INT/074
Public service, supply and
works contracts

Brussels, 26 April 2001

OPINION
of the
Economic and Social Committee
on the
Proposal for a directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors
(COM(2000) 276 final - 2000/0117 (COD)

On 8 September 2000 the Council of the European Union decided to consult the Economic and Social Committee, under Articles 47(2), 55 and 95 of the EC Treaty, on the

Proposal for a directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors
(COM(2000) 276 final - 2000/0117 (COD)).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 7 February 2001. The rapporteur was **Mr Green.**

At its 381st plenary session on 25 and 26 April 2001 (meeting of 26 April 2001) the Economic and Social Committee adopted the following opinion by 88 votes to 17 with 10 abstentions.

1. Introduction

1.1 In response to the Green Paper entitled *Public Procurement in the European Union*: *Exploring the Way Forward* published by the European Commission in November 1996[1], the European Economic and Social Committee adopted an opinion unanimously on 28 May 1997[2].

The amendments proposed by the Commission to the directive on *special sectors* (93/38/EEC) coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[3], following the gradual liberalisation of certain sectors, involve rethinking the whole of European law on public procurement. The Commission also proposes recasting the directives on supplies, works and services, one aspect of which process would be to exclude the telecommunications sector from the scope of the directives. In the directive under consideration it is proposed to amend the present provisions to take account of the effective liberalisation of telecommunications markets. The proposal involves amendments grouped under two headings: simplification of the directive and modifications to the legal framework.

1.2 The ESC congratulates the Commission in particular on the work accomplished through the opening of markets, promoted by the European Community from the outset, but wishes to propose modifications or amendments to the text of the proposed directive.

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1 Green Paper on *Public Procurement in the European Union: Exploring the Way Forward*, COM(96) 583 final.

2 Opinion on the Green Paper, Rapporteur **Henri Malosse**, OJ C 287 of 22 September 1997, p. 92.

3 Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications' sectors ("special sectors' directive") as amended most recently by Directive 98/4/EC; Directives 89/665/EEC and 92/13/EEC on the application of appeal procedures ("appeal directives") (OJ L 199 of 9.8.1993) as modified by Directive 94/22/EC of 30.5.1994 (OJ L 164 of 30.6.1994) and Directive 98/4/EC of 16.2.1998 (OJ L 101 of 1.4.1998).

1.3 After some general comments on the proposed simplifications and on the changes to legislation proposed by this text, the ESC's proposals will be set out.

2. General comments on the proposed simplifications to Directive 93/38/EEC

2.1 The proposed amendments affect the scope of Directive 93/38/EEC on public procurement in the water, energy, transport and telecommunications sectors, to take account of the gradual liberalisation of these sectors, the introduction of electronic purchasing mechanisms, a clarification of provisions on technical specifications to encourage innovative enterprises in particular, the strengthening of the provisions on allocation criteria, simplification of thresholds and the introduction of a common procurement vocabulary.

The ESC endorses these changes, but regrets that European law is modified too often: this has a damaging effect on knowledge and comprehension of European law. It calls upon the Commission to consider establishing more flexible and more stable general frameworks to avoid impairing the necessary development of knowledge of European law.

2.2 The ESC welcomes the clarification provided by this new draft directive, set out under four headings which cover definitions, rules applicable to contracts, specific rules applicable to design contests, and statistical rules and final provisions. However, the text remains laborious to read through an excess of details on certain points (e.g. Article 26) and a clear lack of precision on other points, such as Article 9 which is not explained.

2.3 National legislation will have to be adapted after the adoption of this directive, since new common provisions with the purpose of clarification are found in the consolidated directive, such as those on the information to be given to participants in a contract-award procedure, about the results of that procedure, or the information to be given to applicants for qualification following a qualification system established in accordance with the directive. Another substantive change is proposed: the obligation to provide information on the result of a contract-award procedure is extended to all the awarding bodies: this is useful. A step forward is the introduction of the general principles of mutual recognition and equality of treatment into the selection procedure for participants in a restricted and negotiated procedure.

