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R E P O R T

of the Committee on Economic and Monetary Affairs and
Industrial Policy

on the Commission proposal for a Council directive
coordinating the laws, regulations and administrative
provisions relating to the application of Community rules on
the procurement procedures of entities operating in the
water, transport and telecommunications sectors
(COM(90) 0297 final - C3-0290/90 - SYN 292)

Rapporteur: Mr Vincenzo MATTINA

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A Series: Reports - B Series: Motions for Resolutions, Oral Questions - C Series: Documents received from other Institutions (e.g. Consultations)

*	= Consultation procedure requiring a single reading	**II	= Cooperation procedure (second reading) which requires the votes of a majority of the current Members of Parliament for rejection or amendment
I	= Cooperation procedure (first reading)	*	= Parliamentary assent which requires the votes of a majority of the current Members of Parliament

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By letter of 6 September 1990 the Council consulted the European Parliament, pursuant to Article 100a of the EEC Treaty, on the Commission proposal for a Council Directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

At the sitting of 14 September 1990 the President of Parliament announced that he had referred this proposal to the Committee on Economic and Monetary Affairs and Industrial Policy as the committee responsible and to the Committee on Transport and Tourism, the Committee on Legal Affairs and Citizens' Rights and the Committee on Energy, Research and Technology for their opinions.

At its meeting of 26 September 1990, the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr Mattina rapporteur.

At its meetings of 5-7 November 1990, 18-19 December 1990, 29-30 January 1991 and 5-7 February 1991 it considered the Commission proposal and draft report.

At the last meeting, on 6 February 1991, it adopted the draft legislative resolution unanimously.

The following took part in the vote: Beumer, chairman; Fuchs, vice-chairman; Mattina, rapporteur; Barton, Beazley, Bernard Reymond, Bofill Abeilhe, Cassidy, Cox, de Donnea, De Piccoli, Donnelly, Ernst de la Graete, Friedrich, Herman, Hoff, Lataillade, Metten, Merz, Patterson, Pinxten, Read, Ferreira Ribeiro, Roumeliotis, Sboarina, Siso Cruellas, Stevens, Tongue, von Wogau, Wettig, Braun Moser (for Gallenzi), David (for Caudron), Fitzgerald (for Ruiz Mateos), Nielsen (for Visentini), Porto (for De Montesquiou) and Wijsenbeek, pursuant to Rule 111.

The Committee on Legal Affairs and Citizens' Rights and the Committee on Energy, Research and Technology decided not to deliver opinions.

The opinion in letter form of the Committee on Transport and Tourism is attached.

The report was tabled on 15 February 1991.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.

Proposed amendments

Commission text¹

Amendments

Citations and recital 1 to 8 unchanged

(Amendment No. 1)
9th recital

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

Whereas, it is necessary to enable Member States to apply a control system based on attestation by an independent body and offering equivalent guarantees in relation to the transparency and non-discriminatory nature of the awarding procedure;

Recitals 10 and 11 unchanged

(Amendment No. 2)
Recital 12

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

Whereas it is necessary to provide for the possibility of non-litigious conciliation at Community level to enable disputes to be settled amicably;

¹ Full text: OJ No. C 216, 31.8.1990, p. 8

(Amendment No. 3)
13th recital

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

Whereas the application in practice of the provisions of this Directive should be reviewed at the same time as that of Directive .../.../EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures;

Article 1 unchanged

(Amendment No. 4)
Article 2(1) and (7)

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

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

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

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

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

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

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

(c) To take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned including the power to order for the payment of a specified amount to the individual or individuals instigating the review procedure if the infringement is not corrected or prevented;

AND (in the two above-mentioned cases)

(d) to award damages to persons harmed by an infringement,

Paragraphs 2 to 4 unchanged

Article 2(4)a (new)

The amount to be paid in accordance with paragraph 1(c) must be set at a level sufficient to dissuade the contracting entity from committing or persisting with an infringement, taking into account, according to the case, the value of the contract and of the turnover of the contracting entity. This amount shall be equivalent to at least 1% of the value of the contract, plus any planning costs. The payment may be subject to a final decision establishing that the infringement has been committed.

