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GREEN PAPER

PUBLIC PROCUREMENT IN THE EUROPEAN UNION: EXPLORING THE WAY FORWARD

(presented by the Commission)

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1. INTRODUCTION

1.1 An effective public procurement policy is fundamental to the success of the single market as a whole. Every year, the European Union's public authorities spend about 720 billion ECU buying goods and services: this represents 11% of EU Gross Domestic Product. With the completion of the Community's legal framework for public procurement, it is essential to launch thinking and discussions on how best to achieve its full potential: discussions in which the Member States, the European Parliament, and, crucially, the contracting authorities and suppliers themselves are invited to take part.

1.2 The European Union has already made considerable progress in its public procurement policy. The legislative framework for open and competitive public procurement is in place and is now being implemented by Member States. The parties involved in public procurement are gradually adapting to the new situation. This policy framework will continue to be an incentive for major change in traditional purchasing practices in the Member States, thus contributing to an environment favourable to economic development in Europe as a whole. Public procurement is already more open to competition than ever before. Wider access to public procurement in other countries, including those outside the Union, is already generating significant new market opportunities.

1.3 If our public procurement policy represents new opportunities, it also presents a formidable challenge. New rules necessarily involve major efforts to adapt traditional ways of working. For a contracting entity this means having to deal with new companies, often from another Member State right from the outset. For a supplier, it means: increased exposure to competition; the need to test new markets and the crucial requirement to remain internationally competitive. For the Governments of the Member States too, the challenge is real. As the major purchasers, they must follow the rules; they are also responsible for the transparency of the system; and they have to implement the Directives into their national legislation in accordance with their political commitments.

1.4 Now is the time to look at what we have achieved and what is still to be done. The process of transformation is already under way. It is the adoption of the Community Directives and their implementation, even if only partial, and the action of the Commission to protect the rights to which they give rise, which have put into place the essential elements of efficient purchasing. However, it is a difficult and sometimes painful process, particularly where relationships based on habit, special links and national preferences once reigned. Long-standing purchasing traditions that bred inefficiency are being progressively abandoned. Some contracting entities have already been able to demonstrate that, by applying the Community rules, they are getting the best value for money. Procurement markets of other Member States are beginning to open up; competition is intensifying and our industry is becoming better and better prepared to face challenges at international level. Yet more remains to be done if our public procurement policy is to achieve its full potential.

1.5 Of course, the primary responsibility for the success of this process lies with the contracting entities and suppliers, whatever their size. But the Commission and the Member States themselves have a major role to play. They must work together to create

the conditions in which competitive procurement can take place and our enterprises can flourish. The potential in economic growth and, ultimately, employment will go largely unexploited if barriers to cross-border transactions in goods and services are not removed. The smooth functioning of the internal market in procurement is, therefore, of relevance in the context of the evolving debate on a European Confidence Pact for Employment.

1.6 This Green Paper is intended to provide a framework for a wide-ranging debate. The chapters that follow set out the background against which the Commission is developing its initial thinking on a number of issues central to the Community's present and future public procurement policy. These issues include the effective implementation into national law and application of legislation; how market access can be facilitated by information and training and by the development of electronic procurement; how the correct application of public procurement law can be pursued while implementing other Community policies, in particular with regard to policy on small and medium-sized enterprises (SMEs), Trans-European Networks (TENs), standardisation, the Cohesion Fund and the Structural Funds and contracts awarded by the European institutions or using Community resources, on social policy, consumer policy and environment policy; and, finally, on access to other countries' procurement markets. To assist the reader, a brief summary is provided at the beginning of each chapter and a short list of key issues for debate at the end.

1.7 The Commission invites all interested parties (Council, the European Parliament, Economic and Social Committee, Committee of the Regions, trade associations, contracting entities, suppliers and consumers) to present their views. Responses to all or part of the Green Paper should be made in writing no later than 31st. March 1997.

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At the end of this written consultation phase, the Commission will decide whether or not to hold a hearing in Brussels with interested parties.

1.8 The Commission will draw up a special communication on public procurement on the basis of the contributions to the Green paper and the analysis and reflection stimulated by the communication on the impact and effectiveness of the Internal market¹. That communication, which will include a plan of action, should set out what needs to be done to bolster the effectiveness of the legal framework and more fully achieve the objectives of the Community's public procurement policy.

¹ Document COM(96) 520.

2. THE BACKGROUND TO THE DEBATE

The objective of the Union's public procurement policy is to achieve fair and open competition for public contracts, thereby allowing suppliers to gain the full benefits of the single market and contracting authorities to choose from a more competitive and wider range of bids. The basic Community legal framework needed to meet these objectives has now been established: it strikes a fair balance between legal certainty and operational flexibility. The results already achieved on the transparency front are highly encouraging. As far as the economic impact of the rules is concerned, however, the data available are less favourable and show that problems still remain in terms of the practical effectiveness of the legislation, even if certain positive signs are beginning to emerge.

I. **The objectives of the Union's public procurement policy**

2.1 The foundations of the Community's open procurement rules are to be found in the EC Treaty, particularly in those provisions which guarantee the free movement of goods, services and capital, establish fundamental principles (equality of treatment, transparency and mutual recognition) and prohibit discrimination on grounds of nationality. To render these basic Treaty provisions more effective, detailed secondary legislation (in the form of directives) was required. These cover the award of public works, supplies and service contracts (the traditional sectors) by public authorities and by entities operating in the water, energy, transport and telecommunications sectors (utilities) and also provide means of redress for suppliers (for details, see Annex 1).

2.2 Before the present Community legal framework was in place, procurement tended to be focused on the market of each Member State. There was at times a high degree of protection for domestic suppliers and a large proportion of public sector contracts were usually awarded to domestic suppliers with little regard to value-for-money criteria. Under these conditions, there was little incentive for a domestic supplier to the public sector to improve its competitiveness. As a result, past purchasing policies all too frequently failed to take sufficient account of commercial considerations, with the result that the taxpayer and consumer were, probably unknowingly, left to bear the consequences in inefficiency and extra costs.

2.3 The primary objectives of the Union's public procurement policy, set within this context, have remained unchanged: to create the necessary competitive conditions in which public contracts are awarded without discrimination and value for taxpayers' money is achieved through the choice of the best bid submitted; to give suppliers access to a single market with major sales opportunities; and to ensure that the competitiveness of the European supplier base is strengthened. Developing an effective European public procurement policy is essential if the single market is to deliver long-term sustainable growth and job creation; a European supplier base that can exploit the opportunities of the largest integrated domestic market in the world and continue to compete successfully in global markets; and better public services at lower costs to the taxpayer and the utility customer. Public authorities and public utilities in the EU spend some ECU 720 billion per year on goods and services, which in 1994 was 11,5% GNP of the 15 Member States or, in other words, the totality of the Belgian, Danish and Spanish economies, i.e. nearly ECU 2 000 per EU citizen. The extent of European public procurement means that buying

goods and services by effective purchasing systems can make significant savings for governments and thus for taxpayers. Such considerations are all the more relevant in view of the strong pressure to cut budget deficits in line with the Maastricht convergence criteria.

2.4 There are, of course, many other, perhaps less obvious, benefits of a more open procurement policy. Fair, non-discriminatory and transparent procurement procedures render perpetration of fraud and corruption in public administration more difficult. Whilst transparent procedures are not sufficient in themselves to eradicate fraud and corruption, an effective and dissuasive system of monitoring, procedural checks and proportional penalties helps to protect against breaches of public trust. In addition, it should be noted that, where Community funds are involved, instruments establishing standards of protection are already in existence² to deal with the problem of fraud and corruption. These could provide a useful source of reflection for an in-depth discussion.

II. The impact so far

2.5 The Cecchini report on the cost of non-Europe³ estimated that savings of around ECU 22 billion could result from greater transparency and an increased openness of public contracts. There is as yet no hard evidence that savings on this scale have been made. The same is true about price convergence or greater intra-community trade flows in public contracts for sensitive sectors. In co-operation with EUROSTAT, methods of investigation have been drawn up to assess in a comparable and harmonised way the importance and structures of public contracts in the various Member States. Two Member States (Portugal⁴ and Greece⁵) have already volunteered to test these methods which quantify the significance of public contracts in these two countries by collecting different types of information (amount and number of contracts awarded by public entities, type of award procedure, products bought, features of firms who have won contracts, etc.,...). A similar exercise is planned for Germany before the end of the year.

2.6 The Commission presented a communication on the impact and efficiency of the legislation on the Internal Market ("1996 Review")⁶. One theme is the liberalisation of public procurement contracts. It discusses whether certain of the expected benefits have been obtained in this sector by analysing in particular the effects of legislation on demand and supply, import penetration, price evolution and estimates of economies realised. The results show that public procurement markets in Europe are developing significantly even if public procurement policy has not yielded all the benefits, particularly because Member States have failed to incorporate the Directives into national law.

² See, for Community administrative penalties, Regulation concerning the protection of financial interests n° 2988/95, OJ n° L312, 8.12.1995, p. 1; regarding criminal penalties see the Convention on the protection of the European Communities financial interests (against fraud), 2607.95, OJ N° C316, 27.11.1995, p. 48 and the first additional protocol (regarding corruption), 27.9.1996, OJ n° C313, 23.10.1996, p. 1.

³ "The cost of non-Europe in Public Sector Procurement" WS Atkins Management Consultants, 1987.

⁴ Instituto Nacional de Estatística, Portugal, March 1995.

⁵ National Statistical Service of Greece, February 1995.

⁶ See footnote 1. above.

2.7 The most visible effect of the Directives has thus undoubtedly been a major increase in the transparency of contract award procedures. The number of tenders advertised in the Supplement to the Official Journal (and in its electronic version, Tenders Electronic Daily) has steadily increased. The total number of procurement notices rose from 12.000 in 1987 to nearly 95.000 in 1995. Projections for the next two years suggest further increases to nearly 200.000. These figures are themselves a useful indicator of the effects of the public procurement Directives on the transparency of public contracts award procedures. Moreover, an enquiry of 1.600 suppliers has shown increased response rates to new business opportunities (90% for local markets and 70% for markets beyond the frontier). Nevertheless, it must be added that of the some 110.000 entities and contracting authorities to which the Directives apply, about 85%, especially local authorities, do not comply with their advertising and transparency requirements.

2.8 Firms supplying equipment to the public transport, telecommunications, electrical and health service sectors - all with important public sector clients - have undergone considerable structural change due to different factors, among which the rules on public contract award procedures can be assumed to have played a part. Joint ventures and mergers have taken place, allowing research and development efforts to be pooled. The overall result is, without doubt, a more efficient European industry, better placed to take advantage of the economies of scale offered by the single market and better prepared to compete at the global level.

2.9 Despite these few encouraging signs, there is still a major problem of non-compliance. Some Member States have not incorporated the Directives into national law. Only three Member States have fully incorporated all texts. Need one emphasise that the Commission has initiated 39 infringement procedures against the Member States concerned for failure to incorporate the Directives into national law ? This is a problem connected with ensuring greater compliance with the legislation which is discussed in the next chapter.

2.10 Moreover, it seems that in a number of sectors, contracting entities are not seeing the benefits which justify the efforts necessary to fulfil the obligations imposed by the Directives and are also detecting reluctance on the part of would-be suppliers (particularly those from other Member States) to bid for their contracts. This may be an indication of the existence of a time-lag for economic operators to adapt behaviour to take account of new rules and respond to new market opportunities. No doubt, certain economic operators have responded to observed or perceived competitive threats in a defensive manner rather than by expansionist strategies to build up presence and market share in other Member States.

2.11 Finally, the share of imports for public contracts in Europe remains modest : for direct cross-frontier business, they have risen from 1.4% in 1987 to 3% in 1995; and for purchases made through importers or local subsidiaries, they have increased from 4% in 1987 to 7% in 1995.

III. Questions

1. Do you have any other economic statistics which would be useful for assessing the impact of the Directives and their effects on employment?
2. Why are economic operators reluctant to tender for contracts in other Member States ?

3. APPLICATION OF PUBLIC PROCUREMENT LAW **CURRENT STATE OF PLAY AND TRENDS**

A legislative framework has been set in place for public procurement. The Commission recognises the need for a period of stability and does not therefore intend to make any fundamental changes to the framework. Neither does it renounce its right of initiative, of course and it is prepared to take or to propose the most appropriate measures wherever this should prove necessary.

The Commission stresses that efforts have to be stepped up with regard to both implementation and application of the legal framework, in order to achieve a level-playing - field for operators seeking public contracts throughout the Union.

In carrying out its task of monitoring the application of Community law, the Commission has found a number of problems to do with both implementation of the Directives into national law and actual application of the rules by contracting authorities and contracting entities. These are initial observations that the Commission will incorporate into the detailed examination of the application of the existing rules which it is required to carry out in accordance with the Directives.

For enforcement of the law on public procurement to be successful, speedy and effective means of redress must function satisfactorily at both Community and national level. The ways in which remedies operate do not always fulfil these conditions. With the Remedies Directives in place, most of the problems should now be tackled at national level. Encouraging the practice of attestation and making the conciliation procedure more accessible are also fundamental issues to be tackled.

I. Introduction

3.1 A Union-wide legislative framework for public procurement is now in place (see Annex 1). At this stage, the Commission recognises the need for a period of stability, as the framework has not yet produced its full effects. This stability should give all interested parties time to adapt to the new procurement rules and practices. Therefore, without prejudice to its right to initiate legislation, the Commission does not envisage any fundamental modification of the existing regime and confirms its determination to pursue its action in this area in accordance with the principles already established as far as the method chosen and the substance of the rules are concerned. Clearly, should new developments raise problems in specific areas or reveal shortcomings in the legislation, the Commission would not hesitate to take the most appropriate measures to ensure that European purchasers continue to benefit from an open and competitive supply and that suppliers continue to have genuine access to public procurement contracts while strengthening their competitiveness. Liberalisation is now taking place in the telecommunications and other utilities sectors. With regard to the application of the public procurement Directives, the Commission will check whether this liberalisation leads to the establishment of conditions of effective competition in the sector. If this should be the case, it will consider how best to respond to the situation. It should also be noted that most of the Directives require the Commission to review the application of the rules. It will have

to carry out a detailed examination of their application in the near future. The debate prompted by this Green Paper should provide useful input for that exercise.

3.2 Community Directives must be implemented into national law. Their application - whether by national, regional or local administrations or by contracting entities in the utilities sectors - must not jeopardise the overall objective of establishing a level-playing-field in public procurement throughout the Union. The perception that not everybody is playing according to the same set of rules can be a major disincentive to opening up public procurement.

II. Directives must be implemented into national law

3.3 The Directives are an essential instrument for our public procurement system. They make it possible to boost economic efficiency and enable the internal market to function properly. The state of Member States' implementation of internal market legislation is regularly published by the Commission and discussed with Member States, including at ministerial level. The Commission has frequently expressed its continuing concern that the current level of implementation of public procurement Directives is inadequate (Table 1). Public procurement is one of the internal market areas where there are the most problems both in terms of communication of the implementing measures and in terms of the quality of implementation. The Services Directive, the consolidated Supplies Directive and the consolidated Utilities Directive are particular problem areas.

