting or distributing electricity and granted a concession for distribution pursuant to *Article 8 les concessions communales et intercommunales* of the *Loi du 10 mars 1925 sur les Distributions d'Énergie Electrique*.

The *Société Publique de production d'Electricité (SPE)*.

Denmark

Entities producing or transporting electricity on the basis of a licence pursuant to § 3, *Stk 1* of *Lov nr. 54 af 25. februar 1976 om elforsyning, jf. Bekendtgørelse nr. 607 af 17. december 1976 om elforsyningslovens anvendelsesområde*.

Entities distributing electricity as defined in § 3, *stk 2* of *Lov nr. 54 af 25. februar 1976 om elforsyning, jf. Bekendtgørelse nr. 607 af 17. december 1976 om elforsyningslovens anvendelsesområde* and on the basis of authorizations for expropriation pursuant to Articles 10 to 15 of *Lov on elektriske stærkstrømsanlæg, jf. Lovbekendtgørelse nr. 669 af 28. december 1977*.

Germany

Entities producing, transporting or distributing electricity as defined in § 2 II of the *Gesetz zur Förderung der Energiewirtschaft (Energiewirtschaftsgesetz) vom 13.12.1935*.

Greece

The *Αημόσια Επιχείρηση Ηλεκτρισμού (Public Power Corporation)* set up pursuant to the law 1468 of 2 August 1950 *Περί ιδρύσεως Δημοσίας Επιχειρήσεως Ηλεκτρισμού* and operating pursuant to the Law 57/85 *Δομή, ρόλος και τρόπος διοίκησης και λειτουργίας της κοινωφελικοποιημένης Δημοσίας Επιχείρησης Ηλεκτρισμού*.

Spain

Entities producing, transporting or distributing electricity pursuant to Article 1 of the *Decreto Ley de 12 marzo 1954* approving the *Reglamento de Verificaciones eléctricas y regularidad en el su Ministro de Energia. Red Eléctrica España (REDESA)* set up pursuant to *Decreto Real n. 91 de 23 enero 1985*.

France

Electricité de France, set up and operating pursuant to the *loi 46/6288 du 8 avril 1946 sur la nationalisation de l'Electricité et du Gaz*.

Entities (*sociétés d'économie mixte* or *régies*) distributing electricity and referred to in Article 23 of the *loi 48/1260 du 12 août 1948 portant modification des lois n° 46/6288 du 8 avril 1946 et N° 46/2298 du 21 octobre 1946 sur la Nationalisation de l'Electricité et du gaz*.

Compagnie Nationale du Rhône

Ireland

The *Electricity Supply Board (ESB)* set up and operating pursuant to the *Electricity Supply Act 1927*.

Italy

Ente Nazionale per l'Energia elettrica set up pursuant to *Legge n° 1643, 6 dicembre 1962 approvato con Decreto n° 1720, 21 dicembre 1965*.

Entities operating on the basis of a concession pursuant to Article 4, n. 5 or 8 of Legge 6 dicembre 1962, n. 1643 — *Istituzione dell'Ente nazionale per la energia elettrica e trasferimento ad esso delle imprese esercenti le Industrie elettriche.*

Entities operating on the basis of concession pursuant to Article 20 of *Decreto del Presidente della Repubblica 18 marzo 1965, n. 342 norme integrative della legge 6 dicembre 1962, n. 1643 e norme relative al coordinamento e all'esercizio delle attività elettriche esercitate da enti ed imprese diverse dall'Ente Nazionale per l'Energia Elettrica.*

Luxembourg

Compagnie grand-ducale d'électricité de Luxembourg producing or distributing electricity pursuant to the *Convention du 11 novembre 1927 concernant l'établissement et l'exploitation des réseaux de distribution d'énergie électrique dans le Grand-Duché du Luxembourg approuvée par la loi du 4 janvier 1928.*

Société électrique de l'Our (SEO).

Syndicat de Communes SIDOR.

Entities producing electricity pursuant to the *Accord du 1er janvier 1960 entre le Gouvernement et les petites centrales hydro-électriques privées concernant la fourniture d'énergie électrique au réseau public.*

Entities distributing electricity pursuant to Article 5 of the *Convention du 11 novembre 1927 concernant l'établissement et l'exploitation des réseaux de distribution d'énergie électrique dans le Grand-Duché du Luxembourg, approuvés par la loi du 4 janvier 1928.*

The Netherlands

Electriciteits produktie maatschappij Oost-Nederland (EPON)

Electriciteitsbedrijf Utrecht-Noord-Holland-Amsterdam (UNA)

*Electriciteitsbedrijf Zuid-Holland (EZH)
Elektriciteitsproduktiemaatschappij Zuid-Nederland (EPZ)*

Provinciale Zeeuwse Energie Maatschappij (PZEM)

Samenwerkende Electriciteitsproductiebedrijven (SEP)

Entities distributing electricity on the basis of a licence (*vergunning*) granted by the provincial authorities pursuant to the *Provinciewet van 25 januari 1962.*

Portugal

Electricidade de Portugal (EDP) set up pursuant to the *Decreto-Lei n. 502/76 de 30 de Junho de 1976.*

Entities distributing electricity pursuant to *Artigo 1º do Decreto-Lei nº 344-B/82 do 1 de Setembro de 1982* amended by *Decreto-Lei nº 297/86 de 19 de Setembro de 1986.*

United Kingdom

Central Electricity Generating Board (CEGB), and the Area Electricity Boards producing, transporting or distributing electricity pursuant to the *Electricity Supply Act 1926, Electricity Act 1947* and the *Electricity Act 1957.*

The *North of Scotland Hydro-electricity Board (NSHB)* set up pursuant to the *Hydro-electric Development (Scotland) Act 1943* and the *Electricity Act 1947.*

The *South of Scotland Electricity Board (SSEB)* set up pursuant to the *South of Scotland Electricity Order Confirmation Act 1956.*

The *Northern Ireland Electricity Service (NIES)* set up pursuant to the *Electricity Supply (Northern Ireland) Order 1972.*

Annex III

Transport or distribution of gas or heat

Belgium

Distrigaz SA operating pursuant to the *Loi du 29 juillet 1983*.

