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**Public procurement in the excluded sectors**

**Commission communication accompanied by two proposals for Council Directives relating to water, energy, transport and telecommunications**

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# Proposal for a Council Directive, based on Articles 100a and 113 of the EEC Treaty, on the procurement procedures of entities operating in the telecommunications sector

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# Proposal for a Council Directive on the procurement procedures of entities operating in the telecommunications sector

## Explanatory memorandum

### A. *Background*

1. The Directives in force on the public procurement of supplies and works specifically exclude certain areas of activity from their scope, among which the telecommunications sector.

2. The supplies Directive 77/62/EEC [1] as modified by Directive 88/295/EEC [2] does not apply to contracts awarded by contracting authorities whose principal activity is to offer telecommunications services. The works Directive 71/305/EEC [3] does not specifically exclude such contracting authorities with the result that such bodies which have the status of State authorities are covered. The other entities operating in the telecommunications sector are not covered by any of these Directives.

3. The intention to open up the markets for telecommunications equipment to Community-wide competition dates back to 1976. In December 1976, [4] the Council invited the Commission to propose measures whereby supply contracts in this area could become subject to effective competition at Community level.

4. Specific measures were decided in 1984 when the Council adopted Recommendation 84/550/EEC, [5] according to which opportunities should be provided for undertakings established in other Community countries to tender for:

(i) all purchases of new telematic terminals and all conventional terminals for which there are common type-approval specifications;

(ii) at least 10% of the annual orders of switching and transmission apparatus as well as other than the abovementioned terminal apparatus.

A report on the implementation of this Recommendation is attached to the communication on 'a Community regime for procurement in the excluded sectors: water, energy, transport and telecommunications'. [6] A survey on the structure of the telecommunications sector is given in Chapter II B 4 of that communication.

5. The realization of the internal market by 1992 requires that the complementary measures now be taken. The economic justification for doing so is clear, as already explained in recent studies on the benefits to be realized through the completion of the internal market. [7] With particular regard to the telecommunications sector the intention to make the necessary proposals to that effect was also included in the common policy on telecommunications which has developed rapidly since 1984 and has now acquired the global character described in the Green Paper of 1987. [8] The telecommunications Council of 30 June 1988 has confirmed the objective of complete opening up of both the supplies and the works contracts in this area and has invited the Commission to make the necessary proposals.

6. The Commission's approach to introducing Community-wide competition in the telecommunications sector involves two main lines of action: to help market forces to play in such a way that 'buy national' for its own sake cannot occur, and to introduce procurement procedures in those areas where the forces of competition are absent or not sufficient to ensure that result. As regards the first line of action, the Commission Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment [9] is the first step.

7. Effective Community-wide competition requires parallel action, furthermore, nota-

[1] OJ L 13, 15.1.1977.
[2] OJ L 127, 20.5.1988.
[3] OJ L 185, 15.8.1971.
[4] OJ C 11, 15.1.1977.
[5] OJ L 298, 16.11.1984.
[6] COM(88) 376 final, 11.10.1988.
[7] See 'The economics of 1992', *European Economy* No 35, March 1988.
[8] COM(87) 290 final, 30.6.1987.
[9] OJ L 131, 27.5.1988.

bly in the field of standardization. The main measures to that effect concern the use of common technical requirements and the recognition of type approvals. The Council Directive 86/361/EEC [1] and the Council Decision 87/95/EEC [2] are therefore particularly relevant in this context.

8. This proposal is limited to the telecommunications sector. The sectors of water, energy and transport are subject to a separate proposal. [3] In its operational parts, the regime proposed for the telecommunications sector is largely the same as for the other sectors. The degree of flexibility inherent in that regime, such as the mechanisms for calling for competition and for qualifying and selecting suppliers are indeed appropriate for any sector in which a balance has to be struck between the needs, on the one hand, to avoid overly rigid rules to be applied to private entities and, on the other hand, to take account of the procurement rules already applicable to those entities which are public.

9. The consultations leading to the preparation of this proposal have however brought to light some specific factors in the telecommunications sector which require different provisions from those of the other Directive. The main points are the progressive application of the provisions of this Directive, and the use of a specific Advisory Committee on Telecommunications Procurement to assist the Commission with various aspects of the implementation of the Directive. As emphasized in paragraph 6 above, the situation in the area of standardization is in full development and, although for the time being the text proposed is the same as for the other sectors, a different text is likely to be required to reflect the new situation in this sector when in the autumn of 1988 the statute of the European Telecommunications Standards institute is finalized.

## B. *The field of application*

### (1) The general approach

10. The main reason given for excluding the telecommunications sector from the supplies Directive was, as in the case of the other sectors concerned, that a particular activity may be allocated to a 'public' entity in some States, to a 'private' entity in others or indeed to both. In addition, even the concept of a public entity is highly variable depending on the precise context, national and regulatory. As a result any Community approach to the problem which sought to base itself simply on a distinction between public and private entities would confront enormous difficulties at the outset and probably be doomed to failure. A concept must be developed which addresses the procurement problem in terms which transcend the public/private distinction and permit situations which are in substance the same to be treated equally regardless of differences in legal form.

11. Accordingly, as regards the field of application, the proposal is based on identification of those underlying objective conditions which lead entities in the telecommunications sector to pursue procurement policies that are uneconomic in the sense that they do not ensure that the best offer from any supplier or contractor in the Community is systematically preferred but privilege national suppliers.

12. Two types of condition are of particular relevance.

13. First, barriers to entry for potential competitors, whether technical, economic or legal, often place an entity, public or private, in a situation in which it is sufficiently insulated from the force of the market that it can pursue other goals than that of always securing the best offer, including the protection of national suppliers and contractors.

14. This position of relative privilege can arise in a number of ways. The entity may have a formal legal monopoly of a territorial character. Even in the absence of a true monopoly, the number of participants may be restricted by technical, legal or economic factors, or some combination of all of these,

[1] OJ L 217, 5.8.1986.
[2] OJ L 36, 7.2.1987.
[3] COM(88) 377 final, 11.10.1988. This Directive is here in after referred to as the 'Directive on the other sectors'.

so that the competitive environment is fundamentally qualified and the comportment of the entities concerned is not market-led.

15. Where goods or services are made available by means of a technical network, as in the telecommunications sector, the system has a natural tendency to develop into a monopoly or oligopoly. That natural tendency may well be reinforced by the allocation by the State of special rights or powers relating to the management of the network. Regardless of whether they are public or private, the entities supplying or managing the network are in a position in which competitive forces are qualified in such a way that regulatory or other governmental measures are considered necessary to redress the balance.

16. Indeed, the second type of condition leading to uneconomic procurement, which is often but not always associated with barriers to entry, consists in the means available to a State to influence the present or future operations of an entity. Such means take multiple forms. The public character of an entity often automatically involves such means of influence: control of the entity's management by the State or of its financing, for example. But private entities too can equally be subject to State influence, particularly where a vital activity depends on the State's continued approval, for example, on a special right to carry out that activity. In such cases, it is hardly surprising that, even in the absence of explicit demands, an entity may decide that it is in its long-term interests to accept the State's objectives as its own, despite the short-term cost, and direct procurement to national firms rather than those from other Member States.

17. Where the two conditions, insulation from the market and exposure to State influence, are both present to a significant degree, and perhaps for a period of many years, the result is that substantial markets are essentially closed to suppliers or contractors from other Member States, however competitive they may be. Indeed, the result in some cases appears to be a firmly closed, vicious circle in which outside firms do not even try, since to do so would be a waste of resources and impossible for a responsible manager to justify.

### (2) The legal mechanism

18. The draft proposal seeks to identify those situations in the telecommunications sector in which, whatever the public or private status of the entities concerned, the objective conditions leading to nationalist purchasing practices can be identified. These conditions, which are of necessity drafted in rather general terms, are the following.

