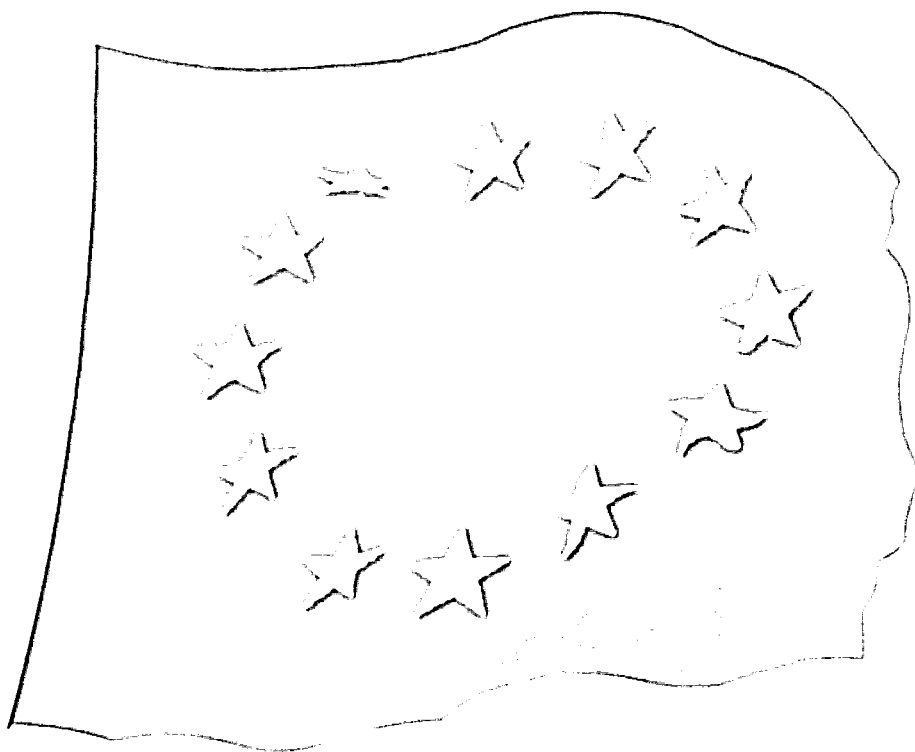


# Public procurement in the excluded sectors

Proposal for a Council Directive:  
Review procedures



Commission of the European Communities  
**Bulletin of the European Communities**

Supplement 3/90

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## Supplements 1990

1/90 Programme of the Commission for 1990

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3/90 *Public procurement in the excluded sectors (II)*

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regulations and administrative provisions relating to  
the application of Community rules on the procurement  
procedures of entities operating in the water, energy,  
transport and telecommunications sectors**

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# Explanatory memorandum

## Introduction

### *The context*

1. In October 1988, as provided for in the programme for completing the internal market by 1992, the Commission sent the Council two proposals for a Council Directive on the procurement procedures of entities operating in the water, energy and transport sectors<sup>1</sup> and of those operating in the telecommunications sectors<sup>2</sup> (hereafter 'the utilities'). These two proposals became one single proposal on the recommendation of Parliament and an amended proposal was submitted to the Council in August 1989,<sup>3</sup> following the adoption of the European Parliament's opinion<sup>4</sup> in May of that year. The Council's common position was adopted on 29 March 1990.

2. In December 1989, the Council adopted Directive 89/665/EEC<sup>5</sup> on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. This Directive applies to the fields covered by Directives 71/305/EEC<sup>6</sup> and 77/62/EEC:<sup>7</sup> purchases of works and supplies by the public administration. It does not apply to the award of works and supply contracts in the water, energy, transport and telecommunications sectors.

3. The availability of adequate remedies and control procedures is as important in the hitherto 'excluded sectors' as it is in the general field of public procurement. Only such guarantees will ensure that the Community rules on contract procedures are in practice respected and that the Community's fundamental objectives in this area of the internal market programme are realized. This new proposal thus fills an important gap and is the necessary complement to the proposals already made.

### *General approach*

4. As matters stand at the present time, the remedies open to a contractor or supplier concerning the procedures for awarding contracts vary considerably from one Member State to another. Suspension of illegal award procedures or similar interim remedies are not available under similar conditions in all Member States. The possibility of obtaining damages is also subject in many jurisdictions to such constraints that it is really a theoretical possibility only.<sup>8</sup> Moreover, since the utilities have in many cases not been subject to regulation of their procurement procedures, national systems of remedies may simply not exist.

5. The Commission therefore considers it necessary for Member States to amend, where appropriate, their administrative and judicial procedures so as to afford contractors and suppliers interested in taking part in relevant contract award procedures effective and rapid remedies against procedures, practices and decisions that are incompatible with Community procurement law. As noted above, this is as necessary for the utilities as it is in relation to the established public procurement regime.

6. It should also be recalled that Article 5 of the EEC Treaty imposes a general duty on Member States to make effective judicial remedies available for the enforcement of directly applicable Community rights arising under the Treaty itself (Case 33/76 *REIVE-*

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<sup>1</sup> OJ C 319, 12.12.1988.