Entities transporting gas on the basis of an authorization or concession pursuant to the *Loi du 12 avril 1965* as amended by the *Loi du 28 juillet 1987*.

Entities distributing gas and operating pursuant to the *Loi relative aux intercommunales du 22 décembre 1986*

Local authorities, or associations of, supplying heat to the public.

Denmark

Dansk Olie og Naturgas A/S operating on the basis of an exclusive right granted pursuant to *Bekendtgørelse nr. 869 af 18. juni 1979 om eneretsbevilling til indførsel, forhandling, transport og oplagring af naturgas*.

Entities operating pursuant to *Lov nr. 294 af 7. juni 1972 om naturgas-forsyning*.

Entities distributing gas or heat on the basis of an approval pursuant to Chapter IV of *Lov om varmforsyning, jf. Lovbekendtgørelse nr. 542 af 6. oktober 1982*.

Entities transporting gas on the basis of an authorization pursuant to *Bekendtgørelse nr. 141 af 13. marts 1974 om rør ledningsanlæg på dansk kontinentalsokkelområde til transport af kulbrinter* (installation of pipelines on continental platform for the transport of hydrocarbons).

Germany

Entities transporting or distributing gas as defined in § 2 II/1 of the *Gesetz zur Förderung der Energiewirtschaft vom 19. Dezember 1935 (Energiewirtschaftsgesetz)*.

Local authorities, or associations of, supplying heat to the public.

Greece

DEP transporting or distributing gas pursuant to Ministerial Decision 2583/1987 *Ανάθεση στη Αημόσια Επιχείρηση Πετρελαίου αρμοδιοτήτων σχετικών με το φυσικό αέριο*.

Athens Municipal Gasworks SA *DEFA* transporting or distributing gas.

Spain

Entities operating pursuant to *Law No 10 of 15 June 1987*.

France

Société nationale des gaz du sud ouest transporting gas.

Gaz de France, set up and operating pursuant to the *Loi 46/6288 du 8 avril 1946 sur la nationalisation de l'Electricité et du Gaz*.

Entities (*sociétés d'économie mixte* or *régies*) distributing electricity and referred to in Article 23 of the *Loi 48/1260 du 12 août 1948 portant modification des lois n. 46/6288 du 8 avril 1946 et n. 46/2298 du 21 octobre 1946 sur la Nationalisation de l'Electricité et du gaz*.

Compagnie Française du Méthane transporting gas.

Local authorities, or associations of, supplying heat to the public.

Ireland

Irish Gas Board and other entities operating pursuant to the *Gas Act 1976*.

Dublin Corporation supplying heat to the public.

Italy

SNAM and *SGMe Montedison* transporting gas.

Entities distributing gas pursuant to the *Testo Unico delle leggi sull'assunzione diretta dei pubblici servizi da parte dei comuni e delle province approvato con Regio Decreto 15 ottobre 1925, n. 2578* and to the *Decreto del P.R. n. 902 del 4 ottobre 1986*.

Entities distributing heat to the public referred to in Article 10 of the *legge 29 maggio 1982, n. 308 norme sul contenimento dei consumi energetici, lo sviluppo delle fonti rinnovabili di energia, l'esercizio di centrali elettriche alimentate con combustibili diversi dagli idrocarburi*.

Local authorities, or associations of, supplying heat to the public.

Luxembourg

Société de Transport de Gaz SOTEG SA

Gaswierk Esch-Ueizecht SA

Service industriel de la Commune de Dudelange.

Service industriel de la Commune de Luxembourg.

Local authorities, or associations of, supplying heat to the public.

The Netherlands

Entities transporting or distributing gas on the basis of a concession (*concessie*) granted by the local authorities pursuant to the *Gemeentewet van 29 juni 1851*.

Local or provincial authorities transporting or distributing gas to the public pursuant to the *Gemeentewet van 29 juni 1851* and the *Provinciewet van 25 januari 1962*.

Local authorities, or associations of, supplying heat to the public.

Portugal

Electricidade de Portugal (EDP).

United Kingdom

British Gas PLC and other entities operating pursuant to the *Gas Act 1986*.

Local authorities, or associations of, supplying heat to the public.

Annex IV

Exploration for and extraction of oil or gas

The entities granted an authorization, permit, licence or concession to explore for or extract oil and gas pursuant to the following legal provisions:

Belgium

Loi du 1 mai 1939 complétée par l'Arrêté royal n° 83 du 28 novembre 1939 sur l'exploration et l'exploitation du pétrole et du gaz.

Arrêté royal du 15 novembre 1919.

Arrêté royal du 7 avril 1953.

Arrêté royal du 15 mars 1960. Loi au sujet de la plateforme continentale du 15 juin 1969.

Arrêté de l'Exécutif régional wallon du 29 septembre 1982.

Arrêté de l'Exécutif flamand du 30 mai 1984.