19. The first category of entities are those which operate the technical network which is needed for providing telecommunications services, and which, by its very existence, limits the scope for competition. Once one network is in place the prospects for competition through an alternative network or new entrants are in practice small. Even if provision is made for an alternative, the number of competitors is likely to remain so limited that at best they constitute an oligopoly.

20. The second category of entities are those which provide telecommunications services to the public. In many cases entities do of course both operate a network and provide telecommunication services. However, the evolution of markets and of the entities' activities is such that both cases need to be mentioned explicitly.

21. As explained in paragraph 15 above, the insulation from market forces is all the more pronounced where governments have legally reinforced the natural monopoly or oligopoly, and have reserved for themselves the possibility of influencing the comportment of the entities, by way of granting them special or exclusive rights with regard to the operation of the network or the rendering of telecommunication services. The existence of such rights is therefore also required as a criterion for qualifying entities to be covered by this Directive.

22. In order to ensure a high degree of legal certainty, the provisions formulating those conditions are complemented by a nominative list of entities. The annex gives the national legislator as brief and precise an identification as possible of the organizations subject to the Community regime. The annex will also facilitate the Commission's task of applying the Directive once it is in force.

A mechanism for keeping the annex up to date is also provided.

### (3) Exceptions for competitive activities

23. Present trends in telecommunications indicate growing competition in some Member States for the provision of a number of services.

In some of these areas, it may be assumed that the entities concerned will be led by the market to pursue fair and open procurement policies. In such cases regulation would have no useful purpose and the proposal would be open to the criticism that it seeks regulation for regulation's sake.

For this reason, the proposal contains a number of provisions designed to take account of situations in which the market is, in form and in reality, open and other factors likely to lead to nationalist procurement are absent.

## C. *The obligations*

### (1) The general approach

24. The obligations to be imposed on entities to be covered by the new Community instrument must take fully into account their particular character. Public or private, they differ from the essentially administrative organizations typically covered by the existing Directives in having economic or industrial purposes. In addition, to achieve their goals, they rely upon the exploitation of a network which is complex and highly specialized. They are in a real sense enterprises having much in common with ordinary enterprises that are not subject to the particular conditions outlined above.

25. Accordingly, the obligations to be imposed should not be those long applied to the administrative bureaucracies. More flexibility is required to permit the entities concerned to manage their procurement activities effectively in the light of their particular circumstances. The requirements should not be conceived as a comprehensive regulation of the procurement function, but as the minimum safeguards needed to permit the entities concerned to secure the best offer from all Community firms that are in a position to compete.

26. The regime proposed is a framework for sound commercial practice. Much of the details will be settled by the purchasing entities themselves in accordance with their particular needs and circumstances. Flexibility is provided as to the choice of open, restricted or negotiated procedures and the particular manner in which the procedures are opened to competition. Traditional open tender notices, periodic notices of procurement intentions, invitation to suppliers who have qualified through an accessible qualification system all find their place in the system. The counterpart of this flexibility is that, whatever procedures are used, they will have to be transparent and capable of being monitored in order to help create the climate of mutual confidence without which the market opening would not take place in real terms.

### (2) The legal mechanism

27. Although the telecommunications sector is subject to a comprehensive Community policy, the particular aspect of procurement is not much different in its nature from the patterns observed in the other excluded sectors. In order to ensure that the regimes to be applied in all these sectors are identical or at least as close as possible, the legal mechanism chosen for this Directive is therefore to make cross-references to the Directive on the other sectors. It is obvious that this Directive is therefore not fully self-explanatory; but the link between the two proposals concerning the excluded sectors is sufficiently close that both texts will in any case have to be considered together. Moreover, the explanations given on the individual Articles of this Directive, in part D below, provide full details on the provisions of the other Directive to which this Directive refers.

## D. *Comments on the articles of this Directive*

### (1) Title I — General provisions

28. Article 1 specifies which types of entities have to apply this Directive on the basis of their status, their powers and their activities.

29. More precisely, Article 1 covers:

(i) those entities in the public sector which either operate a public telecommunications network or offer telecommunications services to the public, or do both;

(ii) those other entities which are granted special or exclusive rights by the Member State to operate a public telecommunications network or to offer one or more telecommunications services to the public, or to do both.

30. Legal certainty about which entities fulfil these criteria is established, pursuant to the last sentence of paragraph 1, as regards the entities listed in Annex I.

31. Article 2 permits a contracting entity meeting the criteria of Article 1 not to apply the provisions of this Directive to its purchases when the latter are made exclusively in connection with either an activity outside the telecommunications sector or with a telecommunication service which the entity offers in competition with other providers under the same conditions and in the same geographical area.

32. As regards activities outside the telecommunications sector, the field of application of this Directive requires that such activities be clearly identified. Moreover, transparency of the procurement market requires that they are made known to the interested suppliers or contractors. Article 2(a) serves these purposes by providing that such activities must be notified to the Commission and published in the Official Journal, before being exempted from this Directive. Notifications of such activities could be made even before this Directive comes into force so that they can be published, and the relevant activity be excluded from this Directive from the start.

33. In the second case, that is, a competitive environment for certain telecommunication services, the notification requirement is according to Article 2(b) addressed to the Member States, which should be in a position to inform the Commission about the relevant legal provisions, which are those, in particular, that ensure that other potential market participants are free to offer the service concerned under the same conditions as the contracting entity concerned.

It must be underlined here that a State requirement imposing restrictions of a technical nature, for example, allocation of frequencies, is not to be considered as a limitation to competition as long as several enterprises are free to compete for access to the market.

34. Article 3 makes applicable the following provisions of the Directive on the other sectors:

(a) Concerning definitions: Article 1, paragraphs 1 to 3, 5, 7 to 10, 12 and 13

35. Article 1(1) to (3) define the entities in the public sector from a legal point of view by referring to the public sector as defined for the purposes of the existing Diectives 77/62/EEC and 71/305/EEC. In addition the public sector also embraces, according to paragraph 3, those public undertakings which are the object of the Directive on financial transparency. [1]

36. Paragraphs 5, 7 and 8 correspond to the definitions used in the existing Directives for the kind of contracts covered, the participants in award procedures, and the types of award procedures.

37. Paragraphs 9, 10, 12 and 13 concern the terminology used in the area of standards and technical specifications. They are in line with the definitions used in the existing Directives, as regards paragraphs 9, 10 and 12, with some simplified language notably in paragraph 9. It should also be noted that reference is explicitly made to 'quality assurance requirements', in order to clarify that

[1] Directive 80/723/EEC of 25 June 1980: OJ L 195, 29.7.1980.

technical specifications may also deal with such matters as the necessary organization and monitoring of production processes, and with the durability of products and their maintenance. Paragraph 13 corresponds to the definition proposed in the draft Directive on construction products. [1]

38. The definitions contained in paragraphs 4 and 6 are not relevant because they concern the water sector only.

39. The definition of European standards contained in paragraph 11 is not appropriate for the telecommunications sector because it does not take into account the role which the European Telecommunications Standards Institute (ETSI) will play in the future (see paragraph 9 above). A more appropriate definition is therefore introduced for the specific purposes of this Directive, in Article 3(2)(b).

40. Furthermore, Article 3(2)(a) of this Directive contains a definition of software service contracts, which has not been necessary for the purposes of the Directive on the other sectors. Software forms such an important part of many telecommunications equipment contracts that it is essential to include software service contracts from the outset. In the other sectors, this problem can be re-examined in the context of the new proposals now being prepared concerning public procurement of services.

(b) Concerning general rules on the exclusion of certain contracts: Articles 4, 6, 7 and 8.