3.4 Even though most of the provisions of the Directives have "direct effect" in legal terms, failure to implement and/or faulty implementation prevent European citizens and businesses from taking full advantage of the internal market in public procurement. Thus, for example, major disparities can be observed between, on the one hand, the share of Community Gross National Product accounted for by some of the Member States which have not correctly implemented the Directives and, on the other, the number of notices published in these countries as a proportion of the total number of notices published in the Community. In other words, the number of notices published in these Member States appears low in comparison with their economic importance. The Commission therefore again calls on Member States to ensure that public procurement legislation is, first of all, implemented into national law. The lack of any implementing measures can provide contracting authorities and contracting entities with a ready-made excuse for not applying the rules.

3.5 As a next step, it is essential that Member States draft their national implementing provisions with the utmost care if the quality of implementation is to be sufficiently high to ensure that the objectives of the Community legislation are fully achieved. Faulty implementation can, in certain cases, weaken the rights which the Directives create for the benefit of operators and place the bodies which have to apply the rules in a situation where Community and national legislation are in conflict and consequently cause them to apply the Community rules in force incorrectly. Such a situation is just as serious as non-implementation, because it has the same effect in practice. Therefore, whatever the method used for incorporating the provisions of the Directives into national law, Member States must be sure to eliminate any contradiction between pre-existing national rules and the principles and provisions of Community law, so that operators will interpret and apply

them properly. The Commission also calls on Member States to ensure that, wherever possible, the national legislative frameworks into which the Directives are incorporated are made clearer, for example by limiting references to other instruments and endeavouring to group together all the relevant provisions in a single text. This would facilitate application of the rules by purchasing entities and access to contracts for interested firms.

3.6 The Commission is aware of the fact that Community instruments are complex. Their complexity can perhaps explain some of the difficulties in implementation and, above all, in their application. But, this is a direct consequence of the fact that the questions to be solved in order to achieve the objectives pursued, are themselves complex. In implementing the Directives, the Commission is willing to afford the Member States, on request, all the necessary assistance to facilitate the understanding and simplification of the existing texts.

3.7 In any event, according to the information at the Commission's disposal, in some cases, the adoption of implementing measures, for which drafts were prepared in good time, has been delayed for no apparent reason. In other cases, Member States have refused to implement certain provisions of Community law. The Commission doubts whether such situations are justified and would, at the very least, be interested to ascertain any other reasons which might account for the difficulties encountered.

3.8 The Court of Justice of the European Communities has given judgement in several cases concerning the protection of individuals' rights under Community law when Member States are in breach of their obligations, particularly where the implementation of directives into national law is concerned. In *Francovich*⁷, the Court established the principle of the liability of the State for damage caused to individuals by the non-implementation of a directive, the provisions of which grant rights to the individual, even though such rights may not have direct effect. In *Brasserie du Pêcheur-Factortame*⁸, the Court went even further, recognising that under certain conditions, State liability may be incurred in respect of damage caused by any breach of Community law, regardless of the State body whose action or omission is responsible for the breach. It is thus probable that individuals will avail themselves of this case law before national judges in order to obtain compensation for damage suffered, including loss of profit, and thereby enjoy effective protection of their rights.

⁷ Judgement of 19.11.1991 in Joined Cases C-6/90 and C-9/90 [1991] ECR I-5403.

⁸ Judgement of 5.03.1996 in Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029. See also the Judgement of 26.03.1996 in Case C-392/93 *British Telecom* [1996] ECR I - 1631

III. The law on public procurement must be correctly applied

3.9 While it is essential that the proper legislative framework should be in place through faithful implementation of the Directives into national law, it is equally important that the rules should be correctly applied by contracting authorities and contracting entities.

3.10 In carrying out the task conferred on it by Article 155 of the EC Treaty of ensuring that Community law is complied with, the Commission has identified a number of cases where application of the rules by purchasing entities has caused problems. Without claiming to be exhaustive, the following points group together some exemplary cases of incorrect application of Community law.

A Issues linked to incorrect application of the Directives

(a) Basic definitions in the Directives

3.11 The first type of problem encountered has to do with the correct interpretation of the scope of the different concepts used in the Directives. For example, in *Beentjes*⁹ the Court of Justice defined more precisely what is meant by the term "contracting authority" used in the Directives, stressing the need to interpret the concept in functional terms. Experience has also shown how difficult it is to circumscribe the notion of "contracting entity" as used in the Utilities Directive, since it refers both to the subjective character of entities and to the activity carried on in one of the utilities sectors. The Directive specifies a large number of special cases where purchasing bodies, although covered by the notion of contracting entity are not subject to the rules of this Directive.

3.12 It has also proven difficult in several cases to establish precisely what constitutes a "public procurement contract". The Directives define public procurement contracts in fairly broad terms in order to bring within the scope of the Community rules all kinds of contracts for consideration concluded in writing between a contracting authority and a contracting firm. Despite this broad definition, certain contracting authorities have endeavoured to evade application of the Directives.

3.13 Similar points can also be made with regard to other concepts used in the Directives, and in particular that of a "work", for which some guidance is given in the text itself, but which can be given different interpretations in certain cases. For other concepts, such as that of "supplies" or "services", the Commission notes that some purchasers try to take advantage of the flexibility of the definitions in order to evade application of the Directives by artificially splitting up different contracts that do in fact form a whole.

3.14 The fairly general nature of these concepts is a necessary consequence of the fact that they have to be applied in a wide variety of national situations and legal systems; the Community legislator had to strive to take account of this variety. Care must therefore be taken to ensure that the concepts concerned are interpreted in a way which is consistent with the intentions of the legislator and enables his objectives to be achieved.

⁹ Judgement of 20.09.1988 in Case 31/87 [1988] ECR 4635.

(b) Excessive use of negotiated procedures

3.15 A second type of problem has to do with the choice of contract award procedures, and more specifically the use of negotiated procedures. Under the "traditional" Supplies, Works and Services Directives, the negotiated procedure - particularly where there is no prior publication of a notice - is an exceptional means of awarding contracts that may be used only in exhaustive list of cases. The Court of Justice has stated (in *Commission v Italy*¹⁰) that the provisions governing the negotiated procedure must be interpreted strictly and that the burden of proving the actual existence of exceptional circumstances justifying the derogation lies on the person seeking to rely on those circumstances. But a number of infringement proceedings brought by the Commission and judgements handed down by the Court bear witness to the fact that contracting authorities use the procedure much more than they should under the existing strict rules, in particular by claiming extreme urgency where there is none or where the urgency has arisen owing to factors for which they are responsible, or by wrongly claiming that there is only one supplier or contractor capable of performing the contract.

3.16 In cases where it is allowed, the negotiated procedure appears to enable an economically more efficient outcome to be arrived at than a traditional call for competition, thus proving to be a rational method of reducing public purchasers' costs while achieving the objectives pursued. The fact remains, however, that the procedure is less favourable to the goal of market transparency.

(c) Unsatisfactory quality of notifications

3.17 A third type of problem concerns the advertising of contracts. Some of the particulars specified in the model notices annexed to the Directives are missing from a large number of contract notices published in the Official Journal. Cross-checks on published notices have also revealed that the obligation to publish prior information notices and contract award notices is still widely ignored.

3.18 However, transparency, which is a necessary precondition for opening up public procurement, requires contract notices to be complete. Failure to advertise contracts rules out effective competition and the resulting benefits. Each type of notice laid down by the Directives follows a specific line of reasoning. The prior information notices (or periodic information notices in the Utilities Directive) are intended to enable firms, and particularly SMEs, to ascertain purchasers' procurement requirements sufficiently early and to organise themselves accordingly so that they can submit better tenders. The purpose of tender notices proper is to give economic operators all the information they need in order to decide whether and how to bid for a particular contract. Contract award notices enable firms which have taken part in the tendering procedure to check that their rights have not been infringed and provide useful information for analysing market trends in different sectors.

¹⁰ Judgement of 10.03.1987 in Case 199/85 [1987] ECR 1039.

(d) Excessive use of accelerated procedures and imposition of deadlines that are too short

3.19 A fourth type of difficulty relates to the shortening of deadlines through the use of accelerated procedures. Scrutiny of notices published in the "S" Supplement to the Official Journal in pursuance of Directive 92/50/EEC has revealed that a large proportion of the contracts concerned are awarded by accelerated procedure and that, in consequence, the periods allowed for submitting requests to participate and tenders are shortened substantially. Since these periods are thus reduced to minima of 15 days and 10 days respectively, it becomes extremely difficult for firms from other Member States to bid for such contracts. Unlike the Utilities Directive, the "traditional" Directives allow the accelerated form of restricted and negotiated procedures to be used only in cases where urgency renders the normal deadlines impracticable. This means that accelerated procedures should be exceptional. In the light of the above findings, it would appear that they are not regarded as such by contracting authorities.

3.20 A similar but more serious problem arises in the fairly frequent case where purchasing entities set deadlines for participation in contract award procedures that are shorter than the minimum periods laid down by the Directives. Clearly, such behaviour, which is in breach of the applicable rules, considerably restricts or even completely prevents genuine competition between all interested suppliers.

(e) Selection and award criteria

3.21 A fifth type of problem has to do with the criteria applied by contracting authorities in contract award procedures when checking the suitability of candidates (selection criteria) and awarding contracts (award criteria).

3.22 In a number of cases the Commission has challenged, and the Court of Justice has found incompatible with Community law (*Transporoute*¹¹), the practice adopted by some contracting authorities of laying down criteria for the technical capacity of candidates other than those listed exhaustively in the Directives. It has also been found that the suitability of candidates has in some award procedures been tested on the basis of clauses that cannot be regarded as selection criteria.

3.23 Furthermore, although the Court has made it perfectly clear that selection and contract award are quite separate phases and therefore that the rules and criteria used in the two phases should not be confused (*Beentjes*¹²), experience shows that many contracting authorities continue to take account, when awarding the contract, of factors that are covered by the selection criteria. This can lead, in certain cases, to the contract not being awarded on the basis of the best tender for that particular contract but to the candidate with the most experience or financial strength. Similar problems arise where purchasers, sometimes relying on national rules which are not compatible with Community law, use award criteria based on factors which are not provided for in the Directives and are therefore unacceptable. Cases where the award criteria are based fairly loosely on regional, social or environmental considerations provide ample illustration of this problem.¹³

¹¹ Judgement of 10.02.1982 in Case 76/81 [1982] ECR 471.

¹² See footnote 9.

¹³ The issues are further discussed in Chapter 5.

B Issues linked to situations which do not fall within the scope of the Directives

3.24 Community law on public procurement is based on a set of rules and principles, in particular the principles of non-discrimination, equality of treatment, transparency and mutual recognition. As the Court has emphasised (*Commission v Italy*¹⁴), the Directives are designed only to ensure the effective attainment of these principles, but it is clear that, given their nature, the principles must apply in all situations where public procurement and similar contracts are involved, and in particular contracts which are not covered by the Directives. Some situations which are particularly significant are mentioned below by way of example.

(a) Concessions or similar contracts

3.25 For the completion and/or management of large infrastructures as well as for the supply of certain services, contracting authorities have recourse more and more frequently to legal mechanisms such as concessions or similar contracts or other awards of special or exclusive rights. This is, in many cases, the result of budgetary constraints to which the contracting authorities are subject and it also meets their concerns to ensure better management of the services. Many projects relating to trans-European networks are an illustration of this.¹⁵ At all events, many complaints received by the Commission concern concessions, similar contracts or other awards of special or exclusive rights.

3.26 Contracting authorities appear to consider that Community law is not applicable to the award of these contracts or rights and, in many cases, they do not implement the measures necessary to ensure transparency and open competition. On the contrary, in this type of situation, contracting authorities must respect the provisions of the EC Treaty, in particular the rules governing free movement of goods and services as well as fundamental principles such as non-discrimination, equality of treatment, transparency and mutual recognition. Moreover, by virtue of the Works Directive, Member States are also bound by the rules relating to publicity when awarding works concessions. The Commission considers that this lack of respect for these fundamental principles of the Treaty is far from satisfactory as it obstructs the proper functioning of the internal market. It does not allow contracts (or rights) in which important economic interests are at stake to be opened up to competition.

3.27 At a later stage and with a view to reinforcing the opening up the award of these contracts to even more competition, consideration could be given to the adoption of rules governing procedures for the competitive award of exclusive rights to provide public services through a system of concessions. The aim of introducing such rules would be to afford new public or private operators easier access to contracts for public services and to instil in existing operators an enterprise culture which is closer to the concerns of users, while still allowing exclusive rights to be granted where these are necessary for maintaining a service in the general economic interest. Such an approach would enable Member States to choose for their citizens operators of public services who are the most efficient in terms of both cost-effectiveness and quality of service. In the case of inland transport services, the Commission has already presented this approach in its Green Paper entitled "Citizens' network."¹⁶

¹⁴ See footnote 10.

¹⁵ See also Chapter 5, point III.

¹⁶ COM(95) 601 fin - 29.11.95

(b) Public procurement contracts below the thresholds laid down in the Directives

3.28 The procedures provided for by the Community Directives apply exclusively to public procurement contracts whose estimated value exceeds the specified thresholds. Some contracting authorities consider that, for procurement contracts below these thresholds, no Community provision applies, with the consequence that these procurement contracts are sometimes awarded without being put out to tender. Such contracts are often of considerable importance, particularly for small and medium-sized enterprises. As in the case of the granting of concessions and similar rights, these contracts must be awarded in accordance with the provisions of the EC Treaty concerning the free movement of goods and services as well as its underlying fundamental principles of non-discrimination, equality of treatment and transparency.

(c) Changes to rules in the course of individual procedures

3.29 In several cases brought to the Commission's attention, contracting authorities or contracting entities have, when awarding public contracts whose value exceeds the thresholds laid down in the Directives, engaged in behaviour or taken decisions incompatible with Community law, even if the rule or prohibition to be complied with is not expressly laid down in the Directives. This is the case, for example, where substantial amendments are made to the tender specifications in the course of the procedure. One contracting authority thus changed the site of the work to be performed while continuing with the award procedure. In another case, the authority cancelled a large proportion of the works initially planned. Another case revealed changes to the financing terms. The Commission maintained that these changes were substantial and should entail the cancellation of the procedure under way and launching of a new procedure through publication of a new contract notice. Certain cases have revealed a different problem, namely negotiation with one or more candidates in open or restricted procedures. The Commission held that such negotiation was not allowed as it was contrary to the principle of equal treatment and its interpretations have been confirmed by the Court of Justice.¹⁷ The same considerations as those developed above in connection with concessions and contracts below the thresholds apply here since, even if these situations are not regulated by the Directives, they are nevertheless subject to the general principles of Community law.

C Preliminary conclusions

3.30 The examples cited above demonstrate that the application of the Community legal framework in the Member States still lacks consistency. It therefore appears that there is a clear need for further explanation and elucidation of the applicable rules. To this end, the Commission considers it timely to intervene to clarify some of the points mentioned earlier either by means of interpretative communications and/or through guidelines or even through other appropriate means or new rules.