Denmark

Lov nr. 293 af 10. juni 1981 om anvendelse af Danmarks undergrund.

Lov om kontintalsoklen, jf. Lovbekendtgørelse nr. 182 af 1. maj 1979.

Germany

Bundesberggesetz vom 13. August 1980 amended on 29 November 1986.

Greece

*Law 87/1975 setting up DEP-EKY *Περί ιδρύσεως Δημοσίας Επιχειρήσεως Πετρελαίου.**

Spain

Ley sobre investigación y Explotación de Hidrocarburo de 27 junio 1974 and its implementing decrees.

France

Code minier (décret n° 56.838 du 16 août 1956) amended by the Loi 56-1327 du 29 décembre 1956, Ordonnance 58-1186 du 10 décembre 1958, Décret 60-800 du 2 août 1960, Décret 616359 du 7 avril 1961, Loi 70-1 du 2 janvier 1970, Loi 77-620 du 16 juin 1977, Décret 80-204 du 11 mars 1980.

Ireland

Petroleum and Other Minerals Development Act 1960.

Ireland: Exclusive licensing terms 1975. Revised licensing terms 1987.

Italy

Law No 136 of 10 February 1953

Law No 6 of 11 January 1957 amended by Law No 613 of 21 July 1967

Luxembourg

...

The Netherlands

Mijnwet No 285 van 21 april 1810

Wet Opsporing delfstoffen n. 258 van 3 mei 1967

Mijnwet continentaalplat 1965, n. 428 van 23 september 1965

Portugal

Decreto-Lei n° 543/74 of 16 de Outubro de 1974 as amended by Decrees and communications Nos 168777, 22/79, 266/80, 234/84 and 174/85.

Decreto 47.973 of 30 de Setembro de 1967 and 493/69 of 11 de Novembro de 1969 as

amended by *Decrees 97/71, 98/71, 96/74, 424-C/76, 315/78, 266/80, 2/81 and 245/82.*

United Kingdom

Petroleum Production Act 1934.
Continental Shelf Act 1964.

Pipeline Act 1962.
Petroleum and Submarine Pipeline Act 1975.
Oil and Gas Act 1982
Petroleum Act 1987
Petroleum (Production) Regulations 1982, 1984, 1986.
Oil and Pipeline Act 1985.

Annex V

Exploration for and extraction of coal or other solid fuels

Belgium

Entities exploring or extracting coal or other solid fuels pursuant to the *Arrêté du Régent du 22 août 1948* and the *Loi du 22 avril 1980*.

Denmark

Entities exploring or extracting coal or other solid fuels pursuant to *Lov nr. 223 af 8. juni 1977 om råstoffer*.

Germany

Entities exploring or extracting coal or other solid fuels pursuant to the *Bundesberggesetz vom 13 August 1980, BGBl 1980*.

Greece

Public Power Corporation *Δημόσια Επιχείρηση Ηλεκτρισμού* exploring or extracting coal or other solid fuels pursuant to the *Mining code of 1973 as amended by the Law of 27 April 1976*.

Spain

Entities exploring or extracting coal or other solid fuels pursuant to the *Mining Code of 21 July 1973*.

France

Entities exploring or extracting coal or other solid fuels pursuant to *Code Minier, (Décret No 56863 du 16 août 1956)* as amended by the *Loi No 77-620 du 16 juin 1977, Décret No 80204 et Arrêté du 11 mars 1980*.

Ireland

Bord na Móna.

Italy

Carbo Sulcis SpA

Luxembourg

...

The Netherlands

...

Portugal

Empresa Carbonífera do Douro.

United Kingdom

British Coal Board set up pursuant to *Coal Industry Nationalization Act 1946*.
Entities exploring or extracting solid fuels pursuant to the Mineral Development Act (Northern Ireland) 1969.

Annex VI

Contracting entities in the field of railway services

Belgium

Société nationale des Chemins de fer belges
Nationale Maatschappij der Belgische Spoorwegen.

Denmark

Danske Statsbaner (DSB).

Entities operating set up pursuant to *Lov nr. 295 af 6. juni 1984 om privatbanerne.*

Germany

Deutsche Bundesbahn.

Other entities providing railway services to the public as defined in paragraph 2 of *Allgemeines Eisenbahngesetz 1951.*

Greece

Οργανισμός Σιδηροδρόμων Ελλάδος.

Spain

Red Nacional de los Ferrocarriles Españoles.
Ferrocarriles de Via Estrecha (FEVE).
Ferrocarriles de la Generalitat de Catalunya (FGC).
Euski Trenbideak (Bilbao).
Ferrocarriles de la Generalitat Valenciana (FGV).

France

Société nationale des Chemins de fer français and other réseaux ferroviaires ouverts au public referred to in the *Loi d'Orientation des Transports intérieurs du 30 décembre 1982, Titre II, Chapitre 1er du Transport ferroviaire.*

Ireland

Iarnród Éireann (Irish Rail).