<sup>2</sup> OJ C 40, 17.2.1989.

<sup>3</sup> OJ C 264, 16.10.1989.

<sup>4</sup> OJ C 158, 26.6.1989.

<sup>5</sup> OJ L 395/33, 30.12.1989.

<sup>6</sup> OJ L 185, 16.8.1971, most recently amended by Directive 89/440/EEC (OJ L 210, 21.7.1989).

<sup>7</sup> OJ L 13, 15.1.1977, most recently amended by Directive 88/295 (OJ L 127, 20.5.1988).

<sup>8</sup> The situation in the Member States is analysed in a summary of studies recently carried out on this subject in a Commission information document III/F/7086/final, June 1990.

*Zentralfinanz* [1976] ECR 1989). This duty has since been specifically recognized in relation to Treaty provisions concerning free movement of goods (Case 178/84 *Commission v Germany* [1987] ECR 1227) and of workers (Case 222/86 *Heylens* [1987] ECR 4097). New secondary Community legislation on remedies should take account of this legal duty as well as considerations calling for remedies to be available on a broader basis.

7. The following general considerations have in particular guided the Commission in preparing this proposal:

(i) the need to ensure that effective remedies for disadvantaged tenderers are available at national level and at Community level;

(ii) the need to ensure that these remedies in the sectors of water, energy, transport and telecommunications be in principle as close as possible to those already adopted for the general system of public procurement review procedures while taking into account the particular characteristics of the entities engaged in those sectors from the economic, technical and legal points of view;

(iii) the need to ensure that effective remedies are available to disadvantaged tenderers irrespective of the public law or private law status of the utilities;

(iv) the need to ensure that remedies are available in as flexible and unbureaucratic a manner as possible;

(v) the need to ensure that compliance with Community law may be effectively supervised at Community level;

(vi) the need to ensure that a litigious approach is not the only method of dispute settlement available to interested parties;

(vii) the need to take account of the different character of the national legal systems within which the review procedures and remedies must be created.

8. There are various remedies which may, depending on the circumstances, be relevant in connection with ensuring compliance with Community law, apart from the inherent right of the Commission to exercise its discretion to bring infringement proceedings under Article 169 of the EEC Treaty. In considering these remedies, it is important to remember that infringements of Community rules on public procurement generally occur before the contract is awarded. Since

contract award procedures are of short duration (a decision is often taken within a few weeks), any failure to comply with the Community rules in question needs, if possible, to be dealt with urgently and rapidly. Among the principal remedies are therefore interlocutory remedies, designed to correct the alleged infringement by, for example, ordering the setting aside or modification of a contested clause or to prevent further damage to the party concerned by, for example, securing the suspension of the award procedure or of the implementation of a decision of the awarding entity. On its own, however, interlocutory relief is not enough and, as has been agreed in relation to Directive 89/665/EEC, it is necessary to ensure that damages may be awarded for those breaches of relevant Community provisions which it has not proved possible to avoid or correct.

9. However, the preparatory work and consultations on this proposal have shown that the particular characteristics of the utilities concerned, and of the national legal orders within which review procedures and remedies must be made available, require a degree of flexibility to be introduced into the proposal. In some contexts it may be possible, legally and politically, to apply a classical system of the type applied to the public administration generally. In other contexts, this could create major difficulties. For example, given the industrial character of some organizations concerned, and also their need to satisfy imperative requirements of continuous service to the public, the view is strongly held in some quarters that classical remedies which directly affect the decision-making of the bodies concerned would not be appropriate. Suspension of contract award procedures and setting aside of award decisions are accordingly said to be unacceptable.

10. In some Member States, indeed, the application of such remedies to bodies governed by private law would face constitutional or other serious obstacles due to the adverse impact on the autonomy of the bodies concerned.

11. Thus, in Germany, attention has had to be given to the basic rights of enterprises pursuant to Articles 12 and 19(3) of the Basic Law: the principle of non-interference in the exercise of a trade or profession. The proposed Directive respects this principle as it permits the Member States to offer entities a flexible means of demonstrating compliance with Community law which does not involve mandatory inter-



ference with their freedom of commercial action. Thus Article 11 is drafted so as to permit effective interim relief whilst respecting this freedom.

12. In Spain, any re-distribution of jurisdiction arising from the implementation of this proposal may require modification of the organic law on the judiciary by a special majority in Parliament in accordance with Article 81 of the Constitution.

13. Means have accordingly had to be found to resolve these difficulties through the introduction of a degree of flexibility which is nevertheless conditioned to ensure its compatibility with the principle of equal treatment of similarly situated undertakings both as between Member States and whether they are public or private.

14. This approach has also served to introduce into the Community procurement framework for the first time a form of control which has its own particular merits: attestation on a regular, periodic basis or, as it is often called, 'audit'.<sup>9</sup> In brief, where Member States choose to depart from the classical approach applied to the public administration by not providing for remedies such as suspension of procedures and setting aside of decisions, they may do so subject to two conditions: the bodies concerned must be subject to regular attestation of the general conformity of their procurement systems with Community law by an independent, qualified person; and, in addition, effective interlocutory remedies must still be available though in a way which leaves the body concerned the final responsibility to decide whether to correct an infringement or instead pay a financial penalty.