¹⁷ See judgements of 22.06.1993 in Case C-243/89 *Commission v Denmark* [1993] ECR I-3385 and 25.04.1996 in Case C-87/94 *Commission v Belgium* (not yet published).

3.31 This situation is clearly unsatisfactory, since the efforts to ensure that the Directives are completely and correctly implemented into national law would come to nothing if they were not properly applied in practice. The Commission is determined to tackle these problems actively. The remainder of this Green Paper (and particularly this and the following chapters) sets out a number of options envisaged for achieving more effective application of the public procurement rules. It is important for the Commission to ascertain whether the sectors concerned think that these options are likely to provide satisfactory solutions to the problems mentioned or whether other solutions can be envisaged.

IV. Monitoring application of the law on public procurement

3.32 If we are to remedy the problems that have arisen in connection with the implementation and application of Community law and therefore achieve the objectives we are pursuing, all the authorities concerned must play their part and take the most appropriate initiatives, starting with systems for monitoring the behaviour of contracting authorities and entities, to act swiftly in order to restore compliance with the law. Such systems and powers already exist at Community and national level, but they need to be strengthened.

3.33 Member States and the European Commission must shoulder their responsibilities. Member States must ensure that obligations deriving from Community legislation are fulfilled, inter alia, through appropriate systems of control and sanctions (penalties), which are both effective in practice and have a deterrent value (Article 5 of the EC Treaty). The Commission, for its part, is required by Article 155 of the EC Treaty to ensure that Member States respect and fulfil these obligations, taking into account not only the letter of the law, but also the objectives the legislation is intended to achieve. Enforcement measures must improve compliance and build confidence among suppliers in the satisfactory operation of the system.

A The Remedies Directives

3.34 It is clear that the reactions of suppliers provide the best and most immediate way of ensuring that contracting entities practise open and competitive tendering. They are best placed to see whether the procurement rules are being followed and they can, where necessary, quickly draw purchasing entities' attention to breaches they have committed. Sometimes, breaches are immediately corrected when the contracting entity is made aware of them. When they are not corrected, however, formal remedies can be used, including action through the courts.

3.35 With the Remedies Directives in place, economic operators in every Member State have the possibility of lodging before a national court or tribunal (or body whose decisions are subject to judicial review) a complaint for violation by purchasing entities of the rules laid down in the Directives. The Remedies Directives require the bodies in question to be empowered to grant interim relief (by suspension of the contract procedure, for example), to deliver judgements on the compatibility of procurement procedures with the rules and, where appropriate, to set aside or ensure the setting-aside of decisions taken unlawfully, to require the offending terms to be removed from calls for tender and to award damages. The extent of the remedies available to suppliers should make them the most effective means of protecting the rights of firms bidding for contracts.

3.36 Suppliers need to be given full information about their rights under the Remedies Directives with regard to other Member States' procedures. The Commission will publish guides to make economic operators aware of what can be done when potential infringements in other Member States are identified, including the procedures that are available; how they can be used and the possible rights to compensation they may enjoy. Mention should also be made here of the possibilities offered by the recent case-law of the Court of Justice on the damage suffered by individuals as a result of breaches of Community law committed by Member States (see point 3.8 above).

B Appropriate sanctions

3.37 In the establishment of the legal framework on public procurement by national authorities, an essential element is the introduction of appropriate sanctions. In its communication to the Council and Parliament on the role of sanctions¹⁸, the Commission has already highlighted public procurement as a sector where the possibility of introducing a common system of penalties might be considered with a view to upholding the integrity of the law, and where discrepancies between the sanctions applied by different Member States in cases of infringements of Community law could hamper the effectiveness of this policy. The Council, for its part, in its resolution of 29th June 1995 on the issue of penalties in Community law¹⁹, has also recognised the importance of this issue. It has encouraged the Commission to ensure efficient implementation of Community legislation, including sanctions. If necessary, this could involve provisions relating to sanctions in future Commission proposals. Moreover, it has asked Member States to give positive support to Community action in this field.

3.38 The Commission is concerned that, in practice, the application of the Remedies Directives may vary considerably between Member States, and sometimes even within a Member State. It has also been made aware of the considerable differences which exist between Member States, particularly as regards the requirement for complainants to provide proof of an infringement in order to receive damages, as well as the amount of damages awarded. In some cases, courts and tribunals have awarded successful complainants only a purely symbolic amount; in others complainants have been awarded only the costs of putting together their bid (these costs can be substantial but in no way provide full compensation for losing a contract). The Commission invites Member States and other interested parties to comment on the effectiveness of existing remedies in Member States and on any discrepancies that may exist between the sanctions applied. In addition to the obligation to provide for full compensation for damages suffered, the Commission would also welcome reactions to the desirability of the award consisting of liquidated damages of a sufficiently dissuasive sum, exceeding the damage suffered.

¹⁸ COM(95) 162 final, 3.5.1995.

¹⁹ OJ No C 188, 22.7.1995, p. 1.

C Complaints

(a) At Community level

3.39 The Commission, as guardian of the Treaty, investigates complaints it receives from firms which consider that they have been harmed and seeks to resolve the problems raised. Many such cases have been settled as a result of the Commission's intervention and without referral to the Court of Justice. However, when the Commission finds itself in the situation where it must pursue a case, experience has demonstrated that the infringement procedure provided for under Article 169 of the EC Treaty is not capable of ensuring rapid and effective redress. Whilst the Commission is committed to speeding up its internal procedures, the different stages in the procedure leading to a Court judgement (involving, in the first instance, a letter of formal notice to the Member State authorities concerned and, in the second, a reasoned opinion) can last up to three years and, in some cases, even longer. This particularly arises when the requisite information cannot be obtained in time. In public procurement such lengthy procedures may often be ineffective.

3.40 As indicated in its opinion on the Intergovernmental Conference "Reinforcing political union and preparing for enlargement", the Commission considers that the means used to ensure the application of Community law should be made more effective, in particular as far as the internal market is concerned. The Commission has also taken the view that the role of the Court of Justice should be reinforced, especially in relation to compliance with its judgements.

3.41 Some commentators have pointed to a number of avenues that could be explored with a view to achieving these objectives. One possibility would be to confer on the Commission more effective investigative powers than it has at present, since they considerably limit the effectiveness and promptness of its action in the public procurement field. The system based on Regulation (EEC) No 17/62 in the competition field could provide a useful example of this approach. In the same way, some observers have considered extending the supervision procedures and measures provided by the Regulation (Euratom, EC) 2185/96²⁰ for the protection of the financial interests of the European Communities to public procurement in general. These provisions are, in fact, applied to the award of public contracts involving Community financing, for example, in the case of trans-European networks (TENs), the Structural and Cohesion Funds or contracts with third countries (see Chapter 5).

(b) At national level

3.42 The Commission has neither the resources, nor the information, to identify and resolve each and every breach of Community rules throughout the EU. From a practical point of view, the vast majority of individual problems encountered by economic operators should be tackled at national level. It goes without saying, however, that the Commission will not hesitate to intervene where appropriate to maintain the integrity of Community public procurement law. The Commission also confirms its determination to play its full role in enforcement, in particular in the pursuit of cases where there are important economic interests and/or legal issues at stake.

²⁰ OJ of 15.11.1996

3.43 The emphasis the Commission wishes to place on the full and effective application of public procurement rules at national level has already been recognised by some Member States. Sweden, for example, has entrusted the supervision of its contracting entities to an independent authority. Experience suggests that not only does this authority handle particular complaints, its very existence may even prevent behaviour giving rise to complaints, thereby reducing the potential burden on national courts and tribunals as well as on the Community institutions. With a view to monitoring application of the rules more effectively at national level, it could be worthwhile for other Member States to set up a similar body.

3.44 In order to be effective (and recognised as such) an authority such as this would need to be genuinely independent and have the power to require contracting entities to correct procedural errors. However, the standard by which its potential contribution should be evaluated should not, in the first place, be the detection of errors but the achievement of better procurement. Such authorities could play a key role in improving procurement systems: they could provide useful advice to contracting entities, check procurement practices to promote efficiency and ensure that mandatory reporting requirements were in place to enable Member States to supply any necessary statistical data to the Commission. Moreover, it might be useful to exchange information regularly among similar bodies. In this way, a permanent administrative network could evolve between Member States. The creation of authorities of this kind cannot undermine the current distribution of powers between the Commission, as guardian of the Treaty, and the national courts, responsible inter alia under the Remedies Directives for protecting the rights of businesses. Any dispute that might arise between the Commission and these authorities would have to be settled by the Court of Justice, which ensures, in accordance with Article 164 of the EC Treaty, that Community law is interpreted uniformly and applied correctly.

3.45 The Commission invites Member States to consider the establishment or appointment of such an independent authority. The Commission believes that, in some cases, existing bodies could be used for that purpose. Indeed the tasks of such an authority could form part of the functions of a Member State's national court of auditors or of an equivalent authority with genuine and unquestionable independence. The Commission will pay particular attention to the reactions of all interested parties to the concept of national independent authorities for public procurement. It invites any Member State(s) to run a pilot project to test how feasible the application of the concept might be.

D Other means for settlement of disputes

(a) Attestation

3.46 Among the measures under consideration with a view to ensuring that the existing rules are applied more effectively, the Commission considers that greater advantage should be taken of the attestation and conciliation procedures, which have already been established under the Remedies for Utilities Directive but have so far not been used.

3.47 Those contracting entities which apply best procurement practice and set up sound procedures internally are most likely to reap maximum benefits from the Community procurement regime now in force. It is for this reason that the Remedies for Utilities Directive provides for the creation of an attestation procedure under which contracting entities can undergo independent attestation of procurement procedures to check that they are in compliance with the Directive and geared to a rational use of public money. Such attestation, rather like a financial audit, is undertaken by an objectively independent body qualified and authorised to carry out this function. There is no comparable provision in the Remedies Directive applicable to the "traditional" sectors.

3.48 In order to be awarded a certificate of good procurement practice, contracting entities must demonstrate they have procedures in place which, on the basis of past experience, appear to work and to be in conformity with the rules. While an examination of the past procurement record does not, in itself, offer an absolute guarantee as to future procurement, it does afford the contracting entity a degree of confidence that its procedures are sound. The publication of the attestation in the Official Journal could help to give would-be suppliers confidence that it is worth the trouble of tendering because the attested entity has a proven record of competitive and open public procurement. Utilities that accept and meet the prescribed standards could enjoy the advantages of greater choice of suppliers and more competitive bids and so obtain best value for money.

3.49 In conformity with the mandate given by the Commission to the European standardisation bodies CEN and CENELEC, a European standard for attestation was approved in June 1995²¹. Member States must now make appropriate arrangements to ensure that attestators are appointed and can begin work. The Commission is keen to see utilities seek attestation. Moreover, in view of the benefits of attestation procedures the Commission also believes that similar arrangements could usefully be extended to contracting entities outside the utilities sectors and it would welcome a debate on this issue. Similarly, the Commission intends, as a priority, to apply the attestation arrangements to contracting entities awarding contracts involving the Community Funds (see Chapter 5 below).

(b) Conciliation

3.50 Settling disputes amicably is always to be preferred. In this regard the Remedies for Utilities Directive makes provision for a "conciliation" procedure, whereby suppliers and contracting entities may agree to discuss and settle any disputes that arise between them about the correct application of Community law by using independent conciliators. However, in their three years of operation, these procedures have not so far been used. This may in part be due to a lack of information among suppliers and contracting entities on how the procedure works. The Commission would welcome a debate involving Member States, experienced conciliators, contracting entities and industry on how to improve the conciliation procedure and ensure that it is more accessible and operational.

²¹

Standard EN 45503 : 1996, published by CEN/CENELEC on 24.1.1996

V. Questions

1. Do you have views on the effectiveness of Member States' implementation of the Directives? What, in your opinion, are the reasons for the difficulties encountered by Member States in this area ?
2. Do you agree with the list of problems to do with application of Community legislation as presented? Should attention be given to other types of erroneous application of Directives? Do you think that there are other reasons for the problems than those mentioned in the text?
3. What, in your view, are the points on which interpretative communications or guidelines would be useful in order to explain and elucidate the applicable rules?
4. How effective are existing remedies in the Member States? Have you found discrepancies between the remedies and sanctions applied within and between Member States that are liable to affect the smooth operation of the internal market in this area? If so, should action be taken?
5. Would liquidated damages exceeding the actual loss suffered be useful?
6. Do you think that, in order to be able more effectively and more swiftly to carry out its task of monitoring compliance with Community law, the Commission should be given more effective investigative powers than it has at present, along the lines of those conferred on it by Regulation No 17/62 in the competition field?
7. Could the establishment of an independent supervisory authority in each Member State improve procurement systems and aid effective enforcement of the rules? Should the Commission establish systems of co-operation at Community level between such independent authorities, calculated to promote a uniform application of the rules for awarding public contracts and fairer access for all to public procurement?
8. Do you agree that attestation should be promoted as an effective means of achieving sound public procurement procedures ? Should attestation be extended to contracting entities outside the utilities sectors? If so, how could this best be achieved (for example, could it be on a voluntary basis)?
9. What is your opinion on the reasons why the conciliation procedure provided for in the Remedies for the Utilities Directive has not yet been used?

4. IMPROVING ACCESS TO PUBLIC PROCUREMENT MONITORING, INFORMATION, TRAINING, ELECTRONIC TENDERING

Now that the regulatory framework is in place, entities and suppliers must exploit the opportunities it offers and maximise benefits. Through monitoring, information has to be collected for evaluation of the economic impact of the regime and to allow suppliers to analyse the specific public procurement demand in the whole of the Union. Monitoring is also necessary in order to enable the Commission to check application of the rules consistently. Information and training can contribute decisively to optimally ensuring effective, value- for- money public procurement. Yet many contracting entities appear to lack detailed knowledge of their legal obligations; suppliers, particularly SMEs, frequently seem unaware of the market opportunities that exist. This is where the opportunities offered by training and information must be fully exploited. Training stimulates the adjustment of old ways of thinking and acting towards a culture that promotes transparency and openness in the choice of suppliers and procurement to the highest commercial standards. Information is the driving-force for efficient public procurement and by improving its quality, it will be made easier for both contracting entities and suppliers to exploit the opportunities offered. Looking into the future, electronic tendering will play a key role in further enhancing transparency and access to public procurement.

I. Monitoring public procurement

4.1 The supervision of correct application of the existing legal framework has to be complemented by permanent monitoring of public procurement practice. A full understanding of the economic realities underlying the award of public contracts is necessary. The relatively homogeneous EU regulatory regime covers increasingly heterogeneous contracts. Services procurement in particular needs to be monitored because it has only recently become subject to the Community rules. Such monitoring could involve, for example, obtaining regular information on the classification of contracts in accordance with Annexes IA and IB to Directive 92/50/EEC and on the behaviour of contracting authorities in this area. To allow monitoring of the economic impact of the Union's public procurement regime, analysis of competition and prices paid by the entities is needed, together with a sound understanding of the size and the structure of the demand side and the information needs of the supply side. On this basis it will be possible to consider to what extent the current regime is meeting the needs of contracting entities and economic operators.

