

# COMMISSION OF THE EUROPEAN COMMUNITIES

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## REPORT FROM THE COMMISSION

concerning

negotiations regarding

access to third countries' markets

in the fields covered by

Directive 90/531/EEC

(the Utilities Directive)

## INTRODUCTION

This report describes the progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the third countries' markets in the fields covered by Directive 90/531/EEC of 17 September 1990, on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ("the Utilities Directive")(1). It is presented in accordance with Article 29 (6) of that Directive.

It first lists the agreements which the Community and its Member States have already signed with third countries and which cover procurement in the fields covered by the Directive.

It then describes the state of play of other multilateral and bilateral negotiations which the Commission is conducting with third countries in the same fields.

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(1) O.J. L 297 of 29 October 1990, p.1.

## I. NEGOTIATIONS CONCLUDED

Agreements have been signed between the Community and the EFTA countries and some of the eastern European countries in the fields covered by the Directive. Formal conclusion will follow the completion of ratification procedures currently under way.

### 1. EFTA countries

The Agreement on the European Economic Area signed on 2 May 1992 by the Community, its Member States and the EFTA Countries (the EEA) provides in its Article 65 and Annex XVI that the provisions of the Utilities Directive be applied in the EFTA Countries. As a result, Sweden, Finland, Iceland and Austria will, upon entry into force of the Agreement, provide access to Community undertakings.

As regards Norway and Liechtenstein, the Agreement provides for a reciprocal suspension of such opening until 31 December 1994 at the latest. Consequently, until such time as Norway and Liechtenstein implement the Directive, EC undertakings will not have guarantees of access to contracts awarded in these countries.

Following the withdrawal of Switzerland from the EEA, EC undertakings have no guarantee of access to contracts awarded in Switzerland in the fields covered by the Directive.

### 2. Eastern European Countries

The European Agreements signed on 16 December 1991 by the Community, its Member States and Hungary, Czechoslovakia and Poland provide that undertakings of the respective countries shall be given full access to the contract award procedures in the Community under conditions not less favourable than those applied to Community companies. National

treatment will also be granted to Community companies established under specific forms in the countries concerned. By the end of the respective transition periods, national treatment will be granted to any Community undertakings and full access to procurement established on a reciprocal basis.

## II. ONGOING NEGOTIATIONS

### 1. GATT Government Procurement Agreement

In pursuance of Article IX:6(b) of the GATT Agreement on Government Procurement<sup>(2)</sup> (the GPA) negotiations have been undertaken with a view to broadening its coverage to other awarding entities and extending it to cover works and other services contracts.

The Community has sought, in these negotiations, to obtain guarantees of access for Community undertakings to markets in the fields covered by the Directive.

These negotiations, which run in parallel to the Uruguay Round, have not so far been concluded.

#### The Community's request and offer

The Community, in its request of 2 August 1990, sought coverage under the GPA of Parties' entities operating in the telecommunications, electrical, water, urban transport, port and airport sectors, which are either publicly owned or are privately owned and operate on the basis of special or exclusive rights. It also sought a commitment by governments not to impose discriminatory requirements on the procurement practices of entities in other fields.

In return, the Community offered to cover its own entities in the relevant fields under the GPA and to provide the same commitment not to impose discrimination on entities in other fields.

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(2) OJ N° L 71 of 17.1.1980, p. 1  
OJ N° L 345 of 9.12.1987, p. 24

GPA disciplines have been negotiated which correspond to the rules of the Directive.

Other Parties' offers

Apart from the EFTA Countries (including Switzerland) whose offers following the EEA Agreement, correspond to that of the EC, other Parties' offers have not met the Community's request in full.

There are three outstanding characteristics of the US offer in the fields of the Directive. In the first place, the concrete commitment is limited to subjecting the six federal power administrations to GPA disciplines, and to committing five federal agencies to refrain from imposing discriminatory requirements on non-governmental entities. Secondly, the federal authorities agree to seek the voluntary acquiescence of the states to the GPA. Since urban transport, port, airports and water supply are largely owned by state and municipal governments, as are some electrical utilities, American failure to make a concrete offer in this respect clearly raises major difficulties. Although Commission negotiators have been given the names of 30 states that have, so far, agreed in principle to accept coverage, the US negotiators have been unable to be specific as to the entities of the fields of activity covered in these states. Thirdly, the American offer makes no provision for the elimination of discriminatory requirements which are imposed along with the provision of federal funds, or for the coverage of the many privately owned entities which operate under special or exclusive rights. As a result, the telecommunication operators and the private electrical power utilities are absent from the US offer.

In the fields of the Directive, Canada offers to "seek to include" unspecified entities which are:

- owned by the federal government and performing an essentially government function; these should be subject to procurement disciplines;

- privately owned, but substantially influenced by the federal government; the federal government would agree not to influence their purchasing decisions;
- provincially owned or influenced; the provincial governments would voluntarily agree not to influence their purchasing decisions.

The coverage implied by this offer is unclear. It has been understood that it would include some publicly owned electrical utilities. However, purchases of rail and urban transportation equipment, systems, components and materials incorporated therein are excluded, as well as all project-related materials of iron and steel. Telecommunications operators are not covered.