41. The reference to Article 4 of the Directive on the other sectors has the effect that another group of contracts, namely those where the contracting entity intends to sell or hire the equipment purchased in a competitive market, are not covered by this Directive. This exclusion is similar in nature to the one provided for in Article 2(b) of this Directive (see paragraph 32 above). The consequence of these two exclusions is that procurements necessary for either offering services or products to the end consumer are excluded from this Directive when the end consumer has the choice between several suppliers.

42. The reference to Article 6 of the Directive on the other sectors has the effect of excluding from this Directive contracts which in their execution must be accompanied by special security measures or when the protection of the basic interests of the State's security so requires.

It is limited in that it is only by virtue of specific rules that contracts may be excluded from this Directive, or by reference to the basic State security interests which are well-defined in all Member States. The article is based on a corresponding provision added to the supplies Directive in March 1988 in its Article 2(2)(c).

43. By way of the reference to Article 7 of the Directive on the other sectors, the priority has been established of other procurement rules such as those existing under international agreements, or in connection with the activities of international organizations or with the stationing of troops. Article 7 corresponds to Article 3 of the supplies Directive.

44. Article 8 of the Directive on the other sectors, which is also included in this reference, provides for the thresholds which the value of contracts must exceed in order to be covered by this Directive. The figures are those, as regards supplies, of the existing Directive, and as regards works, of the modified Commission proposal for modification of the works Directive. [2] The calculation method laid down in paragraphs 2 to 4 is largely the same as in the supplies Directive, with the relevant provisions on works contracts being added, notably in paragraphs 5 and 6. Extensive consultation on whether the thresholds should be raised or lowered produced no conclusive result. For every argument in one direction, a counterargument can be advanced.

It accordingly seems sensible to maintain the present levels for the time being. They are themselves the end result of long and intensive debate in the Community institutions and elsewhere.

[1] Initial Commission proposal: COM(86) 756 final/3 of 17 February 1987.
[2] COM(88) 354 final of 21 June 1988.

45. Since the Directive on the other sectors does not cover software service contracts, it was furthermore necessary to lay down a specific threshold for such contracts. The figure proposed in Article 4 of this Directive to that effect is the same as for supply contracts.

### (2) Title II — Technical specifications and standards

46. As explained in paragraph 9 above, there is at present no evidence of the telecommunications sector requiring different rules than those included in the Directive on the other sectors. Article 5 of this Directive therefore makes a global cross-reference to the relevant provisions of the Directive on the other sectors. There is just one addition to those provisions, laid down in Article 5(2) of this Directive; it is explained in paragraph 52 below.

47. The concept underlying Articles 9 to 11 of the Directive on the other sectors is basically the same as the one adopted on this matter by the Council concerning the revision of the Directive on supply contracts. Its main objective is to ensure to the maximum extent possible that contract specifications do not have the effect of excluding foreign suppliers. To that effect,

(i) European standards, common technical specifications and European technical approvals are made obligatory, subject to a number of exceptions;

(ii) there is an explicit prohibition on technical specifications which have the effect of favouring or eliminating certain undertakings, except in strictly defined cases;

(iii) performance specifications and standards that indicate functional requirements rather than particular techniques should be used unless there are sound reasons for not doing so; and

(iv) transparency of the contract specifications is ensured by an obligation to tell interested suppliers in advance what they are or where to find them.

48. It goes without saying that this provision can apply only in so far as the contracting entity has a choice for developing the contract specifications. There is no choice, however, where mandatory requirements, for example, in the form of technical regulations, exist. Such requirements must obviously be respected.

49. It is important to understand that the contracting entity remains free to use in-house specifications for those technical aspects which are not subject to any of the prescribed standards or specifications or for dealing with situations which these standards or specifications do not address.

50. In accordance with the principles of Community standardization policy and of Community law, contracting entities cannot under all circumstances insist on compliance with those standards or specifications which they have laid down in the contract documents. The principles of equivalence and mutual recognition of national standards oblige them to accept any offers which are based on satisfactory but different national standards of other Community countries. There is no specific provision on this matter in the Directive. But these principles apply as a direct effect of Article 30 of the Treaty, in accordance with the decisions of the European Court of Justice as recalled in the preamble to this Directive.

51. As Articles 9 to 11 of the Directive on the other sectors are based on the provisions of the supplies Directive, it is important to point out the differences compared to those provisions.

52. As regards Article 9, there is no particular preference in paragraph 1 to legally binding national technical rules. As explained above, compliance with such rules is self-evident. Paragraph 3 does not include the record-keeping and information requirements which are part of the equivalent provision of the supplies Directive. However, the recording requirement has not been deleted from the general Directive. It is now included in its Article 27, which regroups, for the purpose of simplicity, all record-keeping requirements related to the provisions of this Directive.

53. For the purposes of this Directive, the priority of the rules of Directive 86/361 con-

cerning telecommunications terminals equipment has been established by Article 5(2).

54. The differences in Article 10 (other standards and specifications), compared to the revised supplies Directive, are as follows. Paragraph 1 does not state that the principles of equivalence and mutual recognition of standards must be respected. This is now recalled in the preamble. As explained above, these principles apply, irrespective of whether or not they have been mentioned, when offers received by the contracting entity refer to other national standards than those of the country where the contract is to be awarded. Paragraph 2 is new. It reflects the idea that performance-related standards or specifications leave more choice to the supplier and are therefore more appropriate than design standards, for the purpose of market opening. However, provision is made for justified deviations from this principle. Paragraph 3 is somewhat different from Directive 77/62/EEC (Article 7(2)) in that it focuses on the need not to discriminate against certain undertakings. It does not prohibit, however, favouring or eliminating certain products. It must indeed be possible to require the product to be of a particular material, or performance, and thereby to eliminate others.

55. Article 11, on availability of technical specifications, goes beyond the new provisions retained for Directive 77/62/EEC in that it requires contracting entities to inform interested suppliers about those technical specifications which will be applied in forthcoming procurements. In order to avoid the dispatch of voluminous texts, references may suffice where suppliers can have access to the full texts. Contracting entities are free to make the relevant information available against payment of a fee which must not in itself, however, operate as a barrier to trade. This provision corresponds to the request of suppliers for having as much specific information as possible at an early stage in order to have a longer lead-time for preparing participation in award procedures. It also reflects the widespread practice of some entities to lay down and make available the technical specifications which they regularly apply.

### (3) Title III — Procedures for the award of contracts

#### (a) General approach

56. Article 6 of this Directive uses again the technique of making a global cross-reference to the Directive on the other sectors. It also includes, in its paragraph 2, the provisions necessary for making the Directive on the other sectors applicable to software service contracts. Its paragraph 3 clarifies that the cross-reference to the Directive on the other sectors does not cover the model notices for making publications in the *Official Journal of the European Communities*. Instead, there is a full set of model notices attached to this Directive.

57. The cross-reference to the Directive on the other sectors is to those provisions which deal with the following major aspects:

(a) the choice of award procedures;

(b) the choice of how to make a call for competition under each of the procedures;

(c) formal requirements concerning publication in the *Official Journal of the European Communities*;

(d) minimum time-limits established for each phase of the award procedures.

58. Contracting entities will according to Article 12(1) of the Directive on the other sectors have a free choice between procedures which have the characteristics of any one of the allowed types of award procedures. Thereby, they will enjoy substantially more flexibility than under Directives 77/62/EEC and 71/305/EEC, which make the use of the negotiated procedure and, concerning supply contracts, the choice of the restricted procedures subject to certain conditions. The provisions of Article 12 do not attempt to fix which award procedure is appropriate for what kind of contract. It is rather the entities themselves which will decide. It would, however, not be a great surprise if the open procedure were mainly used for purchasing standard off-the-shelf items and the negotiated procedures were applied in case of complex and sensitive projects.