4.2 The Commission intends to design a framework for the monitoring of the economic impact of public procurement and is currently studying ways of optimising the use of data collected from various sources (Tenders Electronic Daily - TED, EUROSTAT). The monitoring exercise should eventually permit the development of price indicators for a representative basket of goods purchased by entities subject to the Community rules. As previously stated, it is only by securing the best and most competitive supplier that contracting entities will be able to provide the best service to the public.

4.3 The Commission reaffirms its commitment to ensuring day-to-day compliance with the Community's Directives in accordance with the principles enshrined in the Treaty. The economic monitoring should also allow the market analysis of particular procurement sectors in all Member States. On this basis the Commission will be able systematically to identify problem areas and to carry out its role of supervision in a more coherent manner, rather than simply reacting to individual complaints. Databases (including Tenders Electronic Daily) are valuable instruments for the collection, analysis and dissemination of information and can perform a useful function in monitoring compliance with the law. A system of periodic controls to identify consistent cases of non-publication of tenders has also been set up. However, the sheer volume of public procurement transactions (and the number and range of public entities) makes detailed monitoring by the Commission alone an impossible task. This is especially true in determining whether public entities publish information about all relevant tenders. Against this background, the Commission would be interested in receiving suggestions on improving the monitoring of public contract award procedures, both at Community and at national level. It would also like to receive reactions to the question of whether the Commission should look again at the operation of a European Observatory. This observatory was created within the framework of the Advisory Committee on Public Procurement to monitor the application of the public procurement rules by Member States' contracting authorities, but has not, so far, been fully operational, despite the fact that it is in no way intended to develop into a technical assistance department or an agency. The idea of introducing cross-checking procedures could also be usefully exploited in this context.

II. Information

4.4 Information related not only to the legal framework and the data available on public procurement contracts, but also to observed irregularities and malfunctioning, is the key to ensuring optimally effective and honest value-for-money procurement.

(a) Improved readability of the legal framework

4.5 Improvements in transparency and the dissemination of information are crucial to support efforts to improve procurement practice. The Commission has already taken a number of steps to improve both the quality and quantity of information about the rights of suppliers and the obligations of procurement entities under EU rules. Although all EU public procurement directives have been brought together and published in a single volume, the rules themselves would be easier to understand if each Directive were consolidated in such a way as to group together all the provisions applicable to public procurement in a particular sector. For public supply contracts, public works contracts and contracts in the utilities sectors (water, energy, transport and telecommunications), the adoption by the Council of Directives 93/36/EEC, 93/37/EEC and 93/38/EEC has brought about a formal consolidation. But such a formal consolidation may not be possible each time a procurement Directive is amended. Where it is not, other means could be envisaged.

4.6 To facilitate understanding of the public procurement rules, the Commission is committed to publishing a number of Vademecums (interpretative communications) which will explain and clarify questions on the application of the Directives. These Vademecums will update those first published in 1987 (on the Works and Supplies Directives) and provide equivalent texts in respect of the Services and Utilities Directives. The Commission reaffirms that it will also make available written guides on national remedies procedures and the means by which suppliers can pursue their rights.

(b) Dissemination of notifications

4.7 Providing information to clarify the legal framework is important. Equally important is ensuring the availability of information and data for suppliers to be able to bid for contracts. Good and easily available data is vital in exploiting procurement opportunities. Now, over 130 000 procurement notices are published each year in the EC Official Journal and it is no easy task for suppliers to identify out of this mass, the specific calls for tender in which they have an interest. The Commission is aware that there are problems disseminating this amount of information in a transparent way by means of the paper copy of the Supplement of the Official Journal. The possibility of ultimately shifting the publication system away from the paper version is under consideration.

4.8 The Commission has already carried out a market survey of subscribers to the Supplement to the Official Journal and TED in order to find out what improvements can be made to the information and to its presentation. This survey has shown that only a small number of subscribers prefer the current publication to any other possible alternatives. The majority would prefer to find the information on the World Wide Web or on a CD-ROM with search facilities. Selective subscriptions to the Supplement may also be possible so that users would receive information only on contracts which are of particular interest to them. Whilst it is expected that such improvements will make public contracts more accessible to businesses, we must go further and improve access to information in step with each and every advance in technology.

4.9 Today, problems with the quality of tender notices are also frequent. Although several Directives require the nature of the procurement to be described using a code from the CPA (Classification of Products by Activity) or the CPC (Central Product Classification), only a few entities use these nomenclatures. This is costly for the European taxpayer. The Commission has developed the Common Procurement Vocabulary (CPV) as a list of codes based on the CPA but geared to the specific needs of the procurement process. The CPV has recently been published in a revised version²² together with a recommendation²³ to encourage its use by entities, in order to allow definition of the nature of the procurement in CPV terms by those responsible for procurement. Extending the use of the CPV to all entities and contracting authorities could improve the transparency of public procurement in the Union and allow significant savings for the taxpayer because the publication process, including translation into all 11 languages, could be made easier. The Commission seeks comments from the interested parties on whether, in this context, use of

²² OJ S 169 of 3.9.96

²³ OJ L 222 of 3.9.96

the CPV should be made obligatory. An alternative solution would be to levy a charge on those entities which have not used the CPV and the standardised electronic forms to identify the nature of their procurement, proportional to the extra costs of processing these notices.

III. Training

4.10 Changing traditional procurement practices will only succeed if there is a change in management ethos away from closed relationships with national suppliers to a transparent and truly commercial environment where doors are open to other bidders and value for money is the primary motivation. Training on procurement rules and best practice may well be the best and least costly way to achieve such a change. Yet for some governments, this is sometimes depicted as a costly luxury, the first to suffer cuts in times of budgetary stringency. New procurement techniques, such as electronic notification and electronic tendering, will not deliver greater efficiency and lower costs unless procurement officers know how to use them.

4.11 Welcome changes are visible. Current discussions on improving Europe's competitiveness increasingly focus on the importance of continuing education and the application of knowledge. For procurement, this must result in still greater efforts to provide systematic and rigorous training for officials in order to give them the tools that effective procurement demands.

4.12 However pressing the need, we cannot expect those, whose practices are traditional, to change overnight. To nurture an optimal procurement policy demands a real awareness of what procurement of the highest commercial standard actually entails. The Commission believes that steps must now be taken to stimulate the training of procurement officers in the new and evolving skills they need and to help them to better understand the new role they are called upon to play. If we are to bring about real change, however, a programme needs to be developed which spreads training throughout the Community; a programme that focuses on best procurement practice and which is not simply a one-off event. The application of information technology in procurement and the exchange of information on best practice could be covered. The elaboration of such a programme would involve many players: the Commission, Member States, national sectoral associations, businesses, universities and other interested parties.

IV. Electronic tendering

4.13 Our current procurement regime is based on the use of traditional administrative practices and means of communication: it is mainly a paper-based system of notification, dissemination and tendering. Now, thanks to progress in data processing and telecommunications, we do not need to proceed as we have in the past. It is time to take our procurement policy into the future; to benefit from the opportunities offered by today's advances in information technology. In the short term, new information technologies are helping us to introduce electronic notification of tender notices and the dissemination of information to suppliers. In the longer term, the use of computer systems and

telecommunications will revolutionise the way in which contracts are awarded. An "electronic marketplace" could be developed in which suppliers could list products and prices in electronic catalogues, and contracting entities could compare prices and conditions and order electronically the best value item that meets their needs. We all stand to benefit; electronic procurement will be more transparent, more open to dialogue with suppliers, and far more efficient than any present paper-based system.

4.14 The European Union cannot afford to fall behind in this area. The recommendations of the Bangemann Group report²⁴ to the European Council identified public procurement as one of the ten top-priority applications for the use of information technology in the public sector. The report suggested that at least 10% of all contracting entities should have electronic tendering procedures in place within the next two to three years. Clearly, two years later, major efforts are needed at all levels to meet that target. At the G7 Summit Conference on the Information Society held in 1995, the participants called on the private sector to seize the initiative and committed themselves to encourage the private-sector development of information networks and the provision of new information-related services.

(a) Current state of play

4.15 The notification and dissemination of tender notices is the most appropriate point at which to apply information technology to public procurement. Under our Directives, contracting entities are under the obligation to publish notices about their calls for tender in the Supplement of the EU Official Journal. This supplement already runs to more than 300 pages per daily issue and the expectation is of continued expansion in the year ahead. Not surprisingly, suppliers find it difficult to identify the tender opportunities which interest them. The system must, quite simply, be made more efficient and more simple to use.

4.16 Considerable progress has already been made. The TED database was introduced a decade ago and has been updated recently by the development of more user-friendly software, the application of the Common Procurement Vocabulary (CPV) and the provision of access to the INTERNET. Further improvements are now under way.²⁵

(b) Electronic notification

4.17 With today's technology, opportunities abound for increasing transparency, cutting operating costs and reducing delays. To this end, the Commission has embarked upon an ambitious programme known under the acronym SIMAP ("Système d'information pour les marchés publics") which builds on the experience of TED. SIMAP covers a range of different projects. Its most immediate aim is to increase the capacity of the current publication system so as to cope adequately with the growing number of notices which need to be published. SIMAP will eventually make it possible to provide better tender information more quickly - a change which is both urgently needed (given the rapid growth in published tenders), and vital if we are to improve the transparency of contract award

²⁴ Europe and the Global Information Society: Recommendations presented to the European Council at Corfu, Brussels, 26.5.1994.

²⁵ See also points 4.7 to 4.9.

procedures in Europe. SIMAP offers the prospect of improved monitoring, market analysis and the exchange of a variety of other useful information so as to make it easier for suppliers to identify sales opportunities.

4.18 Under SIMAP a number of pilot projects have already been launched involving a limited number of contracting entities and information providers. They focus on the electronic communication of procurement notices between contracting entities and the Official Journal and TED, and on facilitating on-line access to information for suppliers. If these pilots are successful - and the first signs are encouraging - they could eventually be developed into an operational system of electronic notification and dissemination of information to which all interested parties in the Union would have access (using a Community-wide electronic bulletin board system on procurement).

4.19 Using such a system, contracting entities would have the means for transmitting their notices electronically rather than in paper form. A key question will be how the shift from paper to electronic transmission can be achieved. The latest modifications to the legislative texts already propose changes to permit the electronic transmission of notices. Initially, and for a period of several years, the paper-based and electronic systems will co-exist. We shall need to decide whether such a change could be achieved on a voluntary basis or whether it would be advisable to legally oblige contracting entities to transmit notices in electronic form and, whether such an obligation should be introduced first in a limited way at central government and utilities level, before extending it to other contracting authorities. Such electronic transmission of notices could also make it possible to shorten the time needed for disseminating the information and perhaps, ultimately, the deadlines for bidding. The Commission invites comments on this issue.

(c) Electronic dissemination

4.20 It is clear that, with the steady rise in the number of notices published and the improvements in technology for electronic publishing, the paper version of the OJ/S will in time be superseded by electronic versions. The market survey of subscribers has confirmed that the majority would prefer to find the information over the World Wide Web and many would be interested in a CD-ROM. A CD-ROM is already being developed and further improvements to the TED database such as the development of INTERNET access will doubtless attract more interest.

4.21 There are currently around 13,000 subscribers to the Official Journal Supplement. This can only be a small part of the number of suppliers potentially interested. The electronic or on-line versions must be designed to attract new subscribers, as well as to replace the paper version for existing subscribers, for whom it is becoming increasingly difficult to use.

4.22 Once these replacement systems are in place and accepted by subscribers, the obligation to publish the OJ supplement on paper could be modified to refer to electronic means, so that the paper version could be phased out as demand falls.

4.23 As a result of the findings of the market survey, the Commission is considering the possibility of printing short summaries of notices in a much slimmer OJ supplement and giving full information only in a database, also available as a CD-ROM or via the INTERNET. It is also considering the possibility of producing only the database version or of providing the information only through third parties under licence.

4.24 The Commission would be interested in reactions to or comments upon these various options from all the interested parties, Member States, contracting entities and suppliers.

(d) Fully electronic tendering system

4.25 The opportunities offered by technology are wider than the relatively straightforward electronic transmission and dissemination of notices. In the longer term, the way forward for electronic procurement will undoubtedly be a fully electronic tendering system. This could include the extension of electronic procurement to meet existing mandatory requirements under the Directives (such as the obligation to publish) but, far more dramatically, to cover every other part of the procurement process. A full electronic tendering system could cover the exchange of tender documents and tenders as well as information exchange during the life of the contract (including invoices and payments). However, unlike the publication of notices, such applications would fall outside the Commission's direct area of responsibility; it would be a matter for the commercial judgement of contracting entities and economic operators. The Commission will, of course, be closely associated with these developments: they will certainly significantly affect the EU regulatory framework for public procurement; and there are real dangers that incompatible national systems could create major new internal (and external) trade barriers.

4.26 Our regime must be responsive and ready to meet the challenge posed by a constantly changing public procurement environment. No specific provisions in the public procurement directives deal with the use of information technology. Our existing rules will, whenever possible, be interpreted in such a way as to allow and to accommodate the new developments. Although the Commission starts from a presumption that no amendments to the legal framework on public procurement will be proposed, it is not excluded that those stemming from changes of a technical nature which do not overturn the essential principles of the regime may call for specific legal proposals. Electronic procurement could be one such area.

(e) Experience outside the European Union²⁶

4.27 How developments in information technology will be integrated in procurement in the coming years is uncertain, but important pointers are available. The US Administration has licensed information on tender notices to a dozen private companies which have developed so-called value-added networks (or VANs). These networks offer high-quality information about procurement possibilities in the US and abroad. Similar private sector involvement can be found in Canada. Because of the commercial value of procurement

²⁶ See also Chapter 6.

data, the private sector may be interested, for example, in their dissemination in Europe, even if multilingualism in the EU might retard the process. The Commission would welcome expressions of interest from private sector operators. Consideration must be given as to how the availability of information about potential suppliers of goods and services can be improved and how industry can be stimulated to provide the infrastructure for electronic trading with contracting entities. This requires much thought from all interested parties, in particular to find ways of co-operating to develop the necessary tools and services.

4.28 Electronic procurement is a global phenomenon. Our major trading partners have all embarked on ambitious programmes to develop integrated electronic access to their procurement information and to expand electronic tendering for their acquisitions. As with many new and exciting developments, there are opportunities as well as threats. The opportunities include the greater availability of information on public contracts: sophisticated software programmes can now give suppliers the information they need at the push of a button - irrespective of their geographic location. The threat is that national policies and interests could prove to be too great for governments. This could result in technically incompatible systems - making it more difficult to communicate; and consequently we may not be able to reap the expected benefits of electronic tendering. With the Commission's support, the Government Procurement Committee of the World Trade Organisation (WTO) - which deals with matters relating to the Government Procurement Agreement (GPA) - has already begun to discuss the application of information technologies in public procurement. Industry is also inviting us to examine the possibility of establishing a system of public purchasing using electronic means of communication, compatible between the European Union and the United States. These discussions within the GPA Committee also aim to reach a consensus on compatible systems in all GPA signatory countries. The key issues of internationally acceptable standards and technical procedures will therefore be tackled.

