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REPORT

drawn up on behalf of the Committee on Economic and  
Monetary Affairs and Industrial Policy

on the communication from the Commission to the Council  
(Doc. C2-9/85 - COM(84) 717 final) on public supply  
contracts

- Conclusions and perspectives -

Rapporteur: Mr K. von WOGAU

WG(2)1887E

PE 97.711/fin.



By letter of 28 March 1985, the Commission of the European Communities requested the European Parliament to deliver an opinion pursuant to Article 100 of the EEC Treaty on the communication to the Council on public supply contracts - conclusions and perspectives .

This communication was referred to the Committee on Economic and Monetary Affairs and Industrial Policy as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights and the Committee on Regional Policy and Regional Planning for their opinions.

At its meeting of 26 March 1985, the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr von WOGAU rapporteur.

At its meeting of 20-22 May 1985, the committee adopted the motion for a resolution by 18 votes to 1 with 1 abstention.

The following took part in the vote: Mr Seal, chairman; Mr P. Beazley, vice-chairman; Mr Abelin, Mr Besse, Mr Beumer, Mr Chaboche, Mr Falconer, Mr de Ferranti, Mr Gautier, Mrs van Hemeldonck, Mr Mattina, Mr Metten, Mr Mihr, Mr Mühlen (deputizing for Mr Herman); Mrs Oppenheim, Mr Patterson, Ms Quin, Mr Rogalla, Mr Starita and Mr Visser (deputizing for Mr Wagner).

The Committee on Legal Affairs and Citizens Rights and the Committee on Regional Policy and Regional Planning did not deliver opinions.

The report was tabled on 22 May 1985

The deadline for tabling amendments to this report will be indicated in the draft agenda for the part-session at which it will be debated.

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The Committee on Economic and Monetary Affairs and Industrial Policy hereby submits to the European Parliament the following motion for a resolution together with explanatory statement:

MOTION FOR A RESOLUTION

The European Parliament,

- having regard to the communication from the Commission to the Council (COM(84) 717 final),
  - having been consulted by the Commission pursuant to Article 100 of the EEC Treaty (letter of 28 March 1985 - Doc. C2 - 9/85),
  - having regard to the report drawn up by Mr von Wogau on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy, and the opinions of the Committee on Legal Affairs and Citizens' Rights and the Committee on Regional Policy and Regional Planning (Doc. A2-38/85),
- A. whereas the European Council meeting on 29-30 March 1985 in Brussels declared its support for the objective of obtaining free access for industry to public contracts<sup>1</sup>,
- B. whereas free access to public supply contracts increases competition between undertakings in the Community and results in more economical use of public money,
1. Recalls its resolution on the need to implement the internal European market<sup>2</sup>, paragraph 41 of which 'reiterates that the principles and provisions of the EEC Treaty should also apply to public markets and must be guaranteed by legislation so that undertakings in all the Member States can respond to invitations to tender from national authorities';
  2. Stresses the economic importance of Community-wide access to public contracting and therefore does not regard the issuing of mere communications or recommendations as an appropriate procedure to follow since even binding directives are not adequately observed, as the Commission's study demonstrates;
  3. Calls on the Commission to incorporate in its proposal the sectors hitherto excluded by the directive, in particular transport, water and energy suppliers, telecommunications and defence insofar as the products are not intended for specifically military purposes,
  4. Considers it appropriate for the Council to publish in the Official Journal of the Communities the list of products intended for specifically military purposes drawn up pursuant to Article 223(2) of the EEC Treaty,

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<sup>1</sup> See Conclusions, bottom of p. 4, in EP Bulletin No. 6, 15 April 1985

<sup>2</sup> See OJ No. C 127, 14.5.1984, p. 9

5. Calls on the Commission to review the existing directives' threshold values, in particular with a view to increasing the involvement of small and medium-sized businesses in tendering throughout the Community;
6. Calls on the Commission, in updating Regulation 70/32/EEC, to provide for arrangements which afford small and medium-sized businesses a fair chance of participating in public supply contracting, the main requirement for this purpose being that tenders should be invited for clearly defined lots;
7. Stresses the obligation on all Community organs (institutions, funds, trusts, Investment Bank) to implement or finance only those projects which comply with the directives governing the award of public supply contracts;
8. Considers it necessary to include among the tender documents information in the official languages of the Community on the administrative and judicial, national and Community channels of legal redress,
9. Encourages the Commission to take action in an official capacity also against central, regional or local authorities reported to it for infringements of the directive governing the award of public supply contracts (infringement procedure: Article 169 of the EEC Treaty);
10. Considers it a matter of urgency to increase information about the procedures governing the award of public supply contracts in order to improve awareness of the public supply contract market throughout the Community;
11. Demands an end to discrimination in public contracting through the use of uniform standards, where possible through CEPT (European Conference of Postal and Telecommunications Administrations), CEN (European Committee for Standardization) and CENELEC (European Committee for Electrotechnical Standardization);
12. Calls on the Commission to submit forthwith to the Council and Parliament - in line with its programme of work - a proposal for a directive of extended scope to govern public contracting;
13. Instructs its President to forward this resolution as Parliament's opinion to the Council, the Commission and the parliaments of the Member States together with the report by the Committee on Economic and Monetary Affairs and Industrial Policy.