15. Since, in any event, the industrial, public service character of the utilities may well make it more difficult for individuals to obtain effective interlocutory relief due to the utilities' possibility of relying on arguments to show that suspension of procedures is not justified taking account of all possible interests likely to be affected, including the public interest, the proposal also seeks to ensure that in all Member States claims to damages will be a practical proposition and therefore a genuine incentive to compliance. In particular, it should not be necessary for interested parties seeking to recover the costs of bid preparation or of their participation in an illegal procedure to show that they would have been awarded the contract. Such proof will in many cases be extremely difficult and makes the availability of remedies in dam-

ages far less effective as an incitation to contracting bodies to comply with the law. Interested parties should be required to show only that their chances of securing the contract were adversely affected. In addition, disputes about the exact amount of their bidding costs should be limited by providing for a minimum amount, related to the value of the contract, which will be payable in the absence of proof that the costs were in fact higher.

16. Different considerations apply to claims for other losses such as lost profits. These raise complex issues which are resolved by the Member States in the context of their particular approaches to the quantification of economic loss. Much of the legislation is derived from case-law and is of general application, applying outside the field of procurement. Harmonization of these approaches would certainly encounter considerable difficulties. Such matters are accordingly left to be resolved for the time being according to national law as under *Council Directive 89/665/EEC*. In the longer term, it will be necessary to see whether further action at Community level is necessary.

17. The proposal further envisages a rapid corrective mechanism whereby the Commission may invoke certain procedures when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions on procurement in the fields covered is being committed during a contract award procedure. This proposed corrective mechanism is in terms identical to those of Article 3 of *Directive 89/665/EEC* and has the same justification. First, remedies at national level, while vital, need to be complemented by possibilities for effective intervention at Community level. Parties directly concerned may not consider their intervention at national level to be in their own best interests. Nevertheless, important violations of Community procurement law may have occurred calling into question its credibility. In these circumstances, the Commission must be able to act and obtain a rapid intervention at national level, preferably to correct the situation before the damage has become irreparable. In addition, rapid

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<sup>9</sup> 'Audit' is not used in the proposal to avoid possible confusion with the financial audit of corporate accounts. 'Certification' has also been rejected because of its use in connection with technical standards.

clarification of the issues will facilitate the Commission's possibility, in appropriate cases, of seizing the Court of Justice of the European Communities, in good time, of requests for interim measures where it considers that necessary corrective action has not been taken at national level.

18. The proposal finally envisages a conciliation procedure at Community level. This would be available to interested parties as a non-litigious method of dispute settlement without prejudice to the possibility of infringement procedures being taken under Articles 169 or 170 of the EEC Treaty, or to the possibility of a corrective mechanism being used, or to the rights of persons invoking the procedure, of the contracting entity or of any other person under applicable national laws unless they enter into an agreement for the resolution of the differences between them. Experience in certain Member States suggests that such a procedure may have a useful role to play, not least by avoiding unnecessary law suits. Considerable interest in this possibility has been expressed in some quarters. Accordingly, it seems appropriate to establish such a system with a view to testing its utility in practice.

19. Given the important changes that the Directive will introduce and also the necessarily limited nature of some of its provisions, for example on damages, a review of its working in practice after a sufficient period of time would appear to be useful. Provision is accordingly made to this effect along the lines of the provision already included in Directive 89/665/EEC.

## Detailed commentary

### *Chapters 1 and 2 — Remedies at national level*

20. Chapter 1 requires that Member States ensure that adequate means of independent review are available to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. The provisions of the chapter are for the most part the same as those in Articles 1 and 2 of Council Directive 89/665/EEC. Since in many cases it will be necessary to seek review at an early stage prior to the award of a

contract, provision is made for obtaining interim relief by interlocutory procedure, in particular, suspension of the award procedure. Provision is also made for the award of damages and, for the reasons given above, this includes a specific provision concerning the recovery of bidding costs.

21. Considerable flexibility is left for the Member States to implement the Directive's requirements in accordance with their particular approaches to administrative and judicial review, including the procedural and other conditions applying to such remedies. This is to facilitate the insertion of the new remedies into existing national structures.

22. However, to ensure that the fundamental guarantees offered by different national systems are equivalent, if the review bodies are not themselves judicial in character, their decisions must be subject to review by a body which is capable of making references to the Court of Justice of the European Communities and which is independent both of the contracting entity and the review body. This requirement was the provision which was central to the resolution of the differences of view concerning Directive 89/665/EEC.

23. Chapter 2 permits Member States to adopt an alternative approach in cases in which they consider that the classical remedies such as suspension of award procedures or setting aside decisions of contracting bodies are inappropriate for reasons already given. Those particular remedies then need not be made available under the conditions that the utilities in question are subject to regular certification of their purchasing systems, and that, in addition, effective interim remedies are still available.