2.3.1 It is legitimate for contracting authorities to take social and environmental aspects into account when assessing the quality of tenders, provided that the principle of equal treatment is respected and the current national and European social and environmental legislation, as well as ILO agreements ratified by the Member States, are complied with. This should be reflected in the directive.

2.4 Other welcome innovations are recognition of quality assurance systems for service contracts as well as works and supplies contracts, and the obligation to refer to European standards concerning quality assurance or certification (the standards of the series EN 29 000 and EN 45 000) and recognise other means of proof. The reference to the Member States' experiment with their own standards ought to be specified more clearly in the draft directive, since it could be confusing or lead to

excessive requirements amounting to a disguised restriction of access to the market. These frequent changes in legislation are in any case disruptive for economic operators.

2.5 The ESC would also take issue with the lack of references in the proposal to environmental considerations which are crucial to Europe's future. Reasonably compatible environmental criteria which do not distort the contract could be incorporated in more specific terms in Article 53. These should only be taken into account when they have a decisive influence on the environmental impact depending on how the tenderers intend to carry out the works.

Equally remarkable is the absence of any social aspects among the criteria for awarding a contract. Social criteria could also be developed in a specific manner in Article 53. The Committee realises that it is difficult to cover these points in detail and recommends that the future Commission interpretative Communications dealing with environmental and social aspects are transformed into guidelines for Member States, containing the details on how these aspects could be implemented. In addition, the Commission is now working on a Green Public Procurement Handbook in order to guide public authorities on taking into account environmental characteristics when awarding a contract. The ESC recommends the drafting of a Social Procurement Handbook with a view to guiding public authorities in this field also.

2.6 The gradual disengagement of the State, and increased budgetary rigour, lead the Commission to propose simplification, flexibility and modernisation measures to take account of new technology and alleviate rules which are sometimes too detailed and complex. However, the ESC notes that to take full account of this disengagement it would be necessary to define more clearly public procurement as a whole, and go beyond the old definitions in earlier directives which involve grey areas, particularly where concessions are concerned. The ESC regrets that the Commission has not taken the opportunity offered by this renewal of the directive to define clearly the ways of concluding contracts and the contractual framework of the PPP (public/private partnership) and concessionary contracts, involving a new definition of concessionary contracts and of public/private partnership as suggested by the ESC in a number of opinions, and most recently in the opinion on the strengthening of the law on concessions and PPP in European law[4]: *"A public works concession is an act (whether by contract or unilateral) whereby a public authority delegates to a private organisation the task of designing, constructing, financing, maintaining and operating an infrastructure and/or service for a predetermined extended period."* A better definition of concessions on services is essential, particularly with regard to contracting procedures involving all types of public or private entity.

2.7 The ESC regrets that the proposed text does not cover the allocation of exclusive suppliers' rights, when the problem arises at this level mainly with regard to the allocation of service concessions. This brings us back to what has already been stated on the definition of concessionary and PPP contracts; the ESC thinks it important to reaffirm that the points in the Interpretative Communication on the subject are extremely important; they clearly show that the granting of exclusive rights must be subject to the rules of the Treaty and the basic principles of European law. It is a

4 ESC opinion, OJ C 14 of 16.1.2001, pg. 91, rapporteur **Mr Levaux**, point 4.1.3

complex problem[5], which cannot be dealt with in a peripheral way since the public authorities exclude whole areas of activity from the competition rules without an objective justification: this impedes the unification of the European market.

2.8 As the ESC has stated on a number of occasions, and again recently in the own-initiative opinion mentioned above[6], a complete clarification of public procurement (contracts and delegated contracts) in European law has still not been achieved, as the place of concessionary contracts and PPP contracts in European law remains confused; this is shown by the Interpretative Communication on Concessions in Community law[7] of April 2000, and it means that private investments in public infrastructure cannot be made in a sufficiently clear and stable legal framework. Although the Commission announces that this Communication is without prejudice to any specific draft legislation on concessions, it would have been desirable to include a definition of concessionary and PPP contracts in the proposed directive, to avoid proceeding by continual changes to European legislation. Article 2(3) of the draft directive is the ideal place in the text to incorporate the ESC's proposals and the content of the interpretative communication on ways of allocating concessionary or PPP contracts. **The ESC is pleased to note that a directive or regulation is being drawn up with a view to establishing clear principles on awarding of contracts within the EU, and that it will reflect the content of the interpretative communication of April 2000.**

2.9 The ESC also proposes that Article 1 should contain a partial cross-reference to Article 1 of the consolidated directive, which is more complete and of largely similar content.