59. The objective of introducing competitive bidding requires that there should be a call for competition as part of whatever award

procedure has been chosen. The proposed provisions on this matter are designed with particular care in order to allow for a maximum of flexibility and to avoid any undue bureaucracy. The underlying concept is that entities may chose between the different ways of approaching potential suppliers which are current practice already. There are two exceptions from these principles.

60. In open procedures, the 'normal' tender notice is mandatory according to Article 13(1) of the Directive on the other sectors. It is indeed an essential part of the open award procedure that any interested supplier has the benefit of a tender notice to which he is free to respond if he so wishes.

61. In negotiated procedures, a call for competition would not make sense in certain situations where there is no prospect for any competition at all or where the existing competitors are known in any case. These situations are listed in Article 12(2) of the Directive on the other sectors along the lines accepted by the Council with regard to Directive 77/62/EEC and in accordance with the Commission proposals for modifying Directive 71/305/EEC.

62. The particular ways and means for making a call for competition in the other cases are described in Article 13(2) and (3) of the Directive on the other sectors.

63. The normal tender notice according to Article 13(2)(a) is an option which should be available to entities if they so wish even in the case of restricted or negotiated procedures.

64. The possibility of making a call for competition, according to Article 13(2)(b) of the Directive on the other sectors, by inviting suppliers who have undergone a qualification test reflects the current practice of many entities in the excluded sectors. Inviting qualified suppliers could not by itself be considered as a sufficient call for competition because those other suppliers who have not (yet) qualified would have no chance to compete. A call for competition could be considered as having been made only if those other suppliers had a chance to qualify. It is therefore necessary to establish the conditions that the existence of the qualification system is publicly known, that the rules of operation are available, and that a minimum standard of fairness in the operation of the qualification system is guaranteed. These requirements are laid down in Article 20 of the Directive on the other sectors. It may be noted that the notice concerning qualification systems is not mandatory but its publication is a prerequisite for the entity to be able to invite only qualified suppliers to take part in an award procedure.

65. The periodic notice of Article 13(3) of the Directive on the other sectors is a survey which entities have to publish once a year. The information contained in it will normally be of a rather general nature. However, the periodic notice offers the opportunity to any interested suppliers to approach the entity concerned for more detailed information on specific contracts to which the contracting entity decides to make reference; therefore it can also serve the purpose of a call for competition provided that those suppliers who have stated their interest get a chance to participate when particular award procedures are initiated. It is evident that suppliers who intend to sell to contracting entities should have a strong interest in monitoring periodic notices.

66. The ways and means for making calls for competition are summarized in the following table:

| Call for competition<br>Award procedure | 'Normal' notice Art. 13 (1) and (2) (a) | Periodic notice Art. 13 (3) | Qualification system Art. 13 (2) (b) |
|---|---|---|---|
| Open procedure | obligatory | — | — |
| Restricted procedure | optional | optional | optional |
| Negotiated procedure with prior call for competition | optional | optional | optional |

**(b) Detailed comments**

67. The list of cases in which negotiated procedures may be applied without call for competition figuring in Article 12(2) of the Directive on the other sectors is essentially a compilation of the relevant provisions of the revised supplies Directive and of the proposals for revision of the public works Directive. Differences compared to those provisions are:

(i) In subparagraph (a), the possibility of all tenders being irregular has been added. The requirement that the original terms of the contract must stay the same in the negotiated procedure has been deleted because these terms may subsequently be modified anyway. There is no requirement for a report to the Commission.

(ii) According to subparagraph (d), contracting entities are dispensed from making a call for competition whether or not they are responsible for the situation of extreme urgency.

(iii) In subparagraph (e), a time-limit of five years during which no call for competition need be made has been introduced following the example of subparagraph (g).

(iv) In subparagraph (f), there is no limit as regards the proportion of the value of additional works compared to the value of the original contract.

(v) In subparagraph (g), the period during which the negotiated procedure may be applied in the circumstances referred to has been extended to five years.

(vi) A new subparagraph (h) has been added in order to allow purchases on commodity markets to be made according to the rules of these markets which in any case guarantee competition.

(vii) A new subparagraph (i) has been added which allows contracting entities to use the occasion for making bargains by purchasing from suppliers which are in bankruptcy or any other of the situations described in Article 20(1)(a) of the supplies Directive.

68. Article 14 of the Directive on the other sectors, on periodic notices, is in line with the corresponding provision of the revised supplies Directive, as regards subparagraph (a), and with the Commission's modified proposal for revising the public works Directive, as regards subparagraph (b). It should be borne in mind that this Article does require the inclusion in the periodic notices of all contracts which are envisaged at the time when the periodic notice is drawn up.

However, only those envisaged must be covered. Where additional projects are developed, or additional funds become available later in the year, there are two possibilities: either the award procedure will be initiated in the same year by other means of calling for competition (except where no call is required), or the contract will be included in the periodic notice of the following year, unless the project is abandoned. Equally, the article does not require that contracts included in a periodic notice must be launched during the period covered by that notice. If they are not, they would simply have to be included in the periodic notice of the following year.

69. Article 15 of the Directive on the other sectors, on publication of results of procedures, attempts to strike the right balance between the need to ensure transparency in the public procurement market and respect for confidential information. The compromise consists in making a post-award publication mandatory, but in allowing its contents to be reduced to the bare minimum where confidentiality or other obstacles to disclosure of information are at stake. In this case, the contracting entities may decide what information they would like to give to interested suppliers on a bilateral basis. The time-limit set by paragraph 3 allows sufficient time to pass by for possible subsequent debriefings to individual suppliers to take place in a non-controversial way.

70. Article 16 of the Directive on the other sectors, on general rules on publication of notices, lays down certain formalities. They correspond to the rules of the existing Directives. It should be noted that these requirements are not addressed to the contracting entities or the suppliers or contractors. They ensure that the Publications Office, for its part, will work according to certain rules and schedules.

71. The time-limits laid down in Article 17 of the Directive on the other sectors, concerning the different phases of award procedures, are indispensable despite the need to make the rules on the excluded sectors as flexible as possible. Partly contradictory interests have to be reconciled in fixing them. On the one hand, contracting entities may want to proceed very quickly for certain procurements; indeed this may not present problems for those of their suppliers with whom they have long-standing relationships. On the other hand, too short time-limits are the most evident and one of the most efficient means of excluding foreign suppliers who have to overcome certain handicaps which do not exist for domestic suppliers, such as language problems. Article 17 provides for the time-limits accepted by the Council for modification of Directive 77/62/EEC.

72. In addition, Article 18 of the Directive on the other sectors also provides for time-limits within which the contracting entities have to respond to requests for information. These are also based on the provisions of the existing Directives. There is no express rule as regards the costs of any documents to be sent. However, charges for such documents should not be higher than their real cost and must not in any case be fixed in a discriminatory way.

## (4) Title IV - Qualification, selection and award of contracts

### (a) General approach

73. Article 7 makes applicable, for the purposes of this Directive, the relevant provisions of the Directive on the other sectors. There is no need for any specific provisions on this matter for the telecommunications sector.

74. The relevant provisions of the Directive on the other sectors may be subdivided between those dealing with:

(i) qualification and selection of participants (Articles 19 to 21);

(ii) award of contracts (Articles 22 and 23).

75. As regards qualification and selection of participants, the relevant provisions are of a different nature:

(i) Articles 19 and 20 are part of a new concept which establishes the general principles according to which the contracting entities can fix their own rules;

(ii) Article 21 is based on Directive 77/62/EEC and the current state of discussions concerning the revision of Directive 71/305/EEC.

