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**PUBLIC PROCUREMENT
IN THE EUROPEAN UNION**

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1 INTRODUCTION

Optimising the functioning of the internal market is of vital importance for the European Union. The Commission's *Single Market Action Plan*¹, which was endorsed by the Amsterdam European Council and the European Parliament, is intended to ensure that the single market fulfils its potential. As part of the Action Plan, the Commission published, in November 1997, the first edition of the *Scoreboard*² containing detailed indicators on the state of implementation and application of single market legislation.

The Scoreboard confirmed that public procurement is one of the key areas of the single market where results do not yet meet expectations. This is particularly significant because of the economic importance of public procurement markets: they represent more than ECU 720 billion or about 11% of the Union's GDP, equivalent to half of the GDP of the Federal Republic of Germany.

Existing policy aims to open up national public procurement markets to competition from other Member States, offering competitive suppliers significant opportunities. Today these opportunities extend to the EEA countries and Europe's major trading partners, the USA, Canada and Japan. As regards the EEA, this extension results from the integration of the Community "acquis" in public procurement in the Agreement on the EEA and, in consequence, in the legislation of the EFTA countries signing it. The agreement guarantees access of these countries' suppliers to the Community market in the same way as Community firms are guaranteed access to the markets of the EFTA countries. Existing policy seeks to encourage transparent and competitive purchasing behaviour in order to deliver the best value for money. Community-wide competition for public contracts will lead to an efficient allocation of resources and thus enhance the quality of public services, improve economic growth, competitiveness and job creation. Efficient procurement is particularly important on the eve of the single currency and in the prevailing climate of stability and budgetary restraint necessary for such fundamental change to occur and develop under satisfactory conditions. A good public procurement policy, by preventing inefficient public spending and by providing a major means of avoiding corruption, can give taxpayers confidence that their money is being spent correctly and thus reinforce public trust in government. While the fight against corruption is not the primary objective of public procurement, improvements in public procurement procedures can make a useful contribution³. Accordingly, proposals in this communication aimed at enhancing transparency and clarity, such as publication of tendering information or the designation of independent authorities in each Member State, will help create a system which minimises opportunities for corruption.

¹ CSE (97) 1 final, 4.6.1997.

² Single Market Scoreboard, No 1, November 1997, SEC 97/2196.

³ See Commission Communication to the Council and the European Parliament on *A Union Policy against Corruption* (COM(97)0192 - C4-0273/97).

The legal framework composed of the principles and rules enshrined in the Treaty and developed in detail by six Directives, was completed nearly four years ago, the first Directives dating back more than twenty years. However, several Member States have failed to implement all the Directives. As the November 1997 Scoreboard shows, public procurement is one of the areas where the deficit in transposition is greatest, with only 55.6%⁴ of the Directives correctly implemented in all Member States. Moreover, the Commission's communication on the *Impact and Effectiveness of the Single Market*⁵ makes it clear that the economic results so far achieved fall short of expectations. The level of import penetration in the public sector (that is, the sum of direct and indirect imports by public purchasers) may have risen from 6% in 1987 to 10% today. It can be observed, however, that specific sectors remain closed because of the use of standards and certification and qualification systems. Moreover, there is no clear evidence of price convergence between Member States over the same period.

Concerned by Member States' failure to implement the Directives and by the disappointing economic results, the Commission launched its Green Paper on *Public Procurement in the European Union: Exploring the Way forward*⁶, published in November 1996. The high level of response to the Green Paper is gratifying. Nearly 300 contributions have been received from a wide range of key players and the Commission thanks all - institutions, Member States, suppliers and purchasers, representative organisations on the demand and the supply sides and other interested parties - for their valuable contribution. Discussions in the Council, in the European Parliament and in the Advisory Committees for public procurement have been extremely productive and helpful.

The Commission has carefully analysed all of the contributions received. The measures proposed by the Commission in the present communication take them fully into account, recognise that procurement policy needs to be reinvigorated in order to reap the full benefits of the regime and define the direction that public procurement policy in the European Union will take over the next five years.