2.10 The ESC wishes to point out that public bodies acting as economic operators must not take advantage of their position to distort the conditions of competition. It is notable that in several Member States administrative corporations or para-public companies with a privileged status have competitive advantages in relation to private companies. It is essential for the text of the proposal to clarify this point, for which European law fails to provide a clear answer for lack of clearly enunciated European principles. Judicial precedents on universal service cannot provide an answer to a question that European law does not cover clearly.

2.11 Consequently, additional rules to oblige awarding authorities to check that public bodies bear the same costs - particularly fiscal, social and financial costs - as private operators are indispensable. The obligation to use a competition procedure for the allocation of contracts, or of activities equivalent to a contract, in the private sector must also be imposed on the awarding authorities in their relations with public, para-public or private entities which are dependent on them or on other

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5 In its judgement of 12 December 1996, the Court of Justice stated "that the exclusive or special rights referred to must generally be taken to be rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, and which substantially affect the ability of other undertakings to provide or operate telecommunications networks or to provide telecommunications services in the same geographical area under substantially equivalent conditions."

6 Opinion of 19 October 2000, OJ C 14 of 16.1.2001, pg. 91,, rapporteur **Mr Levaux**

7 Commission Interpretative Communication on Concessions in Community law, OJ C 121 of 29.4.2000, p. 2.

awarding authorities. This point was clearly made in the Commission's Interpretative Communication on PPP and concessionary contracts in April 2000 and the ESC considers that it would be necessary to use the principles set out in this document when drafting the present directive.

2.12 Nor is it desirable for monopolistic conditions to prevail on certain markets to the advantage of private firms. It should be ensured that neither public nor private operators are the object of discriminatory treatment in the awarding of public contracts, that exactly the same terms of competition apply to all participants, and that these terms comply with Community law.

3. Detailed comments on the proposed amendments

3.1 The ESC endorses the two principles proposed:

3.1.1 The Commission indicated that it would submit proposals to exclude from the scope of Directive 93/38/EEC the sectors or services (water, energy, transport and telecommunications) which operate within a given Member State under effective conditions of competition. In view of full liberalisation of the telecommunications sector on the one hand, and the developments in other sectors covered by Directive 93/38/EEC, the draft directive introduces different types of solution for these sectors. One can only agree with this.

3.2 The regulatory framework for **liberalisation of telecommunications** is based on Articles 86 and 95 of the EC Treaty. Under Directive 90/388/EEC, as amended by Directive 96/19/EC, the Member States were to take the necessary steps to guarantee every enterprise the right to provide telecommunications services or to establish or supply the telecommunications networks required for the provision of such services by 1 January 1998 at the latest. The planned measures have indeed been transposed into national legislation (national regulatory authorities, authorisation, interconnection, universal service, pricing etc.); moreover, the Commission reached the conclusion that public procurement for most telecommunications services in most Member States was regarded as being already excluded from the scope of this directive[8]. The ESC takes note of this but wonders about the means adopted by the Commission to promote liberalisation in the other fields covered by Directive 93/38/EEC. Article 29 appears to offer a satisfactory framework, but the situation which can result from it varies enormously in the European Union.

3.3 The ESC would question the need to include, in the consolidated version of the "traditional directives" - submitted in parallel with the proposal under consideration - provisions which could continue to exempt public authorities from the scope of these directives for their purchasing in the telecommunications sector. The ESC wonders by what principle the awarding authorities would not be subject to the rules of competition in this field (see Article 15 of the consolidated directive).