Italy

Ferrovie dello Stato

Entities providing railway services on the basis of a concession pursuant to Article 10 of *Regio Decreto 9 maggio 1912, n. 1447, che approva il testo unico delle disposizioni di legge per le ferrovie concesse all'Industria privata, le tramvie a trazione meccanica e gli automobili.*

Entities operating on the basis of a concession granted, pursuant to special laws, as referred to in *Titolo XI, Capo II, Sezione 1a of Regio Decreto 9 maggio 1912, n. 1447, che approva il testo unico delle disposizioni di legge per le ferrovie concesse all'industria privata, le tramvie a trazione meccanica e gli automobili.*

Entities providing railway services on the basis of a concession pursuant to Article 4 of *Legge 14 giugno 1949, n. 410, concorso dello Stato per la riattivazione dei pubblici servizi di trasporto in concessione.*

Entities or local authorities providing railway services on the basis of a concession pursuant to Article 14 of *Legge 2 agosto 1952, n. 1221 — Provvedimenti per l'esercizio ed il potenziamento di ferrovie e di altre linee di trasporto in regime di concessione.*

Luxembourg

Chemins de fer luxembourgeois (CFL).

The Netherlands

Nederlandse Spoorwegen NV
Streekvervoerbedrijf Centraal Nederland.

Portugal

Caminhos-de-Ferro Portugueses.

United Kingdom

British Rail.
Northern Ireland Railways.

Annex VII

Contracting entities in the field of urban railway, tramway, trolleybus or bus services

Belgium

Société nationale des Chemins de Fer vicinaux (SNCV)/Nationale Maatschappij van Buurtspoorwegen (NMB).

Entities providing transport services to the public on the basis of a contract granted by SNCV pursuant to Articles 16 and 21 of the *Arrêté du 30 décembre 1946 relatif aux transports rémunérés de voyageurs par route effectués par autobus et par autocars.*

Société des Transport intercommunaux de Bruxelles (STIB),

Maatschappij van het Intercommunaal Vervoer the Antwerpen (MIVA),

Maatschappij van het intercommunaal Vervoer the Gent (MIVG),

Société des Transports Intercommunaux de Charleroi (STIC)

Société des Transports Intercommunaux de la région liégeoise (STIL)

Société des Transports Intercommunaux de l'agglomération verviétoise (STIAV), and other entities set up pursuant to the *Loi relative à la création de sociétés de transports en commun urbains/Wet betreffende de oprichting van maatschappijen voor stedelijk gemenschappelijk vervoer* of 22 February 1962.

Entities providing transport services to the public on the basis of a contract with STIB pursuant to *Article 10* or with other transport entities pursuant to *Article 11* of the *Arrêté Royal 140 du 30 décembre 1982 relatif aux mesures d'assainissement applicables à certains organismes d'intérêt public dépendant du Ministère des Communications.*

Denmark

Danske Statsbaner (DSB)

Entities providing bus services to the public (*almindelig rutekørsel*) on the basis of an authorization pursuant to *Lov nr. 115 af 29. marts 1978 om buskørsel.*

Germany

Entities providing transport services to the public as defined in § 12 II and II of the *Personenbeförderungsgesetz vom 21 März 1961.*

Greece

Ηλεκτροκίνητα Λεωφορεία Περιοχής Αθηνών-Πειραιώς.

(Electric Buses of the Athens — Piraeus Area) operating pursuant to *Decree 768/1970 and Law 588/1977.*

Ηλεκτρικοί Σιδηρόδρομοι Αθηνών-Πειραιώς.

(Athens — Piraeus Electric Railways) operating pursuant to *Laws 352/1976 and 588/1977.*

Επιχείρηση Αστικών Συγκοινωνιών.

(Enterprise of Urban Transport) operating pursuant to *Law 588/1977.*

Κοινό Ταμείο Εισπράξεως Λεωφορείως.

(Joint Receipts Fund of Buses) operating pursuant to *Decree 102/1973.*

ΡΟΔΑ (Δημοτική Επιχείρηση Λεωφορείων Ρόδου).

Roda-Municipal bus enterprise in Rhodes.

Οργανισμός Αστικών Συγκοινωνιών Θεσσαλονίκης.

(Urban Transport Organization of Thessaloniki) operating pursuant to *Decree 3721/1957 and Law 716/1980.*

Spain

Entities providing transport services to the public pursuant to the *Ley de Régimen Local.*

Corporación metropolitana de Madrid.

Corporación metropolitana de Barcelona.

Entities providing urban or inter-urban bus services to the public pursuant to Articles 113 to 118 of the *Ley de ordenación de Transportes Terrestres, 31 julio de 1987.*

Entities providing bus services to the public, pursuant to Article 71 of the *Ley de Ordenación de Transportes Terrestres*, 31 julio de 1987.

FEVE, RENFE (or *Empresa Nacional de Transportes de Viajeros por Carretera*) providing bus services to the public pursuant to the *Disposiciones adicionales, Primera, de la Ley de Ordenación de Transportes Terrestres*, 31 julio de 1957.

Entities providing bus services to the public pursuant to *Disposiciones Transitorias, Tercera, de la Ley de Ordenación de Transportes Terrestres*, 31 julio de 1957.

France

Entities providing transport services to the public pursuant to *Article 7 II of the Loi n° 82-1153 du 30 décembre 1982, Transports Intérieurs, Orientation*.

Régie Autonome des Transports Parisiens, Société Nationale des Chemins de Fer Français, APTR and other entities providing transport services to the public on the basis of an authorization granted by the *Syndicat des Transports Parisiens* pursuant to the *Ordonnance de 1959 et ses décrets d'application relatifs à l'organisation des transports de voyageurs dans la région parisienne*.

Ireland

Iarnród Éireann (Irish Rail).
Bus Éireann (Irish Bus).
Bus Atha Cliath (Dublin Bus).

Entities providing transport services to the public on the basis of a licence granted pursuant to the *Road Transport Act 1932*.