The new concept underlying Articles 19 and 20 reflects the need to avoid any unnecessary formalities and to allow for a maximum of adaptation to the particular circumstances in which each individual contracting entity operates. In order to meet these criteria, common general principles are laid down in Article 19 for any stage before and during award procedures where contracting entities need to select between interested suppliers, that is:

(a) when enterprises apply for qualification, Article 20 specifies how the qualification system must be handled;

(b) when they request to participate in restricted or negotiated procedures, Article 21 lays down the basic principles.

The general principles contained in Article 19 are based on the interpretation given by the Court of Justice to Article 30 of the Treaty. Paragraph 3 leaves it to the contracting entities to determine their own rules within these limits.

76. As a counterpart for the freedom thereby created, it is, however, necessary that the rules fixed by contracting entities are laid down in writing, and that they must be sent to anybody interested. Without this, the conditions of the market would become totally obscure rather than more transparent, since the rules applied by individual contracting entities will be different from one to another.

77. The provisions of Title IV are also applicable in those cases where contracting entities have entrusted third parties with qualification or selection of participants, or with awarding the contract in so far as those third

parties act as agents for and on behalf of the contracting entity.

78. The general approach to rules on the award of contracts follows the provisions of the existing Directives very closely. It provides a considerable degree of flexibility for the contracting entities. Unless they choose to base the award decision on the lowest tender, they can, according to Article 22(1)(a), take into account any relevant aspect related to the object of the contract. Article 23 also repeats provisions from the existing Directives. There are certain contracting entities in the excluded sectors, including telecommunications, which by national law have to apply regional preference rules, mainly among those entities which belong to the public sector. The Directive on the other sectors accordingly takes exactly the same approach as the existing Directives.

**(b) Detailed comments**

79. Article 19(1)(b) is to be interpreted in the context of the case law of the European Court of Justice. It requires contracting entities to recognize existing tests or proofs in so far as they are relevant for its purposes.

80. Article 20(1) allows the opening of qualification systems to interested suppliers from abroad to take place in a progressive way. Contracting entities can respond to objective constraints in dealing with new applications by programming their examination over a given period of time. They must, however, give some precise information on the time schedule to the applicants. The real cost of the examination may be charged to applicants provided this is done in a non-discriminatory manner. Paragraphs 4 and 5 reflect the two existing ways of operating a qualification system: either on a permanent basis or on an *ad hoc* basis in connection with specific investment projects.

81. As regards Article 22, the catalogue of criteria listed in paragraph 1(a) is not exhaustive. However, the term 'economically most advantageous tender' does not allow reference to macroeconomic or social, regional or other criteria which are not relevant to the object of the contract. Paragraphs 3 and 4 deal with tenders which do not fully conform to the contractual requirements.

Paragraph 3 makes it clear that contracting entities may themselves decide to what extent they would accept alternative proposals, by fixing the hard core of requirements from which no deviations would be accepted. In the interest of transparency they must however specify in the contract documents whether they are ready to consider variants. Paragraph 4, concerning construction products, reflects the principles of mutual recognition of such products as proposed by the Commission in the proposal for a Directive on construction products. Paragraph 5 is a particularly important provision because of the differing cost calculation basis which may be underlying tenders from other Member States. The purpose of market opening and competitive purchasing would not be achieved if tenders which are low but sound would be rejected because they could at first sight be considered abnormally low and therefore unreliable. Paragraph 5 identifies accordingly the cases in which an apparently very low tender may not be rejected. Paragraph 5 also states that contracting entities, when considering that a very low offer is unreliable because it is based on a State aid, may reject such offers. The main purpose of this provision is not to make contracting entities instrumental in the application of the rules on State aids of the Treaty. Their own interest requires that they be allowed in an explicit way to reject such offers. Without such a clause, entities would, according to the second subparagraph of paragraph 5 ('exceptionally favourable conditions'), be obliged to accept tenders which might not afterwards be carried out if the State aid had to be reimbursed.

82. Article 23, dealing with regional preference rules, corresponds in its paragraph 1 to Article 25(4) of Directive 77/62/EEC and refers to national rules which require the application of other than the normal criteria, or a different weighting of them, in awarding individual contracts. It does not cover rules, however, which aim at giving preference to certain tenderers by such methods as market quotas. Paragraph 2 estab-

lishes, as in the recently modified supplies Directive, the basis for a general solution to the question of preference schemes. The existing national schemes should come to an end not later than end 1992 in the absence of a new Community regime which the Commission has indicated its intention to propose. It does not exempt Member States, in the period up to 1992, from their obligations to respect the rules of the EEC Treaty and, as far as the other sectors are concerned, of the GATT Agreement on Government Procurement.

## E. *Relations with third countries*

### (1) General considerations

83. Third-country firms are watching with growing interest the Community's new impetus to establish a common procurement framework as a key element in the realization of its internal market by 1992. They are focusing especially on the Community's moves towards opening procurement in the excluded sectors because of their obvious economic and technological importance and also because fierce international competition in these sectors is forcing all participants to seek new markets. Opening procurement in the excluded sectors could under certain conditions result in access to large contracts becoming available to firms of third-country origin, either directly or through their subsidiaries established in the Member States. In other words, the Community is running a serious risk of unilaterally making its domestic market more accessible to third-country firms if the Directives on the excluded sectors fail to take proper account of the external dimension.

84 Furthermore, in parallel with the Community's efforts to create the conditions whereby domestic industry can exploit the single European market, discussions have been under way to strengthen and extend the scope of the GATT procurement Code, with the US in particular pushing for the inclusion of entities engaged in telecommunications and power generation. It should be recalled that at present the procurement practices of entities in the telecommunications sectors fail outside the scope of GATT disciplines. The Community clearly has an important interest in ensuring that its enterprises have access to third-country markets in the sectors concerned. The Community has accordingly supported the GATT broadening exercise, though the outcome, including the timing of any future agreement, is at present hard to predict.

85. Discussions are also under way between the Community and EFTA countries concerning possibilities for further mutual opening of public procurement. The implications of these discussions for procurement in the excluded sectors are also uncertain at the present time.

86. In these circumstances, the adoption of Community legislation opening procurement in the excluded sectors needs to be accompanied by measures designed to achieve the following general objectives. First, provisions are needed to defend the Community's commercial interests and preserve its negotiating position by making no unilateral concession but on the contrary creating a positive incentive for third countries to give guarantees of equal access to similar markets. Second, Community producers should, where necessary, be given the necessary time for the industrial adaptation required to meet the objectives of 1992 and the day when reciprocal access is finally agreed.

### (2) The situation in the telecommunications sector in particular

87. The overall approach described above is appropriate also for the telecommunications sector, as some of the Community's principal trading competitors are actively pursuing a further opening of the Community market, in particular for telecommunications equipment. The Commission considers the situation in this sector, as set out in the telecommunications Green Paper, not simply as a risk for Community suppliers, but also as a challenge and an opportunity to be exploited in parallel with the other Community efforts to open extra-Community markets.

### (3) The legal mechanism

88. As to the content of Community legislation in this field, it should explicitly address the problem of offers made by firms established within the Community. Situations in which offers are made by firms established entirely outside the Community are in practice relatively rare and, in any case, this Directive will simply not apply to them. On the other hand, where an offer is made by a firm established in a Member State, this Directive will apply to it even if the firm is a subsidiary or agent of a third-country firm and the goods or services to be rendered under the offer have their origin entirely in that third country.

89. After having examined various possible approaches, the Commission considers that the best means for the Community to realize these important objectives is to provide for a regime whereby, in the absence of relevant international obligations, contracting entities are placed under no obligation to apply the provisions of this Directive to offers having their origin outside the Community. For this purpose, an offer is considered as having its origin outside the Community when more than half its value represents goods or services produced or performed outside the Community. However, in the case of offers from subsidiaries or agents, a substantial part of the value of the offer may represent economic activity within Member States, and can thus be considered to be of Community origin. In addition, where a Community offer is equivalent to one from a third-country firm or to one of third-country origin, the Community offer should be preferred.