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8 The introduction of effective competition in the sector implies that the purchasing of voice telephony, telex, mobile radio telephony, radio-messaging and satellite telecommunications services can from now on be carried out according to the normal rules applicable to service contracts, as is already the case for other telecommunications services.

3.4 As to the **technical specifications**, the ESC considers that the new wording with the reference to performance and functional requirements is an improvement that will make it easier to overcome disguised barriers to competition. With regard to the specifications covered by Article 34, paragraph 3 of which stipulates that they "must be formulated by reference to European standards": it is necessary to indicate that these references must be explicitly named and listed precisely in the set of specifications, since the contractor can only demonstrate that he meets criteria that are clearly defined and precisely referenced.

3.5 The recognition of **a confidentiality principle** (Article 12) for the information provided by economic operators is in line with supporting innovation by enterprises by protecting their intellectual contribution. However, a text of this importance should clarify rather better the scope of this principle, particularly with regard to its purpose and duration. The ESC takes the view that the confidentiality principle concerns not only the tenders but also all proposals forwarded to the awarding authority[9] and all information relating to business matters and to the enterprises themselves. Moreover, this could be done with reference to Article XIV of the Government Procurement Agreement (GPA). The ESC takes the view that Community law must clearly cover tenderers' intellectual property rights and must condemn any attempt to cream off the best ideas, which would undermine the principle of real and fair consultation.

4. Comments on methods of consultation

4.1 The introduction of **electronic purchasing mechanisms** is essential because of current developments in methods. Uncertainty prevails as to the security of these forms of communication, and the ESC calls for protection of electronic communication and data storage to be made a precondition for any innovation in the forms of consultation. The Commission takes the view that electronic transmission should make it possible to reduce the period of 12 days (necessary at present for transmission to the Publications Office and publication in the Official Journal) to five days. This reduction seems excessive, and it is doubtful whether this shortening of the time-limit would enhance European competition, particularly as complex services are involved which often require preliminary studies and periods for enterprises to reflect before committing themselves to public procurement procedures. In these circumstances SMEs are likely to encounter real difficulties when tendering for offers.

4.2 **The strengthening of provisions relating to award criteria and selection** is an excellent innovation. It is healthy to set a general rule beforehand on a compulsory relative weighting of criteria from the start of any procedure. The proposal in the new directive is an obligation to mention the relative weighting of each criterion in the contract notice or set of specifications[10]. **The ESC fully supports the weighting of criteria for award of contract to the most economically advantageous tender, which would make it possible to enhance transparency of contract award procedures and**

9 For example: draft solutions, authorised variants, proposals made during negotiations and everything that relates to communications between the awarding authority and the enterprises.

10 This weighting can take various forms (e.g. percentages, or expressed as a relative share in relation to another criterion); to maintain a certain flexibility, it can be expressed as a range within which the value of each criterion is stated.

guarantee equality of treatment among tenderers. Another welcome provision is the application of restricted or negotiated procedures which involve a restriction in the number of applicants called upon to tender by applying objective criteria announced in advance. Article 54 could lay down the social and environmental criteria, with the proviso that they are not directly or indirectly discriminatory. These criteria must necessarily accord with the main objective of the contract. Social criteria can only be applied to the selection of applicants or to contract award procedures if they are in accordance with the current jurisprudence of the ECJ, i.e. where equivalent tenders are submitted.

4.3 With regard to **abnormally low tenders** (Article 55) it would be useful to provide for the awarding authorities to be obliged to examine tenders which seem abnormally low in relation to the other tenders submitted in accordance with Community rules, on the basis of the GPA (Article XIII(4)(a)). It must also be specified that when the reasons given are not satisfactory, the tenders in question must be rejected. There must be effective machinery to combat social dumping, which seriously distorts the market for public procurement, since differences in social rights in Member States and in neighbouring countries are conducive to unfair competition. The ESC takes the view that the directive should cover the competition-distorting effects of social dumping. The following text should therefore be inserted: "When examining tenders, the awarding authorities must take into consideration the actual respect of obligations concerning employee protection, labour law and the social regimes in force in the host countries".