Italy

Entities providing transport services to the public on the basis of a concession pursuant to *Legge 28 settembre 1939, n. 1822 — Disciplina degli autoservizi di linea (autolinee per viaggiatori, bagagli e pacchi agricoli in regime di concessione all'Industria privata) —*

Article 1 as modified by Article 45 of *Decreto del Presidente della Repubblica 28 giugno 1955, n. 771*.

Entities providing transport services to the public pursuant to Article 1, No 4 or No 15 of *Regio Decreto 15 ottobre 1925, n. 2578 — Approvazione del testo unico della legge sull'assunzione diretta dei pubblici servizi da parte dei comuni e delle province*.

Entities operating on the basis of a concession pursuant to Article 242 or 256 of *Regio Decreto 9 maggio 1912, n. 1447, che approva il testo unico delle disposizioni di legge per le ferrovie concesse all'industria privata, le tramvie a trazione meccanica e gli automobili*.

Entities or local authorities operating on the basis of a concession pursuant to Article 4 of *Legge 14 giugno 1949, n. 410, concorso dello Stato per la riattivazione dei pubblici servizi di trasporto in concessione*.

Entities operating on the basis of a concession pursuant to Article 14 of *Legge 2 agosto 1952, n. 1221 — Provvedimenti per l'esercizio ed il potenziamento di Ferrovie e di altre linee di trasporto in regime di concessione*.

Luxembourg

Chemins de fer luxembourgeois (CFL).

Service communal des autobus municipaux de la ville de Luxembourg.

Transports Intercommunaux du Canton d'Esch sur Alzette (TICE).

Fédération luxembourgeoise des entreprises d'autobus et d'autocars operating pursuant to the *Règlement Grand-Ducal du 3 février 1978 concernant les conditions d'octroi des autorisations d'établissement et d'exploitation des services de transports routiers réguliers de personnes rémunérées*.

The Netherlands

Entities providing transport services to the public pursuant to Chapter II (*openbaar vervoer*) of the *Wet Personenvervoer van 12 maart 1987*.

Portugal

Rodoviária Nacional E.P.

Serviço de Transportes Colectivos do Porto

Companhia Carris de Ferro de Lisboa

Companhia de Metropolitano de Lisboa

Entities providing bus services to the public pursuant to *base 7, Lei 2008 de 7.09.1945 Coordenação dos Transportes Terrestres* and Article 72 of the *Decreto-Lei 37272 de 31.12.48 Regulamento dos transportes automóveis*.

United Kingdom

Entities providing bus services to the public pursuant to the *London Regional Transport Act 1984*.

Entities providing bus services to the public pursuant to the *Transport Act 1985*.

Newcastle Railway.

Glasgow Underground.

Manchester Underground.

Dockland Railway.

London Underground.

Annex VIII

Contracting entities in the field of airport facilities

Belgium

Régie des Voles Aériennes set up pursuant to the *Arrêté-loi du 20 novembre 1946 portant création de la Régie des Voles Aériennes* amended by *Arrêté Royal du 5 octobre 1970 portant refonte du statut de la Régie des Voles Aériennes*.

Danmark

Airports operating on the basis of an authorization pursuant to § 55, *stk. 1 I Lov om luftfart, jf. Lovbekendtgørelse nr. 408 af 11. september 1985*.

Germany

Airports as defined in paragraphs 38 II No 1 and 49 II No 1 of the *Luftverkehrszulassungsordnung vom 19. Juni 1964*.

Greece

Airports operating pursuant to *Law 517/1931 setting up the civil aviation service Υπηρετία πολιτικός Αεροπορίας*.

International airports operating pursuant to *Presidential Decree 647/981*.

Spain

Airports managed by *Aeropuertos Nacionales* operating pursuant to the *Real Decreto 278/1982 de 15 octubre 1982*.

France

Aéroports de Paris operating pursuant to *Titre V, Articles L 251-1 à 252-1 du Code de l'Aviation Civile*.

Aéroport de Bâle — Mulhouse set up pursuant to the *Convention Franco-Suisse du 4 Juillet 1949*.

Airports as defined in *Article L 270-1, Code de l'Aviation Civile*.

Airports operating pursuant to the *Cahier de Charges type d'une concession d'aéroport, décret du 6 mai 1955*.

Airports operating on the basis of a *Convention d'exploitation* pursuant to *Article L/221, Code de l'Aviation Civile*.

Ireland

Airports of *Dublin, Cork and Shannon* managed by *Aer Rianta-Irish Airports*.

Airports operating on the basis of a *public use licence* granted pursuant to the *Air Navigation and Transport Act No 23 1936*, the *Transport, Fuel and Power (Transfer of Departmental Administration and Ministerial Functions) Order 1959* and the *Air Navigation (Aerodrome and Visual Ground Aids) Order 1970*.

Italy

Civil State airports (*aerodromi civili istituiti dallo Stato*) referred to in Article 692 of the *Codice della navigazione, Regio Decreto 30 marzo 1942, n. 327*.

Entities operating airport facilities on the basis of a concession granted pursuant to Article 694 of the *Codice della navigazione, Regio Decreto 30 marzo 1942, n. 327*.

Luxembourg

Aéroport de Findel

The Netherlands

Airports operating pursuant to Article 18 to 30 of the *Luchtvaartwet* of 15 January 1958, amended on 7 June 1978.

Portugal

Airports managed by *Aeroports e Navegação Aérea (ANA) EP* pursuant to *Decreto-Lei 246/79*.

Aeroporto do Funchal and *Aeroporto de Porto Santo* regionalized pursuant to the *Decreto-Lei 284/81*.