### *Article 1*

24. This Article sets out the principle of decisions by contracting entities on award procedures falling within the scope of the utilities Directive already proposed being subject to effective and rapid review on the ground of infringements of Community law in the field of procurement or national rules implementing that law. The coverage is complete in the sense that breaches of all provisions of the Directive already proposed which require the utilities to act in a particular way will be subject to the review procedures specified. For this reason, specific reference is made to Article 3(2) of the utilities Directive which obliges entities subject to the alternative regime for the explo-

ration for and extraction of oil, gas, coal and other solid fuels to respect the principles of non-discrimination and competitive procurement, particularly as regards information on their procurement intentions made available to undertakings.

25. No discrimination between undertakings may result from the distinction made in the proposed Directive between national rules implementing Community law and other national rules.

26. The Member States will be at liberty to establish detailed rules relating to the review procedures, for example, concerning procedural formalities or costs. Of course, in so doing, they must in no way disadvantage those who seek to use the remedies for breaches of Community law by comparison with persons seeking redress for breaches of national rules. This is in line with the approach of the Court of Justice in myriad cases (for example Case 199/82 *Amministrazione delle Finanze dello Stato v Spa San Giorgio* [1983] ECR 3595) which requires that the availability of remedies for breach of Community law must be on conditions no less favourable than those governing the availability of remedies for breach of national law and that the conditions must not be such as to render the remedies illusory or virtually impossible to obtain.

27. Accordingly the procedures must be open at least to persons having or having had an interest in obtaining a particular contract and who have been or risk being harmed by an alleged infringement. Review will be thus available to those who have or have had a legitimate interest in the outcome of a particular procedure. Nevertheless, express provision is made to the effect that Member States will be free to require that the person seeking review should have previously notified the contracting entity of the alleged infringement and of his intention to seek review. This has the advantage of ensuring that there is the possibility of achieving a settlement prior to the dispute going to formal review.

28. The wording of this Article closely reflects that of the equivalent Article in Directive 89/665/EEC.

## Article 2

29. This Article deals with the remedies for which provision must be made; it does not preclude a Mem-

ber State from providing for additional remedies. The first set of remedies are essentially interim remedies, designed to correct the alleged infringement or prevent further damage to the interests concerned. This set includes the power to suspend or ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity. The second set of remedies concerns the setting aside of decisions taken unlawfully. This set includes the power to remove discriminatory technical economic or financial specifications in the invitation to tender, the contract documents or any other document relating to the contract award procedure. The final remedy is the right to damages for injury caused by the infringement.

30. The Member States will be able to endow separate bodies with powers in relation to different aspects of the review procedure. This flexibility permits Member States to allocate functions to different bodies in accordance with their existing practices. In some cases, those practices reflect sensitive and deep-seated constitutional considerations such as the national conception of the separation of powers between the administration and the judiciary. Because suspension may not always be appropriate, the proposed Directive provides that review procedures need not in themselves have an automatic suspensive effect in relation to the award procedure concerned. The Member States are also free to provide that in considering whether to order an interim measure the body concerned may have regard to the balance of convenience. Interests that may be taken into account include those of other participants in the award procedure as well as those of persons to whom the contracting entity provides a service and indeed the public in general. As is customary, a decision not to grant interim measures will not prejudice the outcome of any other claim which an applicant for such measures may make. The Member States may require that a contested decision be set aside or declared illegal before an award of damages may be made in relation to an unlawful decision.

31. It will be for national law to determine the effect of the exercise of the review powers. Save where a Member State has made setting aside a precondition for the award of damages, a Member State may restrict the powers of the reviewing body, after the conclusion of a contract following its award, to the award of damages. The provision on claims for damages is a limited step designed to ensure that in all Member States such claims will be a practical possibility.

Given likely constraints on suspension and equivalent interim measures, the possibility of claims for damages will be a particularly important part of the system. A high level of harmonization of the quantification of damages is an unrealistic objective at this stage. A limited step of the kind proposed is both feasible and sufficient to meet the Community's immediate objectives in the procurement field. In any event, Member States must ensure that the decisions of the reviewing bodies can be effectively enforced. As part of the guarantee of transparency, if reviewing bodies are non-judicial in character, they must give written reasons for their decisions. Any allegedly illegal measures taken by the reviewing body or any alleged defect in the exercise of its powers must be subject to judicial review or to review by a body which is a body capable of making a reference to the Court of Justice under Article 177 of the EEC Treaty and which is also independent of both the contracting entity and the reviewing body. The purpose of this requirement is to ensure that the review systems offer equivalent guarantees as to the effective application of the requirements of Community procurement law. References to the Court of Justice of the European Communities for a preliminary ruling will also ensure the coherent development of case-law in the different Member States. If the judicial or other independent body is of last instance jurisdiction then the obligation in the third paragraph of Article 177 of the EEC Treaty will apply, as interpreted by the Court of Justice.

32. The wording of this Article reflects that of the equivalent Article in Directive 89/665/EEC.

### *Article 3*

33. This Article empowers the Member States to set up a system of attestation whereby contracting entities attested in accordance with the system set out in Chapter 2 need not be subject, in particular, to the suspension of their awards of contracts or to the setting aside of unlawful decisions, including specifications. They remain, however, subject to other interim measures designed to correct alleged infringements or prevent further damage to interested parties and to the award of damages to persons harmed by any infringement.