EXPLANATORY STATEMENTI. The background

1. The directive coordinating procedures for the award of public supply contracts stipulates that all central, regional and local authorities and certain bodies governed by public law must, in principle, publicize any supply contracts exceeding a threshold value of 200,000 ECU throughout the Community and award these on a non-discriminatory basis.
2. Notwithstanding the Community-wide provisions, it has not yet proved possible to eliminate the partitioning of national procurement markets and to establish the internal Community market in the public supply contracts sector.
3. The public sector's share of gross domestic product is around 20% (investment and current purchases), i.e. more than 400,000 million ECU. This estimate incorporates all purchases by public undertakings, including the defence sector<sup>1</sup>. The additional costs incurred by public purchasers as a result of the partitioning of markets were estimated by Albert and Ball in their working document at 40,000 million ECU<sup>2</sup>.
4. The cost of the 'non-realization of Europe' represents a serious threat to vital elements of Community industrial potential, as considerable sums of public money totalling some 40,000 million ECU are being misspent. Opening up public supply contracting will alleviate national budgets and also benefit suppliers, industry, small and medium-sized businesses and trade.
5. In 1981, as the breakdown of the contracts awarded by central governments shows, 93.3% and in 1982 as many as 98.9% of contracts were awarded on a national basis<sup>3</sup>, i.e. only some 4.5% of all contracts in the Community were awarded to firms abroad in 1981. In 1982, the figure was only 1%.
6. The overriding reason for this is the national orientation of public purchasers and the fact that many suppliers are unaware of the extent of the Community market in the public supply sector. The very small number of subscriptions - some 3,500 copies - to Supplement S (tenders) of the Official Journal demonstrates this, even though the number of invitations to tender has steadily increased: in 1979 1,038, 1983 2,683 notices<sup>4</sup>.
7. The effectiveness of the directive on the award of public supply contracts on a Community-wide basis is minimal, as the abovementioned percentages demonstrate.

<sup>1</sup> See Communication COM(84) 717, p. 3

<sup>2</sup> See document of 31 August 1983, p. 79

<sup>3</sup> See Table VI, COM(84) 717

<sup>4</sup> See Communication COM(84) 717, p. 10 and Annex I

## II. Experience gained under existing legal provisions

### A. The main provisions

1. Public contracting is governed by international, Community and, overridingly, by national provisions.
2. The GATT agreement on government procurement has also been in force in the Community since 1 January 1981; this allows scope for direct competition from suppliers in certain third countries (USA, Canada, Japan, Singapore, Hong Kong, Israel and the EFTA countries)<sup>5</sup>.
3. The Council adopted Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts<sup>6</sup>, the resolution of 21 December 1976 concerning the review of Directive 77/62/EEC<sup>7</sup> and Directive 80/767/EEC of 22 July 1980 on adapting the directive to the GATT agreement.
4. The enactment of these legal instruments between 1976 and 1981 resulted in a complex array of Community provisions which impeded their incorporation into national law and hence national authorities' compliance with them.

### B. Compliance with current provisions

#### - by the Community institutions

5. The Community authorities have not always insisted on compliance with the directives as a condition of Community participation in financing particular projects. This has not encouraged respect for the directives. In future, therefore, the Community authorities must insist on compliance with the directives for projects which are financed in whole or in part by the Community.
6. The communication urges the Commission itself 'to set the example for the Member States in its own procurement activities' - with the astonishing proviso - 'applying as far as possible the provisions of the directives'.<sup>8</sup>
7. Parliament must insist that Community instruments and bodies (funds, trusts, pilot projects and development programmes) comply in full with the Community directives in order to set an example.

#### - by the central government authorities

8. The directives cover only some 7% of central government economic activity. This figure must be adjusted by the volume of contracts which fall below the threshold specified in the directive (1982 = 44% of contracts) or were awarded on the open market despite exceeding the threshold (1982 = 29%)<sup>8</sup>. Thus, in 1982 only 27% of all contracts awarded by central government within the scope of the directives were awarded on the basis of Community-wide competition.