(f) Conclusion

4.29 Having considered reactions to this Green Paper, the Commission will publish a strategy paper on electronic procurement which will take account of reflections on electronic commerce and the information society. Its aim will be to prepare, with the help of Member States, an action plan setting out the way electronic procurement could develop over the next five years.

V. Questions

1. Is sufficient attention given to monitoring the application of the procurement rules as a way of preventing problems or detecting possible breaches? Are there suggestions to improve Community and Member State monitoring systems? Do you see merit in cross-border monitoring, for example by developing the concept of the European Observatory to look at rates of compliance in the public procurement market?

2. Positive incentives to stimulate efficient follow-up procedures in this sector are vital. Are there incentives (cross-checking, publication of results achieved, awards etc.) that could be applied at national level?
3. Are you satisfied with the information provided by the Commission or Member States on public procurement issues? Would a regular information bulletin reporting on public procurement developments and stimulating the exchange of views and experience at the European level be useful?
4. What other sources of information are available? What sort of statistical information would meet information and transparency requirements?
5. Regulations are now in place to protect the Community's financial interests. These contain provisions obliging Member States to communicate cases involving fraud or other irregularity to the Commission on a regular basis. These obligations already apply to public procurement dossiers, where there is Community financing. Could this information system be extended to public procurement in general?
6. Are there any training initiatives in your Member State? (Please give details.) Is sufficient attention being paid to training in relation to the application of information technology in public procurement?
7. Is a Community-wide programme needed to stimulate training and spread best procurement practice? What form should it take and what should be its duration? How can Member States, the procurement profession, academics and business play their full part in such a programme?
8. What improvements to the Official Journal Supplement or to the Tenders Electronic Daily database are needed?
9. Does electronic notification and tendering offer opportunities to make procurement more efficient and more accessible to suppliers? Can they contribute to the opening-up of public procurement?
10. How can increased electronic transmission of notices by contracting entities best be encouraged (voluntarily or as a legal obligation)? What incentives can be provided to encourage such transmission?
11. What elements would you regard as essential to exploit the wider potential of electronic tendering in public procurement? What role should be played by the Commission, the Member States, contracting entities, suppliers and software writers?
12. Is the private sector interested in providing procurement information services in the Union?
13. Should discussions aimed at reaching consensus with our major trading partners on the technical compatibility of electronic tendering systems be given high priority?

5. PUBLIC PROCUREMENT AND OTHER COMMUNITY POLICIES

Public procurement policy has positive spin-off effects on other Community policies. Although SMEs firms still face a number of difficulties in effectively winning contracts, more transparent market access, for example, allows these firms to unlock new potential markets. In this chapter, the Commission presents measures that could improve the situation.

In the field of standards, the Commission intends to step up efforts, in agreement with business, to ensure that the standards institutions draw up European standards for use in contract documents, thereby contributing to the effective opening-up of public procurement.

The massive capital commitment required for Trans-European Networks is encouraged with contract award procedures laid down by the Directives that guarantee an acceptable return for investors. The Commission is prepared to clarify the legislative framework should this prove necessary in order to build partnerships between the public and private sectors for these projects.

Correct application of the Community rules also helps to allocate Community resources from the Structural and Regional Funds in the most efficient way. With this objective, the Commission is proposing a number of measures to improve compliance with these rules in procedures for the award of contracts part-financed by these Funds. The Green Paper deals with contracts awarded by the Community institutions or by non-Member countries who benefit from Community resources.

Public procurement rules can contribute to the achievement of social and environment policy objectives. A description of the possibilities offered by the Directives in these areas is given in this chapter. In the light of the outcome of the debate initiated by the Green Paper, the Commission will consider how better account can be taken of social and environmental aspects in the application of the rules.

Lastly, the Commission would welcome any initiative aimed at stimulating competition in defence procurement, with a view to conferring a European identity on security and defence policy and at the same time strengthening the competitiveness of our industry.

I. SMEs

5.1 Most of our larger companies now have considerable experience in bidding for public contracts in other countries. They are usually well placed to obtain information about particular calls for tender and sufficiently experienced in order to participate in them. They often continue to submit tenders through their local subsidiaries or via consortia in which the lead company is from the same Member State as the purchasing entity. The number of contracts won directly by firms based in other Member States remains small. This also holds true for small and medium-sized enterprises (SMEs), which face greater difficulties on account of their size. Although a survey of SMEs undertaken in 1994 by the Euro Info

Centres²⁷ identified firms which had won contracts in other Member States, these are only isolated cases that cannot be used to establish a general trend.

5.2 And yet SMEs should win a larger share of public contracts given their importance in the European economy: they account for over 65% of turnover generated by the private sector in the European Union. Wider SME participation in public procurement would lead to the creation of a core of SMEs capable of seizing opportunities offered by open public procurement not only within the European Union but also in countries covered by the GATT Agreement on Government Procurement (see Chapter 6) and would also in the long run enable SMEs to make a greater contribution to growth, competitiveness and employment. The basic objectives of an internal market in procurement (widening the choice of value-for-money suppliers for procurement entities and increasing the competitiveness of EU industry) will not be met unless SMEs can also secure genuine access to Europe's markets.

5.3 Work carried out on the basis of various communications or resolutions on the subject of SMEs and the internal market²⁸ has identified a long list of obstacles encountered by SMEs during contract awards, both upstream and downstream of the award procedure.

5.4 When planning their business activities, SMEs thus already encounter difficulties in organising themselves in order to bid effectively for the contracts of interest to them. This is because they find it difficult to adjust their activities to market demand; they lack practical information on contracts put out to tender in their sector; they lack the trained staff and technical assistance necessary to cope with prequalification procedures, particularly in the utilities sectors, and where appropriate, to prepare bids; they have problems in meeting quality certification requirements; and they are often too small in comparison with the contracts covered by the Directives and put up for competition at Community level. The problem of size is compounded by the difficulty in setting up effective and advantageous forms of partnership between SMEs.

²⁷ Survey on the impact of the internal market on business, involving more than 140 small and medium-sized companies in 12 Member States. See Commission press release IP (95) 364, 10.4.1995.

²⁸ See, for example, the Commission communications; of 7.5.1990 on promoting SME participation in public procurement in the Community (COM (90) 166); of 1.6.1992 on SME participation in public procurement in the Community (SEC (92) 722); of 3.6.1992 on measures relating to the industries supplying utilities sectors in the structurally disadvantaged regions of the Community (SEC (92) 1052); of 18.11.1992 on the problem of the time taken to make payments in commercial transactions (SEC (92) 2214); of 22.12.1993 on making the most of the internal market: Strategic programme (COM (93) 632); and of 3.6.1994 on the implementation of an integrated programme in support of SMEs (COM (94) 207); the Council resolutions of 22.11.1993 on strengthening the competitiveness of enterprises, in particular small and medium-sized enterprises and craft enterprises, and developing employment in the Community (OJ No C 326/1) and of 22.4.1996 on the coordination of Community activities in favour of small and medium-sized enterprises and the craft sector (OJ No C 130/1); and Parliament's resolution of 21.4.1993 on the Commission communications "Towards a European market in subcontracting" and "SME participation in public procurement in the Community" (OJ No C 150/71).

5.5 SMEs also have to contend with a number of problems in the contract award phase. For example, it is difficult for them to gain rapid access to the information necessary for preparing bids, especially for identifying and interpreting tender notices potentially of interest to them, the subject-matter of the contract, the regulations applicable (including national rules) and the standards and technical specifications to be complied with. In particular, a recent study²⁹ has shown that late transmission of contract documents by contracting authorities is a real barrier to participation by SMEs, since in many instances (over 50% of the cases studied) it prevents them from submitting a valid bid before the deadline expires. The costs of submitting tenders and the securing of financial guarantees at competitive rates are also substantial obstacles for these firms.

5.6 Even when performing contracts they have won, SMEs face special difficulties: in meeting the requirements of performance bonds they have accepted when contracts were concluded; in securing payment for their works or supplies on time; in settling any disputes quickly and cheaply; and in obtaining adequate protection as subcontractors.

5.7 Action has already been taken to tackle these problems at Community level. As far as the availability of information is concerned, some Community sponsored networks (including a core group of Euro Info Centres specialised in public procurement) have already developed information and market support services, in co-operation with private consultants. These networks, together with a number of local, sectoral or national services, provide information on contract opportunities even below the thresholds of the Directives - as well as additional information about the procurement plans of specific contracting authorities. Moreover, the new design of tender notices published daily in the Official Journal certainly facilitates the task of SMEs, which have access to it, in obtaining sufficient information on procurement opportunities, particularly in other Member States.

5.8 The Commission has also adopted a number of measures aimed at providing information and technical assistance to SMEs in disadvantaged regions in breaking into European procurement markets. These include PRISMA³⁰ (Preparation of Regional Industry for the Internal Market), which ran until 1994, and the newly launched SMEs³¹ and INTERREG II³² initiatives, which also cover the promotion of partnerships between SMEs in different Member States and specialised training.

5.9 The Commission believes that other initiatives should be taken. It would welcome comments on the options for action envisaged in this area and described below.

5.10 As far as general information is concerned, it could prove useful to draft a practical guide for SMEs, explaining how they can prepare for participation in public procurement, and to draw up interpretative documents on some aspects of the Directives that concern

²⁹ Euro Info Centre Aarhus County, Analysis of irregularities occurring in tender notices published in the Official Journal of the European Communities 1990-1993. Study presented to the Commission in 1996.

³⁰ PRISMA (91/C 33/05), OJ No C 33/9 of 8.2.1991.

³¹ SMEs Initiative (94/C 180/03), OJ No C 180/10 of 1.7.1994.

³² INTERREG II (94/C 180/13), OJ No C 180/60 of 1.7.1994.

these types of business more particularly, such as the splitting of contracts into lots, the publication of prior information notices, and the problem of the time limits for distributing documentation on contracts.

5.11 As regards information on specific contracts, consideration could be given to adapting TED to the specific requirements of SMEs. Another possibility would be to take advantage of the increasing popularity of the INTERNET and World Wide Web to provide access to such information for a much wider audience. There are few technical obstacles to such developments, but there may be a need for co-ordination at a European level if such initiatives are to succeed. It could also be useful to press for greater transparency on the part of contracting authorities by encouraging them to use wherever possible the Common Procurement Vocabulary (CPV) and standard forms for procedural documents, which would facilitate electronic data interchange.³³

5.12 As far as preparing for contract award procedures is concerned, the opening-up and simplification of contracting authorities' practices through the training of procurement officers, the exchange of officials and the exchange of information on good procurement practice could only make it easier for SMEs to bid for contracts.

5.13 Given their size, it would be easier for SMEs to take part effectively in an ever more global market if frameworks were established for co-operation between them. It could therefore be worth looking into the question of whether the European Economic Interest Grouping (EEIG) is suitable for promoting co-operation between SMEs, particularly for cross-border public procurement.

5.14 An aspect which is extremely important for SMEs, but is not dealt with directly by the Directives, is subcontracting. The Commission has been called upon to "pursue, in concert with the Member States, its general role of instigating, initiating and co-ordinating measures aimed at creating a propitious environment for subcontracting"³⁴. To that end, action could be taken in this area, for example to improve the existing network of databases on subcontracting and to encourage the establishment of approved codes of practice and standard contractual clauses. In order to gauge the economic importance of sub-contracting, pilot studies have been carried out in 10 Member States using as a basis the common methodology developed by EUROSTAT. These studies were carried out on sub-contracting enterprises or those ordering in three economic sectors (cars, electronics, textiles/clothing) and the results will be published before the end of 1996.

5.15 Another aspect which closely concerns SMEs is payment periods. On this topic the Commission, after carrying out wide-ranging consultations, adopted a recommendation³⁵ in which it calls on Member States to ensure that their contracting authorities are disciplined in the matter of payment. The recommendation thus provides, for example, for a time limit by which payments should be made and for the payment of interest in the event

³³ See in this connection the arguments developed in Chapter 4.

³⁴ See Council resolution of 26th September 1989 on the development of subcontracting in the Community (OJ No C 254/1 of 7.10.1989).

³⁵ Commission recommendation on payment periods in commercial transactions (OJ No L 127/19 of 10.6.1995 and OJ No C 144/3 of 10.6.1995).

of late payment. Member States are to submit reports by the end of 1997 on the action they have taken to implement the recommendation; the Commission would be interested in having at this stage the reactions of the parties concerned on this matter.

5.16 On a more general note, the Commission takes the view that the effective access of SMEs to public procurement could be achieved through a set of concrete measures based on a thorough analysis of these firms' practical needs and opportunities, and in particular through the development of networks of support services which would provide them with the necessary information, technical assistance and suitable training. Following the consultations launched by this Green Paper, the Commission intends to present a communication on the measures it proposes in this area.

II. Standardisation

5.17 Standards and technical specifications describing the characteristics of the works, supplies or services covered by contracts play a crucial role in our efforts to open up public procurement. The use of national standards can significantly restrict access to contracts for non-national suppliers. With this in mind, the Directives provide that contracting authorities define technical specifications with reference to European standards or technical approvals, without prejudice to mandatory national technical rules, in so far as these are compatible with Community law. This was a problem the Directives sought to resolve by requiring contracting entities to refer to European standards where they exist. Under Commission mandates issued within the framework of the 1985 Council resolution on a new approach to standards and technical harmonisation,³⁶ the European standardisation bodies (CEN, CENELEC, ETSI) have developed many European standards which are then implemented into national standards. In addition mandates in support of public procurement have been issued on a number of occasions. This effort must be stepped up since certain markets are to this day still *in practice* closed off, chiefly owing to insufficient standardisation work. Together with industry, the Commission is currently determining where further mandates are needed. The Commission would welcome comments from interested parties on the general issue of standardisation and technical specifications in public procurement and on the identification of areas where the absence of European standards poses problems for the opening-up of public procurement.

III. Trans-European Networks (TENs) and transport in particular

5.18 The Maastricht Treaty committed the European Union to promoting the creation of a web of Trans-European Networks (TENs) in the transport, energy and telecommunications sectors. Successfully developing TENs will contribute to the optimal use of the opportunities offered by the single market; investing in TENs is an investment in our future. This policy is crucial to the overall competitiveness of the EU economy and, both directly and indirectly, to the creation of employment. Several key projects are already under way, including the Øresund road and rail link between Denmark and

³⁶ Resolution of 7.4.85, OJ C 136/1 of 4.6.1985.

Sweden, upgrading Malpensa airport for Milan and the rail link between Cork and Stranraer. However, progress on other priority TENs has been slow.

5.19 Against a background of ever tighter government budgets, the European Council has emphasised the importance of private finance in the Union's efforts to increase investment in TENs infrastructures. Investment projects are increasingly unlikely to be funded only by grants from local or national governments. They demand a massive financial commitment. There is therefore a need to find fresh ways of raising capital. Many private sector organisations have made it clear that they are increasingly ready to invest substantially in TENs projects and are willing to do so on a risk-financing basis. But a number of obstacles still have to be overcome.

5.20 The Commission's report to the Madrid European Council (December 1995) outlined ways of overcoming obstacles to the private financing of Trans-European Network projects. Apart from the problem of how to ensure an acceptable rate of return for projects, the report also referred to the problem of non-commercial risks arising due to changes in public policy. The Commission is presently looking into this issue. The private sector has also expressed concern about the application of EU public procurement rules; in some circles, it has been claimed that the Directives may inhibit private sector involvement.

5.21 The ultimate objective of the Community's public procurement directives is to achieve fair and open competition for procurement contracts in the internal market. Their aim is to facilitate and not to obstruct private sector involvement in projects. The Commission believes that the Community public procurement rules can facilitate private sector participation in Trans-European Networks, without any need, at this stage, to amend the existing legal framework. Should clarification of the framework prove necessary, the Commission is prepared to tackle the different questions arising with the parties concerned to ensure that partnership between the public and private sectors is in no way inhibited. As announced in its report to the Madrid European Council, the Commission has also set up a TENs Help Desk to provide a one-stop shop to answer enquiries from private sector TENs participants.

5.22 To date, industry has identified three principal concerns which, while not being exclusively concerned with TENs projects, are certainly of considerable importance in that particular area. These concern the pre-tendering phase, concessions to consortia and use of the negotiated procedure.³⁷

(a) The pre-tendering phase

5.23 The private sector has indicated its reluctance to engage in pre-tender discussions or studies without an assurance that it will not be excluded from the subsequent tendering procedures, fearing a potential infringement of the principle of equal treatment. The Commission recognises that, in view of the complexity of most of the projects - some of which may require solutions never attempted before - a technical dialogue before the calls for tender between the awarding authority and private parties involved may be necessary. If, through the introduction of specific safeguards - affecting matters of substance as well

³⁷ See discussion in Chapter 3.

as procedure - contracting authorities refrain from requesting or accepting information that would have the effect of restricting competition, the principle of equal treatment will not be violated.

(b) The award of concessions to consortia

5.24 As previously stated (see Chapter 3), the award of a public works concession is the usual way of enabling the private sector to participate on a risk basis in the building and operation of infrastructure projects in partnership with the public sector. The Commission notes that, in line with the applicable Community rules, it is essential that consortia, participating on a risk basis, can bid for concessions knowing they will be able to award contracts to their associates within the consortium in respect of the necessary supplies, works or services. The provisions of the public works Directive applying to the award of works concessions for the construction of public transport infrastructures permit the winning consortium to do so.

(c) The use of the negotiated procedure

5.25 Complex works and services contracts may in some cases justify the use of the negotiated procedure. Under the Utilities Directive, contracting entities already have a free choice between three procedures (i.e. open, restricted or negotiated procedures) involving a prior call for competition. In the traditional sectors, however, as has already been mentioned (see Chapter 3), the negotiated procedure may be used only in certain well-defined circumstances that are listed exhaustively in the Directives. For example, the public services Directive allows an award by negotiated procedure where a service is complex and cannot be specified with sufficient precision, particularly in the field of intellectual services. The public works Directive allows the use of the competitive negotiated procedure in exceptional cases where, for instance, the nature of the works or the attendant risks do not permit prior, overall pricing.

IV. Procurement involving Union funds

(a) Structural and Cohesion Funds

5.26 The Structural and Cohesion Funds have contributed over ECU 50 billion to public authority investments in the Member States during the past two years. Through other financial instruments (including European Investment Bank loans and grants from other Community sources) the Union has provided a further contribution of over ECU 34 billion. Moreover, by means of financing from the Funds, the Union expects to spend ECU 57 billion over the next two years. It is undeniable that Member States must have confidence amongst themselves that each and every one of them respects the rules; that the best value for money is being achieved in the expenditure of European taxpayers' money and that the risk of fraud is minimised. Our rules on public procurement and on the protection of the financial interests of the Community have a central role to play in this, it being understood that there can be no discrimination in their application, whether it is a question of contracts financed from national resources or contracts qualifying for support from the Structural and Cohesion Funds.

5.27 The present system of control is based on the 1989 Commission communication to the Council.³⁸ It clarifies the obligation on Member States to ensure, systematically, that the public procurement rules have been respected and to confirm that for each and every request to the Commission for payment of funds the rules have been honoured. However, very few Member States have put into place a systematic and thorough mechanism for monitoring compliance with the public procurement rules. The Commission, for its part, can release the funds only upon explicit confirmation of that compliance. If the rules have not been followed (for example, if tenders have not been correctly advertised) funding can be suspended, and then, if necessary, withdrawn and infringement procedures started. In the case of the Cohesion Fund, and large ERDF projects an *ex ante* verification is systematically made as part of the examination of applications for part-financing.

5.28 The Commission must increasingly rely on Member States to fulfil their obligations, especially since the volume of individual projects is steadily growing. The problem has become more acute and needs resolution. Indeed, following the reform of the Structural Funds, the management of funds (particularly the choice of and follow-up to funded projects), has been devolved to each Member State. Greater authority over fund management goes hand in hand with greater responsibility to control compliance with procurement rules. Improving the current system of control at the Member State level is therefore vital. It is appropriate to recall that an important discussion is taking place as part of SEM 2000 on the need for greater transparency and rigour in the use of the Structural Funds. In this context, concrete proposals will be submitted to the Dublin European Council, directed at clarifying certain criteria and also at promoting co-operation and dialogue between Member States and the Commission in the framework of partnership, and in the interest of the beneficiaries. The conditions for the application of financial adjustments in cases of fraud and irregularity are also tackled, including net correction in the extreme case where a Member State persists in failing to meet its audit obligations. Work will continue in 1997. At the same time, one should recall and underline the rules of transparency, under which there is an obligation to communicate established cases of irregularity or fraud to the Commission.

5.29 Although ultimately, responsibility for improving procedures rests with the Member States, the Commission will use its best offices to ensure that improved systems of control are introduced as soon as possible. Any solution must go beyond identifying particular problems in specific projects. Our goal must be to create a regime that adds value. Accountability, performance and results must become bywords in Structural Fund management. The likely benefits are clear: considerable savings at all levels; more effective spending of limited resources; a healthier employment situation in the regions concerned; more confidence from our citizens that EU money is well spent; and projects that work for their users. To demonstrate proper regard for the use of public money and to win public support, the Commission believes that Member States should publicise the fact that value-for-money has been achieved in any particular project.

³⁸ COM (88) 2510 and OJ No C 22 of 28.1.1989.

5.30 Improvements to the regime itself could be made by introducing relatively small changes in procedures. One such change would be the introduction, for each project, of a statement signed by the responsible national official that the Union's public procurement rules have been complied with. Such a statement of personal accountability has been used in other areas and in some third countries, most notably in the United States; it has proved to be one of the most effective ways of securing the best price and preventing fraud. More widely, thought could be given to developing a code of good conduct to which national officials could commit themselves. Clearly, the feasibility of such measures would have to be looked into in the light of the different systems of staff regulations for civil servants in Member States.

5.31 The idea of individual accountability is inspired by the notion of prevention. Our policy in handling Structural Funds must anticipate - prevention is better than cure. The application of the system of attestation (see Chapter 3) to contracting entities receiving EU funds could significantly improve the situation and provide assurances that recipients have mechanisms in place that are capable of securing value-for-money equal to best commercial practice. It is our common interest that EU funds are spent effectively. Certifying by means of attestation that an effective procurement system is in place calls for only a small effort from public authorities in return for the benefit of saving considerable sums of EU money.

5.32 A more far-reaching proposal could be the use of the independent authorities referred to in Chapter 3 to promote compliance with public procurement rules in respect of European Union funds. Without prejudice to the Commission's competence, such bodies could play a key role not only in monitoring public authorities' behaviour, but also in advising them. These functions could also be the responsibility of a Member State's national court of auditors or an equivalent independent authority.

5.33 Implementing proposals will not solve each and every problem. A transformation of public procurement that involves funds of the Union - permanently and structurally - will only be achieved if such specific solutions are accompanied by a process of ongoing change in close partnership with the Member States. It may be necessary to formalise such initiatives (for example to establish accountability) in order for real and lasting change to be achieved. This is also in keeping with the spirit and objectives of the "good sound management" exercise (SEM 2000) carried out by the Commission and the personal representatives of Member States, following on from the impetus given by the Madrid European Council in 1995. The conclusions of this group confirm the need to be concerned about rigour and transparency in making good use of appropriations and about sharing responsibilities, and will be presented to the Dublin European Council in December 1996.

5.34 With an improved system of checks in place at national level, the Commission, for its part, could concentrate on an *ex post* verification of projects (for example in close co-operation with the independent body designated in each Member State). The Commission could also be invited to carry out an audit of the checking systems established in each country. The Commission will, in addition, seek to improve information flows between the Commission and the Member States on projects, especially through the use of modern information technologies.

(b) Public procurement by the European institutions or financed by non Member countries benefiting from Community resources

5.35 When awarding contracts for their own operational requirements or for the purposes of implementing the different policies for which the Community is responsible, the European institutions are required by Article 56 of the Financial Regulation to follow the same rules as those applicable to national contracting entities under the Directives on public procurement. Furthermore, only contracts awarded by the Council and the Commission are covered by the provisions of the GPA of the World Trade Organisation (see Chapter 6). The exceptions to the obligations laid down by these instruments concern: (a) in the case of the GPA, contracts concluded in connection with food aid; (b) in the case of the obligations deriving from Article 56 of the Financial Regulation³⁹, the same derogations as those laid down in the Directives plus, in accordance with Title IX of the Financial Regulation, contracts awarded in the context of external aid financed from the Community budget, with the exception of public service contracts awarded for the Commission's own requirements, to which the normal rules apply. Clearly, although they fall outside the scope of the Directives, all of these contracts, which are financed from Community resources (general budget, EAGGF and under EDF) and under Community programmes (e.g. PHARE, TACIS, MEDA, etc.), are still subject to specific rules and the fundamental principles governing the award of contracts, in particular transparency and equality of treatment.

5.36 These wide-ranging general obligations have been spelt out in greater detail by recent amendments to the Financial Regulation and will be clarified further still by other amendments which the Commission intends to propose with a view to circumscribing the above mentioned derogations in order to ensure that they are interpreted restrictively. The Commission's action forms part of its efforts to improve financial management, as provided for in the guidelines of the SEM 2000 operation.

5.37 The aim of this legislative framework is, by encouraging competitive tendering, to enable more efficient use to be made of the Community's general budget and of funds for development co-operation. The departments concerned must therefore endeavour to apply it as comprehensively as possible. The Commission wishes to ascertain whether the measures taken are sufficient to ensure fair access to contracts awarded both by the European institutions and by other bodies or third countries under Community programmes and using Community funds. In this connection, third countries in receipt of financial aid from the Community budget should also be invited to commit themselves to meeting certain obligations, particularly as regards on-the-spot checking for irregularities, recovering sums misappropriated and penalising irregular dealings.

³⁹ Financial Regulation of 21.12.1977 applicable to the general budget of the European Communities, as last amended by Council Regulation (ECSC, EC, Euratom) No 2335/95 of 18.09.1995 (OJ No L 240 of 7.10.1995).

V. Procurement and social aspects

5.38 The European Union's social policy contributes to promoting a high level of employment and social protection (Article 2 of the EC Treaty), the free movement of workers, equality of opportunity between men and women, stronger economic and social cohesion, better living and working conditions, a high level of health protection, high standards of education and training and the integration of the disabled and other disadvantaged groups into society.

5.39 Contracting authorities and contracting entities may be called upon to implement various aspects of social policy when awarding their contracts, as public procurement is a tool that can be used to influence significantly the behaviour of economic operators. As examples of the pursuit of social policy objectives, one can mention legal obligations relating to employment protection and working conditions binding in the locality where a works contract is being performed or so-called "positive action". The latter occurs where public procurement is used as a means of achieving the desired objective, for example by providing a captive market for a disabled workshop which could not reasonably expect to compete on equal terms with normal commercial enterprises enjoying normal levels of productivity.

5.40 The legal framework created by the Treaty and the Directives continues to apply in these situations. For this reason, since the entry into force of the public procurement directives, questions have constantly arisen as to whether and to what extent social objectives can or should be pursued, given the specific limitations imposed by the public procurement directives in order to prevent their whole purpose being frustrated.

5.41 Provisions which have been included in all the Directives offer an initial possibility for pursuing social objectives by allowing contractors or suppliers to be excluded where they have been convicted of an offence concerning their professional conduct or have been found guilty of grave professional misconduct. These rules clearly also apply where the offence or misconduct involves an infringement of legislation designed to promote social objectives. In these cases, then, the provisions in question indirectly allow contracting authorities to pursue such objectives by excluding from contract award procedures candidates who have failed to comply with such legislation.

5.42 Another possibility is to require successful tenderers to comply with social obligations when performing contracts awarded to them, for example obligations aimed at promoting the employment of women or the protection of certain disadvantaged groups. Checking of compliance with such conditions should take place outside the contract award procedure (see the judgement of the Court in *Beenjes*, cited earlier, and the Commission communication on public procurement: regional and social aspects⁴⁰). Clearly, contract performance conditions are allowed only where they do not result in direct or indirect discrimination against tenderers from other Member States. Sufficient transparency must also be ensured by mentioning the conditions in the contract notices or contract documents.

⁴⁰ Commission communication of 22.9.1989. COM(89) 400 final, OJ No C 311 of 12.12.1989.

5.43 On the other hand, the Directives do not currently allow social considerations to be taken into account when it comes to checking the suitability of candidates or tenderers on the basis of the selection criteria, which relate to their financial and economic standing or their technical capability, nor when it comes to awarding contracts on the basis of the award criteria, which must relate to the economic qualities required of the supplies, works or services covered by the contract. As against this, however, it should be added that, in the case of contracts falling below the thresholds for application of the Directives, purchasers may include social preferences in the award criteria, provided that they are extended without discrimination to all Community nationals with the same characteristics.

5.44 The question that arises here is, first, whether the possibilities offered by public procurement law for pursuing Community and national social-policy objectives in respect of the different groups concerned need to be clarified by means of an interpretative communication and, second, whether these possibilities are sufficient to satisfy needs or whether other measures need to be taken in order to achieve these objectives in applying the Community rules on public procurement, while safeguarding fair competition.

VI. Procurement and the environment

5.45 Environmental protection policy has become one of the most important Community policies, following the amendments made to the EC Treaty first by the Single Act and then by the Maastricht Treaty. Over 200 legislative instruments have been adopted, concerning inter alia action to combat air, water and soil pollution, waste management, product safety standards, environmental impact assessment, and the protection of nature. Article 130r of the EC Treaty also provides that environmental protection requirements must be integrated into the definition and implementation of other Community policies. Several Member States have, for their part, developed extremely advanced environmental protection policies.

5.46 In this specific sector, Member States (and their public authorities) have, increasingly, started to integrate environmental considerations into their public procurement practices. Because of its size, public procurement can have an enormous impact on certain business activities; it can even give a major push to the commercial development of certain products. The Danish Government has recently adopted an 'Action plan for a sustainable environmental/'green' policy for public procurement'. Other Member States are also examining what steps can be taken to promote procurement of green products and services. In addition, the OECD recently adopted a Recommendation on improving the environmental performance of government,⁴¹ which urges member countries, and in particular their governments, to establish and implement policies for the procurement of environmentally friendly goods and services.

5.47 The application of the public procurement directives does indeed leave scope for public authorities to promote environmental protection. It would undoubtedly be desirable in this connection to clarify the possibilities offered by the general provisions of existing

⁴¹ OECD Council Recommendation C(596)39/Final, 20.2.1996.

legislation for taking environmental concerns into account and, at the same time, to define more precisely the limits to these possibilities.

5.48 First, as with social objectives, environmental protection can be achieved through specific rules for the infringement of which a supplier or contractor can be convicted of an offence concerning his professional conduct or found guilty of grave professional misconduct. In such cases, the Directives allow contracting authorities and contracting entities to exclude from contract award procedures any supplier or contractor who has been found guilty of breaching such rules.

5.49 Second, environmental protection considerations can be incorporated into the technical requirements relating to the characteristics of the works, supplies or services covered by contracts, namely the technical specifications which purchasers must indicate in the general contract documents and with which tenderers must comply, in accordance with the Directives. Efforts should be made to develop European standards or common technical specifications which incorporate and promote environmental concerns while avoiding the negative implications for the single market that would result from establishing criteria that are over-specific. An example of such a specification could be a European eco-label, complying with Community law. In any event, purchasing entities can already encourage firms to adopt a more active approach towards the environment by ceasing to reject tenders for goods that incorporate reconditioned components or recycled materials despite the fact that their technical characteristics satisfy the requirements laid down in the contract documents.

5.50 Third, the Directives allow, under certain conditions, environmental protection objectives to be included among the criteria for selecting candidates. These criteria are designed to test candidates' economic, financial and technical capacity and may therefore include environmental concerns depending on the expertise required for specific contracts.

5.51 Fourth, during the contract award phase environmental factors could play a part in identifying the most economically advantageous tender, but only in cases where reference to such factors makes it possible to gauge an economic advantage which is specific to the works, supplies or services covered by the contract and directly benefits the contracting authority or contracting entity. In the case of contracts falling below the thresholds for application of the Directives, environmental preferences may be used as an award criterion provided that they are non-discriminatory and open to all tenderers in the Community on the basis of the mutual recognition principle.

5.52 Fifth, purchasing entities can pursue environmental protection objectives through performance conditions imposed contractually on successful tenderers. In other words, a contracting entity can require the supplier whose tender has been selected to perform the contract in accordance with certain constraints aimed at protecting the environment. Clearly, such performance conditions should not be discriminatory or in any way disturb the smooth functioning of the single market. The conditions should also be mentioned in tender notices or contract documents to ensure that bidders are sufficiently aware of their existence. Lastly, verification of the successful tenderer's ability to perform the contract in accordance with the conditions should take place outside the contract award procedure.

5.53 Within the limits of the possibilities set out above, the Commission would be most interested to receive information on the experience of Member States or individual contracting entities in taking environmental objectives into consideration in their purchasing. The Commission, in its proposed Decision on the review of the 5th. Action programme for the environment, has already indicated that further action could be needed to take better account of environmental considerations in the application of Community public procurement rules, while safeguarding fair competition.

VII. Defence procurement

5.54 In 1990 the total defence procurement expenditure by EU defence ministries amounted to ECU 65-70 billion. Whilst a large part (around one third) of such purchases is already covered by the public procurement directives, the benefits of open procurement in this sector are still to be fully exploited. A 1992 study carried out for the Commission on the costs of non-Europe in defence procurement, including contracts for military equipment, suggested that major savings (ranging from ECU 5 billion to ECU 11 billion on the basis of 1990 figures, according to the different possible scenarios) can be achieved in this area. The Commission welcomes any move to introduce more competition into defence procurement. This will result not only in direct economic savings, but also in economies of scale from longer production runs and, ultimately, in a more competitive European defence industry. As a contribution to the debate the Commission recently issued a communication entitled "The challenges facing the European defence-related industry - A contribution for action at European level"⁴². Since the defence-related industry depends almost exclusively on public purchases, public procurement is extensively dealt with in this communication. Nevertheless, as a competitive European defence industry is also an essential precondition for conferring a European identity on security and defence policy, the special nature of the sector has to be taken into account. This could prompt some adjustments to the procedures laid down in the public procurement directives. Neither should initiatives taken by the Western European Union (WEU) and other similar organisations working in the defence co-operation field be overlooked.

VIII. Procurement and consumer policy

5.55. The implementation of an effective procurement policy, which improves market access and transparency in an increasingly integrated Single Market can bring significant benefits to consumers, providing them with better quality and more economically efficient services and infrastructures. In this context, it would seem important to take greater account of consumer policy in Union procurement policy. Promoting more transparency and dialogue with consumer organisations would be particularly welcome.

⁴² Commission communication of 24th January 1996, COM (96) 10 final.

IX. Questions

1. For general information purposes, do you think that it would be useful to compile a practical guide explaining to SMEs how to prepare themselves for taking part in public procurement, and for interpretative notices to be drawn up on aspects of the application of the Directives which are of special interest to SMEs? On what topics, in your view, should these documents particularly focus?
2. Given that some Community-sponsored networks already supply additional information on procurement, particularly to SMEs, should their role be reinforced? If so, how?
3. What is your opinion on the options under consideration for improving the information available to SMEs about specific contracts (adaptation of TED, using the INTERNET, the CPV and standard forms)? Do you think that there are other avenues which should be explored?
4. Is the EEIG (European Economic Interest Grouping) an appropriate instrument for promoting co-operation between SMEs, especially in cross-border public procurement?
5. Do you think that, to promote greater SME participation in public procurement, other action should be taken at Community level, particularly on the issues of subcontracting and payment periods? If so, what type of action? For example, should one consider the fixing of mandatory payment periods, after which interest on late payment and, if need be, damages and interest would be due?
6. What are, in your view, the most appropriate ways of developing networks of SME support services? What type of services in particular should be provided by these networks?
7. In your opinion, to what extent has the standardisation policy pursued by the European standards bodies (CEN, CENELEC, ETSI) on the basis of Commission mandates been successful in eliminating obstacles to the opening-up of public procurement?
8. Which product sectors should be given priority in determining further mandates for European standards?
9. A number of anxieties expressed by the private sector have been dealt with in the part of this Chapter concerned with TENs. Has the clarification of the relevant provisions been sufficient to dispel these anxieties or should further written guidance be given on the application of the Directives to public tendering for TENs or other major projects (for example, through an interpretative communication)?
10. Do you know of any other issues related to tendering procedures for contracts that need clarification or resolution to facilitate private participation in TENs or other public/private partnerships?
11. Do you agree that, as an incentive to the effective management of the Structural Funds, wider publicity should be given by Member States and contracting entities to the fact that value for money has been achieved in procurements for EU co-financed projects?

12. Would it be useful to require the persons responsible to sign a personal statement that, in respect of a particular project, value for money has been obtained and that the public procurement rules have been followed?
13. Are there any other ways of increasing the effectiveness of the public procurement rules when structural funds are utilised ?
14. Do you think that contracting entities receiving funds from the Union should be encouraged to undergo attestation to ensure that an effective procurement system is in place?
15. Do you think that it could be useful and efficient if an independent national authority, co-operating closely with the Commission, were to assist contracting authorities when their procurements are financed from Community funds?
16. Do you think that the rules governing contracts awarded by the Community institutions and contracts awarded by other bodies or third countries under Community programmes and using Community resources are adequate to ensure fair access to these contracts for all interested parties?
17. In your opinion, do the possibilities offered by public procurement law for pursuing Community and national social policy objectives need to be clarified, for example by means of an interpretative communication?
18. Do you think that these possibilities are sufficient to satisfy needs? If not, what other measures do you think could be taken in order to ensure that social policy objectives are more effectively achieved in the application of the Community rules on public procurement, while safeguarding fair competition?
19. In your opinion, are obligations relating to health and safety at the workplace taken sufficiently into account during the preparation of tender notices and contract documents? What improvements can you suggest?
20. What has been your experience with the promotion of "green" products and services procurement under the Directives? Is there a need for the Commission to clarify the possibilities for incorporating environmental protection concerns in the application of the public procurement directives (e.g. by means of a Commission communication)?
21. Do you think that the possibilities offered are sufficient to attain the objectives pursued? If not, what measures do you think could be taken in order to ensure that environmental protection objectives are more effectively achieved in the application of the Community rules on public procurement, while safeguarding fair competition? Should the eco-label be included among the technical specifications mentioned in the general contract documents, or should application for registration under the Environmental Management and Audit Scheme figure among the selection criteria?
22. Given the absence of competition in the military equipment sector, should this not be governed by a system of public procurement as desired by some Member States?

6. PROCUREMENT OUTSIDE THE UNION

With a new World Trade Organisation Government Procurement Agreement (GPA) in place, globalisation of public procurement is certain to grow. Our industry must reply positively and effectively to this challenge; world-wide competition will be intensifying and success will hinge on innovation and international thinking to meet the challenge. Further market opening must be actively pursued; a constructive, ongoing dialogue with our industry is critical to identify new market opportunities and to help set objectives for any future negotiations. To this end, the Commission invites Member States and industry to provide information on any problems particular markets might pose and to suggest possible solutions, in particular where market opening agreements are under negotiation.

The preparation of the associated countries of Central and Eastern Europe for accession to the Union remains a major priority. The Commission's White Paper provides guidelines on the full range of single market policies, including public procurement. The Commission and the Member States have already made considerable efforts in helping to lay the foundations for an effective public procurement system. These efforts must be intensified. Training on best procurement practice and ready access to sound legal advice are paramount.

Similarly, in line with the Commission's attempts to improve links with countries in the Mediterranean basin and as is provided for in the agreements concluded with Turkey, Morocco and Tunisia, the Commission will also look at ways of assisting in the development of competitive public procurement practices there.

I. Access to world procurement markets - Getting a fair deal for Europe

6.1 Increased liberalisation of EU markets must, to the greatest extent possible, be mirrored throughout the world in order to maximise the benefits to our industry of competitive tendering. The EU has been instrumental in achieving large-scale procurement liberalisation with its major trading partners, through the first-generation GATT Agreement on Government Procurement of 1979, the European Economic Area (EEA), the Europe Agreements, and more recently through a new WTO Government Procurement Agreement (GPA), concluded alongside the Uruguay Round.

6.2 The new GPA came into force on 1st January 1996. In addition to the European Union, the contracting parties are the US, Canada, Japan, Israel, South Korea, Norway and Switzerland. Aruba and Liechtenstein recently joined the agreement, and Singapore is in the process of acceding. The agreement's coverage includes contracts awarded by lower levels of government (such as individual states in federal countries, provinces and cities) as well as by entities operating in a number of utilities sectors (such as electricity, urban transport, water, ports and airports). Whereas the 1979 GPA was limited to public supply contracts, public works and public service contracts now fall within the scope of the new GPA. Significantly, suppliers will also have the right to challenge the award of contracts where they feel that they have been discriminated against. The Commission estimates

overall that the new GPA will open to international competition public contracts worth around ECU 450 billion every year. That represents approximately a tenfold increase in the value of contracts opened to bidding under the 1979 GPA.

6.3 Many discriminatory provisions which kept EU business out of huge procurement markets in third countries were removed at the beginning of this year. New business opportunities have been created for industries as diverse as banking and heavy engineering. In the US, most discriminatory "Buy American" provisions, some dating from the 1930s, have been removed by the Federal Government as well as by 39 of the 50 state governments (including California, New York, Texas, Illinois and Florida). As a result, market opportunities worth around ECU 100 billion per annum will be available to EU business. The GPA also represents major progress on opening up procurement markets in south-east Asia. Japan for example agreed to cover the award of contracts by its 47 prefectures which are responsible for the bulk of procurement expenditure, particularly in the area of construction and civil engineering. In South Korea, which will apply the GPA from 1997, EU business will be able to bid for contracts throughout the public sector without the compulsory technology transfer, buy-back or local content arrangements that applied in the past.

6.4 But we cannot stand still. Despite major progress achieved to date, not all restrictions on tendering opportunities have been removed; certain important restrictions have remained in place in the countries which are signatories to the GPA (in which case, the Community has followed the principle of reciprocity). Moreover, the GPA, which is for the time being a plurilateral agreement, is intended to become a multilateral agreement, which means that a large number of countries have yet to accede. As the European market is generally open for suppliers from third countries, it is in the interest of European business that the Community should seek, in negotiations with third countries, to agree on market-access arrangements which achieve full reciprocal liberalisation of procurement.

6.5 Further opening-up of public procurement world-wide will therefore remain our key target. Results will be sought from the multilateral process in the WTO, by completing the coverage of existing parties to the GPA and by enlarging its membership. Future applicants for membership of the WTO such as China and Taiwan should, as a matter of principle, join the GPA, if necessary after a transitional period. (Indeed, Taiwan has already tabled an offer to join.) The Commission already strongly encourages present WTO members to accede to the GPA, particularly those with observer status under the Agreement. The multilateral approach through the WTO remains the key forum for our efforts. A parallel negotiation should be initiated in order to reach an agreement on transparency, opening up and systems of remedies in public procurement. The end objective remains national treatment and the effective application of the most favoured nation clause for all the public contracts and all Members of the WTO. To further this process, the European Union also proposes an advance revision of the GPA of 1994, which would include the extension of the Agreement, the abolition of discriminatory measures and practices and its simplification and improvement. Bilateral negotiations are, nonetheless, still needed. The Commission is therefore already in negotiation with Switzerland and South Korea. In a similar vein, the Commission is looking at gaining market access for EU suppliers in the countries of the Mediterranean Basin. Further to the Barcelona Declaration which aims to establish a Free Trade Area between the Community

and the Mediterranean countries in time for the beginning of the next century, an Association Agreement covered by Article XXIV of the GPA has been reached with Israel. This agreement has been completed by two specific agreements on public procurement. These, which are not yet ratified, aim to broaden offers made on a reciprocal basis under the GPA and to open the telecommunication procurement markets of both parties. A Customs Union Agreement with Turkey has also been concluded which makes provision for future access to public procurement on a reciprocal basis. A similar approach has been taken in two Interim Association agreements concluded with Morocco and Tunisia.

6.6 European industry already has much detailed knowledge of local difficulties in tendering in third countries. As indicated in its Communication on a market access strategy⁴³, the Commission must, if this strategy is to be effective, have first-hand up-to-date knowledge of the problems that suppliers face in third country markets so that it can remove those barriers which are most harmful to European interests. It would be helpful to have details of the experience industry has. The new interactive data base, accessible on the INTERNET, makes it possible for industry to inform the Commission directly about its market access problems. This will enable the Commission to evaluate the problems and to examine and decide upon what action should be taken to resolve them. On the other hand, in order to identify problems of access and to help set objectives for future negotiations with third countries, the Commission has launched a major multi-country study on public procurement regimes in 19 countries in Asia, the Middle East and Latin America. The results of the study will be available shortly. The contribution of European industry to this study would be most welcome.

6.7 However, compiling and analysing information is only half the battle. Agreements are only useful if they can be made to work in practice. The Commission will therefore take steps to ensure that the GPA is made to work effectively. It will draw on its network of delegations in third countries to assist it in this task. The Commission also invites Member States to provide assistance where necessary to ensure that its suppliers are treated fairly. When necessary and appropriate, the Commission will not hesitate to use the consultation procedures provided under the GPA. If these consultations fail to resolve the issue, the Community may make use of the WTO dispute settlement procedures.

6.8 But competition is not a one way street. The Community and the Member States can help in creating the right conditions, but European industry must itself be prepared to fight strong competition for public sector contracts inside the Union from third country suppliers who now benefit from the GPA. Suppliers should, in time, seek to maximise the commercial opportunities the Agreement offers to increase their exports to third countries, and increase their share of third country procurement markets. Those who adapt to change and seek to find new markets will generally be the most successful. Those who are complacent and wait are most at risk.

⁴³

doc. COM(96) 53 final

II. Laying the foundations for open procurement in Central and Eastern European Countries and in the Mediterranean countries

6.9 Following the entry into force of the Europe Agreements, which are covered by Article XXIV of the GPA, suppliers from Hungary, Poland, the Czech Republic, Slovakia, Bulgaria, Romania, Slovenia (and shortly the Baltic States) have access to public tenders in the EU. At the end of a ten-year transitional period, suppliers based in the EU will also have access to public tenders in the associated countries. It is, therefore, vital that suppliers in the associated countries take up the challenge of participating in contract award procedures in the EU. They must also begin to make advances in competitiveness that will enable them to compete effectively with EU companies in domestic tender procedures following the transitional period. Similarly, in line with the Commission's attempts to improve links with countries in the Mediterranean Basin and as is provided in the agreements concluded with Turkey, Morocco and Tunisia, the Commission will also look at ways of assisting in the development of competitive public procurement practices there.

6.10 One of the major challenges facing the Union is to help the countries of Central and Eastern Europe (CEECs) to prepare themselves for EU membership. A key element in the pre-accession phase is the alignment by the CEECs of their legislation with Community legislation governing the single market. At the request of the Essen European Council, the Commission set out the basis of its strategy in the White Paper on the preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union.⁴⁴ Presented to the Cannes European Council in June 1995, the White Paper gives guidance on the legislative measures that the countries concerned need to put in place in order to set up the necessary regulatory structure by the time of their accession to the EU. The White Paper makes it clear that, in the area of public procurement, the right administrative procedures must be established by law in order to foster competitive tendering for public contracts and to encourage competition between suppliers for those contracts.

6.11 However, open and competitive public procurement procedures are a relatively new phenomenon for most suppliers and contracting entities in the CEECs. Aligning domestic legislation with that of the internal market will not in itself bring about the changes that are necessary for suppliers and contracting entities to establish an efficient procurement system. The legislative framework that is being put in place will be reinforced by relevant and targeted technical assistance. Procurement officials need to be given the appropriate training to be able to define the goods and services that they are seeking to buy as effectively as possible, based on a thorough understanding of the economic and financial implications. Training will also help in improving the administrative and managerial skills that are needed to run an efficient procurement and contract management system. Suppliers too must adapt themselves to the culture of providing the goods and services that their public clients require, and improve their ability to prepare and submit competitive tenders.

⁴⁴ COM (95) 163 of 3.and 10.05.95.

6.12 The European Union is already supporting the CEECs in their first efforts to lay the foundations for efficient and open procurement. Valuable assistance, especially in the drafting of laws and the setting-up of administrative frameworks, is being delivered through PHARE and the mostly PHARE-financed SIGMA programme⁴⁵, which operates under the auspices of the OECD. The Commission has also established a new multi-country facility called the Technical Assistance Information Exchange Office. The Office will be a focal point for enquiries for help and advice from the Commission. It will also be a 'one-stop shop' where information on technical assistance relating to the internal market can be delivered and exchanged.

III. Questions

1. How effective in terms of market opening has the Government Procurement Agreement been? Is there a need for further initiatives?
2. From a business perspective, which countries (or group of countries) and which business sectors should be given the highest priority in future market opening initiatives?
3. Do you believe that a set of common principles (such as transparency and non-discrimination) would be enough to ensure that real market opening is achieved in future in developing countries?
4. Are there any other barriers (regulatory or non-regulatory) preventing successful participation in third countries' procurement that fall outside the scope of the GPA?
5. Would it be useful to set up an advisory group of industry representatives to assist the Commission on matters relating to access to procurement in third countries?
6. What additional steps could be taken by the Community or by the Member States to help suppliers enforce their rights under the GPA and ensure that other contracting parties play by the rules?
7. Do you believe that the Community should give priority to helping the CEECs to develop public procurement skills? If so, what would be the most effective means of providing training for the CEECs?
8. Would the procurement profession be ready to take an active role in providing assistance and lending expertise to the CEECs? Have you already been involved in any training programme? If so, what conclusions would you draw from your experience for future programmes?
9. Given that the Commission is looking at ways of assisting in the development of public procurement practice in the Mediterranean Basin, what initiatives do you think appear appropriate in this matter?

⁴⁵ Support for Governance and Management in Central and Eastern European Countries.

Annex I

The first Community procurement Directives, on public works (71/305) and public supplies (77/62) made a positive, but limited, contribution to more competitive procurement. The scope of these Directives was restricted. Major portions of public procurement, such as procurement in the water, energy, transport and telecommunications sectors and contracts for services, were not covered by these rules. Moreover, there was no harmonisation of remedies procedures, so that suppliers excluded from contracts in violation of the Directives often had no means of challenging doubtful procurement decisions or seeking compensation. The rules also left open too many loopholes for procurement entities to avoid open procedures on grounds that were not objectively justified. Subsequently changes have been made to the EU procurement rules to respond to public and political reaction to past improprieties and perceived weaknesses in the system.

The EU legal framework for public procurement was completed between 1987 and 1993 as part of the 1985 Internal Market White Paper programme. The public supplies and public works Directives were updated, in 1988 and 1989 respectively, and then consolidated in 1993 (as Directives 93/36 and 93/37). Procurement of service contracts was included in the EU's open procurement regime by Directive 92/50, in force since 1st July 1993. A Directive on supplies and works procurement by utilities in the water, energy, transport and telecommunications sectors, covering both public undertakings and undertakings to which Member States have granted special or exclusive rights, was adopted by the Council in 1990 (Directive 90/531/EEC). A consolidated version of the Utilities Directive, including service contracts, was adopted in June 1993 (Directive 93/38), superseding Directive 90/531 with effect from its entry into force on 1st July 1994 (1st January 1997 for Spain and 1st January 1998 for Greece and Portugal). Two specific Directives on remedies exist, one for the 'traditional' procurement sectors (89/665, as amended by the Services Directive 92/50) and one for the utilities sectors (92/13). The Remedies Directives require Member States to ensure that administrative or legal remedies are available to suppliers in the event of non-compliance with the substantive rules on open procurement.

The Directives require Member States to ensure that award procedures for contracts over specific thresholds are transparent and competitive. The Directives include rules covering the publication of tenders; the procedures for awarding contracts which must be followed (for example, technical specifications must normally refer to European standards where they exist or, in the absence of European standards, to national standards referring to international standards); and the selection and award criteria which may be used. The thresholds defining which contracts fall under the Directives' rules are set at ECU 200 000 for supplies and service contracts (ECU 400 000 for contracts awarded in the utilities sectors and approximately ECU 130 000 for contracts falling within the scope of the application of the agreement on public contracts of the World Trade Organisation) and ECU 5 million for works contracts. These thresholds are defined with a view to ensuring the competitive procurement rules apply to contracts likely to interest suppliers from other Member States while allowing administrative and procedural costs on smaller contracts to be kept to a minimum.

STATUS OF IMPLEMENTATION OF THE PUBLIC PROCUREMENT DIRECTIVES

DIRECTIVES	B	DK	D	GR	E	F	IRL	I	L	NL	P	UK	AT	FI	SE
89/440/EEC Works (18.7.1989) In force since 19.7.1990 GR, E, P: 1.3.1992 AT, FI, SE: 1.1.1994 replaced by 93/37/EEC															
88/295/EEC Supplies (2.3.1988) In force since 1.1.1989 GR, E, P: 1.3.1992 AT, FI, SE: 1.1.1994															
89/665/EEC Remedies (21.12.1989) In force since 21.12.1991 AT, FI, SE: 1.1.1994															
90/531/EEC Utilities (17.9.1990) In force since 1.1.1993 E: 1.1.1996 GR, P: 1.1.1998 AT, FI, SE: 1.1.1994				D							D				
92/13/EEC Remedies for Utilities (25.2.1992) In force since 1.1.1993 AT, FI, SE: 1.7.1994 E: 30.6.1995 GR, P: 30.6.1997				D							D				
92/50/EEC Services (18.6.1992) In force since 1.7.1993 AT, FI, SE: 1.7.1994															
93/36/EEC Supplies (14.6.1993) In force since 14.6.1994 AT, FI, SE: 1.7.1994															
93/38/EEC Utilities (14.6.1993) In force since 1.7.1994 AT, FI, SE: 1.7.1994 E: 1.1.1997 GR, P: 1.1.1998				D	D						D				

Key:

	National implementing measures not communicated or only partly communicated
	National implementing measures communicated and checked; infringement proceedings for non-compliance under way
	National implementing measures communicated
D	Derogation granted to Member State

FINANCIAL STATEMENT

1 TITLE OF OPERATION

Green Paper "Public Procurement in the European Union: exploring the way forward".

2 BUDGET HEADING INVOLVED

See paragraph 10 below.

3 LEGAL BASIS

Directives 92/50/EEC, 93/36/EEC, 93/37/EEC, 93/38/EEC, 89/665/EEC, 92/13/EEC.

4 DESCRIPTION OF OPERATION

4.1 General objective

The above mentioned Directives which are the legal basis of this Green Paper have established a complete legal system for public contracts at Union level. It is difficult to apply it in a complete and effective way to achieve the hoped for objectives. Public contracts in Member States are being opened up, competition is increasing and the purchasing practices of contracting authorities are giving ever better results. Nevertheless all actors concerned need to make still more effort if Community policy in this area is to bring about the maximum benefits.

This Green Paper is intended to stimulate a wide ranging debate. In it the Commission develops its initial thoughts on a certain number of questions essential for present and future policy and invites all interested parties (authorities of Member States, Community institutions, professional organisations, entities and contracting authorities, suppliers) to give their point of view.

By its nature this Green Paper does not contain proposals of the Commission which could have direct budgetary effects. In most cases the Commission only envisages taking, or supporting, some initiatives if, after discussion with the actors concerned, these would be useful or even essential to achieve its policy objectives in public contracts.

The Green Paper announces only one action with budgetary effects. This is the possible organisation, after initial replies have been analysed, of a meeting in Brussels with the most representative interested parties of the Member States.

4.2 Period covered and arrangements for renewal

Expenses incurred following action stated in point 4.1 (organisation of a meeting in Brussels) will have to be provided for during 1997.

5 CLASSIFICATION OF EXPENDITURE OR REVENUE

5.1 DNO

5.2 CND

5.3 None

6 TYPE OF EXPENDITURE OR REVENUE

Expenditure relates to the possible organisation of a meeting in Brussels, following a first analysis of replies received, with the most representative interested parties of the Member States, namely the reimbursement of travel costs (and, if need be, accommodation expenses)

7 FINANCIAL IMPACT

NONE

8 FRAUD PREVENTION MEASURES

Action provided for at point 4.1 will be directly executed by the Commission's Services, by applying rules concerning the reimbursement of travel and accommodation costs as well as disbursements incurred by people foreign to the Commission who have been called upon as experts.

9 ELEMENTS OF COST-EFFECTIVENESS ANALYSIS

9.1 Specific and quantified objectives; target population

The specific object is to make all interested actors aware of the reflections and options which the Commission envisages on the various themes running through its policy on public contracts to open up a large debate on the line to be followed in the future. If necessary a meeting could be organised in Brussels after the written communication phase. In this meeting the representatives of the actors most concerned who have taken part in the written phase could set out their point of view and help the Commission to decide on the most appropriate follow-up to the Green Paper.

Those concerned are the institutional interlocutors in the Member States, the purchasing bodies, professional organisations and enterprises working in the sectors of public contracts.

9.2 Grounds for the operation

The Community is responsible for putting into place policies on the completion and functioning of the Internal Market, such as public contracts' policies. As was said above the Green Paper seeks to open up a debate which will show initiatives which are opportune or even necessary to benefit fully from Community policy on the subject. The nature of the initiatives in the Green Paper implies their direct management by the Commission.

As the objective is to open up a debate on a number of questions on public contracts, the instrument to be used by the Commission is the publication and distribution of a Green Paper.

Neither at national nor at Community level have activities been conducted which are similar to, or the same as, this action.

This initiative has been envisaged after the need for it was expressed in different ways by the actors involved. Therefore one can expect that the Green Paper will be well received by the public and that its specific objectives will be achieved.

9.3 Monitoring and evaluation of the operation

The success of the action envisaged will be evidenced by:

- (a) opening up a large debate on the themes dealt with in the Green Paper;
- (b) better application of the legislation by the actors concerned;
- (c) deeper knowledge of the trends and structures in public contracts
- (d) greater effectiveness of existing rules.

Directorate XV-B will take action after receiving reactions to the Green Paper and the various initiatives already envisaged. As already said, after the actors concerned have been consulted in writing, consideration will be given as to whether it is appropriate to organise a hearing in Brussels with all interested parties.

On the basis of these contributions the Commission will draw up a communication on public contracts intended for Community institutions comprising an action plan and setting out measures to be taken to strengthen the effectiveness of the legal framework and to achieve better the objectives of Community policy on public contracts in the future.

10 ADMINISTRATIVE EXPENDITURE (SECTION III, PART A OF THE BUDGET)

The administrative resources necessary will be found by the annual Commission decision on resource allocation taking account of the staff and supplementary sums accorded by the budgetary authority.

10.1 Effect on the number of posts

Type of post		Staff to be assigned to managing the operation		Source		Duration
		Permanent posts	Temporary posts	Existing resources in the DG or department concerned	Additional resources	
Officials or temporary staff	A	2		2		1yr
	B	1		1		1yr
	C	1		1		1yr
Other resources						
Total		4		4		

10.2 Overall financial impact of additional human resources

	Amounts	Method of calculation
Officials	NONE	
Temporary staff		
Other resources (indicate budget heading)		
Total	NONE	

The expenses relating to human resources necessary for the completion of this action will be covered by rescheduling existing resources, as follows:

Officials (Titles A1, A2, A4 and A5): 400,000 Ecus/year.

10.3 Increase in other administrative expenditure as a result of the operation

Budget heading	Amounts	Method of calculation
	NONE	
Total		

A250 General meetings: 22,000 Ecus - 1997 budgetary year
(on a basis of +/- 30 participants at +/- 695/participant)

A3410 Publication of the Green Paper 12,130 Ecus - 1996 budgetary year
(on a basis of +/- 9,300 copies)

The resources necessary to cover administrative expenses mentioned above will be obtained by rescheduling existing financial resources and will not entail further expenses.

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