34. The purpose of this system is to satisfy concerns which have been expressed about the feasibility of

suspension or setting aside of the award of contracts in certain sectors in which meeting deadlines is of crucial importance while, at the same time, ensuring that the utilities concerned will be subject to effective means for ensuring their compliance with the requirements of Community procurement law, both in general and in particular cases, including situations in which problems arise before a contract is awarded.

35. The attestation system affords the opportunity of controlling the whole purchasing system of contracting entities on a regular and systematic basis. It is thus envisaged as having considerable preventive effects since the entities will be aware that any decision may be the subject of subsequent examination by an independent, qualified person.

36. Since the attestation system addresses the procedure of a utility taken as a whole, it does not provide remedies for particular claims by individuals. Accordingly, contracting entities subject to attestation will still be liable to pay damages to persons harmed by an infringement in accordance with Article 2. In addition, article 3(b) ensures that effective interim relief will also be available with a view to correcting the alleged infringement or preventing further damage to the person concerned. The characteristics of this interim relief are specified in Article 11.

### *Article 4*

37. An attestation by an authorized person on at least an annual basis offers an effective continuing basis on which to evaluate procurement practices and procedures.

### *Article 5*

38. The appointment and removal of those who attest the purchasing procedures and practices must be subject to appropriate guarantees of independence.

### *Article 6*

39. This Article lays down the qualities and qualifications of persons who attest in order to ensure their independence and professional competence.

### *Article 7*

40. This Article deals with the subject-matter of the attestation. The examination covers the overall fairness of the opportunity given to potential suppliers and contractors to secure the award of contracts and whether the procedures and practices of the contracting entities conform with national and Community law concerning the award of contracts.

### *Article 8*

41. This Article sets out the minimum contents of the written report which it requires persons attesting to prepare. Such requirements are essential in the interests of transparency and to ensure that the report is an effective instrument.

### *Article 9*

42. This Article specifies those who are entitled to receive copies of the report drawn up by those who have carried out the attestation. It permits supervision by interested persons, the Commission and the relevant competent authority at national level.

### *Article 10*

43. This Article requires contracting entities benefiting from derogations under Article 3 of this proposal to indicate the general nature of the derogation from which they benefit in the tender and periodic indicative notices published in the Official Journal pursuant to Articles 16 and 17 of the Directive.

### *Article 11*

44. Attestation procedures do not address immediately the particular problems of interested suppliers or contractors, though they may disclose facts which enable them to take action. Claims for damages, though an important part of the system, do not address the issue of corrective action while a contract award procedure is still running. The form of interim relief described by this Article permits such action to be taken while at the same time not interfering directly with the internal decision-making of the con-

tracting entity. Conflict with any constitutionally protected freedoms of the contracting entity are thus avoided while, at the same time, effective means for defending their interests are put at the disposal of interested persons.

45. The sum of money payable in the event that an infringement is not avoided or corrected is to be fixed at a dissuasive level. It should in any event cover the plaintiffs' costs of preparing a bid or participating in a procedure. To facilitate the quantification of these costs, a minimum amount is fixed in accordance with the probable size of the contract in the same ways as in Article 2(7).

## *Chapter 3 — Corrective mechanism*

46. This chapter establishes a corrective mechanism whereby the Commission may intervene prior to the award of a contract, in cases in which it considers that a clear and manifest infringement of Community public procurement provisions in this field has been committed during a contract award procedure. This mechanism is, however, without prejudice to the right of the Commission or a Member State to bring infringement proceedings against a Member State under Articles 169 or 170 of the EEC Treaty respectively.

### *Article 12*

47. This Article sets out the procedure of the corrective mechanism which the Commission may invoke. It parallels the provisions of Article 3 of Directive 89/665/EEC.<sup>10</sup>

## *Chapter 4 — Conciliation*

48. This chapter establishes a conciliation procedure at Community level in addition to any existing procedures at national level as a means of non-litigious dispute settlement. The conciliation procedure may be invoked by any party having an interest in obtaining a particular contract in the field who has been harmed or risks being harmed. There is, though, a filter in the form of the Commission or the national authorities of the Member States who must be prepared to seize the relevant advisory committee. The conciliation proce-

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<sup>10</sup> See footnote 5 above.

procedure is available without prejudice to the possibility of infringement proceedings being commenced under Articles 169 or 170 of the EEC Treaty or to the possibility of the corrective mechanism provided for in Chapter 3 of the present proposal. It is also without prejudice to the rights of the parties to the particular dispute under national law save in so far as they agree to resolve the issues between themselves.

### Article 13

49. This Article sets out the persons who have standing to invoke the conciliation procedure. Thus any person who has an interest in obtaining a particular contract in the field and who in relation to the procedure for that contract has been or risks being harmed by an alleged infringement of Community procurement law or national rules implementing that law may invoke the conciliation procedure by written notification to the Commission or to the national authorities of the Member States listed in Annex I to the present proposal. It is up to the person concerned whether he sends his notification to the Commission or to the national authorities involved.