The conclusions the Commission draws from the debate are twofold. First, the Union must take action to ensure the public procurement regime in place delivers the economic benefits it has promised. Secondly, it must adapt existing instruments to the changing economic environment. Achieving this will require enormous effort from all those involved: the Commission, the Member States and the private sector. While the aims of the internal market policy have remained the same since the adoption of the Treaty of Rome, Europe has gone through immense changes since the adoption of the first public procurement Directives in the 1970s. These are the information revolution, the change of attitude to the State's role in the economy combined with the introduction of budgetary restraint - privatisation, liberalisation of utilities, public-private partnerships - and the increase of cross-border trade in goods and services brought about by the internal market. Together, they have resulted in a highly competitive commercial environment and an increased public awareness of the need to fight corruption and prevent misuse of public finance.

4 See Annex I.

5 COM (96) 520 final, 30.10.1996.

6 COM (96) 583 final, 27.11.1996.

The main theme emerging from the Green Paper debate is the need to simplify the legal framework and adapt it to the new electronic age while maintaining the stability of its basic structure and avoiding unnecessary changes involving further legislative work at Community and national level.

The Community's response and the measures proposed in this communication contain the following main elements:

- The Commission recognises that a stable legal framework is crucial to the smooth operation of public procurement markets and to maintaining market players' confidence in the efficiency of the system. However, the current legal framework does not exist for its own sake but in order to attain the benefits of the single market in the area of public procurement. Rules, policy and enforcement should follow reality rather than the other way round. In the light of the momentous changes, which have occurred since the publication of the first Directives in the seventies, the Commission recognises the need to re-orient its policy and streamline its rules.
- The Commission acknowledges the complexity of the current legal framework and the rigidity of its procedures. It intends, therefore, to simplify the former and make the latter more flexible. Simplification, in this context implies, on the one hand, the clarification of existing rules and, on the other hand, their amendment. In order to preserve the stability of the framework, priority will be given to clarification of existing rules to resolve the most complex issues. Where clarification is not sufficient or where it is felt that the current framework is not flexible enough to take account of new practices or market reality, the Commission intends to propose amendments through a legislative package.
- The use of information and communication technologies (ICT) in public procurement will determine our ability to adapt in the future and maintain a competitive European industry. Fully-fledged electronic procurement will allow the procurement process to take place much more rapidly and significantly reduce transaction costs over the entire lifecycle of the goods or services purchased.
- Simply laying down and enforcing legal rules cannot on its own guarantee economic benefits. Other measures aimed at improving market access are equally important and necessary:
 - It is of the utmost importance, if one seeks to achieve efficient purchasing, to give the different operators involved in a given public procurement a training, which makes real professionals of them. This training should not focus on the legal provisions as such but on how to use them in an effective way in day-to-day procurement and on how to develop new ways of working in a changing market environment.
 - The relatively low response from suppliers to the enormous volume of contract opportunities needs to be addressed through raising awareness of what is at stake, improving transparency of, and access to, information on contract opportunities, general market monitoring and other useful information.

- Specific action in favour of the participation of SMEs has been sought by the European Parliament. Measures will be taken in connection with the general problems of supplier participation.

In the process of ensuring a single market for procurement, Member States and European industry have a key role to play. Governments, by enforcing the legal framework and by setting a good example themselves, will help to build confidence in the openness of their procurement markets. European industry, for its part, should actively seek out new market opportunities and when it encounters difficulties, should be more courageous in defending its rights. Public procurement is too fundamental for the European economy to be left in the hands of a limited number of specialists: only the establishment of a real partnership between the Community, the Member States and industry will bring about the benefits that are to be expected.

2 ADAPTING THE REGULATORY FRAMEWORK TO MARKET CHANGES

2.1 The ground rules: simplification and flexible response to market developments

2.1.1 Objective

It is evident from the debate launched by the Commission's Green Paper that the existing legal framework⁷ and procedures need to be simplified. The Commission endorses the call for simplification, which is in line with one of the strategic targets of its Single Market Action Plan, namely that of strengthening the existing legal framework by simplifying and improving national and Community rules (Strategic Target 1, Action 4).