90. The equally important counterpart to these provisions, which preserve the position of the Community in relation to third countries, is a mechanism which will permit the Council, on a Commission proposal, to extend the benefit of the provisions of this Directive to third-country undertakings or undertakings offering goods or services of third-country origin. This mechanism makes it clear that the Community is not simply seeking to protect its own market, but is in a position to implement agreements with third-countries on equal market access, whether reached through multilateral or bilateral negotiations. Indeed, the fundamental purpose of the provisions is to provide a firm basis for negotiations with third countries.

91. This Directive, by way of the cross-reference contained in its Article 8, makes applicable Article 24 of the Directive on the other excluded sectors, which contains the principles explained above.

92. Article 24(1) provides for contracting entities to be able to exclude offers when less than half the value of the goods or services to be rendered is of Community origin. Paragraph 4 provides definitions of the value of products manufactured and of services performed outside the Community. However, paragraph 2 indicates that the contracting entities must choose a Community offer if offers are equivalent, except when this acceptance would oblige it to acquire material having different technical characteristics, thus creating unreasonable and disproportionate difficulties, from existing material (paragraph 3). At the same time paragraph 5 provides for a mechanism whereby the Council, on a Commission proposal, can extend the benefit of the provisions of the Directive to undertakings or offers of third-country origin.

93. This approach ensures that, for the time being, contracting entities are placed under no obligation to apply the provisions to an offer unless a substantial part of its value represents economic activity within Member States. It thus preserves the status quo, allowing contracting entities to reject offers not meeting the Community origin criterion or to reject firms not having a real connection with the Community.

94. The proposed approach also takes into account the need to give a clear preference to a Community offer where offers are equivalent. For the purpose of comparing prices, a difference of up to 3% in favour of a non-Community offer shall be disregarded. This provision is designed to facilitate the application of the approach in practice. It should be stressed that this preference still leaves the possibility for the contracting entity to choose a non-Community offer on the basis

of a sound technical reason in relation to the operation and maintenance of existing material, even where a non-Community offer is being evaluated on the basis of the lowest price criterion and is within the 3% margin.

95. The provision permitting and requiring contracting entities to exclude non-Community offers will ensure that the Community does not open its market unilaterally. The position of the Community is thus preserved in relation to both multilateral and bilateral negotiations.

96. The extension provision provides a specific mechanism for arrangements for equal market access to be made between the Community and third States, should such negotiations produce positive results.

## F. *Progressiveness of introduction and monitoring of progress*

97. Following the approach of Recommendation 84/550/EEC, the provisions of this Directive will not all become applicable at the same time to the total procurements made by telecommunications entities. Concerning supplies and software services, according to Article 10(1), they will be granted a two-year period of phasing in for most of the contents of this Directive during which 30% of their procurements may be made outside this Directive. It is anticipated that from 1992 onwards, full application of this Directive will take place smoothly, based on the experience gained during the previous two years.

98. However, according to Article 10(2), the periodic information notices explained in paragraphs 65 and 68 above shall from the start include all procurements envisaged; suppliers will therefore be fully informed as from 1990. They will at least have the chance to state their interest in doing business with the telecommunications entities, although the other benefits of the Directive will not apply to all of the contracts concerned.

99. For each of the Member States, as well as for the Commission, comprehensive periodic information notices will also constitute a useful point of reference for monitoring whether the 70% rule of Article 10(1) has been respected.

100. Monitoring of progress will also take place through the statistical reports which will have to be given to the Commission according to the cross-reference to Article 28 of the Directive on the other sectors which is provided in Article 8 of this Directive. Here again, evidence of the 70% rule being respected must be given, according to Article 11 of this Directive.

101. After four years of operation, the Commission will report on the way in which this Directive has been applied, and on the effects it has had. It will also, according to the cross-reference to Article 30 of the Directive on the other sectors which is made by Article 8 of this Directive, make any necessary proposals for adaptation of the regime of this Directive.

102. These monitoring provisions may at first sight appear to be heavy-handed and bureaucratic. They are, however, of fundamental importance. The opening up of procurement markets in the excluded sectors is a very complex and sensitive undertaking. It can succeed only if it is clear from the outset that everybody concerned will have to fully comply with the rules. Without everybody being seen as conforming to the rules, the necessary climate of confidence can never be established. The prospect for making a realistic review after three years, and for developing meaningful and necessary modifications, would equally be hampered if evidence on the operation of this Directive was missing. The Commission intends furthermore to pursue other ideas for assessing progress in market opening in order to keep the degree of bureaucracy required by this Directive as low as possible.

## G. *Final provisions*

103. The other relevant provisions of Title V of this Directive, and of Title V of the Directive on the other sectors which is referred to in Article 8, deal with:

(i) technical adaptations of certain provisions; and

(ii) coming into force, adaptation of the existing Directives and transposition into national law.

104. Article 25 of the Directive on the other sectors enables currency adaptations in the context of the European Monetary System to be taken into account on a regular basis, and subject to a confirmation or a revision of the calculation method.

105. Article 9 of this Directive provides the criteria, and Article 26(2) of the Directive on the other sectors provides the method, for adjusting the field of application of this Directive by way of modification of the Annexes. It thereby creates the necessary margin of manoeuvre with regard to changes in the market place, such as those which may follow from privatization, deregulation, and market liberalization policies. The procedure envisaged in Article 26(2) of the Directive on the other sectors corresponds to the one agreed by way of Council Decision 87/373/EEC [1] for cooperation with advisory committees.

106. The committee established pursuant to Article 12 of this Directive plays a vitally important role in this context, as well as with regard to the monitoring activities explained in paragraphs 101 to 103 above.

107. Article 13 of this Directive provides for the necessary adaptations of the existing Directives which would result from this Directive. In doing so, it refers to the existing Directives as they would be modified by Article 29 of the Directive on the other sectors. If this Directive were to be adopted earlier than the other Directive, Article 13 would have to be revised accordingly.

108. Recommendation 84/550/EEC needs to be cancelled when the new rules are fully in place in order to avoid an overlap. Article 14 of this Directive contains the relevant date.

## Proposal for a Council Directive

*On the procurement procedures of entities operating in the telecommunications sector*

**The Council of the European Communities,**

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 100a and 113 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the measures aimed at progressively establishing the internal market during the period up to 31 December 1992 need to be taken; whereas the internal market consists of an area without internal frontiers in which free movement of goods, persons, services and capital is guaranteed;

Whereas successive European Councils have drawn conclusions concerning the need to realize a single internal market;

Whereas restrictions on the free movement of goods and on the freedom to provide services in the telecommunications sector are prohibited by the terms of Articles 30 and 59 of the Treaty;

Whereas those objectives also require the coordination of the procurement procedures applied by the entities operating in this sector;

Whereas the White Paper on completing the internal market lays down an action programme and a timetable for opening up public procurement markets in sectors which are currently excluded from Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, [2] as last amended by the Act of Accession of Spain and Portugal, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public contracts, [3] as last amended by Directive 88/295/EEC; [4]

Whereas the telecommunications sector is among such excluded sectors as far as Directive 77/62/EEC is concerned;

[1] OJ L 197, 18.7.1987.
[2] OJ L 185, 16.8.1971.
[3] OJ L 13, 15.1.1977.
[4] OJ L 127, 20.5.1988.