### Article 14

50. This Article sets out the mechanics of the conciliation procedure. Both the person invoking the procedure and the contracting entity are to be given the opportunity to make either oral or written representations on the matter concerned. The working group endeavours to resolve the dispute by making recommendations to the parties and inviting their agreement. If necessary, the working group acts by majority vote. The recommendations are not, however, legally binding and there is no sanction for failure to enter into agreement although the whole procedure is without prejudice to the possibilities envisaged in Article 15 of the present proposal. The working group reports to the Committee on its findings and on any result achieved. In keeping with the non-litigious nature of the proceedings, the parties to the conciliation proceedings bear their own costs.

### Article 15

51. The first paragraph of this Article ensures that conflicts will not arise between the conciliation procedure and review proceedings at national level. The second paragraph makes it clear that the conciliation

procedure does not prejudice any possible action under Articles 169 or 170 of the EEC Treaty or the possibility of the corrective mechanism set up under the present proposal being applied. The conciliation procedure likewise does not prejudice the rights of the person invoking the procedure and the contracting entity under national laws or any other person, save in so far as they may agree to resolve the issues between them.

### Chapter 5 — Final provisions

52. This chapter contains provisions to enable the system to be properly reviewed after a sufficient period of operation which shall not be later than 1 January 1996 (Article 16) and to ensure the adoption and application of the necessary measures according to the schedule fixed by the utilities Directive (Article 17).

## Annex

This Annex indicates the Articles of Directive 89/665/EEC which correspond to the provisions of this proposal.

Directive 89/665	This proposal
Article 1	Article 1
1	1
2	2
3	3
Article 2	Article 2
1	1
2	2
3	3
4	4
5	5
6	6
7	8
8	9
Article 3	Article 12
1	1
2	2
3	3
4	4
5	5
Article 4	Article 16
1	1
2	2
Article 6	Article 18

# Proposal for a Council Directive

## *THE COUNCIL OF THE EUROPEAN COMMUNITIES,*

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

Having regard to the proposal from the Commission,<sup>1</sup>

In cooperation with the European Parliament,<sup>2</sup>

Having regard to the Opinion of the Economic and Social Committee,<sup>3</sup>

Whereas Directive .../.../... on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>4</sup> does not contain any specific provisions ensuring its effective application;

Whereas Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts<sup>5</sup> is limited to contract award procedures within the scope of Council Directive 71/305/EEC of 26 July 1971 coordinating procedures for the award of public works contracts,<sup>6</sup> as last amended by Directive 89/440/EEC,<sup>7</sup> and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts,<sup>8</sup> as last amended by Directive 88/295/EEC;<sup>9</sup>

Whereas the existing arrangements at both national and Community levels for ensuring its application will otherwise not always be adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

Whereas the opening-up of procurement in the sectors concerned to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination and whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

Whereas, since procedures for the award of contracts are of short duration, competent review bodies must, among other things, be able to take rapid and effective interim measures aimed at correcting or avoiding infringements during the procedures;

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

Whereas it is necessary to ensure equivalent treatment and guarantees for contracting entities irrespective of their public law or private law status;

Whereas it is necessary, to take account of the specific nature of certain legal orders, to authorize the Member States to choose to apply for any one category of contracting entity a control system based on attestation by an independent body and offering equivalent guarantees in relation to the transparency and non-discriminatory nature of the awarding procedure;

Whereas, when undertakings do not seek review, certain infringements may not be corrected unless a specific mechanism is put in place;

Whereas, accordingly, the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities of the Member State and of the contract-

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<sup>1</sup> OJ

<sup>2</sup> OJ

<sup>3</sup> OJ

<sup>4</sup> OJ

<sup>5</sup> OJ L 395, 30.12.1989, p. 33.

<sup>6</sup> OJ L 185, 16.8.1971, p. 5.

<sup>7</sup> OJ L 210, 21.7.1989, p. 1.

<sup>8</sup> OJ L 13, 15.1.1977, p. 1.

<sup>9</sup> OJ L 127, 20.5.1988, p. 1.

ing entity concerned so that appropriate steps are taken for the rapid correction of any infringement;

Whereas it is necessary to provide for the possibility of non-litigious conciliation at Community level;

Whereas the application in practice of the provisions of this Directive should be reviewed not later than 1 January 1996 on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures,

*has adopted this Directive:*

## **Chapter 1 — Remedies at national level**

### *Article 1*

1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field of procurement or national rules implementing that law as regards:

(a) contract award procedures falling within the scope of Directive .../.../...;<sup>10</sup> and

(b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In particular, the

Member States may require that the person seeking the review must have previously notified the contracting entity of the alleged infringement and of his intention to seek review.

### *Article 2*

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

<sup>10</sup> The proposed Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors: see OJ C 264, 16.10.1989, p. 22.



5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside or declared illegal by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required to prove the infringement of Community law in the field of procurement or national rules implementing that law and that the infringement adversely affected his chance of being awarded the contract. He shall not be required to prove that, in the absence of the infringement, he would have been awarded the contract. The amount of such costs shall be deemed to be one per cent of the value of the contract unless the person making the claim proves that his costs were greater.

8. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measures taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the Treaty and independent of both the contracting entity and the review body.