United Kingdom

Airports managed by *BAA plc*.

Airports which are *public limited companies (plcs)* pursuant to the *1986 Airports Act*.

Annex IX

Contracting entities in the field of maritime or inland port or other terminal facilities

Belgium

Société anonyme du Canal et des installations maritimes de Bruxelles.

Port autonome de Liège

Port autonome de Namur.

Port autonome de Charleroi.

Port de la ville de Gand.

La Compagnie des installations maritimes de Bruges/Maatschappij der Brugse haveninrichtingen.

Société intercommunale de la rive gauche de l'Escaut/Intercommunale maatschappij van de linker Scheldeoever. (Port d'Anvers).

Port de Nieuwport.

Port d'Ostende.

Denmark

Ports as defined in Article 1, I to III of *Bekendtgørelse nr. 604 af 16. december 1985 om hvilke havne der er omfattet af lov om trafikhavne, jf. lov nr. 239 af 12. maj 1976 om trafikhavne.*

Germany

Seaports owned totally or partially by territorial authorities (*Länder, Kreise, Gemeinden*).

Inland ports subject to the *Tarifordnung* pursuant to the *Wassergesetze* of the *Länder*.

Greece

Piraeus port — *Οργανισμός Λιμένος Πειραιώς*, set up pursuant to *Emergency Law 1559/1950* and *Law 1630/1951*.

Thessaloniki port — *Οργανισμός Λιμένος Θεσσαλονίκης*, set up pursuant to *Decree N.A. 2251/1953*.

Other ports governed by *Presidential Decree 649/1977 (Π.Δ. 649/1977)* — *Εποπτεία, οργάνωση λειτουργίας, διοικητικός έλεγχος λιμένων* (surveillance organization of functioning and administrative control).

Spain

Puerto de Huelva set up pursuant to the *Decreto 2 de octubre de 1969, n° 2380/69. Puertos y Faros. Otorga Régimen de Estatuto de Autonomía al Puerto de Huelva.*

Puerto de Barcelona set up pursuant to the *Decreto 25 de agosto de 1978 n° 2407/78. Puertos y Faros. Otorga al de Barcelona Régimen de Estatuto de Autonomia.*

Puerto de Bilbao set up pursuant to the *Decreto 25 de agosto de 1978, n° 2408/78. Puertos y Faros. Otorga al de Bilbao Régimen de Estatuto de Autonomía.*

Puerto de Valencia set up pursuant to the *Decreto 25 de agosto de 1978, n° 2409/78. Puertos y Faros. Otorga al de Valencia Régimen de Estatuto de Autonomía.*

Juntas de Puertos operating pursuant to the *Lei 27/68 de 20 junio 1968; Puertos y Faros. Juntas de Puertos y Estatutos de Autonomía* and to the *Decreto de 9 de abril de 1970, n° 1350/70. Juntas de Puertos. Reglamiento.*

Ports managed by the *Comisión Administrativa de Grupos de Puertos* operating pursuant to the *Ley 27/68 de 20 junio de 1968, Decreto 1958/78 de 23 junio de 1978* and *Decreto 571/81 de 6 mayo de 1981.*

Ports listed in the *Real Decreto 989/82 de 14 de mayo 1982. Puertos. Clasificación de los de interés general.*

France

Port Autonome de Paris set up pursuant to *Loi n° 68/917 du 24 octobre 1968 relative au port autonome de Paris.*

Port Autonome de Strasbourg set up pursuant to the *Convention du 20 mai 1923 entre l'Etat et la ville de Strasbourg relative à la Constitution du Port Rhénan de Strasbourg et à l'exécution de travaux d'extension de ce port*, approved by the *Loi du 26 avril 1924*.

Other inland waterway ports set up or managed pursuant to *Article 6 (navigation intérieure)* of the *Décret n° 69 - 140 du 6 février 1969 relatif aux concessions d'outillage public dans les ports Maritimes*.

Ports autonomes operating pursuant to *Articles L 111-1 et suivants* of the *Code des Ports Maritimes*.

Ports non-autonomes operating pursuant to *Articles R 121-1 et suivants* of the *Code des Ports Maritimes*.

Ports managed by regional authorities (*départements*) or operating pursuant to a concession granted by the regional authorities (*départements*) pursuant to *Article 6* of the *Loi 86-663 du 22 juillet 1983 complétant la Loi 83-8 du 7 janvier 1983 relative à la répartition de compétences entre les communes, départements et l'Etat*.

Ireland

Ports operating pursuant to the *Harbour Act 1968*.

Italy

State ports and other ports managed by the *Capitaneria di Porto* pursuant to the *Codice della navigazione, Regio Decreto 30 marzo 1982, n. 32*.

Autonomous ports (*Enti portuali*) set up by special laws pursuant to *Article 19* of the *Codice della navigazione, Regio Decreto 30 marzo 1982, n. 327*.

Luxembourg

Port de Mertert set up and operating pursuant to *Loi du 22 juillet 1963 relative à*

l'aménagement et à l'exploitation d'un port fluvial sur la Moselle.

The Netherlands

Havenbedrijven, set up and operating pursuant to the *Gemeentewet van 29 juni 1851*.

Havenschap Vlissingen, set up by the *Wet van 10 september 1979 inzake de gemeenschappelijke regeling tot oprichting van het Havenschap Vlissingen*.

Havenschap Terneuzen, set up by the *Wet van 8 april 1970 inzake de gemeenschappelijke regeling tot oprichting van het Havenschap Terneuzen*.