Whereas the main reason for their exclusion was that entities providing such services are in some cases governed by public law, in others by private law;

Whereas the need to ensure a real opening up of the market and a fair balance in the application of procurement rules in these sectors requires that the entities to be covered must be identified on a different basis than by reference to their legal status;

Whereas among the main reasons why entities operating in the telecommunications sector do not purchase on the basis of Community-wide competition is the closed nature of the markets in which they operate, due to the existence of special or exclusive rights or authorizations granted by the national authorities, concerning the supply or management of the telecommunications network or the right to provide telecommunication services;

Whereas the other main reason for the absence of Community-wide competition in this sector results from various ways in which national authorities can influence the behaviour of these entities, including participations in their capital and representation in the entities' administrative, managerial or supervisory bodies;

Whereas this Directive should not extend to activities of these entities which either fail outside the telecommunications sector or which fall within that sector but nevertheless are directly exposed to competitive forces in markets to which entry is unrestricted;

Whereas this Directive should not apply to procurement contracts which affect basic State security interests or which are concluded according to other rules set up by existing international agreements or international organizations;

Whereas the Community's or the Member States' existing international obligations must not be affected by the rules of this Directive;

Whereas, within certain limits, a preference should be given to an offer of Community origin where there are equivalent offers of third-country origin;

Whereas this Directive should not prejudice the position of the Community in any current or future international negotiations;

Whereas, based on the results of such international negotiations this Directive should be extendable to offers of third-country origin, pursuant to a Council Decision;

Whereas contracting entities must be able to reject offers which, because they are based on State aids, are unreliable;

Whereas in the area of standards and technical specifications it is necessary to adopt common rules taking fully into account Community policy in the field;

Whereas the principles of equivalence and of mutual recognition of national standards, technical specifications and manufacturing methods are applicable in the field of application of this Directive;

Whereas the rules to be applied by the entities concerned should establish a framework for sound commercial practice and should leave a maximum of flexibility;

Whereas as a counterpart for such flexibility and in the interests of mutual confidence a minimum level of transparency and appropriate ways for monitoring the application of this Directive must be ensured;

Whereas the arrangements to be introduced should to a large extent be the same as those laid down by the Directive on the procurement procedures of entities providing water, energy and transport services;

Whereas it is desirable for national provisions in favour of regional development to be included in the Communities' objectives;

Whereas the disciplines of this Directive should be phased in in two steps, with a transitional period of two years during which 30% of overall annual procurements may be made outside this Directive, in order to ensure its smooth application as from 1992 on the basis of experience gained during the two previous years;

Whereas no transitional period should be laid down, however, as regards the obligation to publish periodic information notices,

Whereas the Commission should review the functioning of this Directive and the effects which it has had, after four years, in order to make any necessary further proposals,

**Has adopted this Directive:**

*Title I — General provisions*

*Article 1*

The provisions of this Directive shall apply to the award of supply, works and software service contracts by contracting entities which:

(a) are public or are granted special or exclusive rights by Member States; and

(b) operate public telecommunications networks or offer one or more telecommunications services to the public.

The entities listed in Annex I fulfil these criteria.

*Article 2*

This Directive shall not apply to contracts:

(a) which the contracting entities award exclusively for purposes other than the pursuit of their activities described in Article 1, provided that

(i) these activities have been notified to the Commission by the contracting entities; and

(ii) the Commission has published a notification of their exclusion, after verification, in the *Official Journal of the European Communities;*

(b) which a contracting entity awards for purchases exclusively in connection with one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under the same conditions.

Member States shall notify the Commission of the services falling within the scope of this paragraph and any relevant legal provisions.

*Article 3*

1. For the purposes of this Directive, the provisions of Title I of Council Directive .../.../EEC concerning procurement procedures in the water, energy and transport sectors shall apply, except Articles 2, 3 and 5.

2. Article 1 of Directive .../.../EEC shall apply, except paragraphs 4, 6 and 11. For the purposes of this Directive,

(a) software service contracts means procurements of software for use in connection with networks or telecommunications services and purchased by one of the contracting entities defined in Article 1;

(b) a 'European standard' means a standard approved by European standards organizations such as the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (Cenelec) as 'European Standard (EN)' or 'Harmonization Document (HD)' according to the common rules of these organizations.

*Article 4*

This Directive shall apply to the software service contracts whose estimated value, net of VAT, is not less than ECU 200 000.

*Title II — Technical specifications and standards*

*Article 5*

1. Contracting entities shall apply the provisions of Title II of Directive .../.../EEC.

2. Contracting entities may derogate from Article 9(1) of Directive .../.../EEC if its application would prejudice the application of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment. [1]

*Title III — Procedures for the award of contracts*

*Article 6*

1. For the award of supply, works and software service contracts, contracting entities shall apply the provisions of Title III of the Directive .../.../EEC.

[1] OJ L 270 5.8.1986, p. 21.

2. In the case of software service contracts,

(a) contracting entities may use the negotiated procedure without prior call for competition in the cases laid down in Article 12(2)(a) to (e) of Directive .../.../EEC;

(b) Article 14(1)(a) of Directive .../.../EEC shall apply.

3. The notices to be published in the *Official Journal of the European Communities* shall be established in accordance with Annexes II to V to this Directive.

*Title IV — Qualification, selection and award of contracts*

*Article 7*

Contracting entities shall apply the provisions of Title IV of Directive .../.../EEC.

*Title V — Final Provisions*

*Article 8*

Contracting entities shall apply the provisions of Title V of Directive .../.../EEC, except Article 26(1) and Article 29.

*Article 9*

Annex I to this Directive may be amended by the Commission

(a) to delete entities to which Annex I refers because they no longer fulfil the criteria for their inclusion set out in Article 1; or

(b) to include entities which meet those criteria.

*Article 10*

1. In the case of supplies and software service contracts the provisions of this Directive shall apply to

(i) at least 70% in estimated value of the procurement procedures carried out in the year 1990 and the year 1991;

(ii) all procurements carried out from 1992 onwards.

2. Notwithstanding the above, the provisions of Article 14 of Directive .../.../EEC shall apply to all supply and software service contracts from 1 Jannuary 1990.

*Article 11*

For the purposes of Article 28 of Directive .../.../EEC, Member States shall communicate to the Commission evidence that the levels of progressive implementation of this Directive established in Article 10 are complied with.

*Article 12*

1. The Commission shall be assisted by a committee of an advisory nature which shall be the Advisory Committee on Telecommunications Procurement. The Committee is composed of representatives of the Member States and chaired by a representative of the Commission.

2. The Commission shall consult the Committee on:

(a) amendments to Annex I;

(b) revision of the thresholds;

(c) procurement rules established under international agreements;

(d) the review of the operation of this Directive.

*Article 13*

1. Article 2(2) of Directive 77/62/CEE, as amended by Directive 88/295/CEE of 22 March 1988, shall be replaced by the following:

This Directive shall not apply

(a) to the award of supply contracts by contracting authorities in the fields covered by the provisions of Directive .../.../EEC and those of Directive .../.../EEC;

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[1] COM(88) 377, 11.10.1988.

(b) to supplies which are declared secret or when their delivery must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interest of that State's security so require.

2. Article 3(4) and (5) of Directive 71/305/EEC as amended by Directive .../.../EEC of ... [1] shall be replaced by the following:

This Directive shall not apply to works contracts by contracting authorities in the fields covered by the provisions of Directive .../.../EEC and those of Directive .../.../EEC.

*Article 14*

1. Member States shall implement the measures necessary to comply with this Directive by 31 December 1989 at the latest and shall inform the Commission thereof.

2. Recommendation 84/550/EEC is withdrawn on 31 December 1989.

*Article 15*

This Directive is addressed to the Member States.

[1] Proposal for a Council Directive amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts: COM(88) 354 final of 20.6.1988.