Paragraphs 5 and 6 unchanged

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

7. Where a claim is made for damages, (fourteen words deleted) the person making the claim shall be required to prove the infringement of Community law in the field of procurement or national rules implementing that law and that the infringement adversely affected his chance of being awarded the contract. He shall not be required to prove that, in the absence of the infringement, he would have been awarded the contract.

Delete

(Amendment No. 4)

Article 3

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

Member States may supplement the system of review provided for in Chapter 1 by introducing, in the case of contracting entities, the attestation system set out in Articles 4 to 10 of this Directive.

(Amendment No. 5)

Article 4

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

Notwithstanding the remedies set out in Chapter 1, the contracting entities shall, at least once a year, have their purchasing procedures and practices attested, to check their conformity with the provisions of Directive 90/531 EEC.

Article 5 unchanged

(Amendment No. 6)

Article 6

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

(a) independent of the contracting entities;

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

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

(a) independent of the contracting entities, of the entities participating in the tender procedures and of the national, regional and local authorities of each Member State;

(b) in a position to offer adequate guarantees of specific professional training and competence in the sector;

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

(c) in a position to satisfy the criteria set by the relevant European standards;

(d) Persons having knowledge and practical experience of procurement law and practice, in particular concerning contracts in the water, energy, transport and telecommunications sectors

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

The Member States shall adopt their own provisions determining the criteria for the appointment and qualifications of the attestors, and the arrangements for the exercise of their professional activities and their remuneration.

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

They shall also provide for penalties against attestors who contravene the standards governing the exercise of their activities.

(Amendment No. 7)
Article 7

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

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

Their activity shall be based on the principles of cross-examination and transparency.

The attestors may consult technical consultants and experts in the specific area of activity of contracting parties, who shall not, however, have any professional links with or interests in the latter.

2. The persons who attest the purchasing procedures and practices of the contracting entities shall carry out these duties for a minimum period of three years for each entity concerned.

(Amendment No. 8)
Article 8

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

- (a) Unchanged
- (b) Unchanged

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

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

(c) Where deficiencies have occurred pursuant to paragraphs (a) or (b), description of actions needed to prevent their repetition in the future.

(Amendment No. 9)
Article 9

The report to which Article 8 refers shall be

- (a) made available by the contracting entities to interested persons who shall be supplied with copies at their request, for which a price may be charged which does not exceed the cost of their copying and transmission;
- (b) communicated by the contracting entities to the Commission and to any competent authority designated by a Member State by the law of which a contracting entity is governed.

The report to which Article 8 refers shall be

- (a) made available by the contracting entities to interested persons who shall be supplied with copies at their request, for which a price may be charged which does not exceed the cost of their copying and transmission;
- (b) communicated by the contracting entities to the Commission and to any competent authority designated by a Member State by the law of which a contracting entity is governed.

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

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

(Amendment No. 10)
Article 9a (new)

Where an unfavourable report is issued, the competent national authorities shall fix penalties, linked to the severity of the infringement, to be imposed on the contracting parties

(Amendment No. 11)
Article 10

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

Deleted

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

(a) suspension of contract award procedures;

(b) setting aside of decisions'.

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

(Amendment No. 12)

Article 11

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

Delete

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

Delete

Article 12 unchanged

(Amendment No. 13)
Article 13

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

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

(Amendment No. 14)
Article 14

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

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

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

(3) Unchanged

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

(2) The Chairman of the committee in question shall convoke as rapidly as possible a working group of at least two members of the committee and himself or another Commission official designated by him. The working group, excluding observers, shall comprise at least two members of nationalities other than that/those of the contracting entity/entities concerned. (rest unchanged)

(3) Unchanged

(4) The working group shall endeavour to reach an agreement between the parties which is in accordance with Community law and national rules implementing that law.