Havenschap Delfzijl, set up by the *Wet van 31 juli 1957 inzake de gemeenschappelijke regeling tot oprichting van het Havenschap Delfzijl*.

Haven- en industrieschap Moerdijk, set up by the *Gemeenschappelijke regeling tot oprichting van het Haven- en industrieschap Moerdijk van 23 oktober 1970*, approved by *Koninklijk Besluit nr. 23 van 4 maart 1972*.

Portugal

Porto de Lisboa set up pursuant to *Decreto Real do 18 fevereiro 1907* and operating pursuant to *Decreto-Lei n° 36976 de 20 de Julho de 1948*.

Porto do Douro e Leixões set up pursuant to *Decreto-Lei n° 36977 de 20 de Julho de 1948*.

Porto de Sines set up pursuant to *Decreto-Lei n° 508/77 de 14 de Dezembro de 1977*.

Portos de Setúbal, Aveiro, Figueira da Foz, Viana do Castelo, Portimão, Faro operating pursuant to the *Decreto-Lei 37754 de 18 de Fevereiro 1950*.

United Kingdom

Harbour authorities within the meaning of *Section 57 of the Harbours Act 1964* providing port facilities to carriers by sea or inland water way.

Annex X

List of professional activities as set out in the general industrial classification of economic activities within the European Communities

Classes	Groups	Subgroups and items	Description		
50	500		BUILDING AND CIVIL ENGINEERING		
			General building and civil engineering work (without any particular specialization) and demolition work		
		500.1	General building and civil engineering work (without any particular specialization)		
		500.2	Demolition work		
	501			Construction of flats, office blocks, hospitals and other buildings, both residential and non-residential	
		501.1	General building contractors		
		501.2	Roofing		
		501.3	Construction of chimneys, kilns and furnaces		
		501.4	Waterproofing and damp-proofing		
		501.5	Restoration and maintenance of outside walls (repointing, cleaning, etc.)		
		501.6	Erection and dismantlement of scaffolding		
		501.7	Other specialized activities relating to construction work (including carpentry)		
		502			Civil engineering: construction of roads, bridges, railways, etc.
			502.1	General civil engineering work	
	502.2		Earth-moving (navvying)		
	502.3		Construction of bridges, tunnels and shafts, drilling		
	502.4		Hydraulic engineering (rivers, canals, harbours, flows, locks and dams)		
	502.5		Road-building (including specialized construction of airports and runways)		
	502.6		Specialized construction work relating to water (i.e. to irrigation, land drainage, water supply, sewage disposal, sewerage, etc.).		
	502.7	Specialized activities in other areas of civil engineering			
	503			Installation (fittings and fixtures)	
		503.1	General installation work		
		503.2	Gas fitting and plumbing, and the installation of sanitary equipment		
		503.3	Installation of heating and ventilating apparatus (central heating, air conditioning, ventilation)		
		503.4	Sound and heat insulation, insulation against vibration		
		503.5	Electrical fittings		
	503.6	Installation of aerials, lighting conductors, telephones, etc.			
504			Building completion work		
	504.1	General building completion work			
	504.2	Plastering			
	504.3	Joinery, primarily engaged in on the site assembly and/or installation (including the laying of parquet flooring)			
	504.4	Painting, glazing, paperhanging			
	504.5	Tiling and otherwise covering floors and walls			
	504.6	Other building completion work (putting in fireplaces, etc.)			

Annex XI

Model notice of concession contracts in the water sector

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.
2. The subject of the concession, nature and characteristics of the services to be provided.
3. (a) Final date for receipt of candidatures;
(b) the address to which they must be sent;
- (c) the language or languages in which they must be drawn up.
4. Information concerning the candidate's own position and economic and technical standards required of him.
5. The criteria for the award of the contract.
6. Other information.
7. Date of dispatch of the notice.
8. Date of receipt of the notice by the Office for Official Publications of the European Communities.

Annex XII

A. *Open procedures*

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.

2. For supply contracts: form of contract for which offers are invited.

3. (a) Place of delivery, or site;

(b) nature and quantity of the goods to be supplied;

or

Nature and extent of the services to be provided and general nature of the work;

(c) indication of whether the suppliers can tender for some and/or all of the goods requires;

or, for works contracts, if the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all of the lots;

(d) authorization to submit variants;

(e) for works contracts, information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

4. Derogation from the use of European standards, common technical specifications or European technical approvals, in accordance with Article 9.

5. Time-limits for delivery or completion.

6. (a) Name and address of the service from which the contract documents and additional documents may be requested;

(b) The amount and terms of payment of the sum to be paid to obtain such documents (where applicable);

7. (a) The final date for receipt of tenders;

(b) the address to which they must be sent;

(c) the language or languages in which they must be drawn up.

8. (a) The persons authorized to be present at the opening of tenders;

(b) the date, hour and place of such opening.

9. Any deposits and guarantees required (where applicable).

10. Main terms concerning financing and payment and/or references to the provisions in which these are contained.

11. The legal form to be taken by the grouping of suppliers or contractors to whom the contract is awarded (where applicable).

12. Economic and technical standards required of the supplier or contractor to whom the contract is awarded.

13. Period during which the tenderer is bound to keep open his tender.

14. The criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents.

15. Other information.

16. Date of publication of the periodic information notice in the Official Journal to which this contract refers (where applicable).

17. Date of dispatch of the notice.

18. Date of receipt of the notice by the Office for Official Publications of the European Communities.

B. *Restricted procedures*

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.