The members of the independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary.

The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

## Chapter 2 — Attestation

### Article 3

Member States may choose to apply to contracting entities in the same category defined by objective criteria the system set out in Articles 4 to 10 instead of the measures set out in Article 2(1)(a) concerning measures to suspend or to ensure the suspension of procedures for the award of a contract or the implementation of any decision taken by the contracting entity and instead of Article 2(1)(b), provided that the review procedures made available pursuant to Chapter 1 include provisions for the interim measure specified in Article 11.

### Article 4

The contracting entities shall, at least once a year, have their purchasing procedures and practices attested by one or more persons authorized by national law to exercise this function.

### Article 5

Persons who attest the purchasing procedures and practices of the contracting entities shall be appointed to and may be removed from their office either by a competent authority designated for this purpose by the Member States or by the contracting entities themselves subject to the prior approval of such a competent authority. The competent authority shall be independent of the contracting entities.

### Article 6

Persons who attest the purchasing procedures and practices of the contracting entities shall be

(a) independent of the contracting entities;

(b) holders of a higher education diploma within the meaning of Article 1 of Council Directive 89/48/EEC;<sup>11</sup>

(c) persons having knowledge and practical experience of procurement law and practice by reason of

(i) their having passed an examination of professional competence organized or recognized by the State; and

(ii) their having a minimum of three years' practical experience of procurement law and practice in the field of activity of the contracting entities concerned.

### Article 7

The persons who attest the purchasing procedure and practices of the contracting entities shall examine whether those procedures and practices have been in conformity with national and Community law concerning the award of contracts and have given potential suppliers and contractors a fair opportunity to secure the award of contracts.

### Article 8

The persons who attest the purchasing procedures and practices of contracting entities shall prepare a written report relating to the results of their work. The report shall contain the following at least:

(a) an indication of whether the purchasing procedures and practices of the contracting entities gave potential suppliers and contractors a fair opportunity secure the award of contracts;

(b) observations concerning any infringements of national or Community law concerning the award of contracts;

(c) where deficiencies have occurred pursuant to paragraphs (a) or (b), suggestions as to actions needed to prevent their repetition in the future.

### Article 9

The report to which Article 8 refers shall be

(a) made available by the contracting entities to interested persons who shall be supplied with copies at their request, for which a price may be charged which does not exceed the cost of their copying and transmission;

(b) communicated by the contracting entities to the Commission and to any competent authority designated by a Member State by the law of which a contracting entity is governed.

On the basis of these reports the Commission may publish periodic summary reports in the *Official Journal of the European Communities*.

### Article 10

1. Contracting entities to which the system set out in Articles 4 to 9 applies shall indicate in accordance with paragraph 2 the general nature of this system in the tender and periodic indicative notices published in the *Official Journal of the European Communities* pursuant to Articles 16 and 17 of Directive .../.../...<sup>12</sup>

2. The first point of the notice shall conclude with the phrase: 'The contracting entity is subject to attestation and accordingly is not subject to certain powers specified in Article ... of Directive .../.../..., namely those concerning

(a) suspension of contract award procedures;

(b) setting aside of decisions'.

However, subparagraph (a) or (b) of the phrase shall be deleted where it does not apply.

### Article 11

1. The Member States shall ensure, under the conditions specified in Chapter 1, that a review body shall have the power, at the earliest opportunity and by way of interlocutory procedure, to declare at any stage that, on the basis of the evidence available to it at that time, an infringement has been or risks being committed during a contract award procedure and that the contracting entity should correct or avoid the infringement. A review body shall also have the power to make an order for the payment of a sum of money to the person or persons seeking review in the event that the infringement is not corrected or avoided. The payment may be made conditional on a final decision being reached to the effect that the infringement has been committed.

<sup>11</sup> OJ L 19, 24.1.1989, p. 16.

<sup>12</sup> OJ C 264, 16.10.1989, p. 22; COM(89) 380 final.

2. The review body responsible for fixing the sum of money payable in accordance with paragraph 1 shall fix any such sum at a level designed to dissuade the contracting entity from committing or continuing the infringement. The amount shall at least cover any costs of preparing a bid or participating in the award procedure of the person seeking review. The amount of such costs shall be deemed to be one per cent of the value of the contract unless the person seeking review proves that his costs were greater. An order for payment of a sum of money in accordance with this provision shall bar any further claim by the person concerned to the recovery of the costs taken into account by the review body when fixing the order.

### Chapter 3 — Corrective mechanism

#### Article 12

1. The Commission may invoke the procedures for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of procurement has been committed during a contract award procedure falling within the scope of Directive .../.../...<sup>13</sup> or in relation to Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.

2. The Commission shall notify the Member State and the contracting entity concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.

3. Within 21 days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected; or

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission in accordance with paragraph 3(b) may rely among other matters on the fact

that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject-matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

### Chapter 4 — Conciliation

#### Article 13

Any person having or having had an interest in obtaining a particular contract falling within the scope of Directive .../.../...<sup>13</sup> and who, in relation to the procedure for the award of that contract, has been or risks being harmed by an alleged infringement of Community law in the field of procurement or national rules implementing that law may invoke the procedure for which this chapter provides by written notification to the Commission or to the national authorities of the Member States listed in the Annex.

