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INFORMATION INTERIOR MARKET

Business and the creation of European public procurement contracting 90/75

Firms seeking to derive full advantage from the completion of the Common Market in 1968 have so far been unable to do so, because in one major respect the European market is anything but common : public procurement markets of the Community's nine Member States remain rigorously protected on a national basis. While the supply of goods to private buyers across member state borders has been largely untrammelled for the last 7 years, it is quite another story when firms attempt to sell transnationally to public and semi-public buyers - whether it be governments or major public services like railways, electricity and post office authorities.

Such operations are in fact negligible to the point of non-existence. Seventeen years since the creation of the EEC in 1958, national public procurement markets remain as isolated as ever one from the other. The result is that European business is artificially limited in the extent to which it can profit from a so-called transnational framework. For the truth of the matter is that national discrimination in the award of public contracts is just as rife now as it was when the process of industrial integration was first initiated with the entry into force of the Rome Treaty.

Why the Commission needs help from business

The European Commission's internal market department - its Directorate-General XI - is increasingly worried by this continued national partitioning of the Community markets. True, it has EEC legal instruments which provide it with the basis for eliminating discrimination but these, while necessary, are proving

insufficient in themselves for ensuring equal access throughout the EEC to the Nine's lucrative public works (engineering and construction projects) and public supply (on-going supply of goods to meet the needs of public bodies) markets. It needs more than legal texts.

It needs the direct participation of firms themselves. "What's the value of Community rules seeking to create a wider market for European companies, if they won't help us to help them?". The question comes from an EEC official responsible for the enforcement of directives creating common rules between the EEC. Nine for the award of public works contracts (a directive adopted by the Council in July 1971) and forbidding national discrimination in supply contracts (a Commission directive of 1969). He, like those in charge of the Commission's internal market department, which comes under the political direction of Finn Olav Gundelach, badly wants firms which have experienced discrimination at the hands of public authorities in the Nine to come forward and tell the Commission of it. The Commission, besides being the guardian of the Treaty and thus of the Common Market set-up, is clearly ideally placed to pursue with the Nine complaints from companies at practices which clash with the spirit or letter of the Rome Treaty.

The economic stakes are enormously high. It is estimated that no less than 17% of total EEC consumption of goods and services is attributable to the contracts awarded by the Nine's public and semi-public authorities. The vast majority of these are made on a systematically national basis. Opining up these markets to real intra-EEC business competition could thus add almost a fifth to the average European firm's potential market, to say nothing of the savings healthy competition would mean for the European tax-payers. Commission officials, and in particular those of the Directorate-General XI, feel that it is thus well worth any business' while to write and tell the Commission of any public contract practice not in line with Common Market rules.

Breaking down the barriers how firms can help themselves

European companies seeking help to combat discrimination or lack of commercial fair-play have an intricate armoury of legal instruments at their disposal, which the Commission is fully prepared to set in motion if it feels that a substantive complaint hasbeen made. The EEC directive adopted by the Six in 1971

and now in force throughout the Nine provides for alignment of public authority awarding practices in certain vital areas : it classifies national contract award procedures into three categories (open, restricted and private treaty contract procedures) ; prohibits the use of national technical specifications; makes publication in the EEC Official Journal compulsory for all tender calls by public authorities ; defines common criteria for selecting candidates ; and creates a Consultative Committee whose job is to supervise application of the directive. The Commission is currently trying to get the Nine to accept a similar measure for aligning public supply contract awards, but in the meantime its directive adopted in 1969 sanctions supply contracts based on national preferences, national reserves, or those involving outright exclusion of foreign bidders. In fact it is this directive(based on Article 30 of the Rome Treaty) which has provided companies and the Commission with their main means of influencing awarding authorities in a European direction. Some examples of this are given below.

The works directive provides one avenue of redress which has been particularly under-utilised by firms : the public works Consultative Committee which, made up of Member State officials and meeting in Brussels under the chairmanship of the Commission, is a framework for reaching amicable settlements to contract disputes. The Commission is puzzled at why firms have not used this channel more - perhaps they are unaware of its existence and scope, or prefer to lobby their own national governments rather than EEC authorities as a means of getting satisfaction for alleged discrimination.

If so, they would do well to take account of how the Commission could help them in practice :

- the first step is for companies with a complaint to write to the Commission's internal market Directorate-General setting out the alleged abuse by the public authority ;

- after initial examination of this complaint, and if DG XI believes there is a prima facie case to be pursued, the matter will then be completely investigated in collaboration between the services of the Commission and executives of the company. Matters of secrecy will be respected by the Commission wherever necessary.