The Commission is in any event under the obligation to re-examine the application of the Directives within the deadlines laid down therein, as Parliament pointed out in its opinion on the Green Paper. This communication is therefore a response both to Parliament's request and to the obligation laid down in the Directives.

"Simplification" means in this context both the clarification of provisions which are obscure or complex and adjustment of the rules in force where the problems to be addressed cannot be resolved through interpretation of the provisions.

The Commission takes the view that certain important issues cannot be dealt with through mere interpretative documents and that the legislation needs to be amended. Such amendment will not be tantamount to over-regulation but will endeavour on the contrary to make the rules and procedures clearer and more flexible. Amendments will be precisely targeted so as to preserve the structure and foundations of the legal framework.

These amendments are in line with measures announced in the Single Market Action Plan, in which the Commission stressed the need to remedy weaknesses in the existing legal framework for public procurement in order to ensure that the single market functions properly in this area (Strategic Target 1, Action 5).

2.1.2 Presentation of a legislative package

Although the Commission is convinced of the need to adjust some aspects of the existing legal framework, it would stress that, three years after expiry of the deadline for transposing the last of the Directives adopted in the public procurement field, the

⁷ Directives 93/36/EEC, 93/37/EEC and 92/50/EEC on public supplies, public works and public services (the "traditional" Directives) as amended by directive 97/52/EC; Directive 93/38/EEC on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (the "Utilities Directive"); Directives 89/665/EEC and 92/13/EEC on review procedures (the "Remedies Directives").

requisite national legislation is still not fully in place in all Member States. Many of the contributions prompted by the Green Paper, and in particular Parliament's opinion, deplore this state of affairs and call on the Commission to act as a matter of urgency.

The Commission invites the Member States to demonstrate their political commitment to putting an end to delays in transposition at the earliest possible opportunity. Since the transposition and correct application of the Directives is a precondition for the proper implementation of public procurement policy, the Commission reaffirms its determination to take all the necessary steps to ensure that Member States fulfil their obligations. It is proposing a set of measures to that end (see point 2.2 below).

The Commission intends to table a set of amendments to the existing legal framework concerning the following aspects:

- Submission of proposals to exclude from the field of application of Directive 93/38/EEC, the sectors or services to which it currently applies (water, energy, transport and telecommunications) that operate, in each of the Member States, under conditions of effective competition.
- introduction of more flexible procedures, namely a competitive negotiated procedure and framework contracts, in response to the criticism sometimes levelled at the system that procedures are excessively rigid and formalistic and, where complied with strictly, can lead to malfunctioning in the award of contracts;
- adoption of rules to take account of certain trends, such as concessions and other forms of partnership between the public and private sectors and privatisation, to ensure that their proper functioning is compatible with that of the single market;
- fully electronic procurement (see point 3.2 below).

These measures will be tabled by the Commission in a legislative package designed to make certain adjustments to the existing legal framework in areas where interpretation of the rules to take account of changing circumstances would not be sufficient to solve the problems.

2.1.2.1 Adjustment of the scope of Directive 93/38/EEC in line with changes in the sectors it covers

Following the liberalisation of some of the sectors covered by Directive 93/38/EEC, it is necessary to examine the degree of openness to competition of the liberalised sectors with a view to deciding whether the constraints the directive impose on contracting entities are still justified. They were introduced because of the lack of competition resulting from the State's decision to grant a monopoly or a privileged position to an operator. In return for this preferential treatment by the State, the operators concerned had to comply with certain advertising and procedural requirements when awarding contracts. If a sector is found to be effectively open to competition, the constraints imposed by the directive should be removed.

The Commission was the prime mover in the process of liberalisation in the sectors covered by Directive 93/38/EEC (see 3. Report on the implementation of the

telecommunication regulation package⁸). It must now take account of the changes that have occurred and the new factors that are emerging on the market, by excluding from the scope of the Directive entities operating under real competitive conditions in the same way as private entities which base their decisions on purely economic criteria.