<sup>5</sup> See Communication COM(84) 171, p. 16

<sup>6</sup> OJ No. L 13, 15.1.1977, p. 1 ff

<sup>7</sup> OJ No. C 11, 15.1.1977, p. 3

<sup>8</sup> See Communication (COM(84) 717, p. 12



9. Central government purchases made in compliance with the directives governing the award of public supply contracts in fact account for only 2% of their requirements.
10. The reasons why the percentage of public contracting covered by the directives is so low are that a number of central government authorities make no purchases under the directives and the fact that the directives themselves exclude telecommunications, energy, transport, water supplies and defence<sup>9</sup>. Some of the sectors excluded from the scope of the directives fall within the sphere of capital-intensive advanced technology. In its report on the need to implement the internal European market, therefore, the committee called on the Commission 'to draw up a proposal whereby the governments are obliged to award contracts at European level in the telecommunications and military sectors in particular'<sup>10</sup>.
11. Under Article 223(2) the Council is required to draw up a list of products which are necessary for protection of the Member States' essential security interests (arms, munitions, war material or trade therein). The EEC Treaty, however, expressly states that these measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes (Article 223(1)(b), second sentence).
12. The Commission therefore takes the view that the armed forces must invite tenders for the purchase of motor-vehicles, uniforms and similar products in conformity with the Community directives and therefore calls on the Council to publish in the Official Journal of the Communities a list of products which are intended for specifically military purposes so that contracts of the above nature are offered for tender throughout the Community<sup>11</sup>.
13. As with the market for civil procurement in the military sector, there is also a large telecommunications market in which the major purchasers are again the governments of the Member States. Telecommunications has also been excluded from the scope of the directive hitherto on strategic grounds.
14. Excessive variety resulting from a division into national markets may reduce efficiency and entail higher maintenance costs.
15. This market should therefore also be opened up to Community-wide tendering which would stimulate the marketing of new products and improve the capability of the equipment in relation to the price.

<sup>9</sup> See Council Directive, 21 December 1976, OJ No. L 13, 15.1.1977, p.2

<sup>10</sup> Report of 26 March 1984, Doc. 1-32/84, p. 37, paragraph 64

<sup>11</sup> See answer by Mr Narjes of 17.2.1983, OJ No. C 73, 17.2.83, p. 19

16. The directive applies only to public supply contracts whose estimated value net of VAT is not less than 200,000 ECU (see Article 5(1)(a)). Two-thirds of the bodies covered by the directives make no purchases in excess of this threshold. The reason for this lies in the under-estimation of contract values or in an over-zealous division of projects into lots which avoids coverage by the directives<sup>12</sup>. Article 5(4) of the directive, however, expressly states that 'no purchase requirement for a certain quantity of supplies may be split up with the intention of avoiding the application of this article'. Hence, the Commission has the legal means at its disposal to take action against unlawful division of supply contracts (Article 169 of the EEC Treaty, infringement procedure).

- By the local and regional authorities

17. These make hardly any purchases under the directive. In some Member States no invitations to tender are published by these authorities at all. If purchases by local and regional government bodies were added, the value of total government procurement would rise from 7% to 20-25%<sup>13</sup>.

18. Invitations to tender from local and regional authorities are a particularly suitable means of involving small and medium-sized businesses in tendering to a greater extent owing to the geographical proximity of purchaser and supplier. These authorities should therefore ensure that invitations to tender are not issued as a single package but in lots. This would facilitate access by small and medium-sized businesses in various sectors of the economy to public, international tendering.

19. In this connection, Article 5(3) of the directive should be invoked to prevent abuse. This states that 'if a proposed purchase of supplies of the same type may lead to contracts being awarded at the same time in separate parts, the estimated value of the sum total of these parts must be taken as the basis for the application of paragraph 1', i.e. the threshold value is taken to be the sum total of the individual lots.

(c) Implementation of the directive

20. With regard to implementation of the Community directive by the Member States, the committee would point out that they are obliged, within a discretionary framework, to select the most appropriate means of effectively implementing the directives. The implementing provisions must therefore oblige the central, regional and local authorities to comply.

<sup>12</sup>See Communication COM(84) 717, p. 13

<sup>13</sup>See Communication COM(84) 717, p. 12

21. The Commission must strengthen suppliers' confidence in Community law and the channels for legal redress at their disposal in the event of infringement of the directives in the awarding of contracts. The Commission should therefore provide undertakings with information in appropriate form about the administrative and judicial procedures for obtaining redress against the acts of the party awarding the contract. Undertakings may initiate these proceedings under the respective states' national law and under common Community procedures (complaints to the Commission).
22. To prevent the emergence of a 'black list' of firms which have taken legal action and thereby possibly jeopardized their chances of obtaining future contracts, the committee recommends that the Commission should take official action against any authorities which do not comply with the directives, where this is possible.

### III. Conclusions

1. The Commission's communication was issued as a result of a Council resolution of 21 December 1976<sup>14</sup>. This resolution requested the Commission to assess the effectiveness of the directive over an appropriate period of time and to submit proposals for the necessary changes to the directive.
2. Having regard to this request and the Commission's findings, the committee recommends that the directive's threshold value should be reviewed inter alia with an eye to its application to small and medium-sized businesses, and that the scope of the directive should be extended to include sectors of the economy hitherto excluded, e.g. transport undertakings, water and energy suppliers, telecommunications and defence with the exception of products specifically intended for military purposes.

<sup>14</sup>OJ No. C 11, 15.1.1977, p. 3

Supplement to the  
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(\*) The places mentioned in the contents are the addresses of the awarding authorities and not the places or areas where the works are to be performed or supplies delivered.

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