(Amendment No. 15)
Article 15

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

(2) Action taken pursuant to this Chapter shall be without prejudice to

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

(b) the rights of the person invoking the procedure, of the contracting entity or of any other person under applicable national laws except in so far as they enter into an agreement for the resolution of issues between them.

(1) Where, in relation to a particular contract award procedure, an interested person within the meaning of Article 13 other than the person invoking the conciliation procedure is pursuing judicial or other review proceedings or proceedings for review within the meaning of this Directive, the contracting entity shall inform the working group. The chairman shall inform that person that the conciliation procedure has been invoked and shall invite that person to indicate within a given time limit whether he agrees to participate in the procedure. If that person refuses to participate, the working group may decide, acting if necessary by majority, to close the conciliation procedure if it considers that the participation of that person is necessary to resolve the dispute. It shall provide the committee with a reasoned notification of this decision.

(2) Action taken pursuant to this Chapter shall be without prejudice to

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

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

(Amendment No. 16)

Article 16

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

(2) and (3)

(1) Before the expiry of a period of four years following this Directive's entry into force, the Commission, in consultation with the Advisory Committee for Public Contracts, shall review the manner in which the provisions of this Directive have been implemented and, if necessary, make proposals for amendments.

unchanged

(Amendment No. 17)

Article 17

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

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

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

(1) Member States shall adopt, before 1 July 1992, the measures necessary to comply with this Directive. They shall immediately notify them to the Commission.

(2) unchanged

(3) Nevertheless, as regards the Kingdom of Spain, the deadline of 1 January 1993 shall be replaced with 1 January 1996. As regards the Hellenic Republic and the Portuguese Republic, the deadline of 1 January 1993 shall be replaced with 1 January 1998.

(4)(new) Member States shall communicate to the Commission the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by this Directive.

(5)(new) The provisions adopted pursuant to the first subparagraph shall make express reference to this Directive.

Article 18 unchanged

A
DRAFT LEGISLATIVE RESOLUTION
(Cooperation procedure: first reading)

embodying the opinion of the European Parliament on the Commission proposal for a Council Directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

The European Parliament,

- having regard to the Commission proposal to the Council (COM(90) 0297 final - SYN 0292)¹,
 - having been consulted by the Council pursuant to Article 100a of the EEC Treaty (C3-0000/90),
 - having regard to the report of the Committee on Economic and Monetary Affairs and Industrial Policy and the opinion of the Committee on Transport and Tourism (A3-0034/91),
 - having regard to the Commission position on the amendments adopted by Parliament,
1. Approves the Commission proposal subject to Parliament's amendments and in accordance with the vote thereon;
 2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;
 3. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;
 4. Calls on the Council to incorporate Parliament's amendments in the common position that it adopts in accordance with Article 149(2)(a) of the EEC Treaty;
 5. Instructs its President to forward this opinion to the Council and Commission.

¹ OJ No. C 216, 31.8.1990, p. 8

B
EXPLANATORY STATEMENT

I. Analysis of the proposal

1. Purpose and specific features of the proposal

The directive of 21 December 1989 on the application of review procedures to the award of public supply and public works contracts does not apply to the award of works and supply contracts in the water, energy, transport and telecommunications sectors.

There is therefore a need for a separate directive on the application of review procedures, especially since public contracts in these sectors have certain particular characteristics. In addition to the fact that the remedies open to a contractor or supplier vary considerably from one Member State to another, the contracting entities in these sectors very often have an obligation to meet imperative requirements of continuous services to the public. Similarly, in certain Member States (Germany and Spain) the application of these review procedures to private entities would encounter legal obstacles. As a result, classical remedies such as the suspension or setting aside of decisions to award contracts may in certain cases appear difficult to apply. Special procedures are therefore necessary.

2. Remedies

The remedies laid down by the directive are divided into four chapters. Some measures correspond to those already adopted in the general directive on review procedures of 21 December 1989 while others are specific to the sectors concerned.