#### Article 14

1. Where the Commission or the national authorities of a Member State consider that, following a notification pursuant to Article 13, an infringement of Community law has occurred, they may put the matter before the Advisory Committee for Public Contracts or, in the case of contracting entities having as one of their activities the operation of public telecommunications networks or the provision of one or more telecommunications services to the public, the Advisory Committee on Telecommunications Procurement.

2. The chairman of the committee in question shall convoke as rapidly as possible a working group of at

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<sup>13</sup> OJ C 264, 16.10.1989, p. 22.

least two members of the committee and himself or another Commission official designated by him. The working group shall normally meet within 10 working days of the matter being put before the relevant committee. It may decide on a proposal from any of its members to invite not more than two other persons as experts to advise it in its work. Any other member of the committee may attend any meeting of the working group as an observer.

3. The working group shall give the person invoking this procedure, the contracting entity and any other candidate or tenderer participating in the contract award procedure to which the notification relates the opportunity to make representations on the matter either orally or in writing.

4. The working group shall endeavour to reach an agreement between the parties which is in accordance with Community law.

5. The working group shall report to the committee on its findings and any result achieved.

6. The person invoking the procedure and the contracting entity shall bear their own costs of participating in the procedure.

#### Article 15

1. Where, in relation to a particular contract award procedure, an interested person within the meaning of Article 13 other than the person invoking the conciliation procedure is pursuing judicial or other review proceedings or proceedings for review according to Article 2(9), the contracting entity shall inform the working group. The chairman shall inform that person that the conciliation procedure has been invoked and shall invite that person to indicate within a time-limit that it may determine whether he agrees to participate in the conciliation procedure. If that person does not agree to participate within that time and the working group decides, acting if necessary by majority, that his participation is necessary to resolve the dispute, it shall terminate its activities and report to the committee on its reason for so doing.

2. Action taken pursuant to this chapter shall be without prejudice to

(a) any action that the Commission or any Member State might take pursuant to Articles 169 or 170 of the Treaty or pursuant to Chapter 3;

(b) the rights of the person invoking the procedure, of the contracting entity or of any other person under

applicable national laws except in so far as they enter into an agreement for the resolution of issues between them.

## Chapter 5 — Final provisions

### Article 16

1. Not later than 1 January 1996, the Commission, in consultation with the Advisory Committee for Public Contracts, shall review the manner in which the provisions of this Directive have been implemented and, if necessary, make proposals for amendments.

2. By 1 March each year the Member States shall communicate to the Commission information on the operation of their national review procedures during the preceding calendar year. The nature of the information shall be determined by the Commission in consultation with the Advisory Committee for Public Contracts.

3. In the case of matters relating to contracting entities, the activities of which are defined in Article 2(2)(d) of Directive .../.../...,<sup>14</sup> the Commission shall consult the Advisory Committee on Telecommunications Procurement.

### Article 17

1. Member States shall adopt, before 1 July 1992, the measures necessary to comply with this Directive. They shall communicate to the Commission the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by this Directive.

2. The provisions adopted pursuant to the first subparagraph shall make express reference to this Directive.

3. Member States shall bring into force the necessary measures adopted pursuant to paragraph 1 on the same dates as those contained in Directive .../.../...<sup>14</sup> They shall immediately inform the Commission of them.

### Article 18

This Directive is addressed to the Member States.

<sup>14</sup> OJ C 264, 16.10.1989, p. 22.

## Annex

*National authorities of the Member States to which written notifications may be sent invoking the conciliation procedure pursuant to Article 13*

*Belgium*

Ministère des Affaires économiques  
Ministerie van Economische Zaken

*Denmark*

Indkobsaftaler: Direktoratet for Statens Indkøb  
Bygge-og anlægskontrakter: Boligministeriet

*Federal Republic of Germany*

Bundesministerium für Wirtschaft

*Greece*

Ministry of Industry, Energy and Technology  
Υπουργείο Βιομηχανίας, Ενέργειας και Τεχνολογίας  
Ministry of Commerce  
Υπουργείο Εμπορίου  
Ministry of the Environment, Planning and Public Works  
Υπουργείο Περιβάλλοντος, Χωροταξίας και Δημοσίων Έργων

*Spain*

Ministerio de Economía y Hacienda

*France*

Commission centrale des marchés

*Ireland*

Department of Finance

*Italy*

Ministero dei Lavori Pubblici

*Luxembourg*

Ministère des Travaux publics

*The Netherlands*

Ministerie van Economische Zaken

*Portugal*

Ministério das Obras Públicas, Transportes e Comunicações:  
Conselho Superior de Obras Publicas, Transportes e Comunicações

*United Kingdom*

HM Treasury

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This proposal for a Directive is aimed at extending to the sectors hitherto excluded from the general rules on public procurement the remedies and review procedures laid down in Council Directive 89/665/EEC. It is an essential accompaniment to efforts to open up public procurement in the sectors concerned to Community-wide competition (see Supplement 6/88).

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