- if the Commission believes it has an arguable case against an awarding authority, it may bring the matter up in the Consultative Committee with the Member State whose legislation covers the awarding authority in question. The Committee, while in no sense a court of redress, is, however, a forum for settling disputes informally ;

- if all else fails, the Commission may take direct legal action itself against the Member State in question (this in fact applies to both public works abuses and, via the Article 30 directive mentioned above, national discrimination in the award of public supply contracts). Such intervention is provided by Article 169 of the Rome Treaty, and can eventually lead to the Commission bringing the matter before the Court of Justice in Luxembourg.

But legal pressure apart, it would be wrong to underestimate the extent to which the Commission can intercede with national authorities on behalf of business. Even if awarding authorities remain by and large cocooned in an intimate relationship with a small selection of national firms, the Commission, by its access to national governments and public opinion, can bring considerable informal pressure to bear to put right this state of affairs. And the pressure of the public eye can sometimes prove more effective than - or at least an effective complement to - the pressure of the legal text.

Keeping awarding authorities in line with letter and spirit of the Common Market

Since 1970, the Commission has been paying increasing attention to ensuring the observance of Common Market rules in specific cases. Given the underutilisation of the public works Consultative Committee, it has in fact pursued most of these on the basis of the original directive on public supplies of 1969 which outlaws national preferences, reserves and exclusivity clauses invoked to protect national markets.

The most notable of these cases began in 1971 when Kraftwerke Union, the joint subsidiary of Siemens and AEG Telefunken, received the surprising information - surprising, that is, to the Italian trade unions and electrical energy industry - that it was favourite to win the City of Rome's contract for the construction of an electrical generator. In the domestic furore that followed this news, the

City of Rome then felt obliged to withdraw the invitation to tender which had resulted in its judging KWU's offer better than of its main Italian competitor, Ansaldo Meccanico Nucleare. KWU, backed by the German government, then directly protested to the Commission which, first through Italian industrial affairs Commissioner Altiero Spinelli and then by a joint Spinelli-Gundelach approach, eventually got the Italian authorities to reach a compromise solution. Keynote of this settlement was the idea of transnational industrial cooperation - the contract was split halfway between KWU and Ansaldo.

More recent cases which illustrate the supervisory role the Commission can play on behalf of firms concern an Italian aircraft manufacturer seeking to break into the Danish market, and a Danish road equipment company trying to extend its operations in Germany. Both alleged discrimination, the Italian planemaker claiming in particular that the Danish defence ministry had rejected its bid for supply of basic training aircraft so quickly that in effect it must - continued the allegation - have taken the decision on which suppliers to choose before it circulated the general invitation to tender. The Italian firm was particularly aggrieved that the two suppliers which it believed the Danes were going to choose were both extra-EEC (Sweden and New Zealand). As a result the Commission during 1974 proceeded with enquiries with the Danish government which to some extent cleared up the issue, Copenhagen maintaining that no final decision had yet been taken on the purchase of the planes.

The case of the Danish company seeking to extend its road-marking and painting operations in the Federal Republic is in fact still pending, the Commission being contacted by the Danish firm just before Christmas. The internal market department was told by the firm's director that it was being excluded from contracts offered by the West German roadworks authority, on the grounds that it did not have the authorisation required - tests for which, however, only took place once every three years and lasted a similar period. The Commission's public procurement department has now advised the firm in question to request the German authorities to carry out any tests needed for obtaining the authorisation, without which it appears to be automatically excluded from successful competition for contract awards. In addition, the Commission is to enquire whether the same demands are made of German firms as of the Danish company.

Pointers to new legal powers sought by the Commission

Besides holding a watching brief to ensure limitation of discrimination against EEC companies, the Commission is also seeking to extend the legal powers on the basis of which it can so act. The focus of this extension is currently an EEC directive which, if adopted by the Nine, would lay the basis for alignment of the Nine's laws covering procurement procedures in the award of public supply contracts.

Basically, this would provide the same advantages for firms in the supply field as the 1971 directive created for public works contracting : prohibiting the use of discriminary specifications, limiting and defining the use of award procedures to be used, making publication of calls to tender in the EEC Official Journal compulsory, and extending the operation of the Consultative Committee to complaints in the field of public supplies as well as works.

But the Commission may well feel that it needs further instruments if the opening of public contract awards is to be really "effective" - this being one of the proclaimed intentions of the Paris summit meeting of October 1972. In particular, a whole series of purchasing authorities may well be excluded from the scope of the supply directive now under discussion by the Council - in particular the major public utilities in the energy (water, gas, electricity), transport (e.g. railways) and telecommunications (post office) sectors. The Commission's services are now looking into ways whereby these purchasers can be brought within the web of open competition on an EEC scale. Here, the Rome Treaty's article 90 provides for "public undertaking and undertakings to which Member States grant special or exclusive rights" to be the subject of EEC legislation ensuring the application of the Community competition rules. Study of whether such EEC directives are appropriate is now taking place - and if the outcome is positive, firms may find that the EEC armoury for the struggle against procurement discrimination will be further strengthened.