(a) Remedies at national level

- the classical remedies

As in the general directive on review procedures of 21 December 1989, the proposed directive provides that the Member States shall ensure that means of independent review are available to any person having an interest in obtaining a particular contract and at risk of being harmed by an infringement of the procedures for awarding the contract. Provision is made in particular for the suspension of the award procedure by interlocutory procedure, the setting aside of unlawful decisions, and damages for injury. Essentially, the provisions of Articles 1 and 2 are the same as those in Articles 1 and 2 of the general directive on review procedures.

However, the directive states that its scope will include all public contracts in the 'excluded sectors' including contracts awarded under the alternative regime for the exploration for and extraction of oil, gas, coal and other fuels.

- the specific attestation procedure

Alongside the classical remedies, the directive introduces a specific procedure termed attestation (Articles 3 to 11). This attestation system affords the opportunity of controlling the whole purchasing system of

contracting entities on a regular basis. Drawn up on at least an annual basis by an authorized person providing all the guarantees of competence and independence needed, this attestation, will take the form of a report and will contain an evaluation of the procurement procedures and practices of the entity concerned.

This specific mechanism is intended for Member States which consider that the classical remedies (suspension and setting aside of the decisions of the contracting entities) are inadequate by virtue either of their constitutional laws or the public service obligations of certain entities. This attestation mechanism should have a preventive effect by guaranteeing the correction of procedures for awarding contracts. It would therefore provide the Commission with an alternative course provided, naturally, it offered equivalent guarantees of transparency and non-discrimination. However, the attestation mechanism does not constitute a remedy for individual complaints. Consequently, it would not exclude remedies by way of interlocutory procedure (Article 11) or the payment of damages (a minimum flat-rate amount is set at 1% of the value of the contract).

(b) Remedies at Community level

- the corrective mechanism (Article 12)

It can happen that entities fail to introduce review procedures. This means that certain infringements of procedures for awarding contracts may not be corrected. Hence, the introduction of a corrective mechanism allowing the Commission to intervene prior to the conclusion of a contract, by means of notification to the Member States, and the contracting entity concerned, in cases of clear and manifest infringement of the regulations. This corrective mechanism was already included in the general directive on review procedures of 21 December 1989 (Article 3).

- The conciliation procedure (Article 13)

The Commission's concern is to implement regulations which are as flexible and effective as possible. One means of achieving this objective is to avoid litigious procedures as far as possible. To this end, Article 13 lays down a conciliation procedure at Community level. Any person concerned may send notification to the Commission or the national authorities. The matter is referred to the Advisory Committee for Public Contracts. It will then convene a working group which shall endeavour to reach an agreement between the parties concerned.

This conciliation procedure in no way excludes recourse to Articles 169 and 170 of the Treaty, the corrective mechanism, or national remedies.

3. Review of the directive

In view of the innovatory nature of certain provisions in the directive, it has been agreed that the manner in which they have been implemented shall be reviewed after a sufficient period of time, i.e. by 1 January 1996 (Article 16).

II. Assessment of the proposal

1. The need for the two systems proposed to be equally effective

While the principle on which the Commission proposal is based, namely the impossibility, for legal and political reasons, of introducing a single review system for all the Member States, is acceptable in itself, the solutions proposed have major shortcomings.

Any compromise proposal in the delicate area of remedies against unlawful contract procedures must be based on the assumption that equivalent results will be guaranteed, albeit under the different systems proposed. In other words, a guarantee must be given to Community entities that they will all enjoy equal protection of their rights in all the Member States when they participate in procedures for awarding contracts.

There is a clear imbalance between the classical system which allows the suspension of contract award procedures and the setting aside of unlawful decisions (Chapter 1 of the proposal), and the attestation system proposed, which only provides for preventive controls on the mechanisms for awarding contracts applied by the contracting entities (Chapter 2 of the proposal).