The Commission intends, before the end of 1998, to submit proposals to exclude from the field of application of Directive 93/38/EEC sectors or services to which it applies (water, energy, transport and telecommunications) which operate, in each of the Member States under conditions of real competition.

In the immediate future, the Commission is resolved, in the light of the jurisprudence of the Court of Justice, to use the possibilities provided by Article 8 of Directive 93/38/EEC to exempt services in the telecommunications sector operating in a fully competitive environment. Accordingly, the Commission invites the contracting entities to notify the services that they consider excluded from the scope of the Directive.

In its evaluation of the real operation of competition, the Commission will take particular account of the degree of transposition and implementation of the relevant Community legal framework.

2.1.2.2 Facilitating dialogue

Many contributions confirmed the Commission's finding that, especially in the case of particularly complex contracts in areas that are constantly changing, such as high technology, purchasers are well aware of their needs but do not know in advance what is the best technical solution for satisfying those needs. Discussion of the contract and dialogue between purchasers and suppliers are therefore necessary in such cases. But the standard procedures laid down by the "traditional" Directives leave very little scope for discussion during the award of contracts and are therefore regarded as lacking in flexibility in situations of this type.

The Commission will therefore propose amendments to the existing texts of the Directives with a view to making procedures more flexible and allowing dialogue in the course of such procedures and not just in exceptional circumstances. It will propose a new standard procedure, the "competitive dialogue", which would operate alongside open and restricted procedures and would replace the existing negotiated procedure with prior publication of a notice. The conditions and the rules under which contracting authorities would be allowed to use this new procedure and the details of the procedure itself will have to be spelt out and will be based *inter alia* on the principles of transparency and equal treatment. The only remaining exceptional procedure would then be a "direct-agreement procedure", the conditions for the application of which must be construed strictly, in line with the case law of the Court of Justice.

⁸ COM (98) 80, 19.2.1998

This is an initiative which does not aim to introduce new regulatory constraints: on the contrary, it is clearly designed to achieve the procedural simplification and flexibility called for by all interested parties who took part in the Green Paper debate, whether from the institutional sphere or the private sector. It will give operators more room for manoeuvre, which will not fail to yield beneficial effects in terms of the quality and efficiency of procurement.

2.1.2.3 *The role of framework purchasing*

On markets, which are constantly changing, such as the markets for information technology products and services, it is not economically justifiable for public purchasers to be tied to fixed prices and conditions. Public purchasers therefore increasingly feel the need to manage their procurement on a long-term basis. The essential features of contracts of this nature should consequently offer the necessary flexibility. The question of the compatibility of such flexibility with the traditional Directives was raised in many of the contributions.

With a view to simplifying procedures and clarifying the situation, the Commission will propose amendments to the existing instruments, which would permit more extensive use of flexible contracts allowing product developments and price changes to be taken into account. Long-term contracts may, however, pose a threat to competition in that they could cause positions to become entrenched and certain firms to be shut out. It is essential therefore that precise rules be laid down for the use of these procedures. Without anticipating the direction that will be taken by discussions on this issue, the Commission takes the view that objective and transparent information should be published on framework contracts. Once candidates had come forward, lists of potential contractors could be drawn up. To ensure that these contracts are not walled off, lists should either be valid only for a limited period or be kept permanently open to new firms.

2.1.2.4 *Treatment of concessions and other forms of public-private partnership*

The concept of public-private partnership encompasses the different ways in which private capital can take part in the financing and operation of infrastructures and public services. The role, which the public authorities still play in such partnerships, varies greatly according to the situation concerned. The Commission has no intention of intervening in Member States' decisions as to whether these infrastructures and services are to be financed and operated by the public or the private sector, since such decisions are their responsibility. However, if it is to be fully in tune with reality, the Commission has a duty to devise a legal framework, which allows the development of these forms of partnership, while guaranteeing compliance with the competition rules and the fundamental Treaty principles.