## Annex I

*Contracting entities*

### Belgium

Régie des télégraphes et des téléphones/
Regie van telegrafie en telefonie

### Denmark

Københavns Telefon Aktieselskanb
Jydsk Telefon
Fyns Kommunale Telefonselskab
Post-og Telegrafvæsnet
Statens Teletjeneste

### Federal Republic of Germany

Deutsche Bundespost

### Greece

OTE/Hellenic Telecommunications Organization

### Spain

Compañía Telefónica Nacional de España

### France

Direction générale des télécommunications
Transpac
Telecom Service Mobile
Société française de radiotéléphone

### Ireland

Telecom Éireann

### Italy

Amministrazione delle Poste e delle Telecommunicazioni
Azienda di Stato per i Servizi Telefonici
Società Italiana per l'Esercizio Telefonico SpA
Italcable
Telespazio SpA

### Luxembourg

Administration des postes et des télécommunications

### The Netherlandes

Post Telegraaf en Telefon

### Portugal

Telefones de Lisboa e Porto
Companhia Portugues a Rádio Marconi
Correios e Telecomunicações de Portugal

### United Kingdom

British Telecommunications plc
Mercury Communications Ltd
City of Kingston-upon-Hull

## Annex II

### A. *Open procedures*

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.

2. For supply and software service contracts, form of contract for which offers are invited.

3. (a) Place of delivery, or site;

(b) nature and quantity of the goods to be supplied;
or nature and extent of the services to be provided and, in the case of works, general nature of the work;

(c) indication of whether the suppliers can tender for some and/or all of the goods required;
or, for works contracts, if the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all of the lots;

(d) authorization to submit variants;

(e) information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects (where applicable).

4. Derogation from the use of European standards, common technical specifications or European technical approvals, in accordance with Article 9.

5. Time-limits for delivery or completion.

6. (a) Name and address of the service from which the contract documents and additional documents may be requested;

(b) the amount and terms of payment of the sum to be paid to obtain such documents (where applicable).

7. (a) The final date for receipt of tenders;

(b) the address to which they must be sent;

(c) the language or languages in which they must be drawn up.

8. (a) The persons authorized to be present at the opening of tenders;

(b) the date, hour and place of such opening.

9. Any deposits and guarantees required (where applicable).

10. Main terms concerning financing and payment and/or references to the provisions in which these are contained.

11. The legal form to be taken by the grouping of suppliers or contractors to whom the contract is awarded (where applicable)

12. Economic and technical standards required of the supplier or contractor to whom the contract is awarded.

13. Period during which the tenderer is bound to keep open his tender.

14. The criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents.

15. Other information.

16. Date of publication of the periodic information notice in the Official Journal to which this contract refers (where applicable).

17. Date of dispatch of the notice.

18. Date of receipt of the notice by the Office for Official Publications of the European Communities.

### B. *Restricted procedures*

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.

2. For supply and software service contracts, form of contract for which offers are invited.

3. Justification for the use of the accelerated procedure (where applicable).

4. (a) Place of delivery, or site;

(b) nature and quantity of the goods to be supplied;
or nature and extent of the services to be provided and for works, general nature of the work;

(c) Indication of whether the suppliers can tender for some and/or all of the goods required;
or, for works contracts, if the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all of the lots;

(d) authorization to submit variants;

(e) information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

5. Derogation from the use of European standards, common technical specifications or European technical approvals.

6. Time-limits for delivery or completion.

7. The legal form to be taken by the grouping of suppliers or contractors to whom the contract is awarded (where applicable).

8. (a) The final date for receipt of requests to participate;

(b) the address to which they must be sent;

(c) the language or languages in which they must be drawn up.

9. The final date for dispatch of invitations to tender.

10. Any deposits and guarantees required (where applicable).

11. Main terms concerning financing and payment and/or the provisions laid down by law or regulation in which these are contained.

12. Information concerning the supplier's or contractor's position and economic and technical standards required of him.

13. The criteria for the award of the contract where they are not mentioned in the invitation to tender.

14. Other information.

15. Date of publication of the periodic information notice in the Official Journal to which this contract refers (where applicable).

16. Date of dispatch of the notice.

17. Date of receipt of the notice by the Office for Official Publications of the European Communities.

## C. *Negotiated procedures*

1. The name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.

2. For supply and software service contracts, form of contract for which offers are invited.

3. (a) Place of delivery, or site,

(b) nature and quantity of the goods to be supplied;
or nature and extent of the services to be provided for works, general nature of the work;

(c) indication of whether the suppliers can tender for some and/or all of the goods required;
or, for works contracts,

if the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all of the lots;

(d) information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

4. Derogation from the use of European standards, common technical specifications or European technical approvals.

5. Time-limits for delivery or completion.

6. Where applicable, the legal form to be taken by the grouping of suppliers or contractors to whom the contract is awarded.

7. (a) The final date for receipt of tenders;

(b) the address to which they must be sent;

(c) the language or languages in which they must be drawn up.

8. Any deposits and guarantees required (where applicable).

9. Main terms concerning financing and payment and/or the provisions laid down by law or regulation in which these are contained.

10. Information concerning the supplier's or contractor's position and economic and technical standards required of him.

11. The name and addresses of suppliers or contractors already selected by the contracting entity (where applicable).

12. Date of previous publications in the Official Journal of the European Communities (where applicable).

13. Other information.

14. Date of publication of the periodic information notice in the Official Journal to which this contract refers (where applicable).

15. Date of dispatch of the notice.

16. Date of receipt of the notice by the Office for Official Publications of the European Communities.

## Annex III

*Notice on the existence of a qualification system*

1. Name, address, telephone number, telegraphic address, telex and telecopier number of the contracting entity.

2. Purpose of the qualification system.

3. Address where the rules concerning the qualification system can be obtained (if different from the address mentioned under 1 above).

4. Where applicable, duration of the qualification system.

## Annex IV

*Periodic information notice*

### A. For supply and software service contracts

1. Name, address, telephone, telegraphic address, telex and telecopier number of the contracting entity or the service from which additional information may be obtained.

2. Nature and quantity or value of the products to be supplied or, for software service contracts, nature and value of the services.

3. (a) Estimated date of the commencement of the procedures of the award of the contract(s) (if known);

(b) type of award procedure to be used.

4. Other information.

5. Date of dispatch of the notice.

6. Date of receipt of the notice by the Office for Official Publications of the European Communities.

### B. For works contracts

1. Name, address, telephone, telegraphic address, telex and telecopier number of the contracting entity.

2. (a) The site;

(b) the nature and extent of the services to be provided, the main characteristics of the work or of the lots by reference to the work;

(c) an estimate of the cost of the services to be provided.

3. (a) Type of award procedure to be used;

(b) the date scheduled for initiating the award procedures in respect of the contract or contracts;

(c) the date scheduled for the start of the work;

(d) planned timetable for completion of the work.

4. Terms of financing of the work and of price revision.

5. Other information.

6. Date of dispatch of the notice.

7. Date of receipt of the notice by the Office for Official Publications of the European Communities.

## Annex V

*Notice on contracts awarded*

1. Name and address of contracting entity.

2. Award procedure.

3. Date of award of contract.

4. Criteria for award of contract.

5. Number of offers received.

6. Name and address of successful supplier(s) or contractor(s).

7. Nature and quantity of goods supplied, where applicable, by supplier; or nature and extent of the services provided, general characteristics of the finished structure.

8. Price or range of prices (minimum/maximum) paid.

9. Other information.

10. Date of publication of the tender notice in the Official Journal.

11. Date of dispatch of the notice.

12. Date of receipt of the notice by the Office for Official Publications of the European Communities.

European Communities — Commission

**Public procurement in the excluded sectors**

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The communication and the two proposals for Directives on public procurement in the excluded sectors are part of the programme, envisaged in the White Paper on completing the internal market, to open up public procurement in these sectors. Their purpose is to remove barriers to Community-wide competition in the awarding of supply and works contracts by entities enjoying a monopoly or oligopoly situation by virtue of their public status or the fact that they have been granted special or exclusive rights by the government.