Attestation is wholly inoperable while a contract award procedure is in progress, since it is a mechanism for the overall evaluation of an essentially preventive nature. The system also rules out recourse to a court or other equivalent body in fulfilment of the obligation to refer questions of interpretation to the Court of Justice (Article 177 of the EEC Treaty).

It is therefore unacceptable for ex-post payment of damages on the basis of an attestation procedure and the possibility of suspending an unlawful procedure before a contract is concluded should be considered equally efficient and of the same value.

2. The amendments proposed

The amendments proposed are a compromise solution, taking into account the obvious difficulties of codifying a unified system in the area in question and are, in our view, essential in order to ensure fulfilment of the chief objective of the proposed directive, namely non-discrimination and equal protection for entities belonging to different Member States.

(A) The provision for suspension of a contract award procedure and setting aside of unlawful decisions in cases of serious irregularity

It is essential, even in the States in which the attestation system is applied, to allow for the possibility of suspending a procedure or setting aside unlawful decisions in cases of serious infringement, which must be expressly notified, of the relevant Community legislation and the national implementing regulations.

- (B) The provision in Article 2(7) fixing the sum of money payable in compensation for damages at 1% of the value of the contract must be deleted

The amount of damages payable must be determined by the competent authority in each individual case, as the cost of preparing a tender cannot be linked to the value of the contract. Moreover, in addition to the costs incurred by the plaintiff, the lost profits should also be included, where they are an immediate and direct consequence.

- (C) Member States opting for the attestation system must inform the Commission of their decision

In view of the specific features of the sectors in question, which have prompted the Commission to design a system in which the traditional remedies are available as an alternative to the attestation procedure, it would seem advisable for the Member States which opt for the attestation system, in preference to the so-called traditional system to inform the Commission of their decision and, at the same time, specify their reasons, whether legal or political.

- (D) Provision must be made for penalties to be applied to contracting entities which receive unfavourable attestation reports

If the attestation system is to be made more efficient, provision must be made for a system of penalties to be applied to contracting entities which adopt unlawful practices.

- (E) The independence and competence of the attesting bodies must be guaranteed and provision must be made for penalties where their actions conflict with the ethical principles governing their activities

- (1) Guarantees of independence

For obvious reasons, the attestors must be entirely independent of the contracting entities, which, contrary to the provisions of the proposal for a directive (Articles 5 and 6) must neither appoint them nor remunerate them. The Member States must also define the criteria for the remuneration of the attestors.

- (2) Guarantees of competence

In addition to laying down general rules governing competence (Article 6), the directive must provide for control of the attestation procedures by the Commission, acting in its official capacity, or at the request of a third party.

- (3) Penalties

Provision must also be made by the Member States for penalties to be imposed on attestors who infringe the rules on which the procedure is based.

EUROPEAN PARLIAMENT

OPINION

of the Committee on Transport and Tourism

Letter from the chairman of the committee to Mr BEUMER, chairman of the Committee on Economic and Monetary Affairs and Industrial Policy

28 November 1990

Subject: Commission proposal for a Council directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (COM(90) 297 final)

Dear Mr Beumer,

At its meeting of 27 November 1990 the Committee on Transport and Tourism considered the above proposal.

It noted that this directive simply concerns the implementation of legal and administrative procedures by the Member States to ensure conformity with the directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors adopted by the 'Internal Market' Council on 17 September 1990.

This new proposal therefore has no direct impact on transport contracts, since matters relating to these contracts, in particular the thresholds after which procurement procedures are compulsory, are already covered by the directive of 17 September 1990.

As the matter in hand merely relates to the correct application of this directive, the Committee on Transport and Tourism approves the Commission proposal.¹

(sgd) Rui Amaral

¹ The following took part in the vote: Amaral, chairman; Topmann, vice-chairman, Coimbra Martins (for Stamoulis), Lüttge, McIntosh, McMillan-Scott, Müller, Romera i Alcazar, Schodruch, Sapena Granell, Visser and van der Waal.