The Japanese offer includes a number of entities within the fields covered by the Directive. These include the 7 railway companies and NTT (all of which are covered under the existing GPA). However, purchases of materials connected with operational safety of transportation (which would include railway signalling equipment) are excluded for the railway companies, and telecommunications equipment is excluded for NTT. The Japanese authorities have been prepared to explore the possibility of coverage of purchase of telecommunications equipment by NTT. However, this has been linked to special procurement procedures, resulting from their bilateral agreement with the US, which are not fully in conformity with agreed GPA procedures. The offer includes Tokyo International Airport.

Most of the remaining entities in the fields of the Directive are not offered. Japanese negotiators have explained that this is because they are owned by municipalities which are not offered (this is mainly the case of urban transport, ports and airports), or because they are privately owned (the situation of the electrical utilities and some urban transport). Further, some governmental, or quasi-governmental, agencies which operate in these fields have not been offered either. Japanese negotiators have been willing to commit Japan not to impose discriminatory requirements on the entities not offered.

In the context of the renewal of the US/Japan bilateral agreement on NTT procurement, the Japanese authorities proposed, in April 1992, to hold EC-US-Japan trilateral discussions on the liberalisation of telecommunications procurement and basic telecommunications services.

The Korean offer has many gaps in the fields of the Directive. Thus, although Korea Telecom is offered, network equipment is excluded and the offer only concerns the central procurement office. The Korean National Railroad is offered, with the important exception of procurement related to maintenance of transport safety. Moreover, Korea has announced its intention to introduce new legislation regarding Korea Telecom procurement of network equipment. The new legislation, initially announced for implementation as of 1 January 1993, provides for the rejection of tenders presented by foreign suppliers whose country has not concluded a bilateral agreement with Korea.

There is no provision in the offer for coverage of urban transport and subway construction is specifically excluded. The port administration and the container terminal authority are included, but there is no offer regarding airports. The water offices of the six largest cities are offered, but there is no provision regarding other water offices and agencies.

Israel already offers the purchases of its ports, airports and its railways under the GPA. Further, it has offered coverage of its electricity and telecommunication utilities under GPA disciplines, with the exception of procurement of cables, electricity meters and transformers. Water provision by the 3 main municipalities is offered.

Hong-Kong has not made an offer. Further, it has made it clear that it would not be in a position to subject its privately owned utilities in airport, urban transport, electricity and telecommunications to GPA disciplines.

Singapore has not made an offer.

Progress in the negotiations

Extensive discussion has taken place with a view to closing the gap between the Community's request and the offers of other Parties, and to evaluating the situation which would result from less than complete coverage of the sectors in question by GPA disciplines. The issues on which negotiations have focussed include in particular:

- the extent to which there are, in practice, obstacles to access to contracts awarded by utilities which are privately owned and operated;
- practical means which would enable the Community to receive sufficient guarantees concerning access to contracts awarded by entities controlled by sub-central levels of government, in countries where the central government has difficulty in entering into commitments or in imposing obligations on sub-central levels of government;
- the need to ensure a balance of rights and obligations concerning sectors, activities and entities which have not been offered by one or other Party.

2. Bilateral negotiations

The importance attached to agreeing on access to the US market for telephone network equipment and the difficulty of the US authorities to accept that disciplines could be imposed on the privately-owned US telecommunications operators through the GPA, have led the Commission to undertake discussions with the US authorities in this sector. The aim has been to see if a bilateral agreement in this sector could give appropriate guarantees of access in the context of a wider GPA.



The Commission, moreover, has made a number of proposals during the last two years with a view to reaching a satisfactory compromise. In doing so, it has firmly maintained the principles of non-discrimination and transparency, while showing its openness to alternative means of implementing these principles. Most recently, it has submitted a draft agreement to the US authorities, based on national treatment.

These negotiations have not been concluded. Indeed, they have been made more complicated by the announcement by the US authorities of unilateral trade sanctions, which may enter into force from 22 March 1993. These sanctions on which the Council has reserved its full rights to take whatever action is necessary have been addressed elsewhere and are not further discussed here.

Negotiations with a view to "Europe Agreements" are under way with Bulgaria and Romania, but have not yet been concluded.

The Council has been kept informed of developments in all these negotiations through the channels provided for in the Treaty.

#### CONCLUSION

The agreement regarding the EEA extends the benefits of the Directive to the countries concerned.

The "Europe Agreements" for their part, will also require the Community to give access to undertakings from the signatory countries.

Adjustments to the EEA agreement are however required following Switzerland's withdrawal. Further, the manner in which the "Europe Agreement" with Czechoslovakia will be taken over by the successor States is not yet clear.

When procedures are complete, the Commission will take the appropriate steps with a view to the benefits of the Directive being made available to the third countries concerned.

The Commission will not be influenced in its efforts to achieve a satisfactory outcome to the as-yet uncompleted negotiations, by unilateral and unjustified trade sanctions. It remains committed to achieving general reciprocal opening-up of contracts at international level in the water, energy, transport and telecommunications sectors. It will continue its efforts to make progress to this end. In view of the particular difficulties experienced in negotiations with several of the countries concerned, the Commission considers that the multilateral process could be aided if certain problems were to be resolved, in parallel, on a bilateral or plurilateral basis. To this end, the Commission is transmitting a recommendation for negotiating directives to the Council.

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# DOCUMENTS

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