2. For supply contracts: form of contract for which offers are invited.

3. Justification for the use of the accelerated procedure according to Article 17(4) (where applicable).

(a) place of delivery, or site;

(b) nature and quantity of the goods to be supplied;

or

nature and extent of the services to be provided and general nature of the work;

(c) indication of whether the suppliers can tender for some and/or all of the goods required;

or, for works contracts, if the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all of the lots:

(d) authorization to submit variants,

(e) for works contracts,

information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

5. Derogation from the use of European standards, common technical specifications or European technical approvals, in accordance with Article 9.

6. Time-limit for delivery or completion.

7. The legal form to be taken by the grouping of suppliers or contractors to whom the contract is awarded (where applicable).

8. (a) The final date for receipt of requests to participate;

(b) the address to which they must be sent;

(c) the language or languages in which they must be drawn up.

9. The final date for dispatch of invitations to tender.

10. Any deposits and guarantees required (where applicable).

11. Main terms concerning financing and payment and/or the provisions laid down by law or regulation in which these are contained.

12. Information concerning the supplier's or contractor's position and economic and technical standards required of him.

13. The criteria for the award of the contract where they are not mentioned in the invitation to tender.

14. Other information.

15. Date of publication of the periodic information notice in the *Official Journal* to which this contract refers (where applicable).

16. Date of dispatch of the notice.

17. Date of receipt of the notice by the Office for Official Publications of the European Communities.

C. Negotiated procedures

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.

2. For supply contracts, form of contract for which offers are invited.

3. (a) Place of delivery, or site;

(b) nature and quantity of the goods to be supplied;

or

nature and extent of the services to be provided and general nature of the work;

(c) indication of whether the suppliers can tender for some and/or all of the goods required;

or, for works contracts, if the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all of the lots;

(d) for works contracts, information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

4. Derogation from the use of European standards, common technical specifications or European technical approvals, in accordance with Article 9.

5. Time-limit for delivery or completion.

6. The legal form to be taken by the grouping of suppliers or contractors to whom the contract is awarded (where applicable).

7. (a) Final date for receipt of tenders;
(b) the address to which they must be sent;
(c) the language or languages in which they must be drawn up.
8. Any deposits and guarantees required (where applicable).
9. Main terms concerning financing and payment and/or the provisions laid down by law or regulation in which these are contained.
10. Information concerning the supplier's or contractor's position and economic and technical standards required of him.
11. The names and addresses of suppliers of contractors already selected by the contracting entity (where applicable).
12. Date(s) of previous publication(s) in the Official Journal (where applicable).
13. Other information.
14. Date of publication of the periodic information notice in the Official Journal to which this contract refers (where applicable).
15. Date of dispatch of the notice.
16. Date of receipt of the notice by the Office for Official Publications of the European Communities.

Annex XIII

Notice on the existence of a qualification system

1. Name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.

2. Purpose of the qualification system.

3. Address where the rules concerning the qualification system can be obtained (if different from the address mentioned under 1. above).

4. Where applicable, duration of the qualification system.

Annex XIV

Periodic information notice

A. For supply contracts

1. Name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity or the service from which additional information may be obtained.

2. Nature and quantity or value of the products to be supplied.

3. (a) Estimated date of the commencement of the procedures of the award of the contract(s) (if known);

(b) type of award procedure to be used:

4. Other information.

5. Date of dispatch of the notice.

6. Date of receipt of the notice by the Office for Official Publications of the European Communities.

B. For works contracts:

1. The name, address, telegraphic address, telephone, telex and telecopier number of the contracting entity.

2. (a) The site;

(b) the nature and extent of the services to be provided, the main characteristics of the work or of the lots by reference to the work;

(c) an estimate of the cost of the services to be provided.

3. (a) Type of award procedure to be used;

(b) the date scheduled for initiating the award procedures in respect of the contract or contracts;

(c) the date scheduled for the start of the work;

(d) planned timetable for completion of the work.

4. Terms of financing of the work and of price revision.

5. Other information.

6. Date of dispatch of the notice.

7. Date of receipt of the notice by the Office for Official Publications of the European Communities.

Annex XV

Notice on contracts awarded

1. Name and address of contracting entity.
 2. Award procedure.
 3. Date of award of contract.
 4. Criteria for award of contract.
 5. Number of offers received.
 6. Name and address of successful supplier(s) or contractor(s).
 7. Nature and quantity of goods supplied, where applicable, by supplier;
- or, nature and extent of the services provided, general characteristics of the finished structure.
8. Price or range of prices (minimum/maximum) paid.
 9. Other information.
 10. Date of publication of the tender notice in the *Official Journal of the European Communities*.
 11. Date of dispatch of the notice.
 12. Date of receipt of the notice by the Office for Official Publications of the European Communities.

European Communities — Commission

Public procurement in the excluded sectors

Supplement 6/88 Bull. EC

Luxembourg: Office for Official Publications of the European Communities

1989 — 165 pp. — 17.6 x 25.0 cm

ES, DA, DE, GR, EN, FR, IT, NL, PT

ISBN 92-825-9260-X

Catalogue number: CB-NF-88-006-EN-C

Price (excluding VAT) in Luxembourg: ECU 3.50

The communication and the two proposals for Directives on public procurement in the excluded sectors are part of the programme, envisaged in the White Paper on completing the internal market, to open up public procurement in these sectors. Their purpose is to remove barriers to Community-wide competition in the awarding of supply and works contracts by entities enjoying a monopoly or oligopoly situation by virtue of their public status or the fact that they have been granted special or exclusive rights by the government.