4.4 On Article 52, the ESC wishes to stress that some Community countries have set up **qualification systems for services** and that this type of certification must appear among the criteria covered by this article. However, this should not give rise to disguised barriers to competition, and suitable arrangements therefore seem acceptable.

4.5 Article 36, on the use of variants, is well drafted, and it is welcome that they are made subject to the same provisions as apply to the selection of the economically most advantageous tender.

4.6 The wording of Article 37 on subcontracting does not correspond to established practice in all Member States, particularly the reference to designated subcontractors, which is in itself an unusual practice. The ESC calls for the previous wording to be retained.

4.7 The ESC has doubts about the means of proof in the use of electronic communications, particularly as regards Article 46 and considers that electronic signature and encryption procedures should be made more secure

4.8 The directive leaves it to the awarding authority to set the **specific level of capacity** (Article 53) and experience required for any particular contract, which would make possible an effective selection of applicants according to their ability to carry out the contract in an optimum way. In restricted or negotiated procedures with publication of a notice, the obligation to give reasons for any limitation on the number of applicants according to specific levels of capacity and experience increases the transparency of these procedures. However, the ESC regrets the lack of any reference to social considerations in the award criteria and recommends that Article 53 be amended to correct this omission.

4.9 The consultation of enterprises in terms of performance is a very important step forward in the two new directives, and this point is supported by the ESC.

4.10 The current **thresholds** are complex to handle, and it is therefore proposed to simplify the thresholds. On the one hand, the thresholds will be the same for contracts which are not subject to the GPA as for those which are. On the other hand, all the thresholds are expressed directly in euro and rounded down to the nearest EUR 100,000 below the thresholds laid down in the GPA. This simplification gives two thresholds:

– EUR 5,300,000, applicable to **works contracts** whatever the sector in which the awarding authority operates;

– EUR 400,000, applicable to **supply and services contracts and to design contests,** whatever the sector in which the awarding authority operates and whatever the service concerned.

The ESC endorses these simplifications.

4.11 **The use of a Common Procurement Vocabulary** (CPV) was recommended by the Commission in 1996[11]. This nomenclature represents a further development of and an improvement to the CPA and NACE nomenclatures, in that it is better suited to the specific characteristics of the public procurement sector. However, since the CPV will be the subject of a proposed regulation of the Council and the European Parliament, which will then formally adopt it as the Community nomenclature applicable to public contracts and will organise its maintenance, the ESC is not in favour of retaining it in the directive under consideration.

4.12 The monopoly arrangements accorded in the past to enterprises have gradually given way in Europe, particularly in the field of information technology, to competitive environments, but under conditions which should be carefully watched, since they sometimes hide the seeds of significant distortions of competition. Thus the legal opening to competition of the market in digital distribution is characterised in some Member States by a distortion between the actors, as the public operator enjoys particularly favourable conditions, enabling him to go on profiting as long as possible from a monopoly arrangement, so as to be able to cross-subsidise his monopolistic activities and the launching of a new activity regarded as competitive. The ESC deplores a lack of firmness on this matter in the directive under consideration.

Brussels, 26 April 2001.

The President
of the

The Secretary-General
of the

11 Commission Recommendation 96/527/EC of 30.7.1996 on the use of the Common Procurement Vocabulary (CPV) for describing the subject matter of public contracts (JO L 222 of 3.9.1996).

Economic and Social Committee

Göke Frerichs

Economic and Social Committee

Patrick Venturini

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N.B.: Appendix overleaf.

APPENDIX
to the
OPINION
of the Economic and Social Committee

The following amendment was rejected during the debate, but received more than a quarter of the votes cast:

Point 4.3

Delete the last sentence (from "*The following text* ...").

Reason

As far as social dumping is concerned, the Committee should simply call for its effects on competition to be taken into account. The addition to Article 54 proposed here would go against the principle of proportionality. Obliging awarding authorities to check whether all national requirements are really being met would not only entail unreasonable costs for them but would in practice also lead to serious discrimination, especially against external tenderers. The possibility would also arise of numerous legal wrangles that competitors could initiate for minor infringements.

Result of vote

Votes in favour:	46
Votes against:	69
